

Security Information in Proceedings Bill

(Divided from the Security Information in Proceedings Legislation Bill)

Government Bill

As reported from the committee of the whole House

This Bill was formerly part of the Security Information in Proceedings Legislation Bill as reported from the Justice Committee. The committee of the whole House has further amended the Bill and divided it into the following Bills:

- this Bill comprising clauses 1 and 2, Parts 1 to 3, and Schedules 1 and 2
- Security Information in Proceedings (Repeals and Amendments) Bill comprising Part 4 and Schedules 3 to 9.

Hon Kiritapu Allan

Security Information in Proceedings Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Security Information in Proceedings Act **2022**.

2 Commencement

- (1) This Act comes into force on— 5
- (a) the first anniversary of the date of Royal assent; or
- (b) an earlier date appointed by the Governor-General by Order in Council.
- (2) An Order in Council made under this section is secondary legislation (*see Part 3 of the Legislation Act 2019 for publication requirements*).

Part 1

Preliminary provisions

3 Overview

- (1) This guide is for explanation only and does not affect the provisions referred to in it. 5
- (2) **Part 1** contains general provisions.
- (3) **Part 2** identifies certain civil and criminal proceedings as specified proceedings (*see section 8(3)*), including proceedings to which the special procedures apply automatically and proceedings to which the special procedures apply only if the court makes an order to that effect. **Part 2** also sets out the following special procedures that apply to those proceedings when security information is at issue: 10
- (a) a non-Crown party's entitlement to a special advocate (*see section 10*):
 - (b) provision for a closed hearing (*see section 11*):
 - (c) access to the security information by certain persons only (*see section 12*): 15
 - (d) a requirement for the Crown to provide a written summary of the security information to participants (*see sections 13 and 14*):
 - (e) the court's power to appoint a special adviser (*see section 15*).
- (4) **Part 3** applies to civil proceedings in which NSI is at issue or in which the Crown proposes to present classified security information in proceedings arising from 4 specified Acts (the Overseas Investment Act 2005, the Passports Act 1992, the Telecommunications (Interception Capability and Security) Act 2013, and the Terrorism Suppression Act 2002). **Part 3** provides— 20
- (a) a process for the Crown to make an SI application in relation to a proceeding (*see section 32*), asking for the court to make orders protecting the confidentiality of security information (*see section 36*); and 25
 - (b) for the Attorney-General and the Minister of Foreign Affairs and Trade to jointly issue an NSI certificate, which certifies that information is national security information without the need for the court to determine this (*see section 41*). 30

4 Interpretation

In this Act, unless the context otherwise requires,—

authorised court means any of the following courts:

- (a) the High Court: 35
- (b) the Court of Appeal:
- (c) the Supreme Court:

- (d) the Employment Court, in the case of proceedings in respect of matters within the jurisdiction of that court under section 187 of the Employment Relations Act 2000

civil proceeding—

- (a) means any proceeding (including any public law or judicial review proceeding) before a court or tribunal other than a criminal proceeding; and 5
- (b) includes a hearing and determination of an application for a control order under the Terrorism Suppression (Control Orders) Act 2019; but
- (c) excludes an investigation under the Criminal Cases Review Commission Act 2019 other than an application for an order under subpart 6 of Part 2 of that Act 10

classified security information, in or in connection with a civil proceeding, has the meaning given by one of the following (whichever is relevant to that proceeding):

- (a) **section 114** of the Overseas Investment Act 2005: 15
- (b) **section 2AA** of the Passports Act 1992:
- (c) **section 3A** of the Telecommunications (Interception Capability and Security) Act 2013:
- (d) **section 4A** of the Terrorism Suppression Act 2002

closed hearing, in relation to a specified proceeding, means an oral hearing in the proceeding conducted in the absence of all persons except the following: 20

- (a) the Judge or Judges hearing the case:
- (b) any person who is a representative of the Crown for the purposes of the specified proceeding and who has an appropriate security clearance:
- (c) any witness who is authorised by the court to be present at the hearing while giving evidence in respect of security information: 25
- (d) any special advocate appointed to act on behalf of a non-Crown party to the specified proceeding:
- (e) any special adviser appointed for the purposes of advising the court in relation to the specified proceeding: 30
- (f) any court staff member who has an appropriate security clearance:
- (g) any person who has an appropriate security clearance and who is authorised (whether individually or as a member of a class of persons) by the court to attend the hearing

Crown— 35

- (a) means the Sovereign in right of the Government of New Zealand, including—
- (i) any Minister of the Crown; and

- (ii) any public service agency; and
 - (iii) the New Zealand Defence Force; and
 - (iv) the New Zealand Police; and
- (b) when used in relation to a non-party disclosure hearing to which **section 26B** of the Criminal Disclosure Act 2008 applies, also includes a Crown agent (within the meaning of section 10(1) of the Crown Entities Act 2004) 5

designated agency means the public service agency that is designated by the Prime Minister as responsible for one or both of the following:

- (a) maintaining the special advocate panel (*see section 16*): 10
- (b) meeting the costs of special advocates and special advisers under **sections 24 and 27**, respectively

exclusion order has the meaning given by **section 31(2)**

function includes a role, duty, or power

intelligence and security agency has the meaning given by section 4 of the Intelligence and Security Act 2017 15

lawyer has the meaning given by section 6 of the Lawyers and Conveyancers Act 2006

misconduct has the meaning given by section 9 of the Lawyers and Conveyancers Act 2006 20

national security information or **NSI**—

- (a) means 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; and
- (b) includes— 25
 - (i) information certified as NSI under **section 41**; and
 - (ii) information that is the subject of an SI application and that the Crown asserts is NSI until an authorised court finally dismisses the application under **section 37**

national security interests means— 30

- (a) the security or defence of New Zealand; or
- (b) the international relations of the Government of New Zealand; or
- (c) the entrusting of information to the Government of New Zealand on a basis of confidence by—
 - (i) the Government of any other country; or 35
 - (ii) an agency of a Government of another country; or
 - (iii) any international organisation (within the meaning of section 2(1) of the Official Information Act 1982); or

- (d) the security or defence of—
- (i) the self-governing State of the Cook Islands; or
 - (ii) the self-governing State of Niue; or
 - (iii) Tokelau; or
 - (iv) the Ross Dependency; or
- (e) relations between the Governments of any of the following:
- (i) New Zealand;
 - (ii) the self-governing State of the Cook Islands;
 - (iii) the self-governing State of Niue; or
- (f) the international relations of the Government of—
- (i) the self-governing State of the Cook Islands; or
 - (ii) the self-governing State of Niue
- non-Crown party**, in relation to a proceeding,—
- (a) means a party to the proceeding that is not, and does not represent, the Crown; and
 - (b) in the case of a specified proceeding that is the hearing of an SI application or another interlocutory application to an authorised court connected with a substantive proceeding, includes a party to the substantive proceeding who is not, and does not represent, the Crown
- NSI certificate** has the meaning given by **section 41**
- performing a function** includes exercising a power, and **intending to perform**, in relation to a function, has a corresponding meaning
- protective order** has the meaning given by **section 31(3)**
- public service agency** has the meaning given by section 5 of the Public Service Act 2020
- relevant CSI certification**, in relation to an SI application in respect of a civil proceeding, means the certification described in whichever of the following provisions applies to that proceeding:
- (a) **section 114(1)(b)** of the Overseas Investment Act 2005;
 - (b) **section 2AA(1)(c)** of the Passports Act 1992;
 - (c) **section 3A(1)(b)** of the Telecommunications (Interception Capability and Security) Act 2013;
 - (d) **section 4A(1)(b)** of the Terrorism Suppression Act 2002
- security clearance** means a New Zealand Government-sponsored national security clearance that allows a person holding that clearance to access security information

	security information or SI , in relation to a proceeding, means—	
	(a) classified security information, if one of the following applies to the proceeding:	
	(i) section 113 of the Overseas Investment Act 2005:	
	(ii) section 29AB of the Passports Act 1992:	5
	(iii) section 101 of the Telecommunications (Interception Capability and Security) Act 2013:	
	(iv) section 38 of the Terrorism Suppression Act 2002; and	
	(b) in any other proceeding, national security information	
	security information order has the meaning given by section 31	10
	SI application means an application to an authorised court under section 32(1)	
	special adviser means a person who is appointed as a special adviser under section 15	
	special advocate means a person appointed as a special advocate under section 17	15
	special advocate panel means the panel of lawyers maintained under section 16	
	special procedures has the meaning given by section 8(2)	
	special procedures order has the meaning given by section 9(1)	20
	specially represented party , in relation to a special advocate, means a party for whom the special advocate has been appointed under section 10	
	specified proceeding has the meaning given by section 8(3)	
	unsatisfactory conduct has the meaning given by section 12 of the Lawyers and Conveyancers Act 2006.	25
5	Transitional, savings, and related provisions	
	The transitional, savings, and related provisions set out in Schedule 1 have effect according to their terms.	
6	Act binds the Crown	
	This Act binds the Crown.	30
7	Act does not apply to proceedings under Immigration Act 2009	
	This Act does not apply in relation to a proceeding under the Immigration Act 2009 that is a proceeding involving classified information within the meaning of section 7 of that Act.	

Part 2

Procedures to protect security information in proceedings

Preliminary

- 8 Application of special procedures to certain proceedings**
- (1) The special procedures described in **subsection (2)** apply to proceedings or parts of proceedings before an authorised court that are specified proceedings (as set out in **subsection (3)**). 5
- (2) The **special procedures** are the procedures set out in the following sections:
- (a) **sections 10 and 16 to 24** (relating to the appointment and role of a special advocate to act on behalf of a non-Crown party): 10
- (b) **section 11** (relating to the hearing being a closed hearing):
- (c) **section 12** (relating to the Crown's obligation to give the court, special advocate, and special adviser access to the security information):
- (d) **sections 13 and 14** (relating to a written summary of the security information): 15
- (e) **sections 15 and 25 to 27** (relating to the appointment and role of a special adviser to advise the court).
- (3) A **specified proceeding** is any of the following:
- Civil proceedings: national security information or classified security information* 20
- (a) the hearing of an SI application (*see* **section 32**):
- Criminal proceedings: national security information*
- (b) a non-party disclosure hearing to which **section 26B** of the Criminal Disclosure Act 2008 applies:
- (c) the hearing of an application to which **section 30A** of the Criminal Disclosure Act 2008 applies: 25
- (d) the hearing of an application referred to in **section 78(2A) or 101(2A)**, or made under **section 113A**, of the Criminal Procedure Act 2011:
- Special procedures order: national security information or classified security information* 30
- (e) a proceeding in respect of which the court makes an order under **section 9**.
- 9 Court may make special procedures order applying special procedures to proceeding**
- (1) An authorised court may make an order (a **special procedures order**) applying the special procedures (as described in **section 8(2)** and set out in this Part) to a proceeding set out in **subsection (2)** if the court is satisfied that the order is 35

- necessary to protect and limit the disclosure of security information in the proceeding.
- (2) The court may make a special procedures order in connection with the following proceedings:
- (a) a civil proceeding to which an SI application relates (*see* **section 36**, under which the court may make a special procedures order when making a security information order in determining an SI application, after considering the matters set out in **section 38**), or an appeal from that proceeding: 5
 - (b) an application to the court for judicial review of the issue of an NSI certificate, or an appeal from an interlocutory or a final order made in respect of that application: 10
 - (c) an appeal to the court from a decision made by another authorised court in a specified proceeding set out in **section 8(3)**.
- (3) A special procedures order may be made in respect of the whole or any part of the proceeding. 15

Special procedures generally

10 Entitlement to special advocate

- (1) The authorised court must appoint a special advocate in accordance with **sections 16 to 18** to act on behalf of any non-Crown party to a specified proceeding. 20
- (2) However, if the court is satisfied that withholding the security information at issue in the specified proceeding from the party and the party's lawyer, in accordance with this Part, would not have any unfairly prejudicial effect on the party, the court is not required to make the appointment (for example, a special advocate may not be required for a non-Crown party who is one of several non-Crown parties and who is not affected by the matters relating to the security information). 25
- (3) *See* **sections 19 to 24**, which contain further provisions relating to special advocates. 30

11 Hearing closed while security information considered

- (1) An oral hearing in the specified proceeding in which security information is being considered must be a closed hearing.
- (2) Any person not excluded from a hearing must ensure that the confidentiality of the security information considered in the hearing remains protected. 35

Compare: 1992 No 92 s 29AB(1); 2002 No 34 s 38(3)(b); 2005 No 82 s 123(2)(b); 2013 No 91 s 111(2)(b)

- 12 Obligation to give court, special advocate, and special adviser access to security information**
- (1) The Crown must give the authorised court access to any security information at issue in the specified proceeding.
- (2) The Crown must also give access to the security information to— 5
- (a) any special advocate appointed to act on behalf of a non-Crown party to the specified proceeding; and
- (b) any special adviser appointed for the purposes of advising the court in relation to the specified proceeding.
- (3) However, the Crown is not required to give access to the security information to the special advocate or special adviser if, or to the extent that, the court is satisfied that withholding the information from the special advocate or special adviser would not have any unfairly prejudicial effect on the party or the proceeding (for example, because the information is not admissible under the Evidence Act 2006). 10
- (4) *See sections 21, 22, and 26*, which deal with the obligations of special advocates and special advisers to keep the confidentiality of the security information protected. 15
- 13 Summary to be given to authorised court and relevant participants**
- (1) For the purposes of the specified proceeding, the Crown must give a written summary of the security information at issue to any non-Crown party to the specified proceeding. 20
- (2) In addition, for the purposes of the specified proceeding, the Crown must give a copy of the summary to—
- (a) the authorised court; and 25
- (b) any special advocate appointed to act on behalf of a non-Crown party to the specified proceeding; and
- (c) any special adviser appointed for the purposes of advising the court in relation to the specified proceeding.
- (3) The summary, as well as any summary modified under **subsection (4)** or **section 14**, must not disclose any security information. 30
- (4) At any time, the court may consider whether to modify (or to direct the Crown to modify) the summary given for the purposes of the specified proceeding after having regard to—
- (a) the security information; and 35
- (b) any evidence presented or submissions made to the court by the Crown, the special advocate, or any parties; and
- (c) any other relevant matter.

- (5) The court must ensure that a copy of the modified summary (if any) is given to all of the persons entitled to receive the summary under **subsections (1) and (2)**.

14 Waiver or further modification

- (1) An authorised court may decide to waive the requirement for compliance with **section 13(1) and (2)** for the purposes of a specified proceeding if— 5
- (a) the court is satisfied that a sufficient summary cannot be prepared without disclosing security information; or
 - (b) the Crown has already given a summary under those provisions in a related specified proceeding. 10
- (2) If the Crown has already given a summary under those provisions in a related specified proceeding,—
- (a) the authorised court may decide, having regard to the matters in **section 13(4)**, to modify (or to direct the Crown to modify) the earlier summary for the purposes of the later specified proceeding; and 15
 - (b) **section 13(5)** applies accordingly.

15 Appointment of special advisers

- (1) An authorised court may appoint a special adviser for the purposes of advising the court about national security, or related issues, in relation to a specified proceeding. 20
- (2) *See sections 25 to 27*, which contain further provisions relating to special advisers.

Special advocate: appointment

16 Lawyers who may be appointed as special advocates

- (1) The designated agency must maintain a panel of lawyers who may be appointed as special advocates under this Part. 25
- (2) The designated agency may include a person on the panel if—
- (a) the person is a lawyer; and
 - (b) the person holds an appropriate security clearance; and
 - (c) the designated agency is satisfied that the person has suitable knowledge and experience to be a special advocate. 30
- (3) The designated agency may include a person on the panel for 5 years at most, and may renew the person's inclusion on the panel for further periods of 5 years at most.
- (4) The designated agency must remove a person from the panel— 35
- (a) at the request of the person; or
 - (b) if the person ceases to hold an appropriate security clearance; or

- (c) if the person is suspended from practice as a barrister, a solicitor, or both under the Lawyers and Conveyancers Act 2006 or is struck off the roll of barrister and solicitors of the High Court; or
- (d) if the person ceases to be a lawyer.

17	Process for appointing special advocate	5
	<i>Preliminary steps</i>	
(1)	An authorised court must notify the designated agency of the name and contact details of any non-Crown party to a specified proceeding as soon as practicable after the court makes a special procedures order or otherwise becomes aware that the proceeding is a specified proceeding.	10
(2)	The designated agency must provide the party with a list of the names of lawyers from the special advocate panel who are reasonably available and could be appointed as a special advocate for the party in the proceeding.	
(3)	The party may, by the relevant date, nominate a lawyer from the list as the party's preferred choice of special advocate.	15
(4)	The relevant date is a date, determined by the court, that occurs before the hearing of the specified proceeding commences.	
	<i>Appointment</i>	
(5)	The court must appoint a special advocate from the special advocate panel.	
(6)	If the court considers that the lawyer whom the party has nominated from the list is suitable to be the party's special advocate, the court must appoint that lawyer.	20
(7)	The appointment of a special advocate is on the terms that the court directs.	
	<i>Section not applicable if unnecessary to avoid unfairly prejudicial effect</i>	
(8)	This section does not apply in relation to a non-Crown party if the court decides under section 10(2) not to appoint a special advocate to act on behalf of the party.	25
18	Reappointment of special advocate for related specified proceedings	
(1)	If a lawyer is appointed as a special advocate to act on behalf of a non-Crown party to a specified proceeding,—	30
	(a) the lawyer may be reappointed as the special advocate for the non-Crown party for the purposes of any later related specified proceeding; and	
	(b) if that lawyer is to be reappointed, the process for appointing a special advocate in section 17 does not apply in relation to the non-Crown party.	35
(2)	The reappointment of a special advocate is to be on the terms that the court directs.	

- (3) The court must not reappoint a lawyer who has been removed from the special advocate panel.
- (4) Nothing in this section limits the application of section 45 of the Legislation Act 2019.

Special advocate: role, powers, and functions 5

19 Role of special advocate

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.

20 Functions of special advocate related to role

- (1) Except as otherwise provided by **sections 21 and 22**, the special advocate has all of the functions that a lawyer of the specially represented party has. 10
- (2) The functions of the special advocate include—
 - (a) examining and cross-examining witnesses; and
 - (b) making oral and written submissions to the authorised court concerned; and 15
 - (c) preparing and making applications (including commencing related proceedings) on behalf of the specially represented party; and
 - (d) assisting in the settlement of the substantive proceeding to which the specified proceeding is connected.

Special advocate: access to and communications about security information 20

21 Duty to maintain confidentiality of security information

- (1) At all times a special advocate—
 - (a) must ensure that the confidentiality of the security information to which the special advocate has access under **section 12** remains protected; and 25
 - (b) must not disclose the security information to the specially represented party or that party's lawyer; and
 - (c) may disclose the security information to any person only in accordance with **section 22**.
- (2) *See* section 78AA of the Crimes Act 1961, under which it is an offence for a person to knowingly or recklessly, and with knowledge that the person is acting without proper authority, communicate any classified information (within the meaning of that section) to any other person. 30

- 22 Communication between special advocate and other persons about security information**
- (1) After the Crown gives a special advocate access to security information under **section 12**, the special advocate may communicate with a person about the security information only in accordance with this section. 5
- (2) The special advocate may communicate about the security information, without the need for any directions of the court, only with—
- (a) the court;
- (b) persons who are representatives of the Crown for the purposes of the specified proceeding and who hold an appropriate security clearance, including (if relevant) the Crown prosecutor. 10
- (3) The special advocate may communicate about any matter connected with the specified proceeding with any of the following persons (**relevant persons**) only in accordance with directions given by the court on application of the special advocate: 15
- (a) the specially represented party;
- (b) that party’s lawyer;
- (c) any other person not referred to in **subsection (2)**.
- (4) Before giving directions under **subsection (3)**, the court must give the Crown, the special advocate, and any other party the opportunity to make submissions in relation to the application, the proposed direction, and the proposed terms and conditions. 20
- (5) Directions under this section may be given on any terms and conditions that the court is satisfied are appropriate—
- (a) to maintain effective oversight by the court of communications relating to the security information between the special advocate and relevant persons; and 25
- (b) to allow efficient and effective communication between the special advocate and those persons to the extent possible without the special advocate disclosing the security information. 30
- (6) Examples of the directions the court may give include directions—
- (a) allowing communication with a relevant person in accordance with a communication plan that sets out how communication on different matters may be dealt with; or
- (b) allowing unlimited communication with a relevant person about certain matters but not others; or 35
- (c) requiring the special advocate to submit, for the approval of the court, all proposed communications with a relevant person in writing before the communications are forwarded to the person (with or without amendment by the court). 40

*Special advocate: liability and costs***23 Protection of special advocates from liability**

- (1) A special advocate is not guilty of misconduct or unsatisfactory conduct for any act done or omitted by the special advocate in accordance with this Act.
- (2) This Act applies despite the requirements of any practice rules made under the Lawyers and Conveyancers Act 2006. 5
- (3) A special advocate is immune from liability for any act done or omitted, in good faith, when performing a function of the special advocate under this Act, or when intending to perform such a function.

24 Costs of special advocate 10

- (1) The designated agency must meet out of money appropriated by Parliament for the purpose the actual and reasonable costs of the special advocate on a basis—
- (a) agreed between the special advocate and the designated agency; or
- (b) determined by the authorised court (if there is no agreement between the special advocate and the designated agency). 15
- (2) However, the court may, if satisfied that the circumstances of the case warrant it, include part or all of the costs of the special advocate in an award of costs against any party.

*Special advisers***25 Person appointed as special adviser** 20

- (1) The court may only appoint as a special adviser under **section 15** a person who holds an appropriate security clearance.
- (2) The court may terminate the appointment if satisfied that the special adviser has become unable or unsuitable to carry out the role (for example, because of incapacity, misconduct, or bankruptcy). 25

26 Duty to maintain confidentiality of security information

- (1) At all times a special adviser must ensure that the confidentiality of the security information to which the special adviser has access under **section 12** remains protected.
- (2) *See* section 78AA of the Crimes Act 1961, under which it is an offence for a person to knowingly or recklessly, and with knowledge that the person is acting without proper authority, communicate any classified information (within the meaning of that section) to any other person. 30

27 Costs of special adviser

The designated agency must meet out of money appropriated by Parliament for the purpose the actual and reasonable costs of a special adviser on a basis— 35

- (a) agreed between the special adviser and the designated agency; or
- (b) determined by the authorised court (if there is no agreement between the special adviser and the designated agency).

Agreed general practices and procedures

- 28 Agreed general practices and procedures** 5
- (1) The Chief Justice and the Attorney-General may, as soon as practicable after the commencement of this section, agree on any general practices and procedures that may be necessary—
- (a) to implement the special procedures; and
 - (b) to ensure that security information is protected at all times. 10
- (2) The Chief Justice and the Attorney-General may revise the general practices and procedures from time to time.
- (3) The general practices and procedures include practices and procedures relating to any of the following:
- (a) physical and electronic protection of the information during specified proceedings: 15
 - (b) how the information may be provided to an authorised court:
 - (c) preservation of the integrity of the information until any appeals are withdrawn or finally determined:
 - (d) how the information must be dealt with following the withdrawal or final determination of the proceedings or appeal. 20

Compare: 1992 No 92 s 29AC; 2002 No 34 s 40; 2005 No 82 s 125; 2013 No 91 s 113

Part 3

Security information in civil proceedings

Application, overview of Part, and definitions 25

29 Application of Part

This Part applies in relation to the following civil proceedings:

- (a) a civil proceeding described in one of the following, in which the Crown proposes to present classified security information:
 - (i) **section 113(1)** of the Overseas Investment Act 2005: 30
 - (ii) section 29AA(1) of the Passports Act 1992:
 - (iii) **section 101(1)** of the Telecommunications (Interception Capability and Security) Act 2013:
 - (iv) **section 38(1)** of the Terrorism Suppression Act 2002:

- (b) any civil proceeding in which NSI is or may be at issue in the proceeding.

30 Overview of SI application process

- (1) This Part sets out the process by which the Crown may apply for orders to protect the confidentiality of security information in or in connection with a civil proceeding. 5
- (2) When the Crown makes an application, the standard process involves the authorised court considering whether the information to which the application relates is security information and, if appropriate, making security information orders to protect the confidentiality of the information. 10
- (3) This Part also includes the following features:
- (a) the Crown, when making an application, may submit an NSI certificate identifying the information as NSI. The certificate has the effect of satisfying the court that the information to which the application relates is security information and limiting the types of security information orders that are available for the court to make: 15
- (b) for civil proceedings described in **section 29(a)** (that is, proceedings under certain Acts in which the Crown proposes to present classified security information), the Crown, when making an application, must submit the relevant CSI certification. This certification has the effect of satisfying the court that the information to which the application relates is security information, but the types of security information order available to the court are not limited (unless the Crown also submits an NSI certificate in respect of the information). 20
- (4) A general overview of the process for the SI application and decision is set out in the diagram in **Schedule 2**. The diagram is intended as a guide only. 25
- (5) *See* **section 8(3)(a)**, under which the hearing of an SI application is a specified proceeding, and **section 8(2)**, which sets out the special procedures that apply to specified proceedings.
- (6) This section is for explanation only. 30

31 Security information orders: definitions

What security information orders are

- (1) A **security information order** is an order of an authorised court that is one of the following:
- (a) an exclusion order: 35
- (b) a special procedures order made under **section 9**:
- (c) a protective order.

Nature of exclusion orders and protective orders

- (2) An **exclusion order** is an order that security information must not be disclosed, or is not required (by any order or direction of the court, or rule of court) to be disclosed, in or in connection with a civil proceeding.
- (3) A **protective order**— 5
- (a) is an order that may be made under other legislation or rules of court to protect the confidentiality of security information by limiting the disclosure of that information, in or in connection with the civil proceeding to which the SI application relates (but does not include an exclusion order or special procedures order); and 10
- (b) includes the following:
- (i) an order requiring the Crown to give to parties and their representatives (or their representatives only), or to enable them to view,—
- (A) a copy of a document that contains the security information and that has been redacted to the extent necessary to prevent the disclosure of that information; or 15
- (B) a copy of a document that summarises the whole or part of the security information and that does not disclose the security information itself; or
- (C) a copy of a statement of the facts that the whole or part of the security information would (or would be likely to) establish that does not disclose the security information itself: 20
- (ii) a suppression order forbidding publication of the security information: 25
- (iii) an order that, while security information is being considered in the substantive proceeding, all persons (except for the parties to the proceeding and any other specified persons or class of persons) must be excluded from the hearing.

Making of SI application 30**32 Making of SI application**

- (1) In a civil proceeding to which this Part applies, the Crown may make an application (an **SI application**) to an authorised court for 1 or more security information orders to protect the confidentiality of particular information to which the application relates in or in connection with a civil proceeding. 35
- (2) The Crown may make an SI application even if the Crown is not a party to the civil proceeding and, in that case, the court must treat the Crown as a party for the purposes of the application.
- (3) The Crown may make a single SI application that—

- (a) relates to more than 1 item or type of information; and
 - (b) seeks different orders for different items or types of information.
- (4) This section is subject to **sections 33 and 34**.

33 SI application made in substantive proceeding

The Crown may make an SI application in the course of a substantive proceeding that is being heard in the High Court or Employment Court. 5

34 SI application to Court of Appeal or Supreme Court

- (1) The Crown may make an SI application in an appeal being heard by a specified appeal court only if a party to the appeal has sought leave of that court to have the information to which the application relates admitted as further evidence. 10
- (2) In this section, **specified appeal court** means the Court of Appeal or the Supreme Court.

Consideration of SI application

35 Dismissal of SI application if order not necessary

- (1) The authorised court may dismiss an SI application on the ground that a security information order is not necessary without deciding whether it is satisfied that the information to which the application relates is security information (for example, because the information is inadmissible in the civil proceeding to which the application relates under any other legislation or rule of law). 15
- (2) In the case of a single SI application relating to more than 1 item or type of information, the authorised court may dismiss the application in respect of all of the information or different items or types of information. 20

36 Power to make security information order

- (1) This section applies if an authorised court does not dismiss under **section 35** or **37** an SI application in respect of particular information. 25
- (2) The authorised court must make 1 or more security information orders to protect the confidentiality of the information in the substantive proceedings to which the SI application relates if—
- (a) the Crown has submitted—
 - (i) the relevant CSI certification under **section 40** in respect of the information; or 30
 - (ii) an NSI certificate issued under **section 41** in respect of the information; or
 - (iii) both the certification referred to in **paragraph (a)** and the certificate referred to in **paragraph (b)**; or 35
 - (b) the court, in any other case, is satisfied that the information to which the SI application relates is national security information.

- (3) If the Crown submits an NSI certificate, the only security information orders the court may make under **subsection (2)** are—
- (a) an exclusion order; or
 - (b) a special procedures order (together with any 1 or more of the types of protective order set out in **section 31(3)(b)(i)** that the court considers necessary). 5
- (4) This section is subject to **section 39**.
- (5) Nothing in this section limits the power of an authorised court to make an order ancillary to an order made under this section.
- 37 Dismissal of SI application if information is not security information** 10
- (1) The authorised court must dismiss the application if—
- (a) the Crown has not complied with **section 36(2)(a)**; and
 - (b) the court is not satisfied that the information to which the SI application relates is national security information.
- (2) In the case of a single SI application relating to more than 1 item or type of information, the authorised court may dismiss the application in respect of all of the information or different items or types of information. 15
- 38 Matters for consideration when determining type of security information order**
- The authorised court must consider the following matters in determining which type of security information order or orders to make: 20
- (a) whether the proceeding could be fairly determined if an order of a particular type were made:
 - (b) the type or types of order required to adequately protect the national security interests that would be likely to be prejudiced if that type or those types of order were not in place in respect of the security information: 25
 - (c) 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. 30
- 39 Court need not make security information order if substantive proceeding cannot be fairly determined**
- Despite **section 36(2)**, 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— 35
- (a) dismiss the application; and

- (b) make 1 or more of the following orders in relation to the substantive proceeding 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: 5
 - (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.

Certification supporting SI application relating to classified security information 10

40 Requirement to submit certification supporting SI application relating to classified security information

- (1) This section applies if an SI application is made in or in connection with a civil proceeding described in **section 29(a)**. 15
- (2) When making the SI application, the Crown must submit to the authorised court the relevant CSI certification in respect of the information to which the SI application relates.
- (3) The Crown may also submit to the authorised court an NSI certificate in respect of the same information. 20

Certificate supporting SI application relating to NSI

41 Power to issue NSI certificate

The Attorney-General and the Minister of Foreign Affairs may jointly issue a certificate (an **NSI certificate**) in respect of the information to which an SI application relates, certifying that information identified in the certificate is NSI. 25

42 Submission of certificate

- (1) An NSI certificate must be submitted together with the SI application that it supports.
- (2) However, if the Crown amends the SI application by extending it to an item or a type of information not covered by the original application,— 30
 - (a) the authorised court may grant the Crown leave to submit to the court an NSI certificate relating to that item or type of information; and
 - (b) if the court grants that leave, the NSI certificate has effect for the purposes of the amended application. 35

- 43 Application of sections 9A and 9C of Constitution Act 1986**
 Despite sections 9A and 9C of the Constitution Act 1986, the Solicitor-General may not—
- (a) exercise the Attorney-General’s power under **section 39** to certify that information is NSI; or 5
 - (b) delegate that power to a Deputy Solicitor-General.
- Withdrawal of SI application*
- 44 Withdrawal of SI application**
 The Crown may withdraw an SI application at any time before it is determined.
- Further matters: role of Attorney-General and removal to High Court* 10
- 45 Notice by non-Crown party to Attorney-General of possible disclosure of security information**
 A party to a civil proceeding who believes that security information may be disclosed in or in connection with the proceeding must, without delay, give written notice of the matter to the Attorney-General (unless the Crown is a party to the proceeding). 15
- 46 Removal of proceeding not commenced in High Court**
- (1) If the Attorney-General gives written notice to the District Court that the Crown intends to make an SI application in connection with a civil proceeding before the court, the District Court must, without delay, order that the proceeding be removed to the High Court for determination. 20
 - (2) If the High Court is satisfied that a proceeding removed to it under this section does not, or will no longer, involve security information, it may order that the proceeding be removed back to the District Court.
 - (3) Without limiting **subsection (2)**, the High Court may order that the proceeding be removed back to the District Court if the Crown does not make an SI application in connection with the proceeding within the relevant period. 25
 - (4) The **relevant period** is the period of 20 working days (or any further period that the High Court may allow) after the date on which the Attorney-General gives written notice to the District Court under this section. 30
 - (5) The High Court may impose any conditions that it thinks fit on any order it makes under this section for the removal of proceedings back to the District Court.
 - (6) This section applies to any other court or tribunal that is not an authorised court as if a reference in this section to the District Court were a reference to the other court or tribunal. 35

47 Right of Attorney-General to intervene

The Attorney-General may intervene in any civil proceeding in relation to matters concerning security information, without any requirement for a court to grant leave to that intervention, if—

- (a) the Attorney-General believes that security information may be disclosed in or in connection with the proceeding; and 5
- (b) the Crown is not a party to the proceeding.

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Schedule 1

Transitional, savings, and related provisions

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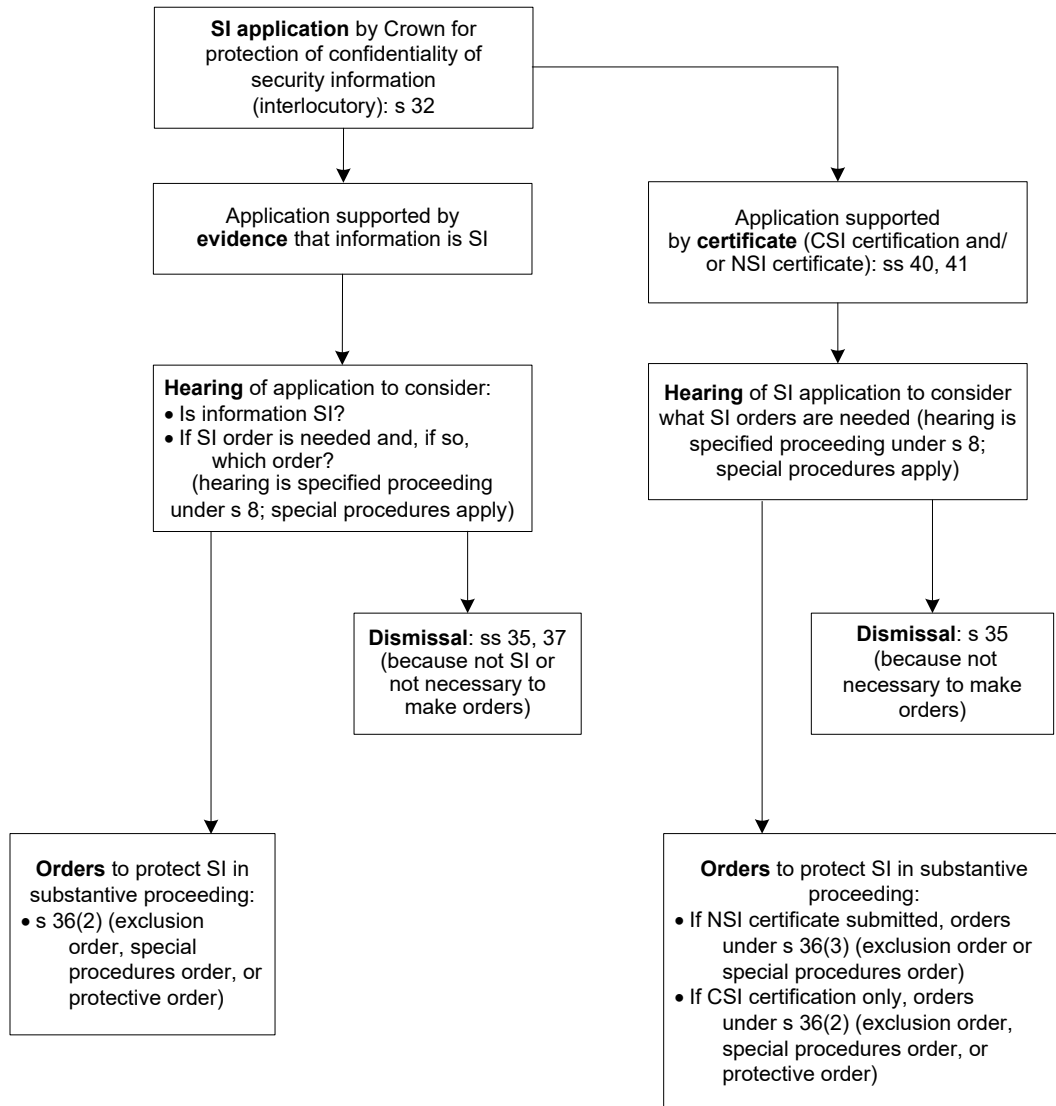
Part 1

Provisions relating to this Act as enacted 5

- 1 General practices and procedures relating to classified security information**
- (1) Any general practices and procedures that are in force, immediately before the commencement of **section 28**, under any of the following provisions are to continue in force, with any necessary modifications, as if the general practices and procedures had been agreed under that provision: 10
- (a) section 125 of the Overseas Investment Act 2005:
- (b) section 29AC of the Passports Act 1992:
- (c) section 113 of the Telecommunications (Interception Capability and Security) Act 2013: 15
- (d) section 40 of the Terrorism Suppression Act 2002.
- (2) The general practices and procedures referred to in **subclause (1)** may be revoked or replaced by general practices and procedures agreed to under **section 28**.
- 2 Proceedings affected by Act** 20
- (1) A provision of this Act applies to any proceeding commenced on or after the date of the commencement of that provision (the **commencement date**).
- (2) To avoid doubt, **subclause (1)** applies to proceedings that commence on or after the commencement date, but that relate to circumstances, applications, or decisions that occurred before, on, or after that date. 25
- (3) Proceedings commenced before the commencement date, and not finally determined before that date (including any rehearing, retrial, or appeal), continue as if the provision had not been enacted.

Schedule 2 Overview of SI application process

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Legislative history

15 November 2022

Divided from Security Information in Proceedings Legislation Bill (Bill 97–2) as Bill 97–3A

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