

BREANNA MORGAN

**CAN JUSTICE BE FOUND IN SECRET? A CRITIQUE OF
THE PROPOSED USE OF CLOSED MATERIAL
PROCEEDINGS IN NEW ZEALAND**

Submitted for the LLB (Honours) Degree

Faculty of Law
Victoria University of Wellington

2016

Abstract

Closed material proceedings operating under the Justice and Security Act 2013 (UK) exclude non-Government parties, their counsel and the public in proceedings to protect the secrecy of national security material. The excluded party is represented in proceedings by a special advocate. The New Zealand Law Commission recommended the general adoption of closed material proceedings after concluding that current procedures which protect sensitive information in New Zealand are unsatisfactory.

This paper reflects on the existing mechanisms available to protect sensitive information and argues closed material proceedings cannot fairly balance national security with the principles of open and natural justice, in achieving a fair outcome for both parties. The irreducible minimum standards of procedural justice must still be respected in national security cases. The common law doctrine of public interest immunity has the potential for being a sophisticated tool to dealing with sensitive information in national security cases.

Key words

Closed material proceedings, national security, open justice, natural justice, public interest immunity

Contents

<i>I</i>	<i>INTRODUCTION</i>	4
<i>II</i>	<i>NEW ZEALAND’S EXISTING APPROACHES</i>	6
<i>A</i>	<i>Public Interest Immunity</i>	6
<i>B</i>	<i>Statutory Closed Proceedings in New Zealand</i>	11
<i>III</i>	<i>FORM OF CLOSED MATERIAL PROCEDURES</i>	14
<i>A</i>	<i>Closed Proceedings Under the Justice and Security Act 2013 (UK)</i>	14
<i>B</i>	<i>New Zealand Law Commission Proposals</i>	14
<i>IV</i>	<i>THE TWIN IMPERATIVES OF THE STATE – JUSTICE AND SECURITY</i>	16
<i>A</i>	<i>National Security</i>	16
<i>1</i>	<i>Closed material proceedings for security reasons</i>	18
<i>2</i>	<i>Closed material proceedings for justice reasons</i>	21
<i>B</i>	<i>Rule of Law</i>	22
<i>C</i>	<i>Open Justice</i>	24
<i>D</i>	<i>Natural Justice through Procedural Fairness and Fair Trial Rights</i>	26
<i>1</i>	<i>Restrictions on natural justice</i>	27
<i>2</i>	<i>Counterbalancing justice through special advocates</i>	29
<i>3</i>	<i>Justifying limitations on natural justice</i>	29
<i>E</i>	<i>Towards Finding a Compromise Between Justice and Security</i>	31
<i>V</i>	<i>CONCLUSION</i>	32
<i>VI</i>	<i>BIBLIOGRAPHY</i>	34

I Introduction

Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.¹

The balancing of two conflicting fundamental rights, justice and security, is not something to consider lightly. How courts should facilitate the inclusion of sensitive materials in civil trials in a free, open and democratic society is a centuries-old debate.² Civil proceedings involving the Crown and evidence sensitive on national security grounds currently proceed under public interest immunity in New Zealand. The laws governing these processes are conflicting and outdated. The Law Commission, upon assessing and recommending a new Crown Civil Proceedings Act, also recommended the general provision of closed material proceedings to hear any civil case involving national security information.³ This recommendation draws heavily from the United Kingdom under the Justice and Security Act 2013.⁴

Closed material proceedings permit the inclusion of sensitive information whilst sustaining its secrecy through two distinct elements. The closure of the hearing to the public and media raises the less controversial, but nonetheless valid, issue of the right to open justice. More seriously, the exclusion of the non-Crown party and their chosen counsel conflicts with procedural fairness. Special advocates representing the excluded party's interest are appointed to counterbalance unfairness, although the communication restrictions diminish the quality of this representation. Information summaries can be provided to compensate for exclusion.

¹ *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 (PC) at 335.

² Hon Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February, 2016) at [1.4]. The Government accepted the majority of review in August 2016, upon the introduction of the New Zealand Intelligence and Security Bill 2016.

³ Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, December 2015) at 151. As at 1 September 2016, the Government has not responded to National Security Information in Proceedings – Part B of the Report. Response to Part A was released June 2016.

⁴ Justice and Security Act 2013 (UK).

The United Kingdom's use of closed material proceedings is the latest legislative response to dealing with sensitive information in civil proceedings and has been heavily criticised due to the elimination of fair trial rights.⁵ Whilst Canada and Australia have developed their own approach to this problem, this paper will focus on the English approach acknowledged by the Law Commission.⁶

Until the Justice and Security Act 2013 (UK), the English courts held against invoking closed proceedings under their inherent jurisdiction, upholding justice for non-Crown parties. The English Supreme Court cases that form the background to the establishment of the Justice and Security Act involved the Government's alleged misuse of state power and complicity in the detention of suspected terrorists. Civil claims brought against the Government turned on evidence of a classified nature, which the non-Crown party sought disclosure. The British Government claimed public interest immunity was an inadequate means of protection. They sought the use of closed material proceedings in order to avoid the consequences of court-ordered disclosure, such as breaching intelligence sharing agreements and the revelation of illegal activities or abuses of power.⁷ The British Government claimed they would otherwise be required to resort to multimillion-dollar financial settlement with claimants to sustain protection.⁸

The Supreme Court treated the extension to closed material proceedings with hesitation. Their rationale was simple: closed material proceedings were inherently unfair and the imposition on individual rights is so fundamental, that only a democratic decision with clear legislative intent can satisfactorily remedy the conflict.⁹ In support of the judges, a court ruled in 1720 "the opportunity of confronting the witnesses and examining them publicly ... has always been found the most effectual method for discovering of the

⁵ Justice and Security Act 2013 (UK), s 6.

⁶ Law Commission *National Security Information in Proceedings* (NZLC IP38, May 2015); Law Commission, above n 3.

⁷ *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Mohamed No 2)* [2010] EWCA Civ 65; *Al Rawi v Security Service* [2011] UKSC 34.

⁸ *Mohamed No 2*, above n 7.

⁹ *Al Rawi v Security Service*, above n 7, at [147].

truth”.¹⁰ Despite the Courts’ negative decisions, legislation was enacted in 2013. Upon this background, the Law Commission recommends closed material proceedings.¹¹

The geographic isolation of New Zealand no longer prevents national security threats due to globalisation, thus closed material proceedings are highly relevant.¹² New Zealand courts are relatively less experienced in dealing with national security than the English, so closed material proceedings needs close analysis against principles of justice.

This paper will assess whether using closed material proceedings can be justified in New Zealand in national security civil cases. Part II investigates how existing procedures can meet the contemporary demands of national security in comparison to the proposals. This is followed by a comparison between English closed material proceedings and the New Zealand proposals in Part III. Part IV breaks down the operation of closed material proceedings under the principles of national security, open justice and natural justice to analyse how to best strike the correct balance between justice and security. The analysis draws on the experience and criticisms of the English system and discusses the considerations Parliament should address before adoption and the potential consequences for New Zealand courts.

II New Zealand’s Existing Approaches

New procedural processes emerge as exceptional circumstances demand. Sensitive information is dealt with differently across legal topics in New Zealand. In this Part, how public interest immunity doctrine and existing closed proceedings provisions create fairness will be analysed.

A Public Interest Immunity

Public interest immunity is the orthodox common law doctrine for protecting information from disclosure in civil proceedings in New Zealand. The Crown Proceedings Act 1950

¹⁰ *Duke of Dorset v Girdler* (1720) Prec Ch 531, 24 ER 238.

¹¹ Law Commission, above n 3.

¹² Hon Sir Michael Cullen and Dame Patsy Reddy, above n 2, at [1.19].

allows the Prime Minister to certify that information is prejudicial to national security and therefore is justifiably excluded from proceedings.¹³

Traditionally, the court treated the executive decision decisively.¹⁴ *Conway v Rimmer* overturned this deference and deemed the court's function was to inspect the documents and balance the competing interests to ensure the proper administration of justice.¹⁵ Lord Reid suggested:¹⁶

There are many cases where the nature of the injury which would or might be done to the nation or the public service is so grave a character no other interest, public or private, can be allowed to prevail over it.

The English courts have demonstrated an increasing willingness to enter into questions of procedural justice and substantive consideration of national security information.

Choudry v Attorney-General is the most recent New Zealand authority for public interest immunity. The case confirmed “it is the court's task to balance the public interest in maintaining the confidentiality of information against the public interest in the effective administration of justice”,¹⁷ and while the court can look behind a certificate, “the power to inspect will not be exercised unless there are reasons to doubt the accuracy of the certificate or the cogency of the Minister's reasons”.¹⁸

Two themes are represented by *Choudry* on how New Zealand courts might approach national security. Firstly, the deference shown reflects the courts' understanding that Ministers are better placed to evaluate the needs of national security and what real harm could occur as a result of disclosure.¹⁹ Secondly the movement towards transparency and

¹³ Crown Proceedings Act 1950, s 27(3); Evidence Act 2006 (NZ) ss 70, 52(4).

¹⁴ *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 (UKHL) at 642 per Viscount Simon LC.

¹⁵ *Conway v Rimmer* [1968] AC 910 (UKHL) at 951.

¹⁶ At 940.

¹⁷ At 593.

¹⁸ *Environmental Defence Society Inc v South Pacific Aluminum Ltd (No 2)* [1981] 1 NZLR 747 (CA) at 156 as cited in *Choudry v Attorney-General*, above n 26, at 593.

¹⁹ *Choudry v Attorney-General*, above n 26, at 594.

open government reflects the “evolving public interest”,²⁰ and the public expectation that public interest immunity claims will have “proper judicial scrutiny”.²¹ In Richardson J's words:²²

The court cannot be beguiled by the mantra of national security into advocating its role in the balancing exercise ... [the court must have] a clear picture as to where along the spectrum of national security concerns the various documents fall.

The assertion of blanket public interest immunity claims over classes of documents was rejected by the Scott Inquiry into the English arms exporting to Iraq undertaken in 1996.²³ The Inquiry exposed the Government's abuse of power and concluded blanket suppression was susceptible to abuse. This principle was affirmed in *Zaoui v Attorney-General* where the Supreme Court confirmed, following *Choudry*, courts “no longer apply blanket rules but make assessments in the particular case”.²⁴ The Supreme Court asserted that New Zealand courts are “increasingly familiar” with issues of security sensitive information.²⁵

The absence of case law for 17 years on public interest immunity in New Zealand arguably has left the law in an unclear and outdated position in comparison to the wealth of recent English litigation.²⁶ In order to have an efficient, contemporary response to classified security information, the public interest immunity balancing exercise needs to be updated and clarified. In addition to the Minister's security certificate,²⁷ s 70 of the Evidence Act 2006 allows the judge to undertake a balancing exercise where the public interest in disclosure is outweighed by the public interest in withholding the information which adds to the ambiguity.²⁸ It is unclear whether the certificate issued under s 27(3) is still subject

²⁰ *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA) at 296 per Woodhouse P as cited in *Choudry v Attorney-General*, above n 17, at 594.

²¹ *Choudry v Attorney-General*, above n 17, at 594.

²² At 594.

²³ Sir Richard Scott *Report of the inquiry into the export of defence equipment and dual-use goods to Iraq and related prosecutions* (HC 115, 1996).

²⁴ *Zaoui v Attorney-General* [2005] 1 NZLR 557 (SC) at [65].

²⁵ At [65] and [63].

²⁶ *Choudry v Attorney-General* [1999] 3 NZLR 399 (CA).

²⁷ Crown Proceedings Act 1950, s 27(3).

²⁸ Evidence Act 2006, s 70.

to the courts balancing assessment under s 70 or whether s 27(3) acts as a prima facie executive veto the court can reject. The Law Commission suggested the courts would follow the Evidence Act approach which reflects recent English court decisions.²⁹

The doctrine of public interest immunity has resolve sensitivity issues for decades. Lord Pannick, in the Second Reading on the Justice and Security Bill reasoned “because the task of the judge is to balance competing interests, the judge vitally considers whether there are means of preserving confidentiality other than excluding the material from disclosure”.³⁰ This paper argues this point should be taken further. The public interest immunity device can respond flexibly as circumstances demand them and has the potential of being developed into a modern, sophisticated tool for dealing with national security interests if it is designed in a way to emphasis its multifaceted ability. The judge’s ultimate decision is for or against disclosure. In doing so, the court could address fairness through other devices such as requiring disclosure subject to redaction of witnesses, operational matters or some other qualification. Disclosure may only be restricted to legal representatives or according to some other confidentiality ring mechanism.

The limitations of public interest immunity established by the Justice and Security Green Paper and Law Commission can be summarised into two arguments.³¹ Firstly, where the court demands disclosure of documents, the Government must decide between facing the argued injury caused by disclosure or withdrawing and settling the case. Million-dollar settlements occurred in a series of English cases concerning allegations of the Government’s complicity in human right breaches of persons detained under national security concerns. In the most prominent case, Mohamed alleged the United Kingdom security services were complicit in his detention and torture at Guantanamo Bay.³² The Court of Appeal ruled that Government intelligence must be disclosed. To avoid revelation, the Government offered a £1 million settlement.³³ This case concerned further issues

²⁹ Law Commission, above n 3, at [5.6] – [5.11].

³⁰ (19 June 2012) 737 GBPD HL 1694.

³¹ “Justice and Security Green Paper” (Cm 8194 October 2011) (UK); Law Commission, above n 3.

³² *Mohamed No 2*, above n 7.

³³ *Mohamed No 2*, above n 7.

involving international intelligence sharing and the *Norwich Pharmacal* jurisdiction which are beyond the scope of this paper. Nonetheless it affirms under public interest immunity, where the court concludes the material does not satisfy a security risk, the Crown could still resort to settlement to protect themselves from judicial scrutiny. In this situation, settlement is not a limitation of public interest immunity rather an opportunity for the Government to take where the Court, empowered by clear balancing guidelines, determines an insufficient risk exists.

Secondly, it is argued if too much information is withdrawn in a case relying on sensitive information, the case could become unworkable and be struck-out.³⁴ This is a problem facing any legal privilege. The fallacy of this proposed disadvantage is the likelihood of this occurring is exceptional.³⁵ The single occurrence in *Carnduff v Rock* was so extraordinary,³⁶ it cannot be a “compelling justification”.³⁷ More decisively, there has been no New Zealand public interest immunity case since 1999, much less one at risk of strike-out.³⁸ The *Al Rawi* proceedings concerned enormous amounts of sensitive material. The claimants argued that as a conventional public interest immunity exercise would take three years to complete, this supports using closed proceedings.³⁹ However the justiciability of a case cannot be determined without undertaking a public interest immunity exercise.⁴⁰ This paper supports the view that a closed material proceeding would not be any less procedurally challenging and burdensome to all parties.⁴¹

³⁴ “Justice and Security Green Paper”, above n 31, at [1.33].

³⁵ JUSTICE *Justice and Security Green Paper (Cm 8194): Consultation Response* January 2012 at 20; Liberty *Liberty’s response to the Ministry of Justice’s Green Paper – Justice and Security* January 2012 at [15]; *Justice and Security Green Paper: Response to Consultation from Special Advocates* at [2(8)].

³⁶ *Carnduff v Rock* [2001] EWCA Civ 680.

³⁷ *Al Rawi v Security Service*, above n 7, at [50] per Lord Dyson, at [108] per Lord Mance.

³⁸ *Choudry v Attorney-General*, above n 26.

³⁹ *Al Rawi v Security Service*, above n 7, at [5].

⁴⁰ House of Lords House of Commons Joint Committee on Human Rights *The Justice and Security Green Paper*, Twenty-fourth Report of Session 2010-2012, HL Paper 286, HC 1777 (4 April 2012) at [111].

⁴¹ Justice and Security Green Paper: Response to Consultation from Special Advocates’ (United Kingdom, 16 December 2011) at [37].

B Statutory Closed Proceedings in New Zealand

New procedures to remedy conflicts of interests must be legislated for by Parliament where there is a compelling case to do so.⁴² There are several statutory closed proceedings available in New Zealand.⁴³ The obvious justifications are proceedings involving children. These proceedings focus on the protection of a child, and thus in some instances, disclosure of particular evidence would be so detrimental to their welfare, it would defeat the overall purpose.⁴⁴ A child's interest will take priority in these proceedings to achieve justice.⁴⁵ Closed proceedings are also often justified to protect a party's private interest in commercial secrets or other intellectual property. These two examples by no means support the use of closed material proceedings generally.

Statutory closed proceedings are used, more controversially, in appeals of certain administrative decisions involving national security material.⁴⁶ These innovative procedures remain unused, which restricts the ability to critique their practical effect and suggests despite predominantly being amended as a response to the *Zaoui* appeals, there is no demand for them.⁴⁷

The statutory closed procedures are similar to the closed material proceedings proposals outlined in Part III, as they anticipate the exclusion of the affected party, their lawyers and

⁴² *Al Rawi v Security Service*, above n 7, at [48].

⁴³ Statutory closed proceedings will refer to existing New Zealand procedures and closed material proceedings will refer to the Law Commission's proposals.

⁴⁴ See *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440 at [58].

⁴⁵ Care of Children Act 2004, s 4(1); the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration.

⁴⁶ Statutory Closed Proceedings are available under the Passports Act 1992, the Terrorism Suppression Act 2002, the Immigration Act 2009, the Telecommunications (Interception Capability and Security) Act 2013 and Customs and Excise Act 1996. Also see Law Commission, above n 6, at [4.1] – [4.86].

⁴⁷ Law Commission, above n 6, at [4.29]; Honourable Justice Susan Glazebrook "From *Zaoui* to Today: a Review of Recent Developments in New Zealand's Refugee and Protected Persons Law" (23 March 2013) Courts of New Zealand <<https://www.courtsofnz.govt.nz>> at 4.

the public.⁴⁸ They both rely on the same national security definition,⁴⁹ although the court's assessment to invoke closed material proceedings is significantly more extensive under the proposals. The use of special advocates and provision of information summaries as a means to counterbalance unfairness under statutory closed procedures differs between the Acts.

Material defined as *classified security information* can be subject to a closed proceeding.⁵⁰ Information meets this definition where it is of a particular nature, where it may: reveal sources, past, current or future operational matters, or it is foreign-sourced and disclosure is not permitted,⁵¹ and meets the necessary risk if disclosed threshold under s 6 of the Official Information Act.⁵²

The Ministry the information is sourced from, is empowered to certify whether information meets the national security definition under all of the Acts.⁵³ Only the Immigration Act allows the court to inspect if the certification is appropriate. This restricts the court's powers to regulate their proceedings.⁵⁴ The court decides the relevancy of all information under these provisions. The proposed closed material proceedings provide superior protections by leaving the final decision to the court. The executive classification system arguably represents the fact tribunals, often with less expertise, are adjudicators of such reviews.⁵⁵

⁴⁸ Passports Act 1992, s 29AB(i); Terrorism Suppression Act 2002, s 38(3)(b); Telecommunications (Interception Capability and Security) Act 2013, ss 111(2)(b), 104(1)(c); Immigration Act 2009, ss 242 – 244, 252 – 256; Customs and Excise Act 1996, s 38M.

⁴⁹ Official Information Act 1982, s 6.

⁵⁰ Passports Act 1992, s 29AA; Terrorism Suppression Act 2002, s 32; Telecommunications (Interception Capability and Security) Act 2013, s 102; Immigration Act 2009, s 7 refers to “classified information”; Customs and Excise Act 1996 does not classify information by a specific term.

⁵¹ See Immigration Act 2009, s 7(1) – (3).

⁵² The standard excludes Official Information Act 1992, s 6(e)(i) – (vi) “the likelihood of seriously damaging the economy of New Zealand”.

⁵³ Passports Act 1992, s 29AA; Terrorism Suppression Act 2002, s 32; Telecommunications (Interception Capability and Security) Act 2013, s 102; Immigration Act 2009, ss 243, 254; Customs and Excise Act 1996, does not specify.

⁵⁴ Passports Act 1992, s 29AA; Terrorism Suppression Act 2002, s 32; Telecommunications (Interception Capability and Security) Act 2013, s 102; Immigration Act 2009, ss 243, 245; Customs and Excise Act 1996 does not specify.

⁵⁵ Immigration Act 2009.

Special advocates are appointed in all Immigration Act cases,⁵⁶ as well as the availability of special advocates to assist or advise the court.⁵⁷ They are only appointed under the Telecommunications (Interception Capability and Security) Act where the court is satisfied it is necessary to appoint special advocates to ensure the affected party can properly prepare and commence proceedings or a fair trial will occur.⁵⁸ Special advocates are not provided for in the other legislation.⁵⁹ They provide an essential safety mechanism and thus their omission is unclear. Where provided for, the communication between the special advocate and non-Crown party is controlled by the court.⁶⁰ Providing a summary of unreleased information is the other safety mechanism available under statutory closed proceedings. The Attorney-General produces a summary, but the court must approve the summary before it is given to the other party.⁶¹ Statutory closed proceedings have flaws when compared to closed material proceedings. Without special advocates being mandatory, fairness is not counterbalanced in a system that already departs from justice.

Whilst these statutory proceedings still infringe on rights, administrative decisions are distinguishable to civil claims involving the Crown. Administrative decisions, for example immigration proceedings, involves national security information concerning the person of interest. Closed material proceedings to protect national security information held by the State in civil claims involve wrongs committed by the State such as human right breaches and trespass to the person. A cloak of secrecy is being placed over the executive's use, and potential misuse, of powers which infringe on an individuals' liberty and privacy.

⁵⁶ Section 265.

⁵⁷ Sections 269 and 270.

⁵⁸ Section 105(2).

⁵⁹ Passports Act 1992; Terrorism Suppression Act 2002; Customs and Excise Act 1996.

⁶⁰ Immigration Act 2009, s 267; Telecommunications (Interception Capability and Security) Act 2013, s 109(3).

⁶¹ Passports Act 1992, s 29AB(2); Terrorism Suppression Act 2002, s 38(4); Telecommunications (Interception Capability and Security) Act 2013, s 111 and the court *may* rather than *must* approve the summary; Immigration Act 2009, ss 242 and 256, the *Chief Executive of the agency that holds the information* must undertake this not the Attorney-General; Customs and Excise Act 1996, not provided for under the legislation.

III Form of Closed Material Procedures

The Law Commission recommended how closed material proceedings should operate in New Zealand, if they were to be adopted.⁶² The recommendations will be treated as decisive for this paper.

A Closed Proceedings under the Justice and Security Act 2013 (UK)

A court can declare, under s 6 the proceedings will be closed from an application by the Secretary of State, any party of the proceedings or of the court's own initiative.⁶³ A declaration requires the satisfaction of two conditions. Firstly, the party is required to disclose sensitive material in the proceedings, or, that party is required but for some exception such as public interest immunity.⁶⁴ The standard requires the information, if disclosed, be damaging to the interests of national security.⁶⁵

Secondly, it must be “in the interests of the fair and effective administration of justice in the proceedings to make a declaration”.⁶⁶ This condition is far broader than a standard where a fair determination could not be reached by any other means and closed proceedings are a last resort. Additionally, the special advocate's ability to communicate with the individual is highly regulated.

B Law Commission Proposals

The proposed operation of closed material proceedings is much narrower than the English requirements as it adds a relevancy consideration. The national security definition is equally as broad however.

National security protection issues are likely to arise in two circumstances: through standard discovery processes where the Crown identifies relevant, non-disclosable

⁶² Law Commission, above n 3, at [6.18] – [6.59].

⁶³ Justice and Security Act 2013 (UK), s 6(1) – (2).

⁶⁴ Section 6(4).

⁶⁵ Section 6(11); *sensitive information* material if disclosures would damage the interests of national security.

⁶⁶ Section 6(5).

information and where information is requested by the non-Crown party.⁶⁷ The case management hearing will determine how the national security information will be handled at trial. This step resembles the inclusion or exclusion determination of information under the public interest immunity doctrine. The Crown must present an arguable claim the information meets the definition of national security for a closed preliminary hearing to be held as part of the case management.⁶⁸ The courts have been exercising a greater inquisitional role and are moving away from executive deference in national security matters so they are unlikely to reject inquiring.

A two-part test at this preliminary closed stage will determine whether closed proceedings are used.⁶⁹ Firstly, the court must determine how relevant the information is to the substance of the trial.⁷⁰ This step encourages the exclusion of immaterial information to ensure the maximisation of openness.

Secondly, the court must consider whether the information falls within the definition of national security.⁷¹ The proposed definition of national security is reflective of s 6 of the Official Information Act 1982 and means information, if disclosed, is likely to prejudice a) the security or defence of New Zealand, 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 the government of any other country or any agency of such a government or any international organisation.

The scope is arguably too wide and lowers the threshold below a serious national security claim which would only invoke closed material proceedings as a last resort option. The standard should be raised to *serious prejudice*. The Law Society submission believed “the interests must truly be of a significant character” before they would justify limiting fundamental legal rights.⁷² Furthermore, a distinction must be drawn between real national

⁶⁷ New Zealand Law Commission, above n 3, at [6.26].

⁶⁸ At [6.27].

⁶⁹ At [6.31].

⁷⁰ At [6.31].

⁷¹ At [6.31].

⁷² New Zealand Law Society *National Security Information in Proceedings Submission to Law Commission* (7 July 2015) at 8.

security threats and broader notions of international relations or economic interests which cannot, in themselves, justify the grave deterioration of individual rights under closed proceedings.

Whilst determining which procedure to use the court must determine whether the security risk justifies non-disclosure when balanced against the interests of the non-Crown party in receiving this information.⁷³ The magnitude and nature of the potential prejudice should be explicitly included in the definition.⁷⁴ Only where the information cannot fairly be excluded from proceedings, will a closed procedure be imposed during the substantive hearing.

When these steps are satisfied, a substantive closed proceeding will be held without the public, media, the non-Crown party and their counsel. A security-cleared special advocate will represent the non-Crown party's interests. The process represents both proportionality and necessity tests, which is necessary to ensure it remains an absolute last resort means. It exemplifies a decision made by the court based on what justice demands, rather than efficiency.

IV The Twin Imperatives of the State – Justice and Security

Positioning the balance between the competing interests of security and justice requires close analysis of what each interest entails. The justifications for and against these procedures used in the Green Paper and response submissions in the United Kingdom debate will colour this discussion.⁷⁵

A National Security

Enemies of the state have always existed and states have sought to protect their citizens and nation from these threats. In today's modern society, the quality of evidence and procedures available to secure intelligence is greatly improved than in the past. These

⁷³ New Zealand Law Commission, above n 3, at [5.42].

⁷⁴ At [5.42].

⁷⁵ "Justice and Security Green Paper", above n 31.

abilities draw on a greater intrusion to individual's privacy and right to freedom from surveillance. Moreover, with these developments in intelligence and the advent of terrorism, the intensification of the intelligence role in protecting citizens has emphasised the public debate of balancing justice against security.

National security is a protection the state must provide value. This is recognised by the Universal Declaration of Human Rights which places security alongside the fundamental rights of life and liberty.⁷⁶ The guarantee of security must be protected in accordance with principles of freedom and fairness, not at their expense.⁷⁷ Cullen and Patsy support the view that security and privacy should be exercised as complementary rather than competing rights.⁷⁸ National security is a “prerequisite to a free, open and democratic society in which individuals can go about their activities without undue interference with their rights”,⁷⁹ however, those responsible for the protection of security cannot do so in a way that undermines those basic values.

The principles underpinning the function of the New Zealand Security Intelligence Service and the Government Communications Security Bureau, are to contribute to keeping New Zealand secure, independent, free and democratic, upholding national security and participating in the maintenance of international security.⁸⁰ To maintain security, it is necessary for the agencies to be able to protect classified information.

National security was formerly treated by the courts as non-justiciable.⁸¹ Security of the state is a matter for the executive because of the executive's policy knowledge, expertise and judgement. Where cases before courts involve both the question of executive action for national security and the potential breach of individual rights, the different roles of these bodies needs to be recognised. While the executive has the primary responsibility for issues

⁷⁶ United Nations General Assembly, Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948, art 3.

⁷⁷ “Justice and Security Green Paper”, above n 31, at [12].

⁷⁸ Cullen and Patsy, above n 2, at [1.5].

⁷⁹ At [1.5].

⁸⁰ New Zealand Security Intelligence Service Act 1969, s 4AAA; Government Communications Security Bureau Act 2003, s 7.

⁸¹ *Choudry v Attorney-General*, above n 26, at [12].

of national security, the judiciary is the ultimate arbiter for the protection of fundamental rights.

1 Closed material proceedings for security reasons

As the English legislation title suggests, the Justice and Security Green Paper argued closed material proceedings would achieve both greater justice and security.⁸² Under the security argument, the executive needs certainty regarding the disclosure of sensitive material. The risk of serious consequences, the executive argues would occur, would be decreased with greater protection.⁸³ Through legislating for closed material procedures, the executive would know when material will be disclosed and the available procedural options. The Law Commission Issue Paper raised the concern that the contents or even the mere existence of information can create a risk of security and without adequate mechanisms for protection, this can create security risks. In support of this, the Special Rapporteur on Human Rights and Counter Terrorism argued the exclusion of the public or other procedural adaptations could be acceptable if they are “accompanied by adequate mechanisms for observations or review”.⁸⁴

The security argument has been heavily criticised as simply providing the Government with greater amounts of protection over their wrongdoing while avoiding the ability for public scrutiny.⁸⁵ Behind closed court doors when no challenge can be given by counsel or the public there cannot be fair accountability and the court has limited scope to do so under the adversarial system. Rather it arguably offers an opportunity to use closed proceedings as a Government defence strategy with their need being exaggerated. The wide meaning of national security under legislation and extraordinary powers possessed by agencies conceivably contributes to the opportunity of abusing the security protection.⁸⁶ Ekins

⁸² “Justice and Security Green Paper”, above n 31.

⁸³ At 21.

⁸⁴ Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/63/223 (2008) at [30].

⁸⁵ Centre for Policy Studies *Neither Just nor Secure – The Justice and Security Bill* (United Kingdom, January, 2013) at 3; also see *Justice and Security Green Paper: Response to Consultation from Special Advocates*, above n 41; House of Lords House of Commons Joint Committee on Human Rights, above n 40;

⁸⁶ New Zealand Security Intelligence Service Act 1969, s 2; Interpretation of security extends to protection from activities relating to its economic wellbeing; Rebecca Kitteridge, Director of the New Zealand Security

argues the climate of terrorism-fear and enhanced provision of powers under terrorism laws taints the decision-making that is ensuring public safety.⁸⁷ Therefore with greater protections afforded to security agencies, greater accountability mechanisms, whether by the court or other independent body, are needed.

Determining how the court should act as a check on the executive clarifies how the court should deal with sensitive information. If the relationship is to exist through closed material proceedings, enhanced engagement and another layer of oversight of security processes should operate. Arguably, the role of the judiciary as an independent and impartial body can only be sustained if the court can analyse whether sensitive information meets the national security threshold. This paper argues although the executive holds the expertise in deciding what constitutes a threat, the court should retain a supervisory role to ensure the proper use of protection.

The role of the Office of the Inspector-General as an oversight mechanism of the New Zealand intelligence agencies is valuable. The Inspector-General has full access clearance and is empowered to have an investigatory role into impropriety on a confidential basis.⁸⁸ This power is much stronger than the court could reasonably possess. The independence of the Office is protected,⁸⁹ but a continuing challenge identified by Gwyn is its autonomous function rather than actually or being perceived as under the control of the Executive. Furthermore, Gwyn identified restrictions in their powers, including their focus on procedural processes, rather than undertaking a general assessment ability.⁹⁰ The relationship between the Office and executive justifies having an alternate oversight system exercised by the judiciary.

Intelligence Service “Spotlight on Security: NZSIS Director” (The New Zealand Centre for Public Law Public Lecture, Victoria University of Wellington's Faculty of Law, Wellington, 3 June 2016).

⁸⁷ Richard Ekins, *Modern Challenges to the Rule of Law* (LexisNexis NZ, Wellington, 2011) at 229.

⁸⁸ Cheryl Gwyn, Inspector-General of the New Zealand Intelligence Services “Spotlight on Security – Inspector-General of Intelligence Services” (The New Zealand Centre for Public Law Public Lecture, Victoria University of Wellington Law Faculty, 4 May 2016).

⁸⁹ Inspector-General of Intelligence and Security Act 1996, ss 5 – 8.

⁹⁰ Cheryl Gwyn, above n 88.

National security protection claims require different treatment depending on the magnitude of seriousness. Courts must give serious consideration to the claim of protection to ensure proper adherence to the privilege and the claim is treated accordingly. The New Zealand classification system officially has four classes: top secret, secret, confidential and restricted.⁹¹ The top secret classification is used where the compromise of information would damage national interest in an *exceptionally grave* manner, for example exceptional damage to the continuing effectiveness of valuably security operations or to the security of allies. Therefore, adapted procedures for top secret information cannot be treated the same as confidential information, which would only cause *some damage or adverse effects*. The difference in the weight of the public interest therefore makes a blanket claim for national security obstructive to fairness. The nature of the information within classifications should also afford different protection, for example, information concerning individuals and current operations is distinct from information protecting international relations.

A key problem is often the sensitive information held by a Government originates from a foreign government. The United Kingdom Government argues “any reduction in the quality and quantity of intelligence that overseas intelligence partners share with us would materially impede our intelligence community's ability ... in protecting the security interest of the United Kingdom”.⁹² Known as the control principle, intelligence is shared based on the confidence that disclosure will not be given without consent of the original source.⁹³ One particular concern presented by the Law Commission, supported by the United Kingdom, is the risk if information is improperly protected, intelligence allies will be reluctant to share.⁹⁴ New Zealand, who entered into several intelligence-sharing partnerships, is heavily dependent on intelligence sharing. The benefits of these agreements far outweigh the amount of information New Zealand provides because of the small capacity New Zealand intelligence agencies have in comparison to our partners. Disclosure could reveal wrongdoing by foreign nations, damaging international relations and the

⁹¹ Protective Security Requirements “New Zealand Government Classification System” (18 December 2014) <<https://protectivesecurity.govt.nz>>.

⁹² “Justice and Security Green Paper”, above n 31, at 9.

⁹³ At 9.

⁹⁴ Rebecca Kitteridge, above n 86; ‘Justice and Security Green Paper’, above n 31.

communication channels operating under agreements. It is a persuasive reason to ensure there are protections in place, however this alone cannot be a justifiable reason to adopt closed proceedings.

2 *Closed material proceedings for justice reasons*

The justification the Green Paper uses under a justice qualification, is it will increase the fairness of the proceedings, in favour of *both parties* by the court's full analysis of the facts, arguments and defences at hand, as well as increasing the judicial scrutiny of the intelligence agencies on material which would otherwise be excluded from proceedings.⁹⁵ This argument postulates a judgment based on full facts is preferable to a judgment on a proportion of the material.⁹⁶ Using the risk of strikeout to argue that having a flawed proceeding is better than no proceeding at all is unsustainable. Procedural fairness is the essence of achieving justice and there is no evidence of a real risk of strike-out.⁹⁷ Nevertheless the Centre for Policy Studies contends the consequences of strike-outs are preferable to allowing procedural fairness be subverted in all issues involving national security.⁹⁸

The secondary argument is it will be fairer to non-Government parties. They might need to rely on information held by the Government, which would be excluded under a public interest immunity.⁹⁹ This is an unreliable justification because it is implausible that non-Government party will demand information they do not know exists. The type of case exercising a closed material proceeding involves a claimant believing they have suffered an injustice by the state. This injustice will not be remedied where the Government retains a procedural advantage.

The freedom for the Government to choose whether it uses a public interest immunity claim or closed material proceedings claim represents an inherent unfairness in the system. The

⁹⁵ "Justice and Security Green Paper", above n 31, at 21.

⁹⁶ At 21.

⁹⁷ Bingham Centre for Rule of Law *Response to the Justice and Security Green Paper* at [22]; House of Lords House of Commons Joint Committee on Human Rights, above n 40, at [84].

⁹⁸ Centre for Policy Studies, above n 85, at 42.

⁹⁹ "Justice and Security Green Paper", above n 31, at 52.

Government could claim a public interest immunity where the material is damaging to their own case, but rely on closed proceedings to advance their own interests. Moreover, the inquiry by the Joint Committee of Human Rights concluded the Government had not demonstrated that its concern of being able to defend itself in certain cases was a real and practical problem or the provision of closed material proceedings in civil trials would enhance procedural fairness.¹⁰⁰ This paper agrees with this conclusion.

B Rule of Law

The rule of law is a foundational, constitution principle in New Zealand.¹⁰¹ Although its definition is vague and its meaning contested, its value is embodied in the principles of open and natural justice. Lord Bingham suggests that at its most basic, the rule of law means “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts”.¹⁰² Although the rule of law is subject to exceptions, any general departures require close consideration and clear justification.¹⁰³

The rule of law in the context of civil procedural standards recognises the status of the state as being equal to all subjects and provides a foundation upon which all fundamental rights and freedoms can be built upon. With any procedure that is used:¹⁰⁴

the paramount object must always be to do justice and if, in order to do justice, some adaptation of ordinary procedure is called for, it should be made, so long as the overall fairness of the trial is not compromised.

In the matters involving *Mohamed*, the rule of law was insensitively abused where the evidence by the court revealed complicity by the Government in his inhumane treatment.¹⁰⁵

¹⁰⁰ House of Lords House of Commons Joint Committee of Human Rights “Legislative scrutiny: Justice and Security Bill” (13 November 2012) HL 59, HC 370 at [157].

¹⁰¹ Legislation Design and Advisory Committee “Basic constitutional principles and values of New Zealand law” (23 December 2014) <<http://www.ldac.org.nz>>.

¹⁰² Tom Bingham *Rule of Law* (Allen Lane, London, 2010) at 8.

¹⁰³ At 8.

¹⁰⁴ *Scott v Scott* [1912] P 241, [1913] UKHL 2 per Lord Haldane LC.

¹⁰⁵ *Mohamed No 2*, above n 7.

The court's disclosure order reflected their strong criticism of the State acting on unsubstantiated grounds of national security and relied on the rule of law to justify publication:¹⁰⁶

the suppression of ... wrongdoing of officials which cannot in any way affect national security is inimical to the rule of law. Championing the rule of law, not subordinating it, is the cornerstone of democracy.

Whether understood in its formal terms or extended to the substantive conception, the rule of law underpins any successful governorship of a nation.

The rule of law is a long standing proposition; one of its earliest articulations in relation to civil procedure lies in the Magna Carta of 1215.¹⁰⁷ The Magna Carta represents the “clear rejection of unbridled, unaccountable royal power, an assertion that even the supreme power in the state must be subject to certain overriding principles”.¹⁰⁸ It continues to play a symbolic role as to how the balance of power should be struck between state and citizens.

Dicey popularised the rule of law and his second construction requires equality before the law of the land, administered by the ordinary law courts.¹⁰⁹ This statement has come to mean that no person was above the law and that no every person, whatever their rank or status, was subject to ordinary law.¹¹⁰ Bingham articulated equality as being the laws of the land apply equally to all, except where objective differences justify differentiation.¹¹¹ Fairness, through the protection of substantive rights and adjudicative procedures, is also expressly provided under Bingham’s fifth and seventh principles. New Zealand has an exemplary tradition of respecting human rights and this would be a significant erosion of

¹⁰⁶ *Mohamed No 2*, above n 7.

¹⁰⁷ Magna Carta 1297 (Eng) 25 Edw 1, ch 39 and 40. Applicable to New Zealand under the Imperial Laws Application Act 1988, s 3 and sch 1.

¹⁰⁸ Lord Bingham, above n 102, at 12.

¹⁰⁹ A V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan Education, Basingstoke, 1959) at 188.

¹¹⁰ At 79.

¹¹¹ Lord Bingham, above n 102, at 55.

how the State respects rights and freedoms. This is a danger New Zealanders are unlikely to accept.

Equality cannot be achieved where the executive party has an advantage the non-governmental party is not procedurally entitled to, nor substantively unable to know the material raised in those proceedings. Undoubtedly the rule of law is so fundamental that even exceptional circumstances should not be able to override irreducible minimum standards.¹¹²

C Open Justice

The obvious starting point to understanding open justice is the celebrated words of Lord Hewart CJ, “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.¹¹³ The importance of open justice is well understood; it authenticates the public confidence in an independent and impartial judiciary and the justice system generally. The classical case of *Scott v Scott* interpreted it as “so precious a characteristic of English law”, “true security for justice under the Constitution”, and “one of the surest guarantees of our liberties”.¹¹⁴

Closed material proceedings frustrates two dimensions of open justice. The private interest of upholding an individual’s rights to the proper administration of justice and the social value of the public and media scrutiny of the judiciary’s assessment of executive action. The operation of closed material proceedings undermines open justice because one party relies on undisclosed and unchallenged evidence, whilst the other party and public is excluded. That evidence is only contestable by a special advocate, in the closed hearing and the special advocates cannot truly represent the interests of the claimant when the communication channels are strictly controlled. An individual’s rights to full participation in an open hearing, is analysed in the next part of this paper.

¹¹² *R v Hansen* [2007] NZSC 7; [2007] 3 NZLR 1 at [119] per Tipping J; *Al Rawi v Security Service*, above n 7, at [14] as per Dyson LJ; *Justice and Security Green Paper: Response to Consultation from Special Advocates*, above n 41, at [13]

¹¹³ *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259.

¹¹⁴ *Scott v Scott*, above n 104, at 260 and 287; *Scott v Scott* [1913] AC 417 (UKHL) at 476 and 482.

The argument in favour of closed courts is justice is more achievable where the court assesses the full facts rather than only a proportion of material. Yet in reality, the judge might be no better placed to find a fair outcome and the right of contesting evidence to ensure it does not mislead is lost.¹¹⁵ From as early as 1720, the common law has sustained that:¹¹⁶

the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method for discovering the truth.

Open justice serves the wider purpose of maintaining public confidence in the justice system.¹¹⁷ Judges act on behalf of the community and exercise great powers to discharge these responsibilities, it is thus fundamental that they are seen to do so correctly. Public confidence recognises the judiciary is fulfilling its purpose. Open justice creates discipline in proceedings for judges and parties, and allows for the wider public to scrutinise and ensure that justice is administered properly. Public trials ensure efficiency, competence and integrity in the operation of the judiciary. All of these elements are lost in closed material proceedings.

A public layer of oversight is valuable because the public can reinforce the constitutional role of the court supervising the use of executive power where transparency is allowed because public trials are a prevailing safeguard against judicial or executive misconduct such as bias, unfairness or indolence.¹¹⁸ Protection could be abused by the Crown in withholding information for improper purposes or shielding itself from criticism or embarrassment. The common perception of government protection claims is that they are exaggerated and given the likely context for closed material proceedings are claims against the government for their misuse of power against an individual, the public interest in executive action is very high.

¹¹⁵ *Al Rawi v Security Service*, above n 7, at [93].

¹¹⁶ *Duke of Dorset v Girdler*, above n 10, as cited in *Al Rawi v Security Service*, above n 7, at [29].

¹¹⁷ *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR at [79].

¹¹⁸ Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan Press, London, 1980), at 34.

Open justice is subject to a “more fundamental principle ... the chief object of Courts of justice must be to secure that justice is done”.¹¹⁹ It was accepted by Woodhouse P that on rare occasions “the quite exceptional step could be taken of closing the court” where a fair hearing would prevent the fair exercise of justice.¹²⁰ Nonetheless it has always been for “strictly limited reasons ... and any departure must depend not on judicial discretion but the demands of justice itself”.¹²¹ Richardson J considers:¹²²

that at common law there is a heavy onus on those who seek to avoid an open hearing to satisfy the Court that by nothing short of the exclusion of the public can true justice be done.

Nonetheless, exclusion to the public or media is commonly accepted. Weakening the open justice principle is more acceptable than departing from the natural justice processes. The exclusion of a party or the public where substituted procedural protections can uphold their rights, may be justified under open justice.

D Natural Justice through Procedural Fairness and Fair Trial Rights

Natural justice embodies the right to a fair trial and the procedural arm of fairness. In order to achieve equality and effective participation in proceedings, the common law requires all parties to have fair trial rights. The elements important here are: the right to be heard, the rights of a party to know the case against him and the evidence supporting it, the right to adversarial procedures and the equality of arms and the right to a reasoned decision.¹²³

The right to a fair trial is treated as absolute and its value towards achieving fairness is echoed across jurisdictions. Australia views “the ability of a society to provide a fair and unprejudiced trial ... [as] a touchstone of the existence of the rule of law”.¹²⁴ The English

¹¹⁹ *Lyttleton v R* [2015] NZCA 279 at [24].

¹²⁰ *Broadcasting Corporation v Attorney-General* [1982] 1 NZLR 120 (CA) at 123.

¹²¹ At 123.

¹²² At 133.

¹²³ Categories identified by the British section of the International Commission of Jurists in the Third Party Intervention Submission by JUSTICE to the European Court of Human Rights, *Gulam Hussein and Tariq v The United Kingdom* App Nos 46538/11 and 3960/12.

¹²⁴ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 58, per Deane J.

Law Lords define the right as “not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control”.¹²⁵ Moreover, in the European Court of Human Rights “the right to fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience”.¹²⁶

Procedural fairness is fundamental to New Zealand’s justice system. It derives from the common law rule of law and builds upon historical developments of judicial fairness. It is directly captured in the Bill of Rights Act 1990,¹²⁷ and the International Covenant on Civil and Political Rights article is influential.¹²⁸

1 Restrictions on natural justice

The right to be heard, to know the case against them and the evidence supporting it is fully breached where information is withheld from the other party. Breaches of this right include exclusion from being part of the hearing, hearing the evidence against them, and having the opportunity to challenge this evidence and cross-examine certain witnesses. The Law Commission believes that special advocates can reduce the potential unfairness of the excluded party.¹²⁹

The right to adversarial procedures and equality of arms is undermined where the opportunities for a person to make written or oral representations to the decision-maker are limited. This right extends to having their own legal representation at a hearing. The choice of counsel assists in a relationship of trust and confidence and the choice ensures the individual’s best interests are represented. The appointment of a special advocate goes against this right, although again, arguably it offers a compromise to the situation. The opportunity to present its case, challenge evidence and fairness generally between the parties should be equal regardless of who the parties are. The Crown Proceedings Act 1950

¹²⁵ *Secretary of State for the Home Department v MB* [2007] UKHL 46 at [91] as per Lord Brown.

¹²⁶ *Ramanauskas v Lithuania* (no 74420/01, 5 February 2008 (Grand Chamber)) at [53]; *Lalmahomed v Netherlands* (no 26036/08, 22 February 2011) at [36]. Also see the European Union Convention on Human Rights, art 6 which is regularly subject to judicial definition of right to a fair trial.

¹²⁷ New Zealand Bill of Rights Act 1990, s 27.

¹²⁸ United Nations International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) art 14.

¹²⁹ New Zealand Law Commission, above n 3, at [5.40].

protects this and requires the Crown to be treated “in the same court and in like manner ... as in suits between subject and subject”.¹³⁰ Without knowledge of the evidence the Government holds, the non-Government party cannot challenge or defend itself. The Crown Proceedings Act, s 12 needs to be qualified if closed hearings are adapted.

Undisclosed evidence is not sound evidence because its validity has not proven through withstanding challenge. Unchallenged evidence is a one-sided story which will favour the party submitting it. In Lord Kerr’s words, “to be truly valuable, evidence must be capable of withstanding challenge ... evidence which has been insulated from challenge may positively mislead”.¹³¹ The importance of evidence that can be challenged is seen generally in cases where admissibility of evidence is questioned and these rules need to be properly upheld in national security cases as well. In order to protect party equality, summaries of undisclosed information could be beneficial. Excluded parties may be left without knowing why they have won or lost when part of the decision is not released. All of these elements are underpinned by the concept of effective participation in proceedings which is distorted by closed procedures.

The traditional understanding of the operation of adversarial justice is strikingly different to a closed proceeding because the court must take a more active role in considering the validity of evidence, firstly for a claim of balancing the interests of natural security, and secondly to assist the special advocate in offsetting the evidence put forward. Closed proceedings are so different that they cannot be considered a natural part of the common law system, rather they represent an inquisitorial approach to justice. The advent of inquisitorial proceedings in New Zealand with a strong adversarial common law system is a persuasive reason against closed proceedings.¹³²

¹³⁰ Crown Proceedings Act 1950, s 12.

¹³¹ *Al Rawi v Security Service*, above n 7, at [93].

¹³² House of Lords House of Commons Joint Committee of Human Rights, above n 40, at [210] per oral evidence to Q85 by Nicholas Blake, 12 March 2007.

2 *Counterbalancing justice through special advocates*

Special advocates help remedy some inherent unfairness of closed courts by providing an opportunity to rebut evidence,¹³³ but arguably only to a “limited extent”.¹³⁴ The deficiencies cannot be overlooked. The intention of special advocates is to have someone represent the party’s interest. The strict regulation by the court on communicate to their representee once closed hearings begin and the inability to get proper instructions without knowing the sensitive information effectively removes the value in representation.

Lord Kerr criticised the reality of a special advocate role as “a distinctly second best attempt to secure a just outcome to proceedings”.¹³⁵ The special advocates themselves concluded these proceedings are “inherently unfair”, “do not work effectively” or “deliver real procedural fairness” and special advocates cannot make them “objectively fair”.¹³⁶ The result of the structure of closed hearings is special advocates lack any practical ability to call evidence to properly challenge Crown submissions or opportunity to determine their party’s interest on the matter.¹³⁷ The lack of evidence admissibility rules in closed hearings where second or third hand hearsay or evidence with an unidentifiable source poses significant issues against testing its validity and only accentuates the difficulties special advocates face in advocating blindly.¹³⁸ The decision therefore turns on whether special advocates can be the accepted compromise for the loss of natural justice rights under closed procedures.

3 *Justifying limitations on natural justice*

If natural justice rights are going to be infringed, it must be justified. The New Zealand Bill of Rights Act 1990 s 5 provides an example of how rights are limited. It states that “rights

¹³³ See *Justice and Security Green Paper: Response to Consultation from Special Advocates*, above n 41; House of Lords House of Commons Joint Committee on Human Rights, above n 40; *Al Rawi v Security Service*, above n 7, at [37].

¹³⁴ *Justice and Security Green Paper: Response to Consultation from Special Advocates* at [2(4)].

¹³⁵ *Al Rawi v Security Service*, above n 7, at 94.

¹³⁶ *Security Green Paper: Response to Consultation from Special Advocates*, above n 41, at [15]; House of Lords House of Commons Joint Committee on Human Rights, above n 40, at [81] – [84].

¹³⁷ *Security Green Paper: Response to Consultation from Special Advocates*, above n 41, at [17].

¹³⁸ At [17].

and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In reference to the closed proceedings under the Telecommunications (Interception Capability and Security) Bill, the Human Rights Commission believed that such a limitation on the natural justice protections amounted to an “unjustified and a disproportionate response to the need to protect classified security information”.¹³⁹ Yet, in the Section 7 Vet of the Bill, the Ministry of Justice took the contrary view.¹⁴⁰

The most comparable discussion on the right to a fair trial in closed proceedings internationally is art 6 of the European Convention on Human Rights. In *Tariq*, the Supreme Court declared closed material proceedings are compatible with art 6 of the Convention where strictly necessary, in light of a strong countervailing public interest such as national security.¹⁴¹ They concluded the demands of national security may require such a system but consideration must always be given to whether the system is necessary and contains enough safeguards. The decision must also be made by an independent adjudicator, not the executive and where there is fair opportunity in open court for both sides to contest the use of closed proceeding. Therefore, if closed material proceedings were to be adopted, what constitutes a *strong countervailing* national security interests needs to be clear.

Natural justice can be flexible, as fair procedure heavily depends on the relevant circumstances of each case. At the heart of this right is an irreducible core.¹⁴² Even though natural justice is adaptable, the minimum standards of knowing the case against them and the full reasoning for the outcome, cannot be adequately protected through safeguards under closed proceedings, therefore no justification can be established.

¹³⁹ Telecommunications (Interception Capability and Security) Act, s 12; Human Rights Commission *Report to the Prime Minister: Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interpretation Capability and Security) Bill, and Associated Wider Issues to Surveillance and the Human Rights of People in New Zealand* (9 July 2013) at [33].

¹⁴⁰ Crown Law Office *Telecommunications (Interpretation Capability and Security) Bill: Consistency with the New Zealand Bill of Rights Act 1990* (3 May 2013).

¹⁴¹ *Home Office v Tariq* [2011] UKSC 35.

¹⁴² *R v Hansen*, above n 112, at [119] per Tipping J.

E Towards Finding a Compromise Between Justice and Security

The analysis recognises that both justice and security are necessary objectives of the state that need to coexist. It is a decision between the lesser of two evils towards justice for two parties with competing interests. Natural justice particularly cannot be subjugated unqualifiedly where a national security interest is raised. This paper agrees with the Bingham Centre for the Rule of Law that even before the Justice and Security Act procedures, the available procedures did not pose a danger to national security and following the House of Lords consideration of the matter,¹⁴³ the Government failed to prove why CMPs were needed.¹⁴⁴ The criticisms of the English system and the Government justifications for adoption are too significant to overlook. It is obvious “closed material proceedings represent the most extreme incursion into justice principles”.¹⁴⁵ Furthermore, the Law Commission has failed to elucidate why closed material proceedings should be adopted in New Zealand or why public interest immunity cannot fairly protect security concerns.

Substantively less restrictive regimes have been successful in dealing with sensitive material,¹⁴⁶ and these should be pursued before closed material proceedings are adopted. Only in the event incompetent procedures cause judicial pause, should closed material proceedings be revisited.

The English backdrop is foreign to the New Zealand intelligence departments’ experiences. The Five Eyes Partnership could potentially allow New Zealand agencies to be found complicit in activities undertaken by foreign detention centres through the intelligence sharing systems.¹⁴⁷ Moreover, Immigration New Zealand is allegedly currently holding up to ten individuals seeking refugee status in New Zealand under high security at Mt Eden

¹⁴³ *Al Rawi v Security Service*, above n 7.

¹⁴⁴ Bingham Centre for the Rule of Law, above n 97, at [5].

¹⁴⁵ House of Lords House of Commons Joint Committee on Human Rights, above n 40 at [81] per Angus McCullough QC.

¹⁴⁶ *Security Green Paper: Response to Consultation from Special Advocates*, above n 41, at [2].

¹⁴⁷ Rebecca Kitteridge, above n 86.

and other prisons because of security concerns.¹⁴⁸ Some have been detained for over one year and there have been reports of detainees being assaulted by other high security prisoners. This draws a closer connection to the types of issues Britain has seen over the last decade.

V Conclusion

New Zealand should treat the adoption of closed material proceedings with greater hesitation than demonstrated by the New Zealand Law Commission. Whilst national security is a necessary protection the state must provide and the protection afforded to sensitive information needs modernisation, there is no demonstrated need for closed material proceedings. The irreducible minimum standards of procedural justice must still be respected in exceptional national security cases.¹⁴⁹ Sustaining procedural rights to non-Crown parties is unachievable because special advocates are an ineffective counterbalance to the injustice of closed material proceedings.

With the departure from blanket immunity claims and judicial deference to the executive in current practices of national security protection, a modern system of public interest immunity is capable of operating as a sophisticated tool for dealing with national security. Although this avenue needs further exploration as a feasible future solution, public interest immunity is an accepted doctrine which more fairly balances the interests between security and justice in New Zealand than can be provided for by closed material proceedings. The need for reconciliation between justice and security continues to prevail, but a search for justice in secret in the dark corners of New Zealand's legal system cannot be tolerated.

¹⁴⁸ Radio New Zealand “NZ needs to treat asylum seekers better – Amnesty” (24 February 2016) Radio New Zealand News <<http://www.radionz.co.nz/>>.

¹⁴⁹ *R v Hansen*, above n 112, at [119].

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 7999 words.

VI Bibliography

A Cases

1 New Zealand

Broadcasting Corporation v Attorney-General [1982] 1 NZLR 120.

Choudry v Attorney-General [1992] 2 NZLR 399 (CA).

Condon v R [2006] NZSC 62.

D v National Society for the Prevention of Cruelty to Children [1978] AC 171.

Dotcom v Attorney-General 2012 NZHC 3268.

Environmental Defence Society Inc v South Pacific Aluminum Ltd (No 2) [1981] 1 NZLR 747 (CA).

Fletcher Timber Ltd v Attorney-General [1984] 1 NZLR 290.

Lewis v Wilson & Horton Ltd [2003] 3 NZLR.

Lyttleton v R [2015] NZCA 279.

R v Hansen [2007] NZSC 7; [2007] 3 NZLR 1.

Westco Lagan Ltd v Attorney-General [2001] 1 NZLR 40.

Zaoui v Attorney-General [2004] NZSC 31 (25 November 2004).

Zaoui v Attorney-General [2005] 1 NZLR 557 (SC).

2 United Kingdom

Al Rawi v Security Service [2009] EWHC 2959 (QB).

Al Rawi v Security Service [2011] UKSC 34, [2011] 3 WLR 388.

Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322 (PC).

Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd [1916] 1 KB 822 (CA).

Carnduff v Rock [2001] EWCA Civ 680.

Conway v Rimmer [1968] AC 910 (UKHL).

Duke of Dorset v Girdler (1720) Prec Ch 531, 24 ER 238.

Duncan v Cammell Laird & Co Ltd [1942] AC 624 (UKHL).

Hinch v Attorney-General (Vic) (1987) 164 CLR 15 at 58, (1987) 74 ALR 353.

Home Office v Tariq [2011] UKSC 35.

R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)
(*Mohamed No 2*) [2010] EWCA Civ 65.

R v Chief Constable of West Midlands Police, Ex p Wiley [1995] 1 AC 274.

R v H and C [2004] UKHL 3.

R v Sussex Justices ex parte McCarthy [1924] 1 KB 256.

Scott v Scott [1912] P 241, [1913] UKHL 2.

Scott v Scott [1913] AC 417.

Secretary of State for the Home Department v MB [2007] UKHL 46.

3 *Australia*

Hinch v Attorney-General (Vic) (1987) 164 CLR 15.

4 *European Court of Human Rights*

Lalmahomed v Netherlands (no 26036/08, 22 February 2011).

Ramanauskas v Lithuania (no 74420/01, 5 February 2008 (Grand Chamber)).

B Legislation

1 New Zealand

Care of Children Act 2004.

Crown Proceedings Act 1950.

Customs and Excise Act 1996.

Evidence Act 2006.

Immigration Act 1987.

Immigration Act 2009.

Imperial Laws Application Act 1988.

Inspector-General of Intelligence and Security Act 1996

Judicature Act 1908 – Schedule 2 High Court Rules.

New Zealand Bill of Rights 1990.

New Zealand Security Intelligence Service Act 1969.

Official Information Act 1982.

Passports Act 1992.

Telecommunications (Interception Capability and Security) Act 2013.

Terrorism Suppression Act 2002.

2 Australia

National Security Information (Civil and Criminal Proceedings) Act 2004.

3 United Kingdom

Justice and Security Act 2013.

Magna Carta 1297 (Eng) 25 Edw 1.

4 Canada

Canada Evidence Act 1985.

Canadian Immigration and Refugee Protection Act 2001.

C International Materials

Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/63/223 (2008).

United Nations General Assembly, Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948.

United Nations International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

D Books and Chapters in Books

Tom Bingham *The Rule of Law* (Allen Lane, London, 2010).

David Bonner *Executive Measures, Terrorism and National Security – Have the Rules of the Game Changed?* (Aldershot, England, 2007).

Richard A. Cosgrove *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Macmillan Press, London, 1980).

A V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan Education, Basingstoke, 1959).

Richard Ekins *Modern Challenges to the Rule of Law* (LexisNexis NZ, Wellington, 2011).

James M. Jacob *Civil Justice in the Age of Human Rights* (Ashgate, Hampshire, 2007).

Philip A Joseph *Constitution and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007).

Philip A Joseph *Constitution and Administrative Law in New Zealand* (4th ed, Thomson Brookers, Wellington, 2014).

Geranne Lautenbach *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, Oxford, 2013).

Nicola McGarrity and Edward Santow “Anti-terrorism laws: balancing national security and a fair hearing” in Victor V Ramraj and others (eds) *Global Anti-Terrorism Law and Policy* (2nd ed, Cambridge University Press, Cambridge (UK), 2012).

Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014).

Joseph Raz *The Authority of Law* (2nd ed, Oxford University Press, Oxford, 2009).

E Journal Articles

John Jackson “Justice, Security and the Right to a Fair Trial: Is the Use of Secret Evidence Ever Fair?” [2013] Public Law 720.

Miiko Kumar “Protecting State Secrets: Jurisdictional difference and current developments” [2013] 82 Mississippi Law Journal 853.

Paul Morris “Balancing Act: Human Rights, Security Risks and the Zaoui Case” [2005] HRR 1.

Adam Tomkins “Justice and Security in the United Kingdom” [2014] 47 Israel Law Review 305.

F Parliamentary and Government Materials

(19 June 2012) 737 GBPD HL 1694.

“Justice and Security Green Paper” (Cm 8194 October 2011) (UK).

Hon Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February, 2016).

House of Lords House of Commons Joint Committee of Human Rights “Legislative scrutiny: Justice and Security Bill” (13 November 2012) HL 59, HC 370.

House of Lords House of Commons Joint Committee on Human Rights *The Justice and Security Green Paper*, Twenty-fourth Report of Session 2010-2012, HL Paper 286, HC 1777 (4 April 2012).

Law Commission *A New Crown Civil Proceedings Act for New Zealand* (NZLC IP35, 2014).

Law Commission *National Security Information in Proceedings* (NZLC IP38, May 2015).

Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, December 2015).

National Security Information (Criminal and Civil Proceedings) Act 2004 – Practitioners’ Guide (Attorney-General, 2008) (Australia).

New Zealand Human Rights Commission *Report to the Prime Minister: Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interpretation Capability and Security Bill, and Associated Wider Issues to Surveillance and the Human Rights of People in New Zealand* (9 July 2013).

G Reports

Bingham Centre for the Rule of Law *Consultation response to New Zealand Law Commission – National Security Information in Proceedings (Issue Paper 38)* 30 June 2015.

Bingham Centre for the Rule of Law *Response to the Justice and Security Green Paper*.

James Carruthers *Closed Material Proceedings in Civil Trials* New Zealand Human Rights Working Paper no 16, 2016.

Centre for Policy Studies *Neither Just nor Secure – The Justice and Security Bill* (United Kingdom, January, 2013).

Intelligence and Security Committee – response to the Justice and Security Green Paper (United Kingdom, 7 December 2011).

Justice and Security Green Paper: Response to Consultation from Special Advocates’ (United Kingdom, 16 December 2011).

JUSTICE *Justice and Security Green Paper (Cm 8194): Consultation Response* January 2012.

Liberty *Liberty’s response to the Ministry of Justice’s Green Paper – Justice and Security* January 2012.

New Zealand Law Society *Comments on Law Commission’s Issue Paper on National Security Information IP38, 2015* 7 July, 2015.

REDRESS *Justice and Security Green Paper: Consultation: Submission from the REDRESS Trust: 6 January 2012* 6 January 2012.

Sir Richard Scott *Report of the inquiry into the export of defence equipment and dual-use goods to Iraq and related prosecutions* (HC 115, 1996).

H Internet Resources

Christian Gysin “Going out shopping, the terror suspect who pocketed a million in compensation over torture claims” (1 November 2011) Daily Mail UK <<http://www.dailymail.co.uk/news/article-2055474/Binyam-Mohamed-Terror-suspect-pocketed-1m-compensation-torture-claims.html>>.

Honourable Justice Susan Glazebrook “From *Zaoui* to Today: a Review of Recent Developments in New Zealand’s Refugee and Protected Persons Law” (23 March 2013) Courts of New Zealand <<https://www.courtsofnz.govt.nz>>.

Legislation Design and Advisory Committee “Basic constitutional principles and values of New Zealand law” (23 December 2014) <<http://www.ldac.org.nz>>.

Ministry of Justice “Introduction to sections 27(1) to 27(3): The right to justice” (2004) Ministry of Justice < <http://www.justice.govt.nz/publications/publications-archived/2004/guidelines-on-the-new-zealand-bill-of-rights-act/introduction-to-sections-27-1-to-27-3-the-right-to-justice>>.

Protective Security Requirements “New Zealand Government Classification System” (18 December 2014) <<https://protectivesecurity.govt.nz>>.

Radio New Zealand “NZ needs to treat asylum seekers better – Amnesty” (24 February 2016) Radio New Zealand News <<http://www.radionz.co.nz/news/political/297320/nz-needs-to-treat-asylum-seekers-better-amnesty>>.

Simon Jeffery “The rules of the game are changing” (5 August 2005) The Guardian < <https://www.theguardian.com>>.

I Other Resources

Rebecca Kitteridge, Director of the New Zealand Security Intelligence Service “Spotlight on Security: NZSIS Director” (The New Zealand Centre for Public Law Public Lecture, Victoria University of Wellington's Faculty of Law, Wellington, 3 June 2016).

Cheryl Gwyn, Inspector-General of the New Zealand Intelligence Services “Spotlight on Security – Inspector-General of Intelligence Services” (The New Zealand Centre for Public Law Public Lecture, Victoria University of Wellington Law Faculty, 4 May 2016).

JUSTICE Third Party Intervention Submission to the European Court of Human Rights, *Gulam Hussein and Tariq v The United Kingdom* App Nos 46538/11 and 3960/12.