Hon Kris Faafoi
Minister of Justice

Proactive release – Security Information in Proceedings Legislation Bill

Date of issue: 7 December 2021

The following documents have been proactively released.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	**Managing National Security Information in Proceedings** *Cabinet paper* Office of the Minister of Justice *Lodged: 28 November 2019*	Released with some information withheld under section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials.
1a	**Managing National Security Information in Proceedings** *Regulatory Impact Statement* Ministry of Justice 27 November 2019	Released in full
2	**Managing National Security Information in Proceedings** *Cabinet Social Wellbeing Committee minute* Cabinet Office *Meeting date: 4 December 2019*	Released in full
3	**Security Information in Proceedings Legislation Bill: Approval for introduction** *Cabinet paper* Office of the Minister of Justice *Lodged: 1 July 2021*	Released in full
3a	**Security Information in Proceedings Legislation Bill**	The copy of the bill provided to Ministers with this paper has been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege.
3b	**Departmental Disclosure Statement**	This document has been withheld because it is publicly available at www.legislation.govt.nz/disclosure
4	**Security Information in Proceedings Legislation Bill: Approval for introduction** *Cabinet Legislation Committee minute* Cabinet Office *Meeting date: 8 July 2021*	Released in full

No.	Document	Comments
5	**Security Information in Proceedings Legislation Bill: approval for amendment prior to introduction** *Cabinet paper* Office of the Minister of Justice *Lodged: 14 October 2021*	Released with some information withheld under section 9(2)(h) of the OIA to maintain legal professional privilege.
5a	**Security Information in Proceedings Legislation Bill**	The copy of the bill provided to Ministers with this paper has been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege. The bill is publicly available from www.legislation.govt.nz
6	**Security Information in Proceedings Legislation Bill: approval for amendment prior to introduction** *Cabinet Legislation Committee minute* Cabinet Office *Meeting date: 11 November 2021*	Released in full

In Confidence
Office of the Minister of Justice

Chair
Cabinet Social Wellbeing Committee

MANAGING NATIONAL SECURITY INFORMATION IN PROCEEDINGS

Proposal

1. This paper seeks Cabinet agreement to proposals to manage national security information (NSI) in court and administrative proceedings. The proposals support other measures being progressed following the Christchurch mosque attacks in March 2019 and are also the Government's response to Part 2 of the Law Commission's 2015 report *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings*.[1]

Executive summary

2. NSI is information that, if disclosed, would be likely to prejudice New Zealand's security, defence, or international relations. As part of a comprehensive response to the Christchurch mosque attacks, I propose to adopt the Law Commission's recommendation of an overarching, coherent framework for dealing with NSI in court proceedings, including challenges to administrative decisions. Current frameworks for dealing with NSI in these settings have developed in an ad hoc manner, and lack clear and consistent protections for both individuals and for national security.

3. The new law I propose balances the rights and interests NSI often throws into conflict. It would provide greater assurance to the Crown that NSI could be used in proceedings while still being protected, standardise and clarify protections for non-Crown parties and ensure clear, consistent processes are followed in a way that addresses natural justice requirements as far as possible. The key feature of the proposed framework is a closed court process.

4. I propose to extend the Law Commission's recommendations in two significant ways. First, by adding a second civil process involving a Ministerial certificate in cases where stronger assurance of protection of NSI is sought by the Crown. Second, by adding a pre-trial criminal process to determine how NSI can be used but protected at trial in the presence of the defendant.

5. Flow-on benefits are expected to New Zealanders' safety and our international relations and reputation. For example, the proposals would allow us to assure our foreign partners and domestic sources that information they provide in confidence will continue to be adequately protected, if used in proceedings, just as we expect our partners to protect information that we share with them.

[1] Law Commission, The Crown in Court, (NZLC R135, 2005). The Government's response to Part 1 of the report, dealing with the Law Commission's related review of the Crown Proceedings Act 1950, was tabled in the House on 13 June 2016.

Background

The Law Commission previously recommended a central framework

6. In December 2015, the Law Commission completed a first principles review of the protection of NSI in criminal, civil and administrative proceedings. The Law Commission made 30 recommendations for reform for a more consistent and coherent approach to the use and protection of NSI. The recommendations sought to clarify the respective roles and interests of the judiciary and the Executive, and balance principles of open and natural justice with the protection of national security.

7. I propose we accept 25 of these recommendations as they stand and accept the remaining five recommendations with some modification. I also propose introducing a second civil process and a pre-trial criminal hearing. The recommendations, and my proposed response, are set out in Appendix 1.

8. Because I propose that Cabinet implement the Law Commission's recommended reforms, albeit in modified form, it is unnecessary to table a response to the NSI report in the House (CO (09) 1 refers).

The proposals form part of a wider Government response to counter-terrorism

9. The development of a Government response was well-advanced in 2017 but was put on hold prior to the 2017 election. The Christchurch mosque attacks on 15 March led the Government to expedite a number of improvements to the counter-terrorism system.

10. The proposals in this paper form part of a suite of measures designed to strengthen the end-to-end system to prevent and respond appropriately to terrorism. Putting in place a coherent, consistent regime for dealing with NSI in proceedings would add certainty to the use of NSI, including within some of the new measures and offences being considered within this broader suite of counter-terrorism proposals (the Terrorism Suppression (Control Orders) Bill, [CBC-19-MIN-0039] and *Strengthening New Zealand's Counter-Terrorism Legislation* [CAB-19-MIN-0612] refer, noting neither proposal will permit NSI to be used as evidence in a substantive criminal trial).

The current general law is inadequate

11. Our current settings provide insufficient assurance to the Crown that NSI can be adequately protected if it needs to be used in court proceedings. This creates both domestic and international risks for New Zealand, in terms of safety, security and international relations. The lack of a process for protecting the use of NSI in court proceedings could lead to the Crown deciding not to bring proceedings or to settle a claim against it, for example when the Crown cannot defend itself by safely introducing NSI.

12. Current settings can also disadvantage non-Crown parties, who may not know the reason for a decision against them, nor be in a position to challenge decisions or actions of the Crown. These disadvantages impinge on fundamental procedural and natural justice rights.

13. The Law Commission identified several problems with the current law:

13.1 except in a small number of specific statutory regimes (for example, provisions relating to passport cancellations), NSI cannot be used as evidence in court unless it is fully disclosed to the other party;

13.2 the Crown can withhold information on national security grounds that would otherwise be discoverable to non-Crown parties;

13.3 there is no clear authority for running a closed court process to allow for the use and protection of NSI, except in specific statutory regimes. This gap has led to the ad hoc development of closed processes in civil proceedings;

13.4 statutes are inconsistent about the respective roles of the Executive and the judiciary. The Crown Proceedings Act 1950 (CPA) enables the Crown to issue a public immunity certificate preventing NSI and other sensitive information from being disclosed to non-Crown parties, while s 70 of the Evidence Act 2006 requires judges to balance the public interest in protecting matters of state by withholding information against the public interest in the disclosure of the information in the proceedings;

13.5 the growing number of specific statutory regimes establishing bespoke closed processes is undesirable and has led to inconsistency of legislative approach; and

13.6 in criminal cases, the defence has only a limited ability to argue for disclosure, meaning that judges have limited information when determining whether information should be disclosed.

The existing subject-specific schemes lack adequate protection for individuals

14. In contrast to the absence of a clear process in the general civil and criminal law, New Zealand has five existing closed court schemes for dealing with NSI and other classified information in specific contexts involving challenges to administrative decisions:

14.1 Passports Act 1992;

14.2 Terrorism Suppression Act 2002 (TSA);

14.3 Telecommunications (Interception Capability and Security) Act 2013 (TICSA);

14.4 Health and Safety at Work Act 2015 (HSWA); and

14.5 Immigration Act 2009.

15. While the schemes follow a broadly similar closed process for protecting NSI, they lack adequate protection for non-Crown parties. For example, the Passports Act, TSA and TICSA require the court to make decisions based on information the affected person is not able to see. The Court is not given any discretion to disregard information not provided to the affected person. The TSA and the Passports Act do not expressly provide for a security-cleared legal representative to stand in for the non-Crown party and their lawyer to represent the non-Crown party's interests

(known as a special advocate).[2] The HSWA is the only scheme to cover criminal prosecutions and contains some unique features.[3] The Immigration Act explicitly prevents the disclosure of NSI by the court to the non-Crown party.

16. As well as inadequately protecting the non-Crown party's interests, the schemes differ from each other. The differences between these schemes add to the inconsistency and uncertainty of how NSI is handled in proceedings. In addition, uncertainties and gaps on the face of the statutes have led to further ad hoc processes being used.[4]

17. The Law Commission proposed repealing the parts of these bespoke schemes that deal with challenges to decisions involving NSI and replacing them with a single overarching statute. I propose to adopt this recommendation, apart from the relevant part of the Immigration Act, which I recommend remains unaffected by these proposals until the Immigration Act can be reviewed in its entirety.

Developments since the Law Commission's report

18. Since the Law Commission's report, two further legislative regimes have been enacted that could benefit from adopting a closed court process (the Outer Space and High-altitude Activities Act 2017 and the Brokering (Weapons and Related Items) Act 2018), and two more are in progress (the Overseas Investment Amendment Bill [DEV-19-MIN-0306], which will adopt the provisions in these proposals when passed, and the Terrorism Suppression (Control Orders) Bill, [CBC-19-MIN-0039]).

19. Court cases involving information claimed to risk national security if disclosed, although infrequent, continue to highlight the gaps and uncertainties in the law, with strongly contested procedures and interim findings.[5] The processes adopted and interim judgments in those cases have been considered in developing the proposals I am putting forward. Recent cases provide helpful insight into the practicalities of balancing the protection of NSI with non-Crown parties' interests. They also provide impetus to enact a statutory closed court process.

20. In September 2019, while not required to determine the matter, the Court of Appeal considered it unlikely the High Court could adopt a closed court process for a substantive hearing under its inherent jurisdiction.[6] This means that while NSI can be protected by withholding it from disclosure, the Crown would not be able to rely on the NSI to defend its actions or decisions. The UK Supreme Court made a similar ruling in 2011, which led to the UK enacting a legislative regime.[7]

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[2] Although a special advocate was appointed under the court's inherent jurisdiction in the recent case of *A* v *Minister of Internal Affairs* [2018] 3 NZLR 583. The closed court procedures in the Terrorism Suppression Act 2002 apply to challenges to an entity designated a terrorist entity.

[3] The scheme is limited to situations where all parties to the proceedings have access to classified security information or where the defendant intends to produce or refer to classified security information.

[4] For example, in respect of *A* v *Minister of Internal Affairs* [2018] 3 NZLR 583 – a challenge to a passport revocation under the Passports Act 1992 on the basis of NSI, the court used its inherent power to appoint a special advocate, a measure not currently provided for by the Passports Act.

[5] *Dotcom* v *Attorney-General* [2019] NZCA 412; *A* v *Minister of Internal Affairs* [2017] NZHC 746; [2018] 3 NZLR 583; [2018] NZHC 1797; [2018] NZHC 2890.

[6] *Dotcom* v *Attorney-General* [2019] NZCA 412. Note that leave has been sought to appeal to the Supreme Court.

[7] *Al Rawi* v *Security Service* [2011] UKSC 34.

21. Several recent inquiries under the Inquiries Act 2013 have involved NSI, and have relied on s 70 Evidence Act 2006 to protect this information. The proposals in this paper will remove that option, but the Inquiries Act allows adequate protection of NSI through the setting of terms of reference. I note that future terms of reference under the Inquiries Act will require specific provisions to provide protections that are equivalent to those I propose here.

The international context

22. A number of international jurisdictions, including Canada, the UK and Australia, have NSI statutes for civil proceedings. The Australian settings favour Executive control over any disclosure of NSI, whereas the Canadian and UK schemes have judicial control over disclosure.[8] These jurisdictions provide separate legislation or special procedures for immigration cases involving NSI.

Reform objectives

23. The overarching goal of the proposed framework is to ensure the legitimacy of, and public confidence in, our systems. New Zealand needs to receive and gather information (including from other jurisdictions) and respond appropriately to threats to our national security, in a way that preserves trust in the outcomes of Executive decisions and court processes. It also needs a framework that appropriately balances the interests of the Crown and its citizens, including the role of the Crown to protect the public interest and for any party to defend itself using NSI. Trust in the outcomes of court processes would be diminished if the court was unduly fettered, and thus unable to effectively fulfil its function of checking excessive or improper use of Executive power.

24. The proposals in this paper aim to create a single overarching legal framework to provide confidence that NSI can be used and relied on in administrative decisions and in civil and criminal proceedings. To ensure clarity for Crown agencies and to bolster our domestic sources and international partners' confidence, the framework should be as consistent as possible while recognising the different contexts and interests at stake. A consistent approach would allow jurisprudence to develop, providing further clarity.

25. The proposals also ensure that intrusions into the rights of non-Crown parties are the minimum necessary and that the courts have a clear process to follow. Any limitation on access to information used in a case against a person, or to make an administrative decision that affects their rights, is a departure from accepted principles of justice. In New Zealand, subject to specific exceptions, justice does not operate from behind closed doors. Protections for non-Crown parties are of the utmost importance. Where information is held within the Crown, checks and balances can help to ensure its proper use, as well as its protection.

26. There is an inherent interrelationship and tension between these objectives that my proposals attempt to balance. Because any closed court process excluding the non-Crown party represents a significant departure from the rules of natural justice

[8] Although the Canadian model provides for an Executive override by the Attorney-General; Canada Evidence Act RSC 1985c C5, s 38.13(5), and also only provides for a preliminary closed court hearing. The Australian scheme also applies to criminal proceedings.

and open justice, it should remain the exception.[9] Its use should be kept to a minimum in civil cases and should not be available in criminal trials.

Proposals

Overview

27. The proposals cover NSI in civil proceedings, challenges to administrative decisions, and criminal proceedings. The term NSI is explained at paragraph 40, below.

28. In civil proceedings, I propose two processes:

    28.1 the first process is that recommended by the Law Commission. As it would not require a certificate, it is referred to as the **non-certificate process**. I expect this process to be the standard process, because it is the least intrusive on rights to open justice and natural justice.

    28.2 the second civil process would require the Attorney-General and the Minister of Foreign Affairs to jointly certify that the information is NSI and that it therefore should not be disclosed beyond the Crown, unless disclosure takes place in a closed court procedure. I propose this process ("**the certificate process**") would only be available in cases where the non-certificate process was considered unsuitable.

29. The Crown would have the choice of electing either the certificate or non-certificate process.

30. There would be two distinct phases to the scheme: a closed-court preliminary hearing and then, depending on the outcome of that preliminary hearing, a closed-court substantive hearing. During a hearing, the court would come in and out of the closed-court process – as required.

31. For challenges to administrative decisions, I propose repealing relevant provisions in four existing statutes and instead providing that they come within the new overarching statute.

32. In regard to criminal proceedings, I propose adopting and adding to the Law Commission's proposal to create a pre-trial process to safely consider the use of NSI, so that any use of it at trial can occur in the presence of the defendant and the defendant's lawyer.

[9] "The whole of our common law tradition, as bolstered by the rights and protections recognised by NZBORA, render the procedure under s 29AB [Passports Act 1992] an anathema to the fundamental concepts of fairness" and "A statutory provision that material and potentially decisive evidence in a court proceeding is to be presented to the Court and considered in the absence of the party adversely affected is as flagrant a breach of the fundamental right recognised in s 27 of NZBORA as could be contemplated."; *A v Minister of Internal Affairs* ([2017] NZHC 746 at 41 and 84, Dobson, J. - although the Court did not decide whether it could be demonstrably justified under s 5 NZBORA in the absence of argument on the point. Section 29AB Passports Act 1992 provides that the court must hear the case in the absence of the non-Crown party, their lawyer and the public and must decide the case on the basis of evidence not provided to the non-Crown party.

Civil cases

The current law

33. Currently, the Crown can choose between two provisions and it is not clear which provision takes precedence. Section 70 of the Evidence Act 2006 requires the judge to balance the public interest in disclosing or withholding the information, whereas s 27(3) of the CPA, provides that the Prime Minister can certify that disclosure would be likely to prejudice New Zealand's security, defence or international relations. The effect of either provision is that the information is not disclosed and does not form part of the case. This can present a problem where the Crown wants to rely on the NSI to defend itself, or where the non-Crown party's case would benefit from the information being before the court. The last time a s 27(3) certificate was relied upon was in a case was in 1999.[10]

34. Following the Crown's choice between the CPA and the Evidence Act, in the absence of statutory guidance, processes for determining whether the information should be excluded from the case are reached by agreement between the parties, based on the court's inherent powers to control its own procedure.[11] For example, in a recent case under s 70 of the Evidence Act, the parties agreed on the appointment of a special advocate, despite there being no statutory provision for one.[12]

I propose to adopt the Law Commission's recommended process

35. I propose a legislative framework that would fill gaps in the existing law by setting out a clear process. Under the Law Commission's non-certificate process, the Crown would be able to apply to the court for a determination:

    35.1 first, that the information meets the definition of NSI; and

    35.2 second, of how the information should be protected.

36. The judge will hold a preliminary hearing in a closed court to determine these matters. The key features of the closed court preliminary process would be that:

    36.1 the hearing takes place in a secure facility (cases would be transferred to an appropriately secure High Court), and the court would be closed to the public, media, any non-Crown parties and their lawyers, and anyone else (other than the judge) without appropriate security clearance;

    36.2 the judge must appoint a security-cleared lawyer (called a special advocate) to represent the interests of the excluded non-Crown party (and set terms for communication between the special advocate and the party or parties);[13]

[10] *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA) i.e. before section 70 of the Evidence Act was enacted. A certificate was issued and presented to the Court in *Dotcom v Attorney-General*, but it was withdrawn after GCSB recognised that it had acted unlawfully, so was not considered by the Court; see *Dotcom v Attorney-General* [2019] NZCA 412 at [18].

[11] Noting the limitations of that inherent jurisdiction as stated by the Court of Appeal in *Dotcom v Attorney-General* [2019] NZCA 412.

[12] *Dotcom v Attorney-General* [2019] NZCA 412.

[13] There would still be submissions, and in some cases, evidence called by the non-Crown party's counsel, but they cannot be in the closed part of the hearing on the application.

36.3 the judge and special advocate would have full access to all NSI at issue in the proceedings, but would not be able to disclose it to any person, including to the non-Crown party or their lawyer;

36.4 the judge would have power to direct that a summary of the NSI be produced and provided to the non-Crown party and their lawyer, as far as is possible without revealing the content of the NSI, in order to enable them to instruct the special advocate;

36.5 the special advocate would be able to call and cross-examine witnesses and make submissions on whether the information meets the test for NSI and if so, how it should be protected; and

36.6 the judge would be able to appoint special advisers to give advice to the judge on any aspect of national security in the case before it.

37. I propose the cost of special advocates would be funded by the Crown. I also propose a limited statutory immunity from claims of professional misconduct or unsatisfactory conduct for special advocates. This immunity is necessary due to the departure from the normal lawyer-client relationship. For example, the special advocate's inability to receive instructions directly from the non-Crown party could put them in breach of normal lawyer-client obligations.

38. After the preliminary closed court hearing, if the court is not satisfied that the information meets the definition of NSI (point 35.1 above), it will need to be disclosed to the non-Crown party. If the court is satisfied that the information meets the definition of NSI (point 35.2 above), the options that the court would have to protect the NSI would be to:

38.1 exclude it from the proceedings;

38.2 use existing ordinary protective measures (to disclose to the non-Crown party but no wider, for example by a suppression order, or excluding the public or media from the substantive hearing);

38.3 direct disclosure of the NSI in a protected form (such as a redacted or summarised form); or

38.4 direct a closed court procedure for the substantive hearing.

39. If the judge orders a substantive closed court process it would contain the same features as the preliminary closed court process, set out in paragraph 36, above.

Definition of national security information

National security information

40. I support adopting the definition of NSI the Law Commission proposed, as information that, if disclosed, would be likely to prejudice:

40.1 the security or defence of New Zealand; or

40.2 the international relations of the Government of New Zealand; or

40.3 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.

41. However, I propose extending this to cover information that would, if disclosed be likely to prejudice the security, defence or international relations of the Cook Islands, Niue, Tokelau or the Ross Dependency or prejudice relations between the governments of any of these and New Zealand on the advice of MFAT. These states make up the Realm of New Zealand and we have a residual statutory responsibility for their external affairs and defence. Adopting a broader definition better reflects the ambit of security interests covered by those current legislative provisions the new civil regime will be replacing and also aligns with definitions in the Official Information Act and Evidence Act.[14]

An additional civil certificate process

42. I am advised that in order to protect New Zealand's security (both domestically and internationally), defence and foreign partner relationships, in rare cases the Crown needs a greater level of certainty that NSI will be protected than is afforded by the Law Commission's proposals. Accordingly, I propose to supplement the Law Commission's proposals with a certificate process.

43. I expect the non-certificate process would be the usual approach, but I propose that where necessary the Crown would be able to request that the Attorney-General and the Minister of Foreign Affairs certify that the information covered by the certificate is NSI and that it cannot be disclosed. Officials will develop suitable processes for advising these Ministers.

44. The certificate provides more certain protection against disclosure than the Law Commission's proposal. I consider that requiring two members of Cabinet to jointly certify ensures a robust case will be presented and assessed. The Foreign Affairs portfolio ensures up-to-date knowledge of international relations and advice can be sought from relevant agencies when the NSI is wholly domestic. The Attorney-General is the Government's senior Law Officer, responsible for upholding the public interest and ensuring government conducts itself according to the law. In carrying out this role, the Attorney-General is required to act independently and free of political considerations, providing an important safeguard on the potential abuse of Executive power. As the Attorney-General is exercising a Ministerial function, I propose that this should not be a function that the Attorney-General is able to delegate to the Solicitor-General.

45. Following presentation of the NSI certificate, either party may apply to the court for a closed court process. Where a certificate is presented, the court would have to determine whether the information should be excluded from the case (because the Crown cannot disclose it to the other parties) or whether it can be withheld from the other parties but disclosed to a special advocate representing their interests and used as evidence in a closed court. The court would be required to order a preliminary closed court process to determine if the NSI can be used in the interests of justice.

[14] Crown Proceedings Act 1950 s 27(3) and aspects of s 70(2)(a) Evidence Act 2006.

46. This option offers more certainty to the Executive that NSI will be protected in appropriate circumstances. To ensure the certificate option is reserved for exceptional cases where information is so sensitive it requires this level of protection, I consider that safeguards are required to prevent the certificate process from becoming the default option.

47. I propose that under a protocol, the Crown would be required to consider the non-certificate track first and that this would be reflected in advice to the certifying Ministers.

48. I also propose that an application by the Crown under the non-certificate track would preclude the use of the certificate track.[15] If a non-Crown party applies to initiate the non-certificate track, the Crown would need to either present a certificate in response, if it wishes to use one, or defend the case under the non-certificate track. I do not support any ability for the Crown to present a certificate later in the proceedings, if this is in response to a court ruling or decision it does not like. Producing a certificate to enable the Crown to act contrary to a court order for disclosure of information is constitutionally unpalatable.

49. However, I propose a degree of procedural flexibility, for example where the nature or scope of proceedings substantially changes, for example, where new information, that was not previously before the Court or relied on by the Crown, becomes relevant. In such cases, I propose the Crown would, with the leave of the court, be able to seek a certificate to cover the new information only. In all cases, the court would be able to exclude the NSI from the proceedings altogether (meaning neither party could present it as evidence), because either the information was not sufficiently relevant, or a closed court process would be unfair to the non-Crown party.

Judicial review of the certificate

50. The right of citizens to seek a review of an administrative decision by a judge is enshrined in the New Zealand Bill of Rights Act 1990 (NZBORA). Being a decision of the Executive, the certificate would be open to judicial review.[16] To ensure that the validity of any certificate that is challenged is settled without undue delay, I propose that an application for judicial review of the certificate must be made within 28 days of the applicant receiving notification of the certificate. This would allow the court to proceed with the preliminary hearing the certificate triggers. A court would be able to grant an extension in special circumstances. This time restriction is consistent with other specialist legislative regimes and is justified to ensure timely facilitation of the process.

Administrative decision-making

51. I agree with the Law Commission that we should continue to allow for tailored initial decision-making processes within our existing statutory schemes. I am not proposing changes to the administrative decision-making mechanisms in the Passports Act, TSA, TICSA and the HSWA. Each set of mechanisms is tailored to the particular context of each scheme. For that reason, I do not propose to change

[15] Note that, should an attempt to seek a certificate prove unsuccessful, it would be possible to use the non-certificate process, if desired.
[16] The availability of judicial review was recently confirmed in *Dotcom v Attorney-General* [2019] NZCA 412; *A* v *Minister of Internal Affairs* [2018] NZHC 1797.

the definitions of information within these schemes that the closed-court process can apply to if decisions are challenged. The schemes all have definitions that are wider than NSI, for example, covering information that, if disclosed, would prejudice the maintenance of the law or endanger the safety of any person.

52. The change I propose is that where administrative decisions made under these schemes are challenged, either by judicial review or by appeal, those processes would come within the proposals when they involve classified information (including NSI), requiring protection under those schemes. This change would align the schemes and ensure a core set of protections for non-Crown parties are in place. I agree with the Law Commission that reforms are needed to ensure people affected by administrative decisions have their rights protected to the greatest extent possible. I seek Cabinet's agreement in principle that any future schemes adopt this uniform process.

53. I propose to modify the Law Commission's recommendation that if a person affected by an administrative decision would be entitled to receive information about a decision that affects their rights, but the information must be withheld for national security reasons, the person should receive a summary of the information the decision was based on in every case. The administrative burden created by this recommendation outweighs the benefit of providing a summary in every case. I propose instead that a summary be provided whenever an affected person requests it. Where it is not possible to produce a meaningful summary without disclosing NSI the requirement to provide a summary when requested would be waived.

54. I propose to accept the Law Commission's recommendation that any person with an existing right of complaint and review by the Inspector General of Intelligence and Security (the IGIS) be informed of that right, except where the bespoke scheme provides a specific review process. The decision-maker may decide to reconsider the decision if the IGIS makes an adverse finding.

Oversight

55. The Law Commission recommended that when security and intelligence agencies provide information used in an administrative decision as defined in those schemes that affects the rights of an individual, the IGIS should be provided with a copy of the information the agencies provided to the decision-maker and a record of the decision made. I propose that, in the first instance, the IGIS is simply provided with the number of decisions made. Under the Intelligence and Security Act 2017, the IGIS can request copies of information the security agencies provided to the decision-maker when considered necessary.

56. Since the Law Commission's report, the Intelligence and Security Act 2017 has been passed. That Act imposes a duty on the security agencies to act with integrity and professionalism and provides the IGIS with oversight mechanisms such as the ability to conduct inquiries and reviews and to ensure agencies act lawfully and with propriety. The amendment I propose accords with the IGIS's functions under the Intelligence and Security Act, which includes an ability to follow up on significant matters as the IGIS sees fit. I do not propose to extend the jurisdiction of the IGIS.

Immigration should retain its own separate scheme

57. There is good reason to treat immigration decisions differently from other decisions involving NSI. Each of our Five Eyes (FVEYs) partners[17] has a specific scheme for dealing with NSI in immigration cases. This is despite Australia, Canada and the UK having a central NSI statute.

58. Immigration decisions are a high-volume area where decisions are necessarily made quickly and in close collaboration with our foreign partners. Controlling inward flows across our borders presents unique challenges, particularly the need to rely on sensitive information sourced from overseas partners. Immigration is an area where the Executive has the prerogative to exercise significant discretion about who can and cannot enter or stay in New Zealand.

59. Our international partners require assurance that information they share with us would not be disclosed. The current immigration scheme explicitly prevents the court from disclosing NSI, an appropriate setting in the immigration context. In the immigration sphere, protecting our borders from people who present a high risk and quickly providing certainty and finality are particularly critical.

60. I am satisfied that the current immigration scheme contains sufficient protections for non-Crown parties, including the provision of special advocates. s9(2)(f)(iv) [redacted] Overall, I am satisfied that the right balance is struck by retaining a separate NSI scheme for immigration at this time.

Criminal cases

61. The use of NSI in a criminal prosecution is likely to be a rare occurrence. In addition, in the vast majority of cases, the Crown would be the prosecutor and would be able to protect NSI by the decisions it makes about how the prosecution is to proceed (in contrast to civil cases where the Crown would more commonly be the respondent).

Law Commission's recommendations for criminal cases

62. I propose to accept the Law Commission's recommendations to ensure NSI is dealt with appropriately and securely in criminal cases. This includes a new ability for sources and intelligence officers to give evidence anonymously, and the use of the closed court preliminary process to determine applications for pre-trial disclosure of NSI material.

63. In line with the Law Commission's view and to preserve fundamental criminal procedural rights, a defendant would always be present during a substantive criminal trial.

64. I also propose two further Law Commission recommendations be adopted. First, that the judge should have an express power to dismiss a prosecution if the NSI must be protected but withholding it would prevent a fair trial. Second, to provide a general ability for the Crown to withdraw charges without the court's leave (as

[17] Australia, Canada, the UK and US.

would usually be required) if the court makes a decision that the Crown considers risks NSI.

Additional matters

65. To manage the residual risk of unsafe disclosure in private prosecutions where the Crown is not the prosecutor, I propose the Attorney-General be able to stay a prosecution on national security grounds (with a requirement for the parties to notify the Attorney-General when the use of NSI is being contemplated).

A new process to enable NSI to be used but protected at a criminal trial

66. I support the Law Commission's view that a closed court criminal process in which the defendant and their lawyer is excluded is inappropriate. However, I consider there remains scope to use but protect NSI evidence at trial without going that far. Similar processes to those I propose exist in Australia and Canada.

67. In addition to the Law Commission's proposals, I recommend a pre-trial process where the parties would be able to apply to the court to admit NSI evidence in a protected form at trial. That form might include, for example, a summary of NSI, a document with NSI redacted, or an agreed statement of facts. It would be for the court to decide, in a closed court pre-trial hearing, whether admitting evidence in that form was consistent with the defendant's right to a fair trial.

68. Under this proposal it would be the summary, redacted document or agreed statement of facts that the court would admit or not admit, and any redacted or withheld NSI would not be part of the evidence so would not be considered by the court. The process would also be available if the need to admit NSI evidence only becomes apparent at the trial.

69. The proposed process places some restriction on the defendant's right to have access to all of the information that may be relevant to the case, although the defendant is able to test all the evidence that makes the case against them. Therefore, I propose limiting this process to serious offences where there is a high public interest in securing a conviction (i.e., prosecutions for category 4 offences and category 3 offences with a maximum penalty of 7 years' imprisonment or more), with a residual discretion available to the court to make the process available to other category 3 offences).[18] In the case of multiple charges, the process would be available if one of the charged offences qualifies.

Health and Safety at Work Act offences

70. I also propose to give the court discretion to make this process available to prosecutions under s 48 of the Health and Safety at Work Act (HSWA) (failing to comply with a duty that exposes an individual to risk of death, serious injury or serious illness). The offence has a maximum penalty of a substantial fine, and

[18] Category 3 offences are offences with a maximum penalty of 2 years' imprisonment or more. Where maximum penalties differ for an offence depending on whether the defendant is an individual or a company or other entity, the availability of the process would be determined with reference to the maximum penalty for an individual.

would not otherwise qualify for the admissibility process.[19]

71. The s 48 offence is a core part of the HSWA's enforcement regime. The possibility that prosecutions under HSWA might involve NSI (for example, a WorkSafe prosecution against a security agency) resulted in the HSWA including special procedures to protect NSI in criminal prosecutions. Those procedures would be repealed and replaced with the proposals in this paper. The inclusion of the s 48 offence in the admissibility process would ensure that NSI can continue to be used but protected in serious prosecutions under the HSWA.

Using NSI in employment cases

72. As part of Cabinet's decision to apply the Employment Relations Act 2000 to the New Zealand Security and Intelligence Service (NZSIS), Cabinet invited the Minister of Justice to consider the approach to using NSI in the Employment Relations Authority and the Employment Court [NSC-16-MIN-0012 refers].

73. I propose to accept the Law Commission's recommended approach that:

73.1 employment cases involving NSI should be determined by the Employment Court (i.e., the Employment Relations Authority would be required to transfer classified information cases to the Employment Court);

73.2 cases involving NSI in the Employment Court should be heard by the Chief Employment Court Judge or by any other Employment Court Judge nominated by the Chief Employment Court Judge; and

73.3 the part of the case that involves NSI should be dealt with using the Law Commission's closed court process.

74. Both the Law Commission's non-certificate process and the additional civil certificate process (for NSI) will apply to employment cases. I am confident these measures would provide adequate protection for NSI that is relevant to an employment proceeding.

Consultation

75. The following agencies have been consulted on this paper: the Law Commission, the Treasury, Crown Law, the Department of Prime Minister and Cabinet (DPMC) National Security Group, New Zealand Police, Government Communications Security Bureau, NZSIS, Ministry of Business, Innovation and Employment, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, New Zealand Defence Force, New Zealand Customs Service and the Inspector-General of Intelligence and Security. DPMC, Policy Advisory Group, were advised.

76. In preparing its recommendations, the Law Commission established an advisory officials' group with representatives from a range of government departments, met with representatives from the security agencies, and held consultation meetings with organisations outside of the government.

77. The Law Commission was invited to comment on the proposals in this paper. With the change in Commissioners since the Law Commission's report was released in

[19] The process would also be available for the offence in s 49 of the Act (reckless conduct in respect of a duty) which has a 5-year maximum penalty.

December 2015, the Law Commission notes only that its recommendations, which are in large being accepted, are supported by reasons which speak for themselves. In terms of the proposed modifications, these are now matters for the Government and Parliament.

78. In 2015, the Law Commission consulted the judiciary on its recommended approach. The then-Chief Justice, on behalf of the Senior Courts, supported the court being the ultimate decision-maker on the treatment of NSI before the courts as the only effective way of ensuring there is a check on Executive power.

79. The proposal to have a process involving a certificate removes some of the court's decision-making ability. Accordingly, I also consulted the Chief Justice before bringing these proposals to Cabinet. The view of a sub-committee of the Legislation and Law Reform Committee of the judiciary was supportive of the Law Commission's proposal. I had been considering its extension to law enforcement information, but altered my position after the sub-committee advised it considered existing protections were sufficient. The sub-committee also questioned the utility of the certificate process, because of the role of the court in all cases in deciding whether the Crown's claim for non-disclosure was justified.

Financial implications

80. I expect cases involving NSI to be rare; usually one or two civil cases a year and fewer than one criminal case a year. Implementation costs for all agencies will be covered from baselines and there would be minimal flow-on impacts to the speed of the court.

81. I propose that the fees of special advocates, special advisers and expert witnesses be paid for by the Crown. If a complex or long running case eventuates additional funding may be required to be sought at that time.

82. Special advocates would include senior, experienced counsel who would require adequate remuneration. Special advocate expenses (including travel and accommodation in some cases) would be a charge against the Crown.

83. Additional implementation and ongoing operating costs would fall primarily but not exclusively to the Ministry of Justice, including providing secure court facilities and establishing and maintaining a panel of special advocates.

84. The Ministry's initial capital costs are estimated to be approximately $37,000. Operating costs are estimated at $86,000 per annum. These costs would be met from within existing baselines. Any future cost pressures may require additional funding which would be sourced by reprioritising other expenditure, through the annual Budget bid process, or by a request directly to Cabinet.

Human rights implications

85. The proposals in this paper clearly engage the rights to justice affirmed in NZBORA. The right to justice includes observing the principles of natural justice (s 27(1)), the right to a judicial review of determinations (s 27(2)) and the right to bring and defend proceedings involving the Crown on the same basis as proceedings between individuals (s 27(3)). Rights in respect of criminal trials are also engaged: the right to be informed of the nature and detail of the case (s 24(1))

and the right to a fair and public hearing (s 25(a)).

86. The proposals aim to ensure any limitation of these rights is justifiable and no more than is reasonably necessary (s 5). I consider the proposals are closely connected to the policy objective of protecting national security and widening the circumstances in which NSI can be used in proceedings and affect rights to justice to the least extent possible. I consider this is the best way to achieve the policy objective. The measures are proportionate to the necessary protection of national security because at every step the judge retains the ability to dismiss the case if it cannot proceed fairly. This overarching judicial discretion provides a significant safeguard, particularly in criminal cases.

87. Other safeguards in the process, such as ways to ensure the non-certificate process is the standard process, the right to receive a summary and having a special advocate representing the interests of the affected person, limit restrictions on rights to justice as much as possible, although I accept they do affect these rights. I note the proposals present additional safeguards compared to aspects of some of the five existing statutory processes (e.g. the ability of the special advocate and the judge to question the content and sufficiency of the summary). I therefore consider that the proposed limitations to NZBORA rights are justified. The Attorney-General will conduct the formal assessment of the Bill's consistency with the New Zealand Bill of Rights Act 1990 prior to its introduction.

Treaty of Waitangi implications

88. Article 2 of the Treaty of Waitangi requires the Crown to actively protect Māori interests, preserving Māori the right to tino rangatiratanga (self-determination). Article 3 of the Treaty requires the Crown ensure equality for Māori. Equality is only achieved when all New Zealanders are treated equally, and the evidence to date (particularly in the criminal justice system) is that this does not always happen for Māori.

89. The proposals aim to protect the rights of non-Crown parties involved in proceedings involving NSI, but they involve departures from normal rights to justice that protecting NSI necessitates. It is unlikely that these proposals would be used to limit Māori expressions of tino rangatiratanga, or to override the Crown's obligations to actively protect Māori interests and rights, however historical events indicate this remains a possibility in the future.

Legislative implications

90. A Bill would be required to implement my recommended approach to the Law Commission's NSI report. My bid for a National Security Information in Proceedings Bill for the 2020 Legislation Programme would be a Category 4 priority (proceed to select committee within the year). I anticipate the Bill would come before select committee before the House rises for the 2020 General Election.

91. I also seek Cabinet agreement that the Bill would bind the Crown (CO (02) 4 refers). The Bill would not limit or otherwise affect the Royal Prerogative.

Regulatory impact analysis

92. The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this

paper. A Regulatory Impact Assessment (RIA) is attached.

93. The Ministry of Justice's Regulatory Impact Assessment Quality Assurance panel has reviewed the RIA prepared by the Ministry of Justice "Managing National Security Information in Proceedings" dated November 2019. The Panel considers that the RIA meets Cabinet's quality assurance criteria, with one comment. The RIA has only been consulted with government departments. There has also been some recent consultation of the options with the judiciary. The analysis draws on and responds to the Law Commission's 2015 report *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings*. As part of its work the Law Commission consulted on similar options to those considered in the RIA. Interested stakeholders will also have further opportunity to consider the detail of the preferred option through the legislative process. In this case, the Panel considers that the lack of recent public consultation does not affect the confidence that decision-makers can have in the analysis.

Publicity

94. I propose to delay the proactive release of this paper and attached RIS proactively beyond 30 business days, given the sensitive nature of the proposals and their link to related counter-terrorism proposals. Any release of these documents will have appropriate and necessary redactions.

95. My office will co-ordinate publicity following Cabinet's decision. There will be publicity of the Bill when it is introduced in the House, which will be in accordance with the Government's agreed Counter-terrorism Strategy [CAB-19-MIN-0467].

Recommendations

The Minister of Justice recommends the Cabinet Social Wellbeing Committee:

1. **note** the Law Commission's report *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* contains 30 recommendations to reform how national security information (NSI) is dealt with in civil, criminal and administrative proceedings;

2. **note** the proposals in this paper will not address the protection of NSI for any inquiry under the Inquiries Act 2013 as protection for NSI in an inquiry is most effectively addressed through the setting of an inquiry's terms of reference;

3. **note** that to provide equivalent protection for NSI when establishing any inquiry under the Inquiries Act 2013, it will be necessary to include specific provisions in an inquiry's terms of reference;

Law Commission's recommendations generally accepted

4. **agree** that the substance of the Law Commission's recommendations be generally accepted and progressed in a new National Security Information in Proceedings Bill, in accordance with the table attached as Appendix 1;

5. **note** the key features of the proposed non-certificate civil process, in line with the Law Commission's recommendations, are that once NSI is raised:

5.1 the court will be closed to the public, the media, the non-Crown party and his or her lawyer and a security-cleared special advocate will represent the non-Crown party;

5.2 the judge will decide whether the information is NSI, and how it should be protected, which may include a summary of the information being provided to the non-Crown party, where it is possible to do so without disclosing the NSI;

6. **agree** to extend the definition of national security information proposed by the Law Commission to include information likely to prejudice the security, defence or international relations of the Cook Islands, Niue, Tokelau or the Ross Dependency or prejudice relations between the governments of any of these and New Zealand;

Reform objectives

7. **note** that the proposed changes would:

7.1 ensure the legitimacy of, and public confidence in our systems;

7.2 provide the Crown with the confidence that New Zealand's national security will be protected by preventing damaging disclosures of NSI;

7.3 allow the Crown or any other party to use NSI in proceedings to defend themselves, where the courts determine this is fair;

7.4 ensure an appropriate balance is struck so that the rights of non-Crown parties are upheld to the greatest extent possible;

7.5 ensure the respective roles of the Executive and the judiciary are clear;

7.6 better equip the courts to make decisions in cases involving NSI by providing a more detailed, coherent and consistent legislative framework; and

7.7 provide a consistent, clear and workable process for dealing with NSI in proceedings.

Additional civil certificate process

8. **agree** to supplement the Law Commission's recommendations in civil cases involving NSI with the ability of the Crown to seek a certificate from the Attorney-General and the Minister of Foreign Affairs;

9. **agree** that the Attorney-General is not able to delegate this function to the Solicitor-General;

10. **agree** that the effect of the certificate is a presumption against disclosure of the information covered by it;

11. **agree** the Crown or another party to the proceedings may apply to the court for the information covered by the certificate to be heard in a closed court process;

12. **agree** any application for a closed court substantive process will be dealt with in a preliminary closed court process;

13. **agree** the court must exclude the information where it considers a substantive closed court process is not in the interests of justice;

14. **agree** that the Crown must consider non-certificate track first;

15. **agree** that where there is a substantial change in the nature or scope of proceedings that requires new evidence, the Crown may, with the leave of the court, seek a certificate from the Attorney-General and the Minister of Foreign Affairs;

16. **agree** that an application for judicial review of the certificate asserting information is NSI must be made within 28 days of receipt of notification that a certificate has been issued and that the court will be able to grant an extension where there are special circumstances;

Proposals not to apply to the Immigration Act

17. **agree** that the proposals will not apply to administrative decisions and challenges to administrative decisions under the Immigration Act 2009;

New schemes to come within this Bill

18. **agree** in principle, subject to Cabinet approval at the time, that the scheme in the new National Security Information in Proceedings Bill should be used for any future schemes regulating the use of NSI in court or administrative proceedings;

Criminal cases: using protected NSI at a criminal trial

19. **agree** to amend the Criminal Disclosure Act 2008 to provide the judge with an express power to dismiss a prosecution if the national security information must be protected but withholding it would prevent a fair trial from occurring;

20. **agree** to amend the Criminal Procedure Act 2011 to allow the Crown to withdraw charges without the court's leave if the court makes a decision that the Crown considers poses an unacceptable risk to national security;

21. **agree** that where the Crown is not the prosecutor, the parties must notify the Attorney-General that the use of NSI is being contemplated and Attorney-General may stay a prosecution on national security grounds;

22. **agree** to supplement the Law Commission's recommendations in criminal proceedings with a new process that would enable a party to apply to the court to admit NSI evidence in a protected form;

23. **agree** the key components of the new evidence admissibility process should be that:

    23.1 the process would be limited to prosecutions for serious offences where there is a high public interest in securing a conviction (i.e., prosecutions for category 4 offences and category 3 offences with a maximum penalty of 7 years imprisonment or more), with a residual discretion available to the court to make the process available to other offences (i.e., prosecutions for other category 3 offences as the judge directs); and prosecutions under s 48 of the Health and Safety at Work Act 2015;

23.2 an application from a party to use evidence in a protected form would be heard and dealt with in a closed court process; that is, a process in which the public, media, any non-Crown party and their lawyers are excluded from the hearing, and a special advocate with access to the full NSI represents the non-Crown party's interests;

23.3 it would be for the court to determine whether admitting evidence in a protected form would be consistent with the defendant's right to a fair trial;

23.4 for the purposes of this process, a 'protected form' might include a summary of the NSI evidence, a document with NSI redacted, or an agreed statement of facts, but would not include the use of the closed court process as part of the trial;

Using NSI in employment cases

24. **note** that, as part of Cabinet's decision to apply the Employment Relations Act 2000 (ERA) to the NZSIS, Cabinet invited the Minister of Justice to consider the approach to using NSI in the Employment Relations Authority and the Employment Court [NSC-16-MIN-0012 refers];

25. **accept** the Law Commission's recommendations that:

25.1 employment cases involving NSI should be determined by the Employment Court (i.e., the Employment Relations Authority would be required to transfer NSI cases to the Employment Court);

25.2 cases involving NSI in the Employment Court should be heard by the Chief Employment Court Judge or by any other Employment Court Judge nominated by the Chief Employment Court Judge; and

25.3 the part of the case that involved NSI should be dealt with by the Employment Court under the proposed non-certificate civil process or the additional certificate process;

Financial recommendations

26. **note** the costs of implementing the proposals will be funded within Ministry of Justice baselines;

27. **agree** to fund the costs associated with the appointment, training and fees for service of special advocates, special advisers and expert witnesses from the non-departmental appropriation Court and Coroner Related Costs within Vote Courts;

28. **note** that funding to pay for the cost of expert witnesses, a special advocate or special adviser appointed for a given process will first be sought from agency baselines, and, if necessary, with Cabinet approval for additional funding out of the agreed appropriation when a case arises;

Next steps

29. **note** that the Minister of Justice will seek a category 4 priority (proceed to select committee within the year) on the 2020 Legislation Programme for a National

Security Information in Proceedings Bill;

30. **invite** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office in relation to the proposed National Security Information in Proceedings Bill;

31. **authorise** the Minister of Justice, in consultation with the Attorney-General, to make minor policy decisions in relation to the National Security Information in Proceedings Bill within the overall framework approved by Cabinet, with any major policy issues subject to further Cabinet consideration;

32. **agree** that the National Security Information in Proceedings Act will bind the Crown;

Publicity

33. **agree** to delay proactive release of this Cabinet paper and Regulatory Impact Statement beyond 30 business days;

34. **note** my office will co-ordinate publicity following Cabinet's decision.

Authorised for lodgement

Hon Andrew Little

Minister of Justice

APPENDIX 1: RECOMMENDED RESPONSE TO LAW COMMISSION RECOMMENDATIONS AND PROPOSALS FOR A NEW NATIONAL SECURITY INFORMATION (NSI) IN PROCEEDINGS ACT

Notes:

1) Any policy reasons for modifications or rejection of a recommendation are described in the table.
2) The acceptance of the recommendation is subject to minor drafting changes and/or further minor policy modifications.

Chapter 6: Civil proceedings			
No	**Recommendation**	**Accept/Reject/Modify**	**Comment**
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.	Accept	There will be new legislative provisions dealing with NSI (as defined in R14).
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.	Accept	–
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.	Accept	–
R15	The court should hold a closed preliminary hearing to assess how national security information should be used (if at all) in the proceedings.	Accept	Parties will be required to advise the Crown in writing that a proceeding is likely to raise NSI. This will enable the Crown to take necessary steps (e.g., the Crown may need to be added as a party if it is not already).
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.	Accept	"Representatives" includes a special advocate on behalf of a non-Crown party. The Judge will have discretion over when to direct a summary is provided to the non-Crown party (except when a certificate has been issued by the Attorney-General and Minister of Foreign Affairs certifying that the information covered is NSI and cannot be disclosed to other parties). Provision will be made for the Attorney-General and Chief Justice to agree a Protocol on any general practices and procedures that may be necessary to implement the closed hearing procedure (as currently provided for in existing regimes). The closed hearing process will also be used in any appeals involving NSI.
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: a) whether the information in question falls within the definition of national security information; b) whether national security interests can be adequately protected if the national security information is provided to the non-Crown party; c) 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; d) the degree of potential prejudice to the non-Crown party if the national security information is heard under a closed procedure; and e) 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.	Modify	Addition: Where warranted, the Crown will be able to present a certificate issued by the Attorney-General and Minister of Foreign Affairs certifying that the information covered is NSI and cannot be disclosed to other parties. The court will determine whether to exclude the information from the proceeding, or disclose it to a special advocate representing the interests of the non-Crown party and used as evidence in a closed court. The court will not be able to order disclosure to the non-Crown parties or the use of lessor protective measures in open court. Modifications will also be made to the Commission's criteria – e.g., criterion (a) would be better expressed as something like "whether the information could not reasonably be considered NSI".
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.	Accept	Note: The additional certificate option to prevent disclosure (outlined above) would be available to the Crown where this was warranted.

Chapter 7: Administrative decisions	*Modify R19 to R22 - restrict these rights to NZ citizens and permanent residents*		
No	**Recommendation**	**Accept/Reject/ Modify**	**Comment**
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.	Modify	The summary will be provided on the request of the affected person, rather than proactively in every case (because the benefit of providing a summary in every case is outweighed by the administrative burden placed on the agency responsible for the NSI and practical difficulties). The agency responsible for the NSI and the decision-making agency may share costs as agreed between agencies. Where the chief executive of the relevant agency and the decision-maker are satisfied it is not possible to produce a meaningful summary without disclosing national security information, this requirement may be waived.
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.	Accept	This is a notification of any existing right, rather than the conferring of new rights of complaint.
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.	Modify	The IGIS will be provided with the number of decisions made using information provided by the security and intelligence agencies where that decision affects the rights of an individual. Under the Intelligence and Security Act 2017 (passed since the Law Commission's report), the IGIS has the power to request a full copy of the NSI (and other information) provided to the decision-maker.
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.	Accept	A legislative provision confirming that the decision-maker may reconsider his or her decision would be useful in the interests of certainty and transparency. This provision will align with the Intelligence and Security Act 2017. There will be a requirement that the IGIS must send the report directly to the decision-maker (rather than via the Prime Minister as currently).
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.	Modify	Immigration will not be included in these proposals.
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.	Modify	Subject to modifications to R17. The closed procedures in the Passports Act 1992, Terrorism Suppression Act 2002, Telecommunications (Interception Capability and Security) Act 2013, and Health and Safety at Work Act 2015 will be repealed and the new uniform process in the Act will apply in all cases. The Immigration Act will remain a stand-alone regime.

Chapter 8: Criminal prosecutions			
No	**Recommendation**	**Accept/Reject/ Modify**	**Comment**
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.	Accept	–
R26	The special advocate will operate in accordance with the same procedure as outlined above at R12 – R18 and R30 – R41.	Accept	–
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.	Accept	–
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.	Accept	–
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.	Accept	Modelled on Evidence Act 2006 provisions for undercover police officers (in respect of NZ intelligence officers) and witness anonymity protections (for sources).
ADD	The parties will be able to apply to the court in limited circumstances to admit NSI as evidence at trial in a "protected form".	-	As recommended in the Cabinet paper, to be limited to prosecutions for serious offences where there is a high public interest in securing a conviction. An admissibility application will be dealt with in a protected evidence hearing (i.e., in accordance with R12-18 and R30-41 as applicable).

Chapter 9: The special advocate and security issues			
No	**Recommendation**	**Accept/Reject/ Modify**	**Comment**
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).	Accept	–
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.	Accept	The scheme modifies the usual role of lawyers, for example, by limiting communications with affected persons, making it necessary to protect lawyers from claims where they are acting in accordance with the Act.
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.	Accept	–
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.	Accept	–
R34	The costs of the special advocates and the cost of their support should be met by the Crown.	Accept	–
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.	Accept	–
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.	Accept	–
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.	Accept	–
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.	Accept	–
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.	Accept	–
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.	Accept	To be supplemented by a power to transfer proceedings to a secure facility.
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.	Accept	–

Coversheet: Managing national security information in proceedings

Advising agencies	Ministry of Justice
Decision sought	This analysis has been prepared to inform Cabinet decisions regarding law reform for National Security Information in proceedings
Proposing Ministers	Minister of Justice

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

New Zealand's legal framework for managing national security information (NSI) in court proceedings is ambiguous, uncertain and inconsistent. This puts both rights to justice and national security at risk. New Zealand needs to have the capability to receive information from overseas jurisdictions and respond appropriately to threats to our national security, in a way that preserves trust in the outcomes of executive decisions and court processes. The absence of a clear process for managing NSI in proceedings could become problematic, as the courts will have to rely on their inherent jurisdiction to establish one on a case-by-case basis.

The options analysed in this RIS aim to establish a clear, consistent framework that protects both individuals' rights and national security in civil, administrative and criminal proceedings. Creating a coherent, overarching legal framework for how NSI is dealt with will standardise protections for non-Crown parties, provide greater assurance to the Crown that NSI can be relied on in court proceedings and still be protected, and ensure a clear process for courts to follow.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

The options outlined in this RIS respond to recommendations made in Part 2 of the Law Commission's 2015 report *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings* ('the Law Commission report').[1] The Law Commission found a number of issues with the current law and recommended a number of legislative changes.

As a result of our analysis, the Government proposes to adopt most of the Law Commission's recommendations and modify others to provide:

In civil proceedings (option 4):

[1] Law Commission *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings* [NZLC R135, 2015]

- a new legislative regime covering the disclosure and management of NSI in civil proceedings, including a new Ministerial certificate option, signed by the Attorney-General and the Minister of Foreign Affairs, that will guarantee protections of the NSI in appropriate circumstances; and
- a standard closed court procedure that would apply in all civil cases, where the court considers this necessary to protect information, which includes providing a security-cleared special advocate to represent the non-Crown party.

In administrative decisions (option 3):

- minor changes to align rights within different administrative schemes; and
- replacing the court stage of most existing legislative schemes for managing NSI in administrative decision making with a single set of provisions applying to judicial review of and appeals from those decisions; and
- excluding the Immigration Act 2009 from the proposals.

In criminal proceedings (option 3):

- a standard pre-trial closed court procedure for disclosure that would apply in all criminal cases that involve NSI, where the court considers this necessary to protect information, which includes providing a security-cleared special advocate to represent the non-Crown party; and
- a new, pre-trial admissibility hearing for the court to determine how NSI should be protected at trial in criminal proceedings; and
- confirmation that closed processes excluding the defendant are not available at trial in criminal proceedings.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Ultimately, the main expected beneficiary is the New Zealand public. We expect that the proposals will:

- better ensure New Zealand is equipped to protect against and respond to national security threats, through assurance to our international partners that their intelligence will be protected when it is provided to the New Zealand Government and the Crown wants to use it in court proceedings;
- better enable relevant evidence to be put before the decision-maker (in a protected way) and later relied on in court to defend proceedings, where recourse to NSI allows the decision-maker or the Crown to justify or explain its actions; and
- maintaining the public's trust and confidence in the operation and integrity of the justice system, by implementing a clearer and more consistent approach to protecting

NSI in courts that maintains minimum standards of protection for individuals' rights to justice.

Immediate operational benefits will flow to the state; the increased certainty of the proposals will make its job of protecting NSI easier, provide for a standardised court process, and will create efficiencies in the medium to long-term.

Non-Crown parties to litigation, subjects of administrative decisions, and defendants in criminal cases will have a clearer picture of what to expect and of their entitlements, and a set of standard protections, when NSI is relevant to their case. In individual cases, non-Crown parties may receive more information relevant to their case than under current settings, improving procedural fairness and adherence to natural justice principles. Over time, individual cases may run more efficiently, with monetised savings for non-Crown parties.

Where do the costs fall?

The monetised costs fall on the Crown, to implement and administer the proposals and to pay for special advocates.

Some additional monetised costs will fall on non-Crown litigants. While system-wide efficiencies may be created through a standardised process, there will be an increase in the complexity of some trials because of the requirements for a preliminary closed court hearing where NSI is involved, increased preparation time, and interface between counsel and special advocates.

Non-Crown parties will carry non-monetised costs. The increased protection of NSI in civil proceedings means that NSI which would currently be excluded may be heard as evidence in closed court without full disclosure to the non-Crown party. In individual cases, this may mean non-Crown parties' natural justice and procedural rights are eroded.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

There are risks in all options that need to be finely balanced (including the status quo), which increase in magnitude the more NSI is used in court.

Overall, these risks include:

- conflict with key principles of the justice system, such as the rule of law, fair trial rights and constitutional principles, as well as judicial independence;
- impacts on international assessments of transparency and human rights in New Zealand;
- jeopardising national security in New Zealand, and potentially our relationships with our foreign partners, by the release of information;

- the Crown claiming information is NSI when the court determines it isn't, and/or the proliferation of cases involving NSI, jeopardising the expected benefits around increased public trust and confidence in the justice system; and
- There are specific risks relating to the Government's preferred civil and criminal proceedings options, listed below.

Civil proceedings

The specific risk for the preferred civil proceedings option (option 4) is that the court may require greater disclosure of NSI where the Crown considers this is potentially damaging to national security interests. This risk is mitigated by giving the Crown the option of presenting a certificate jointly signed by the Attorney-General and the Minister of Foreign Affairs which would ensure greater protection of the NSI.

Criminal proceedings

The specific risk for the preferred criminal proceedings option (option 3) is that natural justice and procedural fairness rights will be affected by enabling a pre-trial closed disclosure hearing and admissibility process that excludes the defendant and their lawyer.

Mitigations

Mitigating these risks requires balancing the competing public interests of maintaining a fair justice system with the need to safeguard national interests by protecting NSI. These risks will be mitigated by allowing for a special advocate to represent the non-Crown party in all proceedings, who will have full access to the NSI and whose role will include arguing for greater disclosure of NSI and helping identify information that could be released to the non-Crown party. A fair justice system is further protected by maintaining court control over proceedings.

Careful implementation planning, including appropriate training and guidance for participants in the new processes will be part of mitigation. Checks and balances on the operation of the proposals are also provided by the underpinning constitutional structure and its associated conventions.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'

Some of the risks identified throughout the proposals may create incompatibilities with some of the Government's expectations. However, these can be justified by the need to protect national security interests in New Zealand. These are discussed in section 5.4.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?
Quantitative, New Zealand-specific evidence underlying the analysis in this document is limited, as there are low numbers of cases that involve the type of information these proposals are concerned with. International models, experiences and trends provide supplementary context to support our assumptions and analysis. Qualitative assumptions and evidence are well-founded in subject matter expertise and thorough independent review by the Law Commission.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
Ministry of Justice RIS Quality Assurance Panel
Quality Assurance Assessment:
The RIS meets the quality assurance criteria.
Reviewer Comments and Recommendations:
The Ministry of Justice's RIA QA panel has reviewed the "Managing national security information in proceedings" Regulatory Impact Assessment (RIA) prepared by the Ministry of Justice and dated November 2019. The Panel considers that the RIA meets Cabinet's quality assurance criteria, with one comment. The RIA has only been consulted with government departments. There has also been some recent consultation of the options with the judiciary. The analysis draws on and responds to the Law Commission's 2015 report *The Crown in Court: A review of the Crown Proceedings Act And national security information in proceedings*. As part of its work the Law Commission consulted on similar options to those considered in the RIA. Interested stakeholders will also have further opportunity to consider the detail of the preferred option through the legislative process. In this case, the Panel considers that the lack of recent public consultation does not affect the confidence that decision-makers can have in the analysis.

Impact Statement: Managing national security information in proceedings

Section 1: General information

Purpose
The Ministry of Justice (the Ministry) is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing: • final decisions to proceed with a policy change to be taken by or on behalf of Cabinet.

Key Limitations or Constraints on Analysis
The infrequency of New Zealand court proceedings involving NSI means case law analysis can only be based on a small body of cases. Five closed court procedures analogous to the proposals have been established in legislation to deal with cases in specific areas, but they have rarely been used. Outside of these statutory procedures, protected processes have been used on only one or two occasions. Two proceedings are continuing; one under the Passports Act 1992 regime, and one under the courts' inherent jurisdiction. Due to the small body of cases, the costs for Special Advocates are difficult to predict and have not been quantified in these proposals. Special Advocates are likely to be senior, experienced lawyers and their fees are likely to reflect this. Special Advocates costs are currently a non-departmental expense and it is expected this will continue when these proposals are implemented. Due to the small body of domestic evidence, officials looked to subject matter experts and overseas jurisdictions where a central legal framework for handling NSI in proceedings has been adopted, including the United Kingdom, Canada and Australia. However, the applicability of overseas provisions is constrained by the unique contexts of those other jurisdictions. This work was accelerated following the Christchurch Mosques attacks, and recent consultation on these proposals has been limited to Government agencies. The judiciary were consulted by the Ministry on issues relating to the operation of the courts and by the Minister on selected policy matters. The Law Commission extensively consulted with agencies and external parties including members of the judiciary, members of the legal profession, human rights groups and legal professional groups in developing its 2015 report. The preferred proposals in this document incorporate many of the Law Commission's recommendations.

Responsible Manager (signature and date):
   Sam Kunowski General Manager, Courts and Justice Services Policy Ministry of Justice Date: 27 November 2019

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The proposals use the Law Commission's proposed definition of NSI 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.

Examples of NSI could include:

- in administrative schemes, the Minister of Internal Affairs may refuse to issue, cancel or retain a New Zealand travel document on grounds of national security, including where someone intends to engage in or facilitate a terror attack in New Zealand or offshore. A civil proceeding may involve a judicial review or appeal of this decision; or
- in criminal proceedings, there may be serious charges based on evidence from New Zealand security agencies, working in conjunction with their overseas counterparts.

The Law Commission report identified a number of issues with the current law regarding the use of NSI in criminal, civil and administrative proceedings. There is a risk that a court would be faced with the stark choice of either excluding information from proceedings, which is highly relevant, due to its NSI status or examining that material in the proceeding and risking national security due to a lack of any closed procedure to undertake that examination.

The Law Commission recommended legislative change to address inconsistencies and gaps and to enable the protection of NSI while protecting individual rights to justice.

The development of a Government response was well-advanced in 2017 but was put on hold prior to the 2017 election. The Christchurch Mosques attacks on 15 March 2019 caused a review of counter-terrorism legislation to be expedited. The review included consideration of the Law Commission's recommendations on an overarching, coherent framework for dealing with NSI in court proceedings and administrative decision-making.

To date, cases involving NSI have been infrequent. The Law Commission report identified four examples:

- In *Choudry v Attorney-General*,[2] the court decided not to enquire into the security certificate issued by the Prime Minister under s 27(3) of the Crown Proceedings Act 1950.
- Proceedings in respect of Mr Zaoui involved an assertion of a risk to national security under the Immigration Act 2009.[3]
- The case of Mr Zhou was an employment case involving security clearances for employees.[4]

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

3 *Zaoui* v *Attorney-General* [2005] NZSC 38

4 *Zhou* v *Chief Executive of the Department of Labour* [2005] NZSC 38

- The Dotcom proceedings relate to assistance provided by the Government Communications Security Bureau (GCSB) to the New Zealand Police, mentioned below.

Developments since the Law Commission report

Since the Law Commission report, the Dotcom proceedings and another proceeding involving NSI are continuing:

- Judicial review proceedings in relation to the cancellation of a New Zealander's passport.[5] The open-court judgments provide helpful insights into the practicalities for schemes protecting classified information in courts, including in relation to the role of the special advocate.[6]
- The Dotcom proceedings, which involve information claimed to risk national security if disclosed. Leave has been sought from the Supreme Court to appeal the most recent Court of Appeal decision.[7]

In the national security space, two new relevant legislative regimes have been enacted (the Outer Space and High-altitude Activities Act 2017 and the Brokering (Weapons and Related Items) Act 2018). These regimes would also benefit from a process to protect NSI during court proceedings. In addition, the Overseas Investment Amendment Bill is in progress and will apply a scheme similar to that used under the Telecommunications (Interception Capability and Security) Act 2013 (TICSA) until this scheme comes into effect.

The Intelligence and Security Act 2017 has been passed. The Act's purpose is to protect New Zealand's national security and international relations while ensuring that the powers of our intelligence and security agencies are subject to appropriate safeguards. The Act emphasises transparency and accountability, including a strengthened oversight role for the Inspector-General of Intelligence and Security (IGIS).

Developments if no action is taken

If the status quo remains, it may reduce the likelihood of the Crown bringing proceedings where NSI is involved and defending itself using NSI, as there is no certainty that NSI will be protected in court. The inability to rely on NSI in court might mean that the Crown is forced to make concessions or settle a case where doing so would be contrary to the public interest or the interests of national security. It would mean that Judges would continue to develop the law on a case-by-case basis and new administrative schemes would provide bespoke responses instead of uniform responses. The counterfactual would see these effects continue and potentially worsen.

[5] *A* v *Minister of Internal Affairs* [2019] NZHC 2992

[6] *HMG* v *Minister of Internal Affairs* CIV-2017-485-000190, which commenced at the same time as *A v Minister of Internal Affairs* but was discontinued, also involved the use of a special advocate.

[7] *Dotcom v Attorney-General* [2019] NZCA 412

2.2 What regulatory system, or systems, are already in place?

Civil proceedings

In civil proceedings there are two different approaches for dealing with NSI. First, there is a certification process under s 27(3) of the Crown Proceedings Act 1950 which enables the Prime Minister, in the case of national security, to certify the Crown to withhold the information.

Second, there is the newer s 70 of the Evidence Act 2006. This section gives judges the scope to examine a claim that information should be withheld on national security grounds by conducting a balancing exercise about what is in the public interest. Section 70 also empowers the judge to give any direction the judge considers necessary to protect the confidentiality of, or limit the use that may be made of, the information. Both approaches may result in the information being excluded from the proceeding entirely, or partially disclosed.

Administrative decisions

In relation to administrative decisions, a number of bespoke statutory regimes provide for NSI to be taken into account using a closed process. These are provided for under the Passports Act 1992, Terrorism Suppression Act 2002, Immigration Act 2009, TICSA, and Health and Safety at Work Act 2015 (HSWA).

Schedule 4 of the HSWA prescribes a regime for protecting NSI in criminal and civil proceedings. The HSWA scheme is limited to situations where all parties to the proceedings have access to NSI, or where the defendant intends to produce or refer to NSI.

The Outer Space and High-altitude Activities Act 2017 and the Brokering (Weapons and Related Items) Controls Act 2018, both passed since the Law Commission's report, are likely to involve NSI, however do not have provisions to deal with court challenges to decisions based on NSI.

Criminal proceedings

In criminal proceedings, s 16(1)(g) of the Criminal Disclosure Act 2008 allows the prosecution to withhold information on national security grounds. The defendant can challenge this decision under s 30 of the Act on the grounds that the reasons for non-disclosure do not apply, or that the interests in favour of disclosure outweigh the interests protected by withholding the information. Under s 30, the court may order disclosure of the information subject to "any conditions the court considers appropriate". The court may suppress names and evidence and close the court from the media and the public on national security grounds under the Criminal Procedure Act 2011.

General considerations

Beyond the legislative provisions, and outside bespoke statutory regimes for administrative decisions, the High Court has relied on its inherent powers to put processes in place to protect NSI on a case-by-case basis, with the parties' consent.

Cases involving NSI will often involve the prospect of judicial review. The New Zealand Bill of Rights Act 1990 (NZBORA) affirms the right to apply for judicial review of a determination by a public authority, if the applicant has been affected by that determination. If such a review finds that the decision-making process or the decision itself was unreasonable, or that the decision-maker acted outside the law, the court may:

- grant relief (for example, a declaration or injunction); and/or

- require the decision-maker to reconsider and re-determine the matter; or
- if the decision-maker acted outside the law, set aside the decision.

Should judicial review proceedings be initiated in respect of a decision to withhold NSI from an affected party – for example, with a Public Interest Immunity certificate under s 27(3) of the Crown Proceedings Act 1950 – the judicial review proceeding itself will involve that same information. As a judicial review is a civil proceeding, the provisions relating to NSI in civil proceedings will apply unless an applicable bespoke scheme makes specific provision.

Government regulation is required because the proposals affect the courts and legislation is required to do this.

A number of agencies have a role or substantive interest in the system: the Crown Law Office, Department of Prime Minister and Cabinet (DPMC) National Security Policy, DPMC Policy Advisory Group, New Zealand Police, GCSB, New Zealand Security Intelligence Service (NZSIS), Ministry of Business, Innovation and Employment (MBIE), Department of Internal Affairs (DIA), Ministry of Foreign Affairs and Trade (MFAT), New Zealand Defence Force, New Zealand Customs Service, the IGIS, and Treasury.

In addition, members of the judiciary, members of the legal profession, human rights groups and legal professional groups will have a substantive role or interest in the system.

2.3 What is the policy problem or opportunity?

The Law Commission report assessed the overall fitness-for-purpose of the system in their 2015 report and found a number of issues with the current legislative settings.

Current frameworks for dealing with NSI in administrative decisions and court proceedings lack clear and consistent protections for both individuals and national security. In civil proceedings, a closed court process has been developed on a case-by-case basis, based on consensus between the judge and the parties.

The courts face a stark choice in dealing with NSI because there is no consistent overarching framework for it. The frameworks that exist are inconsistent or bespoke for specific issues.

There is no clear pathway for courts to take when NSI is involved in proceedings. It is unclear whether the Crown or the court declares that information is NSI, what the process should be for this determination and for protecting NSI, and how non-Crown parties are protected in a process that requires them to be excluded.

Civil proceedings

When NSI is used in the general civil jurisdiction, the courts need to establish a suitable process each time. This can be costly, contentious, inefficient and uncertain. The legislative inconsistency creates a tension between the roles of the Executive and the judiciary, and uncertainty for the various actors within the process. The Crown may be required to defend proceedings brought against it without recourse to NSI and cannot therefore properly justify or explain its actions or decisions. This means the Crown might be forced to concede or settle a case.

Administrative decisions

There are gaps and inconsistent safeguards for non-Crown parties between schemes. These could lead to uncertainties with how NSI is handled if challenged in the courts. Further, allowing for bespoke schemes can create operational inefficiencies. New schemes would likely add to the current diversity and create further confusion.

Criminal proceedings

Disclosure rules allow the prosecutor (usually the Crown) to withhold information and not disclose it to the defendant on national security grounds. Defendants can challenge the withholding of such information, but the prosecutor's claim is heard by a judge alone and determined without the benefit of arguments presented on behalf of the defendant. There is currently no ability for non-disclosure to be challenged by a special advocate presenting arguments for the defendant.

General considerations

In *Dotcom v Attorney-General,*[8] the Crown claimed information should be withheld from the plaintiffs under s 70 of the Evidence Act 2006. By agreement between the parties and under the court's inherent powers, the proceedings over whether the information could be withheld under s 70 have involved a special advocate to represent the plaintiffs' interests. The court has relied on its inherent powers and the cooperation of the parties to regulate procedures to try to protect competing interests.

However, as well as being inefficient, this approach has relied on the parties' consent to a course of action, and on the possible withdrawal of the proceedings in the event the Crown lacks assurance NSI will be protected. These issues have been highlighted recently and provide impetus to enact a statutory closed court process. In September 2019, while not required to determine the matter, the Court of Appeal confirmed that it is implicit in s 70 that the court has the power to hold a closed preliminary hearing using special advocates as to whether information should be withheld, but considered it unlikely that the High Court could adopt a closed court substantive process to hear and consider evidence under its inherent jurisdiction.[9] The United Kingdom (UK) Supreme Court made a similar ruling in 2011, which led to the enactment of a legislative regime.[10] Leave has been sought from the Supreme Court for an appeal of the decision.

Parties other than the Crown may lack information about decisions made about them and may be unable to get sufficient information to effectively challenge (or to know whether to challenge) those decisions. Any withholding of relevant information from non-Crown parties encroaches on fundamental rights to justice. NZBORA affirms that every person has the right for courts, tribunals and government decision-makers to observe the principles of natural justice. These principles involve procedural fairness, so that the Crown has no unfair advantage. They include rights to full information and reasons for decisions, being present at hearings, having legal representation and being able to challenge evidence. NZBORA also sets out minimum standards of criminal procedure, including the right to know the prosecution's case, to be present at the trial, and to

[8] *Dotcom* v *Attorney-General* [2019] NZCA 412

[9] *Dotcom v Attorney-General,* above in n 8.

[10] *Al Rawi v Security Service* [2011] UKSC 34.

present an effective defence. Any limits on these rights must be demonstrably justifiable – rights can be limited only by a sufficiently important purpose and insofar as reasonably necessary to achieve that purpose.

Although there are few cases, the impact on particular individuals can sometimes be high – including freezing of funds or the revocation of a passport, for example.

Our intelligence and security agencies operate within an international context that is dependent on cooperation and shared standards. The state benefits from maintaining these international relationships. As a small nation, New Zealand receives more intelligence from other countries than it provides, and we are partly reliant on other jurisdictions for the protection of our national security interests. The gap in the general law regarding the role of the court and the Crown, in dealing with NSI and the protections it should have, may present an issue for foreign partners in the future if there is uncertainty about NSI being properly protected in court.

2.4 Are there any constraints on the scope for decision making?

While this work is progressing as one aspect of the Government's response to the Christchurch Mosques attacks, its scope is confined to the protection of NSI and responding to the Law Commission's recommendations.

The Law Commission recommended minor changes to the scheme under the Immigration Act 2009 for classified information in line with the other administrative schemes (administrative proceedings option 2) and recommended that the Immigration scheme process align with the recommended civil proceedings process (civil proceedings option 2). Policy decisions were made to exclude the Immigration Act from the Government's preferred options for administrative (option 3) and civil proceedings (option 4).

These proposals have interdependencies with other aspects of that overarching response, including the Terrorism Suppression (Control Orders) Bill and potential new and altered terrorism-related offences in the Terrorism Suppression Act 2002.

2.5 What do stakeholders think?

In developing its report, the Law Commission undertook extensive consultation with Government agencies and external parties. It established an advisory officials' group with representatives from a range of government departments, met with representatives from the security agencies, and held consultation meetings with individuals and organisations outside of government.

Because the period for public feedback was limited the Law Commission also proactively consulted extensively with senior members of the legal profession engaged in or likely to be engaged in proceedings involving NSI. Legal professional groups, human rights groups and advocates and the judiciary were also consulted. The Law Commission's consultation paper outlined three broad models; a judicial control model, an Executive control model, and a hybrid model with elements of both. These are broadly similar to the three options the Ministry has considered and the preferred proposals incorporate many of the Law Commission's recommendations.

Submitters to the Law Commission acknowledged that closed processes are always going to be unfair, however they should be available in narrow circumstances as a last resort. A few noted that special advocates could only mitigate the unfairness to a certain extent, and others noted that it was the best balance of interests.

Most submitters also considered that the courts would be best placed to determine whether the disclosure of NSI would risk national security. The judiciary and the legal profession considered that the court should have the final decision over NSI and did not support an Executive control model (for example, such as the override option discussed in A4.2 below. The Chief Justice said the case for displacing the courts from making these decisions had not been made and that the courts are the only effective way of ensuring there is a check on Executive power. Other submitters noted that an override option may parallel the Official Information Act 1982, where the Executive can veto the Ombudsman's recommendation that information be released via an Order in Council. The New Zealand Law Society supported the hybrid option where the Crown's identification of NSI by a Prime Minister's certificate is subject to review by the courts (a similar option to options 3 and 4 in section A4.2, under which a certificate that information is NSI can be reviewed). Police supported a stronger Executive control model because there needed to be assurance that NSI would not be disclosed, which would not be the case if the courts made the final decision.

Submitters to the Law Commission almost unanimously supported preliminary closed processes in criminal proceedings to determine how NSI is dealt with, and that closed processes should not be used at the substantive trial.

Recent consultation

We consulted with relevant government agencies[11] throughout the development of the proposals. There was widespread support from agencies for a single overarching framework to provide clarity, consistency and certainty, mirroring the Law Commission's proposals. We have consulted the judiciary on issues relating to the operation of the courts.

Security and intelligence agencies (GCSB and NZSIS) consider that retaining the ability of the Executive to protect NSI is essential for protecting national security. Foreign partners need robust assurance that certain information they provide will remain protected. Any change to this situation would alter assurances already given and may affect the willingness of foreign partners to share information in the future. Security and intelligence agencies supported the Law Commission's recommendations, provided there was a separate certificate process that can be used in appropriate circumstances to guarantee protection of NSI and as long as the Executive can select the most appropriate track in each case (as described in options 3 and 4 under section A4.2).

The Minister of Justice consulted the judiciary on the certificate proposal because its removes some of the court's decision-making ability. The sub-committee of the Legislation and Law Reform Committee of the judiciary was supportive of the Law Commission's proposal. However, it did not support an extension to law enforcement information because it considered existing protections were sufficient. The sub-committee also questioned the utility of the certificate process, because

[11] The Ministry consulted with Crown Law Office, DPMC, New Zealand Police, GCSB, NZSIS, MBIE, DIA, MFAT, New Zealand Defence Force, New Zealand Customs Service, Inspector-General of Intelligence and Security, Treasury, and Te Puni Kōkiri.

of the role of the court in all cases in deciding whether the Crown's claim for non-disclosure was justified.

External consultation

Given that the Law Commission consulted externally, sought views on three options that are very similar to the proposed options, and the issues have not substantially changed since then, no further external stakeholder consultation is planned prior to introducing legislation to Parliament. The legislative process will allow external parties to provide feedback on and input into the changes.

Effects on Māori

Article 2 of the Treaty of Waitangi requires the Crown to actively protect Māori interests, preserving Māori the right to tino rangatiratanga (self-determination). Article 3 of the Treaty requires the Crown ensure equality for Māori. Equality is only achieved when all New Zealanders are treated equally, and the evidence to date (particularly in the criminal justice system) is that this does not always happen for Māori.

The proposals in this document aim to protect the rights of non-Crown parties involved in NSI proceedings, but they involve departures from normal rights to justice that protecting NSI necessitates.

It is unlikely that these proposals will be used to limit Māori expressions of tino rangatiratanga, or to override the Crowns' obligations to actively protect Māori interests and rights, however historical events indicate this remains a possibility in the future.

The Te Urewera raids were the most prominent of the rare court actions to date under the Terrorism Suppression Act. The raids related to the assertion of tino rangatiratanga and involved the use of search and surveillance warrants – although the information involved at the time was not NSI. Historically, the Crown has been highly reactive to perceived threats against its sovereignty such as the New Zealand Wars, at Parihaka and the raid and subsequent arrest of Rua Kēnana at Maungapōhatu.

These historical events and lack of responsiveness to Māori Treaty rights have ensured continued disconnection of Māori from these systems. The impacts of institutional or structural racism are significant in the criminal justice system in particular, where settings have a disproportionate effect on Māori, who are overrepresented in our criminal courts. The small restriction on defendant's rights to have access to all of the information that may be relevant to the case (but they may still test all of the evidence) in the criminal jurisdiction when NSI is involved could be seen to derogate from the Crown's duties to protect Māori interests and to ensure equality for Māori under Articles 2 and 3 of the Treaty. It also could be seen to derogate from all New Zealanders' fundamental rights to justice.

To date, we are unaware of any criminal cases involving NSI that have proceeded to a hearing, and if any of these were prosecuting Māori, but this is a possibility in the future. One place this might occur is through search and surveillance warrants that may involve NSI. It is difficult to ascertain ethnicity data on search and surveillance warrants to determine if there is a disparity, however the number of search and surveillance warrants involving NSI is likely to be small in number.

Given that there are mechanisms to mitigate limitations on rights for non-Crown parties in NSI proceedings (such as special advocates), the question then becomes how to ensure the mitigations also work for and ensure equity for Māori. Therefore, it is proposed that mitigations should involve a sufficient level of cultural capability. For example, this may mean that the panel of special advocates should account for the diverse experience of Māori and other cultures by having at least one special advocate with experience with and knowledge of tikanga Māori and Māori rights and interests.

Section 3: Criteria identification

3.1 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

We have assessed these impacts with the overarching goal to create a coherent, overarching legal framework for how NSI is dealt with, which will:

- provide greater assurance to the Crown that NSI can be protected;
- increase protections for non-Crown parties; and
- ensure a clear process for courts to follow.

Having clear laws helps ensure parties have access to justice, a key component of the rule of law.

We have used the following specific criteria to assess the options:

- **protect NSI:** provide certainty that NSI will be protected where appropriate, bearing in mind that where disclosure of some information will be sufficiently prejudicial to national security, in the national interest it can be justifiably withheld from (or only disclosed in a protected form to) non-Crown parties;
- **uphold the rule of law and constitutional principles**: in particular:
    - the rights to **natural justice and procedural fairness**. These include a party's ability to rely on all the evidence relevant to their case, and to receive and test evidence that is relied upon by the other party, and recognition of the principle that the Crown should be in the same position as any other party;
    - in relation to criminal proceedings, **fair trial rights**. These include the right to a fair process and striking an appropriate balance between state interests in prosecuting and the public interest in a fair trial;
    - the tenets of **open justice**, including maintaining the minimum level of secrecy necessary in the circumstances; the legitimacy of public interest in the operation of our courts; and the media's role as the fourth estate;
    - **constitutional principles** including the separation of powers, the rule of law and compliance with the Treaty of Waitangi. This includes recognising and giving effect to the court's ability to control its own processes and its constitutional role to determine questions of law, and its expertise in determining the requirements of a fair trial; the Executive's responsibility for matters of national security; the legislature's responsibility to clearly define the parameters of any significant constraints on fundamental rights (noting that NZBORA stipulates such constraints should be demonstrably justified in a free and democratic society); and the Crown's responsibilities towards Māori;
- **ensure the court has all the relevant evidence in the case:** this recognises that the court should have the full picture of a case, including NSI evidence, and emphasises the importance of securing safe and just outcomes for individuals and New Zealand as a whole; and
- **ensure consistency and clarity (and efficiency):** this recognises that the law should be consistent, clear and it should promote efficiency.

There are inherent interrelationships and tensions between some of these criteria. To a greater or lesser extent, elements of the above principles may be justifiably limited to accommodate conflicting rights and responsibilities. Our legislative settings already impose some of these

limitations in national security and in other contexts. However, the rule of law and the right to a fair trial must be maintained.

Some of the options require weighting of criteria to reach a preferred option. In general, we have weighted protecting NSI and upholding the rule of law and constitutional principles more heavily – noting these are the criteria that come into the most direct conflict.

Section 4: Specific Problem Definition, Option Identification and Impact Analysis

Separate sections for civil, administrative and criminal matters
This section deals with three separate, specific problem definitions, options identification and impact analyses for civil proceedings, administrative decisions and criminal proceedings. Section A relates to civil proceedings, section B relates to administrative decisions and section C relates to criminal proceedings.

A. Civil proceedings

A4.1 What is the specific problem?

As stated in section 2.1 above, the current regime for managing NSI in court is unclear, and at times, contradictory.

In civil proceedings there are two different approaches to dealing with NSI, and it is not clear which provision takes precedence. Both approaches may result in the information being excluded from the proceeding entirely, or partially disclosed.

The two approaches are:

- a certificate process under s 27(3) Crown Proceedings Act 1950 enables the Prime Minister, in the case of national security, to issue a certificate ('a s 27(3) certificate') that authorises the Crown, subject to judicial review, to withhold the particular information covered by the certificate;[12] and
- the more recent s 70 of the Evidence Act 2006 provides an application process for determining whether material can be withheld on national security grounds. It gives judges scope to examine a claim that information should be withheld, by conducting a balancing exercise about what is in the public interest. Section 70 also empowers the judge to give any direction the judge considers necessary to protect the confidentiality of, or limit the use that may be made of, the information.

The Crown may be required to defend proceedings brought against it without recourse to NSI and cannot therefore properly justify or explain its actions or decisions. This means the Crown might be forced to concede or settle a case.

The last case in which a s 27(3) certificate for NSI was relied on was in 1999.[13] When the decision to issue the certificate was judicially reviewed, the courts chose not to examine the underlying material behind the certificate. However, the Law Commission report considered that the courts may be more likely to do so now given international trends, for example in the United Kingdom the Crown appeared willing to provide the documents to the court for it to inspect public interest

12 This is done through the legal process of discovery, where parties can discover, or find out, the information that the other party intends to rely on in the case.

13 *Choudry v Attorney-General,* above in n 2, [i.e. before s 70 of the Evidence Act 2006. A certificate was issued and presented to the court in Dotcom, but it was withdrawn after GCSB recognised that it had acted unlawfully, so was not considered by the court; see *Dotcom v Attorney-General*, above n 7, at [18]

immunity claims.[14] Recently in the Dotcom proceedings the Court of Appeal has confirmed that it will examine the underlying material and assess the Crown's claim. The Court said that although s 27 does not say so expressly, Courts have long held that it is for them to decide whether a common law claim to public interest immunity is well founded, notwithstanding the provision of a relevant opinion or certificate.[15]

In the recent Dotcom case, the Crown provided the NSI to the court and the court relied on the Evidence Act and cooperation between the parties. The High Court put processes in place to protect NSI.

Even with a few cases providing precedent for how to manage NSI in court, there remains a risk that the court will face a stark choice between excluding the NSI – which may result in the collapse of cases or unjust outcomes – or risking national security by requiring parties to present information as evidence without sufficient safeguards. In addition, although not required to make a judgment on this particular matter, the Court of Appeal in its most recent decision on the Dotcom case expressed strong reservations about whether the High Court has jurisdiction to adopt a closed court process to hear and consider evidence at the substantive hearing.[16] Leave has been sought from the Supreme Court to appeal the Court of Appeal's decision.

Impacts

If the problem is not addressed with a clear statutory basis, the continuing uncertainty regarding how NSI is protected and who decides on disclosure will continue to conflict with key principles of the justice system, including the rule of law and constitutional principles. It may also impact international assessments of transparency and human rights in New Zealand, as there is no formalised process that preserves non-Crown parties' rights to natural justice and procedural fairness. It may have an impact on New Zealand's relationships with foreign partners if there is no certainty that NSI will be adequately protected.

A4.2 What options are available to address the problem?

Option 1: Maintain the status quo

NSI is dealt with on a case-by-case basis in the civil jurisdiction, with bespoke statutes and schemes for administrative decisions that are heard in court through appeals or judicial review. The inconsistency between the Crown Proceedings Act 1950 and the Evidence Act 2006 remains. The Crown has relied on the Evidence Act in recent cases, although the s 27(3) certificate remains available under the Crown Proceedings Act.

Option 2: Law Commission recommendation - court decides if NSI and what protections are required

The Law Commission recommended:

14 *Al Rawi v Security Service*, above n 11, at [145] and [148].

15 *Dotcom v Attorney-General*, above n 8, at [22].

16 *Dotcom* v *Attorney-General,* above n 8.

- repealing s 27(3) of the Crown Proceedings Act and replacing it with new legislative provisions for the disclosure and management of NSI in civil proceedings;
- excluding NSI from s 70 of the Evidence Act (which would continue to apply to other forms of sensitive information, including law enforcement information), so that the new legislative regime would apply instead; and
- providing a new legislative regime as set out below.

Preliminary closed court process

Where the Crown considers it likely that disclosure of information to any non-Crown party would pose a risk to national security, it would apply to the court to have the information treated as NSI and made subject to special protective measures. The court would be required to use a new closed court process for a preliminary hearing to determine whether information falls within the Crown's claim of NSI (which needs protection) and, if so, the protective measures to be used.

Key features of the closed court process would be that:

- cases involving NSI would (with a few exceptions)[17] be transferred to and heard in the High Court or Employment Court (as applicable);
- the closed hearing excludes the public, media, any non-Crown parties to the proceedings and their lawyers, and anyone else (other than the judge) without appropriate security clearance, and takes place in a secure facility;
- the judge appoints a security-cleared special advocate to represent the interests of the excluded non-Crown party or parties (and sets terms for communication between them);
- the judge and special advocate have full access to all NSI at issue in the hearing, but must not disclose it to any person, including to the non-Crown party or their lawyer;
- the special advocate can call and cross-examine witnesses and make submissions; and
- the court can appoint special advisers to give advice to the judge on any aspect of national security in the case before it.

If the judge is not satisfied the information is NSI, it will be disclosed to the non-Crown party in the ordinary manner. If the judge is satisfied the information is NSI, the judge would determine whether to:

- exclude the NSI from the proceedings (meaning neither party could present it as evidence in the proceedings) because it was either not sufficiently relevant, or because the judge did not consider that a closed court process would be fair to the non-Crown party;
- direct use of a closed court process for the NSI during the substantive hearing;
- order disclosure to the non-Crown party of a protected form of the NSI (e.g., redacted, or summarised, or an agreed statement of facts). The special advocate has input into the summary and the judge has a supervisory role over the final summary content. The court can waive the requirement altogether if it is not possible to produce a meaningful summary without disclosing NSI; or
- use ordinary protective measures such as suppression orders, or excluding the public or media, to protect the NSI in the court. This option would only be available where the non-

[17] The exceptions were cases before the Immigration and Protection Tribunal and possibly cases before the Human Rights Review Tribunal.

Crown party already possesses the NSI and protective measures are intended to prevent any further dissemination.

When deciding on what protections should apply, the judge would be required to take into account a number of matters set out in statute. These matters include whether national security interests could be adequately protected if the NSI is disclosed to the non-Crown party, whether the proceedings could be fairly determined without the NSI being put before the court, and whether, in the interests of justice, the information should be disclosed.

Closed court substantive hearings

Where the judge orders a closed court process for the substantive hearing, it would have the same key features as the preliminary closed court hearing (set out above).

Option 3: Law Commission recommendations modified to retain the current public interest immunity certificate

Option 3 accepts the Law Commission's recommendations but retains the existing public interest immunity certificate issued by the Prime Minister under s 27(3) of the Crown Proceedings Act and updates the law to make the relationship between it and the new non-certificate regime clear.

The public interest immunity certificate would certify that the information in question is NSI and should not be disclosed. Where it was accepted by the court, the information would be excluded from proceedings, preventing disclosure to the non-Crown party. This option does not allow for NSI to be used in a closed court substantive process under the certificate.

Under this option, the Crown would either present the public interest immunity certificate to the court or apply for a closed court process as described in option 2. Clarifying that the Crown must elect its path would address the uncertainty of how s 27(3) fits with s 70 of the Evidence Act.

Role of, and limitations on, judicial review under option 3

The issuing of a certificate under s 27 (3) of the Crown Proceedings Act would give rise to the possibility of judicial review. This option proposes that judicial review of a certificate must be initiated within 28 days from receipt of notice of the certificate, with judicial discretion to extend this time in the interests of justice

This provides a further check on executive power. This time restriction is consistent with other specialist legislative regimes and is justified to ensure timely facilitation of the process.

Apart from these differences, option 3 adopts the remaining processes and procedures recommended by the Law Commission.

Option 4: Law commission recommendations modified to include a Ministerial certificate track

Option 4 is the same as option 3, with modifications to the certificate track. The key difference in this option is that the Ministerial certificate in this option allows for a closed court substantive process where the court considers it in the interests of justice to hold a closed court process rather than exclude the information entirely. In contrast, the s 27(3) certificate in option 3 excludes NSI from proceedings and does not allow any other mechanism for dealing with NSI. The second difference is that the certificate would be jointly signed by the Attorney-General and the Minister of Foreign Affairs and not the Prime Minister as under s 27(3).

The Ministerial certificate:

- strengthens the certainty of protection of NSI by allowing the Crown to certify to the court that the information poses a risk to national security, by presenting to the court a certificate jointly signed by the Attorney-General and the Minister of Foreign Affairs; and
- would limit the options available to the court. The certificate would mean that the NSI would be excluded from proceedings unless the court determines that it is in the interests of justice to grant an application for a closed court process for a substantive hearing. The court would determine whether a closed court process is appropriate in all circumstances of the case, hearing from a special advocate representing the non-Crown party and Crown counsel. If the court is not satisfied that a closed court process is in the interests of justice, the NSI would be excluded and the Crown could not rely on it in proceedings.

To provide assurance that the certificate option is being used appropriately an application to the Attorney-General and the Minister of Foreign Affairs for a certificate must include a statement confirming that the Crown considered using the non-certificate track, but it was decided that track would not provide adequate assurance for the protection of NSI.

Once a certificate is presented, a preliminary closed court hearing would then be held using the same features as described in option 2. The court would be limited to either considering a closed court substantive hearing or excluding the NSI from proceedings. As discussed below the court would retain the power to judicially review the Ministerial decision to issue a certificate.

Apart from these differences, option 4 adopts the remaining processes and procedures recommended by the Law Commission.

Role of, and limitations on, judicial review under option 4

The issuing of a Ministerial certificate would give rise to the possibility of judicial review, which would be subject to the same time limit as in option 3.

Option 5: Executive non-disclosure certificate to override court decision on NSI (guaranteed non-disclosure of NSI backstop)

This option guarantees that NSI would not be disclosed in court if the Crown does not want it to be disclosed. It would involve the Prime Minister issuing a non-disclosure certificate preventing the disclosure of NSI to the non-Crown party where the court has decided whether and how to disclose NSI, as per option 2, and the non-certificate track in options 3 and 4 discussed above. The non-disclosure certificate would need to justify that the public interest in national security outweighs the public interest in natural justice by disclosing NSI. This would allow the Crown to have final control over whether the NSI is disclosed.

Safeguards would be built in to the process. Before a non-disclosure certificate is issued the Inspector-General of Intelligence and Security (IGIS) would be required to report to the Prime Minister on the propriety of the security agencies' advice to the Crown. The Prime Minister would have to report to the Intelligence and Security Committee on the issue of the non-disclosure certificate and a brief explanation (to the extent possible) on why the certificate was issued. This would provide protection only in regard to information held by the intelligence and security agencies. There would be no judicial review of the non-disclosure certificate, in order to provide finality.

Marginal impact: How does each of the options identified at section A4.2 compare with the counterfactual, under each of the criteria set out in section 3.1?

		Option 1: status quo	Option 2: Law Commission recommendation - court decides if NSI and what protections are required	Option 3: Law Commission recommendations modified to retain the current public interest immunity certificate	Option 4: Law commission recommendations modified to include a certificate track	Option 5: Executive non-disclosure certificate to override court decision on NSI (guaranteed non-disclosure of NSI backstop)
Protect NSI		**0**	**+** More certainty that NSI will be protected, if the court considers the information is in fact NSI. However, as under the status quo, does not guarantee the level of protection or the acceptance of the Crown's assessment of the protections required.	**+ +** As for option 2 – however the Crown has a choice to use a certificate that provides more protection by completely excluding NSI from proceedings.	**+ +** As for option 2 – however the Crown has the choice to use a certificate that provides more protections but still allows the court to determine whether to disclose the NSI into a closed court process.	**+ +** Complete certainty that the NSI can be protected, as the Crown retains ultimate control over whether and how the information is released.
Uphold the rule of law and constitutional principles	**Natural justice and procedural fairness**	**0**	**-** Increases existing potential for relevant information to be withheld from the non-Crown party and their counsel. Their exclusion from closed court processes limits their ability to argue the case and erodes fundamental rights (a cost in itself). This is mitigated to some extent by the guarantee of a special advocate to represent the defendant's interests, and the judge viewing the NSI.	**-** As for option 2 – however the certificate (if used) does not provide a process for the Crown to rely on the information necessary to defend a decision. The Crown may be forced to concede or settle if it is unable to rely on the evidence to support its case. Also, information that supports the non-Crown party will not be available to the court.	**-** As for option 2 – the certificate (if used) limits the courts' options to either excluding NSI or to hold a closed court substantive hearing; but only if the court considers it is in the interests of justice. Information that supports the non-Crown party will be available to the court.	**- -** The Crown's ability to override a court ruling to disclose the NSI effectively ensures that the non-Crown party's rights are not observed (as an override would only occur in the context of a court determining their rights outweigh the interest in protecting the information).

	Constitutional principles	**0**	**+** The court's checking function on the Executive, by interrogating the Crown's assertion of NSI, is clarified in legislation. The court retains its role of determining the procedure to be followed.	**0** As for option 2, however the certificate (if used) is similar to the status quo. The court's checking function over the Executive's power to withhold relevant NSI from other parties is retained.	**0** As for option 2. While the court's checking function of executive action is limited, the respective roles of the Crown and the court acknowledge that the Crown is best placed to determine what is NSI, and the court is best placed to determine court procedure and the interests of justice.	**- -** The court's checking function on executive power to withhold relevant NSI from the court and other parties is limited. While the ultimate effect is the same as under the status quo, the process explicitly overrides the court's reasoned decision-making, with no provision for judicial review, which more clearly erodes the separation of powers and is contrary to the rule of law.
Ensure the court has all the relevant evidence in the case		**0**	**+** The court has a clear, secure, and fairer way of enabling itself to consider relevant NSI evidence in its decision-making.	**0** As for option 2 - however the certificate (if used) means the Crown can remove relevant evidence from the scope of the court's decision-making.	**+** As for option 2. While the certificate (if used) ensures information will be protected, the court is still able to hear relevant evidence in closed court.	**0** The Crown can remove relevant evidence from the scope of the court's decision-making.
Ensure clarity and consistency (and efficiency)		**0**	**+** A standardised process will be clearly specified in legislation, which will promote efficiency as practice beds in.	**+** As for option 2. The additional changes would address issues around s 27(3) of the CPA.	**+** As for option 2.	**+** As for option 2, 3 or 4 (depending on which is progressed)
Overall assessment		**0**	**+**	**+**	**+**	**-**

Key:

++ much better than doing nothing/the status quo **+** better than doing nothing/the status quo **0** about the same as doing nothing/the status quo

- worse than doing nothing/the status quo **- -** much worse than doing nothing/the status quo

A4.4 What other options have been ruled out of scope, or not considered, and why?

We considered a certificate-only option where all NSI would require a Ministerial certificate as an alternative to the Law Commission's model. Under this option the certificate would determine the status of the information as NSI and the courts would then determine the level of protection the information required. The option was ruled out because it forced using the Ministerial certificate in every case and also because it may lead to delay.

The Ministry considers that the Ministerial certificate for civil proceedings should be issued by the Prime Minister, being the highest ranked Minister with the greatest oversight, and therefore best-placed to decide if the material warrants the protection afforded by the certificate. A certificate signed by the Prime Minister would also offer the greatest assurance to foreign partners, signal the significance of the power (which limits the options available to the court), and maintain the status quo as the Prime Minister currently signs the s 27(3) Crown Proceedings Act certificate. While the Ministry consulted with the Crown Law Office and the Ministry of Foreign Affairs, no substantive analysis of the proposal for a certificate jointly signed by the Attorney-General and the Minister of Foreign Affairs in Option 4 was undertaken.

Non-regulatory options were not considered, as they would have little or no impact on court processes.

A4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Weighting all criteria equally, options 2, 3 and 4 rate equally.

Between these three options, if upholding the rule of law, natural justice and constitutional principles is weighted more heavily, then option 2 better addresses the problem. If protecting NSI is weighted more heavily, then options 3 and 4 better address the problem.

Option 5 also provides certainty that NSI will be protected, but it is substantially worse than the others in respect of maintaining the rule of law and constitutional principles. Options 3 protects NSI if the certificate track is chosen, however it lacks a process for the Crown to be able to use the NSI to defend a decision, and it also limits the courts' ability to consider NSI that might benefit non-Crown parties. Option 4 provides more protection in the certificate track and allows the court to consider hearing NSI in a closed court substantive hearing if it is in the interests of justice.

Option 2 best maintains the rule of law and constitutional principles; however it does not protect NSI as well as the other options. Option 4 is the next best in maintaining the rule of law and constitutional principles, and also better protects NSI.

We prefer option 4 as it provides a balance across the objectives, and better achieves the key objective of protecting NSI while upholding rights to justice to the greatest extent possible. Even where the certificate is used, the court still determines whether a closed court process is used. Both branches of state have a role appropriate to their area of expertise and constitutional functions, and each role is made clearer when compared to the status quo.

All options risk conflict with key principles of the justice system, such as the rule of law and constitutional principles, as well as judicial independence, as it formalises a closed court process.

However, the risk is mitigated by the use of special advocates to represent the non-Crown party's interests in a closed hearing, and in options 2, 3 and 4, judicial oversight and control of closed court proceedings. Options 3 and 4, by allowing for judicial review of the certificate, provide further checks on executive power and mitigate the risk to limiting the court's independence.

B. Administrative decisions

B4.1 What is the specific problem?

Overall, current frameworks for dealing with NSI in administrative decisions and court proceedings lack consistent protections for both individuals and national security.

There are five bespoke statutory regimes that provide for the protected use of NSI in administrative decisions and in appeals or judicial review proceedings challenging those decisions. These are provided for under the Passports Act 1992, Terrorism Suppression Act 2002, Immigration Act 2009, Telecommunications (Interception Capability and Security) Act 2013 (TICSA), and Health and Safety at Work Act 2015 (HSWA). These regimes have developed one at a time, and there are inconsistencies between them. There are further schemes on the horizon and further diversity can be expected if a central scheme is not put in place.

Some schemes lack adequate safeguards for non-Crown parties (including not providing sufficient information), which goes against the NZBORA right to natural justice, or provide varying levels of court oversight. This creates constitutional issues regarding the role of the Executive in making initial decisions and the role of the courts in providing a check on executive power.

The Outer Space and High-altitude Activities Act 2017 and the Brokering (Weapons and Related Items) Controls Act 2018, both passed since the Law Commission's report, and while likely to involve NSI, do not have provisions to deal with court challenges to decisions based on NSI.

New Zealanders affected by administrative decisions involving NSI normally have appeal rights and rights to bring judicial review proceedings. The regimes share common features in respect of court proceedings: they typically enable the court to be closed to the public, the media and the non-Crown party, and for NSI to be withheld from the non-Crown party. However, there are inconsistencies in how such provisions are put into practice. 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 required definition, the terminology used, whether summaries are produced and the availability of special advocates. For example, the Terrorism Suppression Act, TICSA and the Passports Act allow the court to make decisions on the basis of information the affected person may not have. In contrast, under the Immigration Act, the Immigration and Protection Tribunal (IPT) or court can only rely on information to the extent that it has been summarised and given to the non-Crown party. The Terrorism Suppression Act and Passports Act schemes do not make explicit provision for special advocates.

The variation between these schemes and the gaps in some of them add to the inconsistency and uncertainty of how NSI is handled in the courts. Further, having a number of bespoke schemes creates operational inefficiencies.

If the problem is not addressed, other bespoke schemes for NSI may be added, further increasing inconsistency and uncertainty if decisions are challenged in the courts and exacerbating existing operational inefficiencies.

The HSWA scheme

The HSWA scheme applies to both civil and criminal proceedings and is an ad hoc scheme with differing provisions to other schemes and current statutes.

It applies only to cases where all parties have access to NSI or the defendant intends to produce or refer to NSI in proceedings. The scheme has some inconsistencies with other existing administrative schemes. For example, it allows the Executive to make the final decision on whether the information is NSI and whether it can be disclosed.

If these issues were not addressed, NSI in a HSWA case would continue to lack protections in the civil and criminal jurisdiction if used. This may impact on national security and New Zealand's relationship with foreign partners, if there is uncertainty regarding protection of NSI. It may also impact on international and national assessments of fair trial rights in criminal proceedings, as the defence (if a non-Crown party) may not be able to present the best case possible where NSI may be relevant, due to the restrictions on access to NSI.

B4.2 What options are available to address the problem?

Given that judicial review and appeals are a subset of civil proceedings, the Law Commission recommended that their proposed civil proceedings model should apply to judicial review or appeal proceedings of administrative decisions where NSI is taken into account. We agree with this approach. We propose that the progressed administrative decision option will flow into the progressed civil proceedings option discussed in A4.2 and analysed in 4A.

Option 1: Maintaining the status quo

Challenges to administrative decisions involving NSI would continue under the existing range of bespoke schemes, with other schemes likely to be added over time.

Option 2: Law Commission recommendation – align schemes

While recognising that different administrative decisions raise different national security issues, the Law Commission recommended some amendments to the existing bespoke schemes to align them and ensure minimum requirements of natural justice were met.

This would mean that tailored initial decision-making processes under these schemes would continue. Reforms would be implemented to ensure people affected by administrative decisions have certain minimum rights protected. The Law Commission proposed that:

- if the person would be entitled to receive a summary of information about the decision but it is being withheld for national security reasons, they should receive a summary of information after a decision is made. The summary of the information would be agreed by the Chief Executive of the relevant agency and the decision-maker;[18]
- when an administrative decision is made that gives rise to a right of complaint to the IGIS, the person affected must be notified of their right to make a complaint to the IGIS

[18] This reform would not need to apply to the Immigration Act because a summary is already provided for under that Act.

and have the actions of the security and intelligence agencies reviewed by the IGIS.[19] Where the IGIS makes a finding that the information was not reliable or balanced, the decision-maker may decide to reconsider their decision; and

- when security and intelligence agencies provide NSI used in an administrative decision that affects the rights of an individual, the IGIS must be provided with a copy of the information given to a decision-maker and a record of the decision made.

The Law Commission also recommended applying the regime established for civil proceedings for appeal or review of administrative decisions under bespoke regimes.

Option 3: Modified rights to information, excluding Immigration Act 2009

This option proposes some modifications to the Law Commissions' administrative decision recommendations. It proposes to exclude the Immigration scheme and make no changes to the Immigration Act.

The modifications to the Law Commission's recommendations in respect of the remaining schemes would mean:

- a summary of the information used in the administrative decision after the decision was made would only be provided on the request of the affected person, rather than in every case (because the benefit of providing a summary in every case is outweighed by the administrative burden placed on the security agencies and practical difficulties). Where the decision-maker is satisfied it is not possible to produce a meaningful summary without disclosing NSI, there would be no requirement to provide the summary;
- notification of any existing right of complaint and review of the actions of the security and intelligence agencies by the IGIS, rather than conferring new rights of complaint would only apply to the Terrorism Suppression Act scheme;[20] and
- the IGIS would be notified of every decision made using NSI, without receiving a full copy of the information.

The progressed civil option would apply to appeals or reviews of administrative decisions under bespoke regimes.

Immigration Act exclusion

A further modification is that this option would not make any changes to the current closed-hearing process established in the Immigration Act, which would remain a standalone regime. Immigration decisions sit within a unique context, involving a high number of decisions regarding non-New Zealanders that must be made relatively quickly in collaboration with our foreign partners. Other jurisdictions also make separate arrangements for immigration (such as Australia, Canada and the UK).

The Immigration scheme is generally consistent with the proposals. The Law Commission report identified the current procedures established for the Immigration and Protection Tribunal (IPT) and the courts under the Immigration Act as the most robust and protective

[19] This reform would not apply to the Immigration Act 2009 because that Act precludes a right of complaint to the IGIS, nor would it apply to TISCA because that Act provides for review by an independent panel for network operators.

[20] The reform would not apply to TICSA as above, and the Passports Act, which has since been amended after the Law Commission report to provide for an independent review process by a Commissioner of Intelligence Warrants.

of the interests of non-Crown parties of the existing models. For example, the IPT is not able to take NSI into account unless it has been provided in a summary form to the non-Crown party.

Health and Safety at Work Act 2015 scheme

It is proposed that the civil closed court process described in A4.2 apply to civil proceedings and the criminal process described in C4.2 apply to criminal proceedings under the HSWA scheme.

Section B4.3: Impact Analysis

Marginal impact: How does each of the options identified at section B4.1 compare with the counterfactual, under each of the criteria set out in section 3.1?

		Option 1: status quo	Option 2: Law Commission recommendation – align schemes and apply Law Commission civil model at judicial review or appeal stage	Option 3: Modified rights to information, excluding Immigration Act 2009
Protect NSI		**0**	**0** Requires a summary of the NSI, agreed by the Chief Executive of the relevant agency and the decision-maker, to be given to the person affected by the decision after the decision is made.	**0** Summary to be given on request and is not required if a meaningful summary would mean disclosing NSI. Immigration scheme fully protects NSI.
Uphold the rule of law and constitutional principles	**Natural justice and procedural fairness**	**0**	**+** Increases rights of parties in some schemes (to have a summary of the information and have a special advocate) and aligns rights and processes in other schemes.	**+** As for option 2 but does not confer new rights. Immigration scheme provides equivalent protections.
	Open justice	**0**	**+** For four schemes, the affected person will be entitled to have a summary of the NSI that the decision was based on (Immigration scheme already allows this).	**+** As for option 2, however summary not given automatically, except where it applies in the Immigration scheme which already requires a summary to be given.
	Constitutional principles	**0**	**+** Notified of right to complain to IGIS, but no new rights. Immigration scheme precludes complaint to IGIS but provides full rights of appeal and review to IPT instead.	**+** As for option 2.
Clarity and consistency (and efficiency)		**0**	**+** Summary always provided if party entitled and IGIS provided with a copy of the NSI given to decision-maker and a record of the decision made.	**+ +** Summary only provided on request, and IGIS only provided with a record of the decision, reducing administrative burden. Immigration scheme would be excluded.
Overall assessment		**0**	**+**	**+ / ++**

Key:

++ much better than doing nothing/the status quo

+ better than doing nothing/the status quo

0 about the same as doing nothing/the status quo

- worse than doing nothing/the status quo

- - much worse than doing nothing/the status quo

B4.4 What other options have been ruled out of scope, or not considered, and why?
Non-regulatory options were not considered, as they would have little or no impact on court processes.

B4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?
The preferred option is option 3 as this meets the objectives to protect NSI and maintain individual rights and is marginally more efficient than option 2. The proposal will result in a more consistent system that gives certainty about how NSI will be dealt with, if it is decided that it will be disclosed. Over time, this efficiency should reduce costs and complexity. The Law Commission's report identified the current procedures established for the IPT and the courts under the Immigration Act as the most robust and protective of the interests of non-Crown parties of the existing models. The protections it provides are consistent with those in the new model applying to other regimes under option 2.

C. Criminal proceedings

C4.1 What is the specific problem?

Overall, current frameworks for dealing with NSI in court proceedings lack clear and consistent protections for both individuals and national security.

The courts face a stark choice in dealing with NSI because there is no consistent, overarching framework for it. The frameworks that exist are inconsistent or bespoke for specific issues.

There is no clear pathway for courts to take when NSI is involved in proceedings. It is unclear whether the Crown or the court declares that information is NSI, what the process should be for this determination and for protecting NSI, and how non-Crown parties are protected in a process that requires them to be excluded.

Criminal proceedings have additional constitutional issues for the courts to consider, particularly how the state's interests can be protected while also upholding fair trial rights under NZBORA and the rights to natural and open justice.

In criminal proceedings, statutory procedures for dealing with relevant NSI lack detail. For example, the Criminal Disclosure Act 2008 allows the prosecution to withhold information it would otherwise be obliged to disclose on NSI grounds. The defence can challenge that withholding, but it has a limited ability to present full arguments as it is unlikely to know the content or context of what is being withheld. The judge may consequently have an incomplete picture or little assistance when making a decision on disclosure, and the defence may end up missing out on relevant information that could assist its case. This effect is somewhat mitigated by the judge's ability to require limited disclosure of the NSI, for example in summarised or redacted form.

At the trial itself, the prosecution cannot present evidence it has withheld from the defendant at the disclosure stage. If NSI has been disclosed in any form, that form could potentially be presented as evidence, subject to the court's assessment of its admissibility. However, the practical implications of managing the admissibility of NSI are not addressed in the law.

Presenting NSI in whatever form in a trial still carries some risk of insufficient protection of it. While the court may suppress names and evidence, and close the court on national security grounds, it is unlikely to prevent the defendant from exercising the right to interrogate the evidence and what sits behind it. A defendant in a criminal proceeding possesses fundamental rights, which are likely to be at the forefront of judicial decision-making in the trial. These include the right to be present at trial and to present a defence, to examine prosecution witnesses, and to elect trial by jury (which introduces further complexity when dealing with NSI).

We do note the use of NSI as evidence in a criminal prosecution is likely to be a rare occurrence; it is more likely that NSI would be used to assist the police investigation and evidence-gathering. Further, in the vast majority of cases, the Crown will be the prosecutor and will be able to protect NSI by the decisions it makes about how the prosecution is to proceed (in contrast to civil cases where the Crown will more commonly be the respondent).

While less likely, there may be scenarios where a defendant (whether the Crown or not) in criminal proceedings wishes to use NSI or where a private prosecutor wishes to use it. It is not clear how the court would proceed when this is the case.

Search warrants and anonymity

Currently, it is unclear whether challenges to search warrants that have been issued on the basis of NSI under the Search and Surveillance Act 2012 would require disclosure of NSI. While warrant applications are always *ex parte*, there is no such provision for challenges of warrants in court.

The Evidence Act allows undercover police officers to give evidence anonymously. It does not contain similar provisions to adequately protect the identity of intelligence officers working for New Zealand or international intelligence agencies or other sources who give evidence on national security matters.

C4.2 What options are available to address the problem?

The Ministry agrees with the Law Commission's recommendation against introducing procedures that exclude the defendant from the substantive criminal trial, as that approach cannot be reconciled with fair trial rights. Accordingly, no options contemplate closed court criminal trials.

Option 1: Maintain the status quo

NSI may be withheld by the prosecutor under the Criminal Disclosure Act. The defence may challenge the withholding of the information, although with limited ability to present arguments, and the court decides whether and how the NSI should be disclosed or not. The court can suppress names and evidence and close the court from the media and the public under national security grounds in the substantive trial. Under s 70 of the Evidence Act the court may determine whether NSI be disclosed. Under s 176 of the Criminal Procedure Act 2011 the Attorney-General may stay proceedings.

Option 2: Law Commission's recommendation: pre-trial closed court process to determine disclosure of NSI in criminal cases

The Law Commission recommended minor reform in respect of criminal proceedings, to:

- amend the Criminal Disclosure Act to allow for a closed pre-trial disclosure hearing with special advocates to challenge claims for non-disclosure of NSI, as described below;
- enable secure facilities to be used for closed disclosure hearings;
- apply these same settings in the case of challenges to search or surveillance warrants, and allow special advocates to present arguments for disclosure of the grounds to the affected person;
- allow the judge to dismiss proceedings if protecting the NSI would prevent a fair trial, and allow the prosecutor to withdraw proceedings without the court's leave where judge-ordered disclosure of NSI would create an unacceptable risk to national security; and
- provide anonymity protections for sources and intelligence officers under the Evidence Act in both criminal and civil proceedings.

Criminal cases involving NSI would be transferred to and heard in the High Court. Key features of the closed pre-trial disclosure hearing would be:

- the public, media, any non-Crown parties to the proceedings and their lawyers, and anyone else (other than the judge) without appropriate security clearance is excluded, and the hearing takes place in a secure facility;
- the judge appoints a security-cleared special advocate to represent the interests of the excluded non-Crown party or parties (and sets terms for communication between them);
- the judge and special advocate have full access to all NSI at issue in the hearing, but must not disclose it to any person, including to the non-Crown party or their lawyer;
- if the NSI is not released, a summary of it is provided to the non-Crown party and their lawyer. The special advocate has input into the summary and the judge has a supervisory role over the final summary content. The court can waive the requirement altogether if it is not possible to produce a meaningful summary without disclosing NSI;
- the special advocate can call and cross-examine witnesses; and
- the court can appoint special advisers to give advice to the judge on any aspect of national security in the case before it.

Option 3: Law Commission recommendations plus new admissibility process
A new closed process to enable NSI to be used but protected at a criminal trial

In addition to the Law Commission's recommendations, this option would allow parties to apply to the court to admit NSI as evidence, but in a protected form. The court would decide, in a closed admissibility hearing including a special advocate to represent the non-Crown party's interests, whether the evidence can be admitted in a form that adequately protects the NSI and is also consistent with fair trial rights ('closed admissibility process'). The protected form might include: a summary of the NSI evidence, a document with NSI redacted, or an agreed statement of facts. Under this option it would be the summary, redacted document or agreed statement of facts that the court would admit, and any redacted or withheld NSI would not be part of the evidence so would not be considered by the court.

The closed admissibility process would generally occur prior to trial, but also be available if the question of admitting NSI evidence only becomes apparent at the trial. Secure facilities could be used for the hearings. The court would continue to have the ability to make suppression orders and close the court to the public and media.

The Solicitor-General would have standing to be heard and to appeal at any time NSI is proposed to be disclosed or admitted in proceedings, including when the prosecution is not a Crown prosecution (for example, in a private prosecution of a non-crown party where NSI is in issue).

The closed admissibility process would be available as of right only in respect of prosecutions for category 4 offences and category 3 offences with a maximum penalty of 7 years' imprisonment or more. The court would have residual discretion to make the process available for other category 3 offences. Where there are multiple charges, the process would be available if one of the charged offences qualifies.

Power to Stay a prosecution

This option proposes that the Attorney-General be able to stay a prosecution on national security grounds to manage any residual risk of disclosure (particularly in cases where the Crown is not the prosecutor).

Repeal and replace the closed court process in the Health and Safety at Work Act

This option proposes the repeal of the HSWA Schedule 4 scheme. The admissibility process would be available for prosecutions under s 48 of HSWA (failing to comply with a duty that exposes an individual to death, serious injury or illness), at the court's discretion. The maximum penalty under s 48 of HSWA is a substantial fine, so it would not otherwise qualify for the process. Including it under the proposed option would ensure that NSI can be used but protected in serious prosecutions under HSWA.

All other criminal procedure proposals (i.e. closed court process) would also apply in HSWA prosecutions.

Section C4.3: Impact Analysis

Marginal impact: How does each of the options identified at section C4.1 compare with the counterfactual, under each of the criteria set out in section 3.1?

		Option 1: status quo	Option 2: Law Commission recommendation – pre-trial closed court process to determine disclosure of NSI in criminal cases	Option 3: Law Commission recommendations plus new admissibility process
Protect NSI		**0**	**+** The court is empowered to better protect NSI through a clear, tailored process to determine what protections will be put in place. The Crown is assured this process will occur in a closed setting. Where the Crown is the prosecutor, it can also ensure that NSI is protected by withdrawing without the leave of the court.	**+** As for option 2, with a marginally increased and more certain protection of NSI by staying proceedings where necessary.
Uphold the rule of law and constitutional principles	**Fair trial rights, natural justice and procedural fairness**	**0**	**0** While also possible under the status quo, this option *mandates* that disclosure hearings dealing with NSI will be closed to non-Crown parties (usually the defendant). This infringes the rights to natural justice and minimum standards of criminal procedure affirmed in NZBORA. The substantive impact on fair trial rights and the risk to robust outcomes from these features is mitigated by increased judicial oversight of NSI, by the requirement for a special advocate to represent the non-Crown party's interests, and explicit recourse for the court to dismiss proceedings on the grounds that withholding the NSI would not result in a fair trial.	**0** As for option 2, with added admissibility process. The admissibility process does not limit the defendant's right to test all the evidence that makes the case against them.
	Open justice	**0**	**0** Court will be closed to the media and the public; however, this may already occur when protecting disclosures.	**0** As for option 2, but the new closed admissibility process may mean at least some form of the NSI evidence is used in (open) court.
	Constitutional principles	**0**	**+** Increases certainty regarding the role of the Crown and the court for deciding how NSI is disclosed.	**+** As for option 2.

The court has all the relevant evidence in the case	**0**	**0** The court is likely to have more assistance and the benefit of more robust argument when determining whether and/or how NSI evidence should be disclosed to the non-Crown party. No substantive impact on the evidence available at trial.	**+** As for option 2, but also increases the likelihood that NSI evidence can be admitted in the trial (albeit in a protected form, which may still limit its evidential value).
Clarity, efficiency and accessibility	**0**	**+** A standardised process will be clearly specified in legislation, which will promote efficiency as practice beds in.	**+** As for option 2.
Overall assessment	**0**	**+**	**++**

Key:

++ much better than doing nothing/the status quo **+** better than doing nothing/the status quo **0** about the same as doing nothing/the status quo

- worse than doing nothing/the status quo **- -** much worse than doing nothing/the status quo

C4.4 What other options have been ruled out of scope, or not considered, and why?
As outlined above, we did not consider any options involving closed substantive trials, as we consider that would be irreconcilable with fundamental rights and principles in criminal cases. Non-regulatory options were not considered, as they would have little or no impact on court processes.

C4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?
Option 3 is the preferred option, because it accepts and adds to the Law Commission's recommendations, allows the court flexibility to deal with NSI in trials and provides consistency by aligning the HSWA Schedule 4 scheme with the new process. It may also increase the viability of prosecutions involving NSI, which may benefit public safety. The risk of adopting option 3 is that natural justice and procedural fairness rights are affected by the defendant not being able to be present at the preliminary hearing. However, the defendant is still able to test all the evidence that makes the case against them in open court. Further, the defendant's interests are represented by a special advocate at the closed pre-trial hearing and the whole process is subject to judicial oversight, including the judge being able to decide that the trial should not proceed because it would not be fair to the defendant. Compared to the Law Commission option, option 3 is more intrusive into fair trial rights in some cases, but has the benefit of allowing the court to admit relevant evidence in a protected form in open court that would otherwise have been excluded. In some cases this will lead to fairer outcomes.

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Preferred options

Based on our analysis, the Ministry and the Government's preferred option is a combination of option 4 for civil proceedings, option 3 for administrative decisions and option 3 for criminal proceedings. These options provide the most appropriate balance between achieving the primary objectives of protecting NSI whilst enabling its use in proceedings, preserving fundamental rights and principles and enabling the court to make decisions based on best evidence.

The preferred options have been designed to work together and come closest to a single, overarching framework for protecting NSI in administrative and judicial processes. This will mean one process for administrative decisions and civil proceedings, and a similar but more limited process for criminal proceedings (with the same settings for closed court processes across all jurisdictions). This will likely result in a more efficient, consistent and certain process that will augment the proposals' benefits for protecting national security and increase the public's trust and confidence in the justice system.

Constitutional principles and NZBORA

Notwithstanding our preferences, the Ministry's view is that the use of closed processes should be kept to a minimum, as they represent a significant departure from the constitutional principles of natural justice and open justice and from minimum standards of criminal procedure as relevant under NZBORA. They should not become the default simply because issues of national security have arisen.

We note that providing a summary of the NSI and special advocates to represent non-Crown parties, and continued judicial oversight mitigate some of these risks, but not fully.

We consider the courts are likely to use closed processes as little as possible. Irrespective of the efficiencies expected from standardising the approach, they are time-consuming, complex and expensive. Where the courts can use other protective measures, such as name suppression or clearing the court, these are likely to be preferred where they provide the necessary protection.

Evidence confidence

Noting the mostly untested nature of the preferred proposals in the New Zealand context, we are confident in our assumptions and the evidence we have used. The outcomes of our analysis do not depend on quantitative evidence or assumptions and we have completed the analysis with the relevant subject matter expertise.

Stakeholder views

Agencies consulted supported the proposals. The Ministry did not consult external stakeholders because they had already been consulted by the Law Commission and there has not been a significant change in proposals since initial consultation took place. The Law Commission report summarised the views of stakeholders and it was determined there was little value in replicating this work. The Law Commission found support for a single, overarching framework, although some submissions noted that there needed to be adequate

flexibility to deal with all circumstances and different ways that NSI may arise in court proceedings.

For administrative schemes and civil proceedings, most stakeholders consulted by the Law Commission preferred the Law Commission recommendations which standardised all administrative schemes and put responsibility for NSI with the court. However, stakeholders acknowledged that a hybrid model where responsibility for NSI lies both with the Crown and the court (such as options 3 and 4) may give stronger assurance that NSI would be protected. In addition, agencies recently consulted agreed that the Immigration scheme should be excluded, as the scheme already has many features of the proposed NSI framework.

For criminal proceedings, the majority of stakeholders supported option 2 (the Law Commission model), where closed procedures would be available for pre-trial matters. Security agencies supported admitting NSI at trial in certain circumstances, similar to the proposals in option 3 (Law Commission recommendations plus new admissibility process). In this case, it was considered that clarifying protection of NSI at trial and allowing the court to consider all evidence that may be relevant added further benefits to protecting public safety, and the risks to fair trial rights could be mitigated by providing a summary of the NSI to the defendant (where possible) and allowing a special advocate to represent their interests.

While the options finely balance the need to protect national security with the need to preserve natural justice, it is likely some stakeholders who were consulted by the Law Commission would consider other options would strike a better balance. In particular, we envisage those representing the interests of non-Crown parties in these kinds of cases would support greater weighting of the preservation of rights and principles, and therefore support the Law Commission's recommendations or oppose any change that formalises the availability of closed court processes. On the other hand, there are also likely to be stakeholders that consider the benefits of protecting NSI justify greater assurance and Crown control of the information than the preferred proposals provide.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment:	Impact	Evidence certainty
Additional costs of proposed approach, compared to taking no action			
Non-Crown parties	Formalising and strengthening protection of NSI may further erode natural justice rights and procedural fairness, limit the ability to present a case, reduce chances of success in court, and/or risk the fairness of the case outcome.	Medium, non-monetisable	High
	Increases in the complexity of individual trials and preparation time, and the interface between counsel and special advocates' expert advice, are likely to result in increased costs to parties	Low-medium, monetisable but unquantified.	Medium
Gove rnment	Cost of setting up the closed court process	$131,000 in the first year, $94,000 ongoing	Medium-high

	Paying for special advocates	Monetisable but unquantified	
	Ministerial certificates in civil proceedings	Low, non-monetisable	Low
Court users	Additional resource needed for closed court processes may create delays for other cases in the system	Low-medium, non-monetisable	Low
Society	Formalising and strengthening protection of NSI may erode the principle of open justice	Low, non-monetisable	High
Total monetised cost		$430,000 over five years	
Non-monetised costs		*Low-medium*	

Expected benefits of proposed approach, compared to taking no action			
Non-Crown parties	Explicit protection of rights in the context of decision-making involving NSI, and potentially greater access to relevant information from assurance that information will be disclosed to the extent possible without risking national security	Medium, non-monetised	High
	Over time, as standardised processes bed in, efficiencies may reduce costs compared to current ad hoc approach	Low, monetisable but unquantified	Medium
Government	Enable Government to use NSI in court proceedings where that is central to justifying or defending its decision, and greater and more certain protection of national security interests when it chooses to use NSI. This enhances international and domestic perceptions of New Zealand's judicial system, safety and national security and improves international relations	Low, monetisable but unquantified; Med-high, non-monetisable.	Medium
	Clearer and more consistent court processes, which balance competing but fundamental interests, increases the trust and confidence in the justice system	Low, non-monetisable	Low
	Intelligence agencies, enforcement and prosecution agencies will have more certainty in the operating environment, and the benefit of continued international assistance and intelligence	Medium, non-monetisable	Medium
Court users	Over time, efficiency from standardised processes may shorten timeframes for other cases in the system	Medium, non-monetisable	Low
Society	Maintained or increased flow of international intelligence and assistance maintains or improves New Zealanders' safety. Rights to justice are upheld, and constitutional roles are preserved and made clearer.	Low-medium, non-monetisable	High
Total monetised benefit		Low; unquantified	
Non-monetised benefits		*Medium*	

5.3 What other impacts is this approach likely to have?

While the proposals may allow more evidence to be admitted in proceedings, its value may be limited because the non-Crown party does not have full recourse to robustly interrogate it. This may also serve to cast doubt over the fairness of the outcome, undermining the expected positive trust and confidence impacts described in the table above.

In light of these factors, the role of the judge as the arbiter of a fair process is heightened. The Ministry considers judges are well placed to assess and maintain fairness, and to run proceedings as they see fit.

The role of a special advocate differs from standard legal advocacy and client representation. The appointment of senior experienced counsel should mitigate any risks around role boundaries and requirements.

Our underpinning constitutional structure and its associated conventions, while somewhat shifted by these proposals, still provide checks and balances on the withholding of information and its ramifications. Judicial independence is a cornerstone of New Zealand's constitution. The judiciary will respect the Executive's security decisions while also providing a level of independent assessment.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The proposals improve New Zealand's compliance with international practices and obligations regarding NSI.

Some of the risks identified throughout the proposals may create incompatibilities with the requirement for regulatory systems to be fair and equitable in the way they treat parties, and the requirement to conform with established legal and constitutional principles outlined in the expectations. However, the analysis in this document establishes that the proposals strike the best balance between competing interests, and the extent of the departure from established practices and principles can be justified by the need to protect national security interests in New Zealand.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The preferred option requires legislation. This legislation is likely to consist of a central NSI statute containing the processes to apply to all administrative and civil court proceedings where NSI is in issue. Legislation and operational processes will be amended to remove or avoid conflicting rules and processes. Four of the five existing bespoke administrative schemes will be modified so that the new scheme is the central statute to proceedings before the court under those schemes. The current confusion over the extent to which the courts may adopt closed court processes for pre-trial and substantive hearings in civil proceedings will be resolved. Amendments to existing legislation such as the Crown Proceedings Act, Evidence Act and Criminal Disclosure Act will be required.

To implement the new scheme, the Ministry proposes setting up a central panel of up to 20 special advocates, providing a pool of senior, security-cleared counsel from which the court can select. The Ministry will bear the cost of setting up a central panel of special advocates and of providing secure court facilities in Wellington, with any required upgrades being completed by the time the Act comes into force. Secure facilities include the ability to securely store evidence and the court record. Cost pressures will be monitored by the Ministry and considered for a future cost pressures bid if necessary.

The fees of special advocates, special advisers and expert witnesses will be paid for by the Crown out of an existing appropriation. Cabinet approval for any additional costs required will be sought, if necessary, when a particular matter arises.

Within the Ministry, the engagement of operational staff in the development of the proposals will help to ensure their comprehensiveness, cost and overall workability. Appropriate training and guidance will be developed as necessary for court staff and administrators.

Alignment of processes will provide administrative efficiency, both in the appointment and payment of special advocates, and the running of the closed court process. Efficiency will also be achieved by providing uniform, detailed operational procedures in agreed protocols.

Enactment and commencement of the arrangements will depend on the Government's and Parliament's priorities. The legislative process (including delayed commencement if necessary) will provide sufficient time to ensure affected parties are prepared for the changes.

Enforcement, prosecuting and intelligence agencies will have responsibility for ensuring their staff are prepared for implementation and operation.

National and international communications regarding the changes will need to be planned and communicated to ensure benefits are realised.

6.2 What are the implementation risks?

There is a risk that predicted case numbers will be exceeded, and there will not be enough capacity to accommodate all closed court hearings. This will be monitored closely, and the Ministry will set up a second secure facility if needed.

There is a risk that parties may use the processes tactically by overclaiming NSI, or by putting forward unmeritorious challenges to decisions involving NSI. This will be mitigated by the court being a check on NSI and in rare cases, if a Ministerial certificate is used, internal checks will be in place to ensure the need for a certificate has been demonstrated.

There is a risk that there would not be enough special advocates available to choose from, which may result in delays or reduced choice during a proceeding. This may undermine the benefits of allowing non-Crown parties a choice and a more efficient process. To mitigate this, we will seek experienced and interested lawyers to form a panel of special advocates.

While we confidently expect in practice that judges will appropriately balance competing interests, there is no guarantee that NSI will be adequately protected in any individual case, unless a Ministerial certificate is obtained and presented to the court. This may undermine some of the benefits of the proposals in practice.

In general, these risks can be mitigated through careful implementation costing and planning, including the use of subject matter experts, centralised management and reporting of cases involving NSI and actively monitoring the impacts of these, as well as proactively providing guidance regarding the changes.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The proposals will affect court processes, so business as usual data collection and assessment will support implementation monitoring. A monitoring plan will be developed as part of implementation planning. The detail of these arrangements will be determined once the Bill has been drafted.

As there is likely to be a small number of cases per year, it will be difficult to ascertain any trends in data. We will manually track cases using the new court processes and implement a requirement for the Minister of Justice (for civil and criminal proceedings) and the Attorney-General (for civil proceedings only) to table an annual report on the use of the process in Parliament.

The IGIS will be able to monitor the use of NSI in administrative decisions, because under the proposals agencies will have to notify the office when such decisions are made.

Cases involving NSI will be of high public importance. We consider that media interest will provide another form of monitoring of the new measures.

7.2 When and how will the new arrangements be reviewed?

Given the very small number of cases involving NSI, we propose periodic review of operational and policy settings (such as the use of special advocates) by the Ministry, as the department administering the legislation, on an as-required basis.

The importance of the interests involved suggests vigilance is required. The process should be used exceptionally rather than routinely. The consolidation that will be achieved by the reforms is not expected to lead to a growth in the use of NSI where open-source information was previously used, but the Ministry will be mindful of this particular impact.

SWC-19-MIN-0191

Cabinet Social Wellbeing Committee

Minute of Decision

Managing National Security Information in Proceedings

Portfolio **Justice**

On 4 December 2019, the Cabinet Social Wellbeing Committee:

1 **noted** the Law Commission's report *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* contains 30 recommendations to reform how national security information (NSI) is dealt with in civil, criminal and administrative proceedings;

2 **noted** that the proposals in the paper under SWC-19-SUB-0191 will not address the protection of NSI for any inquiry under the Inquiries Act 2013 as protection for NSI in an inquiry is most effectively addressed through the setting of an inquiry's terms of reference;

3 **noted** that to provide equivalent protection for NSI when establishing any inquiry under the Inquiries Act 2013, it will be necessary to include specific provisions in an inquiry's terms of reference;

Law Commission's recommendations generally accepted

4 **agreed** that the substance of the Law Commission's recommendations be generally accepted and progressed in a new National Security Information in Proceedings Bill, in accordance with the table attached as Appendix 1 to the submission under SWC-19-SUB-0191;

5 **noted** that the key features of the proposed non-certificate civil process, in line with the Law Commission's recommendations, are that once NSI is raised:

5.1 the court will be closed to the public, the media, the non-Crown party and his or her lawyer, and a security-cleared special advocate will represent the non-Crown party;

5.2 the judge will decide whether the information is NSI, and how it should be protected, which may include a summary of the information being provided to the non-Crown party, where it is possible to do so without disclosing the NSI;

6 **agreed** to extend the definition of NSI proposed by the Law Commission to include information likely to prejudice the security, defence or international relations of the Cook Islands, Niue, Tokelau, or the Ross Dependency, or prejudice relations between the governments of any of these and New Zealand;

Reform objectives

7 **noted** that the proposed changes would:

7.1 ensure the legitimacy of, and public confidence in New Zealand's systems;

7.2 provide the Crown with the confidence that New Zealand's national security will be protected by preventing damaging disclosures of NSI;

7.3 allow the Crown or any other party to use NSI in proceedings to defend themselves, where the courts determine this is fair;

7.4 ensure that an appropriate balance is struck so that the rights of non-Crown parties are upheld to the greatest extent possible;

7.5 ensure that the respective roles of the Executive and the judiciary are clear;

7.6 better equip the courts to make decisions in cases involving NSI by providing a more detailed, coherent and consistent legislative framework;

7.7 provide a consistent, clear and workable process for dealing with NSI in proceedings;

Additional civil certificate process

8 **agreed** to supplement the Law Commission's recommendations in civil cases involving NSI with the ability of the Crown to seek a certificate from the Attorney-General and the Minister of Foreign Affairs;

9 **agreed** that the Attorney-General is not able to delegate this function to the Solicitor-General;

10 **agreed** that the effect of the certificate is a presumption against disclosure of the information covered by it;

11 **agreed** that the Crown or another party to the proceedings may apply to the court for the information covered by the certificate to be heard in a closed court process;

12 **agreed** that any application for a closed court substantive process will be dealt with in a preliminary closed court process;

13 **agreed** that the court must exclude the information where it considers a substantive closed court process is not in the interests of justice;

14 **agreed** that the Crown must consider non-certificate track first;

15 **agreed** that where there is a substantial change in the nature or scope of proceedings that requires new evidence, the Crown may, with the leave of the court, seek a certificate from the Attorney-General and the Minister of Foreign Affairs;

16 **agreed** that an application for judicial review of the certificate asserting information is NSI must be made within 28 days of receipt of notification that a certificate has been issued and that the court will be able to grant an extension where there are special circumstances;

Proposals not to apply to the Immigration Act

17 **agreed** that the decisions under SWC-19-MIN-0191 will not apply to administrative decisions and challenges to administrative decisions under the Immigration Act 2009;

New schemes to come within this Bill

18 **agreed** that the scheme in the new National Security Information in Proceedings Bill should be used for any future schemes regulating the use of NSI in court or administrative proceedings;

Criminal cases: using protected NSI at a criminal trial

19 **agreed** to amend the Criminal Disclosure Act 2008 to provide the judge with an express power to dismiss a prosecution if the national security information must be protected, but withholding it would prevent a fair trial from occurring;

20 **agreed** to amend the Criminal Procedure Act 2011 to allow the Crown to withdraw charges without the court's leave if the court makes a decision that the Crown considers poses an unacceptable risk to national security;

21 **agreed** that, where the Crown is not the prosecutor, the parties must notify the Attorney-General that the use of NSI is being contemplated, and the Attorney-General may stay a prosecution on national security grounds;

22 **agreed** to supplement the Law Commission's recommendations in criminal proceedings with a new process that would enable a party to apply to the court to admit NSI evidence in a protected form;

23 **agreed** that the key components of the new evidence admissibility process should be that:

23.1 the process would be limited to prosecutions for serious offences where there is a high public interest in securing a conviction (i.e. prosecutions for category 4 offences and category 3 offences with a maximum penalty of 7 years imprisonment or more), with a residual discretion available to the court to make the process available to other offences (i.e. prosecutions for other category 3 offences as the judge directs), and prosecutions under s 48 of the Health and Safety at Work Act 2015;

23.2 an application from a party to use evidence in a protected form would be heard and dealt with in a closed court process, that is, a process in which the public, media, any non-Crown party and their lawyers are excluded from the hearing, and a special advocate with access to the full NSI represents the non-Crown party's interests;

23.3 it would be for the court to determine whether admitting evidence in a protected form would be consistent with the defendant's right to a fair trial;

23.4 for the purposes of this process, a 'protected form' might include a summary of the NSI evidence, a document with NSI redacted, or an agreed statement of facts, but would not include the use of the closed court process as part of the trial;

Using NSI in employment cases

24 **noted** that, as part of Cabinet's decision to apply the Employment Relations Act 2000 to the New Zealand Security Intelligence Service, Cabinet invited the Minister of Justice to consider the approach to using NSI in the Employment Relations Authority and the Employment Court [NSC-16-MIN-0012];

25 **accepted** the Law Commission's recommendations that:

25.1 employment cases involving NSI should be determined by the Employment Court (i.e. the Employment Relations Authority would be required to transfer NSI cases to the Employment Court);

25.2 cases involving NSI in the Employment Court should be heard by the Chief Employment Court Judge or by any other Employment Court Judge nominated by the Chief Employment Court Judge;

25.3 the part of the case that involved NSI should be dealt with by the Employment Court under the proposed non-certificate civil process or the additional certificate process;

Financial recommendations

26 **noted** that the costs of implementing the proposals will be funded within Ministry of Justice baselines;

27 **agreed** to fund the costs associated with the appointment, training, and fees for service of special advocates, special advisers, and expert witnesses from the non-departmental appropriation Court and Coroner Related Costs within Vote Courts;

28 **noted** that funding to pay for the cost of expert witnesses, a special advocate, or special adviser appointed for a given process will first be sought from agency baselines, and, if necessary, with Cabinet approval for additional funding out of the agreed appropriation when a case arises;

Next steps

29 **noted** that the Minister of Justice will seek a category four priority (to be referred to a select committee within the year) on the 2020 Legislation Programme for a National Security Information in Proceedings Bill (the Bill);

30 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office in relation to the proposed Bill;

31 **authorised** the Minister of Justice, in consultation with the Attorney-General, to make minor policy decisions in relation to the Bill within the overall framework approved by Cabinet, with any major policy issues subject to further Cabinet consideration;

32 **agreed** that the National Security Information in Proceedings Act will bind the Crown;

33 **noted** that the Minister of Justice's office will co-ordinate publicity following Cabinet's decision.

Vivien Meek
Committee Secretary

Hard-copy distribution (see over)

Present:
Rt Hon Jacinda Ardern
Rt Hon Winston Peters
Hon Kelvin Davis
Hon Grant Robertson
Hon Chris Hipkins
Hon Andrew Little
Hon Nanaia Mahuta
Hon Stuart Nash
Hon Jenny Salesa
Hon Kris Faafoi
Hon Tracey Martin (Chair)
Hon Willie Jackson (part item)
Hon Poto Williams
Jan Logie, MP (part item)

Officials present from:
Officials Committee for SWC
Office of the Chair

Hard-copy distribution:
Minister of Justice

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Security Information in Proceedings Legislation Bill: Approval for Introduction

Proposal

1 This paper seeks Cabinet agreement to introduce the Security Information in Proceedings Legislation Bill (the Bill). It also seeks Cabinet confirmation of additional policy decisions I have made in accordance with authority granted by Cabinet [CAB-19-MIN-0651].

Policy

2 The Bill responds to Part 2 of the Law Commission's report *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* 14 December 2015 (NZLC R135). The Law Commission found that current frameworks for dealing with national security information lack clear and consistent protections for individuals and for national security.

3 The Commission made 30 recommendations for reform to ensure a more coherent approach to the use of national security information in court proceedings, including challenges to administrative decisions.[1] The recommendations sought to clarify the respective roles and interests of the judiciary and the Executive, and balance principles of natural justice with the protection of national security.

4 In December 2019, Cabinet agreed to largely adopt the Law Commission's recommendations for an overarching framework that creates a clear and consistent approach to the use of national security information in court and administrative proceedings [SWC-19-MIN-0191 and CAB-19-MIN-0651]. The Bill implements Cabinet's agreement. The Bill is part of a suite of measures designed to strengthen the end-to-end system to prevent and respond appropriately to terrorism. The core features of the Bill are set out below.

New regime for civil proceedings

5 Where national security information is raised by the Crown, the Bill provides a new civil regime for its use. The court will decide whether the information is national security information and how it should be protected.

[1] Administrative decisions cover a wide range of subject matter where information gathered by security and intelligence agencies needs to be used to inform a decision that affects a person's rights. One example would be cancelling a passport under the Passports Act 1992.

6 If the court is satisfied, on the balance of probabilities, that the information meets the definition of national security information in the Bill, it will have a range of options available to it to manage the information. Options include using existing ordinary protective measures (e.g. a suppression order), or disclosure of the information in a protected form (such as a redacted or summarised form), or a standardised closed court hearing. If the judge orders a closed court hearing, the court will be closed to the public, the media, the non-Crown party and his or her lawyer and a security-cleared special advocate will represent the non-Crown party.

Special advocates

7 The role of the special advocate will be to represent the interests of the non-Crown party in any closed court hearing. The non-Crown party will be able to nominate a special advocate from a panel of designated suitably qualified security-cleared lawyers. The court would appoint the nominated person unless there are exceptional circumstances requiring the court to appoint another panel member instead (e.g. where the court felt there was potential for unreasonable delay due to the person being unavailable).

An additional ministerial certificate process

8 Cabinet agreed to add to the Law Commission's recommendations by incorporating a ministerial certificate process when the Crown requires stronger assurance that particularly sensitive national security information will be protected in court. The Bill will provide the ability for the Attorney-General and the Minister of Foreign Affairs to jointly issue a certificate in such a case to protect the information.

9 The effect of the ministerial certificate is that the court must consider the information covered by the certificate to be national security information. The court will then be limited in the options that are available to it, so that it can only exclude the information from the proceedings or order a closed court hearing.

Criminal proceedings

10 The Bill does not allow a closed court excluding the defendant from a criminal trial. To preserve fundamental criminal procedural rights, a defendant would always be present during a substantive criminal trial. However, the Bill permits the use of a closed court preliminary process to determine applications for pre-trial disclosure of national security information.

11 The Bill includes an express power for the court to dismiss a prosecution if national security information must be protected but withholding it would prevent a fair trial. The Bill also provides for a new ability for sources and intelligence officers to give evidence anonymously

Changes to administrative regimes in existing legislation

12 The Bill will supplement existing administrative regimes that use classified security information under the Passports Act 1992, the Terrorism Suppression

Act 2002, and the Telecommunications (Interception Capability and Security) Act 2013. A person affected by an administrative decision under these regimes will be entitled to a summary of the classified security information used (if requested by the affected person). Where it is not possible to produce a meaningful summary without disclosing classified security information, the requirement to provide a summary when requested would be waived.

13 The new civil regime in the Bill will apply to judicial review of, and appeals from, administrative decisions under these regimes. The court may use any of the options in paragraph 6 to manage the information but will not need to be satisfied that the information is classified security information. Classified security information in administrative regimes is defined differently to national security information and Cabinet has agreed that the Bill will not change this definition [CAB-19-MIN-065]. The definition incorporates certification by the head of an agency that the information is classified security information. The additional ministerial certificate option will be available to the Crown, but only if the classified security information in question comes within the definition of national security information in the Bill.

14 Cabinet noted that there were good reasons for retaining a separate regime for immigration and agreed that the Bill would not apply to the Immigration Act 2009. Immigration decisions sit within a unique context, involving a high number of decisions regarding non-New Zealanders that must be made relatively quickly in collaboration with our foreign partners. Other jurisdictions also make separate arrangements for immigration (Australia, Canada and the United Kingdom).

15 Cabinet also agreed in principle, subject to Cabinet approval at the time, that the Bill should apply to any future regimes regulating the use of security information in court or administrative proceedings.

Some aspects of the Bill require policy approval

16 I seek approval for additional policy changes which have been included in the Bill at my direction, in accordance with authority granted by Cabinet [CAB-19-MIN-0651].

Confirmation that the Bill will apply to the Terrorism Suppression (Control Orders) Act 2019

17 The Terrorism Suppression (Control Orders) Act 2019 (the Control Orders Act) came into force in December 2019. The Control Orders Act was introduced to address the emerging issue of people returning to New Zealand after engaging in terrorism-related activity overseas and who continue to pose a real risk of engaging in terrorism-related activity (returnees).

18 Applications for control orders are made by the Commissioner of Police to the High Court. A control order is a civil order that imposes preventative requirements on the person covered by the order (e.g. electronic monitoring or restrictions on associations). These requirements are aimed at supporting

public safety, preventing the individual engaging in terrorism-related activities and supporting their reintegration into New Zealand.

19 Work on the Control Orders Act progressed in advance of the Bill. When Cabinet agreed to the control orders regime for returnees in July 2019, it was advised that control orders would be covered by the civil regime in the Bill which was then being developed [CAB-19-MIN-0360].

20 On 13 April 2021 the Counter-Terrorism Legislation Bill was introduced to the House. The Counter-Terrorism Bill amends the Control Orders Act to extend the control orders regime to terrorism offenders in New Zealand, who continue to pose a real risk of engaging in terrorism-related activity after completing a sentence of imprisonment.

21 This raises the question of whether applications for control orders should still be covered by the civil regime in the Bill. A control order under the extended regime could be viewed as operating as a criminal penalty, as the entry point to the regime is a previous criminal conviction. A court may not consider it justifiable to exclude a person from determinative proceedings where the penalty may be viewed by the courts as criminal in nature. There is a degree of subjectivity about whether various post-detention orders operate as a penalty, rather than a preventative measure, and the case law in this area is evolving.

22 Despite the extension of the control orders regime, I consider that applications for control orders should still be covered by the civil regime in the Bill for the following reasons:

22.1 The Bill provides strong safeguards such as a summary of security information and a special advocate to represent the affected person, and the decision whether it is fair in all the circumstances to hold a closed court process is made by the court.

22.2 The entry point to the control orders regime is not necessarily a prior conviction, or proof to the criminal standard, and the purpose of the control orders regime is preventative.

23 If the Bill does not apply to the control orders regime, there is a risk that relevant security information could not be used in a control order application. The Court of Appeal has said it is unlikely that the High Court's inherent powers extend to adopting a closed process for determining a proceeding.[2] A court is therefore likely to exclude the security information in a control order application. This could make it more difficult for a control order application to be successful, depending on the specifics of the case and other available evidence.

Confirmation that the Bill will apply to the Overseas Investment Act 2005

24 In June 2020 the Overseas Investment (Urgent Measures) Amendment Act 2020 was passed under urgency (the Amendment Act). It inserted a new administrative regime for the protection of classified security information into the Overseas Investment Act 2005. The new regime came into force on 16 June

[2] *Dotcom v Attorney-General* [2019] NZCA 412

2020 and applies to any civil proceeding relating to the administration or enforcement of the Overseas Investment Act. Cabinet noted that the regime for protecting classified security information in the Amendment Act was a temporary measure and would be replaced by the Bill's overarching framework once it was in place [DEV-19-MIN-0306].

25 On the basis of this noting recommendation, my officials have consulted with the Treasury and instructed the Parliamentary Counsel Office to give effect to the above decision in the Bill. Given the Bill amends the Overseas Investment Act, I consider that Cabinet would wish to confirm that the new civil regime in the Bill will apply to court proceedings involving classified security information under the Overseas Investment Act 2005.

Removing the 28-day time limit for judicial review of a certificate issued by the Crown

26 Cabinet agreed to a 28-day time limit on judicial review of a ministerial certificate issued by the Crown. The policy was to ensure that the validity of a ministerial certificate is settled without undue delay. This limit means that an application for judicial review must be made within 28 days of being notified that a ministerial certificate has been issued.

27 Following consultation with the Legislation Design and Advisory Committee (LDAC), I recommend that Cabinet rescind this approval. LDAC noted that including a time limit could create a perverse incentive to lodge judicial review proceedings so that the opportunity to do so is not lost. In practice, the 28-day period is likely to expire before the Court has made any determinations on the security information at issue in reliance on the certificate. This means that the non-Crown party will not be able to make an informed decision about the impact of the certificate on proceedings and therefore whether judicial review proceedings are necessary.

28 Judicial review would remain available by virtue of section 27(2) of the New Zealand Bill of Rights Act 1990, which affirms the right to judicial review. Without a time-limit, parties could await the outcome of the Court's decision and could then make an informed decision as to whether judicial review proceedings are warranted. There may still be issues with delay, however parties would not be pushed to file for judicial review to avoid losing the right to do so.

29 Officials have consulted with Crown Law and the Ministry of Foreign Affairs and Trade who are comfortable with this policy change.

Impact analysis

30 A regulatory impact assessment was prepared in accordance with the necessary requirements and was submitted when Cabinet policy approvals were sought [CAB-19-MIN-0651].

31 The Regulatory Strategy Team at the Treasury has determined that the regulatory proposals in this paper in relation to:

31.1 confirmation that the regime for security information in the Bill will apply to control orders under the Control Orders Act is exempt from the requirement to provide a Regulatory Impact Statement on the basis that the substantive issues have been addressed by previous impact analysis ("Managing National Security Information in Proceedings" dated 27 November 2019).

31.2 confirmation of the regime for security information in the Bill being applicable to the Overseas Investment Act 2005 and the removal of the proposed 28-day time limit on judicial review of a security information certificate issued by the Crown are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have no or minor impacts on businesses, individuals or not for profit entities.

Compliance

32 The Bill complies with:

32.1 the disclosure statement requirements (a disclosure statement prepared by the Ministry of Justice is attached)

32.2 the principles and guidelines set out in the Privacy Act 2020

32.3 relevant international standards and obligations, and

32.4 the Legislation Guidelines (2018 edition), maintained by LDAC.

New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993

33 The Bill engages the right to justice affirmed in NZBORA. This includes the right to observe the principles of natural justice (section 27 (2)), including the right to know the case against you, and the right to bring and defend proceedings involving the Crown on the same basis as proceedings between individuals (section 27(3)). Rights in respect of criminal trials may also be engaged including the right to be informed of the nature and detail of the case (section 24(1)) and the right to a fair and public hearing (section 25(a)).

34 The Bill aims to protect the rights of non-Crown parties in proceedings involving security information, while also allowing the Crown to have recourse to security information when defending itself in civil proceedings and ensuring a clear process for courts to follow. Under the status quo, the Crown may be required to defend proceedings without the full information before the Court, which limits its ability to properly justify its actions or decisions. The Bill also addresses the possibility raised in *Dotcom v Attorney-General* [2019] NZCA 412 where the Court may find it cannot properly adjudicate a claim without recourse to the security information and so strikes it out, which would leave a claimant with no access to the court.

35 I consider that the departures from the rights proposed by the Bill are proportionate to objectives outlined above because at every step the judge retains the ability to exclude any security information from the proceedings or

dismiss the prosecution if it cannot proceed fairly. This overarching judicial discretion provides a significant safeguard, particularly in criminal cases.

36 I have also considered the human rights implications of applying the Bill to control order applications. A court may consider using a closed procedure to protect security information in a control order application to be a further limit on section 27(1) of NZBORA, which protects the right to natural justice. However, under a closed procedure a special advocate would be able to view the security information and represent the affected person's interest.

37 I consider that using the closed court process in the Bill for control order proceedings can be justified, given the importance of the policy objective of the control orders regime: protecting the public from the risk of terrorism. The Bill includes important safeguards that limit restrictions on rights to justice as much as possible such as the appointment of a special advocate and the requirement for a summary of the security information to be given to the person.

38 Under the Bill it will normally be the judge who determines whether information is security information and what level of protection should be afforded to it. Even in the cases where the Crown issues a ministerial certificate, the Court can still determine it is unfair to hold a closed court process in the circumstances and may exclude the security information from the proceedings.

39 Advice has been provided to the Attorney-General by the Crown Law Office on consistency with NZBORA.

The principles of the Treaty of Waitangi

40 It is unlikely that these proposals would be used to limit Māori expressions of tino rangatiratanga, or to override the Crown's obligations to actively protect Māori interests and rights. However, historical events indicate this remains a possibility.

41 To mitigate this risk, the Ministry of Justice will look to include expertise in tikanga and Treaty of Waitangi as specific criteria when seeking expressions of interest from potential Special Advocates and can also approach the Law Societies for nominees with specific expertise. Special Advocates will receive training on issues relating to security information and this will include ensuring training in tikanga and the Treaty of Waitangi is available.

Consultation

42 In preparing its recommendations, the Law Commission established an advisory officials' group with representatives from a range of government departments. It also met with representatives from the security agencies and held consultation meetings with organisations outside of government (e.g. the New Zealand Law Society, New Zealand Bar Association and Amnesty International New Zealand).

43 The following agencies have been consulted on this paper and Bill: the Treasury, Crown Law, Department of the Prime Minister and Cabinet (DPMC)

National Security Group, New Zealand Police, Government Communications Security Bureau, New Zealand Security Intelligence Service, Ministry of Business, Innovation and Employment, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Te Puni Kōkiri, New Zealand Defence Force, New Zealand Customs Service and the Inspector-General of Intelligence and Security. DPMC Policy Advisory Group, were advised.

44 The judiciary and LDAC were consulted on the Bill.

45 No public consultation has been carried out on the Bill, but there will be opportunity for submissions at Select Committee.

46 The government caucus and other parties represented in Parliament have been consulted.

Binding on the Crown

47 The Bill will bind the Crown [SWC-19-MIN-0191 and CAB-19-MIN-0651].

Creating new agencies or amending law relating to existing agencies.

48 The Bill does not create any new agencies or amend law relating to existing agencies.

49 The Bill provides for a public service agency to be designated by the Prime Minister as responsible for maintaining a panel of special advocates and meeting the costs of special advocates and special advisors. It is intended that the Ministry of Justice be the designated agency.

Allocation of decision-making powers

50 The Bill allocates decision making powers between the Executive and the judiciary. Except where a ministerial certificate is issued by the Crown, an authorised court will determine whether information in a specified proceeding is security information and the protections that will apply. An authorised court means the High Court, Employment Court, Court of Appeal and Supreme Court.

Associated regulations

51 Regulations will not be required. However, rules of court will be developed to deal with disclosure under section 27 of the Crown Procedure Act 1950, and to prescribe forms for applications. Rules of court will also be required under the Criminal Proceedings Act 2011.

Other instruments

52 The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

53 The Bill does not contain a definition of Minister, Department or Chief Executive of a department.

Commencement of legislation

54 The Bill will come into force on the first anniversary of the date on which it receives the Royal assent, or an earlier date appointed by the Governor-General by Order in Council.

Parliamentary stages

55 The Bill should be introduced into the House on the first available date after Cabinet approval. I propose the Bill be referred to the Justice Committee.

Proactive Release

56 I propose to release this Cabinet paper, and related Minute, with any necessary redactions, following the introduction of the Bill.

Recommendations

57 The Minister of Justice recommends that the Committee:

1 **note** that the Law Commission's report *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* recommended an overarching legal framework for dealing with national security information in court, including challenges to administrative decisions;

2 **note** that in December 2019 Cabinet agreed to the drafting of a National Security Information in Proceedings Bill to implement most of the Law Commission's recommendations;

3 **note** that the Security Information in Proceedings Legislation Bill (the Bill) holds a category four priority (to be referred to a select committee in the year) on the 2021 Legislation Programme;

Aspects of the Bill which require policy confirmation

4 **note** that Cabinet authorised the Minister of Justice, in consultation with the Attorney-General, to make minor policy decisions in relation to the Bill within the overall framework approved by Cabinet, with any major policy issues subject to further Cabinet consideration [CAB-19-MIN-0651];

5 **note** that in 2019 Cabinet was advised that applications for control orders involving security information in the Terrorism Suppression (Control Orders) Act 2019 would be subject to the civil regime in the Bill when developed [CAB-19-MIN-0360];

6 **agree** that the Bill will apply to the Terrorism Suppression (Control Orders) Act 2019;

7 **note** that in 2019 Cabinet was advised that the Bill would apply to court proceedings involving security information under the Overseas Investment Act 2005 [DEV-19-MIN-0306];

8 **agree** that the Bill will apply to court proceedings involving classified security information under the Overseas Investment Act 2005;

9 **note** that in December 2019 Cabinet agreed that an application for judicial review of a ministerial certificate issued by the Crown must be made within 28 days of being notified that a certificate has been issued [CAB-19-MIN-0651];

10 **agree** to rescind the decision referred to in paragraph 9 because including a time limit could create a perverse incentive to lodge judicial review proceedings which would not otherwise be brought absent the time limit;

11 **note** that judicial review would remain available by virtue of section 27(2) of the New Zealand Bill of Rights Act 1990, which affirms the right to judicial review.

Other recommendations

12 **approve** the Security Information in Proceedings Legislation Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;

13 **agree** that the Bill be introduced to the House on the first available date after Cabinet approval;

14 **agree** that the Government propose that the Bill be:

14.1 referred to the Justice Committee for consideration; and

14.2 enacted by June 2022.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice

LEG-21-MIN-0109

Cabinet Legislation Committee

Minute of Decision

Security Information in Proceedings Legislation Bill: Approval for introduction

Portfolio **Justice**

On 8 July 2021, the Cabinet Legislation Committee:

1 **noted** that the Law Commission's report The Crown in Court: A Review of the Crown proceedings Act and National Security Information in Proceedings recommended an overarching legal framework for dealing with national security information in court, including challenges to administrative decisions;

2 **noted** that in December 2019, the Cabinet Social Wellbeing Committee (SWC) agreed to the drafting of a National Security Information in Proceedings Bill (the Bill) to implement most of the Law Commission's recommendations [SWC-19-MIN-0191];

3 **noted** that the Bill holds a category four priority (to be referred to a select committee in the year) on the 2021 Legislation Programme;

Further policy decisions

4 **noted** that in December 2019, SWC authorised the Minister of Justice, in consultation with the Attorney-General, to make minor policy decisions in relation to the Bill within the overall framework approved by Cabinet, with any major policy issues subject to further Cabinet consideration [SWC-19-MIN-0191];

5 **noted** that in 2019 Cabinet was advised that applications for control orders involving security information in the Terrorism Suppression (Control Orders) Act 2019 would be subject to the civil regime in the Bill when developed [CAB-19-MIN-0360];

6 **agreed** that the Bill will apply to the Terrorism Suppression (Control Orders) Act 2019;

7 **noted** that in November 2019, the Cabinet Economic Development Committee noted that the Bill would apply to court proceedings involving security information under the Overseas Investment Act 2005 [DEV-19-MIN-0306];

8 **agreed** that the Bill will apply to court proceedings involving classified security information under the Overseas Investment Act 2005;

9 **noted** that in December 2019, SWC agreed that an application for judicial review of a ministerial certificate issued by the Crown must be made within 28 days of being notified that a certificate has been issued [SWC-19-MIN-0191];

10 **noted** that the Minister of Justice has decided to not to progress the decision referred to in paragraph 9 because including a time limit could create a perverse incentive to lodge judicial review proceedings which would not otherwise be brought absent the time limit;

11 **noted** that judicial review would remain available by virtue of section 27(2) of the New Zealand Bill of Rights Act 1990, which affirms the right to judicial review.

12 **approved** for introduction the Security Information in Proceedings Legislation Bill [PCO 22599], subject to the final approval of the government caucus and sufficient support in the House of Representatives;

13 **agreed** that the Bill be introduced as soon as practicable;

14 **agreed** that the government recommend that the Bill be:

14.1 referred to the Justice Committee for consideration;

14.2 enacted by June 2022.

Rebecca Davies
Committee Secretary

Present:
Hon Andrew Little
Hon Poto Williams
Hon Michael Wood
Hon Kiri Allan
Hon Dr David Clark
Kieran McAnulty MP

Officials present from:
Office of the Prime Minister
Officials Committee for LEG

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Security Information in Proceedings Legislation Bill: approval for amendment prior to introduction

Proposal

1 On 12 July 2021, Cabinet approved the introduction of the Security Information in Proceedings Legislation Bill (the Bill) [CAB-19-MIN-0651 and CAB-21-MIN-0271]. Following advice from the Attorney-General, and prior to introducing the Bill to the House, I seek approval for a minor amendment to the Bill to ensure it is consistent with the New Zealand Bill of Rights Act 1990 (NZBoRA).

Policy

2 The Bill aims to protect the rights of non-Crown parties in proceedings involving security information, while also allowing the Crown to have recourse to security information in civil proceedings. The process for dealing with security information in civil proceedings engages section 27 (the right to justice) of NZBoRA. It allows for the possibility that a court will consider evidence that it can use in determining the case that the non-Crown party will not have seen.

3 The Bill provides safeguards so that the right to justice is not limited more than is reasonably necessary to protect security information. The court will normally decide if information raised by the Crown is security information and how it should be managed. Options available to the court to manage the information include using ordinary protective measures (e.g. a suppression order), or disclosure of the information to the non-Crown party in a protected form (such as a redacted or summarised form), or a standardised closed court hearing. A security cleared special advocate will represent the non-Crown party in the closed court hearing.

4 The Bill also allows the Crown to apply for a Ministerial certificate signed off by the Minister of Foreign Affairs and the Attorney-General to protect the security information. Cabinet has agreed that the certificate process will only be used rarely by the Crown for particularly sensitive information.[1] s9(2)(h) [redacted]

[1] To prevent the certificate process from becoming the default option Cabinet guidance will be developed requiring departments to consider the non-certificate track first and this would be reflected in advice to the certifying Ministers [SWC–19-MIN-0191 recommendation 14 refers].

s9(2)(h) [redacted]

The orders available to the court under the Ministerial certificate option could lead to an unfair outcome

5 In those rare cases where a Ministerial certificate is presented, the effect of the certificate is that the Court must consider the information to be security information and cannot authorise its disclosure in any form to the non-Crown party. As the Bill was previously drafted, the court can only order that the information be excluded or order a closed court hearing for the information.

6 s9(2)(h) [redacted] The non-Crown party's only recourse to challenge the decision would be judicial review of the certificate, which only allows the court to examine process and not the merits of the Ministers' decision.

A new provision in the Bill will allow the court to dismiss a civil proceeding to avoid an unfair outcome

7 I therefore seek approval for the inclusion of a new provision in the Bill which will allow the Court to dispose of, or otherwise deal with, a civil proceeding that cannot be fairly determined by any of the options available to the court to manage the security information.[2] In such circumstances the court will be able to make one or more of the following orders:

- an order to strike out the Crown's statement of claim or defence;
- an order to join the Attorney-General as a party to the substantive proceeding;
- an order giving judgment against the Crown;
- any other order that the court has jurisdiction to make in the circumstances.

8 s9(2)(h) [redacted]

Impact analysis

9 A regulatory impact assessment was prepared in accordance with the necessary requirements and was submitted when Cabinet policy approvals were sought [CAB-19-MIN-0651]. The regulatory impact analysis requirements do not apply to the new provision in the Bill as this amendment will have only

[2] The Bill provides such a discretion in criminal proceedings where the courts retain a residual power to dismiss a prosecution that would result in an unfair trial.

minor impacts on businesses, individuals or not for profit entities.

Compliance

10 The Bill complies with:

10.1 the disclosure statement requirements [an updated disclosure statement prepared by the Ministry of Justice is attached];

10.2 the principles and guidelines set out in the Privacy Act 2020;

10.3 relevant international standards and obligations; and

10.4 the Legislation Guidelines (2018 edition), maintained by the Legislation Design and Advisory Committee.

New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993

11 The new provision in the Bill gives the court options for disposing of those rare cases where the court considers the measures that are necessary to protect national security prevent a fair hearing of the case, thereby ensuring the Bill is consistent with NZBoRA. The departures from the right to justice proposed by the Bill are ameliorated by the new provision. It ensures that the judge retains the ability to dismiss the civil proceeding if it cannot proceed fairly, making the limit on the right proportionate to the objective of protecting national security.

12 Advice has been provided to the Attorney-General by the Crown Law Office on consistency with NZBoRA.

The principles of the Treaty of Waitangi

13 Cabinet was advised on the Bill's compliance with the principles of the Treaty of Waitangi when approval for introduction was sought [CAB-19-MIN-0651 and CAB-21-MIN-0271].

Consultation

14 The following agencies have been consulted: the Crown Law Office, the Treasury, Department of the Prime Minister and Cabinet (DPMC) National Security Group, New Zealand Police, Government Communications Security Bureau, New Zealand Security Intelligence Service, Ministry of Business, Innovation and Employment, Department of Internal Affairs, Department of Corrections, Ministry of Foreign Affairs and Trade, Te Puni Kōkiri, New Zealand Defence Force, New Zealand Customs Service and the Inspector-General of Intelligence and Security. DPMC Policy Advisory Group were advised.

Binding on the Crown

15 The Bill will bind the Crown.

Creating new agencies or amending law relating to existing agencies.

16 The Bill does not create any new agencies or amend law relating to existing agencies.

Allocation of decision-making powers

17 The Bill allocates decision making powers between the Executive and the judiciary.

Associated regulations

18 Regulations will not be required. However, rules of court will be developed to implement aspects of the Bill.

Other instruments

19 The Bill does not include any provision empowering the making of other instruments deemed to be legislative instruments or disallowable instruments.

Definition of Minister/department

20 The Bill does not contain a definition of Minister, Department or Chief Executive of a department.

Commencement of legislation

21 The Bill will come into force on the first anniversary of the date on which it receives the Royal assent, or an earlier date appointed by the Governor-General by Order in Council.

Parliamentary stages

22 The Bill should be introduced into the House on the first available date after Cabinet approval. I propose the Bill be referred to the Justice Committee.

Proactive Release

23 I propose to release this Cabinet paper, and related Minute, with any necessary redactions, following the introduction of the Bill.

Recommendations

24 The Minister of Justice recommends that the Committee:

1. **note** that on 12 July 2021 Cabinet approved the introduction of the Security Information in Proceedings Legislation Bill [CAB-19-MIN-0651 and CAB-21-MIN-0271];

2. **note** that following advice from the Attorney-General, and prior to introducing the Bill to the House, the Bill has been amended to ensure it is consistent with the New Zealand Bill of Rights Act 1990;

3. **agree** to the inclusion of a new provision in the Bill which will allow the court to dispose of, or otherwise deal with, a civil proceeding that cannot be fairly determined by any of the security information orders available to the court;

4. **agree** that the Bill be introduced to the House on the first available date after Cabinet approval.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice

LEG-21-MIN-0184

Cabinet Legislation Committee

Minute of Decision

Security Information in Proceedings Legislation Bill: Amendment

Portfolio **Justice**

On 11 November 2021, the Cabinet Legislation Committee:

1 **noted** that on 8 July 2021, the Cabinet Legislation Committee approved for introduction the Security Information in Proceedings Legislation Bill [LEG-21-MIN-0109];

2 **noted** that following advice from the Attorney-General, and prior to introducing the Bill to the House, the Bill has been amended to ensure it is consistent with the New Zealand Bill of Rights Act 1990;

3 **agreed** to the inclusion of a new provision in the Bill which will allow the court to dispose of, or otherwise deal with, a civil proceeding that cannot be fairly determined by any of the security information orders available to the court;

4 **approved** for introduction the Security Information in Proceedings Legislation Bill [PCO 22599/12.1];

5 **agreed** that the Bill be introduced on the first available date after Cabinet approval.

Rebecca Davies
Committee Secretary

Present:
Hon Michael Wood (Chair)
Hon Andrew Little
Hon David Parker
Hon Poto Williams
Hon Kris Faafoi
Hon Michael Wood (Deputy Chair)
Hon Kiri Allan
Hon Dr David Clark
Keiran McAnulty, MP (Senior Government Whip)

Officials present from:
Office of the Prime Minister
Officials Committee for LEG