

Legislative Statement: Security Information in Proceedings Legislation Bill – Second Reading

Presented to the House of Representatives

in accordance with Standing Order 272

Introduction

1. The Bill seeks to create a clear and consistent approach to the use of security information in civil proceedings, including judicial review of administrative decisions, and criminal proceedings.¹ 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.

Background

2. 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).
3. 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.
4. Current settings can also 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 decisions or actions of the Crown. These disadvantages have implications for fundamental procedural and natural justice rights.

Provisions of the Security Information in Proceedings Legislation Bill

As introduced

5. 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 proceedings and ensuring a clear process for courts to follow.
6. The main changes in the Bill are as follows:

¹ "Security information" covers both "national security information" 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).

For civil proceedings:

- a new legislative regime to cover the disclosure and management of security information in civil proceedings;
- a standard closed court procedure that would be available to the court in all civil cases. Where a special procedures order is made, the court will appoint a security-cleared special advocate to represent the non-Crown party;
- 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 security information in appropriate circumstances;
- 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 to standardise provisions that 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.

As reported from the Justice Committee

7. The Justice Committee recommended the following amendments.

Clarifying judicial discretion under clause 12(3) – obligation to give court, special advocate and special adviser access to security information

8. Clause 12(1) of the Bill provides that the Crown must give the authorised court access to any security information at issue in the specified proceeding. Clause 12(2) requires the Crown to also give any special advocate and any special adviser access to the security information at issue.
9. Clause 12(3) gives the court discretion not to apply the requirement set out in clause 12(2) if the court decided that a special advocate or special adviser should not have access to that information

10. The Committee recommended that the Bill clarify that the discretion in clause 12(3) must be exercised in line with the existing powers and limitations under the Evidence Act 2006, including the threshold for excluding evidence in section 8 of that Act. This would clarify the circumstances in which the court may wish to rely on the discretion provided by clause 12(3).

Clarifying that the Bill does not apply to investigations under the Criminal Cases Review Commission Act 2019

11. Clause 29 provides that the Bill would apply to civil proceedings under certain Acts that already have procedures for dealing with classified security information. It would also apply to any civil proceeding in which national security information is or may be at issue.
12. The Committee considered there is a need to clarify how the Bill would apply to investigations of the Criminal Cases Review Commission (the CCRC) under the Criminal Cases Review Commission Act 2019 (the CCRC Act). The Bill is concerned with proceedings essentially of a judicial character, primarily court proceedings but also those where a tribunal is constituted and acts like a court. The CCRC is an independent Crown entity with the primary function of investigating and reviewing convictions and sentences and deciding whether to refer them to the appeal court. The CCRC carries out that function in an investigative manner rather than a judicial one.
13. The Committee recommended a change to clarify that an investigation under the CCRC Act (other than an application by the CCRC to the District Court for an order under subpart 6 of Part 2 of the CCRC Act) would not constitute a civil proceeding before a court or tribunal as that is envisaged by the Bill.