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MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS

A large, stylized, and slightly tilted image of the Law Commission logo and text, rendered in a light blue color, serving as a background for the bottom half of the cover. The logo features the New Zealand Coat of Arms above the text 'LAW · COMMISSION' and 'TE · AKA · MATUA · O · TE · TURE'.

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MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS

Chapter 17

Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill and commentary

INTRODUCTION

- 17.1 This Part contains our recommended Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) and commentary on selected provisions.
- 17.2 As with our Extradition Bill, the Mutual Assistance Bill is designed to give a clear illustration of our policy. It is indicative drafting only and further work would be required before the Bill would be ready for introduction in Parliament.
- 17.3 The following provisions in the Bill are the subject of commentary:
- Clause 6 – Interpretation (criminal matter)
 - Clause 8 – Central Authority
 - Clause 10 – Act not to limit other providing of assistance
 - Clause 11 – Monitoring of interagency mutual assistance schemes
 - Clause 20 – Making request
 - Clause 22 – Grounds on which assistance must be refused
 - Clause 23 – Grounds on which assistance may be refused
 - Clause 24 – Criminal investigations
 - Clause 26 – Assistance may be provided subject to conditions or provided in part or postponed
 - Clause 29 – Information lawfully obtained for earlier request may be provided for later request
 - Clauses 30 and 34 – Obtaining evidence and information
 - Clause 36 – Limit on use of Search and Surveillance Act 2012
 - Clause 37 – Agreements between New Zealand and foreign countries relating to warrants and orders under Search and Surveillance Act 2012
 - Clause 43 – Undertakings by foreign country requesting attendance of person
 - Part 2, subpart 3 – Requirements and procedures for providing assistance to recover criminal proceeds
 - Clause 46 – Interpretation
 - Clause 47 – Interim foreign restraining orders

- Clause 55 – Admissibility of evidence
- Schedule – Amendments to Criminal Proceeds (Recovery) Act 2009

17.4 We have not provided commentary on every provision in the Bill. This is because the policy behind most is either clear on the face of the particular provision in the Bill, or because it is clearly outlined in the preceding chapters of this Report. Instead, the commentary focuses on those provisions where:

- (a) particularly significant words or phrases in the provision warrant further explanation; or
- (b) the provision is not self-explanatory and the policy behind it is not explained elsewhere in the Report.

Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill

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**Mutual Assistance in Criminal Matters and for
Recovery of Criminal Proceeds Bill**

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act **2015**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1
Preliminary provisions**

3 Purpose

The purposes of this Act are to—

- (a) facilitate the providing and obtaining of assistance in criminal matters and assistance to recover criminal proceeds by New Zealand to and from any foreign country;
- (b) provide a framework for New Zealand to consider requests for assistance by foreign countries and provide assistance—
 - (i) to the extent that is practicable; and
 - (ii) with necessary safeguards that are consistent with New Zealand's international obligations;
- (c) provide a framework for New Zealand to request assistance from foreign countries.

Compare: 1992 No 86 s 4

4 Principles

In performing any functions or duties or exercising any powers under this Act, a person or an agency must recognise and provide for the following principles:

- (a) New Zealand has agreed to assist other countries to investigate and prosecute criminal matters and to recover criminal proceeds consistently with its international obligations to do so;
- (b) the powers and investigative techniques available to New Zealand authorities for criminal investigations, and court procedures, are to be made available to assist criminal investigations and prosecutions, and the recovery of criminal proceeds, by foreign countries;
- (c) requests for assistance from all foreign countries must be treated the same and are subject to the same requirements and assessments as provided in this Act.

5 Overview

This Act,—

- (a) in this Part, establishes a Central Authority to deal with incoming and outgoing requests for assistance in criminal matters and assistance to recover criminal proceeds;
- (b) in **Part 2**, sets out a framework for the making of requests for assistance by foreign countries to New Zealand, decision-making by the Central Authority in relation to requests, and the providing of assistance by New Zealand;
- (c) in **Part 3**, sets out a framework for the making of requests for assistance by New Zealand to foreign countries.

6 Interpretation

In this Act, unless the context otherwise requires,—

agency (except for the purposes of **sections 12 to 16**) has the same meaning as in the Privacy Act 1993

Central Authority has the meaning given in **section 8**
criminal matter—

- (a) means an investigation or a proceeding—
 - (i) certified by a foreign Central Authority to have commenced or been instituted in a foreign country in respect of an offence against the law of that country;
 - (ii) certified by the Central Authority to have commenced or been instituted in New Zealand in respect of an offence against the law of New Zealand;
 - (iii) including a trial for a particular offence and any related proceedings; and
- (b) includes an investigation or a proceeding relating to—
 - (i) revenue (including taxation and customs and excise duties);
 - (ii) foreign exchange control; but
- (c) does not include an investigation or a proceeding concerning an act or omission that, if it had occurred in New Zealand, would have constituted an offence under the military law of New Zealand but not under the ordinary criminal law of New Zealand

criminal proceeds has the meaning given in **section 46**

foreign Central Authority means the person or body in a foreign country that is recognised by the Central Authority as the appropriate authority in that coun-

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try for the purposes of making, receiving, or otherwise dealing with requests for assistance under this Act.

Compare: 1992 No 86 ss 2–2B, 27(1)(e)

7 Act binds the Crown

This Act binds the Crown.

Compare: 1992 No 86 s 3

8 Central Authority

(1) The Central Authority is the Attorney-General.

(2) The Central Authority—

- (a) makes and receives requests for assistance in criminal matters and assistance to recover criminal proceeds to and from foreign countries under this Act; and
- (b) decides whether New Zealand will assist a foreign country; and
- (c) authorises and enables the providing of assistance to a foreign country by taking any steps required or allowed by this Act.

(3) For the purpose of performing any function or exercising any power under this Act, the Central Authority may take any action that the Central Authority considers desirable to the extent that the action is otherwise permitted by law.

(4) The Central Authority may not request or obtain, or agree to provide or provide, assistance from or to a foreign country if it involves any action that is unlawful in the foreign country or would be unlawful if done in New Zealand.

Compare: 1992 No 86 ss 8, 25, 27(1)(h)

9 Act not authority for extradition of person

Nothing in this Act authorises—

- (a) extraditing a person or removing a person from New Zealand without the person's consent; or
- (b) arresting or detaining a person with a view to extraditing the person or removing the person from New Zealand without the person's consent.

Compare: 1992 No 86 s 6

10 Act not to limit other providing of assistance

(1) Nothing in this Act affects any other enactment that requires or allows assistance to be provided or obtained in criminal matters or to recover criminal proceeds, by New Zealand, to or from a foreign country.

(2) If a person or an agency in New Zealand may provide or obtain a type of assistance under both this Act and another enactment, that person or agency may use this Act to provide or obtain the assistance if—

- (a) a foreign country wishes the assistance to be provided under this Act because of the formality of process provided by the Act;
 - (b) the assistance or part of it involves the use of coercive measures;
 - (c) the person or agency considers the provision or obtaining of assistance is better dealt with under this Act.
- (3) Nothing in this Act—
 - (a) affects existing forms of co-operation between New Zealand and foreign countries, whether formal or informal; or
 - (b) prevents the development of other forms of co-operation between New Zealand and foreign countries, whether formal or informal.

Compare: 1992 No 86 s 5

11 Monitoring of interagency mutual assistance schemes

- (1) The Central Authority is responsible for monitoring interagency mutual assistance schemes, specifically by—
 - (a) maintaining guidelines for developing or varying interagency mutual assistance schemes; and
 - (b) providing advice on the use of the guidelines.
- (2) Nothing in this section requires the Central Authority to supervise or monitor any particular interagency mutual assistance scheme.
- (3) For the purposes of this section, **interagency mutual assistance scheme** means any arrangement or agreement between a New Zealand agency and an agency or agencies in a foreign country or countries that has the purpose of providing assistance for regulatory matters, criminal matters, or the recovery of criminal proceeds.

Disclosure of agency information to Central Authority and to foreign countries

12 Requests by Central Authority for information held by agencies

- (1) The Central Authority may request information from an agency if the following apply:
 - (a) the Central Authority is considering a request for assistance, or has agreed to provide assistance, under **Part 2**; and
 - (b) the Central Authority has reason to believe that the agency may hold information relevant to that assistance; and
 - (c) if the information may include personal information, the Central Authority is satisfied that it is necessary to obtain any personal information for either of the purposes in **paragraph (a)**.
- (2) A request for information for either of the purposes in **subsection (1)(a)** must be made under this section and the Central Authority may not use any other means to do so.

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- (3) The disclosure of information may only be made—
 - (a) by an agency to the Central Authority under **section 13**; or
 - (b) by the Central Authority to a foreign country under **section 14**.
- (4) Nothing in this section affects any other means of obtaining information under **Part 2**, for example, by taking evidence in a court or executing a search warrant and providing the evidence or information to a foreign country.
- (5) In **sections 12 to 16**,—

agency means a department as defined in the Official Information Act 1982, a Minister of the Crown, or an organisation as defined in that Act

personal information has the same meaning as in the Privacy Act 1993.

Compare: Mutual Assistance in Criminal Matters Act 1987 s 43D (Aust)

13 Disclosure of information by agencies to Central Authority

- (1) Despite any other enactment, but subject to **subsection (3)**, an agency must disclose to the Central Authority any information it holds that is relevant to a request under **section 12**, unless the agency considers that any of the grounds in sections 6 and 9(2)(b) to (k) of the Official Information Act 1982 apply.
- (2) When deciding whether any of the grounds in either section 6 or section 9(2)(b) to (k) of the Official Information Act 1982 constitute good reason to withhold information, the agency must apply the balancing test in section 9(1) of that Act.
- (3) Personal information relevant to a request under **section 12** may be disclosed only if the agency considers that information privacy principle 11(e)(i) of the Privacy Act 1993 applies.
- (4) For the purpose of **subsection (3)**,—
 - (a) the reference to the maintenance of the law in information privacy principle 11(e)(i) is to be read as including the maintenance of the law both in New Zealand and in the foreign country seeking the information:
 - (b) the reference to public sector agency in information privacy principle 11(e)(i) is to be read as including any person or agency with law enforcement functions in the foreign country seeking the information.
- (5) If any information requested is in a document and there is good reason for withholding some of the information contained in that document, the other information in that document may be made available by making a copy of that document available with any deletions or alterations that are necessary.
- (6) An agency must provide information requested by the Central Authority not later than 20 working days after it receives a request or on another date agreed with the Central Authority.

Compare: 1982 No 156 ss 9(2)(a), (b), (h), 17; 1993 No 28 ss 28(1), 29(1)(f)

14 Disclosure of agency information by Central Authority to foreign country

- (1) Despite any other enactment, but subject to the guidelines (relating to disclosure of personal information) made under **section 16**, the Central Authority may disclose to a foreign country information it has received from an agency under **section 13**.
- (2) To avoid doubt, the Privacy Act 1993 does not apply to the disclosure of personal information under **subsection (1)**.

15 Protection for agencies

- (1) Where any information is disclosed in good faith under **section 13**,—
 - (a) no proceedings, civil or criminal, may be taken against any agency in respect of the disclosure, or for any consequences arising from the disclosure; and
 - (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the disclosure may be taken against the author of the information or any other person by reason of that author or other person having disclosed the information.
- (2) For the purposes of the law relating to defamation, breach of confidence, or infringement of copyright, the disclosure of information under **section 13** may not be taken to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is disclosed.

Compare: 1982 No 156 s 48

16 Guidelines for disclosure of personal information to foreign countries

- (1) The Central Authority may not disclose to a foreign country any personal information received from any agency unless the Central Authority has developed guidelines for the disclosure of personal information.
- (2) The guidelines must be developed, and any amendments to the guidelines must be made, in consultation with the Privacy Commissioner.

17 Publication of information relating to requests made under section 12

The Central Authority must publish in its annual report the number of requests made to agencies under **section 12** in the period covered by the annual report.

Confidentiality of communications between Central Authority and foreign countries

18 Confidentiality of communications between Central Authority and foreign countries

- (1) Subject to **subsection (2)**, any communication between the Central Authority and a foreign country in relation to a proposed request or a request for assistance under this Act, whether to or from New Zealand, is confidential, and the Central Authority may refuse to disclose the communication and any opinion

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formed by a person that is based on the communication, including in any proceeding.

- (2) The Central Authority may disclose a communication to an agency for the purposes of considering a request for assistance from or providing assistance to a foreign country, or preparing a request for assistance or obtaining assistance from a foreign country, if satisfied that the disclosure is necessary for any of those purposes.
- (3) An employee, an officer, or a representative of the Central Authority or an agency must not disclose a confidential communication unless the disclosure is made for any of the purposes in **subsection (2)** and the disclosure is authorised by the Central Authority.
- (4) To avoid doubt, the Official Information Act 1982 and the Privacy Act 1993 do not apply to communications referred to in this section.

Compare: 2006 No 69 s 53

Part 2

Requests for assistance to New Zealand

Subpart 1—Making and deciding requests for assistance from foreign countries

19 Requests for assistance by foreign countries to New Zealand

- (1) This Part sets out a framework for the making of requests for assistance in criminal matters or assistance to recover criminal proceeds by foreign countries to New Zealand, decision-making by the Central Authority in relation to requests, and the providing of assistance by New Zealand.
- (2) The assistance that New Zealand can provide is not limited to the types of assistance mentioned in this section or elsewhere in this Part.

Examples of types of assistance

Identifying or locating a person.

Obtaining evidence, information, documents, articles, or things. (Evidence and information include oral evidence or a statement from a person that is recorded in writing.)

Undertaking a forensic comparison and production of a document specifying the result of that comparison under the Criminal Investigations (Bodily Samples) Act 1995.

Arranging for the attendance of a person in a foreign country to assist with an investigation or give evidence.

Applying for an examination order or a production order under the Search and Surveillance Act 2012 or the Criminal Proceeds (Recovery) Act 2009.

Locating property that may be forfeit or information about property that may be forfeit.

Arranging for registration of a foreign forfeiture order or a foreign restraining order under the Criminal Proceeds (Recovery) Act 2009.

- (3) The providing of assistance by New Zealand—
- (a) is subject to **section 8(4)** (any action sought to be taken or provided must be lawful in both the requesting country and New Zealand);
 - (b) is subject to **subsections (4) and (5)**;
 - (c) must be by the least intrusive means available in New Zealand of fulfilling the request.
- (4) A request must relate to a criminal matter or to the recovery of criminal proceeds within the meaning of this Act.
- (5) Any requirements in this Act of general application to the providing of assistance, and any requirements for the providing of particular types of assistance, must be strictly complied with.

Compare: 1992 No 86 ss 27(1)(h), 30, 31, 37, 38, 43, 51, 54, 55, 58–62

20 Making request

- (1) A request may only be made by a foreign Central Authority to the Central Authority.
- (2) A request must include any information required by this Part or any regulations made under **section 67**, and in the case of a request relating to a criminal matter it must be accompanied by the certificate referred to in **paragraph (a)(i)** of the definition of criminal matter in **section 6**.

Compare: 1992 No 86 s 26

21 Power to refuse request if response to request for further information is inadequate

- (1) The Central Authority may request further information from a foreign country in relation to a particular request for assistance and, if not satisfied that the response is adequate, may refuse the request.
- (2) The Central Authority may agree to provide assistance even if the foreign country does not respond adequately to a request under **subsection (1)**.

Compare: 1992 No 86 s 27(2)(h), (4), (5)

22 Grounds on which assistance must be refused

A request for assistance under this Part must be refused if, in the opinion of the Central Authority,—

- (a) there are substantial grounds for believing that the request was made for the purpose of investigating or prosecuting or taking proceedings of any kind against a person, or otherwise causing prejudice to a person, by reason of any of the grounds of discrimination in section 21 of the Human Rights Act 1993; or

- (b) any person will be subjected to torture, or inhumane or degrading treatment, if the assistance is provided.

Compare: 1992 No 86 s 27(1)(c), (ca)

23 Grounds on which assistance may be refused

- (1) A request for assistance under this Part may be refused if, in the opinion of the Central Authority, any of the grounds in **subsection (2)** apply after taking into account the matters in **subsection (3)**.
- (2) The grounds on which assistance may be refused are that—
 - (a) the request relates to the investigation or prosecution of a person for an offence for which the person may be or has been sentenced to death and the requesting country is unable to adequately assure the Central Authority that—
 - (i) the person will not be sentenced to death; or
 - (ii) if that sentence is or has been imposed, it will not be carried out; or
 - (b) providing the assistance would prejudice, or would be likely to prejudice, the safety of any person (whether that person is in New Zealand or not); or
 - (c) the request relates to an investigation, a prosecution, or proceedings of any kind of a political character; or
 - (d) the request relates to the investigation or prosecution of a person for conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or
 - (e) the request relates to the investigation or prosecution of a person for an offence and the person has previously been acquitted of, convicted of, or pardoned for that offence, or has undergone punishment in relation to that offence or another offence constituted by the same act or omission as that offence; or
 - (f) the request relates to the investigation or prosecution of a person, or proceedings of any kind against a person, for conduct for which, if it had occurred in New Zealand at the same time, the person could no longer be prosecuted or be the subject of proceedings by reason of lapse of time; or
 - (g) providing the assistance requested could prejudice—
 - (i) a criminal investigation or criminal proceeding in New Zealand; or
 - (ii) a proceeding of any kind under the Criminal Proceeds (Recovery) Act 2009 or sections 142A to 142Q of the Sentencing Act 2002; or

- (h) providing the assistance would unreasonably interfere with the privacy of an individual; or
 - (i) the request relates to a matter that is trivial in nature; or
 - (j) granting the request would prejudice the national interests of New Zealand; or
 - (k) it is appropriate in all the circumstances of the particular case that the request should not be agreed to.
- (3) If any of the grounds in **subsection (2)** appear to apply in any case, before deciding whether there is a ground or grounds on which the request may be refused, the Central Authority must consider whether providing the assistance sought would—
- (a) be otherwise in the interests of justice; and
 - (b) comply with New Zealand's international obligations.
- (4) For the purpose of this section, **trivial in nature** means that, by reason of the trivial nature of the criminal matter or the low value of the likely penalty or any property likely to be forfeited or restrained, New Zealand would not have made a similar request for assistance.
- Compare: 1992 No 86 ss 27(1)(a)–(ba), (d), (f), (2)(a), (bb)–(ca), (e)–(g)

24 Criminal investigations

If a request for assistance relates to a criminal investigation, for the purpose of deciding whether to provide the assistance, including whether a ground of refusal listed in **section 22 or 23** applies, the Central Authority may, but is not required to, identify a particular offence that may arise from the investigation or a particular penalty that may be imposed as a result of the investigation.

25 Reasons for refusal to be given

If the Central Authority decides to refuse a request, the Central Authority must provide a summary of reasons in writing to the requesting country.

Compare: 1992 No 86 s 28

26 Assistance may be provided subject to conditions or provided in part or postponed

- (1) Assistance may be provided to a requesting country subject to any conditions that the Central Authority considers appropriate for any particular case or class of cases.
- (2) If providing assistance would impose an excessive burden on New Zealand's resources, the Central Authority may require, as a condition of providing assistance,—
 - (a) the foreign country to pay the reasonable costs of doing so (unless a treaty specifically requires assistance to be provided without costs being payable); or

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- (b) if a treaty to which New Zealand and the foreign country are both parties provides for payment of all or some costs by the foreign country, payment of costs in accordance with the treaty.
- (3) The Central Authority may agree—
 - (a) to provide only part of any assistance that is requested; or
 - (b) to postpone the providing of assistance to an appropriate date at the sole discretion of the Central Authority.

Compare: 1992 No 86 ss 27(2)(g), (3), 29

27 Authorisation of particular assistance

- (1) The Central Authority may authorise particular assistance to be provided to a foreign country unless—
 - (a) the Central Authority has decided to refuse the request for any of the reasons in **sections 21 to 23**; or
 - (b) any applicable requirements in this Part have not been met.
- (2) An authorisation must specify whether a Judge, the New Zealand Police, the Department of Corrections, the government agency responsible for border control, or any other appropriate person or agency is to provide the particular assistance specified in the authorisation.
- (3) An authorisation must be in writing and, where applicable, must—
 - (a) be in a form and contain particular content as required under this Part or any regulations made under **section 67**; and
 - (b) specify whether the Central Authority will assist with providing any part of the assistance and, if so, the particular action that will be taken in doing so.

Compare: 1992 No 86 ss 30, 31, 37, 43, 51, 54, 55, 59–62

28 Actions and duties of person or agency authorised to provide assistance

- (1) Subject to any specific provision in this Part, a person or agency authorised to provide assistance must—
 - (a) use or follow any usual process or procedure relevant to the actions required to be taken to provide the assistance; and
 - (b) only take actions that are lawful in New Zealand or would be lawful if done in New Zealand.
- (2) A person or agency authorised to provide assistance under this section must use his or her or its best endeavours to provide that assistance.
- (3) The person or agency authorised to provide assistance must, once the assistance has been provided, report to the Central Authority on the result.

Compare: 1992 No 86 s 27(1)(h)

29 Information lawfully obtained for earlier request may be provided for later request

- (1) This section applies to requests for assistance in relation to both criminal matters and the recovery of criminal proceeds.
- (2) If the Central Authority has authorised the obtaining of information in order to provide assistance to a foreign country under this Act (the **first request**) and the information is relevant to a subsequent request for assistance, the information may be provided to the foreign country making the subsequent request if—
 - (a) the information was lawfully obtained and is lawfully in the possession of a person or an agency in New Zealand; and
 - (b) the Central Authority has authorised the provision of the information in relation to the subsequent request; and
 - (c) the criminal matters or criminal proceeds matters that are the subject of the first request and the subsequent request are substantially similar.

Compare: Mutual Assistance in Criminal Matters Act 1987 s 13A (Aust)

Subpart 2—Requirements and procedures for providing assistance in
criminal matters

*Obtaining evidence, information, documents, articles, or things, including
under Search and Surveillance Act 2012*

30 Obtaining evidence

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to obtain evidence or produce documents, articles, or things if the Central Authority has received an adequate undertaking from the requesting country that any evidence, document, article, or other thing provided to it will be used solely for the purpose for which it was requested.
- (2) An authorisation is sufficient authority for a Judge to—
 - (a) take evidence on oath of a specified person; and
 - (b) require the production of any specified document, article, or thing.
- (3) Any action taken under **subsection (2)** must, subject to this Act, be done in accordance with usual court rules and procedure, with any necessary modifications.
- (4) The Judge must certify any evidence taken under this section as having been taken by him or her, and must certify or otherwise mark any documents, articles, or things produced as having been produced by the witness, and the evidence and any exhibits must be sent to the Central Authority.

- (5) Documents that are judicial records or official records and that are not publicly available may be produced or examined only to the extent that they could be produced or examined in criminal proceedings in a New Zealand court.

Compare: 1992 No 86 ss 31, 32(2)

31 Protection of witnesses

- (1) Subject to **subsection (2)**, the law of evidence applies to the compelling of any person to attend before a Judge to give evidence or produce a document, article, or thing under **section 30**.
- (2) A person is not required to give any evidence or produce any document, article, or thing that the person could not be required to give or produce in proceedings in the foreign country.
- (3) For the purpose of **subsection (2)**, a foreign law immunity certificate authenticated under **section 66** is admissible as prima facie evidence of the matters stated in the certificate.
- (4) For the purpose of **subsection (3)**, **foreign law immunity certificate** means a certificate given by a foreign country certifying that, under the law of the foreign country, persons generally or a specified person may or may not be required to give particular evidence or produce a specified document, article, or thing.

Compare: 1992 No 86 ss 17, 32(1), 33(2)

32 Persons with right to appear and be represented

The following persons may appear and be represented at any hearing of evidence under **section 30**:

- (a) the person who is the subject of proceedings in the foreign country;
- (b) any other person giving evidence or producing documents, articles, or things;
- (c) the Central Authority (to represent the interests of the requesting foreign country).

Compare: 1992 No 86 s 34

33 Powers of a Judge may be exercised by Registrar

- (1) A Judge may authorise a Registrar to take evidence under **section 30**.
- (2) If any matter appears to a Registrar to be one of special difficulty, the Registrar may refer the matter to a Judge, who may deal with the matter or refer it back to the Registrar as the Judge thinks fit.

Compare: 1992 No 86 s 35

34 Obtaining information

The Central Authority may, under **section 27**, authorise the provision of assistance to obtain information of any kind (including arranging for a person to

assist with an investigation) if the Central Authority has received an adequate undertaking from the requesting country that any information provided to it will be used solely for the purpose for which it was requested.

35 Search and Surveillance Act 2012

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to apply for a warrant or an order under the Search and Surveillance Act 2012 if—
 - (a) the Central Authority is satisfied that if the circumstances described in the request had occurred in New Zealand it would be appropriate to deal with those circumstances by applying for a warrant or an order under that Act; and
 - (b) agreement has been reached with the requesting country on the following matters:
 - (i) the number, identity, and role of any foreign enforcement officers who will assist to execute or implement the warrant or order;
 - (ii) the process and criteria for dealing with irrelevant, privileged, or confidential information;
 - (iii) the use to which any information or thing seized or produced will be put;
 - (iv) that any information capable of being duplicated will not be duplicated;
 - (v) arrangements for the return, retention, or destruction of any information or other thing provided to the foreign country;
 - (vi) that the foreign country will act in accordance with any decision of a New Zealand court relating to the legality or reasonableness of the use of any power.
- (2) The agreement under **subsection (1)(b)** must be in writing.
- (3) Subject to **section 36**, the Search and Surveillance Act 2012 (except subpart 6 of Part 4) applies, with any necessary modifications, to the making of the application, proceedings dealing with the application, and the execution or implementation of any warrant or order made.

Example

A necessary modification of that Act is that any reference to an offence should be read as including an offence in a foreign country.

- (4) **Section 37** applies to the making of the agreement.
- (5) The New Zealand Police may be assisted by a foreign enforcement officer if the requirements in **section 38** are met.

- (6) Anything seized or produced must be dealt with in accordance with **sections 39 and 40**.

Compare: 1992 No 86 ss 43, 44

36 Limit on use of Search and Surveillance Act 2012

The Central Authority and any New Zealand agency or authority must not authorise assistance in the form of, or use the powers for, warrantless searches under the Search and Surveillance Act 2012 for the purpose of assisting a foreign country in a criminal matter.

37 Agreements between New Zealand and foreign countries relating to warrants and orders under Search and Surveillance Act 2012

- (1) When deciding the terms of an agreement with a foreign country under **section 35(1)(b)**, the Central Authority must consider any relevant requirements and limits contained in subpart 6 of Part 4 of the Search and Surveillance Act 2012.
- (2) A treaty to which New Zealand and a foreign country are parties, or an agreement between the Central Authority and a foreign Central Authority, may provide for any of the matters listed in **section 35(1)(b)(ii) to (vi)** to apply generally to all requests made by a foreign country.

38 Foreign enforcement officers

- (1) Subject to **subsection (2)** and an agreement under **section 35(1)(b)(i)**, the Central Authority may authorise, in writing, a foreign enforcement officer to assist—
- (a) to execute or implement a warrant or an order, or
 - (b) to determine whether any information or thing seized or produced is relevant to the criminal matter that is the subject of the request.
- (2) The New Zealand Police must supervise any foreign enforcement officer who executes or implements a warrant or an order, and is liable for any cause of action arising from the actions of that officer when executing or implementing a warrant or an order.

39 Dealing with things seized or produced

- (1) Any information or thing seized or produced under a warrant or an order under the Search and Surveillance Act 2012 that is capable of being held and stored must—
- (a) be immediately delivered into the custody of the New Zealand Police; and
 - (b) be dealt with in accordance with **subsections (2) to (4)** and **section 40**.

- (2) The information or thing must be kept in safe custody for a period of not more than 1 month from the day on which it was obtained, pending directions in writing from the Central Authority as to how the information or thing is to be dealt with.
- (3) If the Central Authority gives a direction before the expiry of the period of 1 month, the information or thing must be dealt with in accordance with the direction.
- (4) If no direction is given within the period of 1 month, the information or thing must be returned to the person from whose possession it was obtained, as soon as practicable after the period has expired.

Compare: 1992 No 86 s 49

40 Irrelevant, privileged, and confidential information and copies of documents

- (1) The New Zealand Police must, in accordance with the agreement reached under **section 35(1)(b)(ii)**, check any information or thing held under **section 39** and—
 - (a) remove any information or thing that is not relevant to the criminal matter that is the subject of the request for assistance, or is privileged, or is confidential; and
 - (b) return any information or thing removed under **paragraph (a)** to the person from whose possession it was obtained, as soon as practicable.
- (2) If practicable, documents provided to a foreign country must be copies and the original documents must be retained by the New Zealand Police.

Attendance of person in foreign country

41 Attendance of person in foreign country

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to arrange for the attendance of a person in a foreign country if the Central Authority—
 - (a) is satisfied that the person to whom the request relates consents to travel to the foreign country to provide evidence or other assistance; and
 - (b) if the request relates to a person who is subject to a sentence in New Zealand, is satisfied that there is no reason to believe that granting the request—
 - (i) would not be in the public interest; or
 - (ii) would not be in the interests of that person.
- (2) Before authorising that assistance, the Central Authority must obtain from the foreign country adequate undertakings relating to the matters listed in **section 43**.

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- (3) An authorisation referring to a particular person is sufficient authority for immigration purposes to allow the person to travel to and from New Zealand.
- (4) The Central Authority must make the travel arrangements for any person attending in a foreign country under this section, both—
 - (a) to the foreign country; and
 - (b) back to New Zealand once the assistance has been provided.
- (5) **Subsection (4)(b)** does not apply if the person has remained in the foreign country of his or her own volition for a period of more than 15 days following the conclusion of providing the assistance.
- (6) A person who refuses to consent or fails to attend in the foreign country following a request for him or her to do so must not be subject to any penalty or liability or other disadvantage for the reason only that the person refused to consent or failed to attend in that country.
- (7) For the purpose of **subsection (1)(b)**, a person who is **subject to a sentence** includes a person who is—
 - (a) a prisoner;
 - (b) serving any other custodial or non-custodial or community-based sentence;
 - (c) at large under section 62 of the Corrections Act 2004.

Compare: 1992 No 86 ss 27(1)(g), 27(2)(d), 37, 38, 40

42 Additional provisions relating to prisoners

- (1) If the person named in an authorisation is a prisoner, the Central Authority must also authorise, in writing, the release of the person from prison for the purpose of travelling to the foreign country.
- (2) An authorisation under **subsection (1)** is sufficient authority for the release of the prisoner into the custody of a person employed by the New Zealand Police or the Department of Corrections.
- (3) The effect of removal to the foreign country on a prisoner's sentence is set out in **section 44**.
- (4) A prisoner released under this section is, for the purposes of section 120 of the Crimes Act 1961 (which relates to escaping from lawful custody) and for those purposes only, to be treated as continuing to be in the legal custody of the person or agency that released him or her.

43 Undertakings by foreign country requesting attendance of person

- (1) For the purpose of **section 41(2)**, a requesting country must give adequate undertakings—
 - (a) that, if a person refuses or fails to provide the assistance that is requested, he or she will not be subject to any penalty or liability or other dis-

advantage for the reason only that the person refused or failed to do so;
and

- (b) that, while in the foreign country providing assistance, the person will not be detained (subject to **paragraph (f)**), prosecuted, punished, or subjected to any proceedings for any offence, act, or omission alleged to have been committed or to have occurred before the person departed from New Zealand to travel to the foreign country; and
 - (c) that, while in the foreign country providing assistance, the person will not be required to give evidence or provide assistance, other than as specified in the request; and
 - (d) that any evidence given by the person will be inadmissible and otherwise disqualified from use except in relation to—
 - (i) proceedings to which the request relates; or
 - (ii) proceedings against the person for perjury; or
 - (iii) proceedings that are similar to proceedings for perjury and that have been agreed as an exception in a treaty to which both New Zealand and the foreign country are parties; and
 - (e) that the person will be allowed to return to New Zealand as soon as practicable after giving the evidence or providing the assistance (unless the person chooses of his or her own volition to remain in the foreign country); and
 - (f) if the person is a prisoner, that—
 - (i) he or she will be kept in safe custody while he or she is in the foreign country and not released without the prior approval of the Central Authority; and
 - (ii) if the person is released at the request of the Central Authority, the person's accommodation and other costs will be met by the foreign country; and
 - (iii) he or she will be returned to New Zealand by way of travel arrangements agreed to by the Central Authority; and
 - (g) on any other matters that the Central Authority thinks are appropriate.
- (2) **Subsection (1)(b) and (c)** apply—
- (a) while the person is providing assistance; and
 - (b) for a period of 15 days following the conclusion of providing assistance.

Compare: 1992 No 86 s 39

44 Effect of removal to foreign country on prisoner's sentence

- (1) If a prisoner is serving a term of imprisonment and is released to attend in a foreign country in response to a request for assistance, the period of time spent

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in custody in connection with providing that assistance is to be treated as time spent serving the term of imprisonment.

- (2) Section 91(4A) of the Parole Act 2002 applies if a prisoner is charged with or convicted of an offence against the law of New Zealand and, before sentence is imposed, is released to attend in a foreign country in response to a request for assistance.
- (3) The Central Authority may request a foreign country to provide a certificate recording the total period during which the prisoner was detained in connection with a request for assistance.
- (4) A certificate obtained under **subsection (3)** is presumed to be accurate unless the contrary is proved.
- (5) If a foreign country does not provide a certificate within a reasonable time, the Central Authority may do so if satisfied that sufficient information is available on which to make an accurate calculation.
- (6) A certificate under **subsection (3) or (5)** is sufficient authority to account for the period of time stated in the certificate when determining the remaining sentence for a returning prisoner to serve in New Zealand or for the purpose of section 91(4A) of the Parole Act 2002.

Compare: 1996 No 82 ss 41–41B

Service of summons

45 Service of summons

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to serve a summons in New Zealand if the Central Authority has received an undertaking from the requesting country that the person to whom the summons relates will not be subject to any penalty or liability or otherwise be prejudiced in law by reason only that the person refuses or fails to comply with the summons.
- (2) A person to whom a summons referred to in **subsection (1)** relates must not be subject to any penalty or liability or otherwise be prejudiced in law in New Zealand by reason only that the person refuses or fails to comply with the summons.

Compare: 1992 No 86 ss 51–53

Subpart 3—Requirements and procedures for providing assistance to
recover criminal proceeds

46 Interpretation

- (1) For the purposes of this subpart, unless the context otherwise requires,—
criminal proceeds means—
 - (a) tainted property:

- (b) property of a person who has, or who may have, unlawfully benefited from significant foreign criminal activity;
- (c) an instrument of crime;
- (d) property that will satisfy some or all of a foreign pecuniary penalty order

foreign forfeiture order means an order for the forfeiture of criminal proceeds made under the law of a foreign country by a court or other judicial authority

foreign order means a foreign forfeiture order or a foreign restraining order

foreign pecuniary penalty order means an order, made under the law of a foreign country by any court or other judicial authority, imposing a pecuniary penalty in respect of benefits derived by a person from significant foreign criminal activity (whether proved to a civil or criminal standard), but does not include an order for the payment of a sum of money by way of compensation, restitution, or damages to an injured person

foreign qualifying forfeiture offence means—

- (a) an offence in a foreign country that is punishable in that country by a maximum term of imprisonment of 5 years or more (including an attempt to commit, conspiring to commit, or being an accessory to an offence if the maximum term of imprisonment for that attempt, conspiracy, or activity is 5 years or more); and
- (b) an offence under the law of a foreign country that is a party to the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000, if—
 - (i) it is punishable by imprisonment for a term of 4 years or more; and
 - (ii) there are reasonable grounds to suspect that it is transnational in nature (as defined in articles 3(2) and 18(1) of that convention) and involves an organised criminal group (as defined in article 2(a) of that convention)

foreign restraining order means an order made under the law of a foreign country by a court or other judicial authority or, if a mutual assistance treaty specifically permits, any other body authorised in that country to make a restraining order that—

- (a) restrains a particular person, or all persons, from dealing with the property specified in the order; and
- (b) relates to criminal proceeds

instrument of crime means any property used, in whole or in part, to commit or facilitate the commission of a foreign qualifying forfeiture offence

significant foreign criminal activity—

- (a) means an activity engaged in by a person in a foreign country—

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- (i) that, if proceeded against as a criminal offence in that country, would amount to offending—
 - (A) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
 - (B) from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived; and
- (ii) whether or not—
 - (A) the person has been charged with or convicted of the offending; or
 - (B) the person has been acquitted of the offending; or
 - (C) the person's conviction for the offending has been quashed or set aside; and
- (b) includes an offence under the law of a foreign country that is a party to the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000, if—
 - (i) it is punishable by imprisonment for a term of 4 years or more; and
 - (ii) there are reasonable grounds to suspect that it is transnational in nature (as defined in articles 3(2) and 18(1) of that convention) and involves an organised criminal group (as defined in article 2(a) of that convention)

tainted property—

- (a) means any property that has, in whole or in part, been—
 - (i) acquired as a result of significant foreign criminal activity; or
 - (ii) directly or indirectly derived from significant foreign criminal activity; and
- (b) includes any property that has been—
 - (i) acquired as a result of more than 1 activity if at least 1 of those activities is a significant foreign criminal activity; or
 - (ii) directly or indirectly derived from more than 1 activity if at least 1 of those activities is a significant foreign criminal activity

unlawfully benefited from significant foreign criminal activity means a person has knowingly, directly or indirectly, derived a benefit from significant foreign criminal activity (whether or not the person deriving the benefit undertook or was involved in the significant foreign criminal activity).

- (2) In this subpart, a term defined in the Criminal Proceeds (Recovery) Act 2009 that is used but not defined in this subpart has the same meaning as that Act.

Compare: 1992 No 86 ss 2–2B

47 Interim foreign restraining orders

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to apply for an interim foreign restraining order if the Central Authority—
 - (a) has received adequate assurances from the foreign Central Authority that—
 - (i) a request under this Act for a foreign restraining order relating to the same property will be made within 28 days from the date the interim order is made; and
 - (ii) the foreign country will reimburse any costs or damages ordered by a court in relation to the making, operation, or extension of the interim order; and
 - (b) is satisfied that—
 - (i) the foreign Central Authority understands the requirements for registration of a foreign restraining order in New Zealand; and
 - (ii) the later request for assistance to register a foreign restraining order is likely to be agreed to.
- (2) The authorisation must certify that the Central Authority has received the assurances required by **subsection (1)(a)** and is satisfied of the matters in **subsection (1)(b)**.
- (3) An application must be made under section 128 of the Criminal Proceeds (Recovery) Act 2009, and the application must be made and dealt with, and any order made must be enforced, under that Act.

Compare: 1992 No 86 s 60

48 Registration of foreign orders

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to apply to register a foreign order if satisfied that—
 - (a) the foreign order is a foreign restraining order or a foreign forfeiture order within the meaning of this Act; and
 - (b) there are reasonable grounds to believe that some or all of the property that is the subject of the order is in New Zealand; and
 - (c) the request relates to criminal proceeds (as defined in **section 46**).
- (2) The authorisation must—
 - (a) certify that the Central Authority is satisfied of the matters in **subsection (1)**; and
 - (b) include a copy of the foreign order that has been authenticated under **section 66**.

- (3) An application to register a foreign order must be made under section 133 or 141 of the Criminal Proceeds (Recovery) Act 2009, and the application must be made and dealt with, and any order made must be enforced, under that Act.

Compare: 1992 No 86 ss 54–56

49 Cancellation of registration of foreign order

- (1) The Central Authority may at any time, in writing, authorise the New Zealand Police to apply to the High Court to cancel the registration of a foreign order.
- (2) The Central Authority may give an authorisation under **subsection (1)** if satisfied that—
- (a) the order has, since being registered in New Zealand, ceased to have effect in the foreign country in which it was made;
 - (b) cancelling the order is appropriate having regard to arrangements entered into between New Zealand and the foreign country in relation to the enforcing of orders of that kind;
 - (c) the registration of the order in New Zealand failed to comply with **section 48**;
 - (d) the foreign Central Authority of the foreign country where the order was made thinks it is desirable that the registration of the foreign order be cancelled;
 - (e) the foreign order has been discharged, wholly or in part;
 - (f) for any other reason it is desirable to cancel the order.
- (3) An application to cancel a foreign order must be made and dealt with under the Criminal Proceeds (Recovery) Act 2009.

Compare: 1992 No 86 s 58

50 Search warrants, production orders, and examination orders

- (1) The Central Authority may, under **section 27**, authorise the provision of assistance to apply for a search warrant, a production order, or an examination order under the Criminal Proceeds (Recovery) Act 2009 if—
- (a) satisfied that there are reasonable grounds to believe that some or all of the property that is the subject of the application, or information about that property, is in New Zealand; and
 - (b) satisfied that the request relates to criminal proceeds (as defined in **section 46**); and
 - (c) agreement has been reached with the requesting country on the matters listed in **section 35(1)(b)**.
- (2) An agreement under **subsection (1)(c)** must be in writing and must take account of the matters in sections 103, 105(5), 107(4), 111, 112, and 113 of the Criminal Proceeds (Recovery) Act 2009.
- (3) The authorisation must—

- (a) certify that the Central Authority is satisfied of the matters in **subsection (1)(a) and (b)**; and
 - (b) include a copy of the agreement made under **subsection (1)(c)**; and
 - (c) specify which of sections 101, 102, 104, 106, and 110 of the Criminal Proceeds (Recovery) Act 2009 may be used by the person authorised to provide the assistance.
- (4) An application must be made under sections 124, 125, or **125A to 125C** of the Criminal Proceeds (Recovery) Act 2009, and the application must be made and dealt with, and any warrant or order made must (except as provided by this Act) be executed, under that Act.
- (5) The New Zealand Police may be assisted by a foreign enforcement officer if the requirements in **section 38** are met.
- (6) Anything seized or produced must be dealt with in accordance with **sections 39 and 40**.

Compare: 1992 No 86 ss 59, 61, 62

51 Asset-sharing agreements

The Central Authority may enter into an agreement with a foreign country to share with the foreign country any property or proceeds that are seized or recovered by New Zealand.

52 Criminal Proceeds (Recovery) Act 2009 amended

Amend the Criminal Proceeds (Recovery) Act 2009 as set out in the **Schedule**.

Part 3

Requests by New Zealand for assistance

53 Requests by New Zealand for assistance from foreign countries

- (1) This Part sets out a framework for New Zealand to request assistance in criminal matters or assistance to recover criminal proceeds from foreign countries.
- (2) The assistance that New Zealand can request is not limited to the types of assistance mentioned in this section or elsewhere in this Part.

Examples of types of assistance

Identifying or locating a person.

Obtaining evidence, information, documents, articles, or things. (Evidence and information include oral evidence or a statement from a person that is recorded in writing.)

Undertaking a forensic comparison similar to that which is available under the Criminal Investigations (Bodily Samples) Act 1995 and producing documentary evidence of the result.

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Arranging for the attendance of a person in New Zealand to assist with an investigation or give evidence.

Applying for an order similar to an examination order or a production order available under the Search and Surveillance Act 2012 or the Criminal Proceeds (Recovery) Act 2009.

Locating property that may be forfeit or information about property that may be forfeit.

Enforcing a forfeiture order or a restraining order made under the Criminal Proceeds (Recovery) Act 2009 in the foreign country.

- (3) Requests for assistance and the obtaining of assistance under this Part are subject to **section 8(4)** (any action sought to be taken or obtained must be lawful in both the foreign country and New Zealand) and **subsections (4) and (5)**.
- (4) A request must relate to a criminal matter or to the recovery of criminal proceeds within the meaning of this Act, and in the case of a criminal matter be accompanied by the certificate referred to in **paragraph (a)(ii)** of the definition of criminal matter in **section 6**.
- (5) Any requirements in this Act of general application to the obtaining of assistance, and any requirements for the obtaining of particular types of assistance, must be strictly complied with.

Compare: 1992 No 86 ss 27(1)(h), 9–12, 19–22

Assistance in criminal matters

54 General requirement for requesting assistance in criminal matters

The Central Authority may request assistance if satisfied that a request is appropriate given the level of seriousness of the criminal matter that is the subject of the request.

Compare: 1992 No 86 ss 9–12, 19–20

55 Admissibility of evidence

- (1) Any statement of evidence (by whatever name called) received from a foreign country, and any documents referred to in the statement that have been authenticated under **section 66**, may be admitted in evidence at the hearing of criminal proceedings to which the request relates, unless excluded under the law of evidence.
- (2) Any statement of evidence or document to which this section applies must not be excluded for the reason only that a requirement as to form is not met.

Compare: 1992 No 86 s 11(2)–(4); Mutual Assistance in Criminal Matters Act 1987 s 43 (Aust)

56 Attendance of person in New Zealand

- (1) The Central Authority may request the attendance of a person in New Zealand without being satisfied of the matters in **paragraphs (a) and (b)**, but before

making any arrangements for that person to travel to New Zealand the Central Authority must be satisfied that—

- (a) the person consents to travel to New Zealand to provide evidence or other assistance; and
 - (b) if the person is a foreign prisoner, he or she can be kept in safe custody while in New Zealand.
- (2) If the Central Authority is satisfied of the matters in **subsection (1)**, the Central Authority may—
- (a) make arrangements with the foreign country for the person to travel to New Zealand;
 - (b) issue a certificate of attendance, in writing, and that certificate is sufficient authority to permit a limited visa to be issued under section 83 of the Immigration Act 2009.
- (3) The Central Authority may at any time, by notice in writing, cancel a certificate of attendance issued under **subsection (2)(b)** if satisfied that the attendance of the person in New Zealand to provide assistance under this Act is no longer necessary.

Compare: 1992 No 86 ss 12, 13

57 Detention of foreign prisoners

- (1) If a foreign prisoner is attending in New Zealand under **section 56**, the Central Authority must direct, in writing,—
- (a) that the person be held in safe custody while in New Zealand and specify a place where the person is to be detained; and
 - (b) if agreed with the foreign country, that the person be held in safe custody by a New Zealand authority while travelling to or from New Zealand.
- (2) A direction made under **subsection (1)** is sufficient authority to detain that person at the specified place or for a specified agency to hold that person in custody for the purpose of travelling to or from New Zealand.
- (3) The Corrections Act 2004, so far as applicable and with any necessary modifications, applies to that foreign prisoner as if the person had been imprisoned following a conviction for an offence against New Zealand law.
- (4) If a person is detained under this section and the foreign country from which the person has been brought requests that the person be released from detention,—
- (a) the Central Authority must direct, in writing, that the person be released; and
 - (b) a direction made under this subsection is sufficient authority to release that person.

Compare: 1992 No 86 ss 15, 16

58 Penalty not to be imposed for refusal to attend

A person who refuses to consent or fails to attend in New Zealand following a request for him or her to do so must not be subject to any penalty or liability or other disadvantage for the reason only that the person refused to consent or failed to attend in New Zealand.

Compare: 1996 No 82 s 14

59 Immunities and privileges

- (1) A person who travels to New Zealand to provide assistance may not—
 - (a) be detained (subject to **section 57**), prosecuted, punished, or subjected to any proceedings in New Zealand for any offence, act, or omission alleged to have been committed or to have occurred before the person departed from the foreign country to travel to New Zealand;
 - (b) be required to give evidence or provide other assistance other than as specified in the request to the foreign country;
 - (c) be required, in any investigation or proceeding, to answer any question, give any evidence, or produce any document, article, or thing that the person could not be required to answer, give, or produce if the investigation or proceeding were taking place in the foreign country.
- (2) For the purpose of **subsection (1)(c)**, a foreign law immunity certificate authenticated under **section 66** is admissible as prima facie evidence of the matters stated in the certificate.
- (3) **Subsection (1)** does not apply if—
 - (a) the person has left New Zealand and then returns to New Zealand for a purpose other than to provide assistance under this Act, or
 - (b) the person has had the opportunity to leave New Zealand and has remained in New Zealand, of his or her own volition, for a period of more than 15 days following the day on which the assistance was no longer required.
- (4) For the purpose of **subsection (2)**, **foreign law immunity certificate** means a certificate given by a foreign country certifying that, under the law of the foreign country, persons generally or a specified person may or may not be required to answer a specified question or produce a specified document, article, or thing.

Compare: 1992 No 86 s 17

60 Return of person to foreign country

- (1) Subject to **subsection (2)**, the Central Authority must make arrangements, and direct a person or an agency to effect those arrangements, to return a person who has attended in New Zealand to assist with an investigation or give evidence when the particular assistance sought is no longer required or has been provided.

- (2) **Subsection (1)** does not apply if a person is legally entitled to remain in New Zealand and chooses to do so, of his or her own volition.
- (3) A direction made under **subsection (1)** is sufficient authority for an agency to take steps to effect the removal of the person from New Zealand by any means that the Central Authority directs.

Compare: 1992 No 86 s 15

61 Restriction on use of evidence, information, documents, articles, or things

- (1) Any evidence, information, document, article, or thing obtained from a foreign country or a person who attends in New Zealand as a result of preparing or making a request for assistance, or receiving any assistance from a foreign country, under this Part may only be used by the Central Authority or any person or agency in New Zealand for the purposes of, or in connection with, the criminal matter to which the request relates.
- (2) **Subsection (1)** does not apply to—
 - (a) any of the things listed in **subsection (1)** that are obtained from a foreign country, if the foreign country consents to the use of any of those things for any other purpose; and
 - (b) any of those things that are obtained from or produced by a person while he or she is in New Zealand if that person—
 - (i) consents to the use of any of those things for another purpose; or
 - (ii) is prosecuted for perjury within the meaning of the Crimes Act 1961.

Compare: 1992 No 86 ss 18, 23

62 Request by Central Authority on behalf of defendant

- (1) This section applies if a defendant in a criminal proceeding thinks that it is necessary for the purposes of the proceeding that—
 - (a) evidence be taken in a foreign country; or
 - (b) information held by a person or an agency in a foreign country be requested; or
 - (c) arrangements be made for a person who is in a foreign country to travel to New Zealand to give evidence.
- (2) The defendant may apply to the court hearing the proceeding for an order that the Central Authority make a request to the foreign country for any of those types of assistance.
- (3) The court must take into account the matters in **section 63** and decide whether it would be in the interests of justice for the order to be made.
- (4) Before making a decision on the application, the court must give an opportunity to all the parties in the proceedings and the Central Authority to appear before the court and be heard on the merits of the application.

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- (5) If the court makes an order under this section, the Central Authority must make a request on behalf of the defendant to the foreign country for the type or types of assistance stated in the order, unless it is of the opinion that, because of special circumstances in the case, the request should not be made.

Compare: Mutual Assistance in Criminal Matters Act 1987 s 39A (Aust)

63 Matters relevant to making order under section 62

In deciding whether to make an order under **section 62**, the court must consider the following matters:

- (a) the extent to which the information or evidence that the defendant seeks to obtain from the foreign country would not otherwise be available;
- (b) whether the information or evidence is likely to be admitted into evidence in the proceeding;
- (c) the likely probative value of the information or evidence with respect to any issue likely to be determined in the proceeding;
- (d) whether the defendant would be unfairly prejudiced if the information or evidence were not available to the court.

Compare: Mutual Assistance in Criminal Matters Act 1987 s 39A (Aust)

Assistance to recover criminal proceeds

64 General requirements for requesting assistance to recover criminal proceeds

The Central Authority may request assistance to recover criminal proceeds if satisfied that—

- (a) there are reasonable grounds to believe that criminal proceeds or information that is likely to lead to the recovery of criminal proceeds (whether these are located in New Zealand or overseas) are or is in the foreign country; and
- (b) the request relates to an investigation or proceedings arising from conduct that constitutes significant criminal activity or a qualifying instrument forfeiture offence.

Compare: 1992 No 86 ss 21, 22

Part 4

Miscellaneous provisions

65 Certificate of particulars of request by Central Authority

- (1) The Central Authority may give a certificate for use in New Zealand or in a foreign country certifying that—

- (a) a request for assistance under this Act has been made by or to a foreign country;
 - (b) the request meets the relevant requirements in this Act;
 - (c) a request by a foreign country has been accepted and particular assistance (which may be listed on the certificate) has been authorised.
- (2) A certificate purporting to have been given under **subsection (1)** is, in the absence of proof to the contrary, sufficient evidence of the matters certified by the certificate.

Compare: 1992 No 86 s 64

66 Authentication of documents

- (1) A document is duly authenticated for the purposes of any function or duty performed under this Act if it—
- (a) purports to be signed or certified by a Judge or judicial officer or public official in a foreign country or sealed by an official seal; or
 - (b) is authenticated in accordance with the law of the foreign country.
- (2) All courts must take judicial notice of any seal or signature impressed, affixed, appended, or subscribed on or to any statement of evidence or document tendered in evidence in proceedings under this Act.
- (3) Nothing in this section prevents the proof of any matter, or the admission in evidence of any document, in accordance with any other law in New Zealand.

Compare: 1992 No 86 s 63; Mutual Assistance in Criminal Matters Act 1987 s 43 (Aust)

67 Regulations

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing requirements for, and the contents of, applications, notices, authorisations, certificates, and other documents for the purposes of this Act (which are not limited to information specifically required by this Act to be included in any document), and requiring the use of any of those documents;
- (b) prescribing the types of information to be included in a request for assistance by a foreign country to New Zealand;
- (c) prescribing the procedure to be followed in dealing with requests made under this Act, and providing for notification of the results of action taken in response to any such request;
- (d) prescribing the procedures for obtaining evidence or information or producing documents, articles, or other things in response to a request under this Act.

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- (e) providing for the payment of fees, travelling allowances, and expenses to any person in New Zealand who gives or provides evidence or assistance in response to a request made under this Act;
- (f) prescribing conditions for the protection of any property sent to or by a foreign country in response to a request made under this Act and making provision for the return of property in New Zealand under this Act;
- (g) providing for such other matters as are contemplated by or are necessary for giving full effect to this Act and for its due administration.

Compare: 1992 No 86 s 65; Mutual Assistance in Criminal Matters Act 1987 s 44 (Aust)

68 Repeal of Mutual Assistance in Criminal Matters Act 1992

The Mutual Assistance in Criminal Matters Act 1992 (1992 No 86) is repealed.

Schedule

Amendments to Criminal Proceeds (Recovery) Act 2009

s 52

In section 5(1), repeal the definition of **foreign country**.

In section 5(1), definitions of **foreign forfeiture order**, **foreign qualifying forfeiture offence**, **foreign restraining order**, and **significant foreign criminal activity**, replace “section 2(1) of the Mutual Assistance in Criminal Matters Act 1992” with “**section 46 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015**”.

Replace section 128 with:

128 Application for interim foreign restraining order

- (1) The Commissioner may apply to the High Court for an interim foreign restraining order if authorised by the Central Authority under **section 47 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015**.
- (2) An application under **subsection (1)** is made without notice.
- (3) Sections 19 and 22(2) and (3) apply to an application made under this section, with any necessary modifications.

128A Order by court

- (1) The court must make an interim foreign restraining order—
 - (a) if satisfied that the Central Authority has authorised the making of the application under **section 47 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015**; and
 - (b) if the authorisation complies with the certification requirements of **section 47(2)** of that Act.
- (2) The order must—
 - (a) identify the property in respect of which the authorisation has been given; and
 - (b) state that, for the duration of the order, the property—
 - (i) is not to be disposed of, or dealt with, other than as provided in the order;
 - (ii) is to be held by the Official Assignee.
- (3) Subject to **subsection (4)**, sections 27 to 29 apply to an order made under this section, with any necessary modifications.
- (4) The reference in section 28(2) to legal expenses must be read as a reference to any legal expenses incurred by the defendant, including in defending allegations of criminal activity in the foreign country seeking the order.

35

Schedule

Mutual Assistance in Criminal Matters and for
Recovery of Criminal Proceeds Bill**128B Effect of interim foreign restraining order**

Sections 30 to 36 apply to an order made under **section 128A**, with any necessary modifications.

After section 134, insert:

134A Registration of foreign restraining order

- (1) A foreign restraining order does not have effect and cannot be enforced in New Zealand unless it is registered.
- (2) The court may register a foreign restraining order if satisfied that—
 - (a) the Central Authority has authorised the making of an application to register the order under **section 48 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015**; and
 - (b) subject to **subsections (5) and (6)**, the order is authenticated under **section 66** of that Act; and
 - (c) the order is in force in the foreign country seeking registration of the order.
- (3) Subject to **subsection (4)**, sections 19, 21 to 23, and 27 to 29 apply to an order made under this section, with any necessary modifications.
- (4) The reference in section 28(2) to legal expenses must be read as a reference to a respondent's legal expenses in defending allegations of criminal activity in the foreign country seeking the order.
- (5) An exact copy of a sealed or an authenticated copy of a foreign restraining order must, for the purposes of this Act, be treated as a sealed or authenticated copy.
- (6) However, registration of an exact copy ceases to have effect on the expiry of a period of 21 days commencing on the date of registration unless, before the expiry of that period, the sealed or authenticated copy is registered.
- (7) For the purpose of this section, **foreign restraining order** includes an amendment to a foreign restraining order.

134B Effect of foreign restraining order

Sections 30 to 36 apply to an order made under **section 134A**, with any necessary modifications.

After section 143, insert:

143A Registration of foreign forfeiture order

- (1) A foreign forfeiture order does not have effect and cannot be enforced in New Zealand unless it is registered.
- (2) The court may register a foreign forfeiture order if satisfied that—

- (a) the Central Authority has authorised the making of an application to register the order under **section 48 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015**; and
 - (b) subject to **subsections (4) and (5)**, the order is authenticated under **section 66** of that Act; and
 - (c) the order is in force in the foreign country seeking registration of the order.
- (3) Sections 46 and 47 apply to an order made under this section, with any necessary modifications.
- (4) An exact copy of a sealed or an authenticated copy of a foreign forfeiture order must, for the purposes of this Act, be treated as a sealed or an authenticated copy.
- (5) However, registration of an exact copy ceases to have effect on the expiry of a period of 21 days commencing on the date of registration unless, before the expiry of that period, the sealed or authenticated copy is registered.

COMMENTARY ON SELECTED PROVISIONS

Clause 6 Interpretation

criminal matter —

- (a) means an investigation or a proceeding—
 - (i) certified by a foreign Central Authority to have commenced or been instituted in a foreign country in respect of an offence against the law of that country;
 - (ii) certified by the Central Authority to have commenced or been instituted in New Zealand in respect of an offence against the law of New Zealand;
 - (iii) including a trial for the particular offence and any related proceedings;
- (b) includes an investigation or a proceeding relating to—
 - (i) revenue (including taxation and customs and excise duties);
 - (ii) foreign exchange control; but
- (c) does not include an investigation or a proceeding concerning an act or omission that, if it had occurred in New Zealand, would have constituted an offence under the military law of New Zealand but not also under the ordinary criminal law of New Zealand

Commentary

The Mutual Assistance in Criminal Matters Act 1992 (MACMA) provides that assistance must be refused if the request: "... relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in New Zealand, would have constituted an offence under the military law of New Zealand but not also under the criminal law of New Zealand."⁴⁸⁹

We noted in the Issues Paper that although the ground is rarely applicable, its retention as a potential ground for refusal in New Zealand's mutual assistance statute was important.⁴⁹⁰ We have, however, decided it is more appropriately dealt with in the definition of "criminal matter". This is consistent with the Extradition Bill, in which we excluded military-only offences from the definition of "extradition offence".⁴⁹¹

Clause 8 Central Authority

- (1) The Central Authority is the Attorney-General.
- (2) The Central Authority—
 - (a) makes and receives requests for assistance in criminal matters and assistance to recover criminal proceeds to and from foreign countries under this Act; and
 - (b) decides whether New Zealand will assist a foreign country; and
 - (c) authorises and enables the providing of assistance to a foreign country by taking any steps required or allowed by this Act.
- (3) For the purpose of performing any function or exercising any power under this Act, the Central Authority may take any action that the Central Authority considers desirable to the extent that the action is otherwise permitted by law.

489 Mutual Assistance in Criminal Matters Act 1992, s 27(1)(e).

490 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [15.16]–[15.17].

491 Extradition Bill, cl 7(1)(d). See the discussion in relation to extradition in Issues Paper, above n 490, at [8.52]–[8.55].

- (4) The Central Authority must not request or obtain, or agree to provide or provide, assistance from or to a foreign country if it involves any action that is unlawful in the foreign country or would be unlawful if done in New Zealand.

Commentary

This clause sets out the role of the Central Authority. We have sought to make clear that the Central Authority is the key player, emphasising the role it plays in making and receiving requests for assistance, and evaluating and authorising incoming requests.⁴⁹²

As noted in the Issues Paper, the Central Authorities for mutual assistance and extradition should be aligned to allow a coordinated approach to the assistance New Zealand provides to foreign countries in criminal matters. This will be particularly beneficial where a foreign country's request involves both extradition and mutual assistance proceedings.⁴⁹³

We do not intend subclause (4) to require the New Zealand Central Authority to make proactive inquiries into the lawfulness of actions in the foreign country in relation to outgoing requests. Rather, we expect that if the Central Authority is alerted to some issue with how the foreign country may obtain the requested material, the Central Authority will not make the request.

Clause 10 Act not to limit other providing of assistance

- (1) Nothing in this Act affects any other enactment that requires or allows assistance to be provided or obtained in criminal matters or to recover criminal proceeds, by New Zealand, to or from a foreign country.
- (2) If a person or agency in New Zealand may provide or obtain a type of assistance under both this Act and another enactment, that person or agency may use this Act to provide or obtain the assistance if—
- (a) a foreign country wishes the assistance to be provided under this Act because of the formality of process provided by the Act;
 - (b) the assistance or part of it involves the use of coercive measures;
 - (c) the person or agency considers the provision or obtaining of assistance is better dealt with under this Act.
- (3) Nothing in this Act—
- (a) affects existing forms of co-operation between New Zealand and foreign countries, whether formal or informal; or
 - (b) prevents the development of other forms of co-operation between New Zealand and foreign countries, whether formal or informal.

Commentary

This is one of the key provisions in the Bill. It explains the relationship between the Bill and other tools for providing assistance, such as interagency mutual assistance schemes. The provision and its significance are discussed in Chapter 13.

Clause 11 Monitoring of interagency mutual assistance schemes

- (1) The Central Authority is responsible for monitoring interagency mutual assistance schemes specifically by—

⁴⁹² See ch 12 of this Report for further discussion.

⁴⁹³ See Issues Paper, above n 490, at [14.26].

- (a) maintaining guidelines for developing or varying interagency mutual assistance schemes; and
 - (b) providing advice on the use of the guidelines.
- (2) Nothing in this section requires the Central Authority to supervise or monitor any particular interagency mutual assistance scheme.
- (3) For the purposes of this section, **interagency mutual assistance scheme** means any arrangement or agreement between a New Zealand agency and an agency or agencies in a foreign country or countries that has the purpose of providing assistance for regulatory matters, criminal matters, or the recovery of criminal proceeds.

Commentary

There is no equivalent to this provision in MACMA. We have included it in the Bill to ensure that there is some consistency and oversight in respect of the increasing number of interagency mutual assistance schemes that are being entered into by the New Zealand Government. See Chapter 13 for a more detailed discussion of this issue.

Clause 20 Making request

- (1) A request may only be made by a foreign Central Authority to the Central Authority.
- (2) A request must include any information required by this Part or any regulations made under section 67, and in the case of a request relating to a criminal matter it must be accompanied by the certificate referred to in paragraph (a)(i) of the definition of criminal matter in section 6.

Commentary

MACMA includes substantial form requirements in section 26. In our effort to create a more principles-based statute, we decided that, unless specific information is integral to the assessment of a request under our proposals, the Central Authority can decide the appropriate form requirements and these should be contained in regulations. The benefit of this approach is that it will allow form requirements to be amended with much greater ease.

Clause 22 Grounds on which assistance must be refused

A request for assistance under this Part must be refused if, in the opinion of the Central Authority,—

- (a) there are substantial grounds for believing that the request was made for the purpose of investigating or prosecuting or taking proceedings of any kind against a person, or otherwise causing prejudice to a person, by reason of any of the grounds of discrimination in section 21 of the Human Rights Act 1993; or
- (b) any person will be subjected to torture, or inhumane or degrading treatment, if the assistance is provided.

Commentary

Whether or not to refuse a request is ordinarily a matter for the judgement of the Central Authority in each particular case. Clause 22 provides two exceptions, under which the Central Authority must refuse the request: (1) if there is a discriminatory purpose underlying the request; or (2) a person will be subjected to torture, or inhumane or degrading treatment, if the assistance is provided.

In relation to torture, the prohibition against torture under the Convention against Torture and in customary international law is absolute. It is impossible to justify providing assistance if torture may be the end result.⁴⁹⁴

In relation to discriminatory purpose, if the Central Authority is satisfied the request was made for such a purpose, it should always refuse the request. This is consistent with the value New Zealand places on combatting discrimination in its domestic law,⁴⁹⁵ and is important in demonstrating New Zealand's commitment to its international obligations under the International Covenant on Civil and Political Rights.⁴⁹⁶

In terms of the possible grounds of discrimination, we have chosen to cross-reference the list in section 21 of the Human Rights Act 1993. In the Issues Paper, we noted that MACMA contains a fairly limited range of potential grounds of discrimination and we proposed an expansion.⁴⁹⁷ In the Issues Paper, we focused specifically on including discrimination on the basis of sexual orientation, age and disability, and all submitters agreed that this was appropriate. The benefit, however, of cross-referencing the Human Rights Act is that it contains an even more comprehensive list, including those grounds we previously proposed for inclusion, as well as others, such as marital, employment and family status. Furthermore, by cross-referencing the Human Rights Act rather than repeating the grounds we ensure that any extension of the discrimination grounds under the Human Rights Act would automatically be included in the Mutual Assistance Bill. We acknowledge that this approach is different from the approach we have taken to the equivalent discrimination ground for refusal in the Extradition Bill. See the commentary to clause 20(c) of the Extradition Bill for an explanation of that difference.

Clause 23 Grounds on which assistance may be refused

- (1) A request for assistance under this Part may be refused if, in the opinion of the Central Authority, any of the grounds in subsection (2) apply after taking into account the matters in subsection (3).
- (2) The grounds on which assistance may be refused are:
 - (a) the request relates to the investigation or prosecution of a person for an offence for which the person may be or has been sentenced to death and the requesting country is unable to adequately assure the Central Authority that—
 - (i) the person will not be sentenced to death; or
 - (ii) if that sentence is or has been imposed, it will not be carried out; or
 - (b) providing the assistance would prejudice, or would be likely to prejudice, the safety of any person (whether that person is in New Zealand or not); or
 - (c) the request relates to an investigation, a prosecution, or proceedings of any kind of a political character; or
 - (d) the request relates to the investigation or prosecution of a person for conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or
 - (e) the request relates to the investigation or prosecution of a person for an offence and the person has previously been acquitted of, convicted of, or pardoned for that offence, or has

494 See Issues Paper, above n 490, at [15.50].

495 See New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, s 21.

496 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 12 December 1966, entered into force 23 March 1967); entered into force in New Zealand on 28 March 1979.

497 See Issues Paper, above n 490, at [15.11].

- undergone punishment in relation to that offence or another offence constituted by the same act or omission as that offence; or
- (f) the request relates to the investigation or prosecution of a person, or proceedings of any kind against a person, for conduct for which, if it had occurred in New Zealand at the same time, the person could no longer be prosecuted or be the subject of proceedings by reason of lapse of time; or
 - (g) providing the assistance requested could prejudice—
 - (i) a criminal investigation or criminal proceeding in New Zealand; or
 - (ii) a proceeding of any kind under the Criminal Proceeds (Recovery) Act 2009 or sections 142A to 142Q of the Sentencing Act 2002; or
 - (h) providing the assistance would unreasonably interfere with the privacy of an individual; or
 - (i) the request relates to a matter that is trivial in nature; or
 - (j) granting the request would prejudice the national interests of New Zealand; or
 - (k) it is appropriate in all the circumstances of the particular case that the request should not be agreed to.
- (3) If any of the grounds in subsection (2) appear to apply in any case, before deciding whether there is a ground or grounds on which the request may be refused, the Central Authority must consider whether providing the assistance sought would—
- (a) be otherwise in the interests of justice; and
 - (b) comply with New Zealand's international obligations.
- (4) For the purposes of this section, **trivial in nature** means that, by reason of the trivial nature of the criminal matter or the low value of the likely penalty of any property likely to be forfeited or restrained, New Zealand would not have made a similar request for assistance.

Commentary

Our view is that almost all of the grounds for refusal should leave some discretion for the Central Authority. As discussed in Chapter 5, it is not always clear that the substance of the ground will be engaged. MACMA similarly includes several discretionary grounds for refusal, but the Act provides no guidance on what the Attorney-General should consider in determining whether to refuse on the basis of the relevant ground.⁴⁹⁸ Subclause (3) is designed to provide some guidance on this, by directing the Central Authority to consider whether provision of assistance would otherwise be in the interests of justice and comply with New Zealand's international obligations.

As discussed in Chapter 5, subclause (3) is particularly important for guiding the Central Authority as to whether the general ground for refusal in paragraph (j) should be exercised.

Another key change we have made relates to the wording of the "political offence" ground. Sections 27(1)(a) and (b) of MACMA provide that assistance must be refused if, in the opinion of the Attorney-General: "the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it alleged to have been committed or was committed, an offence of a political character; or...there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character."

⁴⁹⁸ See Mutual Assistance in Criminal Matters Act 1992, s 27(2).

We have chosen the wording in paragraph (c) to allow the Central Authority appropriate leeway in determining whether or not the investigation or proceedings are inherently of a political nature. Its application is, of course, subject to subclause (3). This is slightly different to a request being made for a political purpose, which would be covered under the discriminatory purpose ground in clause 18(a), although there will inevitably be overlap.

The ground for refusal in paragraph (h) is new, requiring that the Central Authority must consider the impact providing the assistance would have on the privacy of any individual. In determining whether the ground for refusal applies, the Central Authority will take into account the guidelines it is required to develop in consultation with the Privacy Commissioner under clause 16 of the Bill.

Subclause (4) of clause 23 is designed to provide some guidance as to the threshold for the triviality ground for refusal. It follows the definition of what constitutes triviality under the Harare Scheme.⁴⁹⁹ The triviality ground in MACMA is bundled with a ground for refusal on the basis that “the provision of assistance ... would impose an excessive burden on the resources of New Zealand”.⁵⁰⁰ We think the issue of “excessive burden” is more appropriately dealt with in relation to considerations as to whether assistance may be provided subject to conditions. This is dealt with in clause 22 of the Bill, and also in the commentary below.

Clause 24 Criminal investigations

If a request for assistance relates to a criminal investigation, for the purpose of deciding whether to provide the assistance, including whether a ground for refusal listed in sections 22 and 23 applies, the Central Authority may, but is not required to, identify a particular offence that may arise from the investigation or a particular penalty that may be imposed as a result of the investigation.

Commentary

This clause clarifies that the grounds for refusal in clauses 22 and 23 apply to the investigation, as well as the prosecution and punishment, of offences. In the Issues Paper, we noted that many of the grounds for refusal in MACMA do not apply to the investigation stage, but only to assistance with the prosecution or punishment of an offence.⁵⁰¹ The difficulty in relation to the investigation stage is that a particular offence may not have been identified at that time. For the same reason, this may cause problems for the definition of “criminal matter” in clause 6. Clause 24 is included to make it clear that the Central Authority is not required to identify a particular offence for requests for assistance made in relation to investigations.

Clause 26 Assistance may be provided subject to conditions or provided in part or postponed

- (1) Assistance may be provided to a requesting country subject to any conditions that the Central Authority considers appropriate for any particular case or class of cases.
- (2) If providing assistance would impose an excessive burden on New Zealand’s resources, the Central Authority may require as a condition of providing assistance, —
 - (a) the foreign country to pay the reasonable costs of doing so (unless a treaty specifically requires assistance to be provided without costs being payable); and
 - (b) if a treaty to which New Zealand and the foreign country are both parties provides for payment of all or some costs by the foreign country, payment of costs in accordance with the treaty.

499 Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002, October 2005 and July 2011 [Harare Scheme] at [8(1)(g)]. See discussion in Issues Paper, above n 490, at [15.39]–[15.40].

500 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(g).

501 Issues Paper, above n 490, at [15.58]–[15.60].

(3) The Central Authority may agree—

- (a) to provide only part of any assistance that is requested; or
- (b) to postpone the providing of assistance to an appropriate date at the sole discretion of the Central Authority.

Commentary

In the Issues Paper, we queried whether the Bill should include a specific cost-contribution provision as a condition of the Central Authority agreeing to requests.⁵⁰² All submitters who responded to this question agreed that there should be such a provision. The wording of clause 26(2) recognises that it is traditional for the requested country to bear the costs of providing assistance, but if providing that assistance would impose an excessive burden on New Zealand's resources, payment of reasonable costs can be required as a condition of providing the requested assistance. This incorporates the "excessive burden" ground for refusal from MACMA.

The other key element of clause 26(2), is that the discretion to require cost contribution is subject to arrangements for costs in any mutual assistance treaty to which New Zealand is a party. This is necessitated by New Zealand's current international obligations. For instance, the Treaty with Hong Kong provides.⁵⁰³

- (2) The Requested Party shall assume all ordinary expenses of executing a request within its jurisdiction, except:
 - (a) fees of counsel retained at the request of the Requesting Party;
 - (b) fees of experts;
 - (c) expenses of translation; and
 - (d) travel and accommodation expenses and allowances of persons.
- (3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

Clause 29 Information lawfully obtained for earlier request may be provided for later request

- (1) This section applies to requests for assistance in relation to both criminal matters and the recovery of criminal proceeds.
- (2) If the Central Authority has authorised the obtaining of information in order to provide assistance to a foreign country under this Act (the **first request**) and the information is relevant to a subsequent request for assistance, the information may be provided to the foreign country making the subsequent request if—
 - (a) the information was lawfully obtained and is lawfully in the possession of a person or an agency in New Zealand; and
 - (b) the Central Authority has authorised the provision of the information in relation to the subsequent request; and

⁵⁰² Issues Paper, above n 490, at [21.21]–[21.28], particularly [21.26]–[21.28].

⁵⁰³ Agreement between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China Concerning Mutual Legal Assistance in Criminal Matters 2132 UNTS 129 (signed 3 April 1998, entered into force 1 March 1999). For full discussion of the effect of mutual assistance treaties on cost contribution, see ch 3 of this Report.

- (c) the criminal matters or criminal proceeds matters that are the subject of the first request and the subsequent request are substantially similar.

Commentary

As we noted in the Issues Paper, MACMA currently involves a double gate-keeping function in relation to access to coercive powers in so far as it requires both agreement by the Central Authority and successful application to the court. This is important, but practically it should be unnecessary to reapply to the court for information already lawfully obtained. The wording of clause 29 is intended to tightly circumscribe the application of this provision. The provision only applies to information sought by two or more different countries that is, in substance, the same information. Take, for instance, a drug smuggling operation between the United Kingdom and the Netherlands where there is information relevant to that operation in New Zealand. The provision would apply if the United Kingdom made a successful request for a search warrant to be executed to obtain information about alleged drug offending, and then later, the Netherlands makes a request for the exact same information. If, however, the Netherlands was to make a request for that information, but in relation to alleged arms offending, it would not be appropriate to use the provision.

Clause 30 Obtaining evidence

- (1) The Central Authority may, under section 27, authorise the provision of assistance to obtain evidence or produce documents, articles, or things if the Central Authority has received an adequate undertaking from the requesting country that any evidence, document, article, or other thing provided to it will be used solely for the purpose for which it was requested.
- (2) An authorisation is sufficient authority for a Judge to—
 - (a) take evidence on oath of a specified person; and
 - (b) require the production of any specified document, article, or thing.
- (3) Any action taken under subsection (2) must, subject to this Act, be done in accordance with usual court rules and procedure, with any necessary modifications.
- (4) The Judge must certify any evidence taken under this section as having been taken by him or her, and must certify or otherwise mark any documents, articles, or things produced as having been produced by the witness, and the evidence and any exhibits must be sent to the Central Authority.
- (5) Documents that are judicial records or official records and that are not publicly available may be produced or examined only to the extent that they could be produced or examined in criminal proceedings in a New Zealand court.

Clause 34 Obtaining information

The Central Authority may, under section 27, authorise the provision of assistance to obtain information of any kind (including arranging for a person to assist with an investigation) if the Central Authority has received an adequate undertaking from the requesting country that any information provided to it will be used solely for the purpose for which it was requested.

Commentary

In the Issues Paper, we queried whether the Bill should include a “speciality” ground for refusal; that is, a ground to refuse to provide assistance on the basis that there is no assurance that the material to be provided to the requested country will be used solely for the requested purpose.⁵⁰⁴ This suggestion found broad support amongst submitters. Rather than dealing with speciality in the

504 Issues Paper, above n 490, at [15.51]–[15.56].

grounds for refusal, we think that it is more appropriately included as a prerequisite for obtaining any evidence or information. We have limited this to evidence and information because with requests for other types of assistance, speciality will never be an issue (for example, requests for assistance to serve a summons in New Zealand).

We note that, on occasion, after the Central Authority has provided assistance, a requesting country may ask for permission to use the evidence or information for a different purpose. The Central Authority will need to make a decision on this, based on the principles in the Bill and on any applicable international obligations. For the latter, it is worth noting that some of New Zealand's mutual assistance treaties state that material provided in response to a mutual assistance request may be used for an exculpatory purpose if prior notification is given.

Clause 36 Limit on use of Search and Surveillance Act 2012

The Central Authority or any New Zealand agency or authority must not authorise assistance in the form of, or use the powers for, warrantless searches under the Search and Surveillance Act 2012 for the purpose of assisting a foreign country in any criminal matter.

Commentary

Access to search and surveillance assistance under MACMA is arguably very limited,⁵⁰⁵ and this is inconsistent with the principle that powers and investigative techniques available to domestic authorities should be available to assist foreign investigations and prosecutions. As such, in clause 35 we have broadened the assistance that can be provided by New Zealand to a requesting country to any warrant or order under the Search and Surveillance Act 2012. We do not, however, think that it is appropriate to give foreign countries access to warrantless search powers under the Search and Surveillance Act and clause 36 is included to make this absolutely clear.

Clause 37 Agreements between New Zealand and foreign countries relating to warrants and orders under Search and Surveillance Act 2012

- (1) When deciding the terms of an agreement with a foreign country under section 35(1)(b), the Central Authority must consider any relevant requirements and limits contained in subpart 6 of Part 4 of the Search and Surveillance Act 2012.
- (2) A treaty to which New Zealand and a foreign country are parties, or an agreement between the Central Authority and a foreign Central Authority, may provide for any of the matters listed in section 35(1)(b)(ii) to (vi) to apply generally to all requests made by a foreign country.

Commentary

Subpart 6 of Part 4 of the Search and Surveillance Act 2012 outlines the procedures to apply to seized or produced materials in the domestic context. These provisions are not applicable because in order to respond to a mutual assistance request at least some of the seized or produced material will need to leave New Zealand's jurisdiction and the provisions in the Act have a purely domestic focus. However, it is important that the Central Authority still take into account the principles underlying the provisions of subpart 6 of Part 4 in determining how seized and produced materials are ordinarily to be dealt with in New Zealand, when negotiating its agreement with the requesting country. That is the action required by subsection (1).

The Central Authority may choose to create ongoing arrangements with foreign countries to cover the matters to be agreed upon in clause 35(1)(b)(ii)–(vi). This may be in the form of a formal treaty, or may simply be a memorandum of understanding between the New Zealand Central Authority and a foreign central authority, governing all requests for search and surveillance assistance from that particular country. Clause 37(2) allows for this. If there is no ongoing agreement, however, the central

⁵⁰⁵ See Issues Paper, above n 490, at [17.14]–[17.16].

authorities must agree on those matters in relation to every request. In respect of the relationships with other countries, we envisage the Central Authority will develop a standard form agreement of the best practice, which will assist the central authorities to agree quickly on those matters. Finally, clause 35(1)(b)(i) – concerning the number, identity and role of any foreign enforcement officers who will assist – will need to be agreed upon in every case (as applicable), regardless of whether there is an ongoing agreement in force, as this will necessarily be case-specific.

Clause 43 Undertakings by foreign country requesting attendance of person

- (1) For the purpose of section 41(2), a requesting country must give adequate undertakings—
- (a) that, if a person refuses or fails to provide the assistance that is requested, he or she will not be subject to any penalty or liability or other disadvantage for the reason only that the person refused or failed to do so; and
 - (b) that, while in the foreign country providing assistance, the person will not be detained (subject to paragraph (f)), prosecuted, punished, or subjected to any proceedings for any offence, act, or omission alleged to have been committed or to have occurred before the person departed from New Zealand to travel to the foreign country; and
 - (c) that, while in the foreign country providing assistance, the person will not be required to give evidence or provide assistance, other than as specified in the request; and
 - (d) that any evidence given by the person will be inadmissible and otherwise disqualified from use except in relation to—
 - (i) proceedings to which the request relates; or
 - (ii) proceedings against the person for perjury; or
 - (iii) proceedings that are similar to proceedings for perjury and that have been agreed as an exception in a treaty to which both New Zealand and the foreign country are parties; and
 - (e) that the person will be allowed to return to New Zealand as soon as practicable after giving the evidence or providing the assistance (unless the person chooses of his or her own volition to remain in the foreign country); and
 - (f) if the person is a prisoner, that—
 - (i) he or she will be kept in safe custody while he or she is in the foreign country and not released without the prior approval of the Central Authority; and
 - (ii) if the person is released at the request of the Central Authority, the person's accommodation and other costs will be met by the foreign country; and
 - (iii) he or she will be returned to New Zealand by way of travel arrangements agreed to by the Central Authority; and
 - (g) on any other matters that the Central Authority thinks are appropriate.

Commentary

Clause 43(1)(d)(iii) is a speciality provision. It ensures that the evidence given by a person in a foreign country, as a result of a mutual assistance request, will only be used for the purpose outlined in the request. There are two exceptions. First, the evidence may be used against the person if they are later charged with perjury in relation to giving the evidence. Secondly, a treaty may specify that the evidence may be used in relation to a charge that is similar to perjury.

Part 2, subpart 3 – Requirements and procedures for providing assistance to recover criminal proceeds

Commentary

The way in which MACMA currently interacts with the Criminal Proceeds (Recovery) Act 2009 (CPRA) is unnecessarily complex and confusing. For instance, the Central Authority's power to authorise the Commissioner of Police to apply to the High Court to register a foreign order is contained in MACMA.⁵⁰⁶ The power for the Commissioner to apply to make the registration, the list of CPRA provisions applying to the registration of foreign orders, and a number of other matters relating to registration, are all contained within CPRA.⁵⁰⁷ However, the High Court's registration of the order is dealt with under MACMA.⁵⁰⁸ From there, the effect of the order is covered in MACMA and CPRA.⁵⁰⁹ This creates an unnecessarily complex back-and-forth between the two Acts.

We think the better approach is the one we have taken in our Bill. Under this approach, the mutual assistance legislation would cover the Central Authority's authorisation to the Police/Commissioner/Official Assignee to apply for the relevant order under CPRA (including the matters the Central Authority must take into account in making this authorisation).⁵¹⁰ Subpart 8 of Part 2 of CPRA would then contain the provisions related to the application for, registration of and effect of the foreign orders, cross-referencing any applicable domestic provisions of CPRA.⁵¹¹

This means, once the assistance has been authorised by the Central Authority, almost everything is dealt with under CPRA, rather than the mutual assistance legislation. This is consistent with the Central Authority's core "gateway/gatekeeper" function in our Bill.

The provisions contained in subpart 3 of Part 2 and the Schedule of our draft Bill have been designed to illustrate two things: (1) the way in which the Bill and CPRA should interact (as described above); and (2) our policy relating to interim foreign restraining orders. In order to illustrate these, we have drafted the relevant provisions of the Mutual Assistance Bill and the main amendments that should be made to CPRA. It is important to note, however, further consequential amendments to CPRA will be necessary to complete the scheme.⁵¹²

Clause 46 Interpretation

foreign restraining order means an order made under the law of a foreign country by any court or judicial authority or, if a mutual assistance treaty specifically permits, any other body authorised in that country to make a restraining order that—

- (a) restrains a particular person, or all persons, from dealing with the property specified in the order; and
- (b) relates to criminal proceeds

⁵⁰⁶ Mutual Assistance in Criminal Matters Act 1992, ss 54(2) and 55(2).

⁵⁰⁷ Criminal Proceeds (Recovery) Act 2009, ss 132–134 and 140–147.

⁵⁰⁸ Mutual Assistance in Criminal Matters Act 1992, s 56.

⁵⁰⁹ See Mutual Assistance in Criminal Matters Act 1992, s 57; and Criminal Proceeds (Recovery) Act 2009, ss 135–139 and 140–149.

⁵¹⁰ There are two exceptions. Firstly, the duration of a registered foreign restraining order will be dealt with in CPRA, but cancellation is dealt with in the Mutual Assistance Bill (Mutual Assistance Bill, cl 49). This is because the Central Authority will need to initiate this process. Secondly, any material seized or obtained as a result of a search warrant, production order or examination order issued under CPRA must be dealt with in accordance with an agreement negotiated between the New Zealand Central Authority and the foreign central authority before the New Zealand Central Authority authorises the provision of assistance (Mutual Assistance Bill, cl 50). It is important that this is dealt with in the Mutual Assistance Bill because it is fundamental to the Central Authority's authorisation of the provision of assistance.

⁵¹¹ The necessary amendments to be made to the Criminal Proceeds (Recovery) Act 2009 are contained in the Schedule to the Mutual Assistance Bill.

⁵¹² For instance, much of s 134 of the Criminal Proceeds (Recovery) Act 2009 is contained in new s 134A (in the Schedule to the Mutual Assistance Bill), thus s 134 will need to be substantially amended.

Commentary

MACMA provides that foreign restraining orders must be made by a “court or judicial authority”.⁵¹³ Although it remains appropriate that foreign *forfeiture* orders must always be made by a court or judicial authority, we understand that in a number of countries *restraining* orders are routinely made by non-judicial authorities.⁵¹⁴ We think that the basic requirement should remain that a court of judicial authority has made the order because it imports notions of impartiality and independence. It is important to leave room, however, for the New Zealand Government to agree by treaty with a foreign country that orders made by a different authority in that country will be acceptable. We acknowledge that dealing with this issue by treaty may take some time, and would need to be dealt with on a country-by-country basis. However, given the impact such an order has on a person’s private property rights, it is important that New Zealand is satisfied that the order has been made by an appropriately independent and impartial authority before it recognises such an order. Requiring this to be dealt with by treaty will ensure that the non-judicial authority in the foreign country will have been subjected to close scrutiny, and that recognising an order made by that authority would not be inconsistent with New Zealand values.

Clause 47 Interim foreign restraining orders

- (1) The Central Authority may, under section 27, authorise the provision of assistance to apply for an interim foreign restraining order if the Central Authority—
 - (a) has received adequate assurances from the foreign Central Authority that—
 - (i) a request under this Act for a foreign restraining order relating to the same property will be made within 28 days from the date the interim order is made; and
 - (ii) the foreign country will reimburse any costs or damages ordered by a court in relation to the making, operation, or extension of the interim order; and
 - (b) is satisfied that—
 - (i) the foreign Central Authority understands the requirements for registration of a foreign restraining order in New Zealand; and
 - (ii) the later request for a foreign restraining order is likely to be agreed to.
- (2) The authorisation must certify that the Central Authority has received the assurances required by subsection (1)(a) and is satisfied of the matters in subsection (1)(b).
- (3) An application made under section 128 of the Criminal Proceeds (Recovery) Act 2009, and the application must be made and dealt with, and any order made must be enforced, under that Act.

Commentary

The scheme for interim foreign restraining orders contained in this provision and in new sections 128–128B (contained in the Schedule to this Bill),⁵¹⁵ is designed to implement our proposal from the Issues Paper.⁵¹⁶ It resolves two fundamental issues inherent in the current interim foreign restraining order scheme: (1) inappropriate delays at the request and authorisation stage; and (2) unnecessary discrepancies between the tests for authorisation applied by the Central Authority, and for registration applied by the court.⁵¹⁷ The provisions in the new Bill streamline the existing process for obtaining an

513 Mutual Assistance in Criminal Matters Act 1992, s 56.

514 For instance, we understand that under Chinese criminal procedure law, initial asset forfeiture power is vested in the administrative arm of the Police and Prosecutors Office. Confiscation powers, however, are retained in the hands of the courts.

515 Dealing with the necessary amendments to the Criminal Proceeds (Recovery) Act 2009.

516 Issues Paper, above n 490, at [16.38].

517 For a full discussion of the issues arising out of the current scheme governing interim foreign restraining orders, and our proposal, see Issues Paper, above n 490, at [16.24]–[16.38].

interim foreign restraining order, while balancing the need for expeditious restraint of property and protection of individual property rights.

Under section 29 of CPRA, the Commissioner of Police may be required to give the High Court an undertaking as to costs upon filing an application for an interim foreign restraining order. Clause 47(1)(b)(ii) is intended to require the foreign country to underwrite that undertaking, thereby substantially decreasing the financial risk to the New Zealand Government.

Clause 50 Search warrants, production orders, and examination order

- (1) The Central Authority may, under section 27, authorise the provision of assistance to apply for a search warrant, a production order, or an examination order under the Criminal Proceeds (Recovery) Act 2009 if—
 - (a) satisfied that there are reasonable grounds to believe that some or all of the property that is the subject of the application, or information about that property, is in New Zealand; and
 - (b) satisfied that the request relates to criminal proceeds (as defined in section 46); and
 - (c) agreement has been reached with the requesting country on the matters listed in section 35(1)(b).
- (2) An agreement under subsection (1)(c) must be in writing and must take account of the matters in sections 103, 105(5), 107(4), 111, 112, and 113 of the Criminal Proceeds (Recovery) Act 2009.
- (3) The authorisation must—
 - (a) certify that the Central Authority is satisfied of the matters in subsection (1)(a) and (b); and
 - (b) include a copy of the agreement made under subsection (1)(c); and
 - (c) specify which of sections 101, 102, 104, 106, and 110 of the Criminal Proceeds (Recovery) Act 2009 may be used by the person authorised to provide the assistance.
- (4) An application must be made under section 124, 125, or 125A to 125C of the Criminal Proceeds (Recovery) Act 2009, and the application must be made and dealt with, and any warrant or order made must (except as provided by this Act) be executed, under that Act.
- (5) The New Zealand Police may be assisted by a foreign enforcement officer if the requirements in section 38 are not met.
- (6) Anything seized or produced must be dealt with in accordance with sections 39 and 40.

Commentary

As noted in the commentary to subpart 3, above, further consequential amendments to CPRA will be necessary to complete the scheme. Sections 125A–125C, referred to in subclause (4) of clause 50 fall into this category.

New section 125A should provide the Official Assignee with the power to apply for a search warrant under section 110 of CPRA, if authorised under clause 50 of the Mutual Assistance Bill. It should specify that sections 110(1), (2) and (4) of CPRA apply with any necessary modifications,⁵¹⁸ and that any search warrant should be executed in accordance with section 114 of CPRA.

New section 125B should provide the Commissioner of Police with the power to apply for an examination order under section 104 of CPRA, if authorised under clause 50 of the Mutual Assistance

⁵¹⁸ Including that: “application for a restraining order” should be read as “application to register a foreign restraining order”; “restraining order” should be read as “registered foreign restraining order”; and “forfeiture order” should be read as “registered foreign forfeiture order”.

Bill. It should also provide that sections 104(2), (3) and (4) and 105(1), (2), (3) and (4) apply with any necessary modifications to an application and determination of an application.⁵¹⁹

New section 125C should provide the Commissioner of Police with the power to apply for an examination order under section 106 of CPRA, if authorised under clause 50 of the Mutual Assistance Bill. It should specify that sections 106 and 107(1), (2) and (3) of CPRA apply with any necessary modifications to an application and determination of an application, and that the order must be executed in accordance with section 107(4)–(7) of CPRA and the agreement referred to in clause 50(1)(c) of the Mutual Assistance Bill.

Clause 55 Admissibility of evidence

- (1) Any statement of evidence (by whatever name called) received from a foreign country, and any documents referred to in the statement that have been authenticated under section 66, may be admitted in evidence at the hearing of criminal proceedings to which the request relates, unless excluded under the law of evidence.
- (2) Any statement of evidence or document to which this section applies must not be excluded for the reason only that a requirement as to form is not met.

Commentary

Clause 55 is designed to ensure that evidence will not be inadmissible solely because it does not comply with requirements as to form. As we noted in the Issues Paper, there may be difficulties getting evidence in the appropriate form, particularly from civil law jurisdictions in which, for example, the concepts of oath and affirmation are not used.⁵²⁰ Clause 55 makes it clear that evidence should not be excluded solely for the reason that it does not meet form requirements.

Schedule—Amendments to Criminal Proceeds (Recovery) Act 2009

Replace section 128 with:

Clause 128 Application for foreign restraining order

- (1) The Commissioner may apply to the High Court for an interim foreign restraining order if authorised by the Central Authority under section 47 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015.
- (2) An application under subsection (1) is made without notice.
- (3) Sections 19 and 22(2) and (3) apply to an application made under this section, with any necessary modifications.

Clause 128A Order by court

- (1) The court must make an interim foreign restraining order—
 - (a) if satisfied that the Central Authority has authorised the making of the application under section 47 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015; and
 - (b) if the authorisation complies with the certification requirements of section 47(2) of that Act.

⁵¹⁹ Including that: a foreign criminal proceeds investigation or proceeding should be treated as if it is an investigation or proceeding under CPRA.

⁵²⁰ Issues Paper, above n 490, at [22.21].

- (2) The order must—
 - (a) identify the property in respect of which the authorisation has been given; and
 - (b) state that, for the duration of the order, the property—
 - (i) is not to be disposed of, or dealt with, other than as provided in the order;
 - (ii) is to be held by the Official Assignee.
- (3) Subject to subsection (4), sections 27 to 29 apply to an order made under this section, with any necessary modifications.
- (4) The reference in section 28(2) to legal expenses must be read as a reference to any legal expenses incurred by the defendant, including in defending allegations of criminal activity in the foreign country seeking the order.

...

Commentary

As noted above, in the commentary to clause 47 of the Mutual Assistance Bill, one of the problems with the current scheme relating to the interim foreign restraining orders is the unnecessary discrepancies between the tests for authorisation applied by the Central Authority, and for registration applied by the court. Under the current scheme, the Central Authority considers whether there is a criminal investigation in the foreign country in relation to the four categories of criminal proceeds: (a) tainted property; (b) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; (c) an instrument of crime; or (d) property that will satisfy some or all of a foreign pecuniary penalty order. By contrast, the court must treat an application for an interim foreign restraining order as if it is an application for a domestic order, and so must consider whether the property does, in fact, fall within one of the four categories of property described above (as required under sections 24–26 of CPRA). This requires a much more extensive examination of the foreign evidence than that conducted by the Central Authority. These tests are too dissimilar. As was noted in the Issues Paper, the Central Authority may be satisfied as to the nature of the foreign investigation; however, on the same information, the High Court may not be able to ascertain a clear enough understanding of the connection between the relevant property and the criminal activity to satisfy itself of the requirements in sections 24–26 of CPRA.⁵²¹ As such, in the amendments to CPRA in the Schedule to our Bill, sections 24–26 of CPRA do not apply. Instead, the court is focused upon whether the Central Authority has followed the process outlined in clause 47 of the Bill (that is, that it has certified under clause 47(2) satisfaction with the relevant matters outlined clause 47(1)).

After section 134, insert:

Clause 134A Registration of foreign restraining order

- (1) A foreign restraining order does not have effect and cannot be enforced in New Zealand unless it is registered.
- (2) The court may register a foreign restraining order if satisfied that—
 - (a) the Central Authority has authorised the making of an application to register the order under section 48 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act 2015; and
 - (b) subject to subsections (5) and (6), the order is authenticated under section 66 of that Act; and

⁵²¹ Issues Paper, above n 490, at [16.28]–[16.31].

- (c) the order is in force in the foreign country seeking registration of the order.
- (3) Subject to subsection (4), sections 19, 21 to 23, and 27 to 29 apply to an order made under this section, with any necessary modifications.
 - (4) The reference in section 28(2) to legal expenses must be read as including reference to a respondent's legal expenses in defending allegations of criminal activity in the foreign country seeking the order.
 - (5) An exact copy of a sealed or an authenticated copy of a foreign restraining order must, for the purposes of this Act, be treated as a sealed or authenticated copy.
 - (6) However, registration of an exact copy ceases to have effect on the expiry of a period of 21 days commencing on the date of registration unless, before the expiry of that period, the sealed or authenticated copy is registered.
 - (7) For the purpose of this section, **foreign restraining order** includes an amendment to a foreign restraining order.

Commentary

While the court may make a domestic restraining order subject to any conditions it considers fit, section 28(2) provides that the court "may not allow any legal expenses to be met out of a respondent's restrained property". Currently, this exception does not apply to foreign restraining orders registered in New Zealand.⁵²² We see no basis to distinguish between domestic and registered foreign restraining orders.⁵²³ As such, new section 134A of CPRA makes it clear that section 28 applies in its entirety, including the legal expenses exception. The same applies to new section 134A(4) of CRPA.

⁵²² Criminal Proceeds (Recovery) Act, s 134(1)(d) states that only s 28(1), (3) and (4) of the Act apply to registered foreign restraining orders.

⁵²³ See discussion in Issues Paper, above n 490, at [16.43]–[16.50].

