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Hon Michael Woodhouse
Minister of Workplace Relations and Safety
Parliament
Wellington

By email: m.woodhouse@ministers.govt.nz

Dear Minister

Health and Safety Reform Bill amendments – national security information

As you know, the Transport and Industrial Relations select committee recently reported back on the Health and Safety Reform Bill. Amongst the amendments recommended by the committee was a new clause 180A and Schedule 2A, "to provide for the secure handling of classified information in legal proceedings" (select committee report at page 4).

Schedule 2A contains provisions relating to classified security information in "any civil or criminal proceedings in a court (including public law and judicial review proceedings) that relate to the administration or enforcement" of the Health and Safety Reform Act. The provisions allow for a 'closed material procedure' involving special advocates. There is only a very brief reference in the Officials' Report to the committee, justifying the insertion (at [292]) on the basis that:

> "We consider that the Bill needs to explicitly provide for secure handling of classified information or material as part of any investigation or legal proceedings where national security is involved. Existing protections for classified materials, reliance on a ministerial certificate under section 27 of the Crown Proceedings Act 1950 or application for a public interest direction under section 70 of the Evidence Act 2006, are not necessarily fit for purpose.
>
> We recommend change to explicitly provide for secure handling of classified information or material as part of any investigation or legal proceedings. Given their limited application, we suggest that the clauses relating to this be placed in a schedule to the Bill."

The New Zealand Law Society brings to your attention significant concerns about the Schedule 2A provisions, as well as the manner in which they have been inserted in the legislation without the opportunity for public consultation and input.

The absence of public consultation is undesirable, particularly where the provisions inserted – as here – directly affect very significant constitutional matters such as the fundamental right to a fair trial and open justice. In addition, Schedule 2A was not in the Bill when it was first introduced and has not therefore been subject to the

Bill of Rights vetting process provided for in section 7 of the New Zealand Bill of Rights Act 1990. This important step in the legislative process should not have been omitted, given the significant implications of the Schedule 2A provisions for fundamental rights affirmed by the New Zealand Bill of Rights Act.

Moreover, the insertion of these provisions is untimely, given that the Law Commission is currently reviewing[1] and will shortly be reporting to the Government on the use of classified security information in proceedings.

In that regard, it does not appear that significant issues identified in the Commission's review were taken into account in the drafting of Schedule 2A. As discussed below, Schedule 2A is directly contrary to the position taken by the Commission on some of those issues.

Inconsistent with the right to a fair trial

Schedule 2A expressly provides that a person may be tried and convicted of a criminal offence without having all of the information relied upon by the Crown disclosed to him or her, and without the right to be present or to have his or her representative present during all of the proceedings (see clauses 4(3), 5(1)(d), and 12). In its Issues Paper, and referring to criminal proceedings, the Commission states "[w]e do not think that having evidence presented to the court without either the defendant or their counsel present can be reconciled with the right to a fair trial" (at [6.89]). Earlier, the Commission cites the Supreme Court's statement that "the right to a fair trial cannot be compromised – an accused is not validly convicted if the trial is for any reason unfair" (at [3.10]).

The Law Society supported the Commission's position on this issue, in its recent submission on the Issues Paper.[2] The Law Society submission stated that "it is not consistent with fair trial rights for the prosecution to be permitted to rely at trial on information which is not disclosed to the accused" (at page 1).

Very broad definition of "classified security information"

Schedule 2A has a very wide definition of "classified security information". In its review, the Commission identified the need for a clear and precise definition of national security, and stated that the concept needed to be more closely defined than it presently is in New Zealand legislation (see [6.5] – [6.9]). The Commission also noted that while concerns about prejudicing New Zealand's international relations could for example justify declining a request for official information, "this reason may not be sufficient to justify the invocation of a closed proceeding or completely refusing to disclose material to parties before the Court" (at [6.8]).

The Law Society supported the Commission on this point. Its submission stated that "a distinction should be drawn between 'national security' and broader notions of New Zealand's 'international relations' or 'economic interests', which do not in themselves justify the serious incursion on natural justice rights that a non-disclosure regime would entail" (at page 8).

Against this, Schedule 2A provides that information may come within the definition of "classified security information" if its disclosure would be likely to "prejudice the international relations of the Government of New Zealand" (clause 3(3)(a)).

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1 *National Security Information in Proceedings*, NZLC IP38, May 2015.

2 Submission dated 7.7.15, National Security Information in Proceedings, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0008/92924/I-LC-National-Security-Information-7-7-15.pdf.

No judicial review

In its submission to the Commission, the Law Society considered it critical that any categorisation of information as "classified security information" by the Crown be subject to review by the courts (see page 9). It also considered that while the Executive could be empowered to override a court decision that such information could not be categorised in this way, such a power should be held by the Prime Minister only, acting on the advice of the Attorney-General. Further, the Law Society's view was that the fact of any override and the grounds for it should be made public.

Under Schedule 2A, however, the courts have no power to review a determination that certain information is "classified security information" and therefore cannot be disclosed, even if they disagree that information falls within that category (see clause 4). In addition, such determinations will be made by the heads of "specified agencies", such as government departments, rather than the Prime Minister.

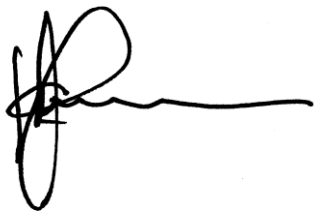
Conclusion

In the Law Society's view such widely drafted provisions, which provide for an inherently unfair procedure, should not have been inserted at this stage of the legislative process. Legislation should not be made without allowing for proper public consideration and input, especially when it affects fundamental rights.

Further, it has not been explained why it is necessary to insert Schedule 2A at this late stage. If it is anticipated Schedule 2A will often be used and hence it is necessary to enact it now, the basis for that view should have been set out in the committee's report so that it could have been debated in the House. As that has not been done, however, presumably it is anticipated that reliance on Schedule 2A will be infrequent (as appears to be the view expressed in the Officials' Report already cited). If that is the case, given the matters set out above the Law Society considers that enacting Schedule 2A now and in haste cannot be justified.

Accordingly, the Law Society recommends that clause 180A and Schedule 2A be removed from the Bill, pending the outcome of the Commission's review. If however these provisions are to be retained in the legislation, at a minimum they should be more narrowly cast. No doubt the Commission's advice on that could be sought and the Law Society would also be willing to assist officials with the task of redrafting the provisions.

Yours sincerely



Chris Moore
President