



LAW · COMMISSION  
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December 2015, Wellington, New Zealand | REPORT 135

# THE CROWN IN COURT

A REVIEW OF THE CROWN  
PROCEEDINGS ACT AND NATIONAL  
SECURITY INFORMATION IN PROCEEDINGS



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SECURITY INFORMATION IN PROCEEDINGS

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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7 December 2015

The Hon Amy Adams  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

Dear Minister

**NZLC R135 – THE CROWN IN COURT: A REVIEW OF THE CROWN PROCEEDINGS ACT AND NATIONAL SECURITY INFORMATION IN PROCEEDINGS**

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive style with a large initial 'G'.

*Sir Grant Hammond*  
President

# Foreword

Two separate Law Commission references are completed by this Report. The unifying feature is that both references address the position of the Crown in the courts and advance the same two principal goals: providing New Zealanders with better access to justice; and providing New Zealand with a modern legal infrastructure.

Part 1 of the Report, *A new Crown Civil Proceedings Act*, recommends replacing the Crown Proceedings Act 1950 with modernised legislation. While the Crown Proceedings Act sounds as if it is dry “lawyer’s law”, it has the important purpose of reflecting New Zealand’s commitment to ensuring that people are able to seek appropriate legal redress against their Government. It forms an important pillar of the rule of law. It is therefore vital that it remains up to date.

The new Act we are recommending is designed to be fit for purpose in 21st century New Zealand. Although the general principles around which the Crown Proceedings Act is constructed remain the same in the draft Bill, especially that Crown and citizen ought to be equal before the courts, much has changed in Government since 1950. We need a modernised and simplified Act that reflects those realities and assists with the conduct of litigation against the Crown. We hasten to add, however, that Part 1 is not about increasing the Crown’s liabilities but ensuring that, where the Crown has breached an existing obligation that ought to be compensated at law, the procedure is clear and effective.

In Part 2 of the Report, *National security information in proceedings*, the Commission grapples with the same two goals – access to justice and ensuring that New Zealand’s legal structure is robust enough to adapt to the changing needs of modern society. Here, we review how information that poses a threat to national security is dealt with in court proceedings.

New Zealand, like other countries, needs to put legal structures in place to manage cases involving information that, if disclosed, would threaten national security. Our current law in this area has gaps and inconsistencies that should be addressed. There is no doubt that, in some situations, the need to protect national security means that information cannot be dealt with in open courts. However, the protection of the rights to natural justice and open justice must be preserved, as far as possible, as these are values that lie at the heart of our democratic framework and way of life.

The recommendations in Part 2 aim at maintaining a proper balance between the necessity of protecting national security interests and upholding rights to natural justice and open justice.



*Sir Grant Hammond*  
President

# Acknowledgements

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We are grateful to all the people and organisations that provided input during this review. We would particularly like to thank the individuals, organisations and government departments with whom we consulted, who made submissions or who expressed their views during our consultation meetings.

In relation to Part 1 of this Report, the Commission particularly wants to acknowledge the Hon David Collins for the support he gave this project while he was Solicitor General.

We are also grateful to members of the bench, both in New Zealand and the United Kingdom, who met with us to discuss the issues addressed in this Report. In addition, the Commission was fortunate to speak with several experienced overseas practitioners (in both the United Kingdom and Canada) with an interest in the matters covered in Part 2 of the Report. We are particularly grateful for their time and input.

A list of those who provided comments, including through formal submissions, can be found in Appendix 4.

We are grateful for the valuable contribution of the Parliamentary Counsel Office. We would like to acknowledge the work of Amy Orr, Parliamentary Counsel, on the draft Bill included in the Report.

The Commissioner responsible for this reference is Dr Geoff McLay. The senior legal and policy advisers for this Report were Jo Dinsdale, Eliza Prestidge-Oldfield and Adam Rossiter.

We also acknowledge the contribution of present and past legal and policy advisers who have undertaken work on the two projects reported on in this Report: Allison Bennett, Marion Clifford, Sophie Klinger, Peter McRae, Kate Salmond and Lisa Yarwood.





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# Chapter 1

## One Report – two references

### INTRODUCTION

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- 1.1 This Report contains the Law Commission’s recommendations on two separate but interrelated references. In Part 1 of the Report, the Commission completes its review of the Crown Proceedings Act 1950. Part 2 reports on the Commission’s review of the use of national security information in proceedings. Both references are about improving the infrastructure that supports the Crown’s involvement in litigation.
- 1.2 The Crown Proceedings Act enables the Crown to both sue and be sued in the courts. It is in general need of modernisation to reflect the realities of modern government in New Zealand.
- 1.3 The national security information project is narrower in scope as it is focused on just how the Crown can use, or refuse to disclose, national security information, but it covers criminal proceedings as well as civil and judicial review proceedings. It also covers administrative decisions that determine individuals’ rights, whether or not these involve the courts.
- 1.4 The two projects share the issue of public interest immunity. Public interest immunity provides a mechanism by which the Crown can limit its obligation to disclose information under the Crown Proceedings Act. Under the public interest immunity doctrine, the Crown may refuse to produce documents if disclosure would be injurious to New Zealand’s security or its defence or international relations. Section 27(3) of the Crown Proceedings Act provides for a process (to be established under the High Court Rules) under which the Prime Minister may certify that the disclosure of information would be likely to prejudice the security or defence of New Zealand.
- 1.5 As part of the review of the Crown Proceedings Act, the Commission has considered the Crown’s obligation as a party in proceedings to disclose documents containing relevant information. This includes whether, and how, current public interest immunity limitations on disclosure on national security grounds should be changed. This question of whether public interest immunity in respect of national security information should be reformed is central to the Commission’s reference reviewing the protection, disclosure and use of classified and security-sensitive information in court proceedings.

### STRUCTURE OF THE REPORT

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- 1.6 The Report is broken into two stand-alone parts.

#### Review of the Crown Proceedings Act

- 1.7 Part 1 of the Report completes the Law Commission’s review of the Crown Proceedings Act 1950.
- 1.8 Within Part 1, Chapter 2 sets out the case for and the purpose of a new Crown Civil Proceedings Act. It also gives an overview of the key changes from the current Act included in the draft Bill. Its key recommendation is the enactment of a much modernised Crown Civil Proceedings Act. Chapter 3 looks at the central issues raised in the Law Commission Issues Paper *A New*

*Crown Civil Proceedings Act for New Zealand* (IP 35) and reports back on submissions received on that paper. The central issues include whether the Crown can be held by the court to be directly liable for torts, the liability of Crown employees and ministers, and whether the Crown should be subject to compulsory enforcement remedies. The important issue of public interest immunity in relation to the Crown's disclosure obligations is fully addressed in Part 2 of the Report.

- 1.9 Because much of the reform we are recommending for the new Crown Civil Proceedings Act is quite technical in nature, Chapter 4 of the Report consists of a draft Bill with commentary that presents and explains our recommendations.

### **The review of national security information in proceedings**

- 1.10 Part 2 of the Report completes the Law Commission's review of national security information in proceedings. This part of the Report does not repeat the material included in the earlier Issues Paper *National Security Information in Proceedings* (IP 38). The Report should therefore be read in conjunction with that paper.
- 1.11 Chapter 5 provides an overview of the Commission's review and gives a summary of the reforms recommended in Part 2 of the Report. Chapters 6, 7 and 8 then separately address issues that arise and set out our recommendations in respect of national security information in civil proceedings, administrative decision-making affecting rights and criminal trials. In Chapter 9, we outline the features of the special advocate model we have recommended and deal with any remaining issues, particularly around ensuring security is maintained for closed procedures. An overview and report back on submissions and feedback on the earlier Issues Paper is included as an Appendix to the Report (Appendix 3).

## **ORIGINS AND CONDUCT OF THE REVIEWS**

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- 1.12 The terms of reference for both reviews are set out in Appendix 1.

### **Review of the Crown Proceedings Act**

- 1.13 The Law Commission began work on the review of the Crown Proceedings Act in July 2011. It was a continuation of earlier work dealing with the legal nature of the Crown conducted by the Law Commission in the late 1980s and early 1990s.<sup>1</sup> The public service went through large-scale changes in those decades, while the 1950 Act changed little to reflect this. The State Sector Act 1988 and the Public Finance Act 1989 created a new legal architecture for the New Zealand public service, and the Crown Entities Act 2004 consolidated the law relating to the many government entities that have their own corporate personality. The outdated Crown Proceedings Act contains provisions that do not reflect modern government accounting practices, for instance, those relating to the mechanics for the enforcement of judgments against the Crown.<sup>2</sup>

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1 Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37, 1997). In August 1989, the Minister of Justice gave the Commission the following reference:

To give fuller effect to the principle that the State is under the law and to ensure that as far as practicable legal procedures relating to and remedies against the Crown (as representing the State) are the same as those which apply to ordinary persons. With this in mind the Law Commission is asked to examine aspects of the legal position of the Crown, including but not limited to –

- (i) the civil liability of the Crown, its officers and agencies, and in particular special rules limiting or excluding that liability
- (ii) the Crown Proceedings Act 1950, with a view to its reform and simplification;
- (iii) the criminal liability of the Crown, its officers and agencies, and relevant procedures, and to make recommendations accordingly.

The issue of the criminal liability of the Crown was partially dealt with by the Crown Organisations (Criminal Liability) Act 2002.

2 See the discussion in Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014), ch 5.

- 1.14 The Commission released the Issues Paper *A New Crown Civil Proceedings Act for New Zealand* (IP 35) in April 2014. The Issues Paper proposed the enactment of a new statute and included a draft Crown Civil Proceedings Bill. While the Crown Proceedings Act review is in nature very much a technical reform about “lawyer’s law”, it has the important purpose of ensuring that people are able to seek appropriate legal redress against the Crown. The proposals in the Issues Paper and the draft Bill sought to simplify and modernise the current Act to assist the conduct of litigation against the Crown.

### Public interest immunity

- 1.15 In the context of the Crown Proceedings Act review, the Commission looked at whether it would be helpful to enact a comprehensive legislative framework for withholding information on grounds of public interest immunity which is currently dealt with by section 27 of the Act. Under section 27, the Crown may issue a public interest immunity certificate to preclude the release of information. In the Issues Paper *A New Crown Civil Proceedings Act for New Zealand* (IP 35), the Commission suggested that a legislative framework could:
- contain the applicable procedure for assessing and challenging claims of public interest immunity (including those based on prejudice to national security);
  - define the roles of the Crown and the courts in deciding whether sensitive information should be disclosed;
  - set out how decisions to withhold or disclose would be made; and
  - define terms more clearly – such as what information it should cover.
- 1.16 The Commission suggested in the Issues Paper that a statutory framework would address concern that public interest immunity does not allow for adequate consideration of the needs of the other party to the litigation to be addressed. Currently, that party may be disadvantaged by not having the opportunity to argue that there is a case for sensitive information being disclosed.
- 1.17 In the Issues Paper, the Commission raised the possibility of an even broader regime that more widely addressed the use of classified and security-sensitive information in civil proceedings. A claim for public interest immunity is a rather blunt instrument. It has the effect of preventing the disclosure of information and thereby excluding it from a proceeding. This can prevent the proceeding from being able to be heard at all.
- 1.18 The Commission said that any new framework would need to balance the interests of other parties clearly against the need to ensure protection of the sensitive information. Legislation could set out a process involving the appointment of a security-cleared special advocate to view the material and represent the interests of the individual or entity concerned when there is a claim for public interest immunity.
- 1.19 Overseas jurisdictions have introduced ways of allowing this sensitive information to be used in court despite its classified nature. Special advocates have also been used in the context of closed court hearings in order to represent the other parties’ interests. In the Issues Paper, we discussed these options and summarised overseas approaches. We noted that consideration of a broader new regime under which protected information could be used in court potentially extended beyond the bounds of the Crown Proceedings Act review. Rather than simply looking at public interest immunity and the role of certificates under section 27, it involved a more expansive consideration of how protected information can be used in court proceedings.



## A new reference – national security information in proceedings

- 1.20 The Minister Responsible for the Law Commission, the Hon Amy Adams, referred a new reference to the Commission in November 2014. The Minister asked the Commission to review measures to protect “classified and security-sensitive information” in the course of criminal and civil proceedings. The scope of the new reference is therefore broad in the sense that it covers the whole ambit of proceedings – criminal and civil, as well as administrative proceedings that determine rights. However, it is also quite constrained because it is concerned only with information that may prejudice national security interests if disclosed, rather than all sensitive information to which public interest immunity applies. The Commission’s review of the Crown Proceedings Act covers all the grounds of public interest immunity currently covered by section 27 of the Crown Proceedings Act. The Commission was asked to also look at whether a new regime is needed to allow for the protected use of classified information in proceedings.
- 1.21 The Commission prioritised this new reference and released the Issues Paper *National Security Information in Proceedings Act* (IP 38) in May 2015. The completion of a report on the review of the Crown Proceedings Act was delayed until consultation on this Issues Paper could be completed because of the close relationship between the references.

## Consultation and submissions

### *A New Crown Civil Proceedings Act*

- 1.22 The Commission received 121 submissions in response to the first Issues Paper, *A New Crown Civil Proceedings Act for New Zealand* (IP 35). Most of these were personal submissions from individual public servants responding to the issue of immunity for Crown servants, which was directly relevant to them. The other submissions were from the New Zealand Law Society, government lawyers, interested law firms and academics. These submissions provided helpful comment on many of the more technical aspects of proceedings against the Crown and also commented on the details of the draft Bill included in the Issues Paper.
- 1.23 The Commission was fortunate also, over the course of this project, to receive comments and input from the Crown Law Office and other government legal advisers as well as from many experienced lawyers who have acted for parties against the Crown. Feedback from the legal sector has been instrumental in helping to shape the Commission’s final recommendations and draft Bill.

### *National security information in proceedings*

- 1.24 The Commission undertook this review as a matter of urgency. This was done to ensure that the Commission’s Report would be completed and available to the independent reviewers (Hon Sir Michael Cullen and Dame Patsy Reddy) appointed under section 22 of the Intelligence and Security Committee Act 1996 to undertake an independent review of New Zealand’s security and intelligence agencies.
- 1.25 There are a number of common issues between the reviews, so the Commission has liaised regularly with the independent reviewers and shared our developing proposals with the independent reviewers insofar as they were relevant to their review. Although there are some matters common to both reviews, the Law Commission has conducted its review independently under its terms of reference. We understand that Sir Michael and Dame Patsy are due to complete their review and report early in 2016.
- 1.26 The compressed timeframe for the Commission’s review meant that we were only able to give six weeks for public submissions. However, to ensure that our review was based on robust


consultation, we also undertook an active programme of meetings with interested parties. This involved intensive consultation within the Crown with agencies involved in national security matters and also with individuals and organisations outside the Crown who have experience in this area.

- 1.27 To ensure the Commission fully understood the Crown’s position in respect of national security information, the Commission established an advisory officials’ group with representatives from the following key departments: the Ministry of Justice, Crown Law Office, Police, Department of the Prime Minister and Cabinet (which is responsible for providing policy advice on the protective security functions of the New Zealand Security Intelligence Service and Government Communications Security Bureau), Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Department of Internal Affairs and New Zealand Customs Service. The Commission consulted this group firstly to gather information on the operation of current measures that protect the use of sensitive information and to help shape the issues for the review. We then tested our proposals with these officials and departments, seeking critical feedback. An outline of this part of the Report and our draft recommendations were provided for comment before we finalised the Report.
- 1.28 The Commission project team also met with representatives from the New Zealand Security Intelligence Service and the Government Communications Security Bureau on several occasions. We debated issues with them and sought critical feedback on our initial proposals. We also tried to ensure that we fully understood their operational and security concerns. We provided the agencies with an outline of this part of the Report for comment before we finalised it. We have endeavoured to address the concerns that they have raised with us when developing our recommendations.
- 1.29 To balance the input from within the Crown, the Commission has actively pursued input from individuals and organisations with expertise in this area outside of the government. In particular, we have undertaken consultation meetings with the New Zealand Law Society, Auckland District Law Society, New Zealand Bar Association and practitioners from the Criminal Bar Association. We also held consultation seminars with the New Zealand Law Society in Wellington and Christchurch and with the Auckland District Law Society in Auckland. Additionally, we met a number of individual barristers and other legal practitioners who have worked in this area. Copies of an outline of this part of the Report and our draft recommendations were provided to a few independent lawyers for comment before we finalised it.
- 1.30 We have been conscious that New Zealand is in a position to take advantage of lessons learned from experiences in both Canada and the United Kingdom. When the Commissioner responsible for this project, Geoff McLay, was in London earlier this year, he met with a number of individuals and organisations that have experience with the United Kingdom’s closed procedures. He had the opportunity to discuss the development of and problems with the United Kingdom’s model and explore how issues could be addressed if New Zealand were to adopt a similar model. Commissioner McLay spoke with senior counsel who have acted either as special advocates or for the Crown in the United Kingdom’s closed procedures, as well as with a number of judges who have presided over closed procedures in the United Kingdom courts. He also met with lawyers from Liberty<sup>3</sup> and others from the independent bar who have been very vocal critics of the move to closed procedures.

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3 Liberty is also known as the National Council for Civil Liberties.



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- 1.31 We also had the benefit of speaking via video conference to a group of senior members of the independent Canadian bar who act as special advocates in proceedings before the Canadian courts. We are grateful for the assistance from both Canadian and United Kingdom experts.
  - 1.32 The Commission has considered carefully the input of all submitters and the comments and observations of everyone we consulted. While the recommendations in the Report have been arrived at with the benefit of such input, for which we are very grateful, the views expressed here are those of the Commission after careful consideration of the issues.



# Part 1

# A NEW CROWN CIVIL PROCEEDINGS ACT



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# Chapter 2

## Why a new Crown Civil Proceedings Act?

### INTRODUCTION

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- 2.1 At common law prior to legislative intervention, the Crown could not be sued in the same way that private individuals could be, and the Crown had to invoke special procedures to enable it to sue.<sup>4</sup> The Crown also enjoyed other privileges. Without the Crown Proceedings Act 1950 or its antecedents, the New Zealand Government could not be sued in contract if it were to breach a contract and would not be able to be held liable for the torts (civil wrongs) of its employees. Similarly, without the Crown Proceedings Act, the Crown would not have been obliged to discover its documents in civil cases.
- 2.2 There are a number of explanations as to why the common law developed in this way, but the effect of various doctrines was that the Crown did not possess the same kind of legal personality that private individuals did. All the countries that inherited English common law needed statutes like the Crown Proceedings Act to remedy this defect.

### CASE FOR REFORM

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- 2.3 The Crown Proceedings Act is a statute of considerable constitutional significance. It is an important part of the rule of law that citizens ought to be able to obtain legal redress when the government has breached those citizens' legal rights and, in appropriate circumstances, to receive compensation and other remedies. This is recognised by section 27(3) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides:
- Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.
- 2.4 The Crown Proceedings Act, and the earlier New Zealand statutes,<sup>5</sup> went a considerable distance towards abolishing the privileged position that the Crown had previously enjoyed at common law in litigation. The Act's aim was that suits would be taken against the Crown as if it were a private person. The old English maxim "the King can do no wrong" was replaced with an assumption that, if the Crown, or its servants, had breached an obligation that would also have been owed by private individuals, the Crown could be sued in the courts. The Act also abolished the somewhat confusing legal devices that had previously been used to circumvent the difficulties of suing the Crown, most notably the petition of right, as well as the Crown's immunity from discovery and costs, which had frustrated litigants.
- 2.5 It is because of its importance that the Crown Proceedings Act now needs to be updated. The Act does not reflect the concerns of contemporary New Zealand or the way in which

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4 The best description of the pre-reform law is in Walter Baker Clode *The Law and Practice of Petition of Right Under the Petitions of Right Act, 1860* (W Clowes and Sons Ltd, London, 1887).

5 Crown Liabilities Redress Act 1871; Crown Redress Act 1877; Crown Suits Act 1881; Crown Suits Act 1908; Crown Suits Act 1910.

New Zealand is now governed. The public service went through large-scale changes in recent decades, while the 1950 Act changed little to reflect this. The State Sector Act 1988 and the Public Finance Act 1989 created a new legal architecture for the New Zealand public service, and the Crown Entities Act 2004 consolidated the law relating to the many government entities that have their own corporate personality.

- 2.6 The Crown Proceedings Act is also somewhat confusing and convoluted. For example, in most cases, a plaintiff attempting to sue the Crown in tort must first establish that an employee of the Crown has committed a tort. This requirement creates significant difficulties when it is alleged that the Crown or a government department as a whole has breached its obligations (systemic negligence). The way in which the 1950 Act was drafted means that, in some areas, it has also not kept up to date with changes in court procedure.

## PRINCIPLES UNDERPINNING THE REVIEW

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- 2.7 In undertaking this review and preparing our Report, the Commission has applied the following principles, some of which are new and some of which are already present in the Crown Proceedings Act:

- The Crown ought to be able to sue, and be sued, as others can. This means that, as far as possible, the Crown ought to be in the same position in litigation as a private individual would be. Any departure from that principle ought to be demonstrably justifiable in a free and democratic society. This principle reflects the rule of law and section 27(3) of NZBORA.
- The Act should enable access to justice by making the procedure for bringing civil litigation against the Crown clear.
- The Act should continue to be a procedural statute that does not seek to define the substantive rights of the Crown, or those that litigate against it, but rather seeks to provide a mechanism by which courts can determine those substantive rights.
- The Act ought to apply to the Crown, as opposed to “government” in general. At its root, the principal problem the statute needs to solve is how to enable suits that would otherwise not be possible because the Crown lacks a distinct legal personality.
- It is the role of Parliament in passing particular statutes, and judges in interpreting statutes and in applying the common law, to define the nature of the Crown’s obligations and whether the breach of those obligations gives rise to a right to compensation.
- The new statute should cover all monetary and civil claims against the Crown.
- The procedure in the Act should reflect the realities of modern New Zealand government.
- The procedures in the Act should reflect the need for departments to be accountable for the liabilities they incur.

## RECOMMENDING A NEW ACT

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- 2.8 The Commission recommends in this Report that a new Crown Civil Proceedings Act be enacted to replace the current Crown Proceedings Act. In Chapter 4, we set out a draft Bill that would give effect to the recommendations in this Report. Such a new Act has two core tasks. First, it must enable the Crown to sue and be sued, and second, it should, with a few justified departures, subject the Crown to the same law, procedure and rules as other litigants.

- 2.9 The Commission considers that some circumstances do remain where different law, procedures or rules continue to be justified. This is not because of any desire to protect the Crown but rather as recognition that the Crown is not simply another litigant. Where different treatment is justified, it is important for the policy behind such a departure from principle to be clear and for the exception to be no more than necessary to give effect to that policy. The draft Crown Civil Proceedings Bill in Chapter 4 reflects this approach.
- 2.10 The draft Bill achieves the core task of giving the Crown legal personality in order to be sued. In a number of respects, it goes further than the current Act. It recognises direct tort liability, rather than relying on the Crown being vicariously liable, and it provides for compulsory enforcement. However, the proposed statute is not designed to increase the liability of the Crown. It does not seek to create liability but rather to recognise that the Crown can be sued, and can sue, in the same way as others can.
- 2.11 The Bill does not create obligations in and of itself; rather, it provides a mechanism through which existing obligations can be enforced. Therefore, it does not alter the essential framework for civil proceedings against the Crown. The basic principle remains the same: the Crown ought to be able to sue, and be sued, as others can. The way in which the draft Bill does this, however, is considerably simpler than under the current Act and is more in line with the realities of the way New Zealand organises its central government. The courts, through the normal processes of the common law, and Parliament, through statutes, will continue to decide in what circumstances the Crown will be liable.

## MODERNISATION

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- 2.12 In most respects, the changes we are recommending in the new Bill are subtle but nevertheless important.
- 2.13 Under the Bill, the Crown can be sued directly in tort, as opposed to vicariously, for the actions of its servants, just as it currently can be in contract. The Crown could be “sued” directly in New Zealand before the 1950 Act,<sup>6</sup> although currently, the Crown can only be sued vicariously, with limited exceptions in the Act.<sup>7</sup>
- 2.14 The purpose of the proposed change is not to increase the potential liability of the Crown. In Australia, the Crown can be directly sued in various states, and the Crown’s liability has not been noticeably increased in the Australian states in comparison to New Zealand or the United Kingdom. The change is intended to more closely align the statute to the realities of modern government in which it is clear that the Crown, and not just its employees, owe obligations to the citizens it serves. The change would also allow the argument that the Crown might be liable in a case of systematic negligence where no one employee has committed a tort but where the Crown has nevertheless failed to meet its obligations.
- 2.15 Under our recommended change, the scope of Crown liability in particular cases would continue to be determined by the courts. Plaintiffs alleging negligence would still be required to establish loss that resulted from the breach of a duty of care. It is not intended, and it is not anticipated, that the traditional reluctance to recognise a duty of care for failures to properly regulate would be altered by this proposed reform. Indeed, the narrow grounds on which the

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<sup>6</sup> See Stuart Anderson “‘Grave Injustice’, ‘despotic privilege’: the insecure foundations of crown liability for torts in New Zealand” (2009) 12 *Otago L Rev* 1. Before 1950, New Zealand enabled the presentation of petition of rights to the courts that covered a wide range of activities of the New Zealand Government.

<sup>7</sup> For instance, the Crown itself can breach contracts or trustee duties under s 3(2)(a), can breach duties owned as an employer under s 6(1)(b) and can breach common law duties relating to the ownership, possession or control of property under s 6(1)(c).



majority of the Supreme Court recognised that there might be duty of care in *Couch v Attorney-General*<sup>8</sup> shows the generally conservative nature of New Zealand courts in this area.<sup>9</sup>

- 2.16 This issue and also the other more significant policy issues raised in the Issues Paper are canvassed below in Chapter 3.

## THE OVERALL SCOPE OF THE NEW ACT

- 2.17 The new Act we are recommending is not a “litigation against the government” statute. First, it is limited to civil proceedings and not intended to cover criminal cases or judicial review cases, which will continue to have their own statutes and separate rules. Second, it only deals with those parts of the government, or the state, that form part of the Crown and which therefore cannot sue or be sued without statutory provisions. These include the core government departments. It is possible to conceive of another function for a Crown Civil Proceedings Act – that of acting as a funnel for all litigation against the government or state. A more expansive statute could deal with litigation against Crown entities, some of which, like school boards of trustees or the Accident Compensation Corporation, serve as a major point of interaction between New Zealanders and their government.
- 2.18 Crown entities are, however, constituted as bodies corporate with the capacity to sue and be sued.<sup>10</sup> These entities fall outside the scope of the 1950 Act and the replacement one we are proposing. One of the reasons for setting up Crown entities as removed from the central Crown is to manage risks and liabilities in different ways from how they are managed by the core public service. This is reflected in the Public Finance Act 1989, which provides that the Crown is not liable for the debts of Crown entities or other agencies or bodies controlled by the Crown.<sup>11</sup>
- 2.19 Nothing prevents an all-of-government direction as to the conduct of the litigation of Crown entities under section 107 of the Crown Entities Act 2004. However, we do not think that this should be the role of a new Crown Civil Proceedings Act.

## THE RELATIONSHIP TO GENERAL RULES OF CIVIL PROCEDURE

- 2.20 The special nature of the Crown requires that the Bill provides a number of special procedural rules, such as the Attorney-General being the nominal defendant, except when another statute provides otherwise, or applying the common rules of discovery to the Crown (which would not apply otherwise). While these particular provisions may require specific rules, the intention is that, on the whole, the general law of civil procedure and High Court Rules will apply to the Crown as they would to private litigants.

### RECOMMENDATION

- R1 The Crown Civil Proceedings Bill attached to this Report, which modernises the Crown Proceedings Act 1950, should be considered for enactment.

8 *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 [*Couch (No 2)*].

9 See Geoff McLay “The New Zealand Supreme Court, the Couch case, and the future of government liability” (2009) 17 Torts Law Journal 77.

10 Crown Entities Act 2004, s 7.

11 Public Finance Act 1989, s 49.

# Chapter 3

## Resolving central policy issues

### INTRODUCTION

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- 3.1 In this chapter, we revisit the central policy issues raised in our Issues Paper *A New Crown Civil Proceedings Act for New Zealand* (IP 35) and report back on the feedback received from submitters.
- 3.2 The policy issues discussed are whether:
- the Crown should be potentially liable for torts in its own right (directly liable);
  - Crown employees should have statutory immunity or an indemnity;
  - ministers of the Crown should have similar protection; and
  - compulsory enforcement remedies should be available against the Crown.
- 3.3 The other important issue concerns the intersection of section 27 of the Crown Proceedings Act 1950 with the doctrine of public interest immunity, including what particular carve-outs from the Crown's disclosure obligations are necessary to deal with national security. This is discussed in Part 2 of the Report.

### LIABILITY OF THE CROWN IN TORT

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#### Introduction

- 3.4 Chapter 3 of the Issues Paper discussed three interrelated issues concerning the Crown's liability in tort, which are:
- (a) whether or not the Crown should be potentially liable in tort in its own right (directly liable);
  - (b) how the imposition of direct liability should affect the range of existing statutory provisions that effectively immunise the Crown by immunising individual employees from liability in tort; and
  - (c) whether the Crown's liability in tort should be limited by statute or left to the courts to determine.
- 3.5 In the Issues Paper, the Commission expressed preliminary views on these issues. The Commission took the view that the proposed new Crown Civil Proceedings Act should allow for the Crown to be potentially directly liable in tort in its own right as a consequence of placing the Crown in the same litigation position as others. We took the view also that, as part of the reform, existing statutory provisions that effectively prevent liability being found against the Crown, by immunising individual employees from liability in tort, might be redrafted to directly immunise the Crown where appropriate. Alternatively, the Bill could explicitly provide that all existing immunities give the Crown immunity. We also proposed that the Crown's liability in tort should not be limited by statute, but should be left to the courts to determine.



- 3.6 Here, we briefly recap on these issues and discuss the points made in submissions in response. Despite some concern expressed in submissions, we think there are advantages in continuing with the approach to direct liability as proposed in the Issues Paper and leaving the limitation of the Crown's liability in tort to the courts. We have revised our thinking in respect of existing immunities and have concluded that they should be listed in a schedule to the Bill and should continue to immunise the Crown from liability in respect of the actions of a Crown employee. We have also made some changes to the original draft provisions included in the Issues Paper in order to address concerns raised in submissions.

## Current law and problems

### *Vicarious liability for employee acts and omissions*

- 3.7 Currently, someone who wants to sue the Crown in tort must fit their case into one of the categories prescribed in section 3 of the Crown Proceedings Act.<sup>12</sup> This is different from other types of claims, including contract.
- 3.8 The Crown Proceedings Act effectively establishes a bar against suing the Crown directly in tort with the exception of the very limited classes of claims available under sections 6(1)(b), 6(1)(c) and 6(2). This bar is felt most sharply in the case of negligence claims but applies equally to other torts. The Crown can only be held vicariously liable in tort for the acts and omissions of Crown employees. Consequently, in order to sue the Crown in negligence, a potential claimant must identify a particular Crown employee and allege that he or she has committed a tort. However, if no particular Crown employee has committed a tort or it is alleged that the government department as a whole has failed or it is claimed that a number of government departments have collectively failed, a person harmed (in circumstances where there would otherwise be legal redress) may be left without any redress against the Crown.

### *Crown reliance on employee immunity*

- 3.9 Currently, the vicarious nature of the Crown's liability and the lack of direct liability for tort claims mean that statutory provisions that give immunity to Crown employees and other officers also immunise the Crown. Some statutes may have been drafted with the intention of immunising the Crown in this way, while for others the intention may have only been to immunise the employee. Immunity for the Crown may not be justified where it leaves a person who has been harmed no remedy in tort.
- 3.10 As we discuss later in this chapter, section 86(1) of the State Sector Act 1988 gives Crown employees an immunity for actions undertaken in good faith in performance of their work. At the same time, section 6(4A) was inserted into the Crown Proceedings Act preserving the ability of those who had suffered harm to continue to pursue the claim against the Crown despite the Crown servant's immunity in section 86 of the State Sector Act. However, this did not confer direct liability on the Crown, so a claim against the Crown must still be based on the vicarious liability of a Crown employee. Furthermore, section 6(4A) only applies to prevent the Crown taking the benefit of immunity under section 86 of the State Sector Act. It does not apply to other immunities given elsewhere on the statute book to Crown employees.
- 3.11 Questions of immunity and liability are intertwined. The effect of some existing immunity provisions would change if claims could be brought directly against the Crown. Where vicarious liability is the only avenue of challenge available to a claimant, a provision that immunises a Crown employee will also protect the Crown from vicarious liability because the Crown enjoys the benefit of its employee's immunity. The immunity will not apply if the Crown is directly

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<sup>12</sup> Crown Proceedings Act 1950, s 3(2)(b).

liable unless these provisions are amended so that the Crown is also protected by a statutory immunity given to its employees.

### *Statutory limits on the Crown's liability*

- 3.12 Section 6 of the Crown Proceedings Act excludes tort claims against the Crown except to the extent that they are permitted by the provisions of the Act. If section 6 was repealed, the situation would be the inverse. As long as they had a cause of action, a person could bring any claim against the Crown except where such a claim was prohibited by legislation (or other legal rule). Therefore, any limitation on the Crown's liability in tort will need to be expressly provided for if section 6 is repealed.

### **Should the courts be able to find that the Crown could be directly liable in tort?**

- 3.13 There are good reasons for allowing the courts to recognise that, in appropriate cases, the Crown could be held directly liable in tort:
- (a) Direct liability is conceptually cleaner and more consistent with the way in which the Crown is held accountable for its conduct (including the conduct of employees).
  - (b) Proceedings against the Crown will be simplified, as the Crown would be in the same position as other corporate entities that might potentially be sued directly.
  - (c) Direct liability might remove the potential for injustice that might arise where no one Crown servant can be said to have committed a tort as long as the court would otherwise find that the Crown would be legally liable.

### *Consistent with modern model of Crown accountability*

- 3.14 In the late 1980s, New Zealand moved to a new model of public service management mainly to clarify public accountabilities and responsibility.<sup>13</sup> New Zealand's reforms of the 1980s established formal straight-line accountability. Under the adopted model, public agencies were made more accountable to ministers and to Parliament who, in turn, were accountable to the voters who elected them.<sup>14</sup> The approach placed emphasis on upward accountability to ministers rather than on accountability directly to members of the public who use public services.<sup>15</sup>
- 3.15 Under the model, there is a chain of accountability with ministers at the head and chief executives accountable to their ministers but in charge of their departments, with explicit hierarchical reporting lines within departments.<sup>16</sup> The result is that employees are primarily accountable upwards through the organisational hierarchy and are not independently accountable to the public.<sup>17</sup> Crown employees in government departments are obliged to give an account of and answer to those further up the chain for their execution of the responsibilities that have been entrusted to them.
- 3.16 Allowing the courts to potentially recognise direct liability is more consistent with this model of public service accountabilities and responsibilities. These formal chains of accountability do not normally include public servants being directly accountable to the public who are affected by the execution of responsibilities. This does not of course mean that public servants are not "answerable" to those affected by the execution of their responsibilities, in the sense

<sup>13</sup> Richard Mulgan "Public Sector Reform in New Zealand: Issues of Public Accountability" (2008) 32(1) *Public Administration Quarterly* at 1.

<sup>14</sup> At 9.

<sup>15</sup> At 9.

<sup>16</sup> Jonathan Boston and Derek Gill *Joint or Shared Accountability: Issues and Options* (Institute of Policy Studies, Working Paper 11/03, June 2011) at 4.

<sup>17</sup> Mulgan, above n 13, at 9.

of needing to be responsive to their needs and interests, explaining decisions, undertaking dialogue and providing information.<sup>18</sup> It does mean that in order to hold the Crown liable, it will be possible to sue the Crown directly in tort rather than requiring a potential claimant to sue the particular Crown employee who made the decision that affected them. This is more conceptually consistent.

### *Simplification and clarification*

- 3.17 Potential claimants will no longer be forced to attempt to frame legitimate tort claims, sometimes artificially, around whether an individual public servant has committed a tort. Rather, the focus will be, as it ought to be, on whether the Crown ought to be responsible in damages for breaching its obligations. We emphasise that this change would not require a court to find the Crown liable; that will be left for the underlying law to determine. The change will simply make clear that direct liability is not precluded. For example, a claim in negligence would still require the court to consider whether a duty of care exists and whether it was breached. The advantage of the change is that the court will not be diverted to questions of vicarious liability or arguing about who is the proper respondent. We expect that there would continue to be the same judicial scepticism in recognising the existence of a duty of care in negligence for regulatory or administrative decision-making that currently exists.
- 3.18 The simplification of direct liability will be of most benefit in cases where, for one reason or another, vicarious liability presents difficulties that do not go to the underlying appropriateness of finding the Crown liable. The exchange at the outset of the *Couch*<sup>19</sup> Supreme Court hearing on 17 April 2007 and the apparent confusion between the bench, counsel for the Appellant and Crown Counsel as to whether the claim was one for vicarious liability for the actions of the individual probation officer or a claim for the direct liability of the Crown demonstrates the conceptual difficulties that arise in this field.<sup>20</sup>
- 3.19 The Crown Law Office said in their submission that the arrangement entered into by the Crown and Mrs Couch was a response to the particular personal circumstances of the probation officer and that care must be taken not to place undue weight on the arrangement in that case. While we acknowledge that point, the case still demonstrates the conceptual difficulties that arise around having to prove vicarious liability for the actions of an individual employee. *Couch* more importantly illustrates the reality that lies behind our approach. It is the Crown's obligation to make sure that the probation service operates effectively, and if there is to be legal liability, it should be the Crown's. The very narrow duty of care that the Supreme Court accepted might exist illustrates the reluctance of the courts to recognise such a duty of care.
- 3.20 A related issue is the potential for unfairness to Crown employees. Under the current law, an individual Crown employee must be named as defendant in a tort claim. In cases where Parliament has decided to place a duty of care or liability on an individual in respect of a particular function and where an appropriate indemnity is available, this is unobjectionable. However, where Parliament has not placed responsibility on an individual employee, a claimant must still target an individual employee, despite the fact that the claim might be one of systemic failure at its core.

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18 Boston and Gill, above n 16, at 5.

19 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 [*Couch (No 1)*].

20 *Couch (No 1)* SC Transcript, 17 April 2007 at 11.

*Removing the potential for injustice*

- 3.21 The inability to sue the Crown directly in tort leaves a gap in the law. A plaintiff who is unable to identify a particular Crown servant or establish a case for vicarious liability is effectively barred from bringing a claim in tort against the Crown (outside those categories in section 6(1)(b) and (c) of the Crown Proceedings Act).<sup>21</sup> The inability to even ask the court to determine whether or not the Crown owes a duty of care, let alone whether or not that duty was breached, has the potential to result in significant injustice.
- 3.22 The depopulation of the Chagos Islands by the British in the 1970s to establish a US military base there demonstrates, albeit in an extreme way, the potential injustice that can result from being unable to ask a court to even consider if the Crown should be liable in tort.<sup>22</sup> In 2002, a group of Chagos Islanders (comprising those born in the Chagos Islands and their children) unsuccessfully sued the United Kingdom Government in respect of their deportation from the Chagos Islands.<sup>23</sup> The Court of Appeal refused the Islanders' application for leave to appeal. The claim for exile and misfeasance in public office failed because, under English law, the State could not be a potential tortfeasor.<sup>24</sup> The claims for deceit<sup>25</sup> and vicarious liability of the Crown for misfeasance in public office<sup>26</sup> were faced with evidentiary difficulties and also failed. The claimants were effectively left with no remedy in tort for the substantial harm they had suffered.
- 3.23 Whatever the justice of the substantive case, it is the procedural bar on holding the Crown potentially liable that concerns us. The need to remove the potential for such an effect of the prohibition on the Crown being liable is, in itself, sufficient justification for reform. At its most basic level, the issue is one of fairness; a person harmed by the negligent action of the Crown, whether it be through a single Crown employee, multiple employees or a systemic failure, should be entitled to have that claim considered by the courts and not have the claim blocked by what is essentially a procedural matter. In New Zealand, claimants in this position would have to rely on the goodwill of the Crown and the willingness of the courts to be flexible in their approach to the restriction on direct liability. In our view, this is an insufficient response.

*Views of submitters were considered*

- 3.24 In the Issues Paper, we asked submitters whether they agreed with the approach of making it possible for the Crown to be directly liable in tort. We asked also what, if any, difficulties they saw with the approach.

*Submissions supporting our proposals*

- 3.25 The majority of submitters who responded to this question agreed with the proposal to allow direct liability in tort against the Crown. Professor Janet McLean said that the Crown can already hold land and enter contracts, so the issue was really more of a procedural one; who to serve and against which fund should judgment be awarded? Russell McVeagh considered

21 Crown Proceedings Act 1950: ss 6(1)(b) and 6(1)(c) allow direct liability in two very limited sets of circumstances. The first, under s 6(1)(b), relates to claims arising from the Crown's duties as an employer; the second, under s 6(1)(c), relates to claims arising from the Crown's duties as an owner and occupier of land.

22 We do not repeat the allegations made by the Chagos Islanders against the United Kingdom Government. It is part of the historical record and is discussed in detail in: *Bancoult, R (on the application of) v Secretary of State for the Foreign & Commonwealth Office* [2000] EWHC 413 (Admin); *Chagos Islanders v Attorney-General, Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB) [*Chagos QB*]; *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997 [*Chagos CA*]; *Bancoult, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin).

23 The claimants sought from the High Court: 1) compensation and restoration of their property rights in respect of their unlawful removal or exclusion from the islands; and 2) declarations of their entitlement to return to all Chagos Islands and measures facilitating their return: *Chagos QB*, above n 22.

24 At [20].

25 At [32].

26 At [28].



that the presumption should be in favour of direct liability but acknowledged that there might be cases where expressly identified exceptions are justified. They said that, from the wronged person's point of view, "the Crown is the Crown and there is no justice is foreclosing such a claim on technical grounds". They made the important point that it would focus the argument on what the law should be rather than on whom the claim should be made against. It would also avoid the injustice that might occur where there is evidence of systemic failure that cannot be fairly attributed to Crown servants.

- 3.26 The New Zealand Law Society (NZLS) said that allowing direct liability would clarify the law regarding the rights of people affected by decisions of the Crown. They thought the proposal would align the position of the Crown and Crown entities in tort so that people could expect clarity and consistency of treatment with respect to the tort liability of the Crown and Crown entities. The NZLS said that allowing direct liability would not affect the approach the courts would take when assessing whether or not the Crown should be liable in tort.
- 3.27 The New Zealand Public Service Association (PSA) agreed that direct liability would be consistent with the principle that the Crown be subject to the same legal rules as private individuals and should be accountable to injured citizens for its actions. Direct liability would also prevent public servants from being unfairly targeted in order for a claim to proceed. They acknowledged that, in some cases, it might be necessary for the Crown to be immunised but that those instances should be carefully defined and limited to that which is necessary. They also highlighted the potential injustice faced by people wishing to bring claims relating to systemic failure by the Crown under the current law.

#### Concern proposal will extend Crown liability

- 3.28 Although supportive of direct liability, the NZLS did raise a concern that the proposal might open the door for the Crown to be sued for policy decisions. The Crown Law Office was also concerned that allowing direct liability would extend the scope of Crown liability in tort in ways that the Law Commission did not intend. In particular, Crown Law is concerned that the proposal might open up a wide area of new Crown liability in the regulatory field. Crown Law's submission takes a strongly risk-averse position. This may be understandable, given their role in minimising and managing the Crown's legal risk, however, we think it overstates the possible risk of expanding Crown liability. Too much weight should not be given to what are really remote and almost theoretical risks.
- 3.29 Our intention is not that the Crown would suddenly be liable in respect of policy choices or in regulatory fields where liability does not currently exist. An underlying cause of action (capable of resulting in liability) must already exist because we are not proposing new causes of action against the Crown. Our proposed approach deals with the ability of the Crown to sue and be sued. The possibility of direct liability will not generate new cases. It will simply allow cases to be brought that were previously prevented by a procedural bar that has little or no justification in modern New Zealand and has the potential to lead to considerable injustice.
- 3.30 Allowing direct liability does mean that the Crown might be sued in cases where previously it would not have been, but this does not change the substantive law of tort. The approach removes an existing procedural impediment that has prevented people from bringing a claim. Without this impediment, the common law of torts in respect of Crown liability can continue to be developed by the courts over time in the same way as other aspects of the law of tort.

#### Development of the Crown's liability by courts

- 3.31 Crown Law considered that there are risks involved in leaving the development of the scope of the Crown's liability to the courts. We do not share that concern. The courts are generally

cautious of recognising new forms of liability where a public authority or public officer is performing a public function, and we would not expect a lesser degree of caution to be exercised should direct liability be authorised.<sup>27</sup> Whether the courts recognise a novel duty of care will continue to depend on whether or not it is fair, just and reasonable to recognise a duty of care in the particular circumstance. The courts will always have regard to the nature of the relationship between the parties and the wider legal and policy issues that affect whether or not a duty of care should be recognised.<sup>28</sup> Moreover, Parliament will remain able to set proper limits on liability in particular cases.

#### Australia and Canada

- 3.32 We looked at the experience in countries that have direct liability to consider whether the concerns that Crown Law identified in their submission have eventuated. They have not, and we think that they are also unlikely to occur in New Zealand.
- 3.33 Each Australian state, with the exception of Victoria,<sup>29</sup> now makes the Crown directly liable in tort.<sup>30</sup> For example, section 5 of the Crown Proceedings Act 1988 (NSW) provides:
- (1) Any person, having or deeming himself, herself or itself to have any just claim or demand whatever against the Crown (not being a claim or demand against a statutory corporation representing the Crown) may bring civil proceedings against the Crown under the title “State of New South Wales” in any competent court.
  - (2) Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject.
- 3.34 In 1976, the New South Wales Law Reform Commission firmly rejected the suggestion that the state ought to adopt the United Kingdom vicarious liability model. This is discussed in more detail in the Issues Paper.<sup>31</sup> Additionally, Professor Anderson notes that the procedural difficulties advanced as reasons for not allowing direct liability in the 1950s have not eventuated.<sup>32</sup>
- 3.35 In the Canadian context, we found no evidence to suggest that, in British Columbia (the only Canadian common law province to allow direct liability),<sup>33</sup> those concerns have been borne out either. Further, in the other Canadian provinces that follow the United Kingdom model, the leading book on Crown liability suggests that the Canadian courts are reluctant to permit the Crown to avoid liability in tort by relying on the residue of Crown immunity that prevents direct tort liability of the Crown.<sup>34</sup> In the opinion of the authors, the limitation on direct Crown liability in tort appears to be largely ignored, and the courts are proceeding on the basis that the Crown can be both directly liable and vicariously liable.<sup>35</sup>

27 At [80].

28 *Couch (No 1)*, above n 19, at [78] and [79].

29 Susan Kneebone *Tort Liability of Public Authorities* (LBC Information Services, North Ryde, NSW, 1998) at 285. Kneebone argues that Victoria’s legislation is distinguishable from the other Australian jurisdictions because the Crown’s liability in tort is limited to vicarious liability.

30 Mark Aronson “Government liability in negligence” (2008) 32 MULR 2009 at 44.

31 Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at 12.

32 Anderson, Stuart, above n 6 at 21.

33 Crown Proceeding Act, RSBC 1996, c 89 s 2(4).

34 Peter W Hogg, Patrick Monahan and Wade K Wright *Liability of the Crown* (4th ed, Toronto, Ontario, 2011) at 185.

35 An example of a case where the judge noted the difference between direct and vicarious liability is *Williams v Canada* [2005] 76 OR (3d) 763.

### Experience of public law compensation

- 3.36 The Crown is directly liable for breaches of the New Zealand Bill of Rights Act 1990 (NZBORA). We have proposed that claims of a breach of NZBORA should be brought under the new Crown Civil Proceedings Act that we are recommending. Despite liability being direct, the courts have emphasised restraint in awarding compensation for breaches of NZBORA. Although there are some important differences between public law compensation and tort claims, the experience of judicial restraint in relation to public law compensation indicates that it is not a question of whether liability is “direct” that leads to expansion or restraint of liability but rather judicial determination of what substantive liability ought to be.

### Torts other than negligence

- 3.37 Crown Law said that our proposal had not fully analysed how direct liability would affect torts other than negligence. They referred to the torts of misfeasance, wrongful imprisonment, corporate defamation, corporate misfeasance and wrongful imprisonment.
- 3.38 In our view, such analysis is unnecessary at this stage. The underlying doctrine of those torts is unaffected by the availability of direct liability. The courts will undoubtedly exercise great caution and give careful consideration to any novel cases that arise. The approach adopted by the New South Wales Supreme Court in *Kable*<sup>36</sup> is a good example of the type of approach we think New Zealand courts will adopt in novel situations (as noted above, direct liability is allowed in New South Wales). In considering the claims for abuse of process, malicious prosecution and false imprisonment, the Court applied settled principles of tort law to what was a unique case.
- 3.39 Crown Law also submitted that our proposal would appear to make it possible for the Crown to be sued as some sort of conglomerate of related companies – a step rarely, if ever, available in private litigation.
- 3.40 We think that the Crown is in quite a different position to a group of related companies. The bodies that make up the Crown are not merely related, they are part of the same whole, and this should be recognised. We are not suggesting that the Crown should be liable for the actions of bodies, such as Crown entities, which have their own capacity to sue and be sued and which have quite deliberately been removed from the central Crown. However, within the Crown itself, there is only one Crown, and this should be reflected.

### *Approach in the Crown Civil Proceedings Bill*

- 3.41 We remain of the view that the court should be able to hold the Crown directly liable in civil proceedings, regardless of whether or not an individual Crown employee is found liable. Although the possibility of direct liability is a logical consequence of the core procedural reforms in this review, namely that the Crown has its own legal personality for the purposes of civil proceedings and may sue and be sued as an ordinary person, clause 8 of the Bill draws attention to the change:

#### **8 Tort liability of the Crown**

A court may find the Crown itself liable in tort in respect of the actions or omissions of Crown employees despite any immunity of those employees.

- 3.42 We have also included sub-clause 3(c) (the purpose clause):

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<sup>36</sup> *Kable v State of New South Wales* [2012] NSWCA 243. The High Court of Australia subsequently held that the Court of Appeal was wrong in its finding of false imprisonment on the grounds that the judicial order in question did provide lawful authority for detention. The High Court did not, however, query the general approach adopted to assess liability.

### 3 Purpose

The purpose of this Act is to clarify and reform the law about civil proceedings involving the Crown, including by—

- (c) providing that the Crown may itself be directly liable in tort (rather than only vicariously liable):

#### Amending existing provisions that immunise the Crown

- 3.43 As already outlined above, many existing statutory provisions effectively immunise the Crown. This is because the Crown's liability is vicarious, and the Crown is entitled to rely on an employee's indemnity. Where the Crown is instead potentially directly liable for a tort claim, existing statutory provisions that give Crown employees immunity will not protect the Crown. This means that many existing statutory provisions that give immunity to Crown employees and other officers will no longer immunise the Crown and will need to be redrafted in order to provide the Crown immunity against direct liability.
- 3.44 Many of the existing immunity provisions have intentionally been drafted and then enacted on the basis that, by immunising the Crown employee, the provision does also vicariously immunise the Crown. However, that will no longer be the position unless those immunity provisions are amended or the effect of immunising the Crown is preserved in some other way.

#### *Approach in clause 15 of the Bill*

- 3.45 We recommend that existing immunity provisions that apply to Crown employees and that have the effect of immunising the Crown should continue to apply to immunise the Crown against liability. To address the possibility of direct liability, clause 15 of the Bill expressly applies the existing provisions to the Crown by providing:

#### **15 Existing immunity provisions**

An existing immunity provision listed in **Schedule 2** immunises the Crown from liability in civil proceedings in respect of the actions or omissions of a Crown employee in the same way as it would immunise the employee.

- 3.46 The Bill at present contains some illustrative examples of provisions of the sort that would be included in Schedule 2. Careful consideration should be given to ensuring that Schedule 2 only includes provisions that immunise the Crown where this is consistent with the purpose of existing provisions. This deserves further careful scrutiny to ensure it reflects the status quo and does not unintentionally create new immunities.
- 3.47 We think the approach we have taken here, of seeking to maintain existing immunities, is the most consistent with the essentially procedural nature of the reforms in the Bill. In future, against the backdrop of direct liability of the Crown, Parliament will need to consider whether or not to grant immunity to the Crown or whether it should only be granted to Crown employees and how to appropriately word such new provisions.

#### Restrictions on Crown liability

- 3.48 In the Issues Paper, we proposed that the Crown's liability in tort should not be limited by statute but should be left to the courts to determine. We gave particular attention to section 6(2) of the Crown Proceedings Act. The intention of that section would seem to be to exclude liability in fields where the Crown provides a service that is not also provided by private individuals. However, as we noted, the provision has most recently been interpreted as enabling claims alleging breaches of statutory duties to be brought against the Crown.



3.49 We consider section 6(2) to now be ineffective and no longer necessary. We do not consider it appropriate to try and impose a general statutory limit on the kind of liability that the Crown may be subject to. The courts should continue to develop the common law and decide whether to recognise new duties of care or types of negligence when claims are brought against the Crown. The policy/operational distinction most famously articulated in *Anns*<sup>37</sup> will continue to be refined and debated by the courts, and new duties of care may be recognised. In cases where the distinction between policy and operational matters is not clear cut, it is appropriate to leave the matter to the courts to determine.

#### *Approach taken in the Bill*

3.50 The revised Bill does not make it more or less likely that courts will extend the scope of tort liability for administrative failings, nor does it increase the likelihood that there will be a “public law of torts”. Whether a statutory duty should give rise to a tort of breach of statutory duty or a claim for breach of a common law duty of care should either be addressed in the specific Act imposing that statutory duty, or if it is not, it should be determined by the courts. It is not appropriate to seek to impose a general statutory limit on the kind of tort liability that can be found against the Crown in a new Crown Civil Proceedings Act, which is otherwise a procedural statute.

3.51 We propose not replacing section 6(2) with an equivalent provision in the new Act as we do not consider it necessary.

#### RECOMMENDATIONS

- R2 The Crown should be able to be sued in tort as a private individual and be held directly liable.
- R3 Existing immunity provisions that apply to Crown employees and that currently have the effect of immunising the Crown should be included in a schedule in the new Act and continue to apply to immunise the Crown against liability.
- R4 The substantive law of torts, including what kinds of torts the Crown should be liable for, should continue to be developed by the courts. We are not recommending a legislative response at this time.

## ACCOUNTABILITY OF CROWN EMPLOYEES

### Introduction

3.52 The question of when and how Crown employees ought to be protected from personal liability for their actions was considered in Chapter 6 of the Issues Paper. In the Issues Paper, the Commission put forward two options for feedback – one being that Crown employees should have immunity and the other being that they have an indemnity. Here, we briefly revisit the distinctions between the options, discuss submissions and explain our recommendations. Clause 13 of the draft Civil Crown Proceedings Bill reflects our recommendations.

### Current law

3.53 Most, but not all, Crown employees are immune from legal actions. Some Crown employees are not immune but may be entitled to an indemnity.

<sup>37</sup> *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 754.

*Public servants*

- 3.54 Following the Supreme Court decision in *Couch*,<sup>38</sup> Parliament enacted amendments to the State Sector Act 1988 to clarify that Crown employees would not be personally liable for actions undertaken in good faith in the performance of their public duties. Section 86(1) of the State Sector Act was amended to provide an immunity for all Crown employees covered by that Act if they acted in good faith in the performance of their work.

Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.

- 3.55 An accompanying amendment to the Crown Proceedings Act inserted a new subsection (4A) into section 6, preserving the ability of those who had suffered loss to pursue the claim directly against the Crown:

Despite certain Crown servants being immune from liability under section 86 of the State Sector Act 1988, -

- (a) a court may find the Crown itself liable in tort in respect of the actions or omissions of those servants; and
  - (b) for the purposes of determining whether the Crown is so liable, the court must disregard the immunity in section 86.
- 3.56 The Select Committee that considered the Bill, while acknowledging that the Law Commission was reviewing this issue, concluded that the doubt the *Couch* decision had created should, nevertheless, be removed to:<sup>39</sup>

...restore what was widely understood to be the status quo, in the knowledge that it would be open for Parliament to amend the provision once the Law Commission's review was concluded if there were a compelling case for doing so.

- 3.57 The 2013 amendments to the State Sector Act were aimed at restoring what many had thought was the law prior to the case. Crown Law said in their submission that, within the Crown, at least, the 2013 amendments were not regarded as increasing the protection of public servants beyond what had been thought (prior to *Couch*) to be the position.

*Crown employees not covered by the State Sector Act*

- 3.58 Section 86(1) of the State Sector Act does not cover all Crown employees. It covers only employees of departments specified in Schedule 1 of the State Sector Act. Crown employees, for example, who are members of the New Zealand Defence Force, the New Zealand Police or the New Zealand Security Intelligence Service are not protected by the immunity in section 86(1) because these are not departments listed in the Schedule.

- 3.59 However, many of these Crown employees are covered by a patchwork of specific immunities. Although this is not comprehensive, some employees in this group are, at least in respect of some actions or omission, covered by specific statutory immunity. For example, Police officers have certain specific statutory immunities when executing judicially issued warrants.<sup>40</sup> Police constables are also protected from civil and criminal liability for acts done in good faith under the Search and Surveillance Act 2012 (including warrantless entry powers, search and surveillance powers) if the power is exercised in a reasonable manner. Police immunities are specific but cover many activities that may give rise to liability.

38 *Couch (No 1)*, above n 19; and *Couch (No 2)*, above n 8.

39 State Sector and Public Finance Reform Bill 2012 (55-2) (select committee report) at 13.

40 Crimes Act 1961, ss 26(2), 27(3), 28(6), 29(5), 30(7) and 39(4) and Policing Act 2008, s 44.

3.60 Employees of the New Zealand Security Intelligence Service also have statutory immunity from both criminal and civil proceedings when acting under provisions allowing intelligence interception and tracking and surveillance under a warrant or emergency powers.<sup>41</sup> Defence force personnel have both criminal and civil immunity in respect of domestic actions where assisting Police to maintain control. They also have common law immunity when engaged in combat overseas.

An indemnity may be available

3.61 Where no statutory immunity covers Crown employees, they may be entitled to seek an indemnity from the Crown if they are sued. However, an indemnity can only be given on behalf of the Crown where there is express statutory authority to give an indemnity.<sup>42</sup> A number of Acts do include express statutory authority to indemnify a Crown employee where the employee has acted in good faith. For example, the Gambling Act 2008 allows the Lottery Grants Board to indemnify employees of the Department of Internal Affairs against costs incurred in proceedings for good-faith performance of New Zealand Lottery Grants Board functions.<sup>43</sup> Another example is the Serious Fraud Office Act 1990, which provides that the Crown shall indemnify members of the office (the Director and employees) against all costs incurred in good-faith performance of their duties.<sup>44</sup>

3.62 If there is no specific statutory provision of this kind, the Minister of Finance may, on behalf of the Crown, give an indemnity to a Crown servant under the Public Finance Act if it appears to be in the public interest to do so. Indemnities for Crown employees need to be approved individually by the Minister of Finance.<sup>45</sup> Guidance on the circumstances in which ministers of the Crown may be indemnified is contained in the Cabinet Manual.<sup>46</sup>

### Should Crown employees have immunity?

3.63 The Commission considers that Crown employees should be protected from personal liability in cases where they have acted in good faith in pursuance of their jobs. The issue, though, is whether such protection should go so far as to provide statutory immunity or whether employees can be adequately protected, in the way private sector employees are, by their employer (the Crown) indemnifying them against liability.

3.64 We presented two options in the Issues Paper:

- *Immunity* – continuing the current immunity public servants have under section 86 of the State Sector Act and providing a similar statutory immunity for other Crown employees (not covered by that Act) in respect of good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.
- *Indemnity* – replacing the current immunity in section 86 of the State Sector Act with a mandatory indemnity for Crown employees for good-faith actions in pursuance of their duties.

3.65 Under both options, the Crown is liable for the actions of its employees. An aggrieved party would bring legal proceedings against the Crown. Under both options, a Crown employee is

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41 New Zealand Security Intelligence Service Act 1969, ss 4A, 41C, 41D and 41F.

42 Public Finance Act 1989, s 65ZC.

43 Gambling Act 2008, s 294. Such employees may also have immunity under s 86(1) of the State Sector Act 1988.

44 Serious Fraud Office Act 1990, s 35.

45 Public Finance Act, s 65ZD.

46 Cabinet Office *Cabinet Manual 2008* at [4.34]–[4.57].

also protected against any personal financial liability only where they had acted in good faith pursuant to their duties.

- 3.66 However, immunity is a more complete protection for Crown employees than indemnity. Immunity from suit means that there is no cause of action against the employee. The employee cannot be sued or found by a court to be liable at law for their actions. Proceedings could be brought against the Crown because section 6(4A) of the Crown Proceedings Act displaces the common law and provides that the Crown cannot rely on the employee's immunity under section 86.
- 3.67 In comparison, indemnity means that the Crown is responsible for payment of losses that may be incurred by an employee who is sued. An indemnity does not stop anyone from bringing proceedings against the employee, and the court can give judgment against the employee. An indemnified employee could be found legally culpable, notwithstanding the fact that the Crown would be required to pay the employee's legal costs and any damages that result from the proceedings.

### *Public policy considerations*

- 3.68 The core difference between the two options is that immunity prevents litigation being brought against a Crown employee whereas, with a statutory indemnity, the employee remains at risk of being named as a party and having litigation brought against him or her. This difference was seen as a very significant one by submitters.<sup>47</sup>

### *Exercise public functions and services – without fear or favour*

- 3.69 Almost all submitters supported immunity and said that public servants should be treated differently from non-Crown employees because Crown employees are exposed to additional legal risks. Submitters said that statutory immunity supported the public interest in having a well-resourced and able public sector. Crown employees serve the government of the day, which means they are required to implement government policy and their ministers' lawful instructions, regardless of their personal views.
- 3.70 Crown employees sometimes must exercise substantial powers or comply with onerous duties requiring them to make decisions that are difficult and likely to significantly affect and possibly aggrieve individuals. Often, there are competing interests being weighed up, so opposition is likely whatever decision is made. Although there may be instances where the acts or omissions are not peculiar to Crown employees, there are many instances where there are no analogous responsibilities in the private sector.
- 3.71 Submitters argued that, if Crown employees are exposed to the threat of liability, this could lead to these employees conducting their work in an overly cautious or risk-averse way. Crown employees should not be unduly influenced by the fear of personal suit. Without immunity, they could be overly defensive. While submitters acknowledged that an indemnity would cover financial costs, there was concern that employees would still be publicly identified and would face the stress of proceedings against them and that having to take part as a defendant in a legal action could significantly impact on how employees undertake their roles.
- 3.72 A number of the submissions the Law Commission received from individual public servants considered that the fear of personal suit could have a chilling effect on the way public servants

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<sup>47</sup> The Commission received 121 submissions in total on the Issues Paper *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014); 118 of these submissions addressed the issue of indemnity versus immunity. All but two favoured a continuation of immunity for Crown employees. 113 of these submissions were from individual public servants supporting the current immunity in s 86 of the State Sector Act 1988. Although these were not form submissions, they were generally very brief. The remaining two submissions preferred the indemnity option.

do their jobs. A submission from a public servant who undertook investigation, for example, said that:

I work in the tax area and mainly address white collar crime and evasion fraud related issues. These clients are at times exceedingly aggressive and tend to attack the person if only to delay matters and remove or conceal the equity being pursued. Malicious court actions are already fairly common and sticking public servants on moderate to low incomes in the firing line will severely curtail the will and ability to do their job ...

...In short the proposal [indemnity] will in practice make non-compliance easier and it will also put an extreme amount of pressure on public servants to walk away from aggressive and difficult clients simply because of personal risk. That is already a problem.

- 3.73 Without a protection against potential personal liability, submitters also argued, it might be difficult to attract employees into public service positions. It would be undesirable if prospective employees were discouraged from joining the public sector because of the risk of legal liability or cost.

#### The alternative view – the “chilling” effect of exposure to liability is desirable

- 3.74 However, the alternative view is that the chilling effect of exposure to liability is desirable because it encourages caution and risk aversion in Crown employees, and this is a good thing. Professor Janet McLean noted in her submission that the absence of immunity is intended to have a chilling effect on Crown servants. From this perspective, immunity is seen to discourage individuals from taking an appropriate level of care in carrying out their work.
- 3.75 Historically, Crown servants were personally liable for any civil wrong committed in the course of their role, and such suits were viewed in much earlier years as a check on the misuse of power. Even if it is only nominal and reputational, exposure to liability provides a degree of individual responsibility for employees. Immunity severs the connection between the individual providing the service or carrying out the function and the party that is held accountable for these actions, and the individual carrying out the function then has less incentive to take responsibility for their actions.

#### Overstating “chilling” impact

- 3.76 It is very hard to determine what, if any, weight should be given to the argument from either side about the chilling effect exposure to litigation has on any individual’s decision-making and actions. It seems likely that it is somewhat overstated. Replacing the current immunity with an indemnity is unlikely to cause any significant change in Crown employees behaviour, making them unduly risk-averse or too conservative in their roles. Likewise, we doubt that the current immunity they enjoy encourages Crown employees to act in a reckless, incompetent or over-zealous manner. The influence of potential litigation is, in our view, likely to be relatively remote. In the modern public sector, there are much more immediate and relevant levers, such as employment sanctions or rewards, for imposing accountability and managing individual responsibility.

#### Accountability and responsibility

- 3.77 In the Issues Paper, we suggested that, if a Crown employee is not personally liable, his or her actions might “not face scrutiny in the same way as they would if the employee were the subject of the proceedings” and that indemnity may have the consequence of removing “some of the incentive for an employee to exercise an appropriate level of care in his or her work”.<sup>48</sup>

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<sup>48</sup> Law Commission, above n 31, at [6.35].



- 3.78 Employee representative organisations, including the PSA, strongly disagree with this and submitted that an employee's actions would face the same level of scrutiny whether he or she had immunity or an indemnity. Submitters said that the actions that give rise to the legal claim are the same in both cases, and any wrongdoing still has to be proved. The fact that immunity is contingent on employees acting in good faith gives employees sufficient incentive to exercise care in their roles. In the event of a trial, immunity does not protect Crown employees from having to give evidence. In fact, some employee organisations suggested that immunity may have the advantage that an employee may feel more free to be completely frank when giving evidence in the knowledge that they are immune from any liability. This may not so much be the case with an indemnity.
- 3.79 Crown employees should be incentivised to do their best and, to this end, should be held accountable for their acts and omissions. The issue, however, is whether exposure to legal liability has any role to play in promoting responsibility at the individual employee level. Submitters argued that there are multiple forms of accountability already in place, and these already produce the desired result. There are various employment processes and codes of behaviour in place within the public sector. The employment relationship and agency codes of conduct oblige Crown employees to carry out their duties in good faith, fairly, impartially, responsibly and in a trustworthy manner.<sup>49</sup> Statutory duties must be carried out in accordance with guidance and policy and, in many cases, require several levels of sign-off. Crown employees owe obligations to their department as part of the employment relationship and can be held accountable for acts and omissions that breach those obligations. Submitters argued that any poorly performing public employee can be quickly caught out by the various performance mechanisms within the various departments, ministries or agencies.
- 3.80 While there is no doubt that accountability arrangements within government departments now do much of the work that may have previously been done by exposure to liability, it should be recognised that sometimes these systems will fail. The existence of these alternative accountabilities does not therefore fully answer the question of whether Crown employees should face the further scrutiny of being personally liable.

#### Impact of public sector reforms

- 3.81 As discussed earlier, New Zealand introduced a new model of public service management with the public administration reforms of the 1980s. The new approach placed emphasis on upward accountability to ministers rather than on accountability directly to members of the public who use public services.<sup>50</sup> The extent to which such public management reforms have enhanced accountability within New Zealand's governmental institutions remains very much a live issue.<sup>51</sup> However, for our purposes, the reforms represent a shift from the earlier model of public administration in which legal liability of the Crown servant for their actions played an important part. Under the current model, formal chains of accountability do not normally include public servants being directly accountable to the public who are affected by the execution of responsibilities.<sup>52</sup>
- 3.82 This new more hierarchical model of accountability is very relevant to the question of whether employees should have immunity. Individual public servants are accountable to their superiors for the way they undertake their responsibilities, and those superiors are in turn accountable to those further up the chain for the actions of their staff. Exposing individual public servants to

49 For example the Code of Conduct for the State services.

50 Mulgan, above n 13, at 9.

51 Boston and Gill, above n 16, at 4.

52 At 5.

personal liability in the courts (even if they are indemnified against any financial consequence) where they have undertaken their functions and responsibilities in good faith does not fit particularly comfortably with the hierarchical model of the public service management New Zealand operates. There is a clearer chain of accountability at play now than there was with the 19th century notion that the law held individual public officials to account for doing their duty.

#### Improvements to systems and processes

- 3.83 A number of submitters argued that removing immunity actually “individualises” obligations, and this could have the effect of lessening the collective obligations of the Crown. They believe that attributing personal responsibility to individual employees by exposure to reputation risk through litigation undervalues the collective responsibility of the Crown. Systemic problems are more likely to be identified when the Crown is the defendant rather than individual employees, because the focus is not then entirely on the actions of individual public servants. Some suggest that underlying systemic and process issues that may exist in organisations are less likely to be identified when the focus is on the actions of individuals.
- 3.84 The suggestion that immunity promotes departmental and systemic accountability while indemnity promotes individual accountability is probably too simplistic. In practice, things are more complex. However, we think it is better for lawsuits to encourage improvements to systems and processes. Personal liability emphasises those mistakes that result in litigation rather than broader and potentially more serious systemic problems. It is important not to overly focus on the actions of individuals where they are part of a broader system. To promote systemic improvements, it is useful to view Crown employee accountability and responsibility in a more systemic way. Our recommendation that the Crown be directly liable, and the shift away from the Crown only being vicariously liable for the actions of employees, should help address this.

#### Public servants are currently immune

- 3.85 Section 86 of the State Sector Act currently provides immunity for all Crown employees covered by that Act where they act in good faith in the performance of their work. As discussed above, the current section 86 was enacted by Parliament to restore what was thought by many to be the status quo prior to *Couch*.<sup>53</sup> The Select Committee that considered the State Sector and Public Finance Reform Bill 2013 reported to Parliament that it should restore what was widely understood to be the status quo, in the knowledge that it would be open for Parliament to amend the provision once the Law Commission’s review was concluded if there were a compelling case for doing so.<sup>54</sup>
- 3.86 Immunity is the status quo for most Crown employees, the vast majority of whom are covered by section 86 of the State Sector Act. Statutory immunities also exist for a range of other public officials outside the Crown. Current immunities include: office holders and employees of Crown entities; members of tertiary education institutes; members of school boards of trustees; the Auditor-General, her deputies and employees; the Ombudsmen, Chief Parliamentary Counsel and all employees of the Parliamentary Counsel Office; and directors, officers and employees of the Reserve Bank. There should be consistency in the protection given to Crown employees. If most Crown servants and public officials have immunity, then it suggests that those who are not currently immune should be.

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<sup>53</sup> *Couch (No 1)*, above n 19; and *Couch (No 2)*, above n 8.

<sup>54</sup> Finance and Expenditure Committee, above n 39, at 13.

## Balancing the competing policy considerations

- 3.87 After considering the position carefully, we have concluded that there is not a compelling case for replacing the current immunity most Crown servants have with a right to indemnity. In reaching this view, we are mindful of the Select Committee's 2013 report. The form of the immunity in section 86 (enacted in the 2013 amendment) provides that the Crown itself is not able to rely on the employee's immunity so would remain liable. The terms of the immunity should continue to preclude the Crown from benefiting. This, together with our earlier recommendations concerning the Crown being directly liable in tort, means that most of the concerns the Commission has previously had over immunity in this context have been addressed. The form of the current immunity does not preclude an aggrieved person seeking redress against the Crown. Provided the Crown continues to remain liable for the acts and omissions of Crown employees, public access to redress is retained even where individual Crown employees have immunity.
- 3.88 We are therefore recommending that the current good-faith immunity provided for in section 86, coupled with a provision preserving the Crown's liability, be retained. This form of a statutory immunity should apply to all Crown employees. We have concluded that there is not a compelling case to change to an indemnity model. As long as the Crown remains liable for their employees' good-faith actions, this achieves a reasonable compromise between the competing policy considerations. However, if in the future there is evidence that this model of accountability is failing to provide the right incentives to those who deliver government services, it may be necessary to consider whether New Zealand should move to the indemnity model or further limit immunity or the terms of the immunity granted.

## RECOMMENDATIONS

- R5 We recommend the retention of statutory immunity for Crown employees in respect of good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.
- R6 The immunities provided for Crown employees should not prevent the courts from holding the Crown itself liable in tort in respect of the actions or omissions of a Crown employee covered by an immunity.

## ACCOUNTABILITY OF MINISTERS

## Introduction

- 3.89 The Issues Paper also considered the position of ministers of the Crown. Should they have a statutory immunity or continue to have an indemnity? If they are indemnified, should that be governed by a specific statutory provision or continue to be provided on a case-by-case basis? Ministers would clearly come within the proposed new Crown Civil Proceedings Bill's definition of the Crown.<sup>55</sup> However, there is a question over whether or not they should be included within the immunity that we recommend for Crown employees. The alternatives are for the Bill to include a specific indemnity clause for ministers or to retain the current arrangements for indemnifying ministers.

<sup>55</sup> See cl 4 of the draft Bill.



## Current law

- 3.90 At present, ministers are protected by an indemnity for legal costs or damages incurred in the course of legal proceedings brought against them in their capacity as ministers through a process set out in the Cabinet Manual.<sup>56</sup> There is no absolute right to indemnity by the Crown in respect of proceedings brought against a minister personally. The relevant minister is required to approach the Prime Minister and Attorney-General for determination of whether the minister has acted within the scope of his or her authority. The Attorney-General forms a view on this issue and submits a paper to Cabinet seeking a decision on whether or not to indemnify the minister's expenses.

## Should ministers have immunity or indemnity?

- 3.91 There may be arguments for aligning the position of ministers with that of Crown employees. From one point of view, it would seem logical to treat a minister in the same way as employees and have one statutory provision covering both. Crown Law's submission said that it saw no reason to treat ministers differently from Crown employees. Ministers, too, are public officials and also perform public functions and are acting in the public interest. They should be able to make decisions without being unduly influenced by the possibility of personal liability. The fact that they have come to hold office through an elective process and have direct accountabilities to Parliament and the electorate does not change this.
- 3.92 However, ministers are currently treated differently than public servants. Ministers have the indemnity described above, while public servants have statutory immunity. There may be good reason for continuing to distinguish the position of ministers from Crown employees. The NZLS said in its submission that, in contrast to employees, ministers of the Crown should be indemnified, not immunised, against civil suit. Ministers are responsible to Parliament for the carrying out of government policy within their portfolios. There should be a greater emphasis on ministers justifying why their actions should be indemnified, as opposed to Crown employees.
- 3.93 We consider that ministers are political actors and should therefore remain in a different position to Crown employees. The immunity we recommend should be retained for Crown employees is based on their place in the model of public service accountabilities and responsibilities, with its emphasis on upward accountability to ministers who sit at the head. Ministers occupy quite a different place, and they should not, in our view, be immune from suit. We consequently do not recommend extending a statutory immunity to ministers of the Crown. Instead, ministers should continue to be indemnified in respect of good-faith actions or omissions in pursuance of their duties, functions and powers.

### *A statutory indemnity*

- 3.94 It may be useful to have a statutory scheme for the indemnification of ministers rather than leaving part of the process to the Cabinet Manual as at present. The coverage of a statutory indemnity should remain essentially the same as that applying at present under the Cabinet Manual.
- 3.95 Indemnification should continue to only be available when a minister is acting in the course of his or her duties and where he or she has acted in good faith. However, under a statutory provision, indemnity would be mandatory where these conditions are met. This type of statutory indemnity provides greater certainty of protection for ministers compared with the current position under the Cabinet Manual. It means that, where a minister has acted in good

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56 Cabinet Office *Cabinet Manual 2008* at [4.34]–[4.57].

faith and within the scope of his or her authority, he or she is entitled to an indemnity without requiring the approval of Cabinet.

- 3.96 We also favour a reporting requirement. Under the provision included as clause 25 in the draft Crown Civil Proceedings Bill, departments would be required to include a statement in their annual financial statements itemising all amounts paid to indemnify a minister under the indemnity. Confidential and personal information would need to be protected when reporting.

## RECOMMENDATIONS

- R7 A statutory indemnity should be enacted for ministers of the Crown to replace the current indemnity procedure in the Cabinet Manual. Under the new provision, the Crown would be required to indemnify ministers for costs and damages in civil proceedings in respect of good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.
- R8 The indemnity should be paid by the department that is responsible for the subject matter of the civil proceedings, and departments should be required to include a statement in their annual financial statements itemising all amounts paid to indemnify a minister under the enacted indemnity. Confidential and personal information would be protected when reporting.

## COMPULSORY ENFORCEMENT

### Introduction

- 3.97 Historically in common law countries, the courts have declined to grant injunctions or make mandatory orders against the Crown.<sup>57</sup> In keeping with this position, the Crown Proceedings Act does not allow injunctions to be made against the Crown.<sup>58</sup>
- 3.98 In this section, we address the policy question of whether the current restriction or some lesser restriction on the granting of injunctions and mandatory orders against the Crown should be included in new legislation to replace the Crown Proceedings Act.

### Current law

- 3.99 Under section 17 of the Crown Proceedings Act, the court has power to award the same relief against the Crown as against a subject, save for the fact that it prohibits the making of mandatory orders of injunction, specific performance and recovery of land or property, limiting relief to a declaration of the applicant's rights against the Crown.
- 3.100 The court is also prohibited from granting an injunction or making any other order against an officer of the Crown if such an injunction or order would, in effect, be granted against the Crown. Moreover, there is, at least according to the House of Lords in *M v Home Office*,<sup>59</sup> no difficulty in holding a minister responsible for contempt if he or she breaches an undertaking or

57 However, such orders were traditionally granted in Scotland. See the discussion in *Davidson v Scottish Ministers (No 1)* [2005] UKHL 74 at [60] per Lord Rodger.

58 The Judicature Amendment Act 1972, s 8, also contains a similar prohibition on the granting of interim orders in relation to the Crown. Amending that provision is not within the scope of this project. In its report *Review of the Judicature Act 1908: Towards a New Courts Act*, the Commission said a substantive review of provisions in the Judicature Amendment Act 1972 was beyond the scope of its project and should be the subject of a separate review. See Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at [2.18].

59 *M v Home Office* [1993] UKHL 5, [1994] 1 AC 377.

an order. There is otherwise no prohibition against making officers or indeed ministers liable when a duty is cast directly onto them.<sup>60</sup>

### Should the current prohibition be retained?

- 3.101 A key principle underpinning our review is that the Crown ought to be able to sue, and be sued, as others can. As far as possible, the Crown ought to be in the same position in litigation as a private individual would be. The rule of law and section 27(3) of NZBORA require that the Crown be subject to court orders as if it were an individual.
- 3.102 Under the current prohibition, the Crown is treated differently than private individuals. Unless there are specific public policy reasons for an exception, it should be removed. Section 5 of NZBORA allows limitations that are justifiable in a free and democratic society.<sup>61</sup> Tipping J summarised in *R v Hansen* that “whether a limit on a right or freedom is justified under section 5 is essentially an inquiry into whether a justified end is achieved by proportionate means”.<sup>62</sup>

#### *Justification for different treatment*

- 3.103 A number of arguments are put forward justifying the current prohibition on mandatory orders. Historically, it is part of the general immunity the Crown had previously enjoyed at common law in litigation under the old English maxim “the King can do no wrong”. It was thought to be constitutionally incompatible for the Sovereign’s courts to be issuing orders against the Sovereign. However, this concern over one branch of government, the courts, commanding another branch, the executive, is now largely anachronistic, and the privileged position the Crown previously enjoyed has largely been abolished.<sup>63</sup>
- 3.104 However, the most important and relevant argument that can be made to justify the prohibition is that mandatory orders are unnecessary because the remedy of a declaration is available against the Crown. The Crown will almost always comply with a declaration even if compliance is not mandatory. This is, however, a double-edged argument, because if the Crown always complies with declarations, why is it necessary to treat the Crown differently from other litigants?
- 3.105 The answer given is that there may be unforeseeable situations where it is in the public interest for the Crown to be able to decline to comply. It is argued that the Crown ought to be free to disobey where compelling public interests require this, for example, in an emergency. Declarations allow this. However, addressing this possibility does not require precluding mandatory relief. Provided the courts have discretion over whether or not to issue mandatory orders against the Crown, they can take account of any compelling public interests that could be injured by any such order. The special nature of the Crown and the policy factors that may arise in proceedings do not justify the blanket substitution of declarations for mandatory orders.

#### *The rule of law*

- 3.106 Section 27(3) of NZBORA provides that every person has the right to bring proceedings against the Crown and have these heard according to law in the same way as civil claims between individuals. This provides a strong argument in favour of allowing mandatory orders against the Crown. As a matter of principle, it is undesirable to have a special regime of remedial law

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60 See HWR Wade “Injunctive Relief against the Crown and Ministers” (1991) 107 LQR 4.

61 The New Zealand courts have commonly adopted the test set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103 for what amounts to a reasonable limit that can be demonstrably justified: see *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and at [103]–[104] per Tipping J.

62 *Hansen*, above n 61, at [123] per Tipping J.

63 Ontario Law Reform Commission Report on the Liability of the Crown (OLRC, 1989, Toronto) at 51.

applicable to the Crown, which is the effect of a regime that substitutes the declaration for the injunction in proceedings against the Crown. Any departure from this principle must be demonstrably justified in a free and democratic society.

- 3.107 The current broad limitation on injunctions is difficult to justify in terms of the rule of law and arguably does not meet the justifiable limitation test in section 5 of NZBORA. In our view, the need to provide the Crown with the ability not to comply with injunctions in extreme cases does not mean that mandatory orders should be prohibited. Our assessment is that the current broad prohibition should not be retained in new legislation.

### Options for reform

- 3.108 In the Issues Paper, we started from the principle that the Crown as a litigant should, as far as possible, be in the same position as subjects of the Crown who are also litigants. Any departure from this principle should be limited to the extent necessary to accommodate the special nature of the Crown and any unique policy factors that may arise in proceedings.
- 3.109 We included two alternative options for the draft Bill in the Issues Paper.
- *Option (a)*: replace the current broad prohibition with a narrower exception under which the courts might choose to issue a declaration as opposed to granting an injunction. An injunction would also not be permitted where it would have the effect of requiring the transfer of particular property.
  - *Option (b)*: repeal the prohibition and allow remedies against the Crown as if it is a private party. The courts would then exercise their discretion in the usual way to determine whether the remedy sought should be granted.
- 3.110 When considering option (b), consideration also needs to be given to the interface of the prohibition with the inability to give mandatory orders in judicial review proceedings. If the prohibition is completely repealed, those seeking mandatory orders might be tempted to recast what might otherwise be a judicial review case within the rubric of civil proceedings.

### Submissions

- 3.111 Submitters favoured treating the Crown and other litigants similarly unless there are justifiable reasons why that should not be so. Some favoured option (a) because it provides the court with a discretion to act in the public interest and enables the special position of the Crown (including its property) to be protected when necessary. Crown Law said this option would enable the Crown to put before the Court all the factors that support its position in the circumstances of the case, so the court can then take these into account and make an appropriate order.
- 3.112 Russell McVeagh also supported the availability of mandatory relief for claims against the Crown to the extent that certain considerations can be addressed in the proposed law. They favoured option (a) because it creates the presumption that all remedies are available to the courts when dealing with the Crown in litigation, but it does also acknowledge that judges should retain the option of declaratory relief, given the special nature of the Crown and the policy factors that may arise in proceedings. They consider that the presumption should be that litigants are entitled to the full range of remedies despite the retention of declaratory relief, and the courts should not fall back and use declaratory relief unless a clear case exists.
- 3.113 Russell McVeagh identified considerations that should inform the assessment of whether the public interest standard is met. They considered that there was a risk that the contrast between mandatory and declaratory relief may erode the significance of declaratory orders (which Crown actors obey as a matter of constitutional convention). The extension of mandatory

orders should not in any way affect or impinge upon the courts' well developed remedial jurisdiction in respect of claims brought under NZBORA.

- 3.114 The NZLS also considers it appropriate that injunctions and mandatory orders be available against the Crown in the same way that they are available against any other defendant in civil proceedings. They said that, while there may have been constitutional reasons in the past for the Crown not to be subject to compulsory enforcement remedies, these reasons no longer hold in New Zealand's modern constitutional framework and in light of NZBORA. Removing the existing exception from compulsory enforcement would be consistent with the rule of law.
- 3.115 While the NZLS noted it has full confidence that the Crown would honour any declarations against it, it is possible that circumstances could arise in future where the Crown is torn between complying with a declaration or continuing along its originally intended path. This could arise, for example, for political reasons where a particular action that is challenged is central to the programme of the government of the day. Giving the courts the power to impose compulsory enforcement remedies provides an important constitutional safeguard. It is also important that the Crown be seen by the public to be equal to other defendants.
- 3.116 The NZLS also took the view that any considerations weighing against imposing compulsory enforcement remedies against the Crown should be considered by the court in exercising its discretion to impose such remedies. For the sake of transparency and objective judicial decision-making, this approach is to be preferred to the Crown making its own decision as to whether or not it will comply with a declaration. While it made a strong case for treating the Crown in the same way as an individual litigant, the NZLS did accept that there could be some limited situations in which compulsory enforcement remedies should still be excepted, such as for defence vessels or crucial defence land.

*Retain a narrow exception – courts might issue a declaration*

- 3.117 The general consensus from submitters has been that the Crown should be subject to compulsory enforcement remedies but that the courts should have discretion to make an exception in some cases. We agree that a narrow exception can be justified. We favour option (a) because it gives the court the option of declaratory relief in situations where the special nature of the Crown and policy factors that may arise in proceedings make granting an injunction inappropriate. While the court would have discretion not to grant an injunction under option (b) – because compulsory orders are discretionary – the court would not have the alternative of declaratory relief.
- 3.118 Under clause 10, which replaces section 17 of the Crown Proceedings Act, the default position would be that the same remedies may be granted against the Crown as might be awarded against private individuals. The intention of the replacement provision is to be enabling so that the Crown is at least subject to the remedies that other litigants might be. The provision should not, for instance, prevent the award of public law compensation on the basis that it, arguably, cannot be awarded against private parties, and nor should the provision be taken as preventing remedies that are otherwise peculiar to the Crown being awarded, if such a remedy might otherwise survive.
- 3.119 However, in circumstances in which some remedies are inappropriate (especially those that involve the transfer of property or the compelling of certain actions, injunctions, attachment, specific performance or the conveyance of land or property), these might be denied by the court on the grounds of public interest. The court could, in such circumstances, give declaratory relief. This seems to us a much more tailored ground for disparate treatment than the broad exemption of the Crown from such remedies.



Retaining an *in rem* exclusion

- 3.120 The exclusion currently in section 28 of the Crown Proceedings Act against bringing *in rem* proceedings against the Crown should be retained. The replacement provision should ensure that the Crown's ships or aircraft and related property, the majority of which would be used by the Defence Force, cannot be arrested or made subject to any of the consequences of *in rem* proceedings.

## RECOMMENDATIONS

- R9 We recommend that a court should be able to grant any remedy in civil proceedings against the Crown.
- R10 Where the public interest requires, the court must make a declaratory order about any party's rights or entitlements instead of ordering against the Crown any of:
- (a) an injunction;
  - (b) an attachment;
  - (c) specific performance; or
  - (d) the conveyance of land or property.
- R11 The new legislation should continue the exclusion in the Crown Proceedings Act against bringing *in rem* proceedings against the Crown and should provide that the Crown's ships or aircraft and related property cannot be arrested or made subject to any of the consequences of *in rem* proceedings.



# Chapter 4

## Draft Crown Civil Proceedings Bill and commentary

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### INTRODUCTION

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- 4.1 This part of the Report contains a commentary on the individual clauses of the draft Crown Civil Proceedings Bill, which provides the legislative basis for the reforms in Part 1 of this Report. The Bill is divided into the following parts:
- Title and commencement
  - Preliminary provisions
  - Part 1 – Substantive matters
  - Part 2 – Procedure and execution
  - Schedules 1–4 – Transitional and savings provisions; Existing immunity provisions; Amendments consequential on repeal of section 5(2) of the Crown Proceedings Act; Consequential amendments to other enactments.
- 4.2 The major policy decisions that underlie the provisions in this Bill and the analysis of feedback received during the consultation process were discussed in the previous chapters of this Report and are not repeated in the commentary. Where relevant, the commentary includes a chapter and paragraph reference back to the text of the Report.
- 4.3 A complete copy of the draft Crown Civil Proceedings Bill is included as Appendix 2 of this Report.

### TITLE AND COMMENCEMENT

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#### Clause 1 – Title

##### 1 Title

This Act is the Crown Civil Proceedings Act 2015.

##### Commentary

The title identifies what properly falls within the scope of the Bill. The inclusion of “Civil” in the title confirms that that Bill only deals with civil proceedings involving the Crown.

#### Clause 2 – Commencement

##### 2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

## PRELIMINARY PROVISIONS

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### Clause 3 – Purpose

#### 3 Purpose

The purpose of this Act is to clarify and reform the law about civil proceedings involving the Crown, including by—

- (a) enabling the Crown to sue and be sued in the same way as any other person:
- (b) making civil proceedings involving the Crown as similar as possible to other civil proceedings:
- (c) providing that the Crown may itself be directly liable in tort (rather than only vicariously liable):
- (d) reforming the law about public interest immunity.

#### Commentary

Clause 3 identifies the purposes of the Bill. It confirms our intention to give the Crown clear legal personality to sue and be sued in civil proceedings. It enacts the principle that the Crown should be in as similar a position as possible to private individuals in civil proceedings (sometimes referred to as the equality principle). It also confirms the intention to abolish any legal rule or procedure that prevents the Crown from being sued directly (as opposed to only vicariously) in tort.

### Clause 4 – Definitions

#### *Civil proceedings*

#### 4 Interpretation

- (1) In this Act, unless the context otherwise requires,—
- civil proceedings** means any proceedings in any court that are not criminal proceedings—
- (a) including proceedings for relief for a breach of the New Zealand Bill of Rights Act 1990; but
  - (b) excluding applications for review under Part 1 of the Judicature Amendment Act 1972 and applications for habeas corpus, mandamus, prohibition, or certiorari
- ...
- (2) Unless the context otherwise requires, a reference to civil proceedings against the Crown includes a set-off or counterclaim against the Crown, and a reference to civil proceedings by the Crown includes a set-off or counterclaim by the Crown.

#### Commentary

The definition differentiates the coverage of the Bill. Criminal proceedings and judicial reviews are excluded and will be unaffected by the reforms in the Bill.

Proceedings for breaches of the New Zealand Bill of Rights Act are included in the definition of civil proceedings in a similar manner to section 12(2) of the Limitation Act 2010. This will bring all claims for monetary relief that can be made against the Crown under the single set of procedural provisions in the Bill.

## Court

**court** means—

- (a) the Supreme Court, the Court of Appeal, the High Court, or a District Court; or
- (b) the Disputes Tribunal, the Employment Court, the Employment Relations Authority, the Environment Court, the Human Rights Review Tribunal, the Māori Appellate Court, the Māori Land Court, the Motor Vehicle Disputes Tribunal, the Tenancy Tribunal, and the Weathertight Homes Tribunal

### Commentary

The provisions of this Bill will apply to proceedings before the courts of general jurisdiction and specified specialist courts and tribunals that may hear civil proceedings involving the Crown.

## Crown, Crown employee, department

**Crown** means the Crown in right of New Zealand, which is the Sovereign in right of New Zealand, Ministers of the Crown, and departments

**Crown employee** means a person employed by a department (whether paid by salary, wages, or otherwise), or a member, chief executive, or other office holder of a department, but does not include—

- (a) an independent contractor; or
- (b) for the avoidance of doubt,—
  - (i) the Governor-General or any Judge, District Court Judge, Justice of the Peace, or Community Magistrate; or
  - (ii) a person to the extent that the person has responsibilities of a judicial nature

**department** means—

- (a) a department specified in Schedule 1 of the State Sector Act 1988;
- (b) the New Zealand Defence Force (within the meaning of that term in section 11(1) of the Defence Act 1990);
- (c) the New Zealand Police (within the meaning of that term in section 7 of the Policing Act 2008);
- (d) the New Zealand Security Intelligence Service (within the meaning of that term in section 3 of the New Zealand Security Intelligence Service Act 1969).

### Commentary

It was evident from the submissions received in response to our Issues Paper that there were a variety of ways in which to conceptualise and describe the Crown in legislation and how we should approach the notion of the Crown in the context of our reform.

We considered all of the feedback received and concluded that the definitions of **Crown**, **Crown employee** and **department** should primarily focus on clearly identifying who the procedural provisions in the Bill apply to. The included definitions will reduce the prospect of constitutional debate around the composition of the Crown from impeding the efficient conduct of civil proceedings involving the Crown. The definitions also reflect the way in which central government has been structured since the reforms of the 1980s, which aimed to modernise and simplify the legal basis for the public service in areas like liability, immunity, indemnity, accountability and transparency.

The definition of **Crown** is deliberately broad. It includes those persons and bodies that are traditionally thought of as comprising central government but that do not have a clear legal personality for the purposes of civil proceedings. We considered including a more detailed definition of Crown that set out specific bodies (for example, Parliamentary bodies) that are included and excluded from the definition. However, we believe that our proposed definition of Crown provides the required certainty and clarity as to whom the provisions of the Bill are intended to apply. We have retained the phrase “Crown in right of New Zealand” in the definition of the Crown. In our view, these words do not require further definition. Although slightly archaic, the phrase is used throughout the statute book of New Zealand and is generally acknowledged as a mechanism to distinguish the Crown’s constitutional role between the different jurisdictions in which the Sovereign is head of state.

We have used a definition of **department** that is wider than the definition in section 27(1) of the State Sector Act 1988. The definition also includes the Defence Force, the Police and the New Zealand Security Intelligence Service, all of which are traditionally thought of as making up part of the executive government but are not “departments” within the terms of the State Sector Act.

Crown entities and State Owned Enterprises are not covered by our Bill as they do not require additional legal infrastructure to enable them to sue and be sued in civil proceedings. Crown entities are bodies corporate under the Crown Entities Act 2004, and State Owned Enterprises have legal personality under the Companies Act 1993.

The definitions do not affect the interpretation of section 3 of the New Zealand Bill of Rights Act or the ability to bring proceedings for breaches of it. The identify of a defendant and their potential liability for breaches of the New Zealand Bill of Rights Act will continue to be determined in accordance with the Bill of Rights Act. This Bill only affects the procedure by which those claims against the Crown as defined in this Bill are to be determined.

**Crown employee** is an umbrella term used to cover employees and the various office holders that work within departments for which the Crown should rightly be held accountable. This means that the actions of a statutory office holder within a department, as well as the actions of members of the New Zealand Defence Force, Police and New Zealand Security Intelligence Service, will be covered for the purposes of civil proceedings involving the Crown.

## Clause 5 – Transitional, savings, and related provisions

### 5 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

## Clause 6 – Act binds the Crown

### 6 Act binds the Crown

This Act binds the Crown.

#### Commentary

Clause 6 confirms that all of the provisions in the Bill will bind the Crown. It has been included to address the presumption in section 27 of the Interpretation Act 1999 that an Act binds the Crown only if it expressly provides the Crown is bound.

## **PART 1 – SUBSTANTIVE MATTERS**

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### **Clause 7 – The Crown may sue and be sued in civil proceedings**

#### **7 The Crown may sue and be sued in civil proceedings**

Subject to this Part, the Crown may sue and be sued in civil proceedings in the same way as any other person.

##### **Commentary**

Clause 7 enacts the principle of equality that is at the heart of the Bill and ensures that the Crown can sue and be sued in civil proceedings as others can. This approach creates less complexity than the “laundry list” approach found in section 3 of the Crown Proceedings Act, which defines in detail what claims may be brought against the Crown.

See [3.4]–[3.51].

### **Clause 8 – Tort liability of the Crown**

#### **8 Tort liability of the Crown**

A court may find the Crown itself liable in tort in respect of the actions or omissions of Crown employees despite any immunity of those employees.

##### **Commentary**

Clause 8 makes it clear that the courts may find the Crown directly liable in tort. This is a logical effect of clause 7, but as it represents a change to the status quo (the Crown may for the most part only be found vicariously liable in tort), we have included a separate clause to avoid any doubt as to this intended effect.

Clause 8 also confirms that the existence of an immunity granted to a Crown employee will not affect the ability of the courts to find the Crown liable.

See [3.4]–[3.51].

### **Clause 9 – The Crown may take advantage of general statutory provisions**

#### **9 The Crown may take advantage of general statutory provisions**

The Crown may take advantage of a statutory provision of general application (for example, a statutory defence) even if not named in the provision.

##### **Commentary**

Clause 9 confirms that the Crown may rely on any statutory provision of general application even if it is not specifically named in that provision. Enabling the Crown to rely on the same statutory defences as any other person (providing the necessary elements of the defence are satisfied) is a necessary feature of ensuring that civil proceedings involving the Crown are conducted in as similar a manner as possible to civil proceedings between individuals.

## Clause 10 – Remedies against the Crown

### 10 Remedies against the Crown

- (1) Except as provided in this section or **section 11**, a court may grant any remedy in civil proceedings against the Crown.
- (2) If a court considers that the public interest so requires, the court must make a declaration about any party's rights or entitlements instead of ordering any of the following against the Crown:
  - (a) an injunction:
  - (b) an attachment:
  - (c) specific performance:
  - (d) the recovery of land:
  - (e) the deliverance of property.
- (3) If a declaration has been made under **subsection (2)**, a court must not make an order against a Minister or a Crown employee if the effect of the order would be to give a remedy that could not be obtained from the Crown.

#### Commentary

Clause 10 replaces section 17 of the Crown Proceedings Act. It establishes as the new default position that a court can grant the same remedies against the Crown as it can grant against an ordinary person. Unlike section 17, clause 10 does not place any restriction on the kind of orders that can be made against the Crown. However, sub-clause (2) does recognise that, in some cases, the public interest may require the court not to make a binding order but instead make a declaratory order as to any party's rights. Sub-clause (3) prohibits the court from making an order against a minister or Crown employee if making such an order would effectively result in a remedy that could not be obtained from the Crown (i.e. because the court had already decided that the public interest prevented an order being made against the Crown).

See [3.97]–[3.120].

## Clause 11 – Admiralty proceedings against the Crown

### 11 Admiralty proceedings against the Crown

- (1) This section applies to the following property belonging to the Crown:
  - (a) ships:
  - (b) aircraft:
  - (c) cargo:
  - (d) freight:
  - (e) other property connected with a ship, an aircraft, cargo, or freight.
- (2) Despite **sections 7 and 10 (1)**, this Act does not—
  - (a) authorise proceedings *in rem* against the Crown; or
  - (b) authorise the arrest, detention, or sale of property to which this section applies; or
  - (c) give any lien on property to which this section applies.



- (3) If, at the time of commencing proceedings that seeks the remedies described in subsection (2), a plaintiff reasonably believed that the relevant property was not property to which this section applies, but it was, the court may order that the proceedings continue on terms that the court thinks just.

#### **Commentary**

Clause 11 retains the exclusion currently in section 28 of the Crown Proceedings Act against bringing *in rem* proceedings against the Crown. Clause 11 also ensures that specified Crown property, the majority of which would be used by the Defence Force, cannot be arrested or made subject to any of the consequences of *in rem* proceedings.

See [3.120].

### **Clause 12 – Contribution and indemnity**

#### **12 Contribution and indemnity**

The same rules about contribution and indemnity apply to the Crown as apply to any other person.

#### **Commentary**

Clause 12 replicates section 8(1) of the Crown Proceedings Act. It is included out of caution, as almost certainly, the common law position that contribution and indemnity could not be sought against the Crown would itself be abrogated by the general provision in clause 7.

### **Clause 13 – Immunity for Crown employees**

#### **13 Immunity for Crown employees**

All Crown employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers (whether or not they are Crown employees to whom section 86 of the State Sector Act 1988 applies).

#### **Commentary**

Clause 13 continues to provide immunity from civil proceedings for public servants. The clause extends immunity to all Crown employees covered by the Bill where they have acted in good faith in the performance of their duties. The immunity will apply regardless of whether or not the Crown employee is also covered by the immunity in section 86 of the State Sector Act.

Since the new clause covers all Crown employees who are currently immune under section 86, that section of the State Sector Act could be repealed at some stage.

See [3.52]–[3.88].

### **Clause 14 – Indemnity for Ministers**

#### **14 Indemnity for Ministers**

- (1) The Crown must indemnify a Minister for the Minister's costs and any money the Minister is liable to pay in relation to civil proceedings arising from the Minister's good-faith actions or omissions in pursuance or intended pursuance of the Minister's duties, functions, or powers.
- (2) The indemnity must be paid by the department that, with the authority of the Prime Minister, is responsible for the administration of government in relation to the subject matter of the civil proceedings.

**Commentary**

Clause 14 creates a statutory requirement for the Crown to indemnify ministers for costs and damages incurred by the minister in civil proceedings that arise in the performance of their ministerial duties. The indemnity only applies to good-faith actions or omissions. Indemnities must be paid from the funds allocated to the department that was involved with the subject matter of the proceedings that gave rise to the indemnity.

See [3.89]–[3.96].

**Clause 15 – Existing immunity provisions****15 Existing immunity provisions**

An existing immunity provision listed in **Schedule 2** immunises the Crown from liability in civil proceedings in respect of the actions or omissions of a Crown employee in the same way as it would immunise the employee.

**Commentary**

Clause 15 ensures that the existing employee immunities listed in Schedule 2 will continue to provide immunity to the Crown. Clause 15 is necessary to maintain the status quo in respect of Crown immunity because, with the change to direct liability implemented by clause 7, existing immunity provisions that immunise various Crown officers and employees will no longer afford the Crown vicarious immunity in tort. In the future, legislation will need to address the question of whether or not immunity should be granted to the Crown.

See [3.43]–[3.47].

**Clauses 16 and 17 – Crown immune from tortious liability in relation to judicial process and responsibilities****16 The Crown immune from liability in tort in relation to judicial process**

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities in connection with the execution of judicial process.

**17 Amendment to Constitution Act 1986**

- (1) This section amends the Constitution Act 1986.
- (2) Before section 23, insert:

**23AA The Crown immune from liability in tort in relation to judicial responsibilities**

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities of a judicial nature.

**Commentary**

Clauses 16 and 17 preserve the essential characteristics of the current immunity in section 6(5) of the Crown Proceedings Act, namely that the Crown should be immune for liability in tort for acts or omissions arising from the discharging of responsibilities of a judicial nature or responsibilities in connection with the execution of the judicial process.

Clause 16 applies to any person discharging responsibilities in connection with the execution of the judicial process. It covers Crown employees who play a role in the judicial process, for example, Police officers and bailiffs. Clause 17 applies to a person exercising responsibilities of a judicial nature. It applies primarily to judges and other judicial officers.

Having two separate clauses emphasises the separation of powers between those exercising executive powers in connection with the execution of the judicial process and those exercising judicial responsibilities. Further emphasising the separation of powers, clause 17 (the immunity relating to judicial powers) will be a provision in the Constitution Act 1986.

Clauses 16 and 17 only grant immunity in respect of tort claims. Claims under the New Zealand Bill of Rights Act are not affected.

## **PART 2 – PROCEDURE AND EXECUTION**

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### **Clause 18 – Same procedural rules to apply**

#### **18 Same procedural rules apply to the Crown as to any other person**

Subject to this Part, the same rules of civil procedure apply to the Crown as apply to any other person.

##### **Commentary**

Clause 18 confirms that the Crown will be subject to the same rules of civil procedure as an ordinary person unless Part 3 of the new Act provides otherwise. The rules of civil procedure that apply in any particular case are provided for in legislation governing that particular type of proceeding. For example, the rules of procedure for proceedings in the High Court are contained in the High Court Rules, while those governing proceedings in specialist tribunals are contained in the rules of procedure for those judicial bodies. Such rules are to apply to the Crown as well as other parties to litigation.

### **Clause 19 – Attorney-General correct party in civil proceedings against and by the Crown**

#### **19 Attorney-General correct party in civil proceedings against and by the Crown**

- (1) Subject to any other enactment, civil proceedings against the Crown must—
  - (a) name the Attorney-General as the defendant on behalf of the Crown (whether or not other defendants are also named); and
  - (b) be served on the Attorney-General at the Crown Law Office.
- (2) Subject to any other Act, civil proceedings by the Crown must be in the name of the Attorney-General as the plaintiff on behalf of the Crown.

##### **Commentary**

In civil proceedings against the Crown, the Attorney-General should be named as the defendant and be served with proceedings at the Crown Law Office unless another statute provides otherwise. This does not preclude other defendants being named as well. Our view is that it is simpler to make the Attorney-General the nominal defendant in all cases.

Civil proceedings commenced on behalf of the Crown must be in the name of the Attorney-General as the plaintiff or applicant unless another statute provides for another person to be named as the plaintiff or applicant.

## Clause 20 – Rules about the Crown’s participation in civil proceedings

### 20 Rules about the Crown’s participation in civil proceedings, etc

A provision in another Act that empowers the making of rules about civil proceedings also empowers the making of rules for 1 or more of the following purposes:

- (a) providing for the Crown’s participation in civil proceedings;
- (b) in civil proceedings by the Crown for the recovery of taxes, duties, or penalties, providing that the defendant is not entitled to a set-off or counterclaim;
- (c) in other civil proceedings by the Crown, providing that the defendant is not entitled to a set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties, or penalties;
- (d) in proceedings by or against the Crown, providing that the defendant is not entitled, without the court’s leave, to a set-off or counterclaim if the subject matter of the set-off or counterclaim does not relate to the subject matter of the proceedings;
- (e) providing that the Crown is not entitled to a set-off or counterclaim without the court’s leave.

#### Commentary

This clause carries over the existing provision for rules set out in section 30(2) of the Crown Proceedings Act, with modernised and simplified language. It continues the power to create court rules that restrict the operation of set-off and counterclaim in civil proceedings involving the Crown.

It is unnecessary to specifically include sub-sections 30(1)(a)–(d) of the Crown Proceedings Act because sub-clause 20(1)(a) of the Bill, which provides for the Crown’s participation in civil proceedings, is sufficiently broad to encompass these procedural matters. Section 30(1)(e) of the Act, covering set-off or counterclaim in proceedings involving taxes, duties or penalties, is divided in clause 20 into sub-clauses (b) and (c) to improve clarity. Sub-section 30(1)(f), which restricts set-off and counterclaim where the subject matter is unrelated, is reflected in sub-clause (d) of the new provision. Sub-sections (g) and (h), covering the Crown’s entitlement to set-off or counterclaim, are simplified in new sub-clause (e).

The intention is that rules made under section 30(2) of the Crown Proceedings Act would be carried over and preserved under the new legislation.

## Clause 21 – Attorney-General’s ability to intervene

### 21 Intervention by the Crown

The Attorney-General, on behalf of the Crown, may seek a court’s leave to intervene in any civil proceedings that affect the public interest.

#### Commentary

Clause 21 gives a court the discretion to permit the Crown to intervene in any civil proceeding that affects the public interest. The procedure by which the Crown is joined in any case would be governed by the procedural rules that apply to those proceedings.

## Clause 22 – Crown’s obligation to give discovery

### 22 Discovery and interrogatories by the Crown

Unless disclosure of a communication or information is restricted under another enactment (for example, under section 70 of the Evidence Act 2006), the Crown must discover and produce documents and answer interrogatories in the same way as any other person.

#### Commentary

Clause 22 carries forward the statutory requirement in section 27(1) of the Crown Proceedings Act for the Crown to discover and produce documents and answer interrogatories in the same way as any other person.

Unlike section 27(3), clause 22 does not grant the Prime Minister or Attorney-General the power to issue a certificate preventing the disclosure of information if they are of the opinion that disclosure would not be in the public interest. Instead, the Crown’s disclosure obligation may only be modified if an enactment provides authority to do so. An example is an order of the court under section 70 of the Evidence Act 2006. In Part 2 of this Report, we recommend a new approach to the way that information that would have previously been subject to an application under section 27(3) should be managed in court proceedings.

## Clause 23 – Security for costs

### 23 The Crown not required to give security for costs

The Crown is not required to give security for the costs of any other party in civil proceedings.

#### Commentary

Clause 23 re-enacts the prohibition in section 18 of the Crown Proceedings Act against ordering the Crown to provide security for costs.

This provision is designed solely to prevent the expense of any application being made against the Crown. The Crown will not satisfy the current preconditions (residency or impecuniosity) for an order for security for costs, and there is no realistic expectation such an order would be needed given that the Crown is unlikely not to be in a position that it will not pay any costs awarded against it.

## Clause 24 – Judgment against the Crown

### 24 Judgment against the Crown

A judgment against the Crown must be satisfied by the department that, with the authority of the Prime Minister, is responsible for the administration of government in relation to the subject matter of the civil proceedings.

#### Commentary

Section 24 of the Crown Proceedings Act provides a complicated regime for the satisfaction of judgments against the Crown. The process requires the court to issue a certificate setting out the amount payable, which is provided to the Governor-General. The Governor-General may then pay the certified amount from the consolidated fund pursuant to a permanent legislative authority. By contrast, claims that are settled prior to a judgment are paid by the relevant department from their annual appropriation. However, we understand that the procedure for paying judgments is not used and that payments are sourced from the consolidated fund and accounted for by departments in a variety of alternative ways.

Clause 24 of our Bill provides a simplified process where judgments must be satisfied by the department connected with the proceedings. The payment of judgments is mandatory, and the Governor-General is not involved. Further, no money is paid out of the consolidated fund. This procedure is more in line

with modern government accounting processes and ensures that financial accountability rests with the department regardless of whether or not the claim is settled prior to judgment.

Legal liability remains with the Crown as the defendant. Clause 24 does not therefore include a provision for the court to apportion the damages between multiple departments if one or more departments are involved. In these circumstances, the decision as to how to apportion the damages should be made by the Crown, almost certainly through negotiation.

In our Issues Paper, we acknowledged the constitutional principle that the Crown should not be forced to spend public money without parliamentary authority. We have concluded that our new procedure together with the additional reporting requirements in clause 25 will provide a heightened degree of transparency and parliamentary accountability for the expenditure of public funds to meet court judgments.

## **Clause 25 – Payments by the Crown in relation to civil proceedings**

### **25 Payments by the Crown in relation to civil proceedings**

- (1) Each department must include a statement in its annual financial statements itemising all amounts paid by it in that financial year—
  - (a) to indemnify a Minister under **section 14**:
  - (b) to pursue civil proceedings on behalf of the Crown:
  - (c) to settle existing or prospective civil proceedings by or against the Crown or against any Crown employee:
  - (d) to satisfy judgments against the Crown.
- (2) The statement—
  - (a) must disclose personal information only in accordance with the Privacy Act 1993:
  - (b) must not disclose information that is subject to an obligation of confidentiality:
  - (c) must not disclose information that is subject to any other rule of law or enactment prohibiting disclosure.

#### **Commentary**

Clause 25 provides increased transparency with respect to payments by the Crown relating to civil proceedings. While the payments identified in sub-clauses (a)–(d) would be included in a department’s annual financial statements, it is difficult for people who are unfamiliar with government finance to identify which funds represent settlements, judgments and other payments arising from civil proceedings.

## **Clause 26 – Repeal of the Crown Proceedings Act 1950**

### **26 Crown Proceedings Act 1950 repealed**

The Crown Proceedings Act 1950 (1950 No 54) is repealed.

## **Clause 27 – Amendments consequential on repeal of section 5(2) of the Crown Proceedings Act 1950**

### **27 Amendments consequential on repeal of section 5(2) of Crown Proceedings Act 1950**

Amend the enactments specified in **Schedule 3** as set out in that schedule.



## Commentary

Section 5(2) of the Crown Proceedings Act provides that the enactments listed in Schedule 1 of the Crown Proceedings Act would bind the Crown. As section 27 of the Interpretation Act provides that legislation will not bind the Crown unless it expressly states that the Crown is bound, clause 27 and the consequential amendments in Schedule 3 insert into each Act a provision that states that it binds the Crown.

## Clause 28 – Consequential amendments to other enactments

### 28 Consequential amendments to other enactments

Amend the enactments specified in Schedule 4 as set out in that schedule.

## Commentary

As a consequence of the repeal of the Crown Proceedings Act and the enactment of this Bill in its place, a number of references in other legislation need to be updated and amended to reflect this change.

## SCHEDULE 1 – TRANSITIONAL, SAVINGS AND RELATED PROVISIONS

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### 1 Crown's powers and authorities otherwise unaffected

#### 1 The Crown's powers and authorities otherwise unlimited by this Act

Except as expressly provided in this Act, this Act does not limit any power or authority vested in the Crown (or in any person on its behalf).

## Commentary

This clause recognises that, unlike ordinary people, the Crown holds prerogatives and other powers arising from its unique obligations, powers and functions. It ensures that these powers or authorities are not limited by the provisions of the Bill unless expressly provided.

### 2 Immunity from tort liability property vested by independent rule of law

#### 2 The Crown immune from liability in tort in relation to certain Crown property

- (1) The Crown is immune from liability in tort in relation to property vested in the Crown under a rule of law that operates independently of the acts or the intentions of the Crown.
- (2) This section does not apply if the Crown has taken possession or control of the property or has occupied it.

## Commentary

This clause grants the Crown immunity from tort liability arising from property that is vested in the Crown by an independent rule of law that does not require the Crown to take any legal action to claim the land. Such instances might involve land *bona vacantia* (ownerless property that passes to the Crown) and other property that vests in the Crown after being disclaimed. The immunity ceases to apply, however, once the Crown takes possession or control of the land or has occupied it.

### 3 Proceedings by or against the Sovereign

#### 3 This Act does not apply to or authorise proceedings by or against the Sovereign

For the avoidance of doubt, nothing in this Act applies to or authorises proceedings by or against the Sovereign in the Sovereign's private capacity.

### Commentary

Section 35(1) of the Crown Proceedings Act states that the Act does not authorise actions against the Queen in her personal capacity. This privilege has not been extended to the Governor-General as her representative. The provision in the United Kingdom Act on which this provision is based was clearly a concession to the personal prerogatives of the monarch. While the rule of law might be said to require that the Sovereign acting in her personal capacity ought to be subject to the same legal procedures as her subjects, it is unlikely that the privilege has much practical importance given the reality that the Sovereign is unlikely to incur legal obligations in New Zealand that are similar to those incurred by private citizens. The dividing line between what is done by the Queen in her official capacity and what is done in her personal capacity is not necessarily clear. It might be that properly considered certain prerogatives remain personal rather than official, but the reality is that their exercise is in no way equivalent to the actions of a private person.

## 4 Transitional arrangements

### 4 Transitional arrangements

- (1) This Act applies to proceedings commenced on or after the date on which this Act comes into force.
- (2) The Crown Proceedings Act 1950 applies to proceedings commenced before the date on which this Act comes into force.

### Commentary

The provisions of this Act should only apply to proceedings that are commenced after enactment of the new Crown Civil Proceedings Act. Proceedings commenced prior to enactment should continue to be determined in accordance with the law that applied at the time the proceedings were commenced.

## SCHEDULE 2 – EXISTING IMMUNITY PROVISIONS

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### Commentary

Schedule 2 will contain the existing immunity provisions that will potentially be affected by clause 15 of the Bill. The Bill currently contains some illustrative provisions. However, this will require further careful scrutiny to ensure that Schedule 2 reflects the status quo and does not unintentionally create new immunities.

See [3.43]–[3.47].

## SCHEDULE 3 – AMENDMENTS CONSEQUENTIAL ON REPEAL OF SECTION 5(2) OF THE CROWN PROCEEDINGS ACT 1950

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### Commentary

Schedule 3 contains a list of those statutes that require legislative amendment to ensure they will continue to bind the Crown following the repeal of section 5(2) of the Crown Proceedings Act.

## SCHEDULE 4 – CONSEQUENTIAL AMENDMENTS TO OTHER ENACTMENTS

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### Bail Act 2000 (2000 No 38)

After section 39, insert:

**39A Court must order bail money to be paid to the Crown unless justice etc requires money to be returned to surety**

- (1) If a defendant's failure to comply with a condition of bail has been entered in the court record under section 39(3), any money paid by a surety under a bail bond is forfeited.
- (2) The court must order money forfeited under a bail bond to be paid to the Crown, unless the court considers that equity and good conscience and the real merits and justice of the case requires the money to be returned to the surety.

#### **Commentary**

This clause re-enacts sections 21 and 23 of the Crown Proceedings Act and provides the procedure by which recognisances are recovered by the Crown once forfeited. We recommend that the provision be included in the Bail Act 2000, as we understand that they are now only used in respect of bail bonds.

A recognisance is a financial undertaking by a person to perform some act or to observe some condition, such as to comply with the terms of bail or to appear at court when summonsed. The cash bond is security for the recognisance. The procedure was recently considered in detail in the judgment of Brewer J in *R v Wu* HC Auckland, CRI-2006-019-8458, 1 December 2011.

### **Civil Aviation Act 1990 (1990 No 98)**

After section 97(8), insert:

- (9) Despite section 3, in an action against the Crown for any damage, loss, or injury sustained by or through or in connection with the use of any service aircraft, this section applies as if the provisions of this Act and any rules made under this Act have been complied with.
- (10) In subsection (9), **service aircraft** means an aircraft that is being used exclusively for the purposes of the Armed Forces of New Zealand.

#### **Commentary**

When read together with the provisions of the Civil Aviation Act, section 9(3) of the Crown Proceedings Act effectively gave the Crown automatic supposed immunity to claims of nuisance or trespass relating to the use of service aircraft. It also provided that the Crown would be subject to strict liability in relation to material damage or loss relating to the use of service aircraft. New sub-sections 98(9) and (10) are to be added to the Civil Aviation Act 1990 and will replace section 9(3) of the Crown Proceedings Act.

### **Criminal Proceeds (Recovery) Act 2009 (2009 No 8)**

Replace section 157(4) with:

- (4) Nothing in this section limits or affects any provision of the Crown Civil Proceedings Act 2015 or the Crimes Act 1961 relating to the liability of the Crown on matters of justification and excuse.

#### **Commentary**

The amendment to the Criminal Proceeds (Recovery) Act 2009 replaces the reference to the Crown Proceedings Act with the title of the new Bill.

### **Designs Act 1953 (1953 No 65)**

Replace section 11(2) with:

- (2) Subject to the rest of this Act, the registration of a design has the same effect against the Crown as it has against any other person.
- (3) If a Crown employee infringes copyright in a design, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act 2015, civil proceedings in respect of the infringement may be brought against the Crown.

- (4) Nothing in subsection (3) or in the Crown Civil Proceedings Act 2015 affects the rights of a government department under sections 16 to 19.
- (5) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act 2015 in respect of the infringement of any copyright in a design.
- (6) In subsection (3), Crown employee has the meaning given in section 4 of the Crown Civil Proceedings Act 2015.

### Patents Act 2013 (2013 No 68)

Replace section 19(3) and (4) with:

- (3) Subject to the rest of this Act, a patent has the same effect against the Crown as it has against any other person.
- (4) If a Crown employee infringes a patent, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act 2015, civil proceedings in respect of the infringement may be brought against the Crown.
- (4A) Nothing in subsection (4) or in the Crown Civil Proceedings Act 2015 affects the rights of a government department under subpart 6 of Part 4.
- (4B) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act 2015 in respect of the infringement of a patent.
- (4C) In subsection (4), Crown employee has the meaning given in section 4 of the Crown Civil Proceedings Act 2015.

### Trade Marks Act 2002 (2002 No 49)

After section 11, insert:

#### 11A Rights against the Crown

- (1) If a Crown employee infringes a registered trade mark, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act 2015, civil proceedings in respect of the infringement may be brought against the Crown.
- (2) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act 2015 in respect of the infringement of a registered trade mark.

#### Commentary

The amendments to the Designs Act 1953, Patents Act 2013 and Trade Marks Act 2002 carry forward the effect of section 7 of the Crown Proceedings Act and provide that, where a Crown employee infringes copyright in a design, a patent or a registered trade mark with the authority of the Crown, proceedings may be brought against the Crown but not the Crown employee.

### District Courts Act 1947 (1947 No 16)

After section 109(5), insert:

- (6) This section applies to civil proceedings by the Crown.

## **Judicature Act 1908 (1908 No 89)**

After section 55(4), insert:

(5) This section applies to civil proceedings by the Crown.

### **Commentary**

The amendments to the District Courts Act 1947 and the Judicature Act 1908 provide that the provisions in those Acts relating to the arrest or imprisonment of defendants at risk of fleeing the jurisdiction will apply to civil proceedings commenced by the Crown.





## Part 2

# NATIONAL SECURITY INFORMATION IN PROCEEDINGS



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# Chapter 5

## Overview and summary

### INTRODUCTION

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- 5.1 This chapter provides an overview of the Commission’s review and a summary of the reforms we recommend in this part of the Report.

### WHAT IS COVERED BY THIS REVIEW?

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- 5.2 Under the terms of reference for the review, the Commission was asked to determine whether a new regime is needed for the protected use of national security information in criminal and civil proceedings. Our review has looked at whether the Crown can withhold or use national security information in both criminal and civil proceedings. Importantly, the review also covers the use of or refusal to disclose national security information in administrative decision-making where there is a determination that affects rights, such as a decision as to whether a citizen’s passport is to be cancelled.
- 5.3 In this Report, we have tried to separate out, at least to some degree, our discussion of national security information in court proceedings from our discussion of administrative decision-making by public authorities that impacts on individual rights, as somewhat different principles apply.
- 5.4 This review is not a general review of administrative decision-making. It is therefore not within our scope to consider whether existing decision-making processes are otherwise fair and balanced or whether there are generally adequate rights of review.

### HOW IS NATIONAL SECURITY INFORMATION MANAGED IN PROCEEDINGS?

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- 5.5 The current law on how national security information is dealt with in proceedings differs somewhat depending on what type of proceedings are involved.

#### Civil proceedings

- 5.6 The current position is that national security information can be withheld by the Crown under the doctrine of public interest immunity and not disclosed to the other party in civil proceedings. Under section 27(3) of the Crown Proceedings Act 1950, if the Prime Minister determines that national security information is too prejudicial to disclose, he or she can issue a public interest immunity certificate. Section 27 certificates have only rarely been used. Traditionally, these certificates were treated as decisive. At the same time, there has always been the ability for the court to question the certificate, and perhaps to reject it, and some uncertainty around the level of judicial deference and the role of judges in viewing the underlying material before making their decision.
- 5.7 The issue has not been squarely before the courts in New Zealand since 1999 when the Court of Appeal decided the case of *Choudry v Attorney-General*. The Court stated that while “Courts and legislatures have at times seen those areas as non-justiciable, or as barely justiciable, or as requiring judicial deference to ministerial exercises of discretion”, it was also the case that

“Courts do not of course always abstain or defer”.<sup>64</sup> In *Choudry*, the Court decided on the facts of that case to defer to the Minister’s certificate. However, since *Choudry* was before the courts, practice has developed considerably in the United Kingdom. Judges now appear to customarily be given the underlying material as part of the assessment of whether the certificate has been properly made.<sup>65</sup> Even more significantly, to properly exercise their role under the Justice and Security Act 2013 (UK), judges in the United Kingdom must have access to the sensitive information. Furthermore, the relevant Civil Procedure Rules (UK)<sup>66</sup> require national security information to be served on the court.

- 5.8 Although it is obviously speculation, we consider that it very likely that the courts would take the same approach to public interest immunity here as has been taken in the United Kingdom and look at the underlying material before making their decision whether to uphold a claim of public interest immunity.
- 5.9 Under section 70 of the Evidence Act 2006, information relating to matters of state may be excluded from proceedings “if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information”. Section 70 of the Evidence Act takes a different approach than section 27(3) of the Crown Proceedings Act because it says that the judge does a balancing act and determines whether national security information must be disclosed to the other party and whether the information can be put before the decision-maker.
- 5.10 It is not clear how this section and section 27(3) of the Crown Proceedings Act relate to each other. The fact that, under section 70 of the more recent Evidence Act, the judge determines whether national security information must be disclosed to the other party also supports our view that the level of deference displayed by the court in the *Choudry* decision is unlikely to be repeated should the issue be before the higher courts again.
- 5.11 Section 52(4) of the Evidence Act allows judges to make directions to protect sensitive information, including national security information, but there is little case law under the section, and it does not explicitly provide for a closed procedure or use of special advocates. This is an essentially procedural provision, combined perhaps with the use of inherent jurisdiction, neither of which give much guidance as to how to balance the needs of national security with natural justice and open justice. In contrast, under section 27, courts can only choose between upholding the certificate and denying disclosure of relevant material, or potentially requiring critical material to be disclosed, but at the cost of national security material being released. Our Report seeks to remove the stark choice under the Crown Proceedings Act and clarify the tools available to judges under the Evidence Act.

### Criminal proceedings

- 5.12 The Criminal Disclosure Act 2008 applies to criminal proceedings. The Act codified the common law of public interest immunity for criminal proceedings. If relevant information cannot be disclosed by the prosecution to the defence because it would prejudice security interests, that information can be withheld, which also means that it will not be presented in evidence.

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64 *Choudry v Attorney-General (No 2)* [1999] 3 NZLR 399 (CA) at [12]. See also *Choudry v Attorney-General (No 1)* [1999] 2 NZLR 582 (CA).

65 The recorded judgments do not appear to reveal any reluctance on the part of the Crown to allow the courts to view documents, nor do they suggest that the courts would tolerate this. See the speech of Lord Clarke in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [145] and [148] for an illustration of the practice that the court may inspect the documents when considering public interest immunity claims.

66 Rule 83.13(2) of the United Kingdom Civil Procedure Rules.

- 5.13 Under the Act, all relevant information must be disclosed by the prosecution to the defence unless there is a reason to refuse disclosure. A prosecutor may withhold national security information – but must give a list of the information and the grounds in support. The decision by the prosecutor to withhold information on national security grounds can be challenged on the basis that the information in question does not meet the criteria for national security grounds or on the basis that other interests favour disclosure and these outweigh the interests protected by withholding the information. The courts can view the information and determine the matter and may order disclosure. A court may attach conditions to disclosure. The defence has a very limited ability to present arguments for disclosure without seeing the information. Although the Act does not spell this out, the prosecution can withdraw the charges rather than disclose the material,<sup>67</sup> or the charges can be dismissed by the judge.<sup>68</sup>

### Administrative decisions affecting rights

- 5.14 Where national security information is relevant to an administrative decision in respect of a person's rights, obligations or interests, it can be withheld by the Crown but still used to inform the decision. There are a number of statutory regimes in place (for example, the Immigration Act 2009, the Passports Act 1992 and the Terrorism Suppression Act 2002) that provide that national security information can be taken into account by decision-makers without disclosing that information to the affected person.
- 5.15 Closed court procedures have been established by legislation to hear appeals and reviews in cases where national security information has formed part of the decision under review or needs to be introduced at appeal or review. There are inconsistencies in approach, and new regimes have been enacted in response to particular issues rather than in a coherent and principled way, the most recent example being that contained in Schedule 4 of the Health and Safety at Work Act 2015. There are questions over whether some of these regimes provide adequate safeguards for the affected person or give the courts sufficient control over proceedings.

### POLICY ISSUES AND PROBLEMS

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- 5.16 We consider that any reform should remove the existing ambiguity between the Evidence Act and the Crown Proceedings Act provisions so that it is clear how national security information should be dealt with by the courts. We also consider that reform should create greater consistency across the board rather than continuing the trend of a growing number of statutory regimes that deal slightly differently with national security information in proceedings.

### Civil proceedings

- 5.17 Public interest immunity needs reform for two reasons. The first is that New Zealand's last major case dealing with this subject, *Choudry*, was decided in the 1990s. As discussed above, we think it is very likely that a similar case would now be decided differently. In the intervening years, practice has developed in the United Kingdom, and *Choudry* is not consistent with the current approach of the United Kingdom courts. In addition the enactment in New Zealand of section 70 of the Evidence Act gives judges more scope to examine a claim that information should be withheld on national security grounds. The uncertainty over how to reconcile the certificate process under section 27 with the newer provisions in the Evidence Act needs to be resolved.

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<sup>67</sup> Criminal Procedure Act 2011, s 146.

<sup>68</sup> Section 147.

- 5.18 The applicable procedure for assessing and challenging claims of public interest immunity and the roles of the government and the courts in deciding whether disclosure of sensitive information is possible are not clear enough. The criteria against which decisions to withhold or disclose information are to be made are also not clear and should be clarified in statute.
- 5.19 The second reason for reforming public interest immunity is that the non-Crown party, whose rights or interests may be prejudiced by a claim for public interest immunity, has inadequate opportunity to challenge any such claim given that they cannot see the information.
- 5.20 In addition, as we discussed in the Issues Paper, a closed procedure has been adopted in the Dotcom proceedings<sup>69</sup> in the High Court under the inherent powers of the court and with the cooperation and consent of the parties. The use of such a procedure raises a question about whether there should be a statutory regime that sets out when this should be used and how natural justice and other important public interests should be protected.

### **Criminal proceedings**

- 5.21 The Criminal Disclosure Act sets out a modern and robust framework for non-disclosure of national security information. However, in line with our other reforms, we suggest that there should be an ability for non-disclosure to be challenged by a special advocate rather than the claim being heard by a judge alone and determined without the benefit of arguments presented on behalf of the accused. The key problem with the current law is that the defence has too limited an ability to present arguments for disclosure, and the judge has little assistance in making his or her decision on whether information should be disclosed. In addition, better provisions for challenge should minimise over-claiming by the prosecution.

### **Administrative decisions affecting rights**

- 5.22 Legislation contains a number of regimes that take inconsistent approaches to managing national security information. Some do not contain express protections and safeguards, such as any weighting towards open-source material that can be disclosed to the affected person. There does not always seem to be adequate oversight where national security information is being used.
- 5.23 In relation to appeals and review by the courts of administrative decisions affecting rights, a number of differing closed court procedures have been established by legislation. Some of the regimes do not provide adequate safeguards for the affected person or give the courts sufficient control over proceedings. The recently enacted closed procedure in the Health and Safety at Work Act is an example of this concerning trend.

### **Issues around the definition of national security information**

- 5.24 The definition of national security information and the way information that comes within that definition is then treated in proceedings have been important issues for our review. There are currently differing definitions and terminology for national security information. The information covered needs to be more clearly identified. A coherent relationship needs to be maintained between access to national security information in court proceedings and an individual's access to that information under the Privacy Act 1993 and public access under the Official Information Act 1982.

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69 *Dotcom v Attorney-General* CIV 2012-404-001928.



## FRAMEWORK FOR REFORM

- 5.25 The overall objective for this review is to develop mechanisms to manage the withholding, disclosure and use of national security information in proceedings and administrative decision-making so that natural justice rights are protected, open justice is maintained as far as possible, the disclosure of national security information does not create unacceptable security risks and a workable accommodation between the different interests is achieved.

### Natural justice protections

- 5.26 The Commission's starting premise is that all court proceedings in New Zealand must be conducted in a fair manner, must adhere to the principles of natural justice and should as far as possible be open and transparent.<sup>70</sup> Limitations on procedural rights need to be justified. Failing to disclose evidence that is relevant in court proceedings or administrative decision-making, on the grounds of a threat to national security, must be justified.
- 5.27 Section 5 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that the "rights and freedoms contained [in the Act] may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".<sup>71</sup> Tipping J summarised in *R v Hansen* that "whether a limit on a right or freedom is justified under section 5 is essentially an inquiry into whether a justified end is achieved by proportionate means".<sup>72</sup>
- 5.28 A culture of justification contributes to "principles of good government, such as transparency, accountability, rational public development, attention to differing interests and so on".<sup>73</sup> The challenge is to ensure that any rights that are viewed as fundamental are protected in a substantive sense while recognising that at the same time there may be circumstances that allow the procedural protections to be limited in the way envisaged by section 5 of NZBORA.

### Open justice and the public hearing principle

- 5.29 The principle of open justice goes to the very existence and health of our political and legal institutions. We regard it as an important safeguard against unfairness that helps maintain public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny and that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".<sup>74</sup> Open justice is a fundamental common law principle.<sup>75</sup> It is supported by the freedom of the media to report on matters of public interest. The role of the media in holding government to account and upholding the rule of law is a vital aspect of open justice.<sup>76</sup> The importance of open justice argues against closed procedures, even if they can be done in a way that does not affect the fundamental fair trial rights.

### The principle of equality in litigation

- 5.30 The approach to reform must have regard to the principle that the Crown should be in the same position as any other party. In Part 1 of this Report on the review of the Crown Proceedings Act, we emphasised that rules that advantage the Crown must be limited to the extent that they can

<sup>70</sup> For more detail on our approach, see Law Commission *National Security Information in Proceedings* (NZLC IP38, 2015) at ch 2.

<sup>71</sup> The New Zealand courts have commonly adopted the test set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 10. See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and at [103]–[104] per Tipping J.

<sup>72</sup> *Hansen*, above n 71, at [123] per Tipping J.

<sup>73</sup> Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 554.

<sup>74</sup> *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.

<sup>75</sup> In *Al Rawi v Security Service* [2010] EWCA Civ 482, [2012] 1 AC 531 at [10]–[15] per Dyson LJ, open justice was described as more than a "mere procedural rule", but rather "a fundamental common law principle".

<sup>76</sup> House of Lords House of Commons Joint Committee on Human Rights *The Justice and Security Green Paper*, Twenty-fourth Report of Session 2010–2012, HL Paper 286, HC 1777 (4 April 2012) at [217].



be justified. It is therefore important that procedural rules that govern how claims are brought against the Crown do not disadvantage the non-Crown party more than necessary.

### **The importance of an independent and impartial court**

- 5.31 The judiciary has a constitutional role of supervising the use of executive power. An independent and impartial judiciary is essential to hold the Crown to account for the exercise of government powers and safeguard against improper use or overreach.
- 5.32 The principle of judicial independence suggests that decisions about national security information in court proceedings should be reviewable by judges. We are concerned that, if the courts are constrained and not able to control court proceedings, the independence and standing of the courts is potentially called into question. While it may be that a court will seldom depart from an executive determination that a matter is of national security, it is the ability of the court to review the Crown's claim that gives legitimacy to that classification, especially as the information will not be released publicly.

### **The need to protect national security**

- 5.33 The potential threat to national security goes further than the question of whether the substantive content of information should be disclosed (for example, the specific details of a document or phone call). Protecting national security also means safeguarding the confidence our allies have in us as well as protecting the methodologies and sources used, given the potential consequences of these being made public.
- 5.34 The disclosure of national security information in proceedings could have implications for New Zealand's obligations to its intelligence-sharing partners. Disclosure of substantive information may not in itself pose a security risk but could inadvertently lead to the uncovering of intelligence-gathering tools and techniques, for example, the identification of an undercover intelligence agent or informer whose safety would then be at risk.
- 5.35 Part of the difficulty is that there may be degrees of threat to national security and degrees of importance of national security interests. A significant risk to a very important security interest may justify a departure from ordinary standards of procedural protection in court proceedings, while a lesser risk may not be sufficient to justify this.

## **OVERVIEW OF THE REFORMS**

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### **Introduction**

- 5.36 The Commission accepts that there are going to be some situations where the protection of national security justifies the withholding of information because disclosure in the usual way could have a serious adverse impact on New Zealand, its people or people overseas. The difficulty we are grappling with is what to do where information genuinely cannot be disclosed, but that information is or may be relevant to an issue in civil or criminal proceedings or relevant to an administrative decision affecting a person's rights and any challenge to that decision. There are two components of this issue – how to decide whether the information meets this standard and what process to adopt when it does.
- 5.37 In relation to the second question, we have considered two ways of proceeding. The first, which is the current approach in civil and criminal proceedings, is to withhold the information and exclude it completely from consideration in the proceedings. Whether the proceedings can then fairly continue without a portion of the relevant evidence being submitted to the decision-maker will depend on the nature of the proceedings and the facts of the case.

- 5.38 The alternative approach is to design some form of closed procedure that allows the decision-maker to view information that is withheld from the affected person. This must be done in a way that affords protection to national security interests while also upholding other interests including procedural fairness. However, as was explored in some depth in the Issues Paper, closed procedures, at least during the determinative or substantive proceedings, can really only offer what is generally accepted to be a second-best solution in terms of natural justice and open justice. When used during the pre-trial or preliminary stages to determine how information should be managed, they are less of a concern.

### Can closed court procedures ever be justified?

- 5.39 A distinction should be made between using a closed procedure during the preliminary or pre-trial phase and during a substantive hearing. During the preliminary phase, a closed procedure ensures that the information in question is properly protected while the court assesses whether it is relevant and what threat disclosure of the information may pose to security interests. At this preliminary stage, the court is considering how to best protect the information and manage the disclosure process. A closed procedure must be adopted at this preliminary stage to protect the information until there has been a determination on whether it should be disclosed to the other party. This same type of approach is taken in respect of other types of confidential information or information that one party claims is privileged. We see it as acceptable to preserve secrecy and not disclose the information to the other party at this stage of proceedings as long as the party's interests are represented by a special advocate.
- 5.40 However, when closed procedures are used for substantive hearings, information is being taken into account by the court in determining the issues in dispute without that material being made available to the other side. This is a major departure from ordinary court processes. The use of special advocates during closed procedures to represent the excluded party's interests at the substantive hearing stage only partially ameliorates the unfairness of proceedings where one party is denied full disclosure of the other party's case. Under normal conditions, this would not be tolerated in our courts.
- 5.41 In the Issues Paper, *National Security Information in Proceedings*, we said that closed procedures should be considered as a way of dealing with national security information in some civil proceedings as well as in review and appeal proceedings under the statutory regimes discussed earlier. However, the paper advocated a cautious approach to the use of closed procedures for substantive hearings and noted the need to guard against the risk that a legislative scheme starts to normalise the use of closed procedures. Closed procedures should not become the default simply because there are national security claims.
- 5.42 In the Issues Paper, we also stressed that the threshold for triggering such closed procedures, if they are available, needs to be set relatively high because they represent a departure from the normal standards of natural justice. The underpinning principle must be to facilitate the greatest degree of disclosure and openness that is consistent with the nature and magnitude of the national security interests at stake. The approach taken in any case should depend on the risks associated with disclosure of information itself and also on the importance of the rights or interests being determined.
- 5.43 In relation to criminal proceedings, the Commission said in the Issues Paper that it did not consider that closed procedures for the substantive trial (where evidence is presented to the court) without either the defendant or their counsel present could be reconciled with the right to a fair trial and should therefore not be used at all. We stressed that the right to a fair trial must be upheld and said that we considered that risks to national security would have to be managed by existing extraordinary measures, such as judges clearing the court or making use

of suppression powers. Where the risk to national security was too high to manage using those methods, we considered that the material must be withheld and not relied on as evidence.

### The recommended approach

- 5.44 The submissions received and the consultation undertaken firmed up the Commission's preliminary views set out in the Issues Paper. We discuss submissions in some detail later in Appendix 3. We have decided to recommend that closed procedures should have a very limited role in civil and administrative proceedings and should not be introduced for substantive hearings in criminal proceedings. They should only be used when the risks of disclosure justify the departure from ordinary processes and there is no other way to both protect the information and fairly hear the matter before the courts.
- 5.45 Our overall approach to reform is to minimise the use of national security information in proceedings where this cannot be disclosed to the other party or managed using existing procedures. Closed procedures will need to be used during the preliminary stage of hearings to protect information that the Crown claims will prejudice national security while the court determines how to proceed. Closed procedures should only be adopted for substantive hearings in civil proceedings and administrative appeals when the information is so relevant that the proceedings could not be justly determined without it and security interests mean it cannot be disclosed to the non-Crown party.

### Defining "national security information"

- 5.46 In the Issues Paper, we suggested a narrow definition of "national security information" that precisely identified what types of security interests should be sufficient to displace the normal assumption that relevant information is disclosed to the affected parties. We also considered that, within each type of interest, there might be different levels of seriousness and that the degree of prejudice is therefore also relevant.
- 5.47 However, after considering submissions and the views expressed at consultation meetings, we have been persuaded that a slightly broader definition of national security information drawn from section 6 of the Official Information Act would be better. It is still narrow in the sense of identifying the specific interests that may be prejudiced but is not limited to any particular kinds of information that may come within the definition. National security information should be defined to mean information that, if disclosed, would be likely to prejudice:
- the security or defence of New Zealand; or
  - the international relations of the Government of New Zealand; or
  - the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.
- 5.48 The approach we are taking means that the magnitude and nature of the potential prejudice is not incorporated into the definition but will be considered by the court when determining how the national security information is to be managed in proceedings. The definition functions to identify the ambit of the information that will need to be carefully considered and managed through court proceedings. Determining that information comes within the definition does not mean that it can never be disclosed. The court must then consider the nature of the information and the seriousness of the prejudice that might occur to an interest when making decisions about the disclosure, exclusion and use of national security information.

### Approach for civil proceedings

- 5.49 The parties will undertake a normal discovery process during which the Crown will identify national security information that it does not want to disclose because of the risk this would pose to New Zealand's security interests. Typically as part of the normal discovery process, the other parties to the litigation will be provided with a list of relevant information held by the Crown. The list will, in the usual way, identify the national security information and the basis (prejudice to national security) for non-disclosure along with other categories of sensitive or privileged information the Crown wishes to withhold.
- 5.50 Under the recommended reforms, the non-Crown party would be able to challenge the non-disclosure of the information the Crown claims is national security information. The first stage would be a preliminary hearing on the non-disclosure of the information. It would be a closed hearing, and the non-Crown party would be represented by a security-cleared special advocate. The non-Crown party and their counsel would be excluded from the closed portion of preliminary proceedings over discovery. The court would consider whether the information falls within the definition of national security information. They would then consider whether the security risks it poses justify non-disclosure when balanced against the interest of the non-Crown party in receiving the information. If the Crown satisfies the court that the information cannot be disclosed to the non-Crown party, the enquiry turns to the question of whether the information can fairly be excluded from proceedings or whether a closed procedure should be used during the substantive hearing to deal with the information.
- 5.51 At this second stage, the court determines whether to order the use of a closed procedure for part of the substantive hearing. The court should only order that part of the substantive hearing be closed where it is satisfied that the national security information is sufficiently relevant to the proceedings that it is in the interests of justice to use a closed procedure rather than to exclude the information and have the case proceed without it. Although a closed procedure would be available in cases where the national security information was beneficial to the Crown's case, the interests of justice test will be much harder for the Crown to satisfy because it is seeking to withhold information from the other party but also use it against them. In some cases where the Crown is defending an action, the courts may consider that this is appropriate, but we would anticipate this would be quite rare. It is more likely that a closed procedure would be in the interests of justice where it would prejudice the non-Crown party if the court excluded the national security information.

#### *Closed procedure*

- 5.52 The closed procedure would be used for any preliminary hearing involving claims of national security information. If the judge so determines, it could also be used in a substantive hearing as outlined above. During a preliminary hearing on disclosure and on whether a closed procedure should be used for part of the case, the court would hear from the Crown and also from the special advocate representing the non-Crown party, who would have access to the national security information under secure conditions that ensured it was properly protected. The court would also have access to the information under secure conditions.
- 5.53 The main features of a closed procedure are as follows:
- The general public and the media are excluded from the closed parts of the hearing, and no part of the closed hearing may be reported.
  - The non-Crown party and their counsel are excluded from the closed parts of the hearing.



- The non-Crown party is represented at the closed parts of the hearing by a special advocate who is security-cleared with full access to the information.
- A summary of the national security information that has been withheld from the non-Crown party must normally be provided to them.

5.54 In cases where the court, at the preliminary hearing, orders that part of the substantive hearing must also be under closed procedure, the approach outlined above would continue.

### Appeals and judicial review of administrative decisions

5.55 In applications for judicial review or appeals of administrative decisions where national security was taken into account, there will inevitably be relevant information that the Crown seeks to withhold from the affected person on security grounds. We do not believe that this requires the automatic use of a closed procedure. Instead, we recommend that the approach above for civil proceedings should apply. This is the best option for protecting the affected person's right to a fair hearing while also ensuring that security information is not publicly disclosed.

5.56 The automatic adoption of a closed procedure under current statutory regimes allows the Crown to have the benefit of using the information without disclosing it to the affected person. We propose instead that the decision of how to protect information should be made by the judge with regard to the degree of prejudice to the parties and the nature of the security interests. The court would also have the ability to make orders for protection that do not go so far as full exclusion, for example, redacting material that identifies particular sources or means of surveillance but allowing the substantive allegations to be released in open proceedings.

5.57 In some cases, the use of a closed procedure may be the best way of ensuring that the information is protected and the case can be heard fairly. We envisage that a closed procedure would be used where there would be significant security risks of disclosing the information to the affected party and where the proceedings cannot be fairly determined without examining the secure materials.

### Criminal proceedings

5.58 The approach in respect of criminal proceedings should continue to be that set out in the Criminal Disclosure Act. This differs from the approach outlined above for civil proceedings in one important respect. Information that has not been disclosed to the defence must not be used against the defendant to prove a charge. We consider that the use of closed procedures in criminal trials cannot be justified, and the prejudice to the accused would always be too great to countenance this option.

5.59 However, we recommend that the Criminal Disclosure Act be amended to provide for the use of special advocates in the pre-trial stages to assist the judge in determining whether information should be withheld. The special advocate would represent the interests of the defendant, who would be excluded from the part of the preliminary hearing that deals with the national security information. As with civil proceedings, the special advocate could view the national security information and then, if there are grounds, challenge the claim for non-disclosure. The court would benefit from having this type of assistance from a lawyer representing the defence perspective when trying to assess the material. It would help address any risk of over-claiming on national security grounds and could lead to more information being disclosed and better evidence being available for the substantive hearing. If non-disclosure was justified on national security grounds, the special advocate could help protect the defendant's interests by presenting arguments about any prejudicial effect non-disclosure has on the defence and particularly whether a fair trial remains available. This would assist the court in making its assessment.

*Witness anonymity*

- 5.60 We also recommend a new provision in the Evidence Act to introduce anonymity protections for sources who provide information on matters of national security and for intelligence officers working for New Zealand or international intelligence agencies. This will be an important tool for ensuring that national security interests are protected while enabling those involved with the security and intelligence agencies to give evidence in open court. Although this reform will probably be of most relevance in criminal proceedings, we consider that protections for intelligence officers and sources may be required in proceedings other than criminal, for example, in the review of administrative decisions, and that the new provision should therefore apply more generally to all proceedings.

*Challenge to a search or surveillance warrant*

- 5.61 We recommend that, where a warrant is obtained on the basis of national security information, a secure hearing should be available if it is later challenged. We understand that, in some situations, judges in the High Court do currently appoint counsel to assist the court when dealing with reviews of warrants where material is not disclosed. Our recommendation would formalise this arrangement in respect of national security information and make it clear that a special advocate should be used.

**Reforms affecting administrative decision-making**

- 5.62 We have also considered whether reform is required in administrative decisions that affect a person's rights where the person affected is unable to have access to national security information taken into account in making the decision. We have identified two areas for reform. First, we suggest that, if an individual would otherwise be entitled to receive information taken into account in a decision that affects their rights but for the fact that the information must be withheld for security reasons, the individual should be entitled to receive instead a summary of the information. The summary serves the purpose of providing the affected person with straightforward and prompt access to the information about why the decision was made. The Passports Act, Telecommunications (Interception Capability and Security) Act 2013 and Terrorism Suppression Act would need to be amended to give effect to this reform.
- 5.63 Second, we suggest that the existing oversight powers of the Inspector-General of Intelligence and Security should be better integrated into the framework for administrative decision-making. When decision-makers (including ministerial decision-makers) rely on information provided by the security and intelligence agencies, there is less scope to test that information compared with information provided by departmental officials. The Inspector-General has the power to scrutinise the information prepared by security and intelligence agencies and presented to the decision-maker, either on his or her own initiative or in response to a complaint.<sup>77</sup> The Inspector-General can consider whether information was properly classified as national security information and whether it was balanced and complete and presented to the decision-maker with appropriate qualifiers. We suggest that the Inspector-General should be notified whenever national security information is taken into account in a decision that affects individual rights such that section 11(1)(c) of the Inspector-General of Intelligence and Security Act 1996 would apply. Individuals who have a right of complaint under section 11(1)(b) of the Inspector-General of Intelligence and Security Act should also be notified of this right in respect of administrative decisions that directly affect them.

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<sup>77</sup> This is subject to an exception in s 42 of the Immigration Act 2009 that provides that no complaint may be made to the Inspector-General of Intelligence and Security about any situation or set of circumstances relating to an act, omission, practice, policy, or procedure done, omitted, or maintained (as the case may be) in connection with a decision under that Act involving classified information (including a determination in proceedings involving classified information).



- 5.64 We consider that both of these requirements are necessary to minimise the degree of prejudice to the affected party that results from the security information being withheld.

### **Role of special advocates**

- 5.65 We recommend that the role of the special advocate in any closed procedure should be to advocate vigorously for the interests of the excluded non-Crown party. Their role during the preliminary stages would be one of arguing for greater disclosure to the affected party and/or the party's lawyer. The advocate would help identify whether some of the information for which protection is claimed could be released to the affected party. The appointed special advocate should have full access to all national security information at issue in the case and should be under a statutory obligation to keep that material confidential and not disclose it, except as expressly permitted under the regime. After the special advocate has been given access to the national security information, there would be restrictions on their communication with the non-Crown party or the party's lawyer.
- 5.66 The special advocate's role should extend to making submissions in respect of the summary of information or allegations.<sup>78</sup> The summary must be sufficient to provide the affected person with enough information so that they can play a meaningful role in the proceedings and can provide instructions to their counsel and also brief the special advocate.
- 5.67 We have recommended having a reasonably large and broad panel of security-cleared lawyers that can act as special advocates in any proceedings. Given the complex and difficult nature of the role, we think that it is important that senior and experienced counsel be available on the special advocate panel. We consider that the special advocate must be given meaningful support to do their job; legal, technical and administrative. There is a need to ensure that the support is both competent and sufficiently independent. Meaningful legal support might be best provided by having available junior counsel who can be security-cleared and can be appointed to provide such support to the special advocate.

### **Courts, security and judges**

- 5.68 We recommend that all cases involving national security information should, with some specific exceptions discussed in Chapter 9, be heard in High Court. We do not think it necessary to security clear judges and acknowledge problems in doing so. A proper separation between the branches of government and the independence of judicial officers must be maintained. Limiting cases to the High Court ensures that only a small group of senior judges will hear these cases and this would allow expertise to develop.
- 5.69 The terms of reference preclude the Commission from making recommendations with respect to purely operational matters, including funding and administrative arrangements to institute an appropriate system for protecting sensitive security information in proceedings. We have therefore not made any recommendations in respect of facilities. However, we do observe that the courts hearing cases do need to have access to appropriate secure facilities to deal with and store secure material. We also consider that, to maintain the proper separation between branches of government, it is important that the necessary secure facilities and services are provided within the court system administered through the Ministry of Justice. This would ensure there is sufficient separation from the security and intelligence agencies.

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<sup>78</sup> Summaries are referred to in the United Kingdom as "gists".

# Chapter 6

## Civil proceedings

### INTRODUCTION

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- 6.1 The ability to bring civil proceedings<sup>79</sup> against the Crown is an essential means by which citizens are able to obtain legal redress when the government has breached individual rights or has failed to comply with its legal obligations. It is in keeping with the principles of accountability and transparency that are fundamental characteristics of open democracy.
- 6.2 A basic tenet of civil procedure in New Zealand is that the parties to a civil case, including the Crown, have access to information held by the other party that is relevant<sup>80</sup> to their particular case.<sup>81</sup> This chapter is concerned with how to manage situations when information that would ordinarily be disclosed to all parties in a civil case cannot be disclosed because the Crown believes that disclosing that information would be likely to prejudice national security interests. We refer to this information as “national security information” and defined it in the previous chapter.<sup>82</sup>
- 6.3 This chapter briefly outlines the current law and the issues relating to the use of national security information in civil proceedings. It provides an overview of submissions received and comments and views shared during consultation on these topics. The chapter concludes with our recommended approach for managing the disclosure and use of national security information in civil proceedings. This approach would replace the patchwork of legislation and common law that currently applies.

### PUBLIC INTEREST IMMUNITY IN CIVIL PROCEEDINGS – ISSUES WITH THE CURRENT LAW

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- 6.4 The use of national security information in civil proceedings is currently governed by a mixture of the common law doctrine of public interest immunity, section 27 of the Crown Proceedings Act 1950,<sup>83</sup> the judicial discretion found in section 70 of the Evidence Act 2006 to exclude

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79 For the purposes of this chapter, “civil proceedings” is used in a broad sense and includes judicial review proceedings. This is a slightly different definition to that used in Part 1 of this Report. The approach discussed in this chapter also covers proceedings before the Employment Court and proceedings before the Human Rights Review Tribunal.

80 See, for example, the definition of “standard discovery” in r 8.7 of the High Court Rules.

81 As the Crown is also entitled to bring civil proceedings according to the same substantive law and procedure as a private individual, this rule applies equally to the Crown; see s 27 of the Crown Proceedings Act 1950 and *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014) at chs 1, 2 and 7.

82 National security information is defined as information that, if disclosed, would be likely to prejudice:

- the security or defence of New Zealand; or
- the international relations of the Government of New Zealand; or
- the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.

83 Section 27(3) enables the Prime Minister, in the case of national security, or the Attorney-General, in the case of the administration of justice, to issue a certificate that essentially prevents discovery being granted for particular documents. Excluded information cannot then be disclosed to the other party or put before the court as evidence. The doctrine of public interest immunity applies in both civil proceedings and judicial review. See [5.6]-[5.8] for a more detailed discussion.

- evidence pertaining to matters of state<sup>84</sup> and the power of judges under section 52 of the Evidence Act to make other orders necessary to protect information that is the subject of an order under section 70. The operation of these provisions was discussed in our Issues Papers<sup>85</sup> and earlier in Chapter 5 of this Report.
- 6.5 The courts have also relied on their inherent powers and the consent of the parties to modify court procedure on a case-by-case basis in an attempt to balance the right to natural justice, the principles of open justice and the need to protect national security information from disclosure. Examples are the procedure adopted by consent in the *Dotcom* proceedings<sup>86</sup> and the procedure contemplated by the Employment Court in *Zhou*.<sup>87</sup>
- 6.6 The leading New Zealand authority on public interest immunity is *Choudry v Attorney-General*.<sup>88</sup> In *Choudry*, the majority of the Court of Appeal decided, among other things, not to go behind the Minister’s assertion that disclosing further information would pose a risk to national security on the facts of that case. The court also found that it was unnecessary to view the information that was the subject of the public interest immunity certificate.<sup>89</sup>
- 6.7 In our view, there is some doubt that the Court of Appeal’s view (expressed in 1999) of the proper role of judges in assessing claims for national security in court proceedings would necessarily preclude the courts from asking to view material to check whether it might properly fall within the bounds of the asserted privilege on a future occasion. This lack of clarity presents a real risk that, unless a procedure like the one we have suggested is adopted, New Zealand courts will be faced with the unpalatable position of either accepting an assertion of privilege without looking at the underlying material (and hence leaving the possibility of injustice to the non-Crown party); or looking at the underlying material and potentially disclosing it to avoid injustice, but without the protections of the closed procedures that we have suggested.

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84 Section 70 allows national security information to be withheld in civil proceedings stating that “a judge may direct that a communication or information that relates to matters of state must not be disclosed in a proceeding if the judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information”. Pursuant to section 70, it is the judge who is required to balance the interests in question and determine whether national security information can be withheld or whether the balance lies in favour of disclosure.

85 Law Commission, above n 81, at ch 7; and Law Commission *National Security Information in Proceedings* (NZLC IP38, 2015) at chs 3–5.

86 *Dotcom v Attorney-General* [2012] NZHC 3286. The details of this case, which is still before the court, are discussed in our Issues Paper *National Security Information in Proceedings* at [5.7]–[5.10]. The High Court has used its general case management powers and inherent jurisdiction to establish a procedure whereby the judge has been provided with access to the relevant information and a special advocate has been appointed to assist at the discovery and disclosure stage. At the time of writing this Report, we understand that the Crown has decided to make an application under s 70 of the Evidence Act to withhold certain information on the grounds of national security and to continue the special advocate regime.

87 *Zhou v Chief Executive of the Department of Labour* [2010] NZEmpC 162, [2010] ERNZ 400. The details of this case are discussed in our Issues Paper *National Security Information in Proceedings* at [5.11]–[5.15]. Mr Zhou was engaged in an employment dispute with the Department of Labour that was triggered by the withdrawal of his security clearance. The Crown sought to withhold the information received from the New Zealand Security Intelligence Service on the grounds that to disclose the information would prejudice national security. The Employment Court ruled that, under its general power to use a procedure “as the Court considers will best promote the object of the Act and the interests of justice”, it had the power to appoint special advocates. Ultimately, the issue was not finally resolved, as the parties settled the dispute.

88 *Choudry v Attorney-General (No 1)* [1999] 2 NZLR 582 (CA) and *Choudry v Attorney-General (No 2)* [1999] 3 NZLR 399 (CA).

89 *Choudry (No 2)* at [12].

- 6.8 In the United Kingdom, it appears that judges will be given access to and consider information that is withheld on the grounds of national security when it is necessary to do so.<sup>90</sup> The Justice and Security Act 2013 (UK) reflects this position: judges look at the relevant information and make decisions about how it should be used in the proceedings.
- 6.9 In New Zealand, this trend is reflected in section 70 of the Evidence Act; the approach adopted by consent in the *Dotcom* litigation; and the approach contemplated in the Employment Court case of *Zhou*. There does, however, remain some uncertainty as to whether a judge has the ability to examine the information and decide if the reasons given by the government for issuing a certificate under section 27 of the Crown Proceedings Act are valid.

### Disadvantage to non-Crown parties under section 27 of the Crown Proceedings Act and common law public interest immunity

- 6.10 As explained in the Issues Paper *A New Crown Civil Proceedings Act for New Zealand* (IP 35), public interest immunity is a Crown privilege at common law that authorises the Crown to withhold documents that would otherwise be discoverable if it is of the view that discovery would be against the public interest. The privilege has received partial statutory recognition in section 27(3) of the Crown Proceedings Act.<sup>91</sup>
- 6.11 The existence of public interest immunity provides the government with the assurance that, ultimately, it can prevent the disclosure of information it considers will threaten an important national interest if disclosed. It is a mechanism designed to avoid harm to important interests but can result in unfairness to non-Crown parties. If it is relied on by the Crown, it prevents non-Crown parties from accessing information that might potentially be relevant to their case. This arguably causes disadvantage to them due to the lack of judicial oversight into the decision to exclude information and the inability of the non-Crown party to argue or have someone argue on their behalf that the information should, in fact, be disclosed.
- 6.12 We have been careful to ensure that any proposed approach provides the necessary assurance to the government that information can still be protected while using a procedure that adheres to the principles of open justice and natural justice and maintains public confidence in the judicial system.

### Relationship between section 27 of the Crown Proceedings Act, section 70 of the Evidence Act and common law public interest immunity

- 6.13 As outlined in the Issues Paper,<sup>92</sup> it is unclear whether common law public interest immunity co-exists with public interest immunity as expressed in section 27. Public interest immunity as

90 The recorded judgments do not appear to reveal any reluctance on the part of the Crown to allow the courts to view documents, nor do they suggest that the courts would tolerate this. The speech of Lord Clarke in *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [145] and [148] is illustrative of what appears to be common acceptance in the United Kingdom of the role of judges when considering public interest immunity claims:

145. I would accept the submission made by Ms Rose that the following principles correctly state the approach to PII as it has stood until now:

...  
 ii) Disclosure of documents which ought otherwise to be disclosed under CPR Part 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice.  
 iii) In making that decision, the court may inspect the documents: *Science Research Council v Nassé* at pp 1089-1090. This must necessarily be done in an *ex parte* process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated: see the Court of Appeal judgment at para 40.

...  
 149. [Repeating Crown counsel's description of the certification process] After the minister has signed a PII certificate, the balance between the relevant public interests must be made by the judge. In a simple case he will hear argument on both sides and reach a conclusion, often having looked at the documents. There will be no need for special advocates. The position may be very different in a case of complexity, especially a case of great complexity such as this was or would have been but for the settlement. The judge may need assistance in order [to] carry out the balance. Such assistance will not of course be available from counsel for the non-state parties because they will not have seen the documents.

91 Law Commission, above n 81, at ch 7.

92 Law Commission, above n 81, at ch 7.

expressed in section 27 also appears to be in conflict with section 70 of the Evidence Act with respect to how determinative the government's claim for non-disclosure is. It is also unclear how section 27 and section 70 relate to each other, in particular, whether or not the use of one provision precludes the use of the other.

### Lack of clear statutory authority for closed procedures

- 6.14 Leaving aside special regimes enacted in the Immigration Act 2009, Passports Act 1992, Telecommunications (Interception Capability and Security) Act 2013, Terrorism Suppression Act 2002 or Health and Safety at Work Act 2015, there is no statutory authority covering civil proceedings that permits national security information to be used as evidence without it also being disclosed to the other party. Nor do sections 70 or 52(4) of the Evidence Act<sup>93</sup> or section 27 of the Crown Proceedings Act specifically provide for a closed procedure whereby national security information is taken into account at the substantive hearing.
- 6.15 In the absence of legislative guidance, New Zealand courts have fashioned procedures on a case-by-case basis by relying on the consent of the parties and on the inherent or general case management powers of the court. The procedure adopted by the High Court in *Dotcom* is one such example.
- 6.16 In our Issues Paper *National Security Information in Proceedings* (IP 38), we raised the issue of whether significant variations should be made to ordinary procedure, where they have implications for natural and open justice, without express statutory authority (even with the consent of the parties).<sup>94</sup>
- 6.17 This kind of case-by-case approach has the potential to compromise predictability, fairness and public confidence in the court system. Members of the public and people embarking on legal challenges against the government should know in advance what kind of process will be followed where national security information is relevant to their case. Our concern is compounded by the rarity of such cases in New Zealand courts and the scope for the evolution of the common law in between cases.

### RECOMMENDED APPROACH FOR CIVIL PROCEEDINGS

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- 6.18 We think that legislation is needed in order to achieve a procedure that is applied consistently and that ensures national security information is protected whilst also respecting the right to natural justice and the principle of open justice. This legislation should clearly define the respective roles and powers of the judiciary, the executive, the non-Crown parties and special advocates. Our recommended approach for managing the disclosure and use of national security information in civil proceedings is intended to achieve these objectives.
- 6.19 For information that falls within our definition of “national security information”, our approach replaces common law public interest immunity, the certificate regime found in section 27(3) of the Crown Proceedings Act and the procedure relating to matters of state in section 70 of the Evidence Act.
- 6.20 Our recommended approach should operate within the case management process that would normally apply to the proceedings, with some necessary modifications to protect the national security information and to ensure judges can make decisions regarding the use of the

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93 While s 52(4) of the Evidence Act 2006 grants the judge a broad discretion to give any direction necessary to protect the confidentiality or limit the use of information that is subject to a direction under s 70, it does not appear to have been used in relation to “matters of state”, and it remains to be seen how the courts will interpret the combined effect of these two sections.

94 Law Commission, above n 85, at [5.18]–[5.20].



information on a fully informed basis. The initial discovery processes should remain the same. There will be an obligation to identify and list otherwise discoverable national security information that is being withheld. Discoverable information and documents that are believed to be national security information should be identified and listed in a neutral way, and it should be clear to the non-Crown party that it is being withheld on the basis that it is national security information. There would be parallels in this regard with how information that is subject to legal professional privilege is managed at the discovery stage.

- 6.21 Under our approach, the Crown's decision to withhold national security information at the discovery stage can be challenged. If challenged, a preliminary hearing will be held, and the judge can decide, among other things, whether or not the case can fairly continue if relevant national security information is excluded. The ability to withhold information from discovery means that the claim for exclusion of relevant national security information will be first made by the Crown, which may ultimately be called on to justify its decision.
- 6.22 Having held a preliminary hearing, one option available to the judge is to order that the court adopt a closed hearing process for the substantive portion of the case where the national security information is dealt with.
- 6.23 Our approach shares some important common features with the United Kingdom's Justice and Security Act 2013.<sup>95</sup> Most relevant for the purposes of this chapter is that it establishes judges as the arbiter of whether a claim for non-disclosure has been properly made and empowers them to look at the national security information in order to decide how it should be managed in civil proceedings. In the New Zealand context, the government will make the claim that information should not be disclosed, and it would then be the role of the court to decide if the claim meets the legal test. In deciding if the claim meets the legal test, we would expect the courts to be circumspect and mindful of the distinct roles of the executive and the judiciary in our system of government and give significant weight to the expertise of the executive in assessing risks to national security.
- 6.24 Judges' decisions will be informed by submissions from special advocates, who are trained to deal with national security information and represent the interests of the non-Crown party, and submissions from the Crown. Decisions will also be subject to appeal to a higher court.

### **Initial claim for withholding national security information and challenges to that claim**

- 6.25 At the discovery and disclosure stage, the court should use the case management process that would normally apply to the proceedings. The normal case management process should only be departed from where it is necessary to ensure that the relevant information is protected while issues around discovery and disclosure are addressed.
- 6.26 Our approach requires the Crown to assert that information it holds that would otherwise be discoverable should be withheld because it is national security information.<sup>96</sup> The Crown's claim of non-disclosure will most often arise in two circumstances: first, as a result of the standard discovery exercise where the Crown has identified the information as being relevant but non-disclosable because of security interests; and second, when information is not identified by the Crown but is requested by the non-Crown party.

<sup>95</sup> See Justice and Security Act 2013 (UK), pt 2.

<sup>96</sup> As discussed in chapter 5, we saw considerable benefit adopting a broad definition of national security information. This would allow information such as the identity of confidential sources, surveillance techniques and other technological capabilities to fall within the definition of national security information in most cases. For further discussion and analysis of submitter comments on this point, see Appendix 3 at [4]-[12].



- 6.27 All that is required at this stage is for the Crown to present an arguable claim that the information meets the definition of national security information and should not be disclosed. The assertion is not conclusive, because if the other party disagrees with the Crown, they can ask the court to evaluate if the claim is fairly made.
- 6.28 If another party challenges the Crown's claim, a preliminary hearing should take place. As much of this hearing should be held in open court as possible, with the non-Crown party and their lawyer present and able to make submissions. However, in most cases, it will be necessary for a portion of the hearing to be held under closed conditions so that the national security information can be put before the court.
- 6.29 As discussed in chapter 5 at [5.39], our view is that holding a closed procedure at this preliminary stage is justified in order to protect the information while issues around discovery and disclosure are resolved.
- 6.30 The court could refuse to hold a closed preliminary hearing in circumstances where it decides that there is no possible way that disclosing the information would be likely to prejudice national security or any of the other interests specified in the definition. Additionally, as in all cases that involve a contest as to discovery, the court can always refuse to hold a closed preliminary hearing where it is satisfied that the non-Crown party is conducting a fishing exercise or information requested by it could in no possible way be relevant to the case.

### **Preliminary hearings on disclosure of national security information**

- 6.31 At the preliminary hearing, the court will need to consider two things:
- (a) Is the information relevant?<sup>97</sup>
  - (b) Is the information national security information?
- 6.32 If the answer to both (a) and (b) is yes, the court must decide how to deal with the information in the particular case, for example, it could be excluded from proceedings, disclosed to the non-Crown party (possibly with protective measures such as closing the court and suppressing details) or disclosed in a closed procedure.
- 6.33 In order to ensure that the information is protected while these matters are determined at the preliminary hearing, the judge should have the following powers:
- (a) The power to close the court to the public and to exclude non-Crown parties, their lawyers, the media and any other person who does not have security clearance to access the national security information.
  - (b) The power to appoint a special advocate to represent the interests of the excluded non-Crown party.<sup>98</sup>
  - (c) The power to review the national security information and to hear argument about it from representatives on behalf of all parties to the case.
  - (d) The power to direct that a summary of the national security information be produced and provided to the non-Crown party and their chosen counsel, as far as is possible without revealing the content of the national security information, in order to enable them to instruct the special advocate.

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<sup>97</sup> Or, to put it another way, does it meet the requirements for discovery or disclosure under the rules that apply to those proceedings?

<sup>98</sup> We discuss the role of the special advocate and how they will contribute to the production of a summary of the information in more detail in ch 9 of this Report.

- 6.34 We acknowledge the inherent difficulties that can arise when assessing the potential relevance of a particular piece of information at a preliminary hearing. We note that assessing the relevance of information in cases involving national security information may also be more difficult than in conventional litigation. Information held by security and intelligence agencies is often fragmented, and the way in which the information is received, collected and analysed is driven by those agencies' respective functions, priorities and capabilities and, in some cases, the functions and capabilities of other entities that first provided the information. Information that emerges as the case progresses, whether through the provision of summaries of information or otherwise, can lead to a case being reframed or refined. In some cases, a lengthy and iterative process may be required to resolve these issues. As a result, we expect that judges may have to case manage the discovery process more intensively than they might in other litigation.
- 6.35 In our view, despite the additional issues that might arise as a result of the potential relevance of national security information, the court should continue to approach the assessment of relevance at the preliminary stage in the same way it would with other information. However, one additional issue that the court will have to take into account is the fact that, although represented by a special advocate, the non-Crown party and their lawyer would not have had the opportunity to see the information and might not have been able to present a full argument on the issue of relevance.

### Should the information be excluded?

- 6.36 If the court is satisfied that the case can be fairly, or more fairly, determined without reference to the national security information, it should be excluded from the proceedings, and the case should proceed.
- 6.37 A hypothetical example where the court may well conclude that exclusion would not result in unfairness is where the national security information could only support the Crown's case but the Crown does not seek its inclusion. Another example might be where, although the information could help the Crown if presented in closed procedures, the non-Crown party would be unduly prejudiced by the use of a closed procedure. In another situation, the court might conclude that exclusion may not be fair where the national security information would assist the non-Crown party in bringing or defending a claim. These cases will require increased scrutiny to assess if it is in the interests of justice for the case to continue if the national security information is excluded.

### Alternative to exclusion

- 6.38 If the court is not satisfied that the case can fairly be determined if the national security information is excluded, it should consider whether or not any other existing powers or mechanisms might be available to protect the national security information and enable the proceedings to be fairly determined. Such mechanisms could include suppression orders, allowing the concealment of witnesses' identities or closing the court to the public and media.<sup>99</sup> This kind of approach might be appropriate where, for example, the non-Crown party already possesses the national security information or knows the identity of the witness. In such cases, excluding the non-Crown party may not contribute to the protection of the national security information, but it might still be necessary to take steps to protect the national security information, such as by excluding the media.

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<sup>99</sup> The High Court possesses an inherent power to regulate its own procedure and has used this power to, for example, hold in camera hearings, suppress evidence and suppress the identities of people involved in the proceedings. Additionally, the High Court Rules authorise the restriction of access to court files (Rule 3.12) and acknowledge the power of the court to make directions (for example) as to whether evidence on disputed matters of fact should be given in open or closed court (Rule 9.51).

- 6.39 If the court decides that no alternative mechanism or combination of mechanisms can adequately protect the information and enable the proceedings to be fairly determined, the court will have to decide whether or not a closed procedure should be used. A closed procedure would enable the national security information to be used as evidence in the substantive determination of the case while preventing disclosure to the non-Crown party and the public.

### **Closed procedure for use of national security information**

- 6.40 In some cases, after having regard to all of the circumstances of the particular case, the court may decide that national security information must be considered in determining the substantive case and cannot be protected through existing mechanisms outlined above. In these instances, the court should have the power to order that a closed procedure be used for the part of the substantive determination of the case that involves the information.
- 6.41 The judge would have the power to order a closed hearing where the national security information is to be used as evidence. The court should exclude the non-Crown party, their lawyer, the public and media, and it should appoint a special advocate to represent the interests of the non-Crown party. It should also order the production of a summary of the national security information unless it is not possible to do so without revealing the national security information.
- 6.42 The majority of the case should still be held in open court. The modified process should only be available for those limited parts of the proceedings that discuss or refer to the national security information. In practice, therefore, a court may go into closed sessions more than once during the course of a case.
- 6.43 Using a closed procedure for the substantive determination of a civil case represents a significant departure from the standards of natural justice and open justice that are traditionally found in New Zealand law. As such, the closed substantive procedure should be kept as a last resort. In this context, we are mindful of the comments of Baroness Berridge during the passage of the Justice and Security Bill (UK):<sup>100</sup>

It should be a competition of interests, a battle even for the Government to show that national security outweighs fair and open justice and that the nature of these proceedings is so unusual and so contrary to our principles of a fair trial that it should be only when nothing else is possible.

- 6.44 Whether or not a closed procedure should be used must be decided by the court on the facts of the case and having considered the views of the Crown and non-Crown parties. A closed procedure should only be ordered where the court is satisfied that the national security information is sufficiently relevant to the proceedings that it is in the interests of justice to use a closed procedure rather than to exclude the information and allow the case to proceed. As part of this assessment, the court will need to decide if the restrictions on the principle of open justice and the right to natural justice that would result from using a closed procedure are justified by the factors that are in favour of the case being determined using the national security information.
- 6.45 In deciding whether to use a closed procedure, the court should have regard to the degree to which the national security information is likely to be of assistance to the non-Crown party or is determinative of the Crown's case. In our view, using a closed procedure is more likely to be in the interests of justice when the national security information supports a claim or defence of a non-Crown party but the only alternative method of protecting the information would be exclusion, which would be unfair.

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100 Baroness Berridge (26 March 2013) 744 GBPD HL 1035.

- 6.46 It should only be in rare cases that a closed procedure is used to enable the Crown to rely on national security information that supports its case but prevents the information being disclosed to the non-Crown party and their counsel. The court would need to pay careful regard to potential prejudice the non-Crown party will suffer as a result of not having direct access to the information that may support the Crown's case.

### **Does this approach provide sufficient protection for the Crown's interests?**

- 6.47 The availability of a closed procedure and the powers available to the court to tailor a procedure to the particular case should be sufficient to protect national security information. Our recommended approach limits the circumstances where national security information is used to the bare minimum. Where national security information is before the court, it will either be in the context of a closed procedure involving special advocates, or it will be subject to other protective mechanisms available to the court (if they are capable of providing the necessary level of protection).
- 6.48 Under our recommended approach, judges control the proceedings and therefore make the final decision about the disclosure and use of national security information in civil proceedings. This is consistent with the responses received from most of our submitters as well as those individuals and organisations that we consulted outside of government. However, as we have described above, our approach ensures that, in making those decisions, judges are fully informed by arguments from the Crown and security-cleared special advocates.
- 6.49 While some submitters suggested that allowing the executive to override the courts' decisions in some circumstances might be acceptable, we think that it would have undesirable implications for the constitutional relationship between the courts and the Crown. It is inconsistent with the principles of open justice and natural justice and is ultimately unnecessary under our model. However, for completeness, we discuss the executive override model and the reasons why we do not recommend its adoption in more detail in [6.60]–[6.92] below.
- 6.50 The Crown will retain the power to decide not to bring a case, withdraw a civil claim or attempt to settle if it would be required to disclose national security information. Any concerns that the court may err in part of its assessment or that a procedure adopted by the court does not adequately protect national security information can be sufficiently addressed by the ability of either party to appeal the decision of the court in the usual way.

### **Proceedings in which the Crown is not a party**

- 6.51 Under the recommended reforms discussed in Part 1 of this Report, the Crown will be subject to the same discovery and disclosure obligations as an ordinary person unless legislation provides otherwise.<sup>101</sup> A consequence of this is that, in some cases, it may be required to disclose information pursuant to a non-party discovery order. We therefore need to consider how national security information should be handled in such situations.
- 6.52 For the purposes of our discussion, a non-party discovery order is an order sought by a party to a civil proceeding against someone who is not a party to the proceedings on the grounds that the non-party holds or is believed to hold information that may assist the development or resolution of the claim. An order of this nature might arise, for example, from an application under Rule

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101 See ch 3 and the commentary to cls 18 and 22 of our draft Bill in ch 4 of this Report.

8.20<sup>102</sup> or 8.21<sup>103</sup> of the High Court Rules or (more rarely in New Zealand) pursuant to a *Norwich Pharmacal Order*.<sup>104</sup>

- 6.53 It would probably only be in a rare case that the Crown was not a primary party or at the very least an intervenor in any case where national security information was relevant. However, when a non-party discovery order is sought against the Crown and relates to information that the Crown considers is national security information, a departure from the ordinary discovery process is required to ensure that the information is properly protected whilst the application is determined.
- 6.54 Under our recommended approach, the court would have the power to hold a closed hearing to determine whether or not the information met the definition of national security information (and was therefore deserving of additional protection) and whether it met the applicable test for ordering non-party discovery in the particular case. The non-Crown party making the application would be represented by a special advocate, and a summary of the information should be provided to the non-Crown party to the extent it is possible to do so without revealing national security information.
- 6.55 As we explain in Chapter 9, the Crown must meet the actual and reasonable costs of the special advocate. However, the court has power to make a costs order against another party if the circumstances of the case justify such an order. In the case of a non-party discovery application the costs of appointing the special advocate should ordinarily be paid by the Crown. However, the court would retain discretion to award costs against any other party if the circumstances of the case justified it.
- 6.56 Where the court finds that the test for ordering discovery is not met, the application will fail. However, if the court is satisfied that the test for ordering discovery is met and that the information is national security information, it should have all the same powers to order a closed substantive hearing that it would have in cases where the Crown is a party to the proceedings.
- 6.57 As with proceedings in which the Crown is a party, the court should decide whether the interests protected by refusing the application for non-party discovery are outweighed by other considerations that make it desirable in the interests of justice to disclose the information or allow it to be used in a closed procedure.
- 6.58 It is crucial that national security information remains subject to control by New Zealand law and that any court process in which it is used is subject to the control of the New Zealand judiciary. The jurisdictional limits of New Zealand law mean that our recommended closed hearing model can only be used for proceedings in New Zealand. This means that a non-party discovery order could not be made if the information was being requested for the purpose of proceedings in a foreign jurisdiction.

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102 Rule 8.20 relates to orders for particular discovery before proceedings are commenced. The court can order that a person (who does not necessarily have to be a party) make documents available for discovery if it is satisfied that an intended plaintiff may have a claim against an intended defendant but that it is impossible or impractical to formulate the claim without reference to certain documents and that there are grounds to believe that the person has or had control or possession of the documents.

103 Rule 8.21 relates to orders for particular discovery that are made against a non-party once proceedings have been commenced. The court can order that a person make documents available for discovery if it appears to the judge that a non-party is in control or possession of documents that the person would have to discover if they were a party to the proceeding.

104 *Norwich Pharmacal Orders* are rarely used in New Zealand. They are common law disclosure orders made against a third-party defendant who is not involved in the litigation but somehow ‘mixed up in it’. Usually, the defendant in an NPO claim (C) has in their possession documents or material that will be useful to the plaintiff (A) in their claim against (B). Sometimes those documents will enable (A) to properly claim or plead against (B). (C) will not be a party to the litigation between (A) and (B) and thus will not normally be considered a third party by the rules of court: *Norwich Pharmacal Co v Customs and Excise Commissioners* [1973] UKHL 6. Further discussion of *Norwich Pharmacal Orders* in the New Zealand context can be found in John Katz “*Norwich Pharmacal Orders: 35 years on*” (2010) 5 NZIPJ 610.



- 6.59 We considered whether or not non-party discovery orders for national security information should be subject to a blanket exclusion or a ministerial certificate regime similar to sections 17 and 18 of the Justice and Security Act 2013 (UK). In our view, while these mechanisms provide a great deal of certainty, they do so at the expense of proper judicial scrutiny of the Crown's claims for non-disclosure and involve no balancing of the respective interests engaged both for and against disclosure.

## RECOMMENDATIONS

- R12 Section 27(3) of the Crown Proceedings Act 1950 should be repealed and replaced by new legislative provisions that provide for the disclosure and management of national security information in civil proceedings.
- R13 Section 70 of the Evidence Act 2006 should be amended to:
- include information that would currently be covered by common law public interest immunity; but
  - exclude national security information, which will be dealt with under the new legislative provisions.
- R14 National security information should be defined as information that, if disclosed, would be likely to prejudice:
- (a) the security or defence of New Zealand; or
  - (b) the international relations of the Government of New Zealand; or
  - (c) the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.
- R15 The court should hold a closed preliminary hearing to assess how national security information should be used (if at all) in the proceedings.
- R16 A closed hearing should have the following features to ensure that national security information is protected while before the court:
- The judge must close the court to the public and exclude non-Crown parties, their lawyers, the media and any other person who does not have security clearance to access the national security information.
  - The judge must appoint a special advocate to represent the interests of the excluded non-Crown party.
  - The judge will be able to review the national security information and hear arguments about its use from representatives on behalf of all parties to the case.
  - The judge must direct that a summary of the national security information be provided to the non-Crown party and their chosen counsel. If the court is satisfied that it is not possible to produce a meaningful summary without disclosing national security information, the judge may waive this requirement.
  - The judge has a supervisory role over the final content of summary.



- R17 The judge should determine whether to exclude the national security information, make the national security information available to the non-Crown party (including with protective measures) or direct that the national security information be heard under closed procedures. The matters that must be taken into account are:
- whether the information in question falls within the definition of national security information;
  - whether national security interests can be adequately protected if the national security information is provided to the non-Crown party;
  - whether, having regard to the degree to which the national security information is likely to be of assistance to the non-Crown party or determinative of the Crown’s case, the proceedings can be fairly determined without it being put before the court;
  - the degree of potential prejudice to the non-Crown party if the national security information is heard under a closed procedure; and
  - whether the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the interests of justice, to disclose the information or allow it to be used in a closed procedure.
- R18 Where an application is made for non-party discovery against the Crown in respect of information the Crown claims is national security information, the judge should have the power to hold a closed hearing.

#### **OTHER OPTIONS THAT WERE CONSIDERED BY THE COMMISSION BUT NOT RECOMMENDED**

- 6.60 Our recommendations for managing national security information in proceedings have been developed with a view to ensuring that national security information will be protected. The recommended approach provides a range of judicial tools for protecting information, such as excluding it from the proceedings or only disclosing it in a closed procedure involving security-cleared special advocates and secure courtrooms. The court will have a supervisory role in determining that information has been properly identified by the Crown as national security information and in determining how it should be protected. This will be based on submissions from the Crown and a special advocate representing the non-Crown party.
- 6.61 Under our recommended model, it is theoretically possible that the court may order disclosure of information in open court despite the Crown’s assessment that this will create risks to national security. If such an instance were to occur, ordinary appeal rights would be available. However, we consider it highly unlikely that the court would allow material to be disclosed where this would present any significant security risks. The purpose of the court’s supervision is to ensure the Crown’s claim is properly made, not to cut across the long-recognised need to protect national security.
- 6.62 Despite the safeguard of an appeal and the safeguards built into the statutory tests we recommend, the Crown may want some kind of assurance that certain types of information will under no conditions be disclosed in court. This desire for absolute assurance may especially arise where there are commitments of confidence to foreign intelligence partners. The Crown may also be concerned about the inadvertent disclosure of information. In some circumstances, the Crown may consider the consequences of disclosure would be so detrimental to national security that additional protection is needed.

- 6.63 In developing our recommended approach, we have been mindful of these concerns. In addition to our recommended approach, we have examined options that might provide the Crown with a greater level of assurance that information will always be protected. There are many variations on how this assurance could be provided. In broad terms, it could involve the Crown requiring at the outset that information either be completely withheld or heard only in closed procedures, or it could involve a backstop veto by the Crown after the court has made an assessment that information can be disclosed in open court (in which the veto would require information to be withheld or heard only in a closed procedure). Within these broad options, there are some significant questions of policy detail. For example, if the Crown considers that information cannot be disclosed openly, should they be able to choose between withholding information and a closed procedure or should this decision be left to the courts? What level of threat to national security interests would justify the use of the Crown's power to withhold information or require it to be heard only in closed procedures? To what extent is the Crown's decision reviewable?
- 6.64 Because our recommended approach is for the courts to control how information is protected in accordance with new statutory criteria, we do not seek to answer all the detailed questions around how additional assurance for the Crown could work in New Zealand. Instead, in this section, we briefly outline three other possible options and examine how these might operate in practice. These alternatives are being presented for completeness and to inform public debate. They each provide for a greater degree of Crown control over the use of national security information in proceedings and are sufficiently distinct from each other to allow them to be debated both in terms of workability and principle.
- 6.65 The first alternative is for the Crown to be able to require a closed procedure. The second is for the Crown to require that information not be disclosed in proceedings at all. Both these alternatives would apply at the outset and would prevent the court from considering how information should be dealt with in the case at hand. We note that it would be possible to combine these two alternatives, such that the Crown could decide either to require closed procedures or to require information not be disclosed, but that this would give the Crown a significant procedural advantage. The third alternative is for the court to first make the decision (as with our recommended approach) but with a backstop of an executive veto whereby the Crown can direct the court to decide between withholding the information and admitting it to closed procedures, precluding full disclosure or the use of any other protective mechanisms.

### **Alternatives 1 and 2: Crown ability to require protection at the outset**

- 6.66 Under Alternative 1, the Crown would be able to require that information be heard under a closed procedure. Unlike our recommended approach, the court would not be able to order disclosure to the other party or order other ways of protecting information. New legislation would need to give the Crown the ability to require the substantive hearing to be held under a closed procedure in whole or part.
- 6.67 Under Alternative 2, the Crown would be able to require that information be withheld completely. Under this option, the Crown would be able to issue a certificate and exclude material from proceedings. If a certificate was issued, then the information would not be put before the court. This goes a step further than Alternative 1 because it retains a form of public interest immunity certificate that allows the Crown to prevent information being disclosed.
- 6.68 The Crown's power to require closed procedures under Alternative 1 or to withhold information under Alternative 2 would be exercised before a case begins, so the court will have no opportunity to make orders as to how information should be protected.

### *Alternative 1: Crown-initiated closed procedure*

- 6.69 This option provides the Crown with the ability to initiate a closed procedure, providing assurance that information will not be disclosed in open court. The option therefore addresses any potential Crown concern that the courts may err in deciding that the disclosure of national security information in open court does not raise security risks or deciding that the prejudice arising from disclosing the information can be adequately addressed by alternative mechanisms such as suppression orders or witness anonymity.
- 6.70 This approach would give the Crown confidence that national security information can always be treated in accordance with security protocols. Under a closed procedure, information would be stored and viewed in a secure facility and only seen by the presiding judge and by the special advocate representing the excluded non-Crown party's interests. Only court staff with the necessary level of security clearance would be able to manage the information within the court system. Under this option, the judge would still be able to review the information and the special advocate would also have access to it. The non-Crown party represented by the special advocate would also normally be provided with a summary of the national security information (insofar as this does not itself prejudice national security).
- 6.71 The judge would retain the power to exclude any information if, despite the appointment of a special advocate, the judge is not satisfied that dealing with that information in closed procedure provides a fair hearing for the non-Crown party.
- 6.72 We are concerned that, under this option, closed procedures could become more frequent and therefore may become normalised. The fear is that the Crown might develop a practice whereby a closed substantive hearing is held as a matter of course whenever national security information is at issue. This would effectively deprive the court of the power to decide whether information is national security information, whether it should be excluded and how the national security information should ultimately be used in the proceedings.

### *Alternative 2: A Crown certificate excluding information from proceedings*

- 6.73 Alternative 2 would address concerns that there is a limited class of information that should not ever be included in court proceedings, even if highly relevant and even if the proceedings are held in closed court, because the risks of disclosure are too significant.
- 6.74 This option could possibly co-exist with our recommended approach, although there would be tensions. In the majority of cases involving national security information, our recommended approach would apply, and the courts would test any Crown claim that information was national security information. The courts would, in these cases, decide on the best way to protect the information in accordance with the interests of justice in the proceedings. However, the Crown would have a power to issue a certificate excluding any information from proceedings. Therefore, in those rare cases where the Crown considers that the risk of disclosure is just too significant, it would issue a certificate to prevent the information from being considered further in the proceedings (including under a closed procedure).
- 6.75 Under this option, we think that the kinds of information that could be excluded by a Crown certificate would need to be much narrower than those currently allowed for under section 27(3) of the Crown Proceedings Act. Section 27(3) of the Crown Proceedings Act would be repealed and replaced with a new section that would provide for the issuing of certificates on quite narrow and specific grounds.
- 6.76 This option would achieve the purpose of assuring the Crown that the most highly sensitive national security information could be withheld. However, this assurance comes at a significant

cost. The certificate process could be unfair to the non-Crown party on occasion as they may be denied access to information that was relevant to their case and possibly supportive of it. They are also denied the opportunity to have a special advocate review the information and advocate on their behalf.

#### *Alternatives 1 and 2: Safeguards and workability*

- 6.77 Both Alternatives 1 and 2 constrain the role of the court in deciding how proceedings should be managed and what evidence should be admitted. Although neither alternative could preclude the courts from ruling on the lawfulness of the Crown's exercise of the power in question,<sup>105</sup> the courts' ability to review would be limited to this narrow question. A conclusive power would need to be explicitly stated in the legislation. The provision would need to clearly say that the court's normal powers of review were limited and that the court was precluded from going behind the Crown's decision and from viewing the information concerned. Under Alternative 2, information is withheld completely, so if a certificate issued under this model is not to be reviewable by the courts, the legislation would need to expressly state that the court could not order that the information be disclosed or put before the court even under a closed procedure.
- 6.78 Consideration should therefore be given to imposing some other safeguards, and these should be clearly incorporated into the enabling provisions. At a minimum, these would probably need to include the following:
- The Crown would need to provide reasons for the exercise of the power.
  - There should be an enhanced security test that identifies a higher level of risk to national security than the broad definition suggested as part of our recommended approach.
  - The Attorney-General should be required to report annually to Parliament on the exercise of the Crown's power and the reasons it was used.
- 6.79 An enhanced test of national security information could identify a higher level of risk to security interests than is captured in the broad definition recommended throughout this Report. In our recommended approach, we have chosen a definition that is likely to capture a range of national security information, some of which could be properly protected while also being admitted in open proceedings, for example, through redaction of sensitive passages in a document. If the court was precluded from considering these options, it would follow that the definition of national security information should be narrow enough to identify the smaller subset of national security information where non-disclosure or a closed procedure is justified. Without an enhanced test, the Crown would end up having a broad power and could require any proceeding involving national security information to go into a closed procedure.
- 6.80 We considered whether an enhanced national security test could be based around particular kinds of information, such as the identity of sources or particular technology. However, in the end, we saw too many difficulties with listing types of information. A list of types of information would either end up being too narrow to cover all possibilities or would become too broad to create a meaningful threshold. An enhanced test would therefore need to be based on the degree of risk and the importance of the security interests in question.
- 6.81 If, following the issue of a certificate, a case was to proceed without the information, then it will do so under the fiction that the information did not exist. This runs the risk of significant

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105 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622. Here, the Court made a declaration that the public announcement by the Prime Minister made in the course of his official duties as Prime Minister had been made "by regall authority" within the meaning of that expression where it occurs in s 1 of the Bill of Rights Act (1688). The Bill of Rights Act (1688) provides that suspending any laws by regall authority without consent of Parliament is illegal.



injustice in situations where the information was relevant to the proceedings and may have altered the outcome. Although the court's normal powers of review would be limited under Alternative 2, the courts would still ultimately determine whether it would be in the interests of justice for the proceedings to continue after a certificate excluding potential evidence had been issued.

### **Alternative 3: Crown override to require national security information to be excluded or heard in a closed procedure**

- 6.82 Under this third alternative, the Crown would be able to override the decision of the court in any case where the Crown considers that the orders the court has made allow information to be disclosed in a way that prejudices national security. This executive override option, which is based on the Canadian approach, was discussed in some detail in Chapter 6 of the Issues Paper *National Security Information in Proceedings* (IP 38).<sup>106</sup> It differs from Alternatives 1 and 2 in that it could only be exercised following the court's assessment under our recommended approach.
- 6.83 Under this option, the court determines the Crown's initial claim for non-disclosure and decides whether information should be withheld, disclosed or heard in a closed procedure. The Crown, for example, through the Prime Minister or the Attorney-General, would have a statutory power to override the court's decision if it believes that disclosure would prejudice national security. The decision to override the court order would only be reviewable on very narrow grounds, for instance, that the information was not within a defined class of information.
- 6.84 A similar model is provided for in the Canada Evidence Act 1985.<sup>107</sup> Under the Canadian approach, the matter is first considered by a Federal Court judge.<sup>108</sup> The judge applies a public interest balancing test to determine if the information should be disclosed in full, partially disclosed or disclosed in a summarised form. The case is then returned to the court of origin for the substantive case to be heard. At this point, the Attorney General could decide to override the Federal Court's decision and provide a certificate setting out the terms on which information may and may not be used.<sup>109</sup> The exercise of the override power is only reviewable on very narrow grounds that the information to which the certificate relates does not fall within the defined scope. Crucially, the review power does not extend to the merits of the decision to issue the certificate.<sup>110</sup>
- 6.85 The decision to override a decision of the court would be very public and capable of review, albeit on narrow grounds. Reasons would need to be given for the exercise of the veto power. This kind of model would give Crown the assurance that it could prevent the disclosure of certain information in exceptional circumstances.
- 6.86 To our knowledge, the power has never been exercised in Canada. This demonstrates perhaps that concern about the courts allowing disclosure when information should be protected is unfounded. It could also be seen to demonstrate that the political costs of the override are significant. The constitutional implications that would arise from exercising the power mean that, although it is a theoretical possibility, it does not need to be used because the courts and

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106 Law Commission, above n 85, at [6.28].

107 Canada Evidence Act RSC 1985 c C-5, s 38.13. The Canadian approach is discussed in more detail in [6.29]–[6.31] of our Issues Paper (see Law Commission, above n 85).

108 The Federal Court judge that determines the disclosure issues will be different from the judge that determines the substantive case.

109 Canada Evidence Act RSC c C-5, s 38.13(5): "If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate."

110 Canada Evidence Act RSC c C-5, s 38.131.

the executive adopt positions of mutual deference and do not force the issue. Some may consider that this is a reason in favour of this approach.

### *Alternative 3: Safeguards and workability*

- 6.87 Like the other two options discussed above, the override option restricts the judiciary's constitutional role of supervising the exercise of executive power. An approach like this does not sit comfortably with New Zealand's constitutional arrangements. Crucially, Canadian courts have the power to review any legislation and strike down provisions that are inconsistent with the Canadian Charter, while New Zealand courts have no equivalent power.
- 6.88 In Canada, the veto certificate is reviewable on very narrow grounds. We suggest this is an important safeguard. The reporting safeguards and enhanced security test that we outlined above for Alternatives 1 and 2 should also apply. An additional safeguard would be to provide that the courts retain the power to decide whether information should be excluded from proceedings or considered in a closed procedure if the information is subject to a disclosure veto. The Crown should not be in a position of choosing between withholding information and using it in a closed procedure, as this would give them the ability to choose the more procedurally advantageous option.

### **Conclusion**

- 6.89 Any option that allows the executive to determine whether information should be excluded from proceedings or heard only in a closed procedure is difficult to reconcile with the rule of law. All the alternatives discussed in this section impede the courts in the exercise of their function of determining how proceedings should be heard to ensure all parties have a fair hearing. They instead give one party to the proceeding power to determine how those proceedings are heard. We have difficulty understanding why such powers would be necessary or in what types of contexts they would ever be used. We are confident that the courts will use the power to withhold information or initiate a closed procedure appropriately to ensure that information is protected when disclosure would pose a risk to security interests.
- 6.90 As we have discussed throughout this Report, the non-Crown party is at a disadvantage in a closed procedure because they do not get to see all the evidence that will be before the court. The appointment of a special advocate helps mitigate the disadvantage to the non-Crown party but does not remove it completely. Disadvantage to the non-Crown party is also an issue when information is withheld, as this potentially limits the ability of the other party to argue their case based on all relevant material. We therefore consider that it is necessary for the judge to ultimately determine that it is in the interests of justice to withhold information or hear a case under a closed procedure.
- 6.91 The courts can be expected to exercise responsible judgement in relation to national security information, and we see no reason why the recommended approach would be applied in such a way as to create security risks. In practice, we consider that, under our recommended model, the court would almost inevitably order that information be heard in a closed procedure where full disclosure would cause significant prejudice to protected interests.
- 6.92 We consider that our recommended approach therefore provides sufficient assurance to the Crown that national security information will continue to be protected, especially where it is particularly sensitive. We are satisfied that our recommended approach is the best model for reform.



# Chapter 7

## Administrative decisions

### INTRODUCTION

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- 7.1 This chapter considers what should happen when the use of national security information in an administrative decision limits the right of the person affected to access information about how the decision was made, including for the purpose of challenging the decision in court.<sup>111</sup> We have developed proposals that seek to protect national security information<sup>112</sup> while also providing for a robust procedure that protects the rights of the affected party.
- 7.2 Administrative decisions cover a diverse range of subject matter. For the purpose of the Report, we are concerned with what happens when:
- (a) there is a decision that directly affects the rights of a person; and
  - (b) the nature of the decision is such that the affected person would ordinarily be entitled to receive the information on which the decision is based; and
  - (c) the information on which the decision is based includes national security information, that is, information that would prejudice national security interests if disclosed.
- 7.3 Administrative decisions that directly affect a person's rights are subject to sections 27(1) and 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA). Given the time pressures involved in some administrative decisions, the requirements of natural justice do not always require that persons be given the opportunity to challenge information prior to a decision being made.<sup>113</sup> Instead, an affected person will be entitled to receive the relevant information after a decision is reached. The right to receive information used in administrative decisions is based on common law norms of fairness and natural justice (affirmed in section 27 of NZBORA) and given statutory expression under section 23 of the Official Information Act 1982<sup>114</sup> and under Principle 6 of the Privacy Act 1993.
- 7.4 Having received the information, the affected person is then able to challenge the decision through judicial review or an appeal if this is provided for in statute. This will provide scope for the decision to be independently tested by the courts. Depending on the nature of the court's review, the information on which the decision was based might be subject to different degrees of scrutiny.

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111 For the purpose of this chapter, the administrative decisions that we are concerned with are those made by a minister of the Crown or other official in the exercise of a public power that affects individual rights.

112 In Chapter 5, we defined "national security information" as information that, if disclosed, would be likely to prejudice:

- the security or defence of New Zealand; or
- the international relations of the Government of New Zealand; or
- the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.

113 In our Issues Paper (Law Commission, above n 85, at [4.3]–[4.6]), we discussed how the context in which an administrative decision is made can affect the degree to which the requirements of natural justice might be derogated from or modified.

114 David McGee "The OIA as a law tool" [2009] NZ L Rev 128.

- 7.5 There is therefore a tension where national security information is taken into account in administrative decisions. If disclosure of national security information could create major security risks, there will be good reason why it cannot be provided in full to the affected person, either following the initial decision or in the judicial review process. However, it is important that, despite the use of national security information, persons whose rights are affected by administrative decisions have the opportunity to challenge those decisions and to test the information relied upon.

## WHY IS REFORM NEEDED?

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- 7.6 We take as a starting point that there will be some areas of administrative decision-making where information gathered by security and intelligence agencies needs to be used to inform a decision that affects a person's rights. In some cases, the disclosure of the information will raise security risks. An example would be the cancellation of a passport under the Passports Act 1992 based on information received from intelligence partners that demonstrates the person in question plans to travel to another country and undertake terrorist activities. In cases such as these, there is a tension between two key interests. The Crown should be able to rely on national security information for legitimate purposes, but the affected person should be able to test that the information has been properly relied upon in the particular case.
- 7.7 As discussed in the Issues Paper *National Security Information in Proceedings* (IP 38), several statutory regimes have established closed hearing procedures that apply where the relevant court or tribunal hears an appeal or review of a decision involving national security information. The Issues Paper discussed closed procedures where national security information is involved under the Immigration Act 2009, the Passport Act, the Terrorism Suppression Act 2002, the Telecommunications (Interception Capability and Security) Act 2013 (TICSA) and the Customs and Excise Act 1996.<sup>115</sup> We compared the core elements of the different procedures under these regimes and identified a number of inconsistencies.
- 7.8 The inconsistencies go to major aspects of the procedure, including who decides whether a closed procedure should be used, who determines if the information meets the definition required, the terminology used, whether summaries are produced and the availability and appointment of special advocates.<sup>116</sup> The Immigration Act procedure is, in our view, the most robust and includes several features designed to protect the interests of the non-Crown party, including a requirement that information not be taken into account by the Immigration and Protection Tribunal unless it has been provided in summary form to the affected person. However, other statutes have not adopted as many procedural protections, and the Immigration Act procedures have not yet been tested in the Tribunal or in the High Court.
- 7.9 While some variation in procedure might be justified due to the different legislative contexts, it is undesirable for core decision-making elements and features such as the appointment and roles of special advocates to be different across various regimes. In addition, the lack of judicial control over the procedure provided for in some of the statutes is potentially concerning. None of these statutes allow the court to order that information be disclosed when other public interests outweigh the national security interests.<sup>117</sup> The Terrorism Suppression Act and the Passports Act both provide for closed hearings but do not explicitly allow for the appointment of special advocates. In addition, under both these statutes and TICSA, the court appears to

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115 We understand that the relevant provisions of the Customs and Excise Act were never used and will be repealed in the near future. We do not therefore propose to comment further on the Customs and Excise Act procedure.

116 Law Commission, above n 85, at [4.27] onwards.

117 In contrast, under the Criminal Disclosure Act 2008, the court may order disclosure if the interests in favour of disclosure outweigh the interests protected by withholding the information.

have little or no power to require further information to be disclosed in a summary to the affected person.<sup>118</sup> Regardless, the court must determine the proceedings on the basis of all the information available to it. TICSAs provide for representatives of network operators subject to that Act to be security-cleared, but the special advocate is not able to communicate with these representatives after viewing the security information except with leave of the court. We are particularly concerned with the Passports Act and the Terrorism Suppression Act, under which we consider that there is a real risk that the courts will be unable to ensure proceedings can be fairly heard.

- 7.10 To be able to bring a meaningful challenge to an administrative decision, the affected person needs to first have access to enough information about the decision so that they can properly assess whether there are grounds for challenge. Notably, sections 37 – 39 of the Immigration Act provide that, where classified information is relied upon, a summary of allegations and reasons for the prejudicial decision must be provided. This protection is not present in the other statutes that provide for the reliance on national security information in administrative decisions.
- 7.11 We consider that there is a clear need to reform these various schemes and introduce greater cohesion and a more principled approach to protecting national security information that is taken into account in administrative decisions while also allowing the decision to be challenged by the affected party. In our view, there is scope to improve these processes to give better effect to the natural justice protections under section 27 of NZBORA and provide more robust mechanisms for the affected person to receive a fair hearing while still ensuring that national security information is protected.
- 7.12 Submitters generally favoured greater alignment between different areas of administrative review. The Chief Ombudsman, Dame Beverley Wakem, supported giving the courts greater power to require more information to be disclosed in the summary of national security information. The New Zealand Law Society considered that inconsistencies amongst existing statutory regimes suggests there is some value in developing a single statutory regime applicable to administrative and civil contexts. The Privacy Commissioner stated that “a standardised process would best reflect and balance the various public interests involved, and is preferable to introducing variant approaches for each statutory regime or new context in which national security information can be relevant to decision-makers”. The New Zealand Security and Intelligence Service and the Government Communications Security Bureau, in their joint submission, also considered there were advantages in greater consistency though noted in discussions with us that there are some areas where particular differences are justified, for example, TICSAs protect the interests of network operators when national security information is used by allowing them to have employees security-cleared.

## OUR APPROACH TO REFORM

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- 7.13 Our approach favours consistency but also recognises that different administrative decisions raise their own particular issues when taking account of national security information. If the information is not taken into account, the decision may not be fully informed or based on the best evidence. However, if it is taken into account, the decision is then made on the basis of information that cannot be disclosed to the affected person and cannot be challenged by the

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118 In our Issues Paper, we noted the particular inconsistency between the Passports Act and Terrorism Suppression Act on the one hand and the Telecommunications (Interception Capability and Security) Act 2013 [TICSA] on the other with respect to the court’s role in approving a summary of the information. While the first two statutes provide that the court *must* approve a summary prepared by the Attorney-General (unless the summary would itself disclose the relevant information), TICSA provides that the court *may* approve the summary. See Law Commission, above n 85, at [4.45].

affected person in open court. The presence of relevant national security information therefore presents a dilemma.

- 7.14 In some cases, with high stakes and limited time, it is important that the decision-maker be able to take account of relevant national security information (which may be the best available evidence) without delay and without an unduly complicated process. In other cases, there will be less time pressure, and it will be possible to use a process whereby national security information is excluded from consideration by the decision-maker on the basis that available open-source information demonstrates the same facts and the national security information does not need to be relied on.
- 7.15 We understand that the latter approach is what currently happens for many decisions under the Immigration Act. National security information can be taken into account, but generally it is possible for those responsible for undertaking investigations and assembling evidence to rely on open-source information, which is then passed on to the decision-maker. This approach thereby avoids the need to use the specific procedures in the Immigration Act that apply when national security information is provided to decision-makers.
- 7.16 We have considered whether reform should clarify how and when national security information should be taken into account in the initial stage of administrative decision-making. We have reached the view that this should be left open, due to the variety of ways that national security information may be relevant and the importance of enabling decisions to be made on the best available evidence in tight timeframes.
- 7.17 Instead, we have decided that it is in keeping with our terms of reference to focus on the narrower question of how the use of national security information changes things compared with the position if the decision had been made on the basis of other information. We are concerned with how to ensure that those affected by administrative decisions in which national security information is taken into account receive substantive natural justice protections as similar as possible to those they would receive if national security information had not been used. It is not the place of this Report to comment on broader issues of natural justice in administrative law.

### **SUGGESTIONS FOR REFORM: INITIAL STAGE OF DECISION-MAKING**

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- 7.18 We consider that there are three key areas for reform that can be applied to all administrative decisions at the initial decision-making stage where the decision affects rights protected under NZBORA.
- 7.19 The first is to require a summary of information to be provided after a decision is made if the complete information is being withheld for security reasons. We note that, for decisions under TICSAs, the summary will only be required for smaller network operators who do not have security-cleared employees able to receive the full information. This reform would not need to apply to decisions under the Immigration Act given that a summary is already provided for under that Act if “classified information” is to be relied on.
- 7.20 The second reform is to require that an affected person be informed of their right to complain to the Inspector-General of Intelligence and Security. As the Immigration Act precludes the right of complaint, this would not apply to decisions made under that Act. We consider that, given the ability under TICSAs for network operators to have decisions reviewed by

an independent panel,<sup>119</sup> it is also unnecessary to notify affected network operators of the availability of Inspector-General review.

- 7.21 Finally, we also suggest that the Inspector-General be notified of administrative decisions that affect individual rights where information that informs the decision is prepared by the security and intelligence agencies. Unlike the other two reforms, this would apply to decisions under the Immigration Act.
- 7.22 We consider that these requirements of provision of summary and notification of review avenues are necessary to minimise the degree of prejudice to the affected party that results from the national security information being withheld.

### Provision of summarised information

- 7.23 If a person would be entitled to receive information taken into account in a decision that affects their rights but for the fact that the information must be withheld for security reasons, the person should be entitled to receive instead a summary of the information.
- 7.24 The purpose of the summary is to provide the affected person with straightforward and prompt access to the information about why the decision was made. This is necessary as a matter of principle, based on natural justice and the rights of a person to access information relevant to themselves.
- 7.25 Under the current law, there is a general expectation that persons whose rights are affected by administrative decisions should have access to information about those decisions. Section 23 of the Official Information Act creates a right of access by a person to reasons for decisions affecting that person. This right is expressly subject to the non-disclosure grounds in section 6(a)–(d) of the Official Information Act, which include matters of national security. In addition, Principle 6 of the Privacy Act establishes the right for people to access information about themselves held by government agencies. However, under section 27 of that Act, an agency may refuse to disclose information that would prejudice national security. In their submission on this review, the Privacy Commission said that Principle 6 is a:

... foundational right which has been described by the Court of Appeal as being of “constitutional significance”. It is the one privacy principle that creates a legal and enforceable right as against public sector agencies. It is also one of the two privacy principles where a breach amounts to an “interference with privacy” regardless of the level of harm sustained by the affected individual. [footnotes omitted]

- 7.26 In our view, the provision of a summary of information is a necessary protection where information cannot be disclosed in full. We are concerned that, in some areas, the level of information provided to affected persons is not sufficient for them to be able to assess whether there may be grounds for challenge. We acknowledge that national security interests can justify limiting the right to access information, yet we consider that, in order to be a proportionate limit, the right should still be given effect as far as possible, such as through a summary. Because administrative decision-making generally relies on review and does not give the affected person an opportunity to challenge information before it is taken into account, it becomes imperative for the information to be provided after the decision. When full disclosure may create a security risk, a summary is the next-best alternative. Without a summary of information, the person has no way of knowing what information was used against them and whether this information is balanced and reliable.

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119 See s 39 of TICSAs, which allows for an independent review panel to be appointed by the Minister, and s 56, which allows for review by the Commissioner of Security Warrants.



- 7.27 We acknowledge that creating a summary may be difficult. It may require careful selection of material, and inevitably, there will be gaps, as sensitive information will be excluded or communicated in general terms. Because of this difficulty, we do not suggest any criteria or standard for the summary. However, as we develop further in the next section, the Inspector-General has the power to review and suggest amendments to the summary if, in their view, further information could be included without creating undue security risks.
- 7.28 As we mention above, the Immigration Act currently requires that a summary be prepared where “classified information” is used. The provisions in sections 37 – 39 of the Immigration Act go further than our proposed reforms, as they require the summary of information to be provided to the affected person for comment before a decision is made. We consider that this requirement should not be applied across the board due to possible time pressures in some administrative decisions. Under our proposed reforms, the Passports Act, the Terrorism Suppression Act and TICSA will all need to be amended to introduce provisions requiring a summary of information to be provided.<sup>120</sup> We suggest that section 39 of the Immigration Act could be a useful model for reform. This section requires that reasons must be given when a prejudicial decision is made on the basis of “classified information” and must “contain the information required under section 23 of the Official Information Act 1982 as if the reasons were given in response to a request to which that section applies”.
- 7.29 Under the Immigration Act, the summary is agreed between the chief executive of the relevant agency and the Minister or the refugee and protection officer concerned. We suggest a similar approach could be used in other areas of administrative law. In particular, it will usually be necessary for security and intelligence agencies to have a role in preparing the summary.
- 7.30 Finally, we note that there is also a practical case in favour of requiring a summary of non-disclosed information. As discussed above, in principle, the summary better enables the affected party to challenge the decision. In practice, however, the provision of comprehensive summaries should ensure that affected parties do not waste time and money pursuing fruitless review or initiating review proceedings as a means of getting the information about their case. This is an especially desirable outcome given that review mechanisms where national security information is taken into account will be more complicated than in an ordinary case.

### Review by Inspector-General of Intelligence and Security

- 7.31 The second element of our reforms directed at the initial decision-making stage relates to the ability of the Inspector-General of Intelligence and Security to review the use of security information in certain administrative decisions.
- 7.32 Except in respect of decisions where section 42 of the Immigration Act limits the right,<sup>121</sup> a person already has a right of complaint to the Inspector-General about how the security and intelligence agencies act when providing information to a decision-maker where rights are being determined. Section 11(b) of the Inspector-General of Intelligence and Security Act 1996 provides that one of the functions of the Inspector-General is to inquire into complaints by any New Zealand person that they have been “adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency”. This is broad enough to include complaints about the way in which the security and intelligence agencies have presented

<sup>120</sup> As noted above, under TICSA, this will only be necessary where there are no security-cleared employees of the network operator able to receive the information in full.

<sup>121</sup> Section 42 states: “No complaint may be made to the Inspector-General of Intelligence and Security about any situation or set of circumstances relating to an act, omission, practice, policy, or procedure done, omitted, or maintained (as the case may be) in connection with a decision under this Act involving classified information (including a determination in proceedings involving classified information).”



- information to a decision-maker resulting in a decision that adversely affected the person, for example, if the information was not balanced.
- 7.33 Under this review model, the role of the Inspector-General is to scrutinise the information prepared by the intelligence and security agencies and presented to the decision-maker and the conduct of the agency in doing so. The Inspector General's role is not to review the actions of the decision-maker. That is the role of the courts in a judicial review or an appeal. It is, however, fitting for the Inspector-General to supervise how the security and intelligence agencies gather and assemble information for decision-makers to take into account when determining a person's rights.
- 7.34 We have considered whether the review should be automatic rather than available only on the request of the affected party. We have decided that an automatic review is not necessary but that, when a person is notified of the decision affecting their rights, they should also be told that they have a right to complain to the Inspector-General. Drawing a person's attention to their right of complaint will provide an additional measure of accountability for the agencies presenting the secure information to decision-makers and additional protection for the affected person.
- 7.35 The review by the Inspector-General will be able to consider whether the security information is:
- (a) properly classified as secure information;
  - (b) balanced and complete such that information advantageous to the affected person is included where relevant and any appropriate qualifiers that might influence the decision-maker's views on reliability are included; and
  - (c) provided to the affected person through a summary that contains as much detail as possible, subject to the need to protect the secure information.
- 7.36 The Inspector-General would be able to issue any recommendations consistent with the powers under the Inspector-General of Intelligence and Security Act, including recommending that more information be disclosed in a revised summary, recommending that the decision-maker be notified if revisions are required to the information initially presented to the decision-maker and issuing an unclassified version of a report of their findings to the affected person.
- 7.37 The Department of Internal Affairs administers the Passports Act. In their submission, they noted that an independent review role is important and should include the ability to make recommendations for the handling of similar cases in future.
- 7.38 We also suggest that the Inspector-General should be notified whenever an administrative decision is made in reliance on national security material and affects individual rights. Under section 11(1)(c), the Inspector-General may, on his or her own motion, inquire "into any matter where it appears that a New Zealand person has been or may be adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency into the activities of the security and intelligence agencies". This is an important safeguard. The ability for the Inspector-General to initiate a review is relevant to our decision that automatic review of the use of security material in administrative decisions is not needed. Having discussed this with the Inspector-General and the Deputy Inspector-General, we reached the conclusion that notification is sufficient to protect the interests in question. We consider that requiring agencies to notify the Inspector-General when such decisions are made will better enable the Inspector-General to perform an oversight function and will help ensure that reliance on secure information in administrative decisions receives sufficient scrutiny.

- 7.39 The requirement to notify the affected person of a right of review by the Inspector-General would not apply to decisions under the Immigration Act or TICSAs, consistent with the current schemes of those Acts, which provide alternative review mechanisms and, in the case of the Immigration Act, precludes complaints to the Inspector-General. The requirement to notify the Inspector-General when this information is used would, however, apply to decisions under these two Acts to enable the Inspector-General to remain informed of activities in this area and therefore promote effective oversight.
- 7.40 There are two key reasons for requiring notification to both the affected person and the Inspector-General generally in administrative decisions (with the exception of legislative schemes that provide for alternative reviews). First, receiving a summary is not the same as receiving all the information. A summary is more limited and provides less scope for the person to independently assess the information. This suggests that a form of independent assessment more accessible than the High Court may be needed to ensure that the affected person's right to natural justice is upheld and enable them to decide whether to formally challenge the decision in the courts. This form of assessment currently exists, but many affected persons may not be aware of it. Second, when decision-makers (including ministerial decision-makers) rely on information provided by the security and intelligence agencies, there is less scope to test that information compared with information provided by departmental officials. The ability of the Inspector-General to initiate a review provides oversight and can promote a more rigorous approach to using national security information in administrative decisions.
- 7.41 This reform is particularly important for decisions made under the Passports Act and the Terrorism Suppression Act, which provide for a challenge in the High Court but which, unlike the Immigration Act and TICSAs, do not have any lower-level review available.
- 7.42 We note that there is currently provision in section 26 of the Inspector-General of Intelligence and Security Act for information to be withheld from the Inspector-General if the Prime Minister issues a certificate. We would expect this to be used only in truly exceptional cases and do not suggest changing this provision. If the Inspector-General's ability to review information is constrained by a section 26 certificate, it will become necessary for an affected party wishing to challenge a decision to have recourse to the courts.

## RECOMMENDATIONS

- R19 If a person would be entitled to receive information about a decision that affects their rights but the information must be withheld for security reasons, the person should instead receive a summary of the information agreed by the chief executive of the relevant agency and the decision-maker.
- R20 When an administrative decision is made that gives rise to the right of complaint to the Inspector-General of Intelligence and Security, the person affected must be notified of their right to make a complaint and have the actions of the security and intelligence agencies reviewed by the Inspector-General.
- R21 When security and intelligence agencies provide information used in an administrative decision that affects the rights of an individual, the Inspector-General must be provided with a copy of the information given to a decision-maker and a record of the decision made.

- R22 The decision-maker may decide to reconsider the decision if the Inspector-General makes a finding that the information was not reliable or balanced.
- R23 The Passports Act 1992, the Terrorism Suppression Act 2002, the Telecommunications (Interception Capability and Security) Act 2013 and the Immigration Act 2009 should be amended where necessary to give effect to the recommendations above.

## JUDICIAL REVIEW AND APPEALS OF ADMINISTRATIVE DECISIONS

### The importance of the right of review

- 7.43 Persons whose rights are affected by the decisions of a public authority have the right to bring judicial review proceedings. As discussed above, if there is no opportunity for a person subject to a decision to make representations to the decision-maker at the initial stage, judicial review becomes the primary way to ensure that the right to natural justice is met. It is an important check on administrative decision-making, giving affected persons recourse to the courts to determine whether the decision reached is reasonable.
- 7.44 Judicial review proceedings can be seen as a subset of general civil proceedings and are governed by the rules of evidence under the Evidence Act 2006. However, the current approach to judicial review of administrative decisions where national security information is taken into account varies considerably depending on the statute under which the decision was made. We discuss this more fully in our Issues Paper *National Security Information in Proceedings* (IP 38) in Chapter 4.
- 7.45 Some statutes, notably the Passports Act and the Immigration Act, provide for an appeals process for certain types of administrative decision. There is an important difference between the nature of the review available under these pieces of legislation and the alternative of judicial review. Judicial review is limited to a consideration of whether the initial decision was made lawfully,<sup>122</sup> while under the appeal provisions in both the Passports Act and the Immigration Act, the High Court or Immigration and Protection Tribunal is empowered to consider the matter anew and substitute their decision on the merits.<sup>123</sup>
- 7.46 We propose that the procedural provisions setting out how closed procedures should operate across different areas of administrative appeal and review should be replaced with the system that we recommend in Chapters 5 and 6 above. It is our view that the inconsistencies in the current range of closed procedures are difficult to justify, and it would be significantly better to have a single process that applies across the different areas. We think that this process, as outlined in the previous chapters, will better protect fair hearing rights while also protecting information when disclosure is likely to create security risks. This section will explain why we prefer this approach, and how it will apply in practice.

### Application of civil model in appeals and reviews of administrative decisions

- 7.47 As mentioned above, administrative decisions sometimes need to be made under urgency, and at times, the stakes may be very high. Even with good faith being exercised by all involved, it is inevitable that mistakes will sometimes be made. At the initial decision-making stage, we have noted the importance of enabling officials to make decisions based on the best evidence,

<sup>122</sup> In a judicial review, the court will determine whether the decision was made on reasonable grounds and may require the decision-maker to reconsider the decision based on additional information or to exclude certain information from consideration.

<sup>123</sup> See Passports Act 1992, s 29AA(3): “Where the appeal relates to a matter within the discretion of the Minister, the court may substitute its own discretion for that of the Minister”; and Immigration Act, ss 196, 197, 198 “determine the matter de novo”.

and we have stated that it may be reasonable and indeed necessary to rely on national security information. The difficulty is in providing for a robust review procedure that accommodates the need to protect security interests that may be prejudiced if the information is disclosed.

- 7.48 For persons involved, the rights may be hugely significant. Removing a passport, for example, prevents a person from exercising their right to freely leave New Zealand under section 18(3) of NZBORA. While that right is subject to justifiable limitations, there should be proper recourse to test the reasonableness of such a decision. However, it is also important that the Crown be able to defend the reasonableness of the decision without risking prejudice to national security.
- 7.49 In an application for judicial review or appeal of an administrative decision where national security is taken into account, there will almost inevitably be relevant information that the Crown seeks to withhold from the affected person on security grounds. However, it is our view that this does not in itself justify the automatic use of a closed procedure as is currently the case under the Immigration Act, Passports Act, TICSAs, Terrorism Suppression Act and Health and Safety at Work Act. Instead, we suggest that the general civil model remains the best option to protect the affected person's right to a fair trial while also ensuring that national security information is not publicly disclosed.
- 7.50 Under our proposed model for civil proceedings, the Crown will be able to withhold information that would otherwise be discoverable if the disclosure of that information may prejudice national security interests. The other party will have received a summary after the decision was made and will also be able to challenge the Crown's claim not to disclose. If there is a challenge, the judge may view the information and may appoint a special advocate to present arguments on behalf of the person seeking disclosure. A further summary may be prepared at this stage under the supervision of the court and taking into account submissions of the special advocate. If the information is found to be of the sort that cannot be disclosed because doing so may prejudice security interests but the exclusion of the information would cause prejudice to the proceedings, the judge may order that a closed procedure should be used for the substantive hearing. This means that the information will not be given to the person directly affected or to their lawyer but will instead be provided to a security-cleared special advocate appointed to represent their interests.

#### *Use and protection of national security information*

- 7.51 The current approach (with automatic adoption of closed procedures) allows the Crown to have the benefit of using the national security information without disclosing it to the affected person. This could be unfair to the non-Crown party, who should be able to present arguments for full disclosure. We suggest that the final decision on disclosure should be made by the judge with regard to the degree of prejudice to the parties and the nature of the security interests. Under section 27(3) of NZBORA, there is a right to bring civil proceedings against the Crown and defend proceedings brought, and these proceedings must be heard according to law in the same way as proceedings between any two ordinary parties. In our view, equality of arms requires that the default position of equal access to material being put before a judge be strongly affirmed and departures from this – whether exclusion of material or a closed procedure – be reserved for cases where it is necessary. In particular, where the material assists the Crown, we consider that it is important for the Crown to separately present the case for protection of information in proceedings (that the material not be given to the affected party) and use of information in proceedings (that the information be taken into account by the judge in determining the case).
- 7.52 Under our model, the judge will need to consider first whether national security interests justify withholding information from a party who would otherwise be entitled to receive it and, second,

whether the information should still be used in the proceedings despite being withheld from the party. In relation to the first question, we would expect that the judge would give significant weight to the view of the Crown, given their expertise in areas of national security. However, in relation to the second question, the interests of justice require that the judge consider the Crown's position and the position of the non-Crown party and the degree of prejudice to each if the information is either excluded from the proceedings or admitted in a closed hearing that the non-Crown party does not attend. The public interest in open justice should also be taken into account. The High Court and the Immigration and Protection Tribunal would have the ability to make orders for protection that do not go so far as full exclusion, for example, redacting material that identifies particular sources or means of surveillance but allowing the substantive allegations to be released in open proceedings.

- 7.53 In some cases, the use of closed procedures may be the best way of ensuring that the information is protected and the case can be heard fairly. We envisage that a closed procedure would be used where there would be significant security risks of disclosing the information to the affected party and where the proceedings cannot be fairly determined without examining the secure materials. In such a case, the use of a closed procedure may provide the only way to meaningfully review the decision.
- 7.54 We have considered the alternative of retaining the automatic use of a closed procedure in areas where this is the status quo. We have reached the view that this approach has several disadvantages. In particular, our consultation and research has led us to the view that, in order to properly protect the fair hearing rights of the non-Crown party, a special advocate should be able to present arguments for the disclosure of information. The Crown should have to justify use of a closed procedure in a given case. Requiring closed procedures for a class of cases under a particular statute does not give due recognition for the important rights at stake, including under section 27 of NZBORA, and the importance of open justice in our legal system.
- 7.55 A further rationale for a single approach is that this will assist in the development of case law given the likely rarity of cases that raise these issues. It will avoid the ongoing fragmentary introduction of closed hearing provisions in new legislation. As yet, none of the existing statutory schemes have been tested. We are of the view that there is no advantage in retaining disparate approaches when the key issue of how best to reconcile fair trial rights and protection of information applies in a range of areas. We see our suggested model outlined in Chapter 5 and 6 as a template that should be applied whenever this issue arises. Any departures from our approach, for example, under the Immigration Act to reflect the jurisdiction of the specialist Tribunal or under TICSA to reflect the role of security-cleared employees of affected operators, should be limited to matters that can be applied consistently with the overall policy approach we suggest.

#### RECOMMENDATION

- R24 Consequential amendments are needed to legislation that currently provides for closed or semi-closed procedures in judicial review or appeals of administrative decisions. These procedures would be modified to ensure greater consistency with R12–R18 and R30–R41.



# Chapter 8

## Criminal prosecutions

### INTRODUCTION

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- 8.1 We take as a starting point that those accused of criminal activity have a right to a fair trial, as affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA) and given effect through the minimum standards in sections 24 and 25 of that Act. In our Issues Paper, we took the preliminary view that the use of closed procedures in criminal prosecutions cannot be reconciled with fair trial rights. This view received widespread support from submitters and in our consultation meetings. We therefore recommend that the changes outlined in earlier chapters to introduce closed procedures in some tightly defined civil cases will not be applicable to substantive criminal trials.
- 8.2 The New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) submitted that closed procedures in a criminal trial should not be ruled out. They stated that, under the current system, a case might arise in which an integral piece of evidence would present security risks if disclosed, and the Crown would then be faced with a choice between being unable to properly prosecute and revealing national security information. We acknowledge that the Crown will be faced with this choice. However, we agree with the Criminal Bar Association that the right to a fair trial requires that:
- ... the defendant and his/her fully informed representative have enough knowledge about the evidence making up the case against the defendant to make it possible to investigate, verify, challenge or rebut that evidence effectively. This is an irreducible minimum standard of fairness.
- 8.3 Put simply, a person accused of a crime must be able to present an effective defence, and this means they must have access to material being used against them and material that might assist them in defending themselves. There is also a strong open justice interest in public proceedings. We recognise that, in a number of areas, there have been justifiable limitations to this. However, we reiterate that it is up to the court to decide what level of disclosure is required to meet the standard of fair proceedings.
- 8.4 In the course of our review, we have identified some areas in which more minor reforms could improve the status quo. We accept that Police should be able to use secure information in their investigations in order to protect public safety and follow up on areas of potential criminal offending uncovered by the security and intelligence agencies. At the same time, this information must be protected in any downstream proceedings, while also upholding fair trial rights.
- 8.5 The use of secure information in Police investigations raises issues for this review only when it creates potential questions about disclosure in proceedings. This can occur in two areas: first, if the Police apply for a search warrant on the basis of secure material and this is later challenged; and second, if the information becomes relevant to a criminal prosecution.
- 8.6 We suggest in this chapter that, if a search warrant is issued on the basis of national security information, a challenge to that warrant could be heard using a closed procedure where this is necessary to protect the information.



- 8.7 Where security information is relevant to criminal proceedings, the current law provides an exception to the ordinary disclosure requirements and allows the information to be withheld from the person charged. The person charged can challenge the non-disclosure but will have no access to the information and therefore limited ability to present arguments for disclosure.
- 8.8 We consider that this should be reformed to provide for the use of a special advocate. The special advocate would be able to advance arguments that the information should be disclosed because the information is not national security information or because the security risks do not justify non-disclosure. The special advocate would also be able to argue that withholding the information is prejudicial to the accused because the information would be advantageous to their case and that therefore the proceedings should be dismissed. The judge should have the power to order that the material be disclosed or alternatively that proceedings be dismissed if disclosure is necessary for a fair trial but the security risks are such that the information should not be disclosed to the accused.
- 8.9 Finally, it should also be made explicit that the prosecutor should be able to withdraw a criminal prosecution if the judge orders disclosure of security information but the Crown considers the risks of disclosure are too high to justify continuing with the prosecution. If a judge dismisses the proceedings, this is deemed to be an acquittal. In contrast, if proceedings are withdrawn, there is scope for them to be brought again, for example, if further evidence is discovered.

## **CURRENT LAW**

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- 8.10 The Criminal Disclosure Act 2008 controls how information will be disclosed by the prosecution to the defence. Section 13 of the Criminal Disclosure Act requires the disclosure of any relevant information unless there is a reason to refuse the disclosure. The prosecutor must disclose a list of information that is being withheld and the reasons, and if the defendant requests, they must also provide grounds in support (unless giving grounds would itself prejudice the protected interests that justify non-disclosure of the information in question). Under section 16(1)(g), information does not have to be disclosed if it would be likely to prejudice New Zealand's security or defence, international relations or the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.
- 8.11 The initial decision whether to disclose or withhold information is made by the prosecutor. The defendant is then able to challenge this decision under section 30, which provides two possible avenues for objection. The first is that the reasons claimed for non-disclosure do not apply. The second is that, even though the information may be withheld (that is, the reasons apply), the interests in favour of disclosure outweigh the interests protected by withholding the information. Under section 30, the court may order disclosure of the information subject to "any conditions that the court considers appropriate". This affirms the court's role in weighing the competing interests under the Act. There is also case law to the effect that the court may view the information subject to the application.<sup>124</sup>

## **USE OF NATIONAL SECURITY INFORMATION BY THE POLICE**

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- 8.12 Section 8C of the Government Communications Security Bureau Act 2003 provides that one of the functions of the GCSB is to cooperate with and provide advice and assistance to the Police. Section 4H of the New Zealand Security Intelligence Service Act 1969 provides that, for the purpose of preventing or detecting serious crime in New Zealand or any other country, the

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124 *Edwards v R* [2012] NZCA 375.

Director of Security may communicate material that comes into the possession of the NZSIS to the Police or to any other persons and in any manner that the Director thinks fit.

- 8.13 These provisions are an important part of the context for the use of national security information by the Police. It is outside the scope of this project to consider how the Police proceed once they receive national security information relevant to their law enforcement role. We accept, however, that there is a public interest in ensuring Police are able to undertake investigations on the basis of information provided by security and intelligence agencies in order to protect public safety. If the Police are concerned about the information being released in a downstream proceeding, it may hamper their investigations. If security and intelligence agencies do not have confidence that information will remain protected, they might not pass this information to the Police, which could lead to a situation where there are unnecessary risks to public safety. For the purposes of the present review, we are concerned to ensure that Police can undertake investigations based on national security information without facing the risk that this information will need to be disclosed in court proceedings that stem from the investigations. We draw a distinction between evidence used in proceedings and information used in Police investigations and law enforcement activities.

## RECOMMENDED REFORMS

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### Challenge to a search or surveillance warrant

- 8.14 The Search and Surveillance Act 2012 currently requires that applications for a search or surveillance warrant must contain, in reasonable detail, particulars about the grounds on which the application is made. As the Law Commission stated in our 2007 Report on search and surveillance powers,<sup>125</sup> the interests of personal privacy require that both the applicant and the issuing officer be satisfied that there are reasonable grounds for the issuing of the warrant.
- 8.15 Our consultation with the Police and security and intelligence agencies suggests that they are concerned that, if a search warrant is obtained on the basis of national security information and is later challenged, the information will need to be disclosed. The NZSIS and GCSB stated in their submission that:

A mechanism is also required to protect the information if a warrant is challenged, including the ability to redact the application for the warrant. Any judicial review of the warrant may need to be conducted using court procedures designed for handling national security information with the assistance of the special advocate.

Other submitters generally agreed that this is an example of an area where closed procedures may be justified.

- 8.16 We therefore recommend that, if a warrant is obtained on the basis of national security information, a closed hearing should be available if it is later challenged. A challenge might occur, for example, in the course of a criminal prosecution in which the accused seeks to have evidence excluded. Consistent with our proposals in the civil and administrative law chapters above,<sup>126</sup> we suggest that this is a discrete area within the criminal context where it may be justified to use a closed procedure and a special advocate to test the reliability of the national security information presented as grounds for the warrant.
- 8.17 We understand that judges in the High Court currently use counsel assisting the court when dealing with reviews of warrants where material is not disclosed. Our recommendation would

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<sup>125</sup> Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.12]–[2.18].

<sup>126</sup> The model presented in chs 5 and 6 would apply if the lawfulness of a search warrant was challenged under NZBORA or in a judicial review.

formalise this arrangement in respect of national security information and make it clear that a special advocate should be used.

- 8.18 We have considered whether there is also a case for reform at the initial stage of issuing a warrant. We have decided against this for the following reasons. First, a search warrant application is always *ex parte* so does not raise the same concerns about full disclosure in open court as other proceedings to which our reforms would apply. Second, the Search and Surveillance Act does not require that all information relevant to a search warrant application be released, only that the grounds be stated in “reasonable detail”. As a matter of interpretation, it would be open to an issuing officer to issue a warrant based on intercepted material received from security and intelligence agencies and presented in such a way as to avoid disclosing key capabilities or other details that might prejudice security interests. We are therefore of the view that there is not a sufficient need to change the Search and Surveillance Act to allow for warrants to be issued using a different process when national security grounds are being relied on.
- 8.19 In our view, allowing search warrants issued on the basis of national security information to be challenged through a closed procedure rather than in open court is likely to be sufficient to address the concerns raised by the Police and security and intelligence agencies.

## RECOMMENDATIONS

- R25 Where the disclosure of grounds for a search or surveillance warrant may prejudice national security, the person subject to the warrant should be able to challenge the warrant through a special advocate. In addition to challenging the validity of the warrant, the special advocate may also present arguments for the disclosure of the grounds to the affected person.
- R26 The special advocate will operate in accordance with the same procedure as outlined above at R12 – R18 and R30 – R41.

## Withholding security information from criminal trials

- 8.20 Under the Criminal Disclosure Act, the prosecution can withhold information if the disclosure would prejudice certain interests, including “the security or defence of New Zealand or the international relations of the Government of New Zealand or the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation”.<sup>127</sup> This can be challenged by the defence, but as mentioned above and discussed in more detail in our Issues Paper,<sup>128</sup> the ability to present arguments for disclosure will be hampered by a lack of access to the information in question.

### *Use of special advocates in preliminary hearing on disclosure*

- 8.21 We suggest that the use of a special advocate in a pre-trial hearing on the question of disclosure of national security information would provide greater protection for the fair trial rights of the accused. The special advocate would function in the same way as outlined above in R12 – R18 and below in R30 – R41 in that they would have access to the information and would present arguments on behalf of the accused, but they would not be able to disclose the information outside of the closed court room.

127 Section 161(g).

128 Law Commission, above n 85, at [3.19]–[3.24].

- 8.22 The Criminal Disclosure Act provides that a claim for non-disclosure can be challenged on two grounds: that the reasons for non-disclosure do not apply or alternatively that the reasons apply but they are outweighed by reasons in favour of disclosure. In our view, the use of a special advocate to present arguments on both these points would help ensure that information that may be helpful to the accused is not withheld unnecessarily and would assist the judge in making an informed decision on the question of disclosure.
- 8.23 We note that successful challenges to non-disclosure of national security information are likely to be rare. The exclusion of national security information would not usually be expected to prejudice the interests of the accused. It is highly unlikely that a prosecutor, subject to the ethical standards of criminal prosecution, would bring a charge knowing that there is exculpatory evidence that cannot be disclosed. Despite the rarity, we consider that providing for representation by a special advocate in a pre-trial hearing on disclosure is necessary to protect against the possibility, however slight, that the claim for exclusion of national security information cannot be justified.
- 8.24 The NZSIS, GCSB and Police all considered that a special advocate should be used in the preliminary stages of challenging disclosure. The NZSIS and GCSB stated that:
- A special advocate would be necessary in circumstances where a court is deciding an application on disclosure involving national security information. A special advocate will have the ability to make arguments on behalf of the accused as to whether the interests in favour of disclosure outweigh the interests protected by withholding the information, or whether the national security reasons claimed for non-disclosure do not apply at all. This would be consistent with the current practice under the Criminal Disclosure Act of relying on an *amicus curiae* on the rare occasion when material cannot be safely disclosed to the defence, for example when disclosure would reveal an informant's identity.
- 8.25 The New Zealand Bar Association said that there is:
- ...scope in criminal trials to use special advocates in the preliminary stages to assist in determining whether national security information should be withheld... A special advocate ought to be able to make submissions to the court as to whether that information can and should be withheld from the accused.
- 8.26 The New Zealand Law Society also drew a distinction between the substantive trial and a preliminary hearing and did not object to the role for special advocates in a pre-trial hearing concerning disclosure.

#### *Power to dismiss or withdraw proceedings*

- 8.27 The Criminal Disclosure Act gives the trial judge the power to order that information be disclosed, and under section 30(3), the judge can impose conditions for disclosure. This could include, for example, requiring partial redaction of sensitive material and other orders that are available under the Criminal Procedure Act 2011.
- 8.28 There is a statutory power in section 147 of the Criminal Procedure Act for the judge to dismiss a charge on his or her own motion or the motion of the prosecutor or defence. We consider that a charge should be dismissed if the exclusion of information will mean that the accused cannot have a fair trial. The combination of the judge's duty to uphold fair trial rights under NZBORA and the power to dismiss a charge under the Criminal Procedure Act would mean this course of action is available. However, we suggest that the Criminal Disclosure Act should be amended to provide explicit guidance to both the trial judge and the prosecution that, if the proceedings cannot continue fairly without disclosure of national security information, they should be dismissed. We suggest this amendment could be given effect as a new subsection 30(4) of the Criminal Disclosure Act, which would provide that, if the court considers that there are

- compelling public interest grounds for non-disclosure but non-disclosure would prejudice the accused's ability to present an effective defence, the charge should be dismissed under section 147 of the Criminal Procedure Act. We accept, however, that the court will necessarily have to exercise some judgement as to the timing of such a conclusion. In some cases, the evidence may be so obviously important that there could never be a fair trial; in others, it may be possible to conduct a fair trial without it.
- 8.29 This is an area where the special advocate should also be able to present submissions, consistent with their role in advancing the interests of the accused person. That is, if after viewing the information the special advocate concludes that the accused will not be able to run an effective defence without referring to it but disclosure would risk significant prejudice to security interests, the special advocate may submit that the proceedings should be dismissed under section 147 of the Criminal Procedure Act rather than allowing them to be heard in the absence of crucial information.
- 8.30 We also suggest that there should be an explicit power for the prosecutor to withdraw the proceedings without leave if the judge orders disclosure but the Crown remains of the view that the disclosure will damage national security. This would be analogous to provisions under section 94 of the Criminal Procedure Act under which a prosecutor may withdraw a charge if permission is given to a defendant to ask an undercover officer any question about their identity. In the case of national security information that is ordered to be disclosed, it would give the Crown the ultimate ability to prevent disclosure by ending the proceedings, which would in turn give agencies assurance that information will not be disclosed where there are serious risks.
- 8.31 This is consistent with the prosecution guidelines, which provide in 5.9.12 that there is a public interest consideration against prosecution when "information may be made public that could disproportionately harm sources of information, international relations or national security".<sup>129</sup> In addition, 13.2.8 provides that the Solicitor-General may direct that a case be conducted as a Crown prosecution when it "involves highly sensitive and/or confidential Crown/government information and/or raises issues of national security".<sup>130</sup> If there has been such a direction, the power for the prosecutor to withdraw proceedings without leave will be exercised under the direct oversight of the Solicitor-General.
- 8.32 We note that, if proceedings are dismissed, it is deemed to be an acquittal under section 147(6) of the Criminal Procedure Act. In contrast, if proceedings are withdrawn, it would not bar future proceedings in respect of the same matter. This is an important distinction.
- 8.33 We received comment from the senior judges that the "possibility of dismissal will also aid in the equality of arms issue, critical in this area". The Police also stated that:
- ... an explicit ability to either withdraw or dismiss proceedings based on the need to protect security information would be helpful. It would give the court a clear indication that this option is available and a legitimate response to that situation.
- 8.34 Balancing fair trial rights with the need to protect national security information relevant to criminal proceedings will inevitably be difficult, and there will be some cases where the only way to ensure that fair trial rights are preserved while information is protected is to discontinue the proceedings. We acknowledge that this may mean some cases that would otherwise be in the public interest to prosecute may be withdrawn or dismissed. We consider that this is the "least bad" option. The public interest in ensuring prosecutions can be completed is important but

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129 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).

130 Crown Law, above n 129.



necessarily subordinate to the public interest in ensuring a fair trial. In some cases, it may also be subordinate to the public interests in protecting particular secure information. To provide for both these possibilities, we suggest that there should be clear provisions allowing proceedings to be dismissed or withdrawn.

#### RECOMMENDATIONS

- R27 The Criminal Disclosure Act 2008 should be amended to provide for the use of special advocates in challenging a claim for non-disclosure of national security information.
- R28 The Criminal Disclosure Act 2008 should provide that the judge may dismiss proceedings under section 147 of the Criminal Procedure Act 2011 if the national security information must be protected but withholding it would prevent a fair trial from occurring. The Criminal Procedure Act 2011 should also provide that the prosecutor may withdraw proceedings if the judge orders material to be disclosed but the prosecutor remains of the view that disclosure would be an unacceptable risk to national security.

#### Anonymity protections when giving evidence

- 8.35 This part of the Report has dealt primarily with the “big picture” questions of when a closed procedure should be used and how it should be conducted. We have referred in places to other mechanisms of protecting information that do not go so far as excluding the non-Crown party from the proceedings. In the criminal context, these mechanisms are contained in both the Evidence Act 2006 and the Criminal Procedure Act.<sup>131</sup> In the course of our research, we have identified one area where these mechanisms can be improved to better protect national security interests.
- 8.36 Section 64 of the Evidence Act currently provides a privilege for “informers”, who are not required to disclose information that might divulge their identity. An informer is defined as a person who has provided information to an enforcement agency “concerning the possible or actual commission of an offence”. This section is therefore not broad enough to protect the identity of sources who provide information on matters of national security or intelligence officers working for New Zealand or international intelligence agencies. Section 110 has a more general provision that allows for witness anonymity if the judge believes on reasonable grounds that the witness or any other person will be in danger if their identity is revealed. While this may be applicable to some potential witnesses on matters of national security, it would not cover a situation where the interest protected by anonymity is a national security interest such as avoiding prejudice to international relations.
- 8.37 NZSIS and GCSB submitted in favour of a provision that would protect sources and intelligence officers. They stated that:
- Intelligence officers deal with sophisticated global actors who have the means to understand and exploit national security information against national interests, and/or may pose a threat to safety. The protection of the identity, expertise and activities of intelligence officers are often inseparable.
- 8.38 Other submitters who commented on this matter either agreed that anonymity provisions should be expanded or had no objections.
- 8.39 We therefore recommend that the Evidence Act be amended to introduce anonymity protections for sources who provide information on matters of national security or intelligence

<sup>131</sup> We discuss the particular tools in more detail in Issues Paper 38 (see Law Commission, above n 85), at [3.33]–[3.37].

- officers working for New Zealand or international intelligence agencies. We consider that this could be an important tool to ensure that national security interests are protected while enabling those involved with security and intelligence agencies to give evidence in open court.
- 8.40 This reform will apply in all proceedings. This is different to sections 64 and 110 of the Evidence Act, which are limited to criminal proceedings. We consider that the protections for intelligence officers and sources may be required in proceedings other than criminal, for example, in the review of administrative decisions, and that the section should therefore apply more generally.
- 8.41 We have considered whether this protection should require a judicial order, as for anonymous witnesses, or whether it should be a privilege, as for informers. Both options have disadvantages. If a judicial order is required, this may not provide sufficient assurance for security and intelligence agencies. However, it is likely that a broad definition will be required to ensure protection for all categories of sources and intelligence officers, and we consider that judicial supervision can ensure that a broad definition does not lead to over-claiming. In addition, the interests at stake in anonymity for intelligence officers may often be public interests in national security rather than the private interests of the witness and therefore the waiver provisions that apply to privileges generally would not be suitable.
- 8.42 Our preferred approach is to provide that a witness is not required to disclose their identity in the course of proceedings if the Director of GCSB or the NZSIS issues a certificate requiring identity to be suppressed. However, a judge would be able to disallow anonymity on the application of the other party if revealing the identity was essential to prove the other party's case. We suggest that, in civil cases, the judge should then be able to direct that the evidence be given in a closed hearing if this is required to protect national security interests that would be prejudiced by open disclosure of the witness's identity. In criminal cases, the prosecution would have to choose whether to allow the identity to be disclosed or to withdraw the charge, as is currently the case for Police informers.
- 8.43 When consulting on this option, the intelligence agencies raised the issue of what would happen when a question is put to a witness and the answer would disclose national security information. On reflection, we consider that this issue can be dealt with using existing measures. The issues posed are not significantly different to other classes of protected information, such as a prosecution witness refusing to answer a question on the basis of the privilege against self-incrimination. First, information relevant to the defence should ordinarily be disclosed prior to the trial, and if information raises security risks, it will be dealt with in the closed procedures discussed above. Second, if the defence asks a question in cross-examination of an anonymous prosecution witness and the answer might prejudice national security, the prosecutor has the ability to object on the basis that the question is either irrelevant or the material is protected under section 70 of the Evidence Act.<sup>132</sup>

## RECOMMENDATION

R29 The Evidence Act 2006 should be amended to provide for anonymity protections for sources and intelligence officers. This should apply in criminal and civil proceedings.

<sup>132</sup> Section 11 of the Government Communications Security Bureau Act 2003 and s 12A of the New Zealand Security Intelligence Service Act 1969 also each prohibit an officer or employee from disclosing information obtained in the course of official duties without authorisation.

# Chapter 9

## The special advocate regime and security issues

### INTRODUCTION

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- 9.1 We have recommended (in the preceding three chapters) the appointment of special advocates as a way to represent the interests of a party excluded from closed procedures in which national security information is being considered. We have suggested that the use of special advocates in closed procedures can operate to allow information to be put before the court that would otherwise be excluded where this is in the interests of justice.
- In civil proceedings and appeals and reviews of administrative decisions by the court involving national security information, we have recommended that a special advocate be appointed to represent the interests of the affected non-Crown party during any closed preliminary hearing.
  - In civil proceedings and appeals and reviews of administrative decisions where the court orders that part of the substantive hearing be heard as a closed procedure, the special advocate will represent the affected party's interests during the closed portion of the case.
  - In criminal cases, we have recommended the appointment of a special advocate to represent and protect the interests of the defendant during any closed pre-trial hearing on disclosure where the prosecution has withheld national security information.
- 9.2 In this chapter, we make recommendations on the role of special advocates and the core features of the special advocate regime. We then also deal with some remaining issues relating to closed procedures, such as maintaining security and ensuring protection of information.

### THE SPECIAL ADVOCATE REGIME

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- 9.3 The role of the special advocate should be to represent the interests of the excluded party. The special advocate should be free to advocate vigorously for that party's interests during the closed hearing, including arguing that material should be released to open proceedings.
- 9.4 Special advocates should be clearly distinguished from *amicus curiae*.<sup>133</sup> The *amicus* role is a much more neutral one as between the parties. The *amicus* presents to the court all material and makes all arguments that might be of assistance to the court rather than necessarily advancing the interests of one of the parties in the proceedings.
- 9.5 Although the special advocate certainly represents the non-Crown party's interests, the advocate cannot act for the party in the way that the party's chosen counsel does. The special advocate will have access to information that cannot be disclosed to the affected party, and this is contrary to a lawyer's obligation of full disclosure to his or her client. The relationship between the special advocate and the excluded party is not an ordinary client/legal counsel

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133 An *amicus* is a lawyer who is appointed by the judge to assist the court.

relationship. Therefore the role and duties of the special advocate should be clearly provided for in legislation.

- 9.6 It is appropriate to provide a limited statutory immunity to protect special advocates from claims of professional misconduct or unsatisfactory conduct as lawyers under the Lawyers and Conveyancers Act 2006 where they are acting in accordance with the requirements of their role as special advocates.

### **Panel of designated security-cleared lawyers**

- 9.7 To be a special advocate, a lawyer will need to hold a current security clearance. We think there should be a panel of suitably qualified and experienced lawyers from which appointments would be made. Although cases involving national security information are likely to be rare, there needs to be a reasonable number of security-cleared lawyers available to undertake the role of special advocate when needed. It is important that the panel is of sufficient size to provide a degree of choice and to avoid any suggestion of capture or that the security and intelligence agencies have effectively selected the special advocate.
- 9.8 The Immigration Act 2009 provides for a panel of designated lawyers who are available to undertake the role of special advocates. The other two statutory regimes that make express provision for special advocates, the Telecommunications (Interception Capability and Security) Act 2013 (TISCA) and the Health and Safety at Work Act 2015, do not establish pre-designated panels. It is left to the judge to appoint a barrister or solicitor as a special advocate to represent the non-Crown party's interests. Before appointing a lawyer as a special advocate under those statutes, the judge must be satisfied that the person holds an appropriate security clearance and is suitably qualified and experienced to fulfil the role of a special advocate.
- 9.9 While this approach achieves much the same result, we recommend for reasons of certainty and efficiency that new legislation follow the approach in the Immigration Act and require that a panel of appropriate security-cleared lawyers be designated as special advocates.
- 9.10 We recommend having one reasonably large and broad panel that can be utilised under any relevant regime or in civil or criminal proceedings. New legislation should specify or at least recognise the process for designating a lawyer as a member of the special advocate panel from which appointments in individual cases would be made. Given the complex and difficult nature of the role, we think that it is important that senior and experienced counsel be available on the special advocate panel.

### *Appointment for a particular case*

- 9.11 The non-Crown party should be able to nominate a lawyer from the panel for appointment. The non-Crown party would apply to the court, and the court would then appoint a special advocate from the panel to represent the non-Crown party's interests. The court would have the power to refuse to appoint the nominated person and appoint another panel member instead. However, this should only happen in exceptional circumstances, and the party's nominee would almost always be appointed. We do not think that it is appropriate for the Crown to have a right to nominate a panel member to be appointed as the advocate in any particular case.

### *Designation, training and support*

- 9.12 One advantage with having a panel of designated special advocates is that a clear standard can be set as to the appropriate knowledge and experience that is needed. While security clearance and litigation experience are obviously fundamental, there is also a need for advocates to have a degree of specialist knowledge and understanding around intelligence methods and capacities.

- 9.13 As part of our review, we have talked to special advocates in the United Kingdom and in Canada. Advocates in both jurisdictions have told us they need significant support in order to do their jobs. There are mechanical aspects to this; special advocates will need assistance in how they store documents or in how they are able to access secure materials. They will also need secretarial and support services because these must be security-cleared and might not otherwise be available. There is also the need to provide advocates with professional development and support, including some kind of networking of shared experiences that lawyers customarily enjoy in other areas of practice.
- 9.14 In the United Kingdom, special advocates have benefited from support provided the Special Advocates Support Office, which is housed with the Treasury Solicitor's Office. While there will always be concerns about the adequacy of such support and fears over perceived conflicts of interest as a result of having support provided from within the government, such support seems to us a crucial part of the special advocate process in the United Kingdom.
- 9.15 In our view, New Zealand needs to consider what support services can be provided within New Zealand and how this can best be done. Although there is much more use of special advocates in the United Kingdom than there is ever likely to be in New Zealand, there is insufficient work for those who work in the Special Advocates Support Office to solely work supporting special advocates. Any New Zealand equivalent must take account of the reality that staff will need to also do other work and the perceived conflicts of interest associated with having support provided from within the government. Moreover, it may be more difficult to host a programme like the Special Advocate Support Office within New Zealand's Crown Law Office, given the smaller size of Crown Law.
- 9.16 We have strong reservations about an approach that relies on junior Crown-employed lawyers to provide legal and research support to special advocates. Instead, consideration should be given to security clearing a number of more junior private sector lawyers who would be available, perhaps as assistant special advocates, to assist the special advocate appointed by the Court. One of the senior special advocates could be allocated a coordinating role amongst the others to ensure that assistant counsel is made available.
- 9.17 Experience overseas also shows that it is important that lawyers acting as special advocates are able to access a degree of expert assistance on security issues. While this can be partially addressed by training, there will also need to be some capacity to engage security advisers who are able to work with special advocates in some situations.
- 9.18 Ultimately, how the necessary support and training is provided is an administrative rather than law reform matter, but we would suggest that meaningful legal, technical and administrative support is essential, as is the need to ensure that the support is both competent and sufficiently independent.

#### *Costs of special advocates*

- 9.19 The cost of a special advocate and their support needs to be paid by the Crown. This is the approach taken in the Immigration Act and the other existing legislative schemes. However, the court is still able to make a costs order against the non-Crown party if the circumstances of the case justify such an order. Having the Crown cover the cost associated with the use of closed procedure recognises that the cost of having a special advocate involved are incurred for the benefit of the Crown to protect its interest in the information.



## Access to all national security information

9.20 The special advocate in a particular case will need full access to all relevant national security information that is in contention in the proceedings. The advocate would be under a statutory obligation to keep this material confidential and to not disclose it, except as expressly permitted under the regime. The practicalities around accessing and managing the national security information both by the advocate and by the court itself need to be considered. As discussed above, we would contemplate that lawyers would need support to fulfil those security obligations.

## Restrictions on communications with the affected party

- 9.21 Submissions from the New Zealand Law Society, the New Zealand Bar Association and the judiciary all stressed the importance of a special advocate being able to communicate with the affected party and the party's lawyer in order to properly fulfil the role. We agree that the special advocate must have access to the party whose interests they represent to understand the case and to view the national security information in context. Without reasonable access, they can do less to mitigate the prejudice of closed procedures. However, access after the special advocate has seen the protected material does potentially make it more difficult for the advocate to balance their competing duties to the person whose interests they represent with their obligation to keep information secure.
- 9.22 In the United Kingdom, special advocates have taken the view that the extent of the restrictions on communication amount to an "absolute bar on direct communication between special advocates and open representatives". They consider that this "is the most significant restriction on the ability of special advocates to operate effectively".<sup>134</sup> This is a significant tactical disadvantage for special advocates who are unable to communicate with the party they represent without disclosing the communication to the Crown party. We think that, while some restrictions must be placed on communications after the special advocate has accessed the national security information, including contact with the affected party's lawyer, channels of communication still need to be as open as possible.
- 9.23 After considering the points raised by submitters and the difficulties of the approach adopted in the United Kingdom, we favour an approach under which the court oversees any communications between the special advocate and the affected party or their lawyer after the special advocate has been provided with access to the national security information. Up until the time that the special advocate has access to the material, there should be no restrictions on communication between the special advocate and the affected party or their lawyer. Having a degree of court oversight in respect of communications after the point in time when the special advocate views the national security information works to protect all of the parties. We consider this preferable to any requirement that the Crown be notified of communications.
- 9.24 However, the legislative scheme must have sufficient flexibility for the court to issue appropriate orders so that those communications can be as efficient as possible. For example, the court could in an appropriate case approve a communication plan that might allow reasonably free communications in relation to certain matters. It would not always be necessary for the court to approve each instance of communication.
- 9.25 The special advocate would have an unrestricted ability to communicate with the Crown's security-cleared lawyers as there is no good reason to limit this.

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<sup>134</sup> Kent Roach "Secret Evidence and Its Alternatives" in Aniceto Masferrer (ed) *Post 9/11 and the State of Permanent Legal Emergency* (Springer, Dordrecht, 2012) at 186.

### Challenging claims of national security and non-disclosure

- 9.26 Under the approach we have developed, special advocates will be integral to preliminary hearings and will be able to challenge claims that information cannot be disclosed. After the special advocate has viewed all the information in question, they will be able to challenge (if there are grounds to do so) the Crown's claim that the information is national security information and that it needs to continue to be dealt with in closed procedures. This is consistent with the approach taken in other jurisdictions. In their international study of special advocates, Waldman and Forcese concluded that special advocates "clearly see as one of their key (and perhaps principal) roles pressing for greater disclosure".<sup>135</sup> We see advocating for greater disclosure as a very important part of the special advocates' role. In challenging the Crown's claim for non-disclosure, they would work to ensure that information that can be disclosed is dealt with in open hearing.
- 9.27 The scrutiny by special advocates should assist in addressing concerns that material may be unjustifiably claimed to be national security information.<sup>136</sup> Their role during the preliminary stages of arguing for greater disclosure to the affected party is not an all or nothing exercise but rather a mechanism for identifying whether some of the information for which protection is claimed could be released to the affected party. For example, a special advocate could argue that only parts of a document need to be withheld.

### Input into whether closed procedure is used

- 9.28 In civil proceedings and in appeals and review proceedings, special advocates should also, at the preliminary hearing, be able to advocate for the affected party on how information should be protected. This includes the question of whether the court should exclude information that cannot be disclosed and whether the court should make an order that part of the substantive case be heard under a closed procedure. Special advocates should be able to submit on the procedural pathway for dealing with the national security information in any particular proceeding.

### Input into summary of information provided to the affected party

- 9.29 Under the special advocate models in the United Kingdom, Canada and Australia, once proceedings are before the courts, the judge oversees and is able to authorise disclosure of a summary or "gist" of the national security information to the non-Crown party. The Canada Evidence Act 1985 and the National Security Information (Criminal and Civil Proceedings) Act 2004 in Australia enable the court to authorise disclosure of all the information, a part or summary of the information or a written statement of facts relating to the information. In the United Kingdom, the Justice and Security Act 2013 provides that the court must consider requiring a summary of the closed material to be provided to all excluded parties where it is possible to do so without damaging national security. In New Zealand, the Immigration Act requires that, once proceedings are before the Immigration and Protection Tribunal (or in relation to an appeal, the High Court), a summary of the allegations arising from the national security information must be submitted by the Crown to the presiding judicial officer for approval.

135 Craig Forcese and Lorne Waldman *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings* (Canadian Centre for Intelligence and Security Studies, August 2007) at 42.

136 On at least three occasions in Canada, security-cleared counsel has been successful in arguing for further information to be disclosed openly. As a result, the Canadian courts increasingly require the security services to ask foreign agencies whether they are willing to amend caveats to allow the disclosure of information: Kent Roach, above n 134 at 188.

- 9.30 In all of these regimes, the legislation gives little guidance as to the content of the summary, and this question is largely left to the courts. How much information must be disclosed to the non-Crown party to ensure that basic natural justice requirements are satisfied is partly contextual, so it is difficult to specify. We have taken the view that, in civil proceedings, the court should normally authorise a summary as one of the ways in which the non-Crown party can be as informed as possible in respect of the material. However, we think that there may be situations where the nature of the security information means that a meaningful summary cannot be provided without disclosing material that must not be disclosed. We therefore recommend that the default position is that a summary that is authorised by the court should be provided but that, where the court is satisfied that a summary cannot be provided, the court may waive that requirement.
- 9.31 In Chapter 7, we have recommended that a summary of grounds is to be provided after an administrative decision is made where rights are affected and full grounds or information can't be disclosed for security reasons. This means that, when any case then comes before the courts on appeal or review, the party will already have a summary. The relevant court or tribunal dealing with the appeal or review should have judicial oversight over the summary of information once the case is before it and should have the power to approve any modifications or amendments to the summary for the purposes of those proceedings.
- 9.32 The special advocate's role should extend to making submissions in respect of the content of the summary. They should try to ensure that the summary discloses sufficient information to give the affected person an opportunity to comment on any potentially prejudicial information they have not been given. In civil proceedings, the special advocate would also make submissions on the question of whether a summary can be made available. The summary must be sufficient to provide the affected person with enough information so that they can play a meaningful role and can provide instructions to their counsel and also brief the special advocate.

### **Powers of special advocates**

- 9.33 Special advocates should have the necessary powers to operate effectively within a closed hearing. For example, in substantive proceedings, the advocate needs similar powers to those that the affected party's lawyer would have at hearing. He or she should be able to call witnesses, cross-examine witnesses and exercise other powers in respect of the closed procedure that counsel would normally have in order to protect the interests of the person they are representing.

#### **RECOMMENDATIONS**

- R30 Legislative provisions should provide that the role of a special advocate is to represent the interests of the non-Crown party in a closed procedure (including closed preliminary hearings).
- R31 A limited statutory immunity should protect special advocates from claims of professional misconduct or unsatisfactory conduct as lawyers under the Lawyers and Conveyancers Act 2006 where they are acting in accordance with the requirements of their role as special advocates.
- R32 There should be a panel of designated security-cleared lawyers who are suitably qualified and experienced to undertake this work from which special advocates are appointed.

- R33 The Government should consider how best to provide necessary training and logistical support for those appointed to the panel in order to ensure that New Zealand can maintain a high level of knowledge and capacity within the panel of special advocates.
- R34 The costs of the special advocates and the cost of their support should be met by the Crown.
- R35 The court should have the power, to be exercised on application by the non-Crown party, to appoint a special advocate from the panel of designated special advocates to represent the non-Crown party's interests in a preliminary hearing. The court should appoint the advocate who is nominated by the non-Crown party unless there are exceptional reasons requiring the court to appoint another panel member instead.
- R36 The appointed special advocate should have full access to all "national security information" at issue in the case and should be under a statutory obligation to keep that material confidential and to not disclose it, except as expressly permitted under the regime.
- R37 After the special advocate has been given access to the national security information, he or she may only communicate with the non-Crown party or the party's lawyer in such terms as are permitted by the court.
- R38 The appointed special advocate should be able to submit on any matter relevant to the use of national security information, including:
- the designation of information as "national security information";
  - the level of redaction of any information that is to be partially disclosed to the affected party;
  - the content of the summary of information, in particular, whether it discloses sufficient information to give the affected party an opportunity to comment on any potentially prejudicial information they have not been given; and
  - whether a closed procedure should be used or whether information that cannot be disclosed should be excluded from proceedings.
- R39 A special advocate must have adequate powers within the closed hearing to be effective. In particular, the advocate should be able to call witnesses and cross-examine witnesses in closed procedures and exercise other powers that advocates normally have in order to protect the interests of the person they are representing.

## SECURITY IN THE COURTS

- 9.34 The courts already deal with cases that involve national security information on occasion, and under the approach we have recommended, they will continue to do so from time to time. The courts consequently need appropriate secure facilities to deal with and store secure material. We think it is important that the necessary facilities and services are available within the Ministry of Justice-administrated courts to ensure there is sufficient separation from the security and intelligence agencies.
- 9.35 The terms of reference preclude the Commission from making recommendations with respect to purely operational matters, including funding and administrative arrangements to institute

an appropriate system for protecting sensitive security information in proceedings. We do not therefore propose to make any recommendations in respect of facilities. However, we do observe that those we consulted in the United Kingdom and in other jurisdictions strongly emphasised the significance of secure court facilities in developing and maintaining confidence between the courts and the relevant security and intelligence agencies. It has helped build trust in the court to know that security information is stored and managed in a fully secure system.

- 9.36 Using security-cleared court staff and implementing similar measures in secure facilities are likely to assist in developing greater confidence that national security information is well protected and secure when it is used in court proceedings. In our view, this should be done proactively so that there is always a certain level of capacity in the courts system as a whole to deal with material. One of the constant practical difficulties in this area is the length of time it can take to get personnel cleared.

### Security and judges

- 9.37 In the Issues Paper, we raised the question of whether cases involving national security information should be restricted to a small pool of judges or tribunal members who might perhaps have some specific training or support to hear these types of claims. A step further, which we did not propose, would be to consider whether some form of security clearance for such judges is justified.
- 9.38 The existing legislative schemes in New Zealand that provide for closed procedures do not require judges, or Tribunal members in the immigration context, to have any form of security clearance. Instead, the approach taken, for example, in the Immigration Act, is to restrict the number of judges who may hear cases involving classified information. Proceedings before the Immigration and Protection Tribunal that involve classified information must be heard by the Chair of the Tribunal, who must be a District Court Judge, or by the Chair and one or two other members, who must also be District Court Judges.<sup>137</sup> Proceedings in the courts involving classified information may only be heard by the Chief High Court Judge and up to two other judges nominated by the Chief High Court Judge.<sup>138</sup>
- 9.39 For a number of important reasons, including retaining a proper separation between the branches of government and preserving the independence of judicial officers, we are not in favour of requiring judges hearing cases to be security-cleared. We do not think that the Crown should determine which judges will deal with cases involving national security information. It is not appropriate for one of the parties involved in litigation to be determining who the judge will be. We prefer the approach, such as that taken in the Immigration Act, where the relevant Head of the Bench nominates judges to hear such cases. There was little support from submitters for requiring judges to be security-cleared. For the same reason, we do not recommend legislation limiting the pool of judges or tribunal members who will potentially deal with cases involving national security information. However, as developed below, we do suggest that cases should be heard in the High Court, not the District Courts.

### High Court Judges

- 9.40 We recommend that all cases involving national security information should, with some specific exceptions, be heard in the High Court. This would, we believe, be an effective way of limiting the number of judges who may become involved with national security information. Restricting cases to the High Court will also assist with managing the security needs of such cases. For

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137 Immigration Act 2009, s 240.

138 Section 252.



the purposes of developing experience in this particular area, the Chief High Court Judge might wish to consider nominating judges to hear these cases.

- 9.41 While it would be a matter for the judiciary to determine, we consider that it would be beneficial for the judges who are likely to be involved in hearing such cases to have specific training around security issues, terminology and intelligence methodologies. Judges hearing cases will need to have access to specialist advisers who can give expert assistance on security issues.
- 9.42 Many civil cases involving national security information are likely to be in the High Court anyway. Applications for judicial review are heard in the High Court. Also, appeals and reviews in cases under the closed regimes in the Passports Act, TICSAs and the Terrorism Suppression Act where national security information forms part of the decision are heard in the High Court. Where civil proceedings involving national security information are brought in the District Court, they should be transferred to the High Court.
- 9.43 In a case where the judge determines that it is appropriate because of the issues involved, there is already provision for the High Court to sit as a full court with two or more judges sitting constituting the court. The full court is reserved for cases of particular significance, and it is at the discretion of a judge to determine whether or not to constitute a full court.

#### *Criminal proceedings in the District Court*

- 9.44 Pre-trial hearings on the question of disclosure of national security information under the Criminal Disclosure Act 2008 should be transferred from the District Court to the High Court. The Criminal Procedure Act 2011 will need to be amended to specifically provide for transfer where national security information is in issue.

#### *Exceptions for specialist courts and tribunals*

- 9.45 Where proceedings would otherwise be in specialist courts, it runs counter to the rationale for establishing specialist courts to transfer cases for decision elsewhere. We therefore think that exceptions should be made to the recommendation that all proceedings involving national security information are dealt with by the High Court for specialist courts and tribunals. However, with the exception of the Immigration and Protection Tribunal, the other specialist courts that may have to grapple with national security information may face some logistical difficulties in managing such cases.
- 9.46 These other specialist courts will need access to secure facilities also if they are to hear cases involving national security information. Some administrative arrangements could be put in place allowing them to use the facilities available for the High Court.

#### *Immigration and Protection Tribunal*

- 9.47 In the area of immigration, the Immigration and Protection Tribunal has been established with the potential to manage cases involving national security information and other types of sensitive information. The current arrangements can simply continue. Proceedings before the Immigration and Protection Tribunal that involve classified information must currently be heard by the Chair of the Tribunal, who must be a District Court Judge, or by the Chair and one or two other members of the tribunal, who must also be District Court Judges.<sup>139</sup> We understand that, currently, there is only one District Court Judge, who is the Chair of the Tribunal. Unless that situation is going to change, consideration should be given to amending the Immigration Act so that it does not require the other one or two members of the Tribunal nominated by the Chair to also be District Court Judges.

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139 Immigration Act, s 240.

## Employment Court

9.48 The case of *Zhou*<sup>140</sup> illustrates how national security information may be relevant to proceedings before the Employment Court. Employment cases involving national security information should be determined by the Employment Court. That Court has exclusive jurisdiction under the Employment Relations Act 2000, so it is inappropriate to transfer proceedings to the High Court. The Employment Relations Act allows for the removal of some cases from the Employment Relations Authority into the Employment Court.<sup>141</sup> However, this should perhaps be amended to include an explicit provision requiring the Authority to transfer a case on the grounds that it involves, or is likely to involve, national security information to ensure that such cases are caught at an early stage. We also think that the Act should be amended to provide that employment proceedings involving national security information will be heard by the Chief Employment Court Judge or by any other Employment Court Judge nominated by the Chief Employment Court Judge.

## Human Rights Review Tribunal

9.49 There is also a reasonable likelihood that national security information may be dealt with in proceedings before the Human Rights Review Tribunal. First, information privacy requests involving national security information may come before the Human Rights Review Tribunal. Although access to information complaints involving the security and intelligence agencies cannot progress to the Tribunal, complaints against other agencies such as the Police or the New Zealand Customs Service may do so. The Privacy Commissioner may refer a case to the Tribunal where an agency refuses to release personal information to an individual requester on national security grounds despite the Commissioner making a finding that particular information should be released to a requester. In addition, the person who requested the information may also apply to the Tribunal. There is potential also for other types of human rights proceedings to involve national security information.

9.50 The Human Rights Review Tribunal has been established with a specific specialist jurisdiction and should hear proceedings that fall within its jurisdiction. However, we suggest that there may be some logistical and practical issues with the Tribunal managing national security information in a way that ensures its security. There are similar practical issues in respect of the Employment Court. An enhanced level of security is needed, and this requires access to secure facilities. As already noted, administrative arrangements could be put in place to use secure facilities available in the High Court.

9.51 The Human Rights Act 1993 makes provision for the removal of proceedings to the High Court on public interest grounds.<sup>142</sup> Given the logistical issues, the Crown may well seek to transfer any case involving national security information into the High Court.

## Other courts and tribunals

9.52 Although national security information could possibly be relevant to civil proceedings before other courts and tribunals, we are not aware of cases where this has arisen and consider it unnecessary to make legislative provision.

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140 *Zhou v Chief Executive of the Department of Labour* [2010] NZEmpC 162, [2010] ERNZ 400.

141 Employment Relations Act 2000, s 189.

142 Human Rights Act 1993, s 122A.

## RECOMMENDATIONS

- R40 Subject to the following specific exceptions, all cases involving national security information should be heard in the High Court:
- (a) The Immigration and Protection Tribunal should continue to hear cases involving national security information and other types of sensitive information.
  - (b) Employment Court proceedings involving national security information should be heard by the Chief Employment Court Judge or by any other Employment Court Judges nominated by the Chief Employment Court Judge for that purpose.
  - (c) Proceedings involving national security information in the Human Rights Review Tribunal should continue to be heard there. Provision already exists for removing proceedings to the High Court on public interest grounds.
- R41 The relevant court or tribunal hearing any case involving national security information should have the power to appoint a special adviser for the purposes of giving advice on any aspect of national security in any proceedings before it.

# Appendices



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# Appendix 1

## Terms of reference

### REVIEW OF CROWN PROCEEDINGS ACT 1950

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The ability of citizens to bring civil legal proceedings against the Crown and its servants is an important part of New Zealand's constitution, and is protected by the New Zealand Bill of Rights Act 1990. The Crown Proceedings Act 1950 is the principal statute that governs the civil liability of the Crown. It is based on a 1947 United Kingdom Act. It was designed to solve problems with the law as it stood at that time in the United Kingdom, and does not reflect the way in which New Zealand is now governed or modern court practice. As a result the current Act presents procedural and substantive difficulties for both plaintiffs seeking to sue the Crown, and for the Crown in defending those actions.

The purpose of this review is to modernise and simplify the Crown Proceedings Act so as to provide a better mechanism for citizens to bring just claims against the Crown, and to allow the Crown to appropriately defend claims. The review will also consider the relationship between the Crown Proceedings Act, and provisions that seek to immunise or indemnify the Crown or its servants, such as section 86 of the State Sector Act 1988. This review is not intended to review the underlying civil law (tort and contract) through which people seek to bring the Crown to account. This review will include consultation with the Crown Law Office, other Government Departments and the profession.

### REVIEW OF NATIONAL SECURITY INFORMATION IN PROCEEDINGS

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The Law Commission will undertake a first principles review of the protection of classified and security sensitive information in the course of criminal, civil and administrative proceedings that determine individuals' rights, and as appropriate, make recommendations for reform. The review will look at the protection, disclosure, exclusion and use of relevant classified and security sensitive information in such proceedings.

#### Context of the review

As part of the review the Commission should consider whether legislation is needed to provide a process by which classified and security sensitive information may be disclosed and used in court proceedings (including criminal trials) and administrative proceedings that determine individuals' rights in a way that protects the information while maintaining principles of fairness and natural justice. There are specific issues around sensitive security information being publically disclosed that the Commission will have to address. The Commission will be considering, among other things, the approaches of other jurisdictions under which security sensitive information can be admitted but not disclosed to private parties or defendants (or only disclosed to a special advocate acting on behalf of such parties). The Law Commission will need to develop a working definition of classified and security sensitive information for the purposes of such processes.



## Issues to be considered

The issues to be considered by the Commission will include (but are not limited to):

- (a) The law relating to claiming public interest immunity as a ground for not disclosing relevant information in civil proceedings and criminal proceedings and whether the law should be reformed so as to provide specifically for how a claim is determined;
- (b) Whether current provisions for withholding classified and security sensitive information in criminal proceedings are sufficient, and if not, how they might be altered consistently with fundamental values that underpin criminal proceedings in New Zealand;
- (c) Whether provision should be made for criminal trials in which classified and security sensitive information could be admitted but not disclosed publically or to the defendant (or could only be disclosed to a special advocate acting on the defendant's behalf ) and whether such an approach can be reconciled with a defendant's fair trial rights;
- (d) The implications of such trial processes for the law of evidence and rules of criminal procedure;
- (e) Whether New Zealand should make provision for hearings in civil proceedings in which classified and security sensitive information can be admitted but not disclosed publically or to private parties (or could only be disclosed to a special advocate acting on behalf of such parties) and if so what form should these take to ensure a fair hearing consistent with natural justice;
- (f) Whether New Zealand's current measures for admitting classified and security sensitive information in civil and administrative proceedings are effective, how comparative international approaches operate, and what New Zealand can learn from those experiences.

## Scope of review

The issues covered by this review touch on important constitutional matters: the fundamental rights of citizens to open justice and to a fair trial, the respective roles of the judiciary and the executive, protecting national security and principles of open government and democratic accountability.

The Law Commission will conduct its review independently, but it will liaise with the independent reviewers appointed to undertake a review of security and intelligence agencies under section 22 of the Intelligence and Security Committee Act 1996 where there are common issues. Public consultation will be a key component of the Commission's processes before making any recommendations.

It is not intended that the Commission will make recommendations with respect to any purely operational matters, such as funding or other operational and administrative arrangements to institute an appropriate system for protecting classified and sensitive information in civil and criminal proceedings.

# Appendix 2

## Crown Civil Proceedings Bill

### Crown Civil Proceedings Bill

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| <b>Schedule 2</b>   |  | 11 |
| <b>Existing immunity provisions</b>   |  |    |
| <b>Schedule 3</b>   |  | 12 |
| <b>Amendments consequential on repeal of section 5(2) of Crown Proceedings Act 1950</b> |  |    |
| <b>Schedule 4</b>   |  | 14 |
| <b>Consequential amendments to other enactments</b>                                     |  |    |

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Crown Civil Proceedings Act **2015**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

## Preliminary provisions

### 3 Purpose

The purpose of this Act is to clarify and reform the law about civil proceedings involving the Crown, including by—

- (a) enabling the Crown to sue and be sued in the same way as any other person;
- (b) making civil proceedings involving the Crown as similar as possible to other civil proceedings;
- (c) providing that the Crown may itself be directly liable in tort (rather than only vicariously liable);
- (d) reforming the law about public interest immunity.

### 4 Interpretation

- (1) In this Act, unless the context otherwise requires,—

**civil proceedings** means any proceedings in any court that are not criminal proceedings—

- (a) including proceedings for relief for a breach of the New Zealand Bill of Rights Act 1990; but
- (b) excluding applications for review under Part 1 of the Judicature Amendment Act 1972 and applications for habeas corpus, mandamus, prohibition, or certiorari

**court** means—

- (a) the Supreme Court, the Court of Appeal, the High Court, or a District Court; or
- (b) the Disputes Tribunal, the Employment Court, the Employment Relations Authority, the Environment Court, the Human Rights Review Tribunal, the Māori Appellate Court, the Māori Land Court, the Motor Vehicle Disputes Tribunal, the Tenancy Tribunal, and the Weathertight Homes Tribunal

**Crown** means the Crown in right of New Zealand, which is the Sovereign in right of New Zealand, Ministers of the Crown, and departments

**Crown employee** means a person employed by a department (whether paid by salary, wages, or otherwise), or a member, chief executive, or other office holder of a department, but does not include—

- (a) an independent contractor; or
- (b) for the avoidance of doubt,—
  - (i) the Governor-General or any Judge, District Court Judge, Justice of the Peace, or Community Magistrate; or

- (ii) a person to the extent that the person has responsibilities of a judicial nature

**department** means—

- (a) a department specified in Schedule 1 of the State Sector Act 1988:
  - (b) the New Zealand Defence Force (within the meaning of that term in section 11(1) of the Defence Act 1990):
  - (c) the New Zealand Police (within the meaning of that term in section 7 of the Policing Act 2008):
  - (d) the New Zealand Security Intelligence Service (within the meaning of that term in section 3 of the New Zealand Security Intelligence Service Act 1969).
- (2) Unless the context otherwise requires, a reference to civil proceedings against the Crown includes a set-off or counterclaim against the Crown, and a reference to civil proceedings by the Crown includes a set-off or counterclaim by the Crown.

Compare: 1950 No 54 s 2

## **5 Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

## **6 Act binds the Crown**

This Act binds the Crown.

# **Part 1**

## **Substantive matters**

### **7 The Crown may sue and be sued in civil proceedings**

Subject to this Part, the Crown may sue and be sued in civil proceedings in the same way as any other person.

Compare: 1950 No 54 s 3

### **8 Tort liability of the Crown**

A court may find the Crown itself liable in tort in respect of the actions or omissions of Crown employees despite any immunity of those employees.

Compare: 1950 No 54 s 6(1), (2), (3), (4A)

### **9 The Crown may take advantage of general statutory provisions**

The Crown may take advantage of a statutory provision of general application (for example, a statutory defence) even if not named in the provision.

Compare: 1950 No 54 s 29(1)



*Remedies against the Crown***10 Remedies against the Crown**

- (1) Except as provided in this section or **section 11**, a court may grant any remedy in civil proceedings against the Crown.
- (2) If a court considers that the public interest so requires, the court must make a declaration about any party's rights or entitlements instead of ordering any of the following against the Crown:
  - (a) an injunction:
  - (b) an attachment:
  - (c) specific performance:
  - (d) the recovery of land:
  - (e) the deliverance of property.
- (3) If a declaration has been made under **subsection (2)**, a court must not make an order against a Minister or a Crown employee if the effect of the order would be to give a remedy that could not be obtained from the Crown.

Compare: 1950 No 54 ss 17, 24(1)

**11 Admiralty proceedings against the Crown**

- (1) This section applies to the following property belonging to the Crown:
  - (a) ships:
  - (b) aircraft:
  - (c) cargo:
  - (d) freight:
  - (e) other property connected with a ship, an aircraft, cargo, or freight.
- (2) Despite **sections 7 and 10(1)**, this Act does not—
  - (a) authorise proceedings *in rem* against the Crown; or
  - (b) authorise the arrest, detention, or sale of property to which this section applies; or
  - (c) give any lien on property to which this section applies.
- (3) If, at the time of commencing proceedings that seeks the remedies described in **subsection (2)**, a plaintiff reasonably believed that the relevant property was not property to which this section applies, but it was, the court may order that the proceedings continue on terms that the court thinks just.

Compare: 1950 No 54 s 28

**12 Contribution and indemnity**

The same rules about contribution and indemnity apply to the Crown as apply to any other person.

Compare: 1950 No 54 s 8(1)

*Immunity for Crown employees***13 Immunity for Crown employees**

All Crown employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers (whether or not they are Crown employees to whom section 86 of the State Sector Act 1988 applies).

Compare: 1988 No 20 s 86

*Indemnity for Ministers***14 Indemnity for Ministers**

- (1) The Crown must indemnify a Minister for the Minister's costs and any money the Minister is liable to pay in relation to civil proceedings arising from the Minister's good-faith actions or omissions in pursuance or intended pursuance of the Minister's duties, functions, or powers.
- (2) The indemnity must be paid by the department that, with the authority of the Prime Minister, is responsible for the administration of government in relation to the subject matter of the civil proceedings.

*Crown immunities***15 Existing immunity provisions**

An existing immunity provision listed in **Schedule 2** immunises the Crown from liability in civil proceedings in respect of the actions or omissions of a Crown employee in the same way as it would immunise the employee.

**16 The Crown immune from liability in tort in relation to judicial process**

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities in connection with the execution of judicial process.

Compare: 1950 No 54 s 6(5)

**17 Amendment to Constitution Act 1986**

- (1) This section amends the Constitution Act 1986.
- (2) Before section 23, insert:

### **23AA The Crown immune from liability in tort in relation to judicial responsibilities**

The Crown is immune from liability in tort for a person's actions or omissions in the discharge or purported discharge of the person's responsibilities of a judicial nature.

Compare: 1950 No 54 s 6(5)

## **Part 2 Procedure and execution**

### **18 Same procedural rules apply to the Crown as to any other person**

Subject to this Part, the same rules of civil procedure apply to the Crown as apply to any other person.

Compare: 1950 No 54 ss 8(1), 12, 13, 18, 19, 25, 26, 27(1), 30, 31

### **19 Attorney-General correct party in civil proceedings against and by the Crown**

- (1) Subject to any other enactment, civil proceedings against the Crown must—
- (a) name the Attorney-General as the defendant on behalf of the Crown (whether or not other defendants are also named); and
  - (b) be served on the Attorney-General at the Crown Law Office.
- (2) Subject to any other Act, civil proceedings by the Crown must be in the name of the Attorney-General as the plaintiff on behalf of the Crown.

Compare: 1950 No 54 ss 2(2), 14, 16

### **20 Rules about the Crown's participation in civil proceedings, etc**

A provision in another Act that empowers the making of rules about civil proceedings also empowers the making of rules for 1 or more of the following purposes:

- (a) providing for the Crown's participation in civil proceedings:
- (b) in civil proceedings by the Crown for the recovery of taxes, duties, or penalties, providing that the defendant is not entitled to a set-off or counterclaim:
- (c) in other civil proceedings by the Crown, providing that the defendant is not entitled to a set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties, or penalties:
- (d) in proceedings by or against the Crown, providing that the defendant is not entitled, without the court's leave, to a set-off or counterclaim if the subject matter of the set-off or counterclaim does not relate to the subject matter of the proceedings:

- (e) providing that the Crown is not entitled to a set-off or counterclaim without the court's leave.

Compare: 1950 No 54 s 30

## **21 Intervention by the Crown**

The Attorney-General, on behalf of the Crown, may seek a court's leave to intervene in any civil proceedings that affect the public interest.

## **22 Discovery and interrogatories by the Crown**

Unless disclosure of a communication or information is restricted under another enactment (for example, under section 70 of the Evidence Act 2006), the Crown must discover and produce documents and answer interrogatories in the same way as any other person.

Compare: 1950 No 54 s 27

## **23 The Crown not required to give security for costs**

The Crown is not required to give security for the costs of any other party in civil proceedings.

Compare: 1950 No 54 s 18

## **24 Judgment against the Crown**

A judgment against the Crown must be satisfied by the department that, with the authority of the Prime Minister, is responsible for the administration of government in relation to the subject matter of the civil proceedings.

Compare: 1950 No 54 s 24(3)

## **25 Payments by the Crown in relation to civil proceedings**

- (1) Each department must include a statement in its annual financial statements itemising all amounts paid by it in that financial year—
- (a) to indemnify a Minister under **section 14**;
  - (b) to pursue civil proceedings on behalf of the Crown;
  - (c) to settle existing or prospective civil proceedings by or against the Crown or against any Crown employee;
  - (d) to satisfy judgments against the Crown.
- (2) The statement—
- (a) must disclose personal information only in accordance with the Privacy Act 1993;
  - (b) must not disclose information that is subject to an obligation of confidentiality;
  - (c) must not disclose information that is subject to any other rule of law or enactment prohibiting disclosure.

Compare: 1950 No 54 s 24(2), (4)

*Crown Proceedings Act 1950 repealed***26 Crown Proceedings Act 1950 repealed**

The Crown Proceedings Act 1950 (1950 No 54) is repealed.

*Amendments to other enactments***27 Amendments consequential on repeal of section 5(2) of Crown Proceedings Act 1950**

Amend the enactments specified in **Schedule 3** as set out in that schedule.

Compare: 1950 No 54 s 5(2)

**28 Consequential amendments to other enactments**

Amend the enactments specified in **Schedule 4** as set out in that schedule.



## Schedule 1

### Transitional, savings, and related provisions

s 5

#### Part 1

#### Provisions relating to Act as enacted

##### *Savings*

**1 The Crown's powers and authorities otherwise unlimited by this Act**

Except as expressly provided in this Act, this Act does not limit any power or authority vested in the Crown (or in any person on the Crown's behalf).

Compare: 1950 No 54 ss 3(1), 11(1)

**2 The Crown immune from liability in tort in relation to certain Crown property**

(1) The Crown is immune from liability in tort in relation to property vested in the Crown under a rule of law that operates independently of the acts or the intentions of the Crown.

(2) This section does not apply if the Crown has taken possession or control of the property or has occupied it.

Compare: 1950 No 54 s 35(4)

**3 This Act does not apply to or authorise proceedings by or against the Sovereign**

For the avoidance of doubt, nothing in this Act applies to or authorises proceedings by or against the Sovereign in the Sovereign's private capacity.

Compare: 1950 No 54 s 35(1)

##### *Transitional arrangements*

**4 Transitional arrangements**

(1) This Act applies to proceedings commenced on or after the date on which this Act comes into force.

(2) The Crown Proceedings Act 1950 applies to proceedings commenced before the date on which this Act comes into force.

## Schedule 2

### Existing immunity provisions

s 15

**Note**

**These provisions are illustrative, and provided for the purpose of example only. This is not an exhaustive list; it is intended that Schedule 2 contain an exhaustive list before introduction of this Bill.**

| <b>Enactment</b>                                  | <b>Provision</b> |
|---|------------------|
| Animal Products Act 1999                          | Section 98       |
| Biosecurity Act 1993                              | Section 163      |
| Climate Change Response Act 2002                  | Section 45A      |
| Conservation Act 1987                             | Section 42       |
| Criminal Investigations (Bodily Samples) Act 1995 | Section 79       |
| Crown Minerals Act 1991                           | Section 99G      |
| Food Act 1981                                     | Section 39       |
| Major Events Management Act 2007                  | Section 47       |
| Medicines Act 1981                                | Section 102      |
| Misuse of Drugs Amendment Act 1978                | Section 12(2)    |
| Search and Surveillance Act 2012                  | Section 165      |
| Wine Act 2003                                     | Section 60(2)    |

**Schedule 3**  
**Amendments consequential on repeal of section 5(2) of Crown Proceedings Act 1950**

s 27

**Bills of Exchange Act 1908 (1908 No 15)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Declaratory Judgments Act 1908 (1908 No 220)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**District Courts Act 1947 (1947 No 16)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Imprisonment for Debt Limitation Act 1908 (1908 No 80)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Inferior Courts Procedure Act 1909 (1909 No 13)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Judicature Act 1908 (1908 No 89)**

After section 1, insert:

**Judicature Act 1908 (1908 No 89)**—*continued***1A Certain provisions of this Act bind the Crown**

Sections 51, Part 3, and Schedule 2 of this Act bind the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Law Reform Act 1936 (1936 No 31)**

After section 1, insert:

**1A Part 1 binds the Crown**

Part 1 binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Mercantile Law Act 1908 (1908 No 117)**

After section 1, insert:

**1A Part 2 binds the Crown**

Part 2 binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

**Sale of Goods Act 1908 (1908 No 168)**

After section 1, insert:

**1A Act binds the Crown**

This Act binds the Crown.

Compare: 1950 No 54 s 5, Schedule 1

## Schedule 4

### Consequential amendments to other enactments

s 28

**Note**

**Schedule 4's amendments carry over the remaining provisions of the 1950 Act that the Law Commission considers should be re-enacted via this Bill.**

**Other amendments would need to be added before introduction to change references to the old Act to the name of the Bill.**

**Bail Act 2000 (2000 No 38)**

After section 39, insert:

**39A Court must order bail money to be paid to the Crown unless justice, etc, requires money to be returned to surety**

- (1) If a defendant's failure to comply with a condition of bail has been entered in the court record under section 39(3), any money paid by a surety under a bail bond is forfeited.
- (2) The court must order money forfeited under a bail bond to be paid to the Crown, unless the court considers that equity and good conscience and the real merits and justice of the case requires the money to be returned to the surety.

Compare: 1950 No 54 s 23

**Civil Aviation Act 1990 (1990 No 98)**

After section 97(8), insert:

- (9) Despite section 3, in an action against the Crown for any damage, loss, or injury sustained by or through or in connection with the use of any service aircraft, this section applies as if the provisions of this Act and any rules made under this Act have been complied with.
- (10) In **subsection (9)**, **service aircraft** means an aircraft that is being used exclusively for the purposes of the Armed Forces of New Zealand.

In section 97, compare note, after "Compare:", insert "1950 No 54 s 9(3);".

**Criminal Proceeds (Recovery) Act 2009 (2009 No 8)**

Replace section 157(4) with:

- (4) Nothing in this section limits or affects any provision of the Crown Civil Proceedings Act **2015** or the Crimes Act 1961 relating to the liability of the Crown on matters of justification and excuse.

**Designs Act 1953 (1953 No 65)**

Replace section 11(2) with:

**Designs Act 1953 (1953 No 65)**—*continued*

- (2) Subject to the rest of this Act, the registration of a design has the same effect against the Crown as it has against any other person.
- (3) If a Crown employee infringes copyright in a design, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act **2015**, civil proceedings in respect of the infringement may be brought against the Crown.
- (4) Nothing in **subsection (3)** or in the Crown Civil Proceedings Act **2015** affects the rights of a government department under sections 16 to 19.
- (5) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act **2015** in respect of the infringement of any copyright in a design.
- (6) In **subsection (3)**, **Crown employee** has the meaning given in **section 4** of the Crown Civil Proceedings Act **2015**.

In section 11, compare note, after “66;”, insert “1950 No 54 s 7;”.

**District Courts Act 1947 (1947 No 16)**

After section 109(5), insert:

- (6) This section applies to civil proceedings by the Crown.

Compare: 1950 No 54 s 29(2)

**Judicature Act 1908 (1908 No 89)**

After section 55(4), insert:

- (5) This section applies to civil proceedings by the Crown.

In section 55, compare note, after “s 2”, insert “; 1950 No 54 s 29(2)”.

**Law Reform Act 1936 (1936 No 31)**

After section 17(5), insert:

Compare: 1950 No 54 s 8(2)

**Patents Act 2013 (2013 No 68)**

Replace section 19(3) and (4) with:

- (3) Subject to the rest of this Act, a patent has the same effect against the Crown as it has against any other person.
- (4) If a Crown employee infringes a patent, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act **2015**, civil proceedings in respect of the infringement may be brought against the Crown.
- (4A) Nothing in **subsection (4)** or in the Crown Civil Proceedings Act **2015** affects the rights of a government department under subpart 6 of Part 4.



**Patents Act 2013 (2013 No 68)**—*continued*

- (4B) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act **2015** in respect of the infringement of a patent.
- (4C) In **subsection (4)**, **Crown employee** has the meaning given in **section 4** of the Crown Civil Proceedings Act **2015**.

In section 19, compare note, after “Compare:”, insert “1950 No 54 s 7;”.

**Trade Marks Act 2002 (2002 No 49)**

After section 11, insert:

**11A Rights against the Crown**

- (1) If a Crown employee infringes a registered trade mark, and the infringement is committed with the authority of the Crown, then, subject to the Crown Civil Proceedings Act **2015**, civil proceedings in respect of the infringement may be brought against the Crown.
- (2) Except as provided in this section, no proceedings may be brought against the Crown under the Crown Civil Proceedings Act **2015** in respect of the infringement of a registered trade mark.

Compare: 1950 No 54 s 7

# Appendix 3

## Submissions summary and comment

### INTRODUCTION

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- 1 The Issues Paper *National Security Information in Proceedings* (IP 38) explored the options for protecting security information in proceedings, drawing on the experience of the United Kingdom, Canada and Australia as well the as yet untested New Zealand closed procedure regimes. The Commission asked for submissions and feedback on whether further legislative provision for closed procedures would be desirable and on the nature and shape of any closed procedure.
- 2 As outlined in [1.24] – [1.32] of Chapter 1, the Commission also undertook an extensive consultation exercise both with government agencies involved in national security matters and also with individuals and organisations outside the Crown who had particular expertise or an interest in these issues.
- 3 In this chapter, we report back on submissions and feedback during consultation on the key issues discussed in the Issues Paper.

### WHAT INFORMATION SHOULD BE PROTECTED?

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- 4 The first key policy question we asked in the Issues Paper was how we should define information that is prejudicial to national security. More specifically, we asked submitters what types of security interests should be sufficient to displace the normal assumption that relevant information is disclosed to the affected parties and how we should define national security for the purposes of the review.
- 5 Submitters generally favoured defining national security information expressly in legislation. The New Zealand Law Society (NZLS) considered a clear, precise and narrowly focused definition a critical first step in the development of any new regime and that the definition needed to be capable of objective interpretation and application so should avoid the inclusion of subjective elements. The Privacy Commissioner favoured a definition that articulated the public policy reasons for treating the information as particularly sensitive and considered that it should be possible to identify with some specificity the particular interests that require protection. The Commissioner said that the advantage of this type of approach was that the various interests deserving protection could be organised in a hierarchy so that there is greater clarity about the circumstances in which national security “trumps” other interests and the circumstances in which it is one factor to be weighed in reaching an appropriate balancing of interests.
- 6 The NZLS argued that a definition needed to be comprised of three important elements:
  - (a) A requirement that the information must be of a certain kind, for example, that it would disclose specific operational matters such as the source of the information or the operational methods by which it was gathered.

- (b) A requirement that disclosure of the specified kind of information would pose a risk to certain specified interests. The NZLS agreed that the interests must truly be of a significant character before they would justify limiting fundamental legal rights. They said a distinction should be drawn between “national security” and broader notions of New Zealand’s “international relations” or “economic interests”, which do not in themselves justify the serious incursion on natural justice rights that a non-disclosure regime would entail.
- (c) A weighting of the level of risk that disclosure would pose to the specified interests. The NZLS considered that the current requirement of simple “prejudice” should be lifted to a requirement of “significant” or “serious” prejudice.

7 In contrast to these submissions, the then Chief Ombudsman, Dame Beverley Wakem, suggested using the definition of national security in section 6(a) and (b) of the Official Information Act 1982 (OIA):

- 6 Good reason for withholding official information exists, for the purpose of section 5, if the making available of that information would be likely—
  - (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
  - (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—
    - (i) the Government of any other country or any agency of such a Government; or
    - (ii) any international organisation.

8 The Chief Ombudsman, Dame Beverley Wakem, questioned whether any tightening up of that definition would be consistent with the OIA and noted that Parliament has made the likely prejudice to these interests determinative. Under the OIA, there is no ability to consider whether the need to withhold is outweighed by other considerations favouring disclosure in the public interest. The Chief Ombudsman favoured an approach that uses this broad definition of national security information and in which the courts then determine whether particular modes of disclosure (such as the use of suppression orders) or particular types of hearings (such as closed hearings) would appropriately mitigate risks identified in the established definition of national security interests rather than seeking to narrow the definition.

9 The joint submission from the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) said that any definition of national security information should be cognisant of the fact that there can be a variety of reasons why information or its release may be sensitive. The reason information may be sensitive may relate to the source or technique used to obtain the information rather than the content of the information.

### Comments on submissions

10 After considering the submissions and also the views expressed by officials and others at consultation meetings, we have taken a reasonably broad approach to defining national security information. We are conscious of the important point made by the security and intelligence agencies and consider that there are advantages in not limiting the kinds of information that may come within the definition. The definition we have settled on identifies the specific interests (such as prejudice to the security or defence of New Zealand or international relations) that could be put at risk by disclosure but does not identify the type of information that might

do this. We favour ensuring that the specified interests align with section 6(a) and (b) of the OIA. These interests are:

- the security or defence of New Zealand; or
- the international relations of the Government of New Zealand; or
- the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.

- 11 The Law Society advocated specifying the level of risk or prejudice that disclosure would pose to one or more of the specified interests as “significant” or “serious”. However, while we consider the magnitude and nature of the potential prejudice very relevant to how the information is to be managed in proceedings, we prefer a broad definition and a staged approach, where coming within the definition is a first step to identify the information that will need to be carefully managed through court proceedings.
- 12 As set out in this Report, the question of whether information is national security information does not determine whether it is ultimately withheld or released. Rather, it is a first step, and consideration must then be given to the seriousness and nature of the risk that disclosure of the information could pose.

## HOW SHOULD NATIONAL SECURITY INFORMATION BE MANAGED IN PROCEEDINGS?

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- 13 The Issues Paper canvassed the full range of options available for deciding how information should be handled in the court process once the court has determined it is evidentially relevant and comes within the scope of national security information, these options being:
- for national security information to be treated in the courts in the same way as other types of sensitive information (and for ordinary court processes, with perhaps some modification, to be used);
  - to withhold the information and exclude it from proceedings;
  - partial disclosure of the information into a closed procedure with the affected party’s interests being represented by a security-cleared special advocate; or
  - a variation of the closed procedure under which the party would be excluded but their lawyer might be security-cleared and able to view the national security information.

### Criminal proceedings

- 14 In respect of criminal trials, the Commission asked submitters whether they agreed that a closed procedure should not be used at all in the substantive trial. We also asked whether they considered that there is scope in criminal trials to use special advocates in the preliminary stages of the trial to assist in determining whether information that prejudices national security should be withheld.
- 15 Submitters and those the Commission spoke with during consultation meetings were almost unanimously in support of this approach.
- 16 However, the GCSB and the NZSIS submission favoured an approach that would allow the use of a closed procedure during the substantive trial in exceptional circumstances. They suggested that the court should be able to order that information only be disclosed to a special advocate representing the defendant and not disclosed to the defendant.

- 17 The security and intelligence agencies noted that Parliament has already legislated for a range of provisions setting out reasonable limits on fair trial and open justice rights in certain cases. They submitted that, in certain situations, a trial can proceed in the absence of the accused. In each case, Parliament has recognised the public interest in placing limits on the open justice and fair trial rights in order to protect other rights and interests. They argued that national security information is simply one further category requiring protection, and the court should be given the discretion to use a closed procedure with a special advocate to protect that information. In some cases, the national security information will form only a small part of the case and may not materially assist either side so could be withheld; but in some cases, it may be central to the issues. They considered that judges should have the discretion to assess whether a fair trial was possible if information was made available only to a special advocate and not to the defence during a closed procedure. They considered that, in an extreme situation, the judge should be able to include national security material if it is relevant but cannot be given to the defence. They considered that this should not be ruled out.

### *Comments on submissions*

- 18 As discussed in the Report proper, we have not been persuaded by these arguments. We think it is of paramount importance that the accused has access to the material being used against them so that they are able to defend themselves. The accused must have access to all the evidence that is being taken into account in determining the case. Our view is that a closed procedure cannot deliver a fair trial to an accused in a criminal case.
- 19 However, we have proposed a new provision to be included in the Evidence Act 2006 to introduce anonymity protections for sources who provide information on matters of national security or intelligence officers working for New Zealand or international intelligence agencies. This will be an important tool for ensuring that national security interests are protected while enabling those involved with security and intelligence agencies to give evidence.

### **Civil and administrative review**

- 20 We asked submitters whether New Zealand should have closed material regimes for civil and administrative proceedings. We also asked whether submitters thought that the use of special advocates adequately ameliorates the unfairness of proceedings when people are denied full disclosure of the other party's case.
- 21 We received a submission from the Bingham Centre for the Rule of Law, an organisation dedicated to independent promotion of the rule of law in the United Kingdom and worldwide. They submitted that New Zealand should not enact closed material proceedings. The submission is based on the United Kingdom experience following the enactment of the Justice and Security Act 2013 (UK). The experience of special advocates in the United Kingdom in closed material proceedings is that they are inherently unfair, they do not work effectively and nor do they deliver real procedural fairness. The Supreme Court in the United Kingdom has also made it clear that closed material procedures involve a departure from the open justice and natural justice principles. The Bingham Centre said that any moves to legislate to reduce equality of arms, natural justice, openness and accountability are of themselves moves that depart from fidelity to the rule of law and should not be made lightly.
- 22 Amnesty International New Zealand considered that closed material procedures undermine standards of fairness in the administration of justice; can deny individuals their right to a fair hearing, including with respect to claims that the government will expose them to the risk of serious human rights violations through deportation; and may prevent victims of human rights violations from accessing their right to an effective remedy.



- 23 Most other submitters also said that closed procedures are inherently unfair but saw some scope for them in rare circumstances or where the non-Crown party wants to access national security information for the purposes of its case. The Auckland District Law Society meeting and other feedback at meetings was very critical of closed procedures, but many critics said they might have a place as a last resort, provided the statute is clear that they should only be used in specific circumstances.
- 24 The Privacy Commissioner said that a special advocate is fundamentally handicapped in representing a party if they are limited in communicating with them. A fundamental feature of our justice system is the opportunity to challenge the accuracy, authenticity, robustness and completeness of evidence relied on by the opposing party and the interpretation of that evidence presented to the court. Legal counsel present argument to the Court by bringing together the full array of the facts and applying the law to them. The ability to analyse facts and law and present arguments in a case is prejudiced where the lawyer/client relationship is constrained by restrictions on frank communication. While special advocates could play a role in challenging the opposing case on the basis of legal argument, there are significant limitations in bifurcating representation between different lawyers.
- 25 The NZLS said that the use of closed material procedures is a fundamental incursion on principles of natural justice. The use of special advocates does not in itself remove the unfairness inherent in a closed material proceedings regime. It can only mitigate the unfairness. That said, the use of special advocates may be preferable to an alternative where there would otherwise be no disclosure and no ability to represent the interests of the affected party.
- 26 However, the NZLS said it should always be a measure of last resort. A closed material proceedings and special advocate regime should only be used in very limited and carefully defined circumstances. In all but the most unusual of circumstances, the Crown should be able to make its decisions and prepare its case without substantial reliance on “national security information”. Other submitters and consultees also acknowledged that there could be circumstances where it was appropriate to modify ordinary rules and use of special advocates as a last resort.
- 27 The New Zealand Bar Association (NZBA) said that the issues raised by the use of national security information in proceedings involve a balancing of interests. The individual’s rights to natural justice and open justice are balanced against the protection of national security. The restrictions on special advocates necessarily result in a restriction on an affected person’s right to natural justice. However, the NZBA considers that special advocates are the best way of balancing the different interests involved. They do not completely remove the unfairness of proceedings but do, on balance, adequately ameliorate that unfairness.

### *Comments on submissions*

- 28 Having considered all of the submissions and feedback, we reached the view that closed procedures should have a limited role in civil and administrative proceedings. Closed procedures, which impact on an affected person’s access to information, should be reserved for those cases where that degree of protection of information is truly necessary – that is, where information would otherwise need to be excluded from proceedings but the prejudicial effect of excluding the information is such that closed procedures allow for a better resolution of the case. Less significant risks to national security should continue to be managed by using the tools for dealing with sensitive information in ordinary court proceedings.



## Own counsel versus special advocate

- 29 In the Issues Paper, we also asked submitters whether they favoured the option of the party's own lawyer representing them during closed procedures compared to the alternative of a special advocate.
- 30 The Privacy Commissioner supported the use of a party's own counsel in preference to the use of special advocates wherever possible. Although it may create a tension for lawyers in representing their clients' interests, lawyers are professionally trained to handle competing interests (such as handling duties to the court and duties to other members of the profession) and are subject to professional ethics. The Commissioner thought it would be desirable for lawyers who are made subject to restrictions to be able to seek directions from the judge where necessary to guide their conduct and the conduct of the relevant proceeding.
- 31 The NZLS did not support an approach involving the lawyer acting for an affected person having access to "national security information" but at the same time being prohibited from disclosing or discussing that information with his or her client. This approach cuts across the lawyer/client relationship and the ethical obligations of counsel and can put the lawyer in a very difficult situation. They said that it is difficult to envisage circumstances involving national security information where this would be workable. Although there are also difficulties with the special advocate procedure, the NZLS considers that it is preferable in this context.
- 32 The NZBA acknowledged that there are benefits in an approach under which the affected party's own lawyer could represent them during closed procedures. The lawyer has the best knowledge of the proceeding, and it would also remove the double layer of assistance and cost that a special advocate introduces. However, the NZBA was not in favour of this option, because the lawyer would have access to information but could not disclose that information or discuss it with his or her client. This is fundamentally contrary to a lawyer's obligation of full disclosure to his or her client and acting in the client's best interests. Further, placing an affected person's own lawyer in this position could increase the risk of disclosure of the information, even on an inadvertent basis.
- 33 In most cases, the NZBA said the benefits in having the person's own lawyer represent them during closed procedures would be outweighed by the ethical conflicts and practical difficulties involved in such an approach. The one exception to this may be where the issues at stake in the proceedings simply do not justify introducing the additional cost of a special advocate, but even then it is difficult to see how this would work in practice. The Chief Justice submitting on behalf of the senior judges took the same position. Although support from the party's own lawyer is the best outcome, the lawyer is in difficulty if unable to pass material on to the client, so in such circumstances, a special advocate is preferable.

### *Comments on submissions*

- 34 We reached the view that, given the concerns raised by submitters, particularly those of lawyers, special advocates are a better option than the use of the person's own counsel, provided we address the limitations on special advocates in the design of the scheme.

## JUDICIAL SCRUTINY

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- 35 Another broad policy question we have grappled with and sought submission on was the degree of judicial scrutiny of an executive claim that information needs to be protected and their role in deciding how that protection should be given effect. When information is relevant to proceedings, should the Crown be able to avoid disclosure based on national security grounds?

To what extent should the court have a role in scrutinising the claim of national security? Who decides what happens to information that is highly relevant but also highly sensitive?

36 In the Issues Paper, we outlined three possible approaches. The first was that the Crown would certify that information required protection for national security reasons and that the courts would not look behind this certification. The second was that the courts would be able to consider whether any claim by the Crown of national security was valid and would have the power to order disclosure if satisfied that did not put national security at risk. The third option was that the courts would be able to review the Crown's claim for non-disclosure but that the Crown would then, if it considered it was necessary to protect the information, have the power to override the court's order that it must disclose the information by issuing a public interest immunity certificate. This third hybrid approach was based on the approach taken in Canada and has parallels with the right of executive veto of an Ombudsman's recommendation under section 32(3)(a) of the OIA.

37 We asked submitters whether the executive override approach might generate a degree of mutual deference between the judicial and executive branches of government and be workable in New Zealand.

38 The submission from the Chief Justice said the courts should be the ultimate decision-maker with respect to the treatment of national security information before the courts. It argued that the case for displacing the courts from making these decisions had not been made. The courts are the only effective way of ensuring there is a check on executive power. Further, New Zealand judges do not support the adoption of the Canadian model under which the executive has the power to ultimately and publicly override the courts' decision because this would remove the check on this aspect of executive power.

39 Most other submitters also considered that the courts are best placed to make the determination as to whether the release of particular information will have serious consequences to the safety and security of New Zealand. The courts are familiar with balancing natural justice principles with public interest concerns.

40 The NZBA said that the least attractive option was allowing the Crown to have the sole ability to decide whether national security information should be disclosed to affected parties or withheld (totally or partially) in proceedings. The Crown is the least independent person or entity in relation to the decision to disclose national security information, and the person with the greatest interest should not be the person solely making the decision as to whether that information should be disclosed. They considered that the Canadian executive override model has some benefits, including the comfort that this model is likely to give to intelligence-gathering agencies and New Zealand's allies. However, they consider that such an executive override is inconsistent with the constitutional relationship between the courts and the Crown. The judiciary has the constitutional role of supervising the use of executive power.

41 The NZLS said that, although the initial identification of "national security information" should be made by the Crown through certification (or similar) by the Prime Minister, that identification should not be decisive. It is essential that the Crown's identification of information as "national security information" should be subject to review by the courts to confirm that it meets the statutory definition and, if so, to determine whether the information should be withheld entirely or can be disclosed in partial or summarised form. The NZLS also considered that the hybrid override option might provide a way to give the security and intelligence agencies and their international information-gathering partners assurance of the ultimate safety of some of the information that they possess.

- 42 The Privacy Commissioner said that it would be more consistent with the rule of law for the courts to decide whether national security information is disclosed to affected parties in preference to the executive. The Commissioner suggested that the hybrid model may achieve a suitable constitutional accommodation. The Commissioner drew attention to the parallel in New Zealand’s OIA, which provides a right of executive veto of an Ombudsman’s recommendation that information be released. Although it is rarely used, it provides a kind of “constitutional safety valve” and power balance between the Ombudsman as a parliamentary officer and the executive. Given this precedent, the Commissioner said that it may be worth considering a hybrid model that provides for an executive override.
- 43 The Chief Ombudsman also noted the parallels between the hybrid approach and the right of executive veto of an Ombudsman’s recommendation (section 32(3)(a) of the OIA). The Chief Ombudsman said that, while the rigour and transparency of the option where the Courts are the ultimate decision-maker is attractive, the hybrid model would have more direct constitutional parallels with the Ombudsman’s role in reviewing OIA decisions of information with national security implications. Under this approach, the executive veto takes the form of an Order in Council.
- 44 The Police considered that there needs to be a mechanism to ensure that information that must be withheld is withheld, so final responsibility should not therefore rest with the courts. The security and intelligence agencies have also indicated that they do not favour the courts having the final decision because that model does not give assurance of the ultimate safety of some of the information that they possess.
- 45 The GCSB and the NZSIS in their joint submission stated that only the Crown has sufficient expertise to determine whether information can safely be disclosed publicly. They were the only submitter that preferred the option of no judicial oversight of the Crown claim. The submission referred us to the reasoning of the Court of Appeal in *Choudry* in which the Court elected not to “look behind” a certification made under section 27 of the Crown Proceedings Act.<sup>143</sup>

### Comments on submissions

- 46 Having considered the points made by the GCSB and the NZSIS, we consider that it would not be consistent with a modern conception of the role of the courts and the rule of law to allow the executive to make a determinative claim for non-disclosure with no judicial oversight. There is a difference between the court deciding to defer to a claim of national security by the executive based on the facts of the particular case and the court being prevented by statute from exercising their well established jurisdiction to review executive action solely because the executive claims that there are national security interests at stake.
- 47 When matters are within the preserve of the executive, we would expect the courts to exercise their powers of review with circumspection and mindful of the distinct roles of the executive and the judiciary in our system of government. However, it is crucial for an independent judiciary tasked with holding the executive to account to have full powers to adjudicate on the question of whether executive action is lawful. This is an essential requirement of the rule of law.
- 48 Most submitters and the individuals and organisations we consulted with outside of government considered that the courts must ultimately determine questions on disclosure and the management of national security information within court procedures. A number, as is evident from the discussion above, could live with the executive override option.

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143 *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA).

- 49 However, we remain concerned that the executive override approach has undesirable implications for the constitutional relationship between the courts and the Crown. We are also not convinced that an executive override is actually necessary to ensure that information that the Crown genuinely must not disclose is not disclosed.
- 50 The judiciary has a constitutional role of supervising the use of executive power. Legislating to empower the Crown (who would otherwise only have authority by acting through Parliament and legislating to change the law) to override a decision of the courts does not sit comfortably with this role. An independent and impartial judiciary safeguards against any transgression of government powers. The principle of independence suggests that decisions about national security information should not be left solely to the preserve of the executive. The courts should not have their decisions overridden, except perhaps by Parliament. If the courts are constrained and not able to control court proceedings, the independence of the courts is potentially called into question and the courts are simply lending legitimacy to matters determined elsewhere. The override is also inconsistent with open justice, as there is no transparency about the Crown's reasoning.
- 51 We also suggest that an override is actually unnecessary. In our view, the risk that the courts will disclose information that must not be disclosed is more apparent than real. We discuss in the Report the need for legislation to be very clear about how the courts should weigh the different interests at stake. While the courts will ultimately have the power to determine how national security information would be managed in proceedings, the executive does retain considerable control over whether information is disclosed. In most situations, it will have the option of discontinuing the proceedings if it is not prepared to disclose the information to the affected party.
- 52 Where that is not an option, the new legislative provisions we recommend would be carefully calibrated to identify the relevant interests and help guide their weighting. The courts would be guided by statutory criteria, and as in all areas of law, it is to be assumed that judges will apply the provision correctly (and that any errors will be addressed on appeal). We think that the models developed in this Report are capable of giving sufficient assurance, and it is therefore difficult to imagine situations where the override needs to be used.

## A SINGLE OVERARCHING FRAMEWORK

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- 53 In the Issues Paper, we asked whether New Zealand should adopt a single overarching framework for managing national security information that applied to all civil proceedings and also what features such a framework should have.<sup>144</sup>
- 54 The Chief Ombudsman supported a generic system to be used by different courts rather than reliance on inherent powers on a case-by-case basis. The Privacy Commissioner was of the view that the standard process in civil proceedings should allow for judicial discretion and express incorporation of openness as a guiding value. The Police submitted that it would be useful to have a clear set of statutory rules for the disclosure and use of national security information in civil proceedings.
- 55 The NZLS noted that inconsistencies amongst existing statutory regimes suggested that there was some value in developing a single statutory regime applicable to administrative and civil contexts. The NZBA submitted that a generic regime would promote consistency. The NZBA suggested that there should be multiple options or pathways by which the information could be

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144 Law Commission *National Security Information in Proceedings* (NZLC IP38, 2015) at 60, Q14 & Q15.

used, including special advocates and relying on your own lawyer. However, it should be for the court to decide which is the appropriate pathway.

56 The Chief Justice submitting on behalf of the judiciary thought it would be difficult for one system to account for all possible circumstances and that, if we were to propose an overarching framework to apply to civil proceedings generally, it would be better to identify principles.

57 The joint submission from the NZSIS and GCSB said that a single unified procedure for managing national security information in proceedings should be developed to give certainty and structure for judges and litigants. The NZSIS and GCSB were of the view that the procedure should be provided for in legislation, should include the use of special advocates and should be flexible enough to be used in different types of proceedings (civil and criminal). The NZSIS and GCSB also submitted that the procedure should be flexible enough to accommodate the different ways that national security information might be in issue in proceedings. In that regard, the NZSIS and GCSB noted that, in some cases, the national security information might form part of the evidence for the case, and in others, the national security information might comprise the methodology by which a particular piece of evidence was obtained.

### **Comments on submissions**

58 We agree with the majority of the submitters that a standard approach to managing the disclosure and use of national security information in civil proceedings should be developed. We are mindful of the difficulty noted by some submitters of creating a system to fit all possible circumstances that arise and as to the desirability of ensuring that judges retain enough flexibility to tailor the procedure to the particular requirements of a given case. We also agree with the views of the NZSIS and GCSB that any procedure should be flexible enough to accommodate the different ways in which national security information can arise in court proceedings.



# Appendix 4

## List of submitters and consultees

### PART 1 REVIEW OF THE CROWN PROCEEDINGS ACT

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#### List of Submitters

- Crown Law Office
- National Union of Public Employees
- New Zealand Law Society
- New Zealand Public Service Association
- New Zealand Public Service Association members employed by the Ministry for Primary Industries
- Janet McLean
- Russell McVeagh LLP
- Wellington Community Justice Project
- We also received 113 individual submissions on the question of granting immunity to ministers and Crown employees. These individuals have not been separately listed.

#### Consultation list

The Law Commission consulted with the following during the review of the Crown Proceedings Act:

- Stuart Anderson
- Hon David Collins QC
- Crown Law Office
- Department of the Prime Minister and Cabinet
- Tony Ellis
- Rodney Harrison QC
- Brian Henry
- Inland Revenue
- Isaac Hikaka
- Philip Joseph
- Rt Hon Sir Kenneth Keith QC
- Janet McLean
- Ministry of Justice
- New Zealand Defence Force
- New Zealand Security Intelligence Service



- Paul Rishworth QC
- Parliamentary Counsel Office
- Davey Salmon
- State Services Commission
- Graeme Taylor
- The Treasury
- New Zealand Public Service Association
- New Zealand Police Association
- Corrections Association of New Zealand

## **PART 2 NATIONAL SECURITY INFORMATION IN PROCEEDINGS**

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### **List of Submitters**

- Amnesty International New Zealand
- Bingham Centre for the Rule of Law (UK)
- Chief Employment Court Judge Colgan
- Criminal Bar Association of New Zealand
- Crown Law Office
- Department of Internal Affairs
- Human Rights Commission
- The Judges of the High Court, Court of Appeal and Supreme Court of New Zealand
- Government Communications Security Bureau
- New Zealand Bar Association
- New Zealand Law Society
- New Zealand Police
- New Zealand Security Intelligence Service
- Ministry of Business, Innovation and Employment
- Ministry of Foreign Affairs and Trade
- Office of the Inspector-General of Intelligence and Security
- Office of the Privacy Commissioner
- Office of the Ombudsman

### **Erratum:**

The Crown Law Office, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, and the Office of the Inspector-General of Intelligence and Security are incorrectly listed as submitters to the National Security Information Proceedings Issues Paper (IP38). These agencies did not submit.

### **Consultation list**

The Law Commission consulted with the following during the review of National Security in Proceedings:

- Karen Clarke QC
- Austin Forbes QC

- Stuart Grieve QC
- Nicky Hager
- Rodney Harrison QC
- Grant Illingworth QC
- John Ip
- Deborah Manning
- Richard McLeod
- Rt Hon Sir Geoffrey Palmer QC
- Dame Patsy Reddy and Hon Sir Michael Cullen (independent reviewers)
- Representatives of the Judiciary
- Government Communications Security Bureau
- New Zealand Security Intelligence Service
- Inspector-General of Intelligence and Security

### **Advisory officials group**

The Commission established an advisory officials group with representatives from the following departments:

- Crown Law Office
- Department of the Prime Minister and Cabinet
- Ministry of Business, Innovation and Employment
- New Zealand Customs Service
- Ministry of Foreign Affairs and Trade
- Department of Internal Affairs
- Ministry of Justice
- New Zealand Police

We are grateful for the valuable contributions made by all submitters and everyone we consulted during these reviews.

# Appendix 5

## Recommendations

### PART 1 REVIEW OF THE CROWN PROCEEDINGS ACT

#### Chapter 2 Why a new Crown Civil Proceedings Act?

##### RECOMMENDATION

- R1 The Crown Civil Proceedings Bill attached to this Report, which modernises the Crown Proceedings Act 1950, should be considered for enactment.

#### Chapter 3 Resolving central policy issues

##### RECOMMENDATIONS

- R2 The Crown should be able to be sued in tort as a private individual and be held directly liable.
- R3 Existing immunity provisions that apply to Crown employees and that currently have the effect of immunising the Crown should be included in a schedule in the new Act and continue to apply to immunise the Crown against liability.
- R4 The substantive law of torts, including what kinds of torts the Crown should be liable for, should continue to be developed by the courts. We are not recommending a legislative response at this time.
- R5 We recommend the retention of statutory immunity for Crown employees in respect of good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.
- R6 The immunities provided for Crown employees should not prevent the courts from holding the Crown itself liable in tort in respect of the actions or omissions of a Crown employee covered by an immunity.
- R7 A statutory indemnity should be enacted for ministers of the Crown to replace the current indemnity procedure in the Cabinet Manual. Under the new provision, the Crown would be required to indemnify ministers for costs and damages in civil proceedings in respect of good-faith actions or omissions in pursuance or intended pursuance of their duties, functions or powers.

- R8 The indemnity should be paid by the department that is responsible for the subject matter of the civil proceedings, and departments should be required to include a statement in their annual financial statements itemising all amounts paid to indemnify a minister under the enacted indemnity. Confidential and personal information would be protected when reporting.
- R9 We recommend that a court should be able to grant any remedy in civil proceedings against the Crown.
- R10 Where the public interest requires, the court must make a declaratory order about any party's rights or entitlements instead of ordering against the Crown any of:
- (a) an injunction;
  - (b) an attachment;
  - (c) specific performance; or
  - (d) the conveyance of land or property.
- R11 The new legislation should continue the exclusion in the Crown Proceedings Act against bringing *in rem* proceedings against the Crown and should provide that the Crown's ships or aircraft and related property cannot be arrested or made subject to any of the consequences of *in rem* proceedings.

## PART 2 NATIONAL SECURITY INFORMATION IN PROCEEDINGS

### Chapter 6 Civil proceedings

#### RECOMMENDATIONS

- R12 Section 27(3) of the Crown Proceedings Act 1950 should be repealed and replaced by new legislative provisions that provide for the disclosure and management of national security information in civil proceedings.
- R13 Section 70 of the Evidence Act 2006 should be amended to:
- include information that would currently be covered by common law public interest immunity; but
  - exclude national security information, which will be dealt with under the new legislative provisions.
- R14 National security information should be defined as information that, if disclosed, would be likely to prejudice:
- (a) the security or defence of New Zealand; or
  - (b) the international relations of the Government of New Zealand; or

- (c) the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation.

R15 The court should hold a closed preliminary hearing to assess how national security information should be used (if at all) in the proceedings.

R16 A closed hearing should have the following features to ensure that national security information is protected while before the court:

- The judge must close the court to the public and exclude non-Crown parties, their lawyers, the media and any other person who does not have security clearance to access the national security information.
- The judge must appoint a special advocate to represent the interests of the excluded non-Crown party.
- The judge will be able to review the national security information and hear arguments about its use from representatives on behalf of all parties to the case.
- The judge must direct that a summary of the national security information be provided to the non-Crown party and their chosen counsel. If the court is satisfied that it is not possible to produce a meaningful summary without disclosing national security information, the judge may waive this requirement.
- The judge has a supervisory role over the final content of summary.

R17 The judge should determine whether to exclude the national security information, make the national security information available to the non-Crown party (including with protective measures) or direct that the national security information be heard under closed procedures. The matters that must be taken into account are:

- whether the information in question falls within the definition of national security information;
- whether national security interests can be adequately protected if the national security information is provided to the non-Crown party;
- whether, having regard to the degree to which the national security information is likely to be of assistance to the non-Crown party or determinative of the Crown's case, the proceedings can be fairly determined without it being put before the court;
- the degree of potential prejudice to the non-Crown party if the national security information is heard under a closed procedure; and
- whether the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the interests of justice, to disclose the information or allow it to be used in a closed procedure.

R18 Where an application is made for non-party discovery against the Crown in respect of information the Crown claims is national security information, the judge should have the power to hold a closed hearing.

## Chapter 7 Administrative decisions

### RECOMMENDATIONS

- R19 If a person would be entitled to receive information about a decision that affects their rights but the information must be withheld for security reasons, the person should instead receive a summary of the information agreed by the chief executive of the relevant agency and the decision-maker.
- R20 When an administrative decision is made that gives rise to the right of complaint to the Inspector-General of Intelligence and Security, the person affected must be notified of their right to make a complaint and have the actions of the security and intelligence agencies reviewed by the Inspector-General.
- R21 When security and intelligence agencies provide information used in an administrative decision that affects the rights of an individual, the Inspector-General must be provided with a copy of the information given to a decision-maker and a record of the decision made.
- R22 The decision-maker may decide to reconsider the decision if the Inspector-General makes a finding that the information was not reliable or balanced.
- R23 The Passports Act 1992, the Terrorism Suppression Act 2002, the Telecommunications (Interception Capability and Security) Act 2013 and the Immigration Act 2009 should be amended where necessary to give effect to the recommendations above.
- R24 Consequential amendments are needed to legislation that currently provides for closed or semi-closed procedures in judicial review or appeals of administrative decisions. These procedures would be modified to ensure greater consistency with R12 – R18 and R30 – R41.

## Chapter 8 Criminal prosecutions

### RECOMMENDATIONS

- R25 Where the disclosure of grounds for a search or surveillance warrant may prejudice national security, the person subject to the warrant should be able to challenge the warrant through a special advocate. In addition to challenging the validity of the warrant, the special advocate may also present arguments for the disclosure of the grounds to the affected person.
- R26 The special advocate will operate in accordance with the same procedure as outlined above at R12 – R18 and R30 – R41.
- R27 The Criminal Disclosure Act 2008 should be amended to provide for the use of special advocates in challenging a claim for non-disclosure of national security information.
- R28 The Criminal Disclosure Act 2008 should provide that the judge may dismiss proceedings under section 147 of the Criminal Procedure Act 2011 if the national security information must be protected but withholding it would prevent a fair trial from occurring. The Criminal Procedure Act 2011 should also provide that the prosecutor may withdraw proceedings if the judge orders material to be disclosed but the prosecutor remains of the view that disclosure would be an unacceptable risk to national security.
- R29 The Evidence Act 2006 should be amended to provide for anonymity protections for sources and intelligence officers. This should apply in criminal and civil proceedings.



## Chapter 9 The special advocate regime and security issues

### RECOMMENDATIONS

- R30 Legislative provisions should provide that the role of a special advocate is to represent the interests of the non-Crown party in a closed procedure (including closed preliminary hearings).
- R31 A limited statutory immunity should protect special advocates from claims of professional misconduct or unsatisfactory conduct as lawyers under the Lawyers and Conveyancers Act 2006 where they are acting in accordance with the requirements of their role as special advocates.
- R32 There should be a panel of designated security-cleared lawyers who are suitably qualified and experienced to undertake this work from which special advocates are appointed.
- R33 The Government should consider how best to provide necessary training and logistical support for those appointed to the panel in order to ensure that New Zealand can maintain a high level of knowledge and capacity within the panel of special advocates.
- R34 The costs of the special advocates and the cost of their support should be met by the Crown.
- R35 The court should have the power, to be exercised on application by the non-Crown party, to appoint a special advocate from the panel of designated special advocates to represent the non-Crown party's interests in a preliminary hearing. The court should appoint the advocate who is nominated by the non-Crown party unless there are exceptional reasons requiring the court to appoint another panel member instead.
- R36 The appointed special advocate should have full access to all "national security information" at issue in the case and should be under a statutory obligation to keep that material confidential and to not disclose it, except as expressly permitted under the regime.
- R37 After the special advocate has been given access to the national security information, he or she may only communicate with the non-Crown party or the party's lawyer in such terms as are permitted by the court.
- R38 The appointed special advocate should be able to submit on any matter relevant to the use of national security information, including:
- the designation of information as "national security information";
  - the level of redaction of any information that is to be partially disclosed to the affected party;
  - the content of the summary of information, in particular, whether it discloses sufficient information to give the affected party an opportunity to comment on any potentially prejudicial information they have not been given; and
  - whether a closed procedure should be used or whether information that cannot be disclosed should be excluded from proceedings.

- R39 A special advocate must have adequate powers within the closed hearing to be effective. In particular, the advocate should be able to call witnesses and cross-examine witnesses in closed procedures and exercise other powers that advocates normally have in order to protect the interests of the person they are representing.
- R40 Subject to the following specific exceptions, all cases involving national security information should be heard in the High Court:
- (a) The Immigration and Protection Tribunal should continue to hear cases involving national security information and other types of sensitive information.
  - (b) Employment Court proceedings involving national security information should be heard by the Chief Employment Court Judge or by any other Employment Court Judges nominated by the Chief Employment Court Judge for that purpose.
  - (c) Proceedings involving national security information in the Human Rights Review Tribunal should continue to be heard there. Provision already exists for removing proceedings to the High Court on public interest grounds.
- R41 The relevant court or tribunal hearing any case involving national security information should have the power to appoint a special adviser for the purposes of giving advice on any aspect of national security in any proceedings before it.