

Departmental Disclosure Statement

Security Information in Proceedings Legislation Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

14 October 2021

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features	9
Appendix One: Further Information Relating to Part Two.....	12
Appendix Two: Further Information Relating to Part Three.....	15

Part One: General Policy Statement

This is an omnibus Bill introduced under Standing Order 267(1)(a) (dealing with an interrelated topic that can be regarded as implementing a single broad policy).

The Bill amends several pieces of legislation and provides an overarching and coherent framework for dealing with security information in court proceedings. These court proceedings encompass civil proceedings, including judicial review of administrative decisions, and criminal proceedings. The Bill 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* 14 December 2015 (NZLC R135).

The Law Commission's report found that current frameworks for dealing with national security information either in court or in administrative decisions have developed in an ad hoc manner. This approach lacks clarity and consistent protections for both individuals and national security. Current settings provide insufficient assurance to the Crown that national security information can be adequately protected if it needs to be used in court proceedings. This lack of assurance creates a risk for New Zealand both domestically and internationally in matters relating to security and international relations.

Current settings may disadvantage non-Crown parties who may not know the reason for a decision against them. The non-Crown party may not be in a position to challenge the decisions or actions of the Crown. These disadvantages have implications for fundamental procedural and natural justice rights.

The Bill seeks to create a clear and consistent approach to the use of security information in court proceedings. The Bill does this by clarifying the respective roles and interests of the judiciary and the Executive as well as the interests of the affected individual.

The Bill adds to the Law Commission's recommendations in two ways. First, the Bill adds a second civil process in which the Attorney-General and the Minister of Foreign Affairs certify that information is security information and that it cannot be disclosed to other parties in open court. Second, the Bill adds a closed pre-trial criminal process in which the court determines whether the information is security information, before deciding on next steps.

The main changes in the Bill are as follows:

For civil proceedings:

- a new legislative regime to cover the disclosure and management of security information in civil proceedings;
- a ministerial certificate option, where the Attorney-General and the Minister of Foreign Affairs sign a certificate guaranteeing the use of court orders that ensure a higher degree of protection of national security information in appropriate circumstances;
- a standard closed court procedure would be available to the court in all civil cases. Where this order is made, the court will appoint a security-cleared special advocate to represent the non-Crown party;
- a discretion for 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;

For criminal proceedings:

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

For administrative decisions:

- minor changes to align processes affecting the rights of individuals whose cases involve security information within different administrative schemes and standardising provisions which allow for the judicial review of and appeals against those administrative decisions;
- replacing the court proceedings stage currently included in several existing legislative schemes for managing security information in administrative decision making with the new civil proceedings process in the Bill which will apply to judicial review of, and appeals against, those decisions.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>The Bill responds to Part 2 of the Law Commission's report <i>The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings</i> 14 December 2015 (NZLC R135). https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R135-The-Crown-In-Court.pdf</p> <p>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.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The Ministry of Justice drafted the Regulatory Impact Statement (RIS) 'Managing national security information in proceedings' along with the Cabinet policy paper 'Managing national security information in proceedings' which were considered by the Cabinet Social Wellbeing Committee on 4 December 2019. The RIS will be published following the introduction of the Bill at https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
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2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Refer to Appendix One for a table containing information that estimates the size of potential costs and benefits.</p> <p>There are financial costs involved with the policy in this Bill. As cases involving national security information are 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. The fees of special advocates, special advisers and expert witnesses will be paid for by the Crown.</p> <p>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. 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.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
Refer to Appendix One.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Bill will 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.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

As part of this analysis, we have undertaken a Treaty analysis due to the historical treatment of Māori expressions of tino rangatiratanga which could involve the use of security information.

The proposals place a restriction on non-Crown parties' 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) when security information is involved.

While we are unaware of Māori perspectives being raised in relation to security information, we are nonetheless informed by historical events that have resulted in an erosion of trust. We have also been informed by the overrepresentation of Māori in the criminal justice system.

The Cabinet policy paper and RIS note that it is difficult to obtain ethnicity data for cases involving security information. We do not know if there is a disparity for Māori in this space. The papers note that while the use of security information in criminal cases will likely be rare, the risk of the impact on rights could be amplified for Māori.

The papers suggest mitigation of this risk by requiring cultural competency for those involved in proceedings. The Ministry of Justice will include expertise in tikanga and the 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.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

A copy of the advice will be available following the introduction of the Bill at:
<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
The Bill creates a power for an authorised Court to hold a closed court process. 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. The non-Crown party and their representative are excluded. The non-Crown party's interests would be represented by a special advocate.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
The Privacy Act 2020 does not apply to a court or tribunal acting in relation to its judicial functions.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO
The Privacy Commissioner was consulted as part of the Law Commission's report.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
Refer to Appendix Two.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
The Bill's policy has been tested with agencies, the judiciary, organisations outside of government and courts operational staff. Submissions during select committee will inform any further amendments necessary to ensure the Bill is workable and complete.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
The Bill protects special advocates from liability when acting in accordance with the Bill. Special advocates acting under the Bill will not be subject to the Lawyers and Conveyancers Act 2006. While a special advocate will have all the powers and functions that a legal representative has, the special advocate will not be able to communicate with the non-Crown party about the security information the special advocate has access to.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill seeks to create a clear and consistent approach to the use of security information in court proceedings. The Bill does this by clarifying the respective roles and interests of the judiciary and the Executive as well as the interests of the affected individual. The main changes are as follows:</p> <p>For civil proceedings:</p> <ul style="list-style-type: none">• a new legislative regime to cover the disclosure and management of security information in civil proceedings;• a ministerial certificate option, where the Attorney-General and the Minister of Foreign Affairs sign a certificate guaranteeing the use of court orders that ensure a higher degree of protection of national security information in appropriate circumstances;• a standard closed court procedure would be available to the court in all civil cases. Where this order is made, the court will appoint a security-cleared special advocate to represent the non-Crown party;• a discretion for 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; <p>For criminal proceedings:</p> <ul style="list-style-type: none">• a standard pre-trial closed court procedure for disclosure that would apply in all criminal cases that involve national security information, where the court considers this is necessary to protect information, which includes providing a security-cleared special advocate to represent the non-Crown party;• a new pre-trial admissibility hearing for the court to determine how national security information should be protected at trial in criminal proceedings;• confirmation that the closed court procedure excluding the defendant is not available at trial in criminal proceedings; <p>For administrative decisions:</p> <ul style="list-style-type: none">• minor changes to align processes affecting the rights of individuals whose cases involve security information within different administrative schemes and standardising provisions which allow for the judicial review of and appeals against those administrative decisions;• replacing the court proceedings stage currently included in several existing legislative schemes for managing security information in administrative decision making with the new civil proceedings process in the Bill which will apply to judicial review of, and appeals against, those decisions.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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Appendix One: Further Information Relating to Part Two

Extent of impact analysis available – question 2.5(a)

Summary table of costs and benefits of the preferred approach

Affected parties	Comment:	Impact	Evidence certainty
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Additional costs of proposed approach, compared to taking no action

Non-Crown parties	Formalising and strengthening protection of national security information 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 a case's outcome. To mitigate against this, the Bill includes a provision that will allow the Court to dismiss a civil proceeding to avoid an unfair outcome. The Bill also 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.	Low - 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
Government	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 national security information may erode the principle of open justice.	Low, non-monetisable	High

Total monetised cost	\$430,000 over five years
Non-monetised costs	<i>Low-medium</i>

Expected benefits of proposed approach, compared to taking no action			
Non-Crown parties	Explicit protection of rights in the context of decision-making involving national security information, 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 national security information 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 national security information.	Low, monetisable but unquantified	Medium
	This enhances international and domestic perceptions of New Zealand's judicial system, safety and national security and improves international relations.	Med-high, non-monetisable	
	Clearer and more consistent court processes, which balance competing but fundamental interests, increases 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		<i>Medium</i>	

Potential impacts on the costs and benefits – question 2.6

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.

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 national security information, or by putting forward unmeritorious challenges to decisions involving national security information. This will be mitigated by the court being a check on national security information 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. 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].

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 national security information 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 national security information and actively monitoring the impacts of these, as well as proactively providing guidance regarding the changes.

Appendix Two: Further Information Relating to Part Three

External consultation – question 3.6

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.

The following agencies have been consulted on the policy to be given effect to by the Bill and on the Bill as introduced: 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.

The judiciary and the Legislation Design Advisory Committee were also consulted on the policy to be given effect to by the Bill and on a draft of the Bill.