Te Tari Ture o te Karauna
Crown Law

30 September 2021

Attorney-General

Security Information in Proceedings Legislation Bill [PCO22599/11.8] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/333

1. We have considered the Security Information in Proceedings Legislation Bill in draft (version 11.8) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise that the Bill appears to be **consistent** with the Bill of Rights Act. We had provided you advice on an earlier version of the Bill but it has since been amended and accordingly we provide this updated advice to reflect the change. A copy of the Bill is **attached**.

2. The Bill is an omnibus bill and is the Government's response 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*. The Bill seeks to create a consistent approach to the use of security information in proceedings which has up until now developed in a largely ad hoc fashion.

Summary

3. We have considered whether the Bill gives the Executive the ability to control the production of evidence in proceedings to such an extent that it may result in unfair trials. However, we consider that for both civil and criminal proceedings, the Bill ensures that courts retain a residual power to deal with a proceeding in a way that will ensure fairness. For a criminal proceeding, there is a power to dismiss a prosecution that would result in an unfair trial (cl 52). In civil proceedings there is recognition of the fact that the Crown's certification that information is national security information (and must not be disclosed to the non-Crown party) may render any subsequent trial unfair (cl 39). Clause 39 gives the Court a range of powers to deal with the substantive proceeding if it considers it cannot be fairly determined without disclosing the security information. We consider it will allow the Court to ensure that any particular case before it can be determined in a rights-consistent way.

Background

4. 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.

5. Under the law at present, the Crown may be faced with the choice of either defending proceedings without being able to put all the information that supports its case before the Court, or disclosing security information. If the Crown cannot use all relevant material then that may limit its ability to properly justify its actions or decisions and may lead to attempts by the Crown to settle unmeritorious claims. The Bill also addresses the concern that 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 plaintiff with no access to the court.[1]

Civil proceedings

6. The Bill provides for special procedures to apply in civil proceedings where there is security information.[2] It creates a two-track scheme.

   6.1 **Non-certificate track** — the application for a security information order is supported by evidence showing that the information is security information.

   6.2 **Certificate track** — the application for a security information order is supported by a certificate provided jointly by the Attorney-General and Minister of Foreign Affairs (cl 39).

7. There is no guidance in the Bill as to which track is to be used when, so it gives a broad discretion to the Crown to choose the track. There is no appeal procedure for a certificate but judicial review of a certificate would be possible.

8. If the Crown chooses the **non-certificate track** the Court determines whether a security information order would be necessary (e.g. it may be unnecessary because the evidence is inadmissible due to some other rule of law), and whether it is satisfied the information is indeed security information. If 'yes' to both, the Court must make:

   8.1 An exclusion order;

   8.2 A special procedures order; or

   8.3 A protective order.

9. If the Crown chooses the **certificate track** the Court determines whether a security information order would be necessary. If 'yes', the Court must make:

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1 This possibility was raised in *Dotcom v Attorney-General* [2019] NZCA 412.

2 "Security information" covers both "national security information" (the term used in Parts 1–3 of the Bill, which will become the Security Information in Proceedings Bill) and "classified security information" (the term used for security information in the Overseas Investment Act 2005, the Passports Act 1992, the Telecommunications (Interception Capability and Security) Act 2013 and the Terrorism Suppression Act 2002). We have used "security information" to capture that the procedures and orders discussed can apply to all of those Acts given they are all "specified proceedings".

9.1 An exclusion order; or

9.2 A special procedures order.

10. An exclusion order is an order that the security information must not be disclosed and is not required to be disclosed by any order or direction or rule of court.

11. A special procedures order is an order to protect and limit the disclosure of security information in or in connection with the proceeding, and may be made in respect of the whole or part of the proceeding. It involves a closed court, excluding even the non-Crown party, and the use of a special advocate to represent the interests of a non-Crown party.

12. A protective order is an order made under other legislation or rules of court to protect the confidentiality of the security information and limit its disclosure beyond the parties. The Bill gives examples of protective orders, including: a suppression order forbidding the publication of the security information; an order excluding all persons except for the parties and other specified persons while the security information is being considered in the substantive proceeding; or an order requiring redacted information, summaries of the security information or a statement of the facts that the security information establishes, provided those documents do not disclose the security information itself.

13. In deciding what orders to make, the Court must consider the following matters:[3]

13.1 whether the proceeding can be fairly determined if an exclusion order, a special procedures order, or a protective order is made;

13.2 the type or types of order required in order to adequately protect the national security interests that would be likely to be prejudiced if no order is in place in respect of the security information; and

13.3 whether the public interest in withholding the security information outweighs the public interest of fair and effective administration of justice in disclosing the information in a limited way in accordance with an order.

14. Clause 39 allows the Crown to have certainty that security information would not be disclosed to the non-Crown party, but may require it instead to assume liability for the claim, if that is what the interests of justice require. The clause provides:

> **39 Court need not make security information order if substantive proceeding cannot be fairly determined**
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> Despite section 36(2) and having regard to the matters in section 38, if the court is satisfied that none of the security information orders would allow the substantive

[3] Clause 37.

proceeding to which the SI application relates to be fairly determined, the court may—

(a) dismiss the application; and

(b) make 1 or more of the following orders in relation to the substantive proceeding to enable the substantive proceeding to be dealt with in a way that does not involve the security information:

(i) an order to strike out the Crown's statement of claim or statement of defence:

(ii) an order to join the Attorney-General as a party to the substantive proceeding:

(iii) an order giving judgment against the Crown:

(iv) any other order that the court has jurisdiction to make

Criminal proceedings

15. In criminal proceedings, the Bill would amend the Criminal Procedure Act 2011 and the Criminal Disclosure Act 2008 to provide for special procedures where security information is at issue:

15.1 A special advocate procedure is available when a person subject to a search or surveillance warrant is challenging that warrant, or when a defendant is challenging a claim for non-disclosure of national security information.

15.2 The Bill also provides for new pre-trial admissibility hearings in respect of how evidence based on national security information should be protected in criminal proceedings in respect of serious offences.[4]

15.3 Similar provisions apply where a party wishes to adduce evidence, during the trial, that either party asserts is based on security information and there needs to be a determination made about admissibility during the trial. New Criminal Procedure Act provisions are introduced such that evidence based on national security information is admissible if the High Court is satisfied that the national security interests will be adequately protected. The Bill explicitly protects the court's discretion to make additional orders it thinks fit to protect the confidentiality of the information.

15.4 The Evidence Act 2006 would be amended to provide for anonymity protections for sources and intelligence officers in both civil and criminal proceedings.

4 Clause 59, providing for new s 79A of the Criminal Procedure Act.

16. The ultimate safeguards for the rights of defendants are as follows:

    16.1 There is no power in the Bill to close the court for the substantive criminal trial itself.

    16.2 New s 146A of the Criminal Procedure Act permits a prosecutor to withdraw proceedings, without leave, if the judge orders material to be disclosed but the prosecutor remains of the view that disclosure would be likely to prejudice national security.

    16.3 New s 147A of the Criminal Disclosure Act empowers a judge to dismiss proceedings if the national security information must be protected but withholding it would create a real risk of prejudice to a fair trial.

Civil proceedings: Right to justice

17. The process for dealing with security information in civil proceedings engages s 27 of the Bill of Rights Act (the right to justice). It allows for the possibility that a court will have before it evidence that it can use in determining the case that the non-Crown party will not have seen.

18. While the courts have previously approved the use of closed court procedures to determine whether or not information should be disclosed to another party,[5] this Bill would go further and allow evidence to be presented in the substantive part of the hearing without the non-Crown party being present. The Court of Appeal in *Dotcom* doubted whether such a process could take place under the High Court's inherent jurisdiction. It relied on the UK Supreme Court decision in *Al Rawi v Security Service*. In that case, the Court held that a closed materials process, in which a party is not present for some of the substantive hearing but does have a special advocate to represent their interests as best they can, lay outside the inherent jurisdiction of the Court because it would "deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice".[6] The majority considered that the use of a special advocate would not sufficiently ameliorate the difficulties.

19. The High Court in *A v Minister of Internal Affairs* described a court considering evidence in the substantive part of a proceeding in the absence of a party adversely affected to be "as flagrant a breach of the fundamental right recognised in s 27 of [the Bill of Rights Act] as could be contemplated".[7] However, a closer review of that case suggests the Judge meant that remark to refer to the right being engaged, and he felt unable to assess whether the restrictions amounted to a justified limit in the circumstances.

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5 *Dotcom v Attorney-General* [2019] NZCA 412, [2019] 3 NZLR 397.

6 *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [22] per Lord Dyson SCJ and at [113] per Lord Mance SCJ.

7 *A v Minister of Internal Affairs* [2017] NZHC 746, [2017] 3 NZLR 247 at [41]. The case involved the special regime under the Passports Act 1992.

20. We note that whether a proceeding can be fairly determined is a matter to consider when choosing between types of order. If the Court considers that none of the security information orders will allow the substantive proceeding to be fairly determined then it has a range of options available to it under cl 37A that will allow it to ensure fairness in the particular case, including giving judgment against the Crown.

21. The question then is whether the Bill can be said to be a justified limit on the right. This requires a proportionality assessment:

    21.1 does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

    21.2 if so, then:

        21.2.1 is the limit rationally connected with the objective?

        21.2.2 does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        21.2.3 the limit in due proportion to the importance of the objective?

22. The Ministry of Justice advised the previous Attorney-General that similar provisions already in the Passports Act were a reasonable limit.[8] However, the cancellation of passports because of involvement in terrorist activities is an administrative decision that often will not be able to be properly defended by the Minister in the absence of a closed procedure of some kind. If it cannot be defended the applicant's passport would need to be returned which could be very unsafe in some circumstances. The same cannot be said of all other civil proceedings. The Ministry's advice also placed some reliance on the availability to a non-Crown party of an unclassified summary of the classified information as reducing the impact on rights. We consider that the usefulness of a summary in reducing the restriction on rights will depend on the facts of the case and may not always be a useful tool.

23. The objective of the Bill — ensuring proceedings can be fairly tried with recourse to security information in a protected way — is an important one and the limits are rationally connected with the objective. They seek to establish a regime that allows for the use of the information in proceedings.

24. Under the certificate track, the non-Crown party has no input into whether information is deemed to be security information. The consequence of that is that the security information cannot be disclosed to the non-Crown party in any form. Their only recourse to challenge the decision would be judicial review of the certificate, which can only examine process and not the merits of the Ministers'

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8 Consistency with the New Zealand Bill of Rights Act 1990: New Zealand Intelligence and Security Bill, 12 August 2016.

decision. Further, the certificate track can be used at the discretion of the Crown; there is no restriction on when it can be used.

25. An important mitigation for this limitation of rights is the special advocate procedure. However, we consider that this protection alone would be inadequate because of the very restricted way in which the special advocate can take instructions. Without being able to discuss the national security information with the non-Crown party, the special advocate may well not be able to obtain instructions that allow the non-Crown party's position to be fairly presented. This was the view of the UK Supreme Court in *Al Rawi*.[9]

26. One of the factors to consider when making an order about what can be done with security information is whether the public interest in withholding the security information outweighs the public interest of fair and effective administration of justice in disclosing the information in a limited way in accordance with an order. The inclusion of cl 39 accommodates a case where no order can provide for a fair trial (as, for example, might be the case with security information material that assists the non-Crown party's case, in a way that cannot be recognised by the special advocate). We note here the recent comments of the Supreme Court in the extradition context in *Minister of Justice v Kim*:[10]

> A trial is either fair or it is not. A somewhat fair trial would not suffice. We also note that we do not accept that there should be a balancing of the right to a fair trial and the public interest in extradition. There can be no public interest in extradition to an unfair trial.

27. However, the inclusion of cl 39 gives the Court a residual power to dispose of civil proceedings in a manner that reflects the fact that the Crown's choice of the certificate track may render any subsequent trial unavoidably unfair. It gives the Court a broad discretion to ensure fairness in a particular case. That discretion will need to be exercised in accordance with s 27 of the Bill of Rights and ensure that any limit is a justified one. We consider it makes the regime for civil proceedings in the Bill consistent with rights.

Criminal proceedings: Minimum standards of procedure

28. The Bill of Rights Act affirms a number of minimum rights of criminal procedure that everyone who is charged with an offence has, in relation to the determination of the charge. A number are engaged here, namely the right to a fair and public hearing (s 25(a)), the right to be present at the trial and to present a defence (s 25(e)), and the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution (s 25(f)).

29. The provisions for a closed disclosure hearing in a criminal trial may have an impact on the material available to the defendant for his or her substantive trial. However, the restrictions apply only at the disclosure stage or at admissibility

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9 *Al Rawi v Security Service,* above n 6, at [36].

10 *Minister of Justice v Kim* [2021] NZSC 57 at [281] per Glazebrook J for the majority.

hearings, and any substantive hearing must be open to the defendant. Ultimately, because the Court expressly has the ability to dismiss proceedings if the national security information must be protected but withholding it would create a real risk of prejudice to a fair trial, we consider that the provisions are consistent with the Bill of Rights Act.

Review of this advice

30. We will advise you if there are any further changes to the Bill that would impact on this advice.

31. In accordance with Crown Law's policies, this advice has been peer reviewed by Daniel Perkins, Crown Counsel/Team Manager.

Kim Laurenson
Crown Counsel
027 307 1891

Approved/Declined

Hon David Parker
Attorney-General
/ /2021

Te Tari Ture o te Karauna
Crown Law

7 December 2021

Attorney-General

Security Information in Proceedings Legislation Bill [PCO22599/11.11] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/333

1. On 30 September 2021, we advised you that the Security Information in Proceedings Legislation Bill draft (version 11.8) was consistent with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**) for the exercise of your duty under s 7 of the Bill of Rights Act to report to Parliament about inconsistent Bills.

2. A copy of that advice is **attached** but for ease of reference, the summary of our advice was:

> We have considered whether the Bill gives the Executive the ability to control the production of evidence in proceedings to such an extent that it may result in unfair trials. However, we consider that for both civil and criminal proceedings, the Bill ensures that courts retain a residual power to deal with a proceeding in a way that will ensure fairness. For a criminal proceeding, there is a power to dismiss a prosecution that would result in an unfair trial (cl 52). In civil proceedings there is recognition of the fact that the Crown's certification that information is national security information (and must not be disclosed to the non-Crown party) may render any subsequent trial unfair (cl 39). Clause 39 gives the Court a range of powers to deal with the substantive proceeding if it considers it cannot be fairly determined without disclosing the security information. We consider it will allow the Court to ensure that any particular case before it can be determined in a rights-consistent way.

3. You approved our advice on 18 October 2021.

4. After our advice was sent to you the Bill was amended before introduction and we were not made aware. Notably, there were changes to clause 39. The changes as between cl 39 as we considered it and cl 39 as introduced (version 11.11) are as follows:

> **39 Court need not make security information order if substantive proceeding cannot be fairly determined**
>
> Despite section 36(2)~~ and having regard to the matters in section 38~~, if the court is satisfied that none of the security information orders would allow the substantive proceeding to which the SI application relates to be fairly determined, the court may—

(a) dismiss the application; and

(b) make 1 or more of the following orders in relation to the substantive proceeding ~~to enable the substantive proceeding to be dealt with in a way that does not involve the security information~~ in order to dispose of, or otherwise deal with, the substantive proceeding:

(i) an order to strike out the Crown's statement of claim or statement of defence:

(ii) an order to join the Attorney-General as a party to the substantive proceeding:

(iii) an order giving judgment against the Crown:

(iv) any other related order that the court has jurisdiction to make.

5. The amendments to cl 39 continue to give the court a broad discretion to ensure fairness in a particular case. As per our previous advice, that discretion will need to be exercised in accordance with s 27 of the Bill of Rights Act and ensure that any limit is a justified one.

6. We consider that these changes do not change the conclusion of our 30 September 2021 advice but do alter a significant clause such that it was necessary to bring the changes to your attention.

Removing the requirement to have regard to the matters in cl 38.

6.1 Our understanding from the drafters of the Bill is that this requirement was implicit in the statutory scheme in that cl 39 follows cl 38 and the cl 39 power is for the court to make (or to not make) a security information order, meaning that even in a decision to not make a security information order under cl 39, the matters set out in cl 38 to consider when determining the *type* of security information order will be relevant. This is confirmed by the language of cl 39, which empowers a court to consider whether the security information application can be "fairly determined".

6.2 We agree that cl 39 can be read as having implicit reference to the matters in cl 38.

6.3 If cl 39 is not read that way, the amendment does not assist the Crown's interests in security information proceedings because it removes the matters that require the Court to consider the matters in favour of protecting national security interests. However, this does not give rise to any concerns about the provision's consistency with the Bill of Rights Act.

6.4 On either reading, the consistency of the Bill with the Bill of Rights Act is not affected and therefore we do not consider you need to draw the change to the attention of the House of Representatives.

Amending the consequence of the order

6.5 We again note that whether a proceeding can be fairly determined is a matter to consider under cl 38(a) when choosing between types of orders. If the court considers that none of the security information orders will allow the substantive proceeding to be fairly determined, then the amended cl 39(b) continues to provide the Court with a range of options available to it to ensure fairness in the particular case, including giving judgment against the Crown.

6.6 The amendment does not raise any further issues as to consistency with the Bill of Rights Act.

Amendment to refer to "any other related order"

6.7 We consider this amendment to be inconsequential. It does not change the important part of cl 39(b)(iv), which is statutory recognition that the court may (continue to) make any order it has jurisdiction to make. This simply continues to preserve the court's inherent powers.

7. If you agree with our analysis, then we propose that this advice is published as an addendum to our 30 September 2021 advice and published together on the Ministry of Justice's s 7 report register.

8. In accordance with Crown Law policy, this advice has been peer reviewed by Peter Gunn, Team Manager/Crown Counsel.

Kim Laurenson
Crown Counsel
027 307 1891

Noted/Approved/Declined

Hon David Parker
Attorney-General
7 / 12 /2021