New Zealand Law Society
Te Kāhui Ture o Aotearoa

Security Information in Proceedings Legislation Bill

18/02/2022

Security Information in Proceedings Legislation Bill 2021

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Security Information in Proceedings Legislation Bill (**Bill**).

1.2 The Bill seeks to establish a legislative framework for the use of security information in court proceedings. It covers civil proceedings, including judicial review of administrative decisions, and criminal proceedings. The Bill represents 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*.

1.3 The Bill goes further than the Law Commission's recommendations in two ways by adding:

(a) a second civil process, in which the Attorney-General and the Minister of Foreign Affairs certify that information is security information that cannot be disclosed to parties in open court; and

(b) a closed pre-trial criminal process, in which the court determines whether information is security information before determining how to proceed.

1.4 The Law Society supports the Bill's objectives and overall framework. However, as the Department Disclosure Statement recognises,[1] the Bill responds to competing concerns about how to protect information implicating national security interests and the fact that the steps taken to protect that information in court proceedings are likely to involve a significant incursion into fundamental principles of fairness and open justice. It is important to ensure that an appropriate balance is struck between protecting sensitive information from disclosure and these core rule of law values. The Law Society considers that in several areas the Bill fails to strike that balance. Those areas are identified below, along with proposals for how they could be addressed.

1.5 The Law Society wishes to be heard.

2 Summary of recommendations

2.1 The Law Society makes the following recommendations in relation to the Bill:

(a) Clause 4(a): the current definition of "national security information" (**NSI**) is too broad and should be amended as follows:

(i) The requirement that the information "would be likely to prejudice national security interests" should be qualified to be a requirement that the prejudice be "significant" or "serious".

(ii) The definition should specify that the information must be of a certain kind which would, for example, disclose its source or how it was gathered.

(iii) The class of interests relating to "international relations of the Government of New Zealand" in clause 4(b) should be deleted.

[1] Security Information in Proceedings Legislation Bill, Department Disclosure Statement, p 3.

(b) The definition of "designated agency" should be amended to ensure that a body responsible for maintaining the special advocates panel and/or meeting the costs of special advocates and special advisers should be independent of the executive branch of Government.

(c) The definition of "authorised court" should be amended to include other courts of specialist jurisdiction with the framework contemplated under the Bill, unless there is an express rationale for their exclusion.

(d) Consideration should also be given to whether specific NSI provisions should be introduced to align other specialist statutory regimes with the framework contemplated under the Bill.

(e) Clause 10(2) should be deleted to ensure the requirement for a special advocate to act on behalf of a non-Crown party is mandatory and without exception.

(f) Clause 12(3) should be deleted as it fails to strike an appropriate balance between the Crown's interests in making use of security information or NSI without risk of public disclosure, and the incursions that excluding a specially represented person from the closed part of the proceeding has for the basic principles of fairness and open justice. If not deleted, the Bill should set out how and on what basis the Court is to decide to deny access.

(g) The Bill should address the question of judgments or other court-issued or -controlled documents that contain classified information.

(h) Clause 14 should be deleted so the requirement to provide a written summary of the security information to any non-Crown party in the specified proceeding is mandatory.

(i) Clause 19 should be amended to align the scope of the special advocate's role with the scope of the role for special advocates under the Immigration Act 2009.

(j) Clause 22(3), which provides that the special advocate requires the direction of the court in order to communicate "about any matter connected with the specified proceeding", should be amended to restrict only those communications that are about the security information.

(k) The Bill should be amended to apply clause 41 to all "security information" in issue in proceedings.

(l) Clause 41 should also be amended to include an express requirement for a supporting statement in respect of certificates under that provision.

(m) The Bill could also be amended to exclude the standing of media to challenge suppression orders made by the Court in relation to NSI.

3 The Bill's key definitions (clause 4)

3.1 Clause 4 sets out the definitions for the Bill. It defines, among other things, "national security information" or NSI, "national security interests", a "designated agency" and an "authorised court". Each of these definitions is considered in turn below.

Definitions of "national security information" or NSI and "national security interests"

3.2 Clause 4(a) defines NSI as information that, "if disclosed in or in connection with a proceeding without any orders in place to protect the information, would be likely to prejudice national security interests".

3.3 Clause 4(b) further provides that NSI includes:

(a) information certified jointly by the Attorney-General and the Minister of Foreign Affairs as NSI pursuant to clause 41 of the Bill; and

(b) information that is the subject of a security information (**SI**) application and that the Crown asserts is NSI until an authorised court finally dismisses the application.

3.4 The phrase "national security interests" is itself a defined term in the Bill. Clause 4 defines "national security interests" as:

(a) the security or defence of New Zealand;

(b) international relations of the Government of New Zealand;

(c) the entrusting of information to the Government of New Zealand on the basis of confidence by the Government or an agency of the Government of another country or an international organisation (within the meaning of section 2(1) of the Official Information Act 1982);

(d) the security or defence of the Cook Islands, Niue, Tokelau or the Ross Dependency;

(e) relations between the governments of New Zealand, the Cook Islands or Niue; and

(f) international relations of the Government of the Cook Islands and Niue.

3.5 The Law Society considers that the definition of NSI in the Bill is too broad. As currently formulated, the breadth of "national security interests" fails to strike an appropriate balance between the need to protect certain types of information from disclosure and the basic constitutional principles of fairness and open justice.

3.6 The concept of NSI is critical to the overall functioning of the framework contemplated by the Bill. The definition needs to be clear, precise and narrowly focused. This is because the consequence of material satisfying the definition of NSI is that such information will only be used in a closed part of the proceeding from which the special represented person is excluded. This type of exclusion has been described by the United Kingdom Supreme Court in *Al Rawi v Security Service*[2] as "fundamentally unfair" in comments that were cited with approval by the New Zealand High Court in *A v Minister of Internal Affairs*.[3] While it may be possible to take steps to mitigate that unfairness by measures such as a system of special advocates, basic concerns about fairness and open justice should inform scrutiny of the proposed definition of NSI and its scope.

3.7 The Law Society sets out below some specific issues with the current definitions of NSI and "national security interests" which the Law Society considers require amendment.

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2 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, at [35].

3 *A v Minister of Internal Affairs* [2020] NZHC 2782 (HC), at [48]-[49].

3.8 First, the current definition requires only that the information "would be likely to prejudice national security interests". In the Law Society's view, the "likely to prejudice" threshold is set too low. The Law Society considers that this requirement should be qualified by a requirement that the prejudice be "significant" or "serious". This type of qualification is necessary given the serious implications that classification as NSI has for the rule of law and open justice.

3.9 Second, the definition does not specify that the information must be of a certain kind. For example, that the information would, or would be likely to, disclose specific operational matters such as the source of the information or the operational methods by which it is gathered. This is contrary to the approach taken to the definitions of "classified information" and "classified security information" in a number of other New Zealand statutes. The Law Society considers that the definition should be amended to include this additional specification. Examples of the type of drafting that the Law Society considers should be included here can be found at:

(a) Section 7(2) of the Immigration Act 2009;

(b) Section 32(2) of the Terrorism Suppression Act 2002;

(c) Section 102(2) of the Telecommunications (Interception Capability and Security) Act 2013; and

(d) Section 29AA(6) of the Passports Act 1992.

3.10 Third, the definition of "national security interests" (which will influence the scope of NSI) extends to a broad range of circumstances, including the "international relations of the Government of New Zealand". This appears to be unnecessary and potentially ambiguous. The definition of "national security interests" already expressly encompasses both "the security or defence of New Zealand" and "the entrusting of information to the Government of New Zealand on the basis of confidence" by another government, government agency or international organisation. The addition of a further class of interests relating to New Zealand's "international relations" should be deleted as those interests may not, in fact, relate to security issues at all.

Definition of "designated agency"

3.11 Clause 4 of the Bill defines "designated agency" as a "public service agency" that is designated by the Prime Minister as responsible for one or both of:

(a) maintaining the special advocates panel; and

(b) meeting the costs of special advocates and special advisers.

3.12 A "public service agency" is further defined as having the meaning given by section 5 of the Public Service Act 2020. This will include departments, departmental agencies, interdepartmental executive boards, interdepartmental ventures and "Crown agents".[4]

[4] Sections 5 and 10(a) Public Service Act 2020.

3.13 The Law Society proposes that this definition should be amended to ensure that a body responsible for maintaining the special advocates panel and/or meeting the costs of special advocates and special advisers is independent of the executive branch of Government.

Definition of "authorised court"

3.14 Clause 4 of the Bill defines an "authorised court" as the High Court, the Court of Appeal, the Supreme Court and the Employment Court (for matters falling within the scope of section 187 of the Employment Relations Act 2000).

3.15 The Law Society considers that it would be appropriate to include other courts of specialist jurisdiction with the framework contemplated under the Bill unless there is an express rationale for their exclusion. For example, the Ministry of Justice's Regulatory Impact Statement sets out policy reasons relating to the nature of immigration decision-making that justify retention of the separate classified information regime under the Immigration Act 2009.[5] At present it is unclear what the rationale is for including the Employment Court, but excluding other courts of specialist jurisdiction from the definition of "authorised court".

3.16 There is a need to consider the way in which NSI should be managed within such specialist jurisdictions. For example, a Coroner is currently undertaking an inquiry into the deaths of 51 people in relation to the 15 March 2019 Christchurch Masjid Attacks. Clearly, NSI can be implicated by this type of inquiry. Section 79 of the Coroners Act 2006 provides that the Coroner may receive, and act upon, material that would not be admissible in a court of law, provided that the Coroner is satisfied that the material is "necessary and desirable" to establish one of the purposes of an inquiry into a death. Those purposes include, so far as possible, establishing the causes and/or circumstances of a death. While the Coroner has the power to order non-publication of certain material,[6] the grounds for exercise of that power do not include national security.

3.17 The Law Society considers that the statutory regime under the Coroners Act 2006 should be aligned with the framework proposed in the Bill. This is particularly important in circumstances where the New Zealand courts have now recognised that a coronial inquiry is one of the ways (if not the primary way) in which the obligation to carry out an effective investigation into a death under section 8 of the New Zealand Bill of Rights Act 1990 can be satisfied.

3.18 The Law Society also recommends consideration be given to whether specific NSI provisions should be introduced to align other specialist statutory regimes with the framework contemplated under the Bill. They include:

(a) The Criminal Cases Review Commission Act 2019;

(b) The Employment Relations Act 2000; and

(c) The Inquiries Act 2013.

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5 Regulatory Impact Statement 'Managing national security information in proceedings', p 30.

6 Section 74 of the Coroners Act 2006.

4 Entitlement to special advocate (clause 10)

4.1 Clause 10(1) provides that an "authorised court" must appoint a special advocate to act on behalf of a non-Crown party to a specified proceeding. However, this general position is subject to an exception in clause 10(2), which provides that the court is not required to appoint a special advocate if it is satisfied that withholding the security information from a party and the party's lawyer will not have "an unfairly prejudicial effect" on that party. The example offered in clause 10(2) is where a non-Crown party is one of several non-Crown parties and is not affected by matters relating to the security information.

4.2 The Law Society considers that the requirement for a special advocate should be mandatory and without exception and that clause 10(2) should therefore be deleted.

4.3 The starting point is that excluding a party from a proceeding is fundamentally unfair. The ability to appoint special advocates has the potential to mitigate concerns about fairness and open justice. It is both unnecessary and contrary to that principle to permit a situation where a party to a proceeding is excluded from participation without even the benefit of a special advocate to represent that party's interests. The rationale that a court must first assess that the party's interests will not be unfairly prejudiced by the exclusion does not address the fundamental concerns about permitting the total exclusion of a party from part of the proceeding.

4.4 As a practical matter, a special advocate would typically be appointed at an early stage of the proceeding. It may not be realistic for a court to make an overall assessment of the potential prejudice that a non-Crown party may suffer if it is excluded (without representation) from the closed part of the proceeding. Nor is it likely to be possible for a court to anticipate the different ways in which the exclusion of a non-Crown party from the closed part of the proceeding may, over the course of the proceeding, result in some prejudice to the non-Crown party. The failure to appoint a special advocate for a non-Crown party where a court subsequently determines that such an appointment has become (or was) necessary would also have implications for the fairness of any proceeding. These issues would be compounded by the fact that the non-Crown party will not be in a position to assess whether there is any prejudicial effect because it has been excluded from part of the proceeding. To the extent that the proposed exception responds to resourcing concerns, it is anticipated that those concerns can be more effectively addressed during the course of the proceeding.

5 Access to security information (clauses 12 and 41)

5.1 Clause 12 of the Bill provides that the Crown must give the authorised court access to "any security information at issue". It must also give access to the appointed special advocate(s) and/or special adviser(s), except if "the court decides that they should not have access".

5.2 Whether particular information is "security information" depends upon the issue of a certificate by the Attorney-General and Foreign Minister under clause 41, or by the head of the holding agency under one of the existing statutory regimes.

5.3 The Law Society makes the following observations on issues that arise under the Bill's proposed approach to access to security information and proposes drafting amendments, where appropriate.

5.4 First, the Bill provides an opportunity to deal with the difficulty that arose in *A v Minister of Internal Affairs*, which was that:

(a) the Court ordered a process of classified/closed discovery, on the basis that the information put forward by the relevant security agency formed only a subset of the information that it held, such that there was a live question of candour and/or lack of balance;

(b) the certificate procedure under the Passports Act 1992, which is one of the existing statutory regimes for certification continued under the Bill, is expressed to apply only to information relevant to whether there are particular grounds under that Act (see section 29AA(5)(a)); and

(c) as a result, the question arose whether that certificate procedure applied to the discovered material because the certificate had been issued in respect of the information as first put forward and section 29AA(5)(a) did not clearly apply on its terms to the discovered material.

5.5 Clause 42(2) of the Bill provides a solution. It allows the amendment of a clause 41 certificate if new material is introduced. However, that solution only applies to certificates issued pursuant to clause 41 of the Bill. It does not apply to certificates issued under the Overseas Investment Act 2005, the Passports Act 1992 and the other existing statutory certificate regimes. The Law Society considers that the Bill could usefully be amended to apply clause 41 to all "security information" in issue in proceedings.

5.6 In addition to addressing the difficulty in *A v Minister of Internal Affairs*, such an amendment would ensure that the certification procedure is uniform across closed material proceedings and avoid complications of procedure and/or related caselaw between the different regimes. It would also address the inconsistency between the general provision in clause 41, by which certificates are issued jointly by the Attorney-General and the Foreign Minister (and which is consistent with longstanding practice of certification of sensitive information), and existing statutory regimes that allow for the heads of relevant departments or other agencies to issue such certificates.

5.7 Second, clause 12(3) provides that the Court may receive information from the Crown but decide that it is nonetheless to be withheld from the special advocate(s)/special adviser(s). The Bill does not set out any criterion or procedure for that determination. As noted above, the Bill must strike a balance between the Crown's interests in making use of security information or NSI without risk of public disclosure, and the obvious incursions that excluding a specially represented person from the closed part of the proceeding has for the basic principles of fairness and open justice. The special advocate procedure cannot remove the fundamental unfairness associated with closed proceedings altogether, but does represent a way in which unfairness can be mitigated. The Bill should seek to give effect to the special advocate system to the extent it does not risk the public disclosure of security information or NSI. The provision for denial of access to information runs counter to that objective and places the Court in the inappropriate position of receiving information from the Crown and deciding to deny access on an unchallenged basis.

5.8 The Bill establishes that special advocates and special advisers are required to hold necessary security clearances and maintain confidentiality. Accordingly, there is no security reason for clause 12(3) of the Bill. It is conceivable that particular classified information – for instance, that provided by a partner government – may be provided on the basis that it will not be seen by a special advocate/special adviser or similar person. However, the appropriate course in that case, and one that would be consistent with the premise of the Bill (and with practice in other jurisdictions), is that the information simply cannot be used in court proceedings.

5.9 The Law Society considers that clause 12(3) should be removed on the basis that it fails to strike an appropriate balance between the interests identified above. If not removed, the Bill should at least set out how and on what basis the Court is to decide to deny access.

5.10 Third, clause 41 and the other existing statutory certification regimes provide for the issue of a certificate but they do not require the certifying officeholder to substantiate that certificate. In practice, such certificates are accompanied by an explanatory affidavit that sets out, in partially closed terms why the information should be withheld. The failure to provide this type of explanation was the reason for the rejection of a certificate in *Choudry v Attorney-General*.[7] In other jurisdictions, this type of explanation is required by the relevant legislation.[8]

5.11 There are good reasons for this type of requirement. The proffered explanation can be scrutinised and, if necessary, challenged and/or supplemented before a court. The Law Society considers that clause 41 should be amended to include an express requirement for a supporting statement in respect of certificates under that provision.[9]

5.12 Fourth, the Bill does not address the question of judgments or other court-issued or -controlled documents that contain classified information. It may be that the lack of such reference is in deference to the need for the courts to retain control of such documents but if so, the Bill should make that, and any associated procedures, clear. A useful example of such an approach can be drawn from the statutory regime in the United Kingdom (see CPR 82.16 (UK)).

6 Summary of security information (clauses 13 and 14)

6.1 Clause 13 of the Bill provides that the Crown must give a written summary of the security information to any non-Crown party in the specified proceeding, including any special advocate(s)/special adviser(s).

6.2 Clause 14 then sets out certain circumstances in which this requirement to provide a written summary can be waived. Before the court may waive the Crown's obligation to provide a written summary, the court must be satisfied that "a sufficient summary cannot be prepared without disclosing security information" or that the Crown has already given a summary in a related specified proceeding.

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7 *Choudry v Attorney-General* [1999] 2 NZLR 582.

8 See, for example, CPR 82.13(2)(b) (UK).

9 If, contrary to the submission above, the existing statutory certificate regimes are retained, then this point would also apply for certificates under those regimes.

6.3 The Law Society considers that the requirement to provide a summary should be mandatory. This represents the simplest and most straightforward way to recognise the unfairness inherent in excluding a person from part of a proceeding in which that person is a party, and the need to mitigate that unfairness to the extent possible. This also ensures consistency with the expected benefit identified in the Department Disclosure Statement ("potentially greater access to relevant information from assurance that information will be disclosed to the extent possible without risking national security").[10]

6.4 The rationale that underpins clause 14 appears to relate to attempted efficiency gains, rather than the protection of national security interests. A better approach would be to develop these types of mechanisms in a manner that aligns with the logic of the Departmental Disclosure Statement, that information should be disclosed to the greatest extent possible without risking national security.

6.5 The Law Society considers that the two specified bases in clause 14 for waiving this requirement are not persuasive in any event.

6.6 First, in terms of the sufficiency of the information provided in the written summary, it is unlikely that such a summary could not be prepared in a manner that would be both useful to a non-Crown party and maintain non-disclosure of security information. Removing the requirement for the court to determine that a "sufficient" summary cannot be prepared also avoids placing the court in the difficult position of making an evaluative assessment at what is likely to be an early stage in the proceeding.

6.7 Second, in terms of provision of a summary in a related specified proceeding, it is unclear why there needs to be express provision for a waiver of the obligation to provide that summary. There would be nothing in practice preventing the Crown from providing the same summary with consequential edits.

7 Limiting the role of the special advocate to the closed hearing (clause 19)

7.1 Clause 19 of the Bill provides that the "role of a special advocate is to act in the interests of the specially represented party for the purposes of the closed hearing of the specified proceeding". In other words, it limits the role of the special advocate to the "closed hearing". This is defined in clause 4 as "an oral hearing in the proceeding" conducted in the presence of certain specified persons: the Judge, a person representing the Crown, an authorised witness and a special advocate appointed to act on behalf of the non-Crown party.

7.2 The role of the special advocate should not be restricted to the closed part of the proceeding. The Law Society considers that clause 19 should be amended to align the scope of the special advocate's role with the scope of the role for special advocates under the Immigration Act 2009.

7.3 Section 263(2) of the Immigration Act 2009 makes clear that a special advocate's ability to represent a specially represented person is not limited to the closed part of the proceeding. It provides that a special advocate may:

(a) lodge or commence proceedings on behalf of a person;

[10] Security Information in Proceedings Legislation Bill, Department Disclosure Statement, p 13.

(b) make oral submissions or cross-examine any witness at a closed hearing; and

(c) make written submissions to the Immigration and Protection Tribunal or to the court, as the case may be.

7.4 This broader role has been adopted by the courts in New Zealand and in cognate jurisdictions that have adopted a special advocates regime. In *A v Minister of Internal Affairs*,[11] the High Court heard from the special advocate in both the open and closed parts of the proceeding. During the course of the proceeding, the High Court specifically rejected an application by the Crown to prevent submissions by the special advocate in the open part of the proceeding. This is consistent with the approach adopted by the courts in other jurisdictions, which have recognised the potential benefits of having a special advocate appear in both the open and closed parts of a proceeding. For example, in Canada, the courts have endorsed the ability of a special advocate to appear in both open and closed proceedings.[12]

7.5 The purpose of establishing a special advocate procedure is to mitigate the fundamental unfairness of a closed part of the proceeding where the specially represented person is excluded;[13] however, the availability of a special advocate cannot fully compensate for the ability of a specially represented person to know and engage with the closed part of the case.

7.6 The Law Society's view is that principles of fairness and open justice require that any restrictions on the ability of a specially represented person to participate in the proceeding must be kept to the minimum extent necessary to protect the NSI, and the special advocate system established to mitigate that unfairness should do so to the maximum extent possible without putting the NSI at risk.

7.7 Against that background, there are good reasons to ensure that a special advocate is able to represent the interests of a specially represented person in both the open and closed parts of a proceeding:

(a) There is no suggestion in the Bill that counsel for the Crown will be separated between the open and closed parts of proceedings. This asymmetry undermines the purpose of the special advocate regime: that is, mitigating the basic unfairness caused by excluding a specially represented person from the closed part of the proceeding to the extent possible. There is a clear need for one counsel (or set of counsel) representing a non-Crown party's interests to be present for all parts of the proceeding.

(b) There will often be important arguments, drawn from NSI, that must (and can) be made largely or wholly in open court. Because those arguments rely on familiarity with the NSI, they can only be made by the special advocate on behalf of then non-Crown party. Even where there is a factual element of the relevant arguments that is

11 *A v Minister of Internal Affairs* [2020] NZHC 2782 (HC).

12 *Canada (Citizenship and Immigration) v Harkat* [2014] 2 SCR 33, at [25].

13 *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, at [35]; *A v Minister of Internal Affairs* [2020] NZHC 2782 (HC), at [48]-[49].

sensitive, it will typically be possible (and preferable) to make the necessary legal submissions in open court.

(c) The very fact that part of a proceeding is closed means that a special advocate will often be better placed than counsel for the non-Crown party to make submissions about the case as a whole, including any concerns about the overall fairness of the proceeding.

7.8 Any concern about the risk that a special advocate will inadvertently disclose sensitive information in open court can be addressed by giving security agencies the opportunity to review copies of submissions and other court documents and proposed redactions (as it was in *A v Minister of internal Affairs*).

8 Communication between special advocate and other persons (clause 22(3))

8.1 Clause 22 of the Bill controls the circumstances in which a special advocate may communicate with a person about the security information after it has been provided to the special advocate. Clause 22(2) provides that the special advocate may communicate about the security information, without any directions from the court, only with the court and representatives of the Crown with appropriate security clearance.

8.2 Clause 22(3) then provides that the special advocate requires the direction of the court in order to communicate "about any matter connected with the specified proceeding" with:

(a) the specially represented party;

(b) the party's lawyer; and

(c) any other person that the special advocate is not expressly permitted to communicate with regarding any matter in relation to the specified proceeding.

8.3 Pursuant to clause 22(4), such directions can only be made after the Crown, the special advocate and any other party to the specified proceeding have had the opportunity to make submissions, including in relation to the appropriate terms and conditions that should apply to such communications.

8.4 The Law Commission's report, which draws on the experience of special advocates in the United Kingdom, identified analogous restrictions in the United Kingdom on communication between special advocates and open representatives as the most significant restriction on the ability of special advocates to operate effectively.[14] The Law Commission characterised this type of restriction as a "tactical disadvantage for special advocates who are unable to communicate with the party they represent without disclosing the communication to the Crown party".[15] On that basis, the Law Commission concluded it was not appropriate for the Crown to be notified of such communications, and recommended that the Court oversee such communications after the special advocate has been provided with the NSI.[16] The Law

[14] Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (2015) at 9.22.

[15] Above n 14, at 9.22.

[16] Above n 14, at 9.23.

Society agrees with the Law Commission's views and recommends amending clause 22(3) accordingly.

8.5 The Law Society also considers that restricting the ability of the special advocate to communicate about "any matter connected with the specific proceeding" is too broad. It should be amended to restrict only those communications that are about the security information, which would align clause 22(3) with the wording adopted in clause 22(2).

8.6 This would enable the special advocate to explain the process, describe the arguments and provide opinions without the need for a direction from the court. The focus of this restriction is on the need to protect "security information" to which the special advocate has been given access by the Crown. Any restriction on the communication between special advocates and non-Crown parties should be as limited as possible, as this will result in a lesser incursion into the fair trial and/or natural justice rights of the specially represented party.

9 Amendments to Criminal Procedure Act 2011 (clause 69)

9.1 Clause 69 would amend the Criminal Procedure Act 2011 (**CPA**) by inserting new section 113A, which enables an application to be made to the High Court for an admissibility hearing relating to evidence that either party asserts is based on NSI.

9.2 Proposed new section 113A(7) leaves intact the general power of the Court to make suppression orders to limit or prevent dissemination of information, or to clear the court. Under sections 202(2)(f) and 205(2)(f) of the CPA, those powers can be used in relation to NSI. However section 210 of the CPA gives the media standing to challenge such suppression orders. It may be appropriate to exclude from the scope of section 210 of the CPA the standing of media to challenge suppression orders when they are made by the Court in relation to NSI.

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