



EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS





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The Law Commission is an independent, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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Call for submissions

Submissions or comments (formal or informal) on this issues paper should be received by **2 March 2015**.

Emailed submissions should be sent to:
extradition@lawcom.govt.nz

Written submissions should be sent to:
**EMA Review
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PO Box 2590
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DX SP 23534**

Alternatively, submitters may like to use the pre-formatted submission template available on our website at www.lawcom.govt.nz.

The Law Commission asks for any submissions or comments on this issues paper on the Review of Extradition and Mutual Assistance in Criminal Matters. Submitters are invited to focus on any of the questions. It is certainly not expected that each submitter will answer every question.

The submission can be set out in any format, but it is helpful to specify the number of the question that you are discussing.

A final report and recommendations to Government will be published in 2015.

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The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus, copies of submissions made to the Law Commission will normally be made available on request and may be published on the Commission's website. The Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Foreword

Today we live in a largely borderless world. Goods, information, capital and people flow more easily over borders than ever before. Globalisation has also given new opportunities to criminals. Just as it is important that New Zealand has a modern and efficient legal infrastructure to facilitate the advantages that come with globalisation, so too must it have a modern infrastructure to deal with criminals who seek to take advantage of it.

The Government has referred to the Law Commission a review of the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992. The Law Commission has arrived at a preliminary conclusion that both these Acts are not fit for purpose in the modern globalised world. They do not provide the efficient and effective infrastructure that New Zealand needs in order to play its part as a good global citizen concerned, as it ought to be, with the detection of crime and the prosecution of offenders. In the case of both the Extradition Act and the Mutual Assistance in Criminal Matters Act, the Commission's view is that they should be replaced with new statutes or substantially redrafted, and the Commission now seeks feedback from all New Zealanders on the new arrangements that we think are appropriate.

The Commission is concerned that these statutes not only provide an appropriate means of dealing with international crime, but that they also respect human rights and other concerns that New Zealanders care so deeply about. The statutes play an important gateway function in allowing foreign countries to use New Zealand's tools to investigate, prosecute and extradite criminals, but must also fulfil an important gatekeeping function in ensuring that such investigations, prosecutions and extraditions accord with New Zealand's values and respect for human rights. The Commission is particularly interested in whether our proposals find the appropriate balance between, on the one hand, facilitating extradition and international investigations and prosecutions, and on the other hand, protecting the rights of those who might be sought or who are being investigated.

The Commission looks forward to receiving your submissions about this important and critical part of our legal system.



Sir Grant Hammond
President

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- Ministry of Justice;
- New Zealand Police;
- Grant Illingworth QC; and
- Christine Gordon QC, Meredith Connell.

The review is led by Geoff McLay and Judge Peter Boshier. The legal and policy advisers involved are Marion Clifford, Kristen Ross, Kate Salmond, Susan Hall and Paul Comrie-Thomson.

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Chapter 1

Review of the Extradition Act and Mutual Assistance in Criminal Matters Act

KEY PROPOSALS

Proposal: The Extradition Act 1999 should be replaced by a new Extradition Act.

Rationale: The problems with the existing Act relate to its fundamental underpinnings as well as technical aspects such as the procedural requirements and the sharing of roles. The problems cannot be resolved by mere tinkering with the existing legislation.

Proposal: The Mutual Assistance in Criminal Matters Act 1992 should be replaced or substantially redrafted.

Rationale: The Act needs to more appropriately balance the function of providing a gateway for foreign countries to access the tools New Zealand has in investigation and prosecuting crime with its gatekeeping role of ensuring the rights of individuals in New Zealand affected by the requests are sufficiently protected.

- 1.1 The Law Commission has been asked to review the Extradition Act 1999 and Mutual Assistance in Criminal Matters Act 1992 (MACMA). These Acts provide a framework for formal assistance between New Zealand and foreign governments in the investigation and prosecution of crime.
- 1.2 The purpose of the review is to ensure that these Acts contain processes that are efficient, effective, and not overly complex or unnecessarily expensive. The review will have regard to the changing international context and international best practice, alongside New Zealand's international obligations, in ensuring the extradition and mutual legal assistance frameworks balance New Zealand's commitment, on the one hand, to international cooperation in criminal matters, and on the other, to the rights of those being investigated or prosecuted.¹

REVIEW PROCESS AND THIS ISSUES PAPER

- 1.3 In preparing this issues paper, the Commission has engaged with various public and private sector stakeholders.
- 1.4 As well as analysing the various issues raised by the terms of reference, we have made a number of preliminary proposals as to how those issues might be best resolved. This, however, is only an issues paper. These proposals are not final recommendations. Indeed, the point of providing

¹ See Appendix A for the full terms of reference for the review.

proposals at this stage is to elicit comment and submissions that will feed into the Commission's final report. Submissions are open until 2 March 2015.

PRINCIPLES BEHIND OUR REVIEW

- 1.5 In approaching the review, we have applied the following principles:
- (a) The regimes should facilitate and support New Zealand's international obligations, and its role as an international citizen, in the prosecution and prevention of crime.
 - (b) At the same time, the reforms as a whole should promote procedural fairness and the protection of the rights of individuals subject to extradition or mutual legal assistance requests.
 - (c) Purely technical or procedural impediments to achieving (a) and (b) should be minimised in favour of substantive opportunities to provide assistance while at the same time substantively protecting the rights of those being extradited or investigated.

WHY THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS IS IMPORTANT

- 1.6 Both Acts under review are important parts of New Zealand's response to international crime. Crimes, and the criminals that commit them, are an intractable part of our globalised world. New Zealand needs laws that enable it to respond to that challenge, while respecting the rights that are both an important part of our legal tradition as well as embedded in the new international legal order.

WHAT IS WRONG WITH THE CURRENT LAW?

- 1.7 The Extradition Act and MACMA are complex and convoluted statutes that are difficult to follow. Both statutes fail to come to grips with the realities of New Zealand's place within a globalised environment. They fail to provide a framework through which to balance both New Zealand's role within the international community and the values that will always remain important to New Zealanders in protecting the rights of those accused of crimes overseas or protecting those here from unwarranted investigation from abroad.
- 1.8 We propose that the Extradition Act should be replaced and MACMA could be replaced or at least substantially redrafted.

PRINCIPAL PROPOSALS FOR A NEW EXTRADITION ACT

An integrated scheme for extradition

- 1.9 Our proposed new Act would provide for an integrated scheme that we consider would achieve the necessary and appropriate balance between protecting the rights of those whose extradition is sought and providing an efficient mechanism for extradition.
- 1.10 The new Act would establish a central authority that would be responsible for receiving, managing, and executing standard extradition requests.² More importantly, it would be the central authority's role, in the first instance, to vet foreign countries' applications. It would also be formally responsible for the oversight of the way in which extraditions are conducted

² Discussed in ch 4.

in New Zealand. The New Zealand Police would continue to be responsible for the simplified backed-warrant procedure that currently applies to Australia and the United Kingdom.

- 1.11 The new Act would provide for real protection of rights where necessary. Much of this would come from the role of the courts. The courts would be given a meaningful judicial role in evaluating the appropriateness of any evidence of the offending but one that does not go as far as requiring a pre-emptive trial of the case in New Zealand. It is an important feature of the nature of extradition proceedings that the person against whom extradition is sought is not on trial. Evaluating the strength of the evidence in determining the guilt or innocence of the person is to be left to the trial in the requesting country.
- 1.12 The proposed scheme under the new Act would also meet New Zealand's international obligations by giving effect to the underlying intention of its extradition treaties, that is, to enable extradition to occur without being complicated by technically confusing treaty texts, most of which were settled over 80 years ago. The new Act would present the interrelationship between the statute and treaties clearly, with the statute being the primary source of extradition law in New Zealand.
- 1.13 The new Act would give to the court the sole responsibility for considering nearly all of the grounds for refusing surrender.³ Only a few grounds would be reserved for sole consideration by the Minister. This would allow the significant matters of the personal circumstances of the individual sought for extradition, the values of New Zealand's legal system, and the human rights and justice system record of the requesting country to be considered directly and openly.

Reducing complexity in the way that we treat foreign countries' requests

- 1.14 The current Act seeks to give direct effect to the treaties that New Zealand has either inherited or concluded.⁴ This has made the technical requirements of those treaties the major focus of much of the extradition litigation that has occurred, causing considerable delay. Moreover, the current Act uses a complex categorisation system to decide which aspects of the Extradition Act regime will apply to which countries in a way that does little to help the underlying sense of the scheme.
- 1.15 Our proposed reforms aim to make it clearer how international obligations might supplement the extradition obligations in the new Act.
- 1.16 Under the new Act, countries would continue to be categorised based on their relationship to New Zealand, and that categorisation would influence how an extradition request is advanced. However, there would be a simpler two-category approach to categorising countries. Category 1 would comprise a small group of New Zealand's closest extradition partners, and Category 2 would include all other countries.⁵
- 1.17 There would be distinct requirements and procedures for the two categories.⁶ There would be no evidential inquiry into requests from countries in Category 1. For countries in Category 2, the Act would allow a country to present to the court a summary of the evidence against the person sought (the "record of the case") on which the court would determine eligibility for extradition.

³ Discussed in ch 8.

⁴ Discussed in ch 3.

⁵ Discussed in ch 6.

⁶ Discussed in ch 7.

Reducing delay

- 1.18 Under the current Act, there is considerable opportunity for delay and multiple considerations of decisions. Our proposals would increase efficiency and enable foreign countries to better cooperate with New Zealand. Under the proposed scheme, we intend that there be one appeal route rather than encouraging the multiplicity of appeals, judicial reviews, and habeas corpus applications.⁷ We do not think that it is appropriate to remove habeas corpus or judicial review procedures, but we prefer to make the possibility of such off-track reviews as irrelevant as possible.
- 1.19 There would also only be one decision maker for each ground of refusal to surrender for extradition. However, the grounds would be flexible enough to provide appropriate protection of rights. While we intend that, in cases that do not involve Australia, the United Kingdom or other Category 1 countries, a judge would still review the evidence proffered, we propose amending admissibility and form of evidence requirements to allow a summary of evidence to be presented. It is true that this inefficiency provides a protection of its own to those whose extradition is requested, but we have taken the view that each matter should be properly considered by the person, body, or court best able to make that decision, subject to an appropriate right of appeal.
- 1.20 Extradition is a process that must operate efficiently from the perspective of the requesting country, reflect New Zealand's own concerns about law enforcement, and protect the rights of the accused through that process.

PRINCIPAL PROPOSALS FOR MACMA

Gateway role

- 1.21 MACMA serves as a gateway, allowing a foreign country to request that New Zealand use its powers to investigate and prosecute crime, and to restrain and seek forfeiture of property derived from crime, on the foreign country's behalf.
- 1.22 The current MACMA legislation is too detailed and specific and instead needs to be more principles based, allowing domestic tools that are used to investigate and prosecute crime to be available for foreign criminal matters in the appropriate circumstances. The proposals that we have made in this paper are designed to widen this gateway function as well as streamline the process for such requests.

Gatekeeper role

- 1.23 MACMA also serves as a gatekeeper, ensuring that the rights of individuals in New Zealand affected by the request are sufficiently protected. Not all requests for assistance will be appropriate, especially when first made. The current Act recognises that, as the Central Authority, the Attorney-General must decline to grant assistance for a few certain reasons and that he or she may decline assistance for a number of others. For coercive powers, there is also a second gatekeeping mechanism involving the use of the court. Our proposals would strengthen this gatekeeping role.

⁷ Habeas corpus is an ancient common law procedure requiring the government to show cause as to why someone is imprisoned.

MACMA and New Zealand's international obligations

- 1.24 International treaties are likely to expand the form of assistance that foreign countries might be able to request from New Zealand. MACMA should do a significantly better job in setting out the relationship between the current statute and those obligations. It should set out how those international obligations might vary the kinds of assistance that would otherwise be offered and the procedures that might be adopted to give that assistance or the terms under which it might be refused. The Act, however, should be clear as to the minimum core of obligations that cannot be waived or whether there are forms of assistance that cannot be added without statutory amendment.

Clarifying the relationship with other forms of mutual assistance

- 1.25 The relationship between MACMA and other mutual assistance arrangements with regulatory agencies and their foreign counterparts should be made clear. Inter-agency mutual assistance agreements will become more prevalent over the coming years. While we do not necessarily see anything wrong with a development that is both inevitable and desirable, there is a pressing need for New Zealand agencies to have a sense of both what is best practice for entering into such arrangements and what minimum protections ought to be expected.
- 1.26 There are likely to be further information exchange arrangements entered into, and inter-agency mutual assistance agreements will become more prevalent over the coming years. While we do not necessarily see anything wrong with a development that is both inevitable and desirable, there is a pressing need for New Zealand agencies to have a sense of both what is best practice for entering into such arrangements and what minimum protections ought to be expected.

OUR APPROACH TO THE IMPORTANCE OF HUMAN RIGHTS IN THIS REFERENCE

- 1.27 The Commission has taken the view that the protection of human rights is critically important in the investigation, prosecution and surrender of offenders. We have therefore carefully gone through each one of our proposals to consider the human rights implications, and have explicitly identified how we believe the interests of those who are being investigated, prosecuted or who are subject to surrender, are to be respected. Central to this consideration is, of course, to look at what is required by the New Zealand Bill of Rights Act 1990 (NZBORA) as well as New Zealand's international obligations.

New Zealand Bill of Rights Act and extradition

- 1.28 Our approach has been to make proposals that protect the rights of the person sought within the context of extradition. One of the difficulties with any such consideration is that extradition is its own subject area, not easily classified as civil or criminal, domestic or international, and any delineation of the correct protections needs to take account of values from quite different areas of law. Sections 24 and 25 of NZBORA provide important protections for those "charged with an offence". By majority, the Supreme Court held that these two sections are not engaged in extradition proceedings because a person who is sought for extradition is not "charged with an offence" in the way those sections envisioned.⁸

8 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355.

- 1.29 Our approach in this paper is to avoid determining how a person subject to an extradition proceeding should be treated by attempting to characterise it as criminal or civil proceeding. Instead, each aspect of the extradition proceedings should be evaluated within the special context of what is appropriate in extradition proceedings. This reflects the Supreme Court's unanimous decision that the natural justice protections of section 27 of NZBORA did apply to extradition proceedings, and that this warranted a contextual examination of each stage of the process to determine what was required. In our view, the Extradition Act should, as far as possible, clearly set out what the accused can fairly expect at each stage of the proceedings.
- 1.30 Other rights in NZBORA, and their underlying values, have also shaped the way that we have dealt with particular issues in this review, for example, the right not to be deprived of life.⁹ Although it has not been held conclusively that this right would prevent New Zealand extraditing someone who might be subject to the death penalty, in our view the Extradition Act should reflect this right and New Zealand's commitment to the abolition of the death penalty by prohibiting such an extradition. In the same way, the degree to which the prohibition in NZBORA against "cruel, degrading, or disproportionately severe treatment or punishment"¹⁰ might prevent extraditions where there is a risk of such treatment, even though it is below the threshold of torture which is a ground for refusing surrender, has not been resolved by the courts. In our view, the Extradition Act should enable the courts to determine whether the possibility of such treatment should prevent an extradition.

New Zealand Bill of Rights Act and mutual legal assistance

- 1.31 Typically, mutual legal assistance requests involve traditional criminal procedures that are subject to the various protections that New Zealand accords all those who are being investigated by the Police or other law enforcement agencies. Our basic approach is that the same protections ought to apply in relation to mutual legal assistance requests as they relate to any domestic investigation. There are additional concerns that are unique in relation to mutual legal assistance requests. We have proposed that the Central Authority continue to have a strong role in requests under MACMA to ensure the rights of individuals in New Zealand affected by the request are sufficiently protected. This means that for the majority of MACMA requests, there will be two protections in place for those being investigated or prosecuted. First, they will be protected by the Central Authority which has a statutory mandate to consider the appropriateness of granting assistance, and may decline the request if it is not appropriate given underlying human rights values. Secondly, invasive assistance such as search or surveillance warrants will only be granted with court approval in the same way as domestic warrants. We have also been particularly conscious of the need to preserve the rights of those being investigated in relation to search and surveillance requests by proposing some additional considerations in respect of the role of foreign law enforcement officers and how seized, produced or created materials should be dealt with.

⁹ New Zealand Bill of Rights Act 1990, s 8.

¹⁰ New Zealand Bill of Rights Act 1990, s 9.

Part 1

EXTRADITION ACT



Chapter 2

Introduction to extradition

WHAT IS EXTRADITION?

- 2.1 Extradition is the formal legal surrender by one country to another of a person who has been accused or convicted of a criminal offence in the jurisdiction of the second country in order for the person to be tried or punished. Throughout this issues paper, we refer to the first country as the “requested country” and the second as the “requesting country”.
- 2.2 The premise of extradition is that perpetrators of crime should not be able to escape justice by leaving one country for another, and countries should assist each other in punishing criminal conduct.¹¹ If extradition does not take place, then generally the person sought cannot be tried in the requested country. Extradition has become an essential international mechanism for cooperation in the suppression of crime. Traditionally, it has been seen as a matter of international comity (the favour accorded by one state to another).¹² This has meant that the system of extradition has been based predominantly on reciprocal treaties between states. In recent years, the importance of direct reciprocity between countries in extradition has been somewhat diminished. Instead, states consider themselves obliged to act as good international citizens. A number of multilateral conventions addressing specific types of international crime have provided a basis for extradition outside of the bilateral treaty approach. Many states have legislation that allows extradition to occur between states without a bilateral treaty.
- 2.3 Extradition proceedings before a court are not considered to be proceedings to determine a criminal charge. They are to assist criminal proceedings that have taken or will take place in another state.¹³ This is fundamental to any assessment of what procedural steps and evidential requirements should be in place for extradition proceedings.

HOW EXTRADITION LAW DEVELOPED

- 2.4 To understand the way New Zealand’s extradition laws operate, it is helpful to know how the law of extradition has developed internationally. Its main period of growth was in the 19th century, with significant extradition treaties being negotiated between the United Kingdom, European countries, and the United States. This network of bilateral extradition treaties was the first of what are now described as the classical mechanisms of international cooperation in criminal matters.¹⁴
- 2.5 The Extradition Act 1870 (Imp)¹⁵ established a statutory process for giving effect to extradition treaties. That process continues to be echoed in New Zealand’s own Extradition Act 1999, as

11 Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom’s Extradition Arrangements* (Home Office, 30 September 2011) at [2.1]–[2.3]; and *In re Arton (No 1)* [1896] 1 QB 108 at 111.

12 See EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 2; and IA Shearer “Extradition and human rights” (1994) 68 ALJ 451 at 451.

13 Baker, Perry and Doobay, above n 11, at [2.4].

14 William Gilmore “International Cooperation in the Administration of Justice: Developments and Prospects” (1992) 18 CLB 1550 at 1550.

15 Extradition Act 1870 (Imp) 33 & 34 Vict c 52.

well as in that of other common law countries. Many of its principles and safeguards continue to have importance in extradition law today.

2.6 While the United Kingdom conducted its extradition relations with foreign states through bilateral treaties, extradition within the British Empire was enabled under the Fugitive Offenders Act 1881 (Imp).¹⁶ As countries gained independence from the United Kingdom, it became necessary for the sovereign Commonwealth countries to develop a new basis on which to extradite between one another. In 1966, the Law Ministers of the Commonwealth developed a statement of agreed extradition principles, now called the London Scheme for Extradition within the Commonwealth (previously the London Scheme on the Rendition of Fugitive Offenders). Each member country agreed to enact legislation to enable the extradition of persons in accordance with the London Scheme.

2.7 In recent decades, modern transportation and communication technology, and the increasing freedom of movement of people, have led to a growth in international crime. In the words of one commentator:¹⁷

The internationalisation of economic activity and of transport goes hand-in-hand with a dramatic internationalisation of crime. Each day, it becomes painfully clear to the police and the judiciary how great the energy, speed, mobility and sophistication of offenders are and, by contrast, how difficult it is to overcome the barriers created for the police and judiciary out of differences in national legal systems and out-moded concepts of national sovereignty.

2.8 Modern international criminal activity, such as transnational organised crime, drug trafficking, international terrorism, and cross-border money laundering, have made the need for an effective and efficient system of extradition between countries more pronounced. A plethora of multilateral treaties addressing different types of international criminal activity have arisen, many containing extradition provisions.¹⁸

ELEMENTS OF NEW ZEALAND'S CURRENT EXTRADITION SCHEME

2.9 As a result of this history, there are several elements to New Zealand's current extradition arrangements:

- **Inherited treaties:** Prior to New Zealand's ratification of the Statute of Westminster in 1947, the United Kingdom entered into extradition treaties on New Zealand's behalf. New Zealand may continue to be bound as a successor state to 41 of these treaties.¹⁹
- **Bilateral treaties:** New Zealand has negotiated bilateral extradition treaties with four countries: the Republic of Korea, Hong Kong, Fiji, and the United States of America.²⁰
- **Multilateral treaties with extradition provisions:** New Zealand is a party to at least 25 multilateral treaties that contain extradition provisions.²¹

16 Fugitive Offenders Act 1881 (Imp) 44 & 45 Vict c 69.

17 Peter Wilkitzki "Development of an Effective International Crime and Justice Programme: A European View" in Albin Eser and Otto Lagodny (eds) *Principles and Procedures for a New Transnational Criminal Law: Documentation of an International Workshop in Freiburg, May 1991* (Max Planck Institute for Foreign and International Criminal Law, Freiburg, 1992) 267 at 270.

18 See Appendix C for a list of multilateral treaties containing extradition obligations to which New Zealand is a party.

19 See [3.9]. The extradition treaties to which New Zealand may be bound as a successor state are with Albania, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Chile, Colombia, the Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, France, the Gilbert and Ellice Islands, Greece, Hungary, India, Iraq, Italy, Latvia, Liberia, Lithuania, Luxembourg, Mexico, Monaco, Nauru, the Netherlands, Nicaragua, Norfolk Island, Panama, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Romania, Russia, Samoa, San Marino, Serbia, the Solomon Islands, Spain, Sweden, Switzerland, Thailand, Tonga, and Uruguay: see Ministry of Foreign Affairs and Trade "Treaties and International Law: Extradition" (24 November 2010) < www.mfat.govt.nz > .

20 See [3.11].

21 See [3.7]–[3.8] and Appendix C.

- **Commonwealth countries:** New Zealand is currently a member of the London Scheme for Extradition within the Commonwealth.²²
- **Domestic legislation:** The New Zealand Parliament enacted its first Extradition Act in 1965. A separate process applied to extradition to and from Commonwealth countries under the Fugitive Offenders Act 1881 (Imp).²³ The Extradition Act 1999 replaced both Acts with a single statute to cover all extraditions.

EXTRADITION ACT 1999

- 2.10 The Extradition Act applies to both extradition requests made by and from New Zealand. The Act provides the procedure through which extradition requests will be considered. It also provides the terms on which extradition can occur. The Act can, however, be supplemented and to some degree supplanted by an extradition treaty in force between New Zealand and a foreign country.
- 2.11 The Act applies only if the request relates to an extraditable person and an extradition offence and comes from an extradition country.²⁴ An **extraditable person** is a person suspected of, or who has been convicted of, committing an extradition offence.²⁵ An **extradition offence** is an offence under the law of the requesting country punishable by 12 months or more in prison and that, if that conduct had occurred in New Zealand at the relevant time, would also have been an offence in New Zealand punishable by 12 months or more in prison (known as the principle of **dual criminality**).²⁶ An **extradition country** is a country to which the Act applies.²⁷
- 2.12 Another important concept that is essential for an extradition request is the principle of **speciality**. Speciality means that, once extradited, a person cannot be detained and tried in the requesting country for an offence that is different to the one to which the extradition request related.²⁸
- 2.13 The Act contains **mandatory restrictions on surrender**, which prevent a person from being surrendered for extradition, and **discretionary restrictions on surrender**, which the Minister of Justice may rely upon to refuse surrender, although these may be modified by a treaty.²⁹ The mandatory restrictions on surrender are:³⁰
- the offence or prosecution is of a political character or because of discrimination;
 - the person may be prejudiced in the justice system due to discrimination;
 - the conduct constitutes an offence under military law only;
 - double jeopardy; or
 - the person is a patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

22 London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966.

23 Fugitive Offenders Act 1881 (Imp) 44 & 45 Vict c 69.

24 Extradition Act 1999, ss 3, 4, and 6.

25 Section 3.

26 Section 4.

27 Section 2.

28 Section 30(5)(d).

29 See discussion in ch 8.

30 Section 7.

2.14 The discretionary restrictions on surrender are:³¹

- where it would be unjust or oppressive in the circumstances to surrender the person because:
 - of the trivial nature of the case;
 - the accusation was not made in good faith in the interests of justice; or
 - of the amount of time that has passed since the alleged offence; or
- the person has been accused of another offence in New Zealand, and proceedings are still under way.

2.15 The Act contains two different procedures for extradition from New Zealand, depending on which country makes the extradition request:

- The **standard procedure**, contained in Part 3 of the Act, applies to extradition requests from:³²
 - a Commonwealth country;
 - a country that New Zealand has an extradition treaty with;
 - a country designated by Order in Council to have Part 3 of the Act apply; and
 - for the purposes of a specific individual extradition request, a country designated under Part 5 of the Act.
- The **backed-warrant procedure**, contained in Part 4 of the Act, is a streamlined procedure (that gets its name from the procedure in which New Zealand is asked to back the overseas warrant for arrest) and applies to extradition requests from:³³
 - Australia; and
 - any country designated by Order in Council (currently only the United Kingdom, including the Pitcairn Islands).

2.16 Below, we briefly describe how extradition requests are dealt with under the two procedures. They are addressed in more detail in Chapter 9.

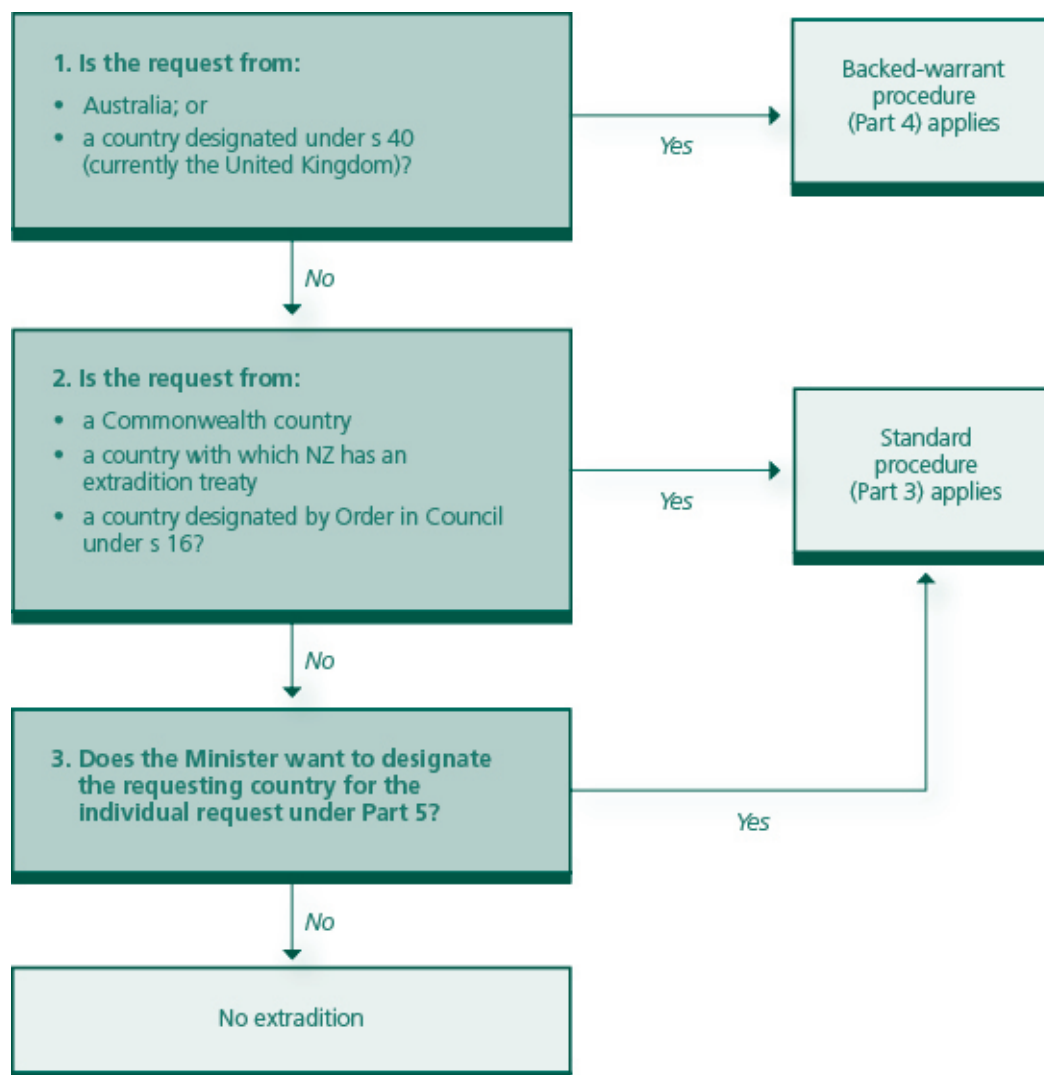
³¹ Section 8.

³² Section 13.

³³ Section 39.

2.17 Figure 1 illustrates which Part of the Act applies to which countries.

Figure 1: Which Part of the Act applies?



Standard procedure for extradition from New Zealand

- 2.18 Figure 2, below, shows the standard procedure for extradition from New Zealand. The process begins with a request for the surrender of a person by the foreign country.³⁴ The request must be accompanied by duly authenticated supporting documents, including the arrest warrant and details of the offence.³⁵ The Minister of Justice must make the decision to either request that a District Court judge issue an arrest warrant for the person or to refuse the request for surrender. The Act does not provide grounds on which the Minister is to make this decision.³⁶
- 2.19 If requested to do so, a District Court judge may issue an arrest warrant after considering whether the person is, or is suspected of being, in New Zealand and whether there are reasonable grounds to find that the matter relates to an extraditable person, an extradition country, and an extradition offence.³⁷
- 2.20 Under section 20 of the Act, the foreign country may make an urgent request without attaching supporting documents, and a District Court judge may issue a provisional arrest warrant. If the provisional warrant procedure is followed, the supporting documents must be received within a reasonable time before the next stages of the extradition process can be carried out. Once the person is arrested, he or she is brought before a District Court judge, and any bail application may be considered.
- 2.21 Subsequently, the hearing to determine whether the person is eligible for extradition will take place in the District Court. The Court must be satisfied, among other things, that the necessary documentation has been produced and that there is sufficient evidence relating to the offending that would justify the person's trial if the conduct constituting the offence had occurred in New Zealand. It will also consider whether any mandatory restrictions or discretionary restrictions on surrender apply.³⁸
- 2.22 If the Court is satisfied that the person is eligible for surrender, the matter is passed to the Minister of Justice for a final decision. The person or country may appeal to the High Court any questions of law arising from the District Court decision.
- 2.23 In making his or her decision, the Minister will look at the grounds for refusing surrender, any danger that the person will be subjected to torture or the death penalty if surrendered, whether the person is a New Zealand citizen, and whether there are any extraordinary personal circumstances that would make surrender unjust or oppressive.³⁹ The Minister may then issue a surrender order. The authorities in New Zealand liaise with the foreign country about the logistics of transferring the person.

³⁴ Section 18.

³⁵ Sections 18 and 78.

³⁶ Section 19.

³⁷ Section 19.

³⁸ Section 24.

³⁹ Section 30.

Backed-warrant procedure for extradition from New Zealand

2.24 Figure 3, below, shows the current process for extradition from New Zealand to Australia or the United Kingdom. The key differences between this procedure and the standard procedure are:

- the extradition request does not have to be made to the Minister of Justice but comes through the Police;⁴⁰
- the District Court is not required to consider whether there is evidence relating to the offending that would justify trial in New Zealand;⁴¹ and
- generally, cases are not referred to the Minister for a final decision on surrender. Instead, the District Court issues the surrender order following the eligibility hearing (although the District Court may decide that it is appropriate for the Minister to have the final decision).⁴²

2.25 As a result of these differences, Part 4 is generally a faster, more straightforward process. However, the District Court must still consider whether the matter relates to an extraditable person, an extradition country, and an extradition offence and whether mandatory or discretionary restrictions on surrender apply.⁴³

Extradition to New Zealand

2.26 The Act sets out a procedure through which New Zealand can request that a person in a foreign country who is accused or has been convicted of a New Zealand offence is returned to New Zealand. The Minister of Justice must make the request if the requested country is a country to which Part 3 applies, while the Commissioner of Police (or delegate) makes the request if the country is a country to which Part 4 applies. However, if the law of the requested country requires a request to be made to a particular person, that law applies. The request may be made directly to the competent authorities in the foreign country or through the Ministry of Foreign Affairs and Trade to a diplomatic or consular representative or Minister of that country.⁴⁴

⁴⁰ Section 41.

⁴¹ Section 45.

⁴² Section 48.

⁴³ Section 45.

⁴⁴ Section 61.

Figure 2: Standard procedure (Part 3 of the Act)

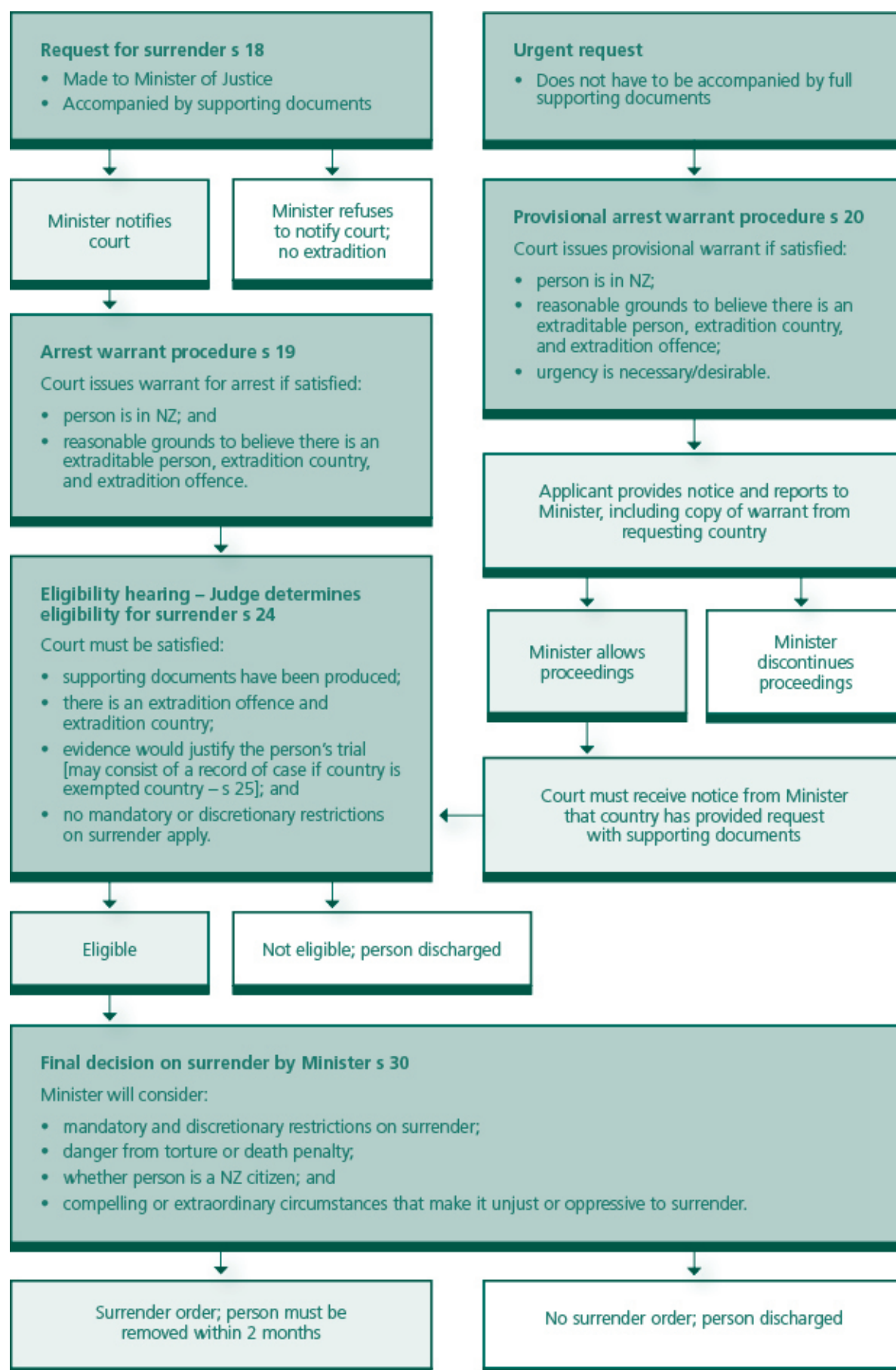
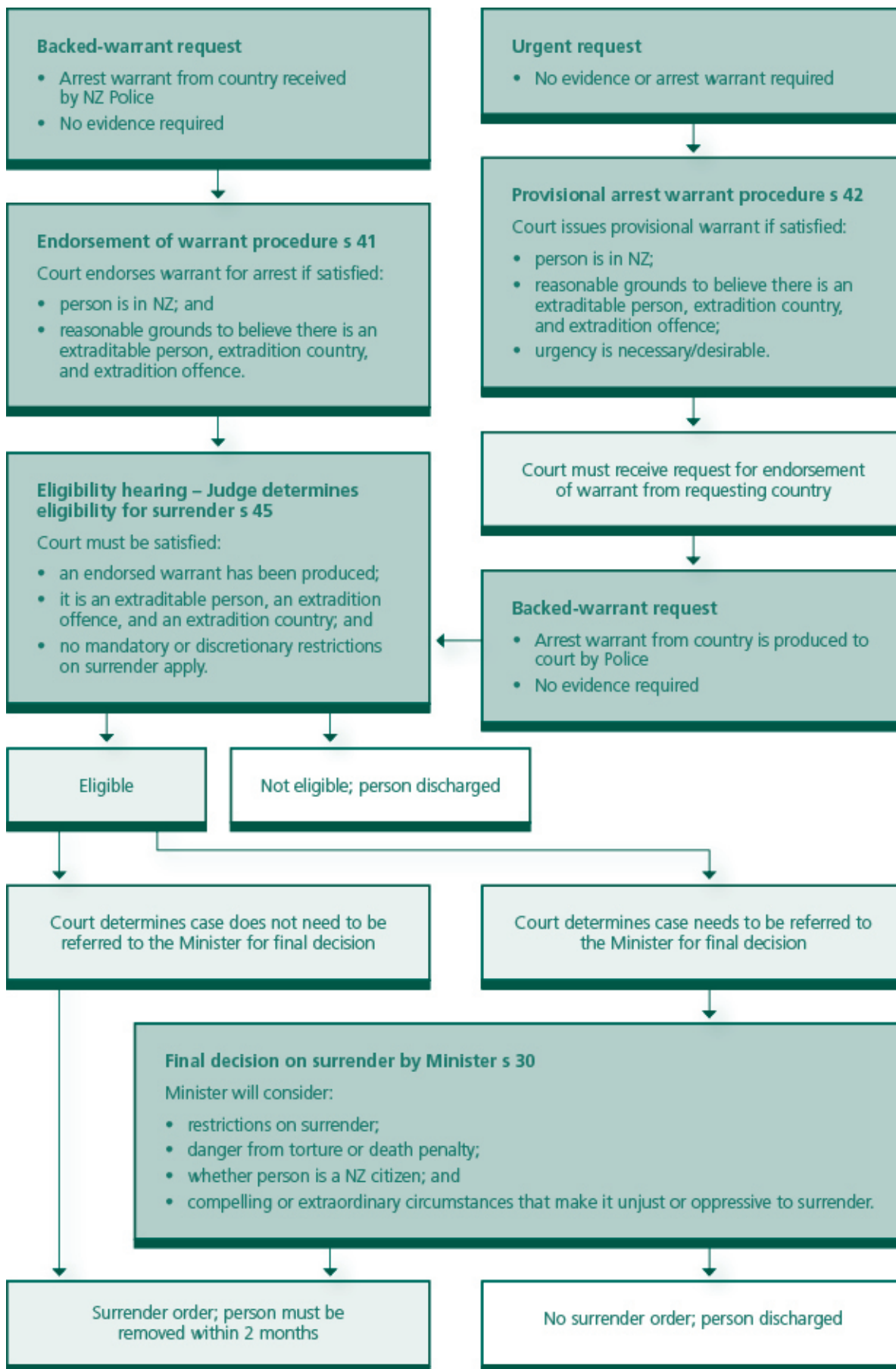


Figure 3: Backed-warrant procedure (Part 4 of the Act)



EXTRADITION IN PRACTICE

- 2.27 Over recent years, New Zealand has received a not insignificant number of extradition requests. Nearly half of all requests were contemplated by Australia and the United Kingdom, thus falling under the backed-warrant procedure. We do not expect this pattern to change materially in the future.

THIS PART OF THE ISSUES PAPER

- 2.28 In the remainder of this part of the issues paper, we deal with the issues that arise in relation to:
- the relationship between domestic extradition legislation and New Zealand's international obligations (Chapter 3);
 - the roles played by the various domestic agencies, officers and bodies in the extradition process (Chapter 4);
 - technical matters arising under the Act relating to:
 - the definition of an extradition offence (Chapter 5);
 - how countries are categorised under the Act (Chapter 6);
 - the procedural and evidential steps required to be followed in extradition requests (Chapters 7 and 9); and
 - the grounds on which New Zealand can refuse to extradite a person (Chapter 8);
 - refugee proceedings and extradition (Chapter 10); and
 - how the Act deals with extradition to New Zealand (Chapter 11).

Chapter 3

Giving effect to international obligations

KEY PROPOSAL

Proposal: The new Act should provide the primary basis for extradition, but its provisions may be supplemented in some respects by the terms of a treaty. The statute should make it clear which provisions may be supplemented.

Rationale: The current way in which the relationship between extradition treaties is expressed within the Act may frustrate the underlying intention of the treaties to enable extradition by focusing on somewhat out-of-date procedures. To be consistent with New Zealand's current and likely future extradition obligations, however, it is important that, in some respects, the Act's provisions can be supplemented in key areas, such as altering procedure or adding additional extradition offences. Emphasising and strengthening the standard procedure allows greater clarity to be given to New Zealand's international human rights obligations.

INTRODUCTION

- 3.1 Extradition in New Zealand is governed by a combination of domestic statute and international treaties. One of our objectives for this review is to appropriately align these.⁴⁵
- 3.2 At present, New Zealand is a party to 45 bilateral treaties that relate specifically to extradition⁴⁶ and at least 25 multilateral treaties that contain extradition obligations.⁴⁷ The relationship between these treaties and the Extradition Act 1999 is complex. Section 11(1) of the Act makes it clear that its provisions must be construed to give effect to the bilateral treaties.⁴⁸ This means that the treaties take precedence over the Act in the event of an inconsistency. This general rule is subject to a limited number of specific exceptions.⁴⁹
- 3.3 There are difficulties with how this relationship works in practice. The vast majority of New Zealand's current bilateral extradition treaties are between 80 and 140 years old and use language that does not align neatly with the Act. This has led to confusion in applying treaty definitions and in determining the exact nature of the applicable process. This confusion has led to litigation and delay, frustrating the main purpose of the bilateral treaties, which is to facilitate extradition.

⁴⁵ See Appendix A: Terms of reference, objectives (i) and (v) and scope of the review (iii).

⁴⁶ Appendix B.

⁴⁷ Appendix C.

⁴⁸ Extradition Act 1999, s 11(1). The definition of "extradition treaty" in s 2 of the Act indicates that s 11 only applies to bilateral extradition treaties, not to multilateral treaties. This interpretation is supported by the definition of "multilateral treaty" in s 60(5) of the Act.

⁴⁹ Sections 11(2) and (3) and 105.

- 3.4 The challenge in this review is to give due regard to New Zealand's international obligations and to provide an effective process that helps rather than hinders extradition. To achieve this, we suggest that the relationship needs to be modified. The new Act should set out an effective procedure for all extradition requests but also identify provisions that treaties may supplement. In this way, the Act will provide the primary basis for processing extradition requests, but where a bilateral treaty contains some provisions that differ from those in the Act, the Act will ensure that it gives appropriate recognition to New Zealand's international obligations. This proposal reflects the approach currently taken in Canada's Extradition Act 1999.
- 3.5 At the end of this chapter, we briefly discuss two other Acts that aim to give effect to New Zealand's international extradition obligations: the International Crimes and International Criminal Court Act 2000 and the International War Crimes Tribunals Act 1995.

THE TREATIES

The extradition treaties to which New Zealand is already a party

- 3.6 New Zealand is party to bilateral and multilateral treaties concerning extradition. In some senses, the bilateral treaties represent the way New Zealand's extradition obligations were framed in the past, while multilateral treaties represent the likely future.

Multilateral treaties

- 3.7 New Zealand's multilateral treaties concerning extradition date from the 1970s onwards, and most of them focus on serious crimes such as hostage taking, genocide and drug trafficking. Most of these treaties include an "extradite or prosecute" obligation. These provisions assume that each state party already has in place an efficient and effective extradition regime that has the potential to apply to any other state party. The aim of the provisions is simply to ensure that specific offences are extradition offences under those regimes.
- 3.8 Other multilateral treaties may prevent extradition in certain circumstances. For instance, New Zealand has agreed not to extradite any person if there are reasonable grounds to believe that person will be subjected to torture⁵⁰ and to only extradite refugees to the countries from which they came in very limited instances.⁵¹ Usually, these treaties include the obligation not to extradite as an express term. In some instances, however, the obligation may exist even though there is no express reference to extradition in the relevant treaty. For example, the Second Optional Protocol to the International Covenant on Civil and Political Rights may create an obligation not to extradite a person who could be subjected to the death penalty.⁵²

50 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 3.

51 Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 33.

52 See the Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty 1642 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991); as interpreted in *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR); and in *United States v Burns* [2001] SCC 7, [2001] 1 RCS 283. It is likely that New Zealand courts would interpret this treaty in the same way.

Bilateral treaties

- 3.9 New Zealand's 45 bilateral extradition treaties relate solely to extradition. All but four date from between 1870 and 1935 and were negotiated by Great Britain, on behalf of the entire British Empire. These imperial treaties were negotiated with the provisions of the Extradition Acts 1870 to 1935 (Imp)⁵³ in mind and were given effect by way of Orders in Council of the British Parliament.⁵⁴ Consequently, they all follow a similar format.
- 3.10 The imperial treaties begin with the general principle that each party agrees to extradite accused or convicted persons to the other parties, under certain circumstances and conditions. Those circumstances and conditions are then detailed in the body of each treaty. Invariably, this includes:
- (a) a list of the offences that are extraditable;
 - (b) a statement that surrender must or may be refused if:
 - the person sought is a subject or citizen of the requested party;
 - the relevant offence is of a political character;
 - the person sought has already been tried or punished for the offence; or
 - a statutory time limit for prosecuting the offence applies;
 - (c) a description of how an extradition request should be made and the documents that should be provided;
 - (d) a description of the types of documents that will be admitted as valid evidence at an extradition hearing;
 - (e) a statement that, in relation to an accused person, extradition will only take place if, according to the law of the requested party, there is sufficient evidence of the alleged offending to justify the person's committal for trial; and
 - (f) a statement explaining how extradition requests will be dealt with if the person sought is being prosecuted or punished domestically for a different offence or is the subject of multiple requests from different countries.
- 3.11 The other four bilateral extradition treaties were negotiated by New Zealand. Two of these treaties (with the United States (1970) and Fiji (1992)) follow a very similar format to the older imperial treaties. That is because these treaties were negotiated with the provisions of New Zealand's Extradition Act 1965 in mind, which essentially mirrored the imperial extradition legislation. New Zealand negotiated a third bilateral extradition treaty under the Extradition Act 1965 (Hong Kong (1998)). That treaty foreshadowed many of the changes that were about to be introduced by the Extradition Act 1999. The fourth treaty was negotiated with the Republic of Korea (South Korea) in 2003.

The accessibility and status of the treaties

- 3.12 Since international treaties are one of the main sources of extradition law in New Zealand, it is important, for reasons of transparency and clarity, that it is easy to access them and to determine whether they are in force.

⁵³ Extradition Act 1870 (Imp) 33 & 34 Vict c 52.

⁵⁴ The Extradition Acts 1870 to 1935 (Imp) applied in New Zealand from 1874 until 1965, when New Zealand passed its own domestic Extradition Act 1965.

- 3.13 The Ministry of Foreign Affairs and Trade has recently launched “New Zealand Treaties Online”, an online database that provides an official record of New Zealand’s binding legal obligations at international law.⁵⁵ All of the bilateral and multilateral treaties concerning extradition to which New Zealand is a party are on this database. This has improved the general accessibility of the treaties.
- 3.14 While the bilateral treaties are now readily identifiable, it remains difficult to identify the multilateral treaties that contain extradition obligations. The Extradition Act does not contain a list of the relevant treaties.⁵⁶ We have identified these multilateral treaties in Appendix C.
- 3.15 There is also uncertainty as to whether some of the imperial bilateral treaties are still in force and to which countries they continue to apply. That is because New Zealand may consider itself bound by these treaties, but its treaty partners may or may not share that view. The reason for this discrepancy is that, given the age of the imperial treaties, issues of termination by war⁵⁷ and state succession arise. State succession is particularly problematic as, since the colonial era, a large number of New Zealand’s treaty partners have gained their independence, fragmented, or gone through some other constitutionally significant reform.⁵⁸ The fact that two of New Zealand’s imperial treaties are with former colonial powers (Belgium and France) adds a further layer of complexity in relation to their former colonies.⁵⁹
- 3.16 In our opinion, it is desirable for New Zealand’s extradition relationships to be further clarified to ensure all countries can access our extradition system. One option could be to list all the treaties that contain extradition obligations in schedules in the new Extradition Act.

New Zealand’s obligations under the treaties

- 3.17 Any reform of New Zealand’s extradition legislation needs to achieve the dual goals of modernising the law whilst still adhering to New Zealand’s existing obligations under international law. Accordingly, those obligations need to be identified and understood.

55 Ministry of Foreign Affairs and Trade “New Zealand Treaties Online” < www.treaties.mfat.govt.nz > .

56 Only one of the multilateral treaties is specifically mentioned in the Extradition Act: the United Nations Convention against Transnational Organized Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003). Section 101B of the Extradition Act 1999 refers to this Convention and two of its supplementary protocols. Section 101A, however, does list domestic provisions that implement various multilateral treaties. From these provisions, it is possible to work backwards to identify the associated multilateral treaty. Notably though, there are further multilateral treaties with extradition obligations that cannot be identified in this way. See Appendix C. In contrast, it is easy to locate New Zealand’s bilateral extradition treaties on the database. The bilateral treaties entered into by the United Kingdom on behalf of New Zealand are also clearly identified in the Schedules of the Extradition Act 1999 and in subordinate legislation. The four bilateral extradition treaties that New Zealand entered into in its own right have all been incorporated into Orders in Council made under either the Extradition Act 1965 or the Extradition Act 1999. Sections 15, 104, and 110 of the Act explain the continuing effect of these various Orders in Council.

57 War explains why the imperial treaty with Germany (1972) no longer applies and may also explain why Canada no longer considers itself bound by the imperial treaty with Iraq (1934).

58 After such an event, it is for the “new state” to decide what its intentions are regarding its pre-existing treaties. Sometimes, however, these decisions are not formally made, acted upon, or widely communicated. For a discussion of these issues, see IA Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 45–51.

59 France’s former colonies were: Algeria, Cambodia, Cameroon, Central African Republic, Chad, Congo, Dahomey, Gabon, Guinea, Ivory Coast, Laos, Lebanon, Malagasy Republic, Mali, Mauritania, Morocco, Niger, Senegal, Syria, Togo, Tunisia, Upper Volta, and Vietnam. Belgium’s former colonies were Burundi, Congo, and Rwanda.

- 3.18 Most of New Zealand's international obligations concerning extradition are contained in its bilateral, as opposed to multilateral, treaties. As explained above, the multilateral treaties assume that the state parties already have extradition regimes in place. Beyond that, they only create obligations regarding the definition of an extradition offence and grounds for refusing surrender.⁶⁰ Here it is sufficient to note that bilateral extradition treaties must be interpreted as including the extradition obligations in multilateral treaties if:
- the parties to the bilateral treaty are both party to the multilateral treaty;⁶¹ or
 - the multilateral treaty in question is so widely accepted that it falls within the special category of "international customary law".⁶²
- 3.19 Bearing that observation in mind, the crucial question in examining the nature of New Zealand's existing treaty obligations is: how closely is New Zealand obliged to comply with the exact terms of its bilateral extradition treaties?
- 3.20 The starting point in answering this question is the guiding principle that an international treaty must be interpreted in context and in light of its object and purpose.⁶³ This principle requires that the terms of the treaties must be interpreted with a sufficient degree of flexibility to ensure their object is not frustrated.
- 3.21 The object of the bilateral extradition treaties, as stated in the treaties themselves, is to facilitate extradition between the state parties by creating a duty to extradite in certain circumstances.⁶⁴ Notably, only a violation of a provision that is essential to the accomplishment of this object will amount to a material breach of New Zealand's obligations.⁶⁵ This raises an important question: what amounts to a violation of an essential treaty provision?
- 3.22 To answer this question, it is useful to consider an example. All of the imperial bilateral treaties state that extradition will only be granted in the case of an accused person if there is sufficient evidence of the alleged offending to justify their committal for trial. If New Zealand legislation gave these treaty partners the option of using the backed-warrant procedure (a process that does not involve any inquiry into the case against the person sought), would this amount to a breach of its treaty obligations?
- 3.23 A narrow approach would hold that the object of the treaty is to facilitate extradition, but only in circumstances where all of the specified conditions have been complied with. On a broader approach, there would be no breach, because the alternative option of forgoing the inquiry would facilitate extradition from the state party's perspective rather than frustrate it.

60 These obligations are discussed in more detail later in this chapter and in chs 4 and 6.

61 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 30.

62 For instance, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above n 50. The prohibition on return to torture created by this Convention is absolute and would override any duty to extradite in a bilateral treaty, regardless of whether the parties to the bilateral treaty were also parties to the Convention. This reflects the Convention Against Torture's status as a *jus cogens* norm of international customary law. This special category of international customary law cannot be overridden by a treaty and may only be overridden by a subsequent norm of customary law having the same character. See the Vienna Convention on the Law of Treaties, above n 61, art 50 and the International Law Commission's commentary on art 50 in *Report of the International Law Commission on the work of its eighteenth session* [1966] vol 2 YILC 169 at 248. See also *Laws of New Zealand* "International Law: Principles" at [110] and the discussions of the Convention Against Torture in *Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA) at [18] and *Bujak v The Minister of Justice* [2009] NZCA 570 at [29].

63 Vienna Convention on the Law of Treaties, above n 61, art 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

64 Article 1 of the Extradition Treaty between the United Kingdom and Albania [1927] UKTS 20 (signed 22 July 1926, entered into force 11 July 1927) is typical of all of the imperial extradition treaties. This article creates the duty to extradite. It states: "The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 2, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party."

65 Vienna Convention on the Law of Treaties, above n 61, art 60(3).

- 3.24 Our proposals generally follow a broader approach. This emphasises that, fundamentally, the treaties are contracts between two state parties that aim to facilitate the extradition process. They were not designed to enable third parties to enforce literal compliance with each term.⁶⁶
- 3.25 We consider that the interests of individuals who are the subject of extradition requests are best served by placing protections in domestic statute rather than relying directly or solely on the treaties. This view is supported by two of New Zealand's more recent bilateral extradition treaties, which contain the following provision:⁶⁷
- The determination that extradition based upon the request therefore should or should not be granted shall be made in accordance with the laws of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.
- 3.26 In practice, there may be provisions in existing treaties – such as those referencing “committal for trial”, which no longer exists in New Zealand law – that are clearly inapt and should not be literally enforced. Our impression is that the provisions of the existing treaties that set out the procedure for advancing extradition requests largely fall within this camp. It is inevitable that a procedure proposed in the late 19th century is not going to be the most apt one to follow now and is, in fact, likely to hinder, rather than facilitate, extradition. We consider that the new Act could justifiably set out a more appropriate procedure and that this could supplant those in the existing treaties. Doing this would, in fact, give better effect to the intent behind the treaties than the words of the treaties themselves. We propose such a procedure in Chapter 9.
- 3.27 On the other hand, there may be other treaty provisions that arguably form part of the core existing agreements between New Zealand and its partners. An example is the grounds for refusal to extradite. There may be a view that any expansion of those grounds in a domestic statute could undermine the existing duty to extradite under the 44 treaties made before the 1999 Act. Yet, our preliminary view is that the grounds should be expanded, because the view of the world represented in the old treaties does not reflect modern values. This, then, poses a more challenging and complex question. We discuss it further in Chapter 8.
- 3.28 Any major variation between New Zealand's domestic regime and the terms contained in the treaties should facilitate the extradition process rather than frustrate it, but in our view, that ought to include not just a more efficient process but a standardisation of the grounds for refusal that reflects modern human rights expectations.

TREATIES AND THE EXTRADITION ACT 1999

The policy behind the relationship

- 3.29 During the 1980s and 1990s, there was a trend throughout the Commonwealth and international community towards modernising extradition law and practice.⁶⁸ In keeping with this trend, the New Zealand Government introduced the Extradition Bill 1998.⁶⁹

66 The traditional view is that a requested individual has no legal standing to enforce compliance with a bilateral extradition treaty. This view has been challenged in some jurisdictions where treaties are the only source of extradition law, such as the United States. See the discussion in M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2007) at 38–40.

67 Agreement on Extradition between the Government of New Zealand and the Government of the Republic of Fiji [1992] NZTS 3 (signed 21 March 1992, entered into force 14 April 1992), art 9; and Treaty on Extradition between New Zealand and the United States of America [1970] NZTS 7 (signed 12 January 1970, entered into force 8 December 1970), art 9.

68 Commonwealth countries entered into numerous multilateral and bilateral treaties during this period, and several introduced new extradition legislation. For instance, between 1985 and 1998, Australia and Canada entered into bilateral treaties or other extradition arrangements with 14 and 42 foreign countries respectively, and in 1991, the United Kingdom ratified the European Convention on Extradition ETS 24 (opened for signature 13 December 1957, entered into force 18 April 1960), thereby terminating 20 of its pre-existing imperial bilateral treaties (but only in so far as they related to the United Kingdom). Further, Australia, the United Kingdom, and Canada introduced new extradition legislation in 1988, 1989, and 1999 respectively. For a list of the relevant multilateral treaties that were negotiated at this time, see Appendix C.

69 Extradition Bill 1998 (146-1).

- 3.30 The Extradition Bill proposed to continue the process of implementing bilateral treaties in New Zealand by way of Orders in Council. In terms of the relationship between the treaties and the Act, the policy behind the Bill was to allow the terms of the treaties to prevail where the terms were more detailed than the Act or where they contained supplementary matters. This policy intentionally sought to create a flexible legislative regime that would accommodate the negotiation of new bilateral treaties. As one commentator observed at the time:⁷⁰
- A dominant Act would greatly minimise opportunities for state by state flexibility in procedure, which is often regarded as one of the principal benefits of a treaty based system.
- 3.31 The original Bill contained two clauses that aimed to clarify the paramount status of the treaties. Clause 14 gave the Governor-General the power to make an Order in Council applying Part 3 of the Act to any treaty country, subject to any “limitations, conditions, exceptions, qualifications or modifications” necessary to give effect to the treaty.⁷¹ Clause 16 of the Bill stated that the provisions of the Act must be construed to give effect to any applicable treaty, subject to the mandatory restrictions on surrender and the restrictions related to the death penalty and torture.⁷² These clauses highlight the difficult balancing exercise that was before the drafters. The Bill needed to reflect the policy goal of giving primacy to the terms of the treaties, but it also needed to be mindful of the constitutional principle that it is undesirable for legislation to contain a power to amend an Act by subordinate legislation (such as the Orders in Council implementing the treaties).⁷³ The tension between these two factors resulted in significant amendments to the Bill during the Select Committee process.
- 3.32 In the end, Parliament opted to retain only one clause to explain the relationship between future treaties and the Act. Originally, this clause had stated that the provisions of the Act must be construed to give effect to any applicable treaty, subject to the mandatory restrictions on surrender and the restrictions related to the death penalty and torture.⁷⁴ During the Select Committee process, this was amended to more comprehensively set out the provisions in the Act that could not be overridden by a treaty. This approach had the added benefit of identifying New Zealand’s bottom line for future treaty negotiations.⁷⁵

The relationship as enacted

- 3.33 Section 11(1) of the Extradition Act 1999 provides that:

- (1) If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of the Act must be construed to give effect to the treaty.

⁷⁰ Janice Brabyn “New Zealand Extradition Law” (LLM Thesis, Victoria University of Wellington, 1985) at 58–59.

⁷¹ This clause was largely adopted from the Extradition Acts 1870 to 1935 (Imp) 33 & 34 Vict c 52 and the Extradition Act 1988 (Cth). In *Commonwealth v Riley* (1984) 5 FCR 8, the Federal Court of Australia considered the similar Australian provision and found that the words in the provision were all words of restriction and that, therefore, treaties were only capable of limiting provisions in the Extradition Act rather than extending them. This decision drew academic criticism.

⁷² Clause 16 was based on an equivalent provision in the Extradition Act 1965. This provision was considered in the controversial Supreme Court decision of *Mewes v Attorney-General* [1979] 1 NZLR 648 (SC). In this case, Chiswell J held that a less demanding test for authentication in a treaty could not override a more demanding test in the Act as, in accordance with ordinary principles of interpretation, treaties may only be used to interpret a statute if the statute is first found to be ambiguous. Given the debates sparked by *Mewes v Attorney-General* and *Commonwealth v Riley*, above n 71, the drafters of the original Extradition Bill probably considered that both cls 14 and 16 were necessary to emphasise the paramount status of the treaties.

⁷³ The Regulations Review Committee highlighted this point in a submission to the Select Committee. It did not object outright to the clauses given the context of extradition but did note that the clauses “constitute a departure from normal principle and should do so only to the extent that is necessary and can be justified”. Regulation Review Committee *Extradition Bill: Report from Regulations Review Committee* (5 October 1998).

⁷⁴ Extradition Bill 1998 (146-1), cl 16.

⁷⁵ For a useful summary of the policy behind this aspect of the Extradition Bill 1998, see the speech given by the Hon Tony Ryall introducing the Select Committee Report on the Bill to the House: (16 March 1999) 575 NZPD 15367.

- 3.34 This section applies to treaties concluded both before and after 1999 and focuses attention of all litigation on the procedures in the treaties, but the Act then goes on to treat these two types of treaties differently in respect of grounds to refusal.

Post-1999 treaties

- 3.35 Despite section 11(1), a post-1999 treaty cannot override certain provisions in the 1999 Act,⁷⁶ including the mandatory restrictions for refusing to surrender, danger of torture or the prospect of death, or any provision in the Act that confers a particular function or power on the Minister or a court.

Pre-existing treaties

- 3.36 The 1999 Act provides that the pre-existing treaties can override both the mandatory and discretionary restrictions in the Act and the Minister's ability to refuse surrender in recognition of compelling or extraordinary personal circumstances.⁷⁷ The reason for not subjecting the pre-existing treaties to the 1999 Act was that the 1999 Act re-expressed the reasons why New Zealand might refuse to surrender an individual in a way that might have been inconsistent with those earlier treaties.
- 3.37 However, the 1999 Act provides that pre-existing treaties cannot be construed to override certain provisions of the 1965 Act.⁷⁸ The relevant sections of the 1965 Act provide that key considerations cannot be overridden such as the mandatory restrictions in the Act, the prospect of a death sentence, and evidence of double jeopardy.

What those old treaties say about grounds for refusal

- 3.38 The imperial treaties make it clear that a person should not be surrendered where:
- the offence is of a political character or the true intention is to try to punish the person for an offence of a political character;
 - he or she has already been tried or punished for the offence; or
 - a statutory time limit for prosecuting the offence applies.

The treaties also reserved the ability to refuse extradition if the person sought was a subject or citizen.

- 3.39 These restrictions are reflected in the 1965 Act, along with some additional provisions that provide that surrender may be refused where the person may face torture⁷⁹ or the death penalty⁸⁰ and where the person is detained on the grounds of mental health after an acquittal or conviction for an offence in the requested country.⁸¹
- 3.40 For extradition treaties negotiated after 1999, the 1999 Act provides that a person may not be surrendered where, among other things, the person may be prejudiced in trial or punishment on grounds of discrimination; the offence is a military offence; and the person may suffer injustice or oppression due to triviality, lack of good faith, or delay. In our view, these are important grounds for refusal that would possibly be read into the existing treaties, especially where they reflect modern human rights expectations.

⁷⁶ Extradition Act 1999, s 11(2).

⁷⁷ Extradition Act 1999, s 105. Note that section 11(2) of the Extradition Act 1999 does not apply to pre-existing treaties because of section 11(3).

⁷⁸ Extradition Act 1999, s 105(2)(a).

⁷⁹ Extradition Act 1965, s 6(4).

⁸⁰ Extradition Act 1965, s 5A.

⁸¹ Extradition Act 1965, s 5(4).

- 3.41 Accordingly, there are some important differences in the grounds of refusal depending on whether a treaty exists and when it was concluded. The risk of this approach is discussed in Chapter 8, which deals with the grounds for refusing surrender.
- 3.42 For the sake of completeness, the other provisions in the Act relating to treaties are as follows:
- “Extradition treaty or treaty” is defined to refer to New Zealand’s bilateral extradition treaties.⁸²
 - The Governor-General can apply the standard or backed-warrant extradition procedures in the Act to any treaty country by way of Order in Council.⁸³
 - If a case arises where the relevant offence meets the definition of an extradition offence under the Act but it does not meet the definition of an extradition offence in an applicable bilateral treaty, the treaty country may apply to the Minister for the request to be considered on a one-off basis under Part 5 of the Act.⁸⁴
 - If the pre-conditions in section 60 are met and the offence in question is an offence under a multilateral treaty to which New Zealand and the other country are party, Part 5 will automatically apply, and there is no decision for the Minister to make.⁸⁵
 - In any future bilateral extradition treaty made between New Zealand and another country:
 - no offence may be specified as an extradition offence unless it meets the test for such an offence under section 4 of the Act;⁸⁶
 - there must be a provision stating that either New Zealand citizens will not be surrendered or that surrender may be refused on the grounds that the person is a New Zealand citizen.⁸⁷
 - The bilateral extradition treaties to which New Zealand is a party are deemed to include certain offences as extradition offences. These offences were all enacted in New Zealand in order to implement widely ratified multilateral treaties. The deeming provisions only apply if New Zealand’s bilateral treaty partner is also a party to the relevant multilateral treaty.⁸⁸
- 3.43 The list illustrates the complex nature of the relationship between the treaties and the Act. The provisions related to treaties are scattered throughout the Act and include deeming provisions⁸⁹ and extensive cross-referencing and incorporate repealed legislation.⁹⁰ Each of these three mechanisms creates problems of interpretation and accessibility and would be best avoided.
- 3.44 The drafters of the Act envisaged that new bilateral extradition treaties would be negotiated⁹¹ and that these would potentially replace New Zealand’s 44 pre-existing bilateral treaties. However, only one bilateral extradition treaty has been successfully negotiated in the 15 years that the Act has been in force. By contrast, during that time, New Zealand has entered into numerous multilateral treaties containing extradition obligations. This trend probably reflects

82 Extradition Act 1999, s 2.

83 Extradition Act 1999, ss 15 and 40.

84 Extradition Act 1999, s 60.

85 Extradition Act 1999, s 60(4).

86 Extradition Act 1999, s 100. and

87 Extradition Act 1999, s 101.

88 Extradition Act 1999, ss 101A and 101B. These offences are listed and discussed further at [5.7]–[5.8].

89 Extradition Act 1999, ss 101A and 101B.

90 Extradition Act 1999, s 105(2)(a).

91 See Extradition Act 1999, ss 100 and 101.

the changing priorities of the international community since 1999 as well as New Zealand's relative geographic isolation.

- 3.45 The Act's approach to pre-existing bilateral treaties mirrors the Extradition Acts 1870 to 1935 (Imp)⁹² (which outlined a default position for the negotiation of the imperial treaties) and the Extradition Act 1965 (which did not substantially reform New Zealand's extradition law). The difficulty, however, is that the language and content of those treaties are now, in some respects, out of date. This partially explains why section 11(1) has been somewhat difficult to apply in practice.
- 3.46 The challenge is to find a solution that is flexible enough to ensure that the new Act can deal with the outdated aspects of the existing treaties, while respecting the agreements that form the basis of them, and at the same time provide for future extraditions and extradition treaties.

Difficulties with the relationship in practice

- 3.47 Two difficulties commonly arise in New Zealand in relation to extradition requests that are made pursuant to bilateral treaties:
- The treaties contain definitions of "extradition offence" that are narrower than the Act and are difficult to apply in practice.
 - The rule that the Act must be construed to give effect to a treaty leads to uncertainty and litigation over procedural matters.
- 3.48 As indicated above, there is also an issue surrounding how extradition treaties currently impact on the available grounds for refusing surrender. That issue will be addressed in Chapter 8.

Definition of "extradition offence"

- 3.49 We discuss the issues around how "extradition offence" should be defined in Chapter 5. Here, it is sufficient to note that, historically, the preferred method for defining extradition offence was simply to make a list of all the offences that would qualify (the list method). The list method is used in all of New Zealand's bilateral treaties, except those recently negotiated with Hong Kong and the Republic of Korea. In contrast, section 4 of the Extradition Act defines an extradition offence by reference to a threshold maximum penalty (offences carrying a maximum penalty of not less than one year's imprisonment). This is the more modern method. By virtue of section 11(1), the definition of extradition offence in the treaties automatically trumps the definition in section 4 of the Act.
- 3.50 The traditional list method has two inherent flaws. First, it is not very adaptable. If an offence has been inadvertently omitted from the list, a new offence emerges, or an offence is no longer viewed as criminal, the list needs to be updated. This generally requires the negotiation of a supplementary treaty.
- 3.51 New Zealand has not negotiated any supplementary treaties. Therefore, an undesirable situation now exists whereby extradition is only available under most of its existing bilateral treaties for approximately 20 offences. Murder and rape are commonly on these lists, but so are very narrow offences like committing a malicious act with intent to endanger the safety of a person travelling on a railway. Notably missing are all offences involving modern technology, such as crimes against privacy and computer-based offending.

92 Extradition Act 1870 (Imp) 33 & 34 Vict c 52.

- 3.52 A second flaw with the list method is that it can lead to extensive litigation around whether the offence in question falls within the ambit of the relevant list. Such litigation involves complex analysis of the intention of the treaty partners and the exact meaning of legal terms in the different jurisdictions (including the history and evolution of those terms).
- 3.53 This issue has frequently arisen in New Zealand in relation to extradition requests from the United States.⁹³ In processing these requests, New Zealand courts have had to determine whether modern criminal offences in the United States (such as immigration fraud, racketeering, and online marketing of counterfeit drugs) are sufficiently similar to any of the offences listed in the bilateral treaty of 1970 to warrant extradition. The irony of this type of litigation is that it does not focus on the seriousness of the offending or on dual criminality – the two cornerstones of the definition of an extradition offence under New Zealand’s Extradition Act.⁹⁴
- 3.54 The recent proliferation of multilateral treaties has gone some way towards ameliorating this situation by deeming emerging serious offences, such as genocide, hostage taking and drug trafficking, to be extradition offences. This has the benefit of modernising some of the imperial treaties to an extent, but on the downside, it further disperses New Zealand’s extradition obligations.
- 3.55 Section 60 of the Extradition Act aimed to resolve the problem entirely by giving New Zealand’s treaty partners the option of applying to use Part 5 instead of relying on their treaties. By virtue of Part 5, the more straightforward definition of extradition offence in section 4 of the Act would apply.
- 3.56 The reality is, however, that none of New Zealand’s treaty partners has ever made an application under Part 5. Two possible reasons for this are immediately apparent. First, section 60 only applies if the offence in question does not meet the definition of extradition offence in an applicable treaty. Given the inherent uncertainty in these treaty definitions, a requesting country may not wish to make a concession in this regard. A second reason is that, by making an application under section 60, the treaty country would lose any perceived benefits that it had negotiated under their treaty and would instead be subject to the decision of the Minister to allow the extradition to proceed as an ad hoc request.
- 3.57 The decision of New Zealand’s treaty partners not to use section 60 of the Act means that there is still an unresolved issue regarding how to minimise the difficulties caused by the narrow definition of extradition offence in most of the treaties.

The effect of treaties on procedural matters

- 3.58 The drafters of the 1999 Act did not design the procedural aspects of the Act with specific reference to the terms of New Zealand’s existing extradition treaties. Instead, they drew on provisions from New Zealand’s domestic criminal procedure wherever possible. Accordingly, two sources of procedural rules for extradition have developed almost entirely in parallel.

⁹³ See *Government of the United States of America v Jiang* [2012] DCR 724; *United States of America v Cullinane* [2003] 2 NZLR 1 (CA); and *Edwards v United States of America* [2002] 3 NZLR 222 (CA).

⁹⁴ Extradition Act 1999, s 4. Section 4(2) requires that the conduct constituting the offence in the foreign country must also constitute an offence at the relevant time in New Zealand. This is the concept of “dual criminality”, which we discuss in detail in ch 5.

- 3.59 This has created the situation whereby it is sometimes difficult to determine whether a treaty substantively deals with a particular procedural matter and, if so, whether there is any inconsistency between the treaty and the Act, warranting the application of section 11(1). Issues that have arisen in recent litigation are:
- whether a treaty provision stating that extradition requests may be made by “the appropriate authority as may be notified from time to time” is sufficiently detailed to override the requirements in section 18(2) of the Act;⁹⁵
 - how a time limit in a treaty for the receipt of the extradition request following a provisional arrest warrant relates to the notice the Minister must provide to the court under section 19 of the Act;⁹⁶
 - whether a reference to a “copy” of a document being admissible as evidence in a treaty means that only photocopies of documents are admissible;⁹⁷
 - whether the authentication requirements in a treaty or the Act or both need to be complied with;⁹⁸ and
 - whether a reference in a treaty to an ability to request further information from the requesting country on a government-to-government basis overrides any potential ability for the courts to make a disclosure order under the Act.⁹⁹
- 3.60 A related issue is the exact scope of the ability of treaties to override the Act on procedural matters given section 11(2)(b) (no treaty may override the rule governing the sufficiency of evidence) and section 11(2)(d) (no treaty may override a power conferred on a court or Minister).

APPROACHES TO TREATIES IN COMPARABLE JURISDICTIONS

- 3.61 The United Kingdom, Australia, and Canada have also faced the problem of bilateral treaties keeping pace with developments in extradition practice and legislation, particularly in relation to surviving imperial treaties. The three countries have adopted different approaches to resolving this issue.

The United Kingdom

- 3.62 Up until 2003, the United Kingdom continued to operate an extradition regime that relied heavily on treaties. Its 1989 Extradition Act operated in much the same way, in this regard, as the Extradition Acts 1870 to 1935 (Imp)¹⁰⁰ had done and as New Zealand’s Extradition Act 1999 currently does. The United Kingdom’s Extradition Act 2003, however, marked a radical change from this position.
- 3.63 The 2003 Act does not contain any provisions explaining the relationship between the Act and the United Kingdom’s existing bilateral extradition treaties. The existence of a treaty

95 *Poon v Police* [2000] 2 NZLR 86 (HC) at [47]. Section 18(2) provides:

(2) The request must be made—

(a) by a diplomatic or consular representative, or a Minister of the country that seeks the person’s surrender; or

(b) by such other means as is prescribed in a treaty (if any) in force between New Zealand and the extradition country or in any undertakings between New Zealand and the extradition country;

96 *Muller v United States of America* [2007] NZCA 376 at [4]; see also *Poon v Police*, above n 95, at [78] and [104]–[113].

97 *Bujak v District Court at Christchurch* HC Christchurch CIV-2008-409-785, 8 October 2008 at [8].

98 *United States of America v Wong* [2001] 2 NZLR 472 (HC) at [7]–[36]; see also *Mewes v Attorney-General*, above n 72.

99 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [167].

100 Extradition Act 1870 (Imp) 33 & 34 Vict c 52.

is, however, relevant to the designation process under the Act. In brief, a country may be designated under Category 1 or Category 2. Any non-designated country must enter into a “special extradition arrangement” with the United Kingdom to enable extradition to take place. The factors to be considered in the designation process are not specified in the Act. Nonetheless, the relevant designation orders make it plain that Category 1 countries are those that are part of the European Union and have signed the relevant extradition agreements. Category 2 countries are all other countries with whom the United Kingdom has an extradition relationship, namely Commonwealth countries (which are subject to the London Scheme)¹⁰¹ and bilateral treaty partners.¹⁰²

- 3.64 The Act deals comprehensively with the extradition process for each category. Accordingly, in the United Kingdom, bilateral extradition treaties now only appear to be relevant to the designation of a country under the Act. The means of processing an extradition request within the United Kingdom is entirely statutory.

Australia

- 3.65 Australia has taken the opposite approach to the United Kingdom and has, since 1985, made a concerted effort to negotiate new bilateral extradition treaties and arrangements, which form the backbone of its current legislation.¹⁰³
- 3.66 In the early 1980s, a high-profile Australian extradition case sparked extensive debate over whether the requirement to provide sufficient evidence to justify committal for trial in support of an extradition case was proving unjustifiably onerous for certain countries to meet.¹⁰⁴ This debate led to the introduction of a “no evidence” alternative to this requirement, under which no evidence needed to be provided to support an extradition request. The “no evidence” model significantly reduces the burden on the requesting country and has been particularly welcome for countries with civil law justice systems, which are unfamiliar with the usual evidence requirements in common law justice systems like our own.¹⁰⁵ The “no evidence” model was then introduced in the Extradition Act 1988 (Cth) as the default position for any new treaties entered into by Australia. Due in large part to this default position, Australia has been able to negotiate 58 bilateral extradition treaties or arrangements since 1988, particularly with civil law countries.¹⁰⁶
- 3.67 Another feature of the 1988 Act is that Australia can only process an extradition request if it has a treaty or similar arrangement in place with the foreign country in question.¹⁰⁷ It is therefore not possible for Australia to process a request on a one-off basis.

101 London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966.

102 See the explanatory notes accompanying the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (UK) and the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (UK).

103 See EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 12 and 25; Joint Standing Committee on Treaties *Extradition – A review of Australia’s law and policy* (Report 40, August 2001); and Australian Attorney-General’s Department *A new extradition system – a review of Australia’s extradition law and practice* (2006).

104 Joint Standing Committee on Treaties, above n 103, at [2.21].

105 Legal systems across the world fall broadly into two categories: “common law” and “civil law”. In simple terms, common law countries have followed the Anglo-Saxon justice model, which places emphasis on the judge’s role in evolving and interpreting the law. In contrast, civil law systems evolved from Roman law and emphasise instead the comprehensive codification of the law. Civil law systems are more widespread than common law systems. See S Cuthbertson “Mutual Assistance in Criminal Matters: The Challenges of the Common Law Tradition” [2012] JCLL 69.

106 Twenty-seven bilateral extradition treaties and 31 non-treaty extradition arrangements: see Australian Attorney-General’s Department “International crime cooperation arrangements” < www.ag.gov.au > .

107 The Act only applies to countries that are declared to be “extradition countries” by regulations; Extradition Act 1988 (Cth), s 2, definition of “extradition country”. The regulations, in turn, must give effect to an extradition treaty or some other reciprocal extradition arrangement; Extradition Act 1988 (Cth), s 11.

- 3.68 The paramount status of the treaties in Australia is cemented by section 11 of the 1988 Act, which explains the relationship between the treaties and the Act. It states that the Act must be applied to a treaty country “subject to such limitations, conditions, exceptions or qualifications as necessary to give effect to” the treaty.¹⁰⁸ Therefore, in Australia, bilateral extradition treaties take precedence over the Act in the event of an inconsistency. The Act contains no specific exceptions to this rule.

Canada

- 3.69 Canada has opted for a middle ground between the Australian and United Kingdom models for giving effect to bilateral extradition treaties. This is reflected in its Extradition Act 1999,¹⁰⁹ which allows for treaties to override only expressly identified provisions in the Act.
- 3.70 Like in Australia, high-profile extradition cases in the 1980s led Canada to re-examine its extradition practice. A policy decision was made to modernise old extradition treaties and to negotiate new ones. Canada’s Extradition Act 1877 contained a blanket rule that, in the event of any inconsistency, an extradition treaty would take precedence over the Act.¹¹⁰ This enabled Canada to enter into bilateral treaty arrangements that differed significantly from the Act.¹¹¹
- 3.71 The 1999 Act significantly changed this approach by removing the blanket rule. Instead, the Act expressly identifies the legislative provisions that a treaty may amend or override.¹¹² These provisions include the definition of “extradition crime”, the rules regarding the admissibility of evidence, and some but not all of the grounds for refusing surrender.
- 3.72 Under the Canadian Act, the exact nature of the relationship between the treaty and the specified provisions depends on the wording of the relevant provision. For example, sometimes the treaty will override the Act,¹¹³ sometimes it will create an additional obligation,¹¹⁴ and sometimes it will provide an alternative.¹¹⁵ Interestingly, the Act has not retained the emphasis on “inconsistency” that was found in its predecessor.¹¹⁶ The decision to move away from assessing the consistency between treaties and the Act was presumably designed to avoid complex litigation about interpretation.

108 Extradition Act 1988 (Cth), s 11. This adopts the formula from the Extradition Acts 1870 to 1935 (Imp) 33 & 34 Vict c 52.

109 Extradition Act SC 1999 c 18.

110 Extradition Act RSC 1985 cE-23, s 3.

111 William H Corbett “The 125 Year History of Canada’s Extradition Statutes and Treaties” (2005) 28 CLB 497 at 526.

112 The provisions that a treaty may override under the Canadian Extradition Act SC 1999 c 18 are: s 3(1) (the definition of “extradition crime”); s 14(1)(b) (the timeframe for receiving an extradition request following the execution of a provisional arrest warrant); s 29(5) (treating a person convicted in absentia as an accused person for the purposes of the extradition committal hearing); s 32(1)(b) (the admissibility of documents); s 33(4) (additional authentication for a record of the case); ss 46 and 47 (some, but not all, of the mandatory and discretionary grounds for refusal); s 66(3) (the requirement for a specific assurance in relation to temporary surrender); and s 80 (the rule of speciality as applied when a person is surrendered to Canada).

113 Extradition Act SC 1999 c 18, s 3(1) (the definition of “extradition crime” in a treaty prevails).

114 Extradition Act SC 1999 c 18, s 33(4) (a treaty may contain additional authentication requirements for the record of the case).

115 Extradition Act SC 1999 c 18, s 32(1)(b) (a treaty may provide for an alternative way of defining admissible evidence).

116 That term is used only once in the 1999 Act in relation to the prevalence of grounds for refusal in multilateral treaties over the grounds in the Act: Extradition Act SC 1999 c 18, ss 10(2) and 45(2).

OPTIONS FOR REFORM

Is there a need for reform?

- 3.73 As explained in this chapter, the current Act is written as if bilateral treaties form its backbone. These treaties trump domestic legislation with the exception of only a limited number of provisions. The main advantage of this approach is that it allows for flexibility. It also reflects the principle of reciprocity, which has traditionally been the rationale for extraditions.¹¹⁷
- 3.74 The advantages of having a treaty-based extradition regime, however, need to be balanced against the following practical realities:
- Treaties have the potential to create countless different extradition processes for the New Zealand courts to apply, which can cause confusion, litigation, and delay.
 - Treaties can quickly become outdated if they are not amended to reflect changes in the criminal offences and state practices of the treaty partners.
 - New Zealand is a small and geographically isolated country, and it is unlikely that negotiating an extradition treaty with New Zealand is high on the political agenda of many foreign countries.¹¹⁸
- 3.75 Bearing these observations in mind, we consider that it is not viable for New Zealand to have an Extradition Act that relies so heavily on bilateral treaties and that a move towards placing greater comparative reliance on the provisions of an extradition statute would be a more sensible option. Such a shift would have the added benefit of being in line with the current international trend towards viewing extradition as an important law enforcement tool of a good international citizen rather than as a purely reciprocal act of comity.

Our preferred approach: treaties can supplement the default extradition procedure in the Act

- 3.76 In our view, the new extradition statute should be the primary source of New Zealand's extradition arrangements, but the statute should be able to be supplemented in some key ways by the provisions of treaties.
- 3.77 Both the United Kingdom and Canada have extradition regimes that rely more heavily on statute than on bilateral extradition treaties. The difficulty with the United Kingdom model, however, is that there is no scope for existing or future treaties to vary the statutory extradition process. This model works in the United Kingdom because it has renegotiated the vast majority of its old imperial treaties and has entered into new extradition arrangements with the European Union and the United States that align neatly with the 2003 Act. New Zealand needs a slightly more flexible extradition regime that can accommodate differences in state practices and laws in a similar way to the Canadian legislation.
- 3.78 We therefore propose that bilateral treaties should continue to play a role in extraditions but by supplementing rather than overriding specific and limited provisions of the new Act. The Act should spell out which provisions can be affected by bilateral treaties and in what way. In

¹¹⁷ Under this principle, extradition operates on the basis that, when a country gives cooperation to another country, it does so on the understanding that it will receive similar cooperation in return: Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) at [3.25].

¹¹⁸ It is unlikely that New Zealand will negotiate a comprehensive new round of bilateral extradition treaties. In relation to these treaties, there is an alternative option of unilateral termination by giving six months' notice. This may actually benefit New Zealand's treaty partners as, ironically, the legislative requirements for processing a one-off extradition request may be easier to meet than the terms of the treaties. Nonetheless, this option may be politically unpalatable.

our view, this approach should be adopted in relation to the same general range of provisions as those in the Canadian Act. In Canada, those are:

- the definition of “extradition crime”;¹¹⁹
- the timeframe for receiving an extradition request following the execution of a provisional arrest warrant;¹²⁰
- treating a person convicted in absentia as an accused person for the purposes of the extradition committal hearing;¹²¹
- the admissibility of documents;¹²²
- additional authentication for a record of the case;¹²³
- some, but not all, of the mandatory and discretionary grounds for refusal;¹²⁴
- the requirement for a specific assurance in relation to temporary surrender;¹²⁵ and
- the rule of speciality.¹²⁶

3.79 We discuss how the new Act should treat these issues in more depth throughout this first part of the issues paper. To illustrate, in Chapter 5 we propose that the definition of “extradition offence” in a treaty may supplement the definition in our Act. Accordingly, the offence would need to meet either of the definitions in order to qualify for extradition. Regardless of which definition was found to apply in New Zealand, the request would continue to be processed in accordance with the Act.

EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT OR WAR CRIMES TRIBUNALS

3.80 In addition to the Extradition Act 1999, there are two other statutes that aim to give effect to New Zealand’s international extradition obligations: the International Crimes and International Criminal Court Act 2000 and the International War Crimes Tribunals Act 1995.

International Criminal Court

3.81 The International Crimes and International Criminal Court Act implements New Zealand’s obligations under the Rome Statute,¹²⁷ which established the International Criminal Court (ICC). Part 4 of the Act provides for the arrest and surrender of a person to the ICC in response to a request to do so from the ICC. This is a process that is similar to extradition.

3.82 The procedure in Part 4 of the International Crimes and International Criminal Court Act echoes that in the Extradition Act, with the same decision makers being responsible for the different stages in the process. The most significant difference between the extradition process and the surrender of a person to the ICC is that the grounds on which the Minister of Justice can refuse surrender in ICC cases are much more limited.¹²⁸

119 Section 3(1).

120 Section 14(1)(b).

121 Section 29(5).

122 Section 32(1)(b).

123 Section 33(4).

124 Sections 46 and 47.

125 Section 66(3).

126 Section 80.

127 Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002).

128 International Crimes and International Criminal Court Act 2000, s 55.

- 3.83 These two procedures should be aligned in the future. Therefore, we are aware of the need to consider the impact that any reforms to the Extradition Act might have on the International Crimes and International Criminal Court Act. In that regard, we note that particular care needs to be taken with proposals that relate to the decision makers responsible for considering requests for extradition (Chapter 4) and the grounds for refusal (Chapter 8).

International war crimes tribunals

- 3.84 The International War Crimes Tribunals Act 1995 enables New Zealand to cooperate with the United Nations tribunals for prosecuting war crimes in Yugoslavia and Rwanda and any other tribunal given coverage under the Act by declaration.¹²⁹ This Act also provides for the arrest and surrender of persons to a tribunal where the Government receives a request from the tribunal.
- 3.85 As it preceded the 1999 Extradition Act, the International War Crimes Tribunals Act does not follow the same procedures or have the same decision makers as apply to extradition. Its procedures differ from both the Extradition Act and the International Crimes and International Criminal Court Act: decisions are made by the Attorney-General, and the court only has a role in issuing an arrest warrant, not in the decision to surrender a person. There is one broad ground for declining surrender: that it would be “unjust or otherwise inappropriate to surrender the person”.¹³⁰
- 3.86 It would be preferable for the procedures and decision makers in these three Acts to align. The reality, however, is that there may no longer be a practical need for the International War Crimes Tribunal Act, as the International Criminal Tribunals for Rwanda and Yugoslavia are both in the process of completing their mandates and are closing down.

QUESTIONS

- Q1 How can we achieve making the new Act the primary source of New Zealand’s extradition law but also, where necessary, give effect to New Zealand’s international obligations?
- Q2 How should extradition treaties be able to alter the statutory regime?

¹²⁹ International War Crimes Tribunals Act 1995, s 2, definition of “Tribunal”.

¹³⁰ International War Crimes Tribunals Act 1995, s 12(2).

Chapter 4

Roles and responsibilities

KEY PROPOSALS

Proposals: The new Act should formally establish a central authority for extradition that would be responsible for receiving, managing, and executing extradition requests in the standard procedure. The central authority should be either the Attorney-General or the Solicitor-General. Ministers of the Crown and other agencies need to be involved in the extradition process; however, there should be a clear division of responsibilities.

Rationale: A clearer and more efficient structure will enable more effective cooperation with foreign states, reduce administrative complexity, and remove any confusion of roles.

INTRODUCTION

- 4.1 Extradition necessarily is a matter that requires the consideration and involvement of multiple government agencies because it combines international relations with criminal procedure and executive discretion. Consequently, extradition cases in New Zealand normally have involvement from the Ministry of Foreign Affairs and Trade (MFAT), the New Zealand Police (Police), the Minister of Justice, and the Crown Law Office (Crown Law). The courts play a significant role in deciding the outcome of an extradition, and the Minister of Justice holds the final discretionary decision-making power.
- 4.2 As set out in Chapter 2, a different procedure, with different roles for the actors involved, applies to standard procedure countries (Part 3 of the Extradition Act 1999) as compared to backed-warrant countries (Part 4 of the Extradition Act). The standard procedure would require judges to receive a record of the case against the requested person and to assess its credibility, whereas the backed-warrant process would replicate the current summary process where the judge simply needs to be satisfied of the validity of the foreign warrant.¹³¹
- 4.3 This chapter first summarises the current roles and responsibilities, before exploring our main proposal of creating a central authority for extradition. We then look at the different types of roles under the present system and consider options where reform is needed.

SUMMARY OF CURRENT ROLES AND RESPONSIBILITIES

- 4.4 The key actors under the Extradition Act 1999 have the following main roles and responsibilities. *Italicised text indicates where we propose removing roles or altering the allocation of responsibilities, and the table below sets out the effect of our proposals.*

¹³¹ See [2.18]–[2.25].

ACTOR	STANDARD PROCEDURE	BACKED-WARRANT PROCEDURE	GENERAL
MFAT	Receives requests in practice. Assists Crown Law in liaising with the foreign country.		Provides advice on recommendations to designate countries under the Act. Assists in the negotiation of extradition treaties.
POLICE	Execute arrest warrants. Arrange detention and travel if extradition takes place.	Receive requests. Liaise with the foreign country. Initiate court proceedings. Execute arrest warrant. Manage District Court proceedings. Arrange District Court representation. May assist in providing advice to the Minister of Justice on the final decision on surrender (if this decision is necessary). Arrange detention and travel if extradition takes place.	
CROWN LAW	Provides legal advice to the Minister of Justice on whether to initiate court proceedings. Liaises with the foreign country. Manages court proceedings. May appear in court proceedings. Provides legal opinion to the Minister of Justice on the surrender decision.	Provides legal advice to the Police (if necessary). Manages higher court proceedings. May appear in higher court proceedings.	May provide legal advice in relation to negotiating and meaning of extradition treaties.
MINISTER OF JUSTICE	Formally receives requests. Decides whether to allow ad hoc extradition requests. Initiates court proceedings. Makes the final decision on surrender in all cases.	Makes the final decision on surrender if the case is referred to the Minister by the court.	
MINISTRY OF JUSTICE	Provides advice to the Minister of Justice in relation to extradition decisions.	Provides advice to the Minister of Justice on the final decision on surrender (if this decision is necessary).	Makes recommendations to Cabinet as to the designation of countries under the Act. Takes the lead in negotiating extradition treaties.
DISTRICT COURT	Decides on eligibility for surrender.	Decides on eligibility for surrender. Decides whether the Minister of Justice should make the final decision on surrender.	
HIGHER COURTS	Decide appeals and judicial reviews (where necessary).	Decide appeals and judicial reviews (where necessary).	
CABINET			Designates countries under the Act.

Need for reform

- 4.5 The way that roles and responsibilities are divided under the current extradition system is complex and compartmentalised. Some of this is inevitable. Extradition is a complicated process that involves diplomacy with foreign countries, their comprehension of our extradition process, the need to provide adequate protection to the person sought, judicial processes, and ministerial decision making.
- 4.6 However, a number of different actors are involved in different parts of the process. This can lead to a lack of clarity regarding who is responsible for what and can make the extradition process more difficult for foreign countries. The current division of responsibilities can give rise to concerns about conflicts of interest and the suitability of certain actors being in certain roles. The Extradition Act itself is also unclear regarding who carries out some roles.

Key proposals

- 4.7 A central authority for extradition should be appointed. The authority should be given responsibility under the statute for receiving, managing, and executing extradition requests under the standard procedure.¹³² Identification of a central authority will not remove the need for a number of agencies to be involved in extradition. However, it will result in a more coherent and certain division of roles and responsibilities. It will also make it clearer which agency has overall responsibility for the process for countries with whom New Zealand does not have a close extradition relationship.
- 4.8 The proposed new division of roles is illustrated in the table below. Our proposed changes are featured in bold text.

ACTOR	STANDARD PROCEDURE	BACKED-WARRANT PROCEDURE	GENERAL
MFAT	Receives requests in practice. Assists Crown Law in liaising with the foreign country.		Provides advice on recommendations to designate countries under the Act. Assists in the negotiation of extradition treaties.
POLICE (AS A DELEGATE OF THE CENTRAL AUTHORITY IN RELATION TO BACKED- WARRANT REQUESTS)	Execute arrest warrants. Arrange detention and travel if extradition takes place.	Receive requests. Vet requests in accordance with the Act. Liaise with the foreign country. Initiate court proceedings. Execute arrest warrant. Manage District Court proceedings. Arrange District Court representation. May assist in providing advice to the Minister of Justice on the final decision on surrender (if this decision is necessary). Arrange detention and travel if extradition takes place.	

¹³² Countries using the backed-warrant procedure would continue to work with the New Zealand Police.

ACTOR	STANDARD PROCEDURE	BACKED-WARRANT PROCEDURE	GENERAL
CROWN LAW (THE CENTRAL AUTHORITY FOR EXTRADITION)	<p>Formally receives requests.</p> <p>Vets requests in accordance with the Act and decides whether to initiate court proceedings.</p> <p>Liaises with the foreign country.</p> <p>Initiates court proceedings.</p> <p>Manages court proceedings.</p> <p>May appear in court proceedings.</p>	<p>Provides legal advice to and oversight of the Police (where necessary).</p> <p>Manages higher court proceedings.</p> <p>Appears in higher court proceedings.</p>	<p>Provides advice on recommendations to designate countries under the Act.</p> <p>Assists in the negotiation of extradition treaties.</p>
MINISTER OF JUSTICE	<p>Makes a final decision on surrender if a case is referred to the Minister by the Court (rare).</p>	<p>Makes the final decision on surrender if a case is referred to the Minister by the Court (rare).</p>	
MINISTRY OF JUSTICE	<p>Provides advice to the Minister of Justice if he or she needs to make a final decision on surrender.</p>	<p>Provides advice to the Minister of Justice if he or she needs to make a final decision on surrender.</p>	<p>Makes recommendations to Cabinet as to the designation of countries under the Act.</p> <p>Takes the lead in negotiating extradition treaties.</p>
DISTRICT COURT	<p>Decides whether there is a sufficient case to extradite.</p> <p>Decides whether the Minister of Justice needs to make the final decision on surrender (rare).</p>	<p>Decides whether to extradite. Decides whether the Minister of Justice needs to make the final decision on surrender (rare).</p>	
HIGHER COURTS	<p>Decide appeals and judicial reviews (where necessary).</p>	<p>Decide appeals and judicial reviews (where necessary).</p>	
CABINET			<p>Designates countries under the Act.</p>

A CENTRAL AUTHORITY FOR EXTRADITIONS THROUGH THE STANDARD PROCEDURE

- 4.9 In the extradition context, a central authority is a designated government agency that has the responsibility for receiving, managing and executing extradition requests. Many countries have an official central authority for extradition. In recent decades, a central authority has been advocated as best practice in all forms of international mutual assistance in criminal matters, including extradition, because of the complexity of keeping track of all of the relevant agreements, treaties, informal understandings, legal regimes, and developments in domestic and international law.¹³³

¹³³ United Nations Office on Drugs and Crime *Manual on Mutual Legal Assistance and Extradition* (United Nations, September 2012) at 29. For instance, the United Nations Convention against Transnational Organized Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003), makes it compulsory that each party designate a central authority for the purposes of mutual legal assistance (art 18(13)). The Model Treaty on Mutual Assistance in Criminal Matters GA Res 45/117, A/Res/45/117 (1990), subsequently amended by GA Res 53/112, A/RES/53/112 (1999), includes art 3, which requires each state party to designate a central authority or authorities; and Asian Development Bank and Organisation for Economic Co-operation and Development *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (ADB/OECD, 2007) at 64.

- 4.10 A designated central authority would supervise and manage extradition requests. It would make it easier for foreign governments to interact with New Zealand on extradition matters because it would be a visible point of contact.¹³⁴ A single, formal central authority may also enhance the standing of an agency as a centre of expertise on extradition and allow a uniform response to all forms of requests. It can avoid some of the duplication of effort and inconsistency that may come from a lack of control.¹³⁵
- 4.11 While the Attorney-General is the formal Central Authority for mutual assistance in New Zealand under the Mutual Assistance in Criminal Matters Act 1992 (MACMA), there is no official central authority for extradition. The various functions that a central authority would have responsibility for are shared between several agencies.
- 4.12 As we see it, the central authority would properly be resourced to receive formal extradition requests under the standard process for extradition and would be responsible for vetting the requests and accompanying information. It would liaise with requesting countries to improve requests where required. It would refer formal requests to the court for extradition proceedings and could act as the formal applicant for extradition before the court. The central authority would have responsibility for instructing counsel and could halt proceedings as necessary.
- 4.13 We have considered whether there is merit in also having the central authority oversee backed-warrant applications. In our view, the backed-warrant procedure seems to work well as currently administered by the Police, who have extensive international contacts through Interpol.
- 4.14 It would not be the central authority's role to advise the Minister of Justice on the exercise of Minister's powers. In the model we propose, there would be a clear division between the administrative and procedural functions, which would primarily be carried out by the central authority, and the political role, which would be carried out by the Minister of Justice as advised by his or her Ministry. This alleviates the potential for a perceived conflict of interest and creates a workable separation of responsibilities.
- 4.15 The proposed approach has the advantage of establishing one agency as the central contact point and manager for extradition requests under the standard procedure. It removes the confusion and doubling up of roles that occur in the present system. Having a central authority would not remove the need for other government agencies to play a role but would allow them to carry out specialised tasks that accord with their expertise, while being coordinated by the central authority. The central authority would also have the purpose of ensuring greater oversight and coherence in New Zealand's overall approach to extradition than can occur under the current approach where no single agency has responsibility for the overall process.
- 4.16 Outlining the role of the central authority in statute would also make the division of roles more transparent. At present, most of what the various agencies do is not described in the Act or is hidden behind a ministerial power or function. This approach would provide more clarity for requesting countries and others seeking to understand how the extradition process functions in New Zealand.

The central authority and the backed-warrant procedure

- 4.17 Notwithstanding the approach above, in proposing the appointment of a central authority, we are concerned not to alter the processing of requests that use the backed-warrant procedure under the current Act.

¹³⁴ Asian Development Bank and Organisation for Economic Co-operation and Development, above n 133, at 65.

¹³⁵ United Nations Office on Drugs and Crime, above n 133, at 30.

- 4.18 The Extradition Act is silent on who receives backed-warrant requests and who decides whether to refer such a request to the court. In practice, it is the New Zealand Police.
- 4.19 The current process for backed-warrant requests operates relatively smoothly and efficiently. This should not be disturbed by the introduction of a central authority, which is intended to improve the efficiency and effectiveness of the management of requests. It is not proposed that the central authority would vet backed-warrant requests or be involved in the decision to apply to the court regarding these requests. We anticipate that the central authority's involvement in backed-warrant requests would be restricted to matters such as reporting numbers and outcomes.

Who should be appointed as the central authority?

- 4.20 Currently, the majority of functions that a central authority would hold are carried out by Crown Law. Crown Law has the necessary expertise to carry out the central authority role in practice, and it is our view that it should do so under the proposed scheme.
- 4.21 It would be helpful to align the central authority for extradition with the Central Authority that currently exists for the purposes of MACMA. This is, in practice, carried out by Crown Law. This would allow a coordinated approach to the assistance New Zealand provides to foreign countries in criminal matters, which is particularly beneficial where a foreign country's request involves both extradition and MACMA proceedings.
- 4.22 Usually, an individual rather than an agency is named in statute in such a role. We propose that the new Act take the same approach and suggest that the two options are the Attorney-General or the Solicitor-General. In practice, whichever is chosen, the work would be carried out within the Crown Law Office.
- 4.23 The Attorney-General is both a political and non-political actor as he or she is both a Cabinet Minister and the senior law officer of the Crown. In the law officer role, the Attorney-General is responsible for conduct of the prosecution system. In exercising this role, the Attorney-General provides advice to Cabinet and exercises statutory decision-making responsibilities, in particular in relation to the criminal justice system. The Attorney-General has the obligation to act on these matters independently and free from political considerations.
- 4.24 Most of the Attorney-General's functions are delegated to the Solicitor-General, who, as well as holding office as the junior law officer of the Crown, is the Chief Executive of the Crown Law Office. The Solicitor-General can, by statute, exercise almost all of the statutory functions of the Attorney-General,¹³⁶ and this is particularly important in allowing the Solicitor-General to assume responsibility for those functions that should be undertaken independently of the political process, most notably with regard to prosecutions.
- 4.25 The Attorney-General would be the most appropriate person if it is considered that the central authority's role should reside in an executive decision maker who is accountable to Cabinet. The Attorney-General would be able to provide senior oversight and a political viewpoint where necessary, which may be suitable to the serious issues that can be raised in extradition proceedings. The role would have some similarity to the Attorney-General's general prosecutorial oversight in the criminal justice system. In contrast, the Solicitor-General would be the better choice if it is considered that a person with complete political independence is preferable.

¹³⁶ Constitution Act 1986, s 9A.

Vetting requests on the standard process

- 4.26 Outside of the statutory process in the Extradition Act, an important task must be carried out in informally vetting an extradition request to make sure it meets requirements under the Act. This process is an opportunity to identify any problems or flaws in a request and to seek to remedy them, most likely through a requesting country providing further information or resubmitting information in an acceptable format. It is also possible that very unlikely or spurious requests are able to be dissuaded before a formal request is made. For requests under the standard procedure, this function is currently carried out by Crown Law.
- 4.27 This aspect of the extradition system generally works well, aside from the difficulties that many countries have in meeting the evidential requirements under the New Zealand Act.¹³⁷ There is some concern, however, that it is not sufficiently clear to outside parties which agency is responsible for this role. Both the Act and information for foreign governments on New Zealand government websites imply that MFAT is to receive requests, and because it is the Minister of Justice who determines whether to refer a case to the court, it may be assumed that the Ministry of Justice has a greater role in checking and screening extradition requests. In addition, Crown Law's role is somewhat concealed on the face of the Act. In our view, the system could be improved by making it clear that the central authority receives and manages extradition requests. We suggest that the authority should be given statutory responsibility for vetting extradition requests.

The applicant in extradition proceedings

- 4.28 The Act is silent on who should be the applicant in extradition proceedings. Normally, a foreign government initiates the extradition process.¹³⁸ It does not necessarily follow, however, that the foreign government should be the formal applicant in the court proceedings.
- 4.29 The current ambiguity has been an issue before the courts in recent cases.¹³⁹ The different approaches taken by different courts and judges illustrate that the issue is far from clear.
- 4.30 This is, in some senses, a technical issue, but it may have substantive implications, particularly for the New Zealand agencies acting as counsel in the case before the court. There is a risk that considering the foreign government to be the applicant gives it too great a standing and creates confusion about the degree to which Crown Law can be instructed by the foreign government. There are also issues about who can withdraw from proceedings, the rules of discovery, and privilege between counsel and the foreign government. The issue of privilege between the foreign country and counsel is discussed below. Another area where the issue of who the applicant is has been problematic is in relation to disclosure.¹⁴⁰
- 4.31 It is desirable to have this issue clarified in legislation to remove the present uncertainty. We propose that the central authority should be the applicant. This role accords with the central authority's administrative and procedural role in managing an extradition request from a foreign country. It removes any difficulty about according a foreign government status as a party before the courts in extradition proceedings. While extradition is a state-to-state process, New Zealand's role is to meet its international obligations by carrying out the aspects of the

¹³⁷ Discussed in ch 9.

¹³⁸ Under pt 4 of the Extradition Act 1999, it may be the foreign police force that does so. The Act is silent on how requests are made under pt 4.

¹³⁹ See *Mailley v District Court at North Shore* [2013] NZCA 266 at [38], where the Court of Appeal found, based on a few indications in the Act, that, under pt 4, the foreign country should be the applicant and be listed as the party to the proceedings. See also *Dotcom v The United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 (and earlier judgments), where different views were expressed by members of the Court as to whether the United States was a party to proceedings (majority) or whether the Minister of Justice was the applicant (Chief Justice minority).

¹⁴⁰ This is discussed in ch 9.

process that occur here. It makes sense, therefore, that the role of applicant sits with the New Zealand Government.

- 4.32 There could be concern that the role of the requesting country, as instigator of the proceedings, would not be as clear as is currently the case, because the central authority would be stated as the party to proceedings. This could be resolved by including wording in the intitlement that makes this relationship clear, such as “[Central Authority] (request by the Government of X)”.

Privilege

- 4.33 Crown Law has raised with us the uncertain nature of the protection that might be accorded to communications made between it and requesting governments in the context of its role as Central Authority in MACMA cases and essentially as an adviser to those countries in extradition cases.
- 4.34 In the non-litigation context, such communications will be protected under a number of grounds in the Official Information Act 1982 or the Privacy Act 1993, most notably as information provided in confidence by foreign governments. In the litigation context, it is possible that such communications might be covered by legal professional privilege and hence not available for discovery or disclosure, but this is not certain and depends on whether a foreign country might be considered a client seeking legal advice.
- 4.35 It will be clear under our proposals that the foreign country is not a client of the central authority and consequently that there be no legal professional privilege. We accept that the communications with the foreign country, in the ordinary course of events, should not be subject to disclosure, but at the same time, we think that there ought to be an overriding disclosure requirement to the person sought when that information might materially affect the outcome of the application.
- 4.36 Arguably, much of a request to a central authority for extradition will involve significant communication back and forth that one would expect of a legal adviser assisting a client through a difficult process.
- 4.37 One solution is to deem communications between a requesting country and the central authority to be privileged in the same way as more traditional requests for legal advice. The requesting country would then have a privilege in all of its communications with the central authority. It would decide whether that information was disclosed. It might be necessary though, given the role of the central authority as the party to the New Zealand proceedings and the consequent obligation to act fairly, to give the central authority the ability to allow disclosure of such information where fairness requires such a disclosure.
- 4.38 This proposal would have the benefit of essentially invoking a familiar regime. However, in our review, we have been concerned to emphasise that the central authority exercises its functions in its own right. Thus, while there is some benefit in invoking the familiarity of legal professional privilege, equating the central authority with a traditional legal adviser risks somewhat muddying the waters.
- 4.39 The other solution would be a special protection in both statutes for such information that would have a similar effect to privilege. Such a provision would again allow the central authority to make a disclosure when required by fairness and allow the requesting country to withdraw the application if it preferred that to making the necessary disclosure. The separate provision has the advantage of clearly preserving the independent role of the central authority.

- 4.40 We prefer a separate provision that communications between the central authority and the requesting country ought not to be disclosed unless in the interests of justice.

QUESTIONS

- Q3 Do we need a central authority for extradition?
- Q4 Who should be appointed as the central authority for extradition?
- Q5 What should be the relationship between the role of the New Zealand Police in backed-warrant extraditions and the role of a central authority?
- Q6 How should privilege work in extradition?

AGENCY ROLES

- 4.41 As noted above, while clarity would be added by the appointment of a central authority, other agencies must necessarily play a role in extradition proceedings.
- 4.42 MFAT is the Government's lead source of advice on foreign, diplomatic, and consular issues. It is the formal channel for communications to and from other countries, which, of course, may have different languages, cultures, and legal and political systems. At present, MFAT liaises with the requesting country for requests under the standard procedure, both before and after a formal request is submitted, and assists it in obtaining Crown Law's advice on the form for the request and the form and content of the evidence that needs to be submitted. It is appropriate for MFAT to retain this role.
- 4.43 For backed-warrant requests, the New Zealand Police liaise at a police-force-to-police-force level. This works efficiently and effectively because backed-warrant countries are those with which New Zealand shares a close working relationship. The Police role in the execution of arrest warrants, detention, monitoring while on bail, and the transit of a person to the requesting country is likewise essential.
- 4.44 There are, however, issues for consideration in relation to some of the other current roles for government agencies in the extradition process. Below, we consider the existing roles of government agencies and how these should best be carried out in a new extradition scheme.

Court proceedings

- 4.45 It is necessary to have an agency that manages the court proceedings on behalf of the requesting country and the New Zealand Government.
- 4.46 For requests under the standard procedure, Crown Law provides submissions for the court proceedings and either appears itself or instructs solicitors to act for the applicant. In the backed-warrant procedure, the Police instruct solicitors to act as counsel in the proceedings. Crown Law acts in all appeals in the Court of Appeal or Supreme Court, as it does for all criminal cases.
- 4.47 As with vetting requests, we consider that the responsibility for managing court proceedings in standard proceedings lies naturally within the role of the central authority.

Advice to Government

- 4.48 Another significant agency function in extradition is providing advice to the Minister of Justice generally about extradition and the administration of the Act and about a specific exercise of a statutory decision-making power. Some of this is in the form of legal advice about the operation of extradition law and the administration of particular cases, while other advice is more of a policy, political, or diplomatic nature.
- 4.49 The Ministry of Justice advises the Minister on the exercise of the Minister's discretions to allow a case to proceed to the District Court for an arrest warrant and the final decision on surrender. This will usually involve the Ministry seeking further information from MFAT and the Police and a legal opinion from Crown Law.
- 4.50 In our view, giving advice on both extradition policy generally and the specific exercise of a statutory power should be kept completely separate from the function of managing the court proceedings.
- 4.51 We think that the provision of a legal opinion from Crown Law can be separated from the function of managing court proceedings (by Crown Law under our proposals) by ensuring that those providing the legal opinion on the discretion to surrender are different personnel from those involved in the case earlier.

MINISTERIAL ROLES

- 4.52 The Minister of Justice has four key roles under the current regime. They are:
- referring the extradition request to the court (under the standard procedure);
 - deciding whether to allow an ad hoc request from a country with which New Zealand does not have an extradition relationship;
 - a decision to discontinue proceedings; and
 - the final decision whether or not to surrender the individual.
- 4.53 We discuss the last of these decisions in Chapter 8. There is a difficult question as to whether that decision is rightfully a political one or whether it is more appropriately a question for a judicial officer. The other bullet points are discussed below.

Referral to the court to proceed with an extradition request

- 4.54 A request for extradition under the standard procedure must be transmitted to the Minister of Justice before action may be taken under the Act. It is the Minister that has the discretion to request that a District Court judge issue an arrest warrant for the person sought for extradition.¹⁴¹ This effectively gives the Minister discretion as to whether extradition proceedings should proceed at all. The Act does not specify any grounds or factors for the Minister to consider in making this decision. As we understand it, it would be extremely rare that the Minister would decline to refer a case to the District Court once a formal extradition request has been received. This is because, by this stage, the request will already have been vetted by Crown Law prior to its formal submission. To have proceeded this far, the request will have some merit.

¹⁴¹ Extradition Act 1999, ss 18–19. The exception to this is where an urgent extradition request is received and is referred directly to the District Court. A District Court judge may issue a provisional arrest warrant without the Minister making a decision on the request (s 20).

- 4.55 Without statutory criteria, it is unclear what type of check this step provides on an extradition, especially as the Minister will consider the case again when considering the grounds for refusing surrender, if the court decides that a person is eligible for extradition. Having this ministerial discretion creates the potential for the Minister's decision to be judicially reviewed, which can contribute to the delay in resolving an extradition case.
- 4.56 We consider that a better approach is to give the central authority the responsibility for vetting extradition requests and requesting the District Court to issue arrest warrants. This would remove the discretionary element of the decision and make it a straightforward application of a statutory test.¹⁴² There would still be potential for the decision to be judicially reviewed. However, our proposals in Chapter 9 for a clear statutory appeal process are designed to reduce the likelihood of judicial review.

Deciding whether to allow an ad hoc request

- 4.57 Where a requesting country has not been designated as either a standard or backed-warrant country but must have its request considered as an individual request under Part 5 of the Act, the Minister of Justice has the discretion to decide whether the request should be dealt with at all.¹⁴³ In our view, this should remain a ministerial decision because it involves the instigation of an ad hoc extradition relationship with a country that does not have a formal, permanent extradition relationship with New Zealand. In Chapter 6, we discuss proposals and options for how countries should be categorised under a new Act. Our preference is that there would no longer be a process for consideration of ad hoc requests because all countries would be automatically categorised. If, however, such a process were to be included in new legislation, we consider that the role should be carried out by the Minister of Justice.

Discontinuing proceedings

- 4.58 Under the standard procedure, the Minister of Justice can refuse to refer the case to the District Court for the issue of an arrest warrant.¹⁴⁴ The Minister may also order proceedings to be discontinued after a provisional warrant has been issued.¹⁴⁵ The Minister has no involvement, however, during the court's eligibility hearing procedures, including no ability to halt proceedings until after the decision on eligibility has been made.
- 4.59 We consider that these powers, along with more general powers to halt proceedings when necessary or appropriate, are better handled by the central authority as the agency responsible for the administrative and procedural aspects of the extradition process.

Who should make the non-court decisions?

- 4.60 The Minister of Justice is currently the decision maker for all non-court decisions under the Extradition Act, and we suggest that the Minister of Justice continues to be the appropriate Minister to make the non-court decisions.
- 4.61 It is desirable to separate the administrative and procedural roles under the Act (to be played by a central authority (being either the Attorney-General or the Solicitor-General under our proposals) from decisions of a diplomatic or political nature under the Act, such as the designation of countries into specific categories and the decision to surrender. These decisions need to be assessed independently, and accordingly, to protect against any perceived conflict of

¹⁴² See [9.19]–[9.21].

¹⁴³ Extradition Act 1999, s 60. The Act does specify factors for consideration for this decision, including the seriousness of the offence, the object of the Act, and any other matter the Minister considers relevant.

¹⁴⁴ Extradition Act 1999, s 19(3).

¹⁴⁵ Extradition Act 1999, s 21(3).

interest, it is important that the extradition request is passed to a separate group of advisers than those involved in earlier stages of advice or representation.

CABINET'S ROLE

Designation of countries

- 4.62 Particular parts of the Extradition Act may be applied to individual countries by the Governor-General by Order in Council on the recommendation of the Minister of Justice, in consultation with Cabinet.¹⁴⁶ Countries may also be declared to be “exempted countries” in this manner, which allows the requesting country to use the record of the case process under Part 3 of the Act.¹⁴⁷ Both of these are effectively designations determining under which category a country falls.¹⁴⁸
- 4.63 In Chapter 6, we propose a new approach to the way in which countries should be categorised under the new Act. It follows that there will continue to be a need for decisions regarding which countries fall into which categories. In our view, this remains rightfully a Cabinet function because it requires the Government’s decision on how it will interact with another country. Foreign relations and political factors will necessarily weigh into these decisions.

JUDICIAL ROLE

Determining eligibility

- 4.64 The court’s roles in the extradition process are to issue an arrest warrant, conduct the hearing to decide on eligibility for surrender, and issue a surrender order under the backed-warrant procedure if the case is not to be referred to the Minister. Through the eligibility hearing, the court has a role in assessing the evidence to see whether it is sufficient and admissible, as discussed in Chapter 9.
- 4.65 The eligibility hearing is merely a process to determine whether the person sought is eligible for surrender. Because the hearing is not itself a trial, it has been considered appropriate that the District Court hold this jurisdiction. The District Court offers accessibility and convenience. Having extradition proceedings begin in the District Court does create the opportunity for multiple layers of appeal, which can lengthen the time before a determination is made. We are not aware, however, of any compelling reasons why extradition proceedings should be shifted to the High Court.

QUESTIONS

- Q7 What is the correct relationship between the administrative decisions and political oversight of extradition?
- Q8 Should the District Court continue to have original jurisdiction for extradition proceedings?

¹⁴⁶ Extradition Act 1999, ss 16 and 40.

¹⁴⁷ Extradition Act 1999, s 17. The record of the case procedure is an aspect of the standard procedure for extradition, which may be used by countries that are “exempted” in this manner. It is discussed further in ch 7.

¹⁴⁸ The Extradition Act 1999 provides that Commonwealth countries, with the exception of Australia and any other designated country that is covered by pt 4, fall within pt 3 of the Act (s 13).

Chapter 5

Extradition offences

KEY PROPOSAL

Proposal: The new Act should define “extradition offence” as an offence punishable in the requesting country by a maximum penalty of not less than 12 months’ imprisonment. The Act should make it clear that the definition can be supplemented by a treaty.

Rationale: This would clarify the law, put it in line with modern international best practice, and alleviate one of the main difficulties in the interaction of treaties and the statute.

INTRODUCTION

- 5.1 Extradition does not apply to every offence. It is essential that extradition law includes a method of distinguishing which offences are sufficiently serious to warrant the time and expense involved in extradition and the disruption caused to the defendant. This chapter briefly outlines New Zealand’s approach to defining “extradition offence” and discusses issues that should be considered in the development of new extradition legislation.
- 5.2 The two main issues that are in need of resolution are:
- the interaction between the statutory definition of “extradition offence” and how this is defined in extradition treaties; and
 - how the “dual criminality” requirement can be defined in order to avoid uncertainty about what must be proved.

CURRENT LAW

Extradition Act 1999

Extradition offences

- 5.3 For the Extradition Act 1999 to apply, the request for extradition must relate to an “extradition offence”, as set out in section 4, unless an alternative formulation of extradition offence applies under an extradition treaty. An “extradition offence” under the Act requires:¹⁴⁹
- for a request from a foreign country:
 - an offence punishable in the requesting country by a maximum penalty of not less than 12 months’ imprisonment; and
 - that, if the conduct constituting the offence had occurred in New Zealand at the same time, it would also have constituted an offence punishable in New Zealand by a maximum penalty of imprisonment of not less than 12 months; or

149 Extradition Act 1999, s 4.

- for a request from New Zealand, an offence punishable in New Zealand by a maximum penalty of not less than 12 months' imprisonment.

5.4 This provision replaced the approach in the Extradition Act 1965 of listing specific offences.¹⁵⁰ The current approach provides increased flexibility and responsiveness as it does not require the Act to be updated in order for new offences to be covered.

Where there is a bilateral extradition treaty

- 5.5 The terms of a bilateral extradition treaty between New Zealand and a foreign country may alter the requirements of the section 4 definition of an extradition offence. As is common practice, the existing treaties contain definitions for “extradition offence” for the purpose of the treaty. Often this is in the form of a list of specific offences, but there may be other requirements about which offences are covered. Where a treaty does define “extradition offence”, the section 4 definition does not apply, as the Act must be construed to give effect to the treaty.¹⁵¹
- 5.6 This creates three difficulties. First, given the age of most of New Zealand's bilateral treaties, the list of offences may omit offences for which, in modern circumstances, extradition should be able to be sought or may include offences that are outdated. Second, the maximum penalty threshold in the Act will generally not apply. The exception is where the treaty was settled after the commencement of the Act.¹⁵² Third, dual criminality will not be required unless it is also explicitly included in the terms of the treaty.¹⁵³ However, whether particular conduct is an offence in both countries will often have been taken into account during the treaty negotiation and drafting process in which the list of offences was drawn up.

Offences under multilateral treaties

- 5.7 Some multilateral treaties to which New Zealand is a party require certain offences to be read into bilateral treaty obligations. Those offences are scattered across our statute book but are brought together in sections 101A and 101B of the Extradition Act.¹⁵⁴ The multilateral treaties address international crime and include offences relating to:
- organised crime;
 - human trafficking;
 - corruption;
 - defeating the course of justice;
 - money laundering;
 - forging and falsifying travel documents; and

150 Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) at [3.18] and [3.71]. The current New Zealand approach would be termed the “eliminative” method in the literature in contrast to the old “list” method.

151 Extradition Act 1999, s 11; and *Cullinane v Government of the United States of America* HC Hamilton A116/00, 10 September 2001 at [12].

152 Section 100 of the Extradition Act 1999 provides that the requirement that the offence must be punishable in New Zealand by a maximum penalty of imprisonment of not less than 12 months applies to any treaty settled after the commencement of the Act. The 12-month maximum penalty threshold was also included in New Zealand's treaty with Hong Kong, which was negotiated in 1998 in contemplation of the requirements in the 1999 Act.

153 The requirement that the conduct constituting the offence in the requesting country is also an offence in the requested country – a common feature of extradition legislation and treaties – is known as “dual criminality”.

154 Extradition Act 1999, s 101A. This includes certain offences under the Aviation Crimes Act 1972, Misuse of Drugs Act 1975, Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980, Crimes of Torture Act 1989, Maritime Crimes Act 1999, Crimes (Bribery of Foreign Public Officials) Amendment Act 2001, Terrorism Suppression Act 2002, Mercenary Activities (Prohibition) Act 2004, Films, Videos, and Publications Classification Act 1993, and Cultural Property (Protection in Armed Conflict) Act 2012.

- offences involving an organised criminal group and punishable by imprisonment of four years or more.

5.8 As the offences in sections 101A and 101B are offences under New Zealand law, the dual criminality requirement clearly applies to these offences already. Indeed, this is made explicit in relation to section 101B.¹⁵⁵ The offences are all sufficiently serious to have a maximum penalty of imprisonment in excess of 12 months. This means that these offences will all also qualify as extradition offences for countries that are not a party to the relevant multilateral treaty.

ISSUES

Offences under extradition treaties

- 5.9 The approach of covering offences that fall within a maximum penalty threshold works well for countries where there is no extradition treaty, as it is not necessary for the offence in question to appear on a predetermined list. However, where there is a bilateral treaty and the treaty defines “extradition offence”, the definition in the Act does not apply, as the Act must be construed to give effect to the treaty.
- 5.10 The fact that bilateral treaties trump the Act’s definition of “extradition offence” can lead to extensive litigation about whether an offence can be treated as an extradition offence in New Zealand. Sections 101A and 101B have improved the situation somewhat by expanding the scope of the bilateral treaties and so allowing New Zealand to better meet its extradition obligations under multilateral treaties. However, the interpretation problem still remains.
- 5.11 We make two proposals to alleviate the difficulty. First, the definition of “extradition offence” in the new Act should prevail over those in treaties. Given the outdated nature of the existing bilateral treaty offence lists, this approach should have the effect of expanding rather than contracting the range of offences for which a country can seek extradition.
- 5.12 In keeping with our approach of allowing for flexibility within the regime, we also propose that the Act should state that bilateral extradition treaties can supplement the Act’s definition. Where a bilateral treaty contains a list of offences, a particular extradition request from that country could relate either to an offence that falls within the definition in the Act or within the treaty. This approach effectively allows treaties to expand on the offences that are extradition offences under the New Zealand Act but not to limit them.

QUESTION

Q9 How do we best give certainty to the definition of “extradition offence” in the new Extradition Act as well as flexibility to best take into account the need to adjust the definition according to an extradition treaty?

¹⁵⁵ Extradition Act 1999, s 101B(3).

Dual criminality

- 5.13 Dual criminality is a mandatory requirement under the Extradition Act 1999. This currently means that, for all extraditions from New Zealand, except where an applicable treaty alters this principle, extradition will only occur where the conduct involved is criminalised in New Zealand.
- 5.14 The reason for the dual criminality requirement is said to be two-fold. First, it underlines the reciprocity in an extradition relationship between two countries. Second, it is considered undesirable for a country to assist in the enforcement of criminal law that is unknown in that country's domestic law.¹⁵⁶ However, the requirement of dual criminality can act as a fetter on extradition, as it limits New Zealand's ability to cooperate with other countries.
- 5.15 Throughout the modern history of extradition law, different approaches have been taken to dual criminality. The traditional, narrow approach is to require substantial correspondence between the offences in each country. The broader view is that it is not necessary that the crimes in each country are the same. Rather, the question is whether the criminal conduct in the requesting country, either in total or in part, amounts to criminal conduct in the requested country.¹⁵⁷ The broader view has been preferred in recent decades. This approach is reflected in the wording of section 5 of the Extradition Act, which provides:
- (1) A reference in this Act to **conduct constituting an offence** is a reference to the acts or omissions, or both, by virtue of which the offence has, or is alleged to have, been committed.
 - (2) In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand—
 - (a) the acts or omissions are categorised or named differently; or
 - (b) the constituent elements of the offence differ.
- 5.16 In referring to the “totality of the acts or omissions” and by clarifying that it does not matter whether, under the law of the requesting country and New Zealand, the acts or omissions are categorised or named differently or the constituent elements differ, the Act has attempted to remove the barriers that can be created by a narrow approach to dual criminality. This accords with the approach in the London Scheme, that it is the totality of the conduct and whether this would constitute an offence in both countries that is relevant,¹⁵⁸ and with the United Nations Model Treaty on Extradition, which clarifies that it is not necessary for the constituent elements of the offence to be identical.¹⁵⁹
- 5.17 Courts in Australia have also interpreted the dual criminality principle broadly.¹⁶⁰ They have found that the law does not require particular facts in the requesting country's statement of the offence to be directly matched to particular elements of offences in the law of the requested country.¹⁶¹ It has also been held that consideration of dual criminality requires some “translation” or “substitution” of factors, such as locality or geographic considerations, or

156 EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 59–60; IA Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 137–138; M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2007) at 494; and Anne Warner La Forest *La Forest's Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 52–53.

157 Aughterson, above n 156, at 61.

158 London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), cl 2.

159 Model Treaty on Extradition GA Res 45/116, A/Res/45/116 (1990), art 2(2)(b).

160 Gavan Griffith and Claire Harris “Recent Developments in the Law of Extradition” (2005) 6 MJIL 33 at 38–41, citing *Cabal v United Mexican States* [No 3] [2000] FCA 1204, (2000) 186 ALR 188; and *Dutton v O'Shane* [2003] FCAFC 195, (2003) 132 FCR 352.

161 *Cabal v United Mexican States* [No 3], above n 160, at [210]–[214].

- matters such as institutions, officials, and procedures, in order to relate the offences in two different countries.¹⁶² However, this approach has been criticised as having the potential for wider, uncertain, and objectionable operation. It has been suggested that it should not be appropriate to make “translations” of the relevant institutions where doing so would align an objectionable offence in the requesting country with one that is quite different, in substance, in the requested country.¹⁶³
- 5.18 There has been some movement internationally towards less reliance on the principle of dual criminality at all. The Framework Decision on the European Arrest Warrant has effectively removed the dual criminality requirement between European countries for those offences that are included in a broadly defined list of offences.¹⁶⁴ In the current international environment where there are increased efforts to combat transnational crime, it is seen as important to reduce barriers to cooperation and to ensure that each country’s criminal justice system can be as effective as possible.
- 5.19 Despite section 5 of the Act, there have been several New Zealand cases where a person has been found not to be eligible for extradition because the dual criminality requirement has not been satisfied.¹⁶⁵ The case of *Radhi v New Zealand Police* illustrates the difficulties with the current law. Radhi was charged in Australia with a people-smuggling offence relating to the transportation of illegal immigrants on a vessel that sank off the coast of Indonesia in 2001. After the District Court’s finding in 2012 that Radhi was eligible for surrender to Australia, the High Court, on appeal in 2013, found that the relevant New Zealand offence at the time of the offending required the arrival in New Zealand of the persons being smuggled. Despite the Extradition Act enjoining a “broad conduct approach”, the High Court found that, at the relevant time, the conduct attributed to Radhi did not constitute an offence in New Zealand and so the requisite dual criminality was not present.¹⁶⁶ The relevant Immigration Act 1987 offence was repealed and replaced with a broader offence in 2002.¹⁶⁷ The Court of Appeal has recently overturned the High Court’s decision on this point, finding that the relevant offence *can* be interpreted in a way that covers Radhi’s conduct, resulting in there being an equivalent New Zealand offence to the Australian offence for which extradition is requested.¹⁶⁸ Nevertheless, the different decisions in this case illustrate the difficulties that can occur in trying to meet the dual criminality requirement.
- 5.20 We think that the dual criminality limitation on extradition is justifiable, particularly on the basis that New Zealand should not extradite unless the conduct in question is criminal in this country. However, it appears that often the dual criminality requirement is breached on a relatively technical element of the offence, and there may be good reasons why a person subject to an extradition request should be held to account despite the alleged conduct not correlating with an offence in New Zealand. For example, some conduct is not an offence in New Zealand because of physical impossibility, such as where the offence requires crossing a land border.
- 5.21 It is our view that the principle of dual criminality should continue to apply under New Zealand extradition law and should be interpreted broadly. While section 5 of the Extradition Act is intended to allow dual criminality to be interpreted broadly, it seems that there may continue to

162 *Dutton v O’Shane*, above n 160, at [66].

163 Griffith and Harris, above n 160, at 41.

164 Council Framework Decision 2005/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, art 2(2).

165 For instance, *Radhi v Police* [2013] NZHC 163; and *United States of America v Wong* [2001] 2 NZLR 472 (HC).

166 *Radhi v Police*, above n 165, at [47]–[49].

167 Immigration Amendment Act 2002, which repealed s 142(fa) of the Immigration Act 1987 and replaced it with s 142(eb) and (ec).

168 *Police v Radhi* [2014] NZCA 327, [2014] NZAR 1019 at [28]–[35].

be cases were the dual criminality requirements, arguably unnecessarily, limit extradition. We are interested in views as to whether reform is needed to the definition of dual criminality to allow an even broader interpretation of this element of an extradition offence.

- 5.22 An alternative reform would be to shift dual criminality from being an element of the “extradition offence” test to a ground for refusing surrender. This would mean that the courts would be able to consider whether lack of dual criminality should prevent an extradition in the particular circumstances of the case. For instance, this discretion might be exercised where there are concerns about the nature of the offence for which extradition is requested. This approach would provide greater flexibility. However, it would require that an extradition request proceed through most of the process before dual criminality would be considered. It would also be out of line with the way that dual criminality is addressed in other jurisdictions. For these reasons, we prefer the option of exploring more expansive wording of the dual criminality element.

QUESTION

Q10 Is there a need for more expansive wording on dual criminality in the new Extradition Act? How could this be achieved?

Is the 12-month maximum penalty threshold appropriate?

- 5.23 There is an issue with whether the 12-month maximum penalty threshold continues to be appropriate. It is arguable that this level is too low. There are some less serious offences that would probably not justify extradition that have a maximum penalty of 12 months’ imprisonment or more, for example:
- unlawful assembly;¹⁶⁹
 - criminal nuisance;¹⁷⁰
 - common assault;¹⁷¹
 - possessing an intimate visual recording;¹⁷² and
 - theft of property of between \$500 and \$1,000 value.¹⁷³
- 5.24 Notwithstanding this, our preliminary view is that the 12-month maximum penalty threshold should be retained. It is difficult to see that the inclusion of offences that are of a relatively low level of seriousness would be a problem in practice. An extradition request creates expense for both the requesting country and the requested country. It makes sense to ensure that there is a reasonable threshold of seriousness, although not one that limits extradition too greatly, and given the cost, it is unlikely that a foreign country will go to the trouble of requesting extradition in relation to a minor offence. It is possible, of course, that extradition may be requested in relation to an offence that seems much more serious in the requesting country than it does in New Zealand, for instance, because of differing cultural or religious values. In such cases, our proposed ground for refusing surrender on the basis of injustice or oppression would likely provide a way for New Zealand to refuse the surrender.¹⁷⁴

¹⁶⁹ Crimes Act 1961, s 86.

¹⁷⁰ Crimes Act 1961, s 145.

¹⁷¹ Crimes Act 1961, s 196.

¹⁷² Crimes Act 1961, s 216I.

¹⁷³ Crimes Act 1961, s 223.

¹⁷⁴ See ch 8 for our proposed expanded ground for refusing extradition on the basis of injustice and oppression, which would incorporate the current triviality ground: see Extradition Act 1999, s 8.

- 5.25 An alternative would be to rely on the comparatively new offence categories in the Criminal Procedure Act 2011. That Act introduced four offence categories based on the severity of the maximum penalty. It would be possible to redraft the penalty threshold in the Extradition Act so that it relies on the Criminal Procedure Act categories, delineating extradition offences in a way that uses a two-year maximum penalty threshold. For instance, the Extradition Act could require that an offence ought to align to category 3 or 4 offences in New Zealand (covering offences punishable by imprisonment for two years or more or as listed in Schedule 1 of the Criminal Procedure Act) in order for extradition to occur.¹⁷⁵ This would align the extradition offence categories with domestic offence categories.
- 5.26 We acknowledge, however, that whatever approach is taken, there is an unavoidable arbitrariness to the setting of maximum penalties for extradition offences. Various penalties for domestic offences have been subject to change over the years. Consequently, there is likely little to be gained by aligning the extradition threshold with domestic offence thresholds. Relying on the Criminal Procedure Act categories may also introduce an undesirable level of complexity, particularly for foreign governments needing to work out whether extradition is available under New Zealand law.
- 5.27 The 12-month maximum penalty threshold is consistent with the approach in Australia and the United Kingdom¹⁷⁶ and is within the options provided for in the United Nations Model Treaty,¹⁷⁷ although Canada¹⁷⁸ and the London Scheme¹⁷⁹ use the higher threshold of 24 months' maximum imprisonment.

Decreasing the threshold where a person has already been sentenced

- 5.28 Some countries take a different approach in relation to extradition requests for a person has already been convicted and sentenced for offending. In the United Kingdom and other countries in Europe, based on the European Convention on Extradition,¹⁸⁰ such a person can be extradited even where the offence concerned has a maximum penalty of less than one year, provided that the individual has received an actual sentence of four or six months' imprisonment. This is justified on the basis that the person's guilt and the seriousness of the offence have already been established by a court. The approach means that those countries can provide greater cooperation to their neighbours in extraditing known criminals. There are significantly fewer cases of extradition where the person sought has already been tried, convicted, and sentenced than where the person has not yet been tried. This means that it would be only seldom that this rule was relevant. However, a reduction to the penalty threshold where the person sought has already been convicted and sentenced may allow some increase in the number of requests.

QUESTION

Q11 What is the correct extradition threshold when someone is accused? What is the correct threshold when someone is convicted?

¹⁷⁵ Criminal Procedure Act 2011, s 6.

¹⁷⁶ Extradition Act 2003 (UK), s 64.

¹⁷⁷ Model Treaty on Extradition, above n 159, art 2(1).

¹⁷⁸ Extradition Act SC 1999 c 18, s 3.

¹⁷⁹ London Scheme for Extradition within the Commonwealth, above n 158, cl 2(2).

¹⁸⁰ European Convention on Extradition ETS 24 (opened for signature 13 December 1957, entered into force 18 April 1960). Ratification was given effect to by the European Convention on Extradition Order 1990 (UK).

Should some countries be treated differently?

- 5.29 The case can be made that the extradition offence requirements, including either or both of the 12-month maximum penalty threshold and the dual criminality test, should not be required in relation to requests from some countries.
- 5.30 The argument in favour of this is that, where New Zealand has a close, trusting relationship with the requesting country because its legal system and legal values are similar, whether the request meets the technicalities of the extradition offence definition should not matter. Removing the requirements would mean that extradition requests would not require as much supporting information and could proceed more quickly. It would mean the extradition offence issues would not need to be considered by the court, which would simplify these court proceedings.
- 5.31 The converse argument is that the extradition offence requirements form an important check on how far New Zealand is willing to go in extradition. It is arguable that the questions of the seriousness of the offence and whether it is considered criminal in New Zealand are just as important whether the request comes from a close partner or any other country. The extradition offence test reflects important values that are key to New Zealand's approach to extradition relating to the seriousness of a crime and its recognition under New Zealand law.
- 5.32 The case for the removal of these requirements may be strongest in relation to Australia. Under Australia's Extradition Act, the "extradition offence" requirements do not apply in relation to extradition requests from New Zealand. The Australian courts will endorse a New Zealand arrest warrant without investigating whether the offence meets the maximum penalty threshold or dual criminality.¹⁸¹ This approach would further simplify the requirements for extradition from New Zealand to Australia. It would allow New Zealand's legislation to reciprocate Australia's and may enhance cooperation between the two countries.

QUESTION

Q12 Should the "extradition offence" requirements (or the maximum penalty threshold or dual criminality requirements) differ for some countries?

¹⁸¹ Extradition Act 1988 (Cth), pt 3.

Chapter 6

Categorisation of countries

KEY PROPOSAL

Proposal: The new Act should establish two categories of countries. Category 1 should contain a relatively small group of New Zealand's closest extradition partners based on set criteria. Category 2 should include all other countries.

Rationale: A simple and clear means of categorising countries will enable more straightforward cooperation with foreign countries. Categorisation reflects a distinction in the treatment of different countries in terms of the extent to which evidence must be presented to support an extradition request.

INTRODUCTION

- 6.1 The way that different countries are categorised, and the consequences of this categorisation, is a significant aspect of the Extradition Act 1999. It identifies the pathway that a country's extradition request to New Zealand will need to follow and is a necessary element of New Zealand's extradition scheme. This chapter explores how the categories should be rationalised to improve the structure and operation of the Act.
- 6.2 The chapter first looks at the categories and method of categorisation in the current Act. We then explain why we think categorisation will continue to be an important tool under the Extradition Act and present options and proposals relating to the number and nature of the categories, the categorisation process itself, and the criteria for categorisation.
- 6.3 Reform of the number and nature of categories in the Act is desirable because of unsatisfactory complexity in the current system. We propose a simplified two-category structure:
 - **Category 1** would be a relatively narrow category that would encompass countries with which New Zealand has a close degree of cooperation on extradition requests. Requests within this category would be processed through a streamlined backed-warrant procedure.¹⁸²
 - **Category 2** would cover all other countries. Requests within this category would follow a revised standard process that would be designed to reduce the current difficulties under the existing standard process.¹⁸³
- 6.4 We consider that further distinctions add unnecessary complexity, both in terms of understanding and administration. We recognise, however, that there may be some concern over the breadth of Category 2, particularly given the variation in the constituent countries' legal and justice systems. We have therefore suggested options for introducing further distinctions within the categories. We have also acknowledged that other safeguards in the

¹⁸² Discussed in ch 2.

¹⁸³ Discussed in ch 2.

new Act, on which requests could be turned away or refused, could be relied on to prevent extraditions on a case-by-case basis to countries over which there are real concerns.

CURRENT CATEGORISATION

- 6.5 The present system of categorisation in the Extradition Act involves complexity both in the number and type of categories and the way that countries are categorised. It has not proved effective as a means of creating clear pathways for different types of countries to engage with New Zealand on extradition.

Existing categories

- 6.6 The Extradition Act has two main categories of countries. In addition, there are two subcategories of countries, which add to or alter elements of the decision making process. Countries must fall within one of these categories in order for their extradition request to be able to be considered in New Zealand. The current categories can be summarised as follows:
- **Countries covered by Part 4 of the Act (Part 4 Country):** Part 4 of the Act relates to Australia and any country designated under section 40. The sole designated country is the United Kingdom. The simpler backed-warrant procedure applies to these countries. Among other features, under that process, requesting countries are not required to provide evidence relating to the offending with their extradition requests.
 - **Countries covered by Part 3 of the Act (Part 3 Country):** Part 3 relates to other Commonwealth countries, countries with which New Zealand has an extradition treaty, and any other country specifically designated to be in this category under Part 5 (no countries have been designated for this purpose). The standard process applies to these countries.
- 6.7 Within a Part 3 Country there are two further subcategories:
- **Countries covered by Part 5 of the Act (Part 5 Country):** Part 5 provides for a special process by which countries can be designated as falling within Part 3 for the purpose of a specific extradition request.
 - **Exempted countries:** Section 17 of the Act provides that Part 3 countries can be exempted from the aspects of the standard procedure. Rather than having to provide full evidence with their extradition request, they can produce a record of the case, which summarises the evidence of the offending. The exempted countries are Canada, the Czech Republic, Tonga, and the United States.

How countries are categorised

- 6.8 The current categorisation system requires ministerial and Cabinet decisions to include countries under each category. Criteria under the Act guide those decisions.
- 6.9 To summarise, the following range of criteria are contained in the Act:
- The similarities between the processes of arrest and trial in the foreign country and New Zealand.
 - The foreign country's ability and willingness to extradite to New Zealand and the process that applies in that country to an extradition request from New Zealand (reciprocity).
 - The rules in the foreign country protecting a person from prosecution for crimes other than those to which the extradition relates (speciality) and from extradition to a third country.

- Giving effect to the commitment to extradite to foreign countries (even those with which New Zealand does not have an extradition treaty).
- 6.10 Designation as a Part 4 Country is made by the Governor-General by Order in Council on the recommendation of the Minister of Justice. The Minister must be satisfied as to the circumstances in which a person may be arrested in the other country and similarities to the process in New Zealand, the other country's ability to extradite to New Zealand (reciprocity), the other country's speciality rules,¹⁸⁴ and the other country's rules about surrendering a person to a third country.¹⁸⁵
- 6.11 Designation as a Part 3 Country or one of its subcategories can take place in one of the following ways:
- Any Commonwealth country other than a Commonwealth country to which Part 4 applies.¹⁸⁶
 - Where a country has an extradition treaty with New Zealand, the country is brought under the Act following designation by the Governor-General by Order in Council.¹⁸⁷
 - Where a country is not a Commonwealth country and does not have an extradition treaty with New Zealand, the country is brought under the Act following designation by the Governor-General by Order in Council, on advice from the Minister of Justice. The only criterion of which the Minister is required to be satisfied is reciprocity.¹⁸⁸
 - Countries are brought into the Part 5 subcategory by the Minister who must consider any undertakings made by the country that it will extradite to New Zealand (reciprocity), the seriousness of the offence in question, the object of the Act, and any other matters the Minister considers relevant.¹⁸⁹
 - Countries are brought into the exempted countries subcategory by the Governor-General by Order in Council, on the recommendation of the Minister of Justice. The Minister must consider whether the country has a similar process to the record of the case procedure that would apply to an extradition request from New Zealand to that country (reciprocity).¹⁹⁰

THE IMPORTANCE OF CATEGORISATION

- 6.12 The main reason for categorisation is to allow for different processes and standards to apply to different countries. The alternative would be to treat extradition requests from all countries in the same manner. New Zealand could do this in one of two ways, but we find neither to be suitable. First, it could follow the Australian approach, which, by default, requires no court investigation into the evidence of the case against the person sought. Alternatively, it could maximise protection for the individual by providing a relatively formal, full process for all extradition requests, no matter where they come from.

184 See above at [2.12].

185 Extradition Act 1999, s 40.

186 Extradition Act 1999, s 13(a).

187 Extradition Act 1999, s 15.

188 Extradition Act 1999, s 16.

189 Extradition Act 1999, s 60.

190 Extradition Act 1999, s 17.

- 6.13 Instead, we propose that categorisation of countries is retained in the new Extradition Act and that the Act should provide for how those categories should be treated differently. In the following chapters, we discuss the aspects of the extradition process that may differ on the basis of a country's categorisation. These relate to:
- the extent to which the court should inquire into the case against the person sought for extradition;
 - if it does inquire into the case, to what standard the court needs to be convinced;
 - on what evidence the court should rely; and
 - the grounds for refusal.
- 6.14 Categorisation of the country could also influence:
- which organisation receives the extradition request – extradition requests from Category 1 countries could be received directly by the Police, rather than through the central authority, as is the case currently with Part 4 Countries; and
 - which offences are extradition offences – Category 1 countries could be exempted from either the maximum penalty threshold or the dual criminality test aspects of the “extradition offence” definition or from both.

HOW SHOULD THE ACT APPROACH CATEGORISATION?

- 6.15 The current Extradition Act categories are overly complex. While there are a few statutory criteria, it is largely unclear on what basis a designation to a particular category or subcategory should be made. We consider that the categorisation of countries under a new Extradition Act should reflect the following principles:
- The Act should be simple and easily understood, with only as many categories as are required.
 - New Zealand's different relationships with different countries should be reflected.
 - There should be no unnecessary delay in the resolution of extradition requests.
 - There should be clear criteria.
 - The Act should cover all countries.
 - Treaties should not automatically determine how countries should be categorised.

Two categories

- 6.16 The new Act should provide for two categories. Category 1 would be for countries with which New Zealand has a particularly close relationship. Category 2 would apply to all other countries. This would enable a relatively simple structure in the new Extradition Act and would be easily understood by foreign countries wishing to make extradition requests.
- 6.17 The key distinction between the two categories would rest on how much evidence relating to the person's offending is required from the requesting country. It is important to be able to excuse some countries from the requirement to provide this type of information as their close ties with New Zealand, procedural similarities, and justice systems warrant leaving this inquiry totally for the trial in the requesting country.

- 6.18 There might be concern that the two-category proposal does not allow for enough gradations in the type of extradition relationship that New Zealand has with different countries. For instance, the proposed structure could be seen as not taking into account countries that may have considerably different legal systems, but nevertheless we are comfortable placing special reliance on their processes in their justice systems. Arguably, these countries should not be treated in the same way as all other countries.
- 6.19 In formulating the proposals in this paper as a package, however, we have aimed to improve the efficiency and effectiveness of all aspects of the extradition process. This means that both Category 1 countries and Category 2 countries would have access to more efficient and effective processes under the new legislation. In particular, we propose that all Category 2 countries should be able to use a procedure (the record of the case procedure) that would remove technical difficulties that many countries have in producing evidence for the New Zealand hearing. This mechanism would allow enhanced cooperation with all countries, as compared with the process that applies currently. Importantly, this would reduce the barriers for civil law countries making an extradition request. While a court inquiry into the case against the person would remain for countries in Category 2, a country that has robust legal and justice systems would not face difficulties in having their request determined by the court and satisfying the court regarding the grounds for refusing surrender.¹⁹¹
- 6.20 A further possible concern about our proposed structure is that, by including in Category 2 all countries that are not in Category 1, the categorisation process is not providing an adequate check on the countries to which New Zealand wants to extradite. Government decisions regarding categorisation provide a screening process regarding which countries are placed into each category. There is benefit to identifying those countries that can have their extradition requests dealt with under a streamlined process with minimal need for the New Zealand decision makers to check on the request (Category 1), but we do not see that applying different treatment to the remaining countries through categorisation is an effective or efficient way of fulfilling New Zealand's extradition obligations. Instead, this paper proposes creating a robust extradition scheme, with appropriate checks and balances that would allow inappropriate extradition requests to be rejected without complex categorisation. Furthermore, the central authority for extradition would be tasked with vetting extradition requests prior to the court considering them.

Option of further gradations to the categories

- 6.21 It would be possible to create further distinctions between countries in both Category 1 and Category 2. For Category 1, one option is to treat Australia even more favourably. For Category 2, further distinctions between countries could be made through the categorisation process, which could dictate other procedural requirements.

Making Australia a special case

- 6.22 Australia could be placed in a special category of its own. This could be done if it was decided that requests from Australia should have even more relaxed rules than other countries in Category 1. In this issues paper, we have raised the options of requests from Australia not having to meet the “extradition offence” test¹⁹² and the speciality test¹⁹³ and being subject to fewer or no grounds for refusing surrender.¹⁹⁴

¹⁹¹ We discuss this further in chs 7 and 8.

¹⁹² Extradition offences are discussed in ch 5.

¹⁹³ See at [11.14]–[11.17].

¹⁹⁴ Grounds for refusing surrender are discussed in ch 8.

- 6.23 The special category for Australia could be justified by the close ties between New Zealand and Australia. Australia is the country that New Zealand extradites to and from most frequently due to the significant movement of people between the two countries and geographical proximity. New Zealand holds a high degree of trust in Australia's legal system. The option would not be a major shift from the special position given to Australia in the current Act, whereby Australia is automatically included as a Part 4 country, while other countries have to be specifically designated following consideration. In Australia's extradition legislation, New Zealand is singled out as being in a special category.¹⁹⁵
- 6.24 However, there could be a concern about creating a special category for Australia. It could immediately raise a question for other countries that have not been given this treatment as to why they are not in the same position, including countries with which New Zealand has strong historical ties, such as the United Kingdom. This may lead to difficulties in the diplomatic relationship between New Zealand and some other countries. In addition, by codifying a special status for Australia in the Act, New Zealand would not be allowing for changes to the legal regime in Australia. Further, the additional category would add another layer of complication to the proposed structure of the new Act.

Splitting up Category 2

- 6.25 It would be possible for some countries to have automatic entry into Category 2, while others would require some consideration before they could be accepted into that category. This distinction would be created through the categorisation process, which is discussed below.
- 6.26 Another possibility is to only make the record of the case procedure available for some Category 2 countries and not for other countries. These other countries would still need to present actual evidence of the case against the person sought for the court inquiry in New Zealand. This option is discussed in Chapter 7.

Categorisation process

Category 1

- 6.27 The following options should be considered:
- *Option (a)*: The Government decides which countries are in Category 1 based on criteria and at a point in time prior to the new Act's entry into force.
 - *Option (b)*: Countries are placed in the category by the Government after the enactment of the legislation following an application by a country.
- 6.28 Option (a) is the simpler and more straightforward of the two options. It allows the Government to make a thorough assessment of all countries it might wish to include in Category 1. This would include, for example, Australia and the United Kingdom.
- 6.29 Option (b) would rely on requesting countries themselves making an application to be included. It would also mean that the Act could be brought into force without the Government having to first work through the decision-making process to formulate the list. The major drawback with option (b) is that few countries may apply for categorisation. This problem is illustrated by New Zealand's experience following the introduction of the 1999 Act, which was premised on the understanding that countries would apply for different designations and exemptions. Very few countries have made these applications.

¹⁹⁵ Extradition Act 1988 (Cth), pt 3.

- 6.30 The options are not exclusive, and regardless of whether one or both options are chosen, the Act would need to contain a procedure to allow changes to the categorisation of countries after the Act is in force.

Category 2

- 6.31 The following options should be considered:
- *Option (a)*: All countries not in Category 1 are in Category 2.
 - *Option (b)*: Countries that have an extradition treaty with New Zealand and are not in Category 1 are in Category 2. Other countries must make an application to be in Category 2, and the New Zealand Government must make a decision on the application based on criteria for inclusion in Category 2.
 - *Option (c)*: Countries that have an extradition treaty with New Zealand and are not in Category 1 are in Category 2. Other countries make ad hoc requests for extraditions, and the New Zealand Government decides at the time of each request based on criteria for inclusion in Category 2.
- 6.32 Option (a) is a straightforward rule that has the advantages of clarity, simplicity, and comprehensiveness. It does not require criteria for inclusion in Category 2 to be developed. It does not involve a ministerial decision, which could then be reviewed and could delay the resolution of an extradition request. Treating all countries that are not in Category 1 the same reduces the capacity for concern or offence from those countries. It provides an equality of process for all countries not in Category 1.
- 6.33 This option would mean that the Act would make it possible to extradite to any country. There would be no preliminary vetting or assessment process before a country becomes eligible to use the record of the case procedure. However, other safeguards in the new Act on which requests could be turned away or refused – such as the definition of extradition offence, the grounds for refusing requests, and a strengthened central authority – could be relied on to prevent extraditions on a case-by-case basis to countries over which there are real concerns.
- 6.34 Option (b) would allow for a controlled list, as it would enable a screening process over the palatability of extraditing to a country before a particular request is made. This would occur either through the treaty negotiation process or through the determination of an application. The option would require the development of criteria. The major problem with this option, as with option (b) under Category 1, is that it requires countries to take the active step of applying to be included in Category 2. It is unclear how many countries would be sufficiently motivated to make an application, given that New Zealand does not have a steady number of extradition requests from many countries and is a relatively small player internationally.
- 6.35 Option (c) has the advantage of tying the consideration of the categorisation to a particular extradition request, which means that countries will have the necessary motivation to engage with New Zealand on these issues. However, this option would add another potentially long and complex stage to extradition requests. It would create a judicially reviewable decision that could significantly delay the resolution of the extradition request.
- 6.36 A major problem with either option (b) or option (c) is that it is difficult to set down what the criteria should be for deciding what countries can come within Category 2. Most likely, this distinction would depend on diplomatic matters that ought not to be reviewable and, therefore, should not be set down in statute. Our preference for the categorisation of Category 2 countries is option (a).

Criteria

- 6.37 There should be statutory criteria that set out the factors that should be considered in deciding how to categorise a country under the new Act. Having clear and comprehensive statutory criteria will make categorisation more transparent and improve the consistency and robustness of decision making.
- 6.38 Under our preferred options, these would apply only to the categorisation of Category 1 countries. Under Category 2, if option (b) or option (c) above are selected, the statutory criteria would also need to be used for categorisation of Category 2 countries. The same criteria would likely be relevant to both decisions. The Minister's role would be to consider whether, on balance, the country met the criteria to a sufficient standard, thus warranting that country's inclusion in a category.
- 6.39 The criteria that currently appear in various sections of the Extradition Act relating to the decisions to designate or exempt countries are neither comprehensive nor exhaustive.¹⁹⁶ Several significant issues that must weigh into a categorisation decision do not appear in the criteria. These include whole aspects of the extradition relationship with a country, such as frequency of extraditions, trustworthiness, and historical ties.
- 6.40 Our view is that the criteria for categorisation should be broad and allow for consideration of a variety of relevant factors. We discuss, below, the nature and importance of a number of factors, all of which we consider should be included in a statutory list of criteria.

Reciprocity

- 6.41 There has been some shift away from the traditional centrality of reciprocity in extradition relationships in recent decades. The growth in international crime and the multilateral efforts to combat it have led to an increased focus on international cooperation for the purpose of law enforcement. We believe, however, that reciprocity still has a place in categorisation decisions. How another country would treat an extradition request from New Zealand is relevant not to whether or not New Zealand should consider extradition at all but to the category in which the country should be placed. Reciprocity is a useful measure of a country's willingness to cooperate and its commitment to good relations with New Zealand, which will assist with the smooth resolution of extradition requests, and indicates whether a streamlined process is appropriate.

International cooperation

- 6.42 A key factor in any decision about categorisation is, and should continue to be, New Zealand's commitment to international cooperation or comity in extradition and the combatting of crime. New Zealand should err on the side of encouraging extradition rather than unnecessarily making things difficult for other countries. This factor will always need to be balanced against other factors that may mitigate against simplifying the process for a particular country too much.

Frequency of extraditions

- 6.43 There would be little point in placing a country in Category 1 if that country is very unlikely to make an extradition request of New Zealand. Conversely, where there is a high volume of extradition requests between New Zealand and another country, as is the case with Australia, there is a high degree of familiarity and trust with the systems and processes that apply in either country. Often, the frequency of extraditions is related to the geographical proximity of

¹⁹⁶ See [6.10] for the criteria contained in the Act.

a country to New Zealand because this will influence the movement of people between the countries and the potential for an extradition request.

Perceived reliability of justice system

- 6.44 The perceived reliability of a country's justice system should be considered in deciding the categorisation of the country, because it impacts significantly on the liberty interests of a person who is the subject of an extradition request. New Zealand would want to be assured that a country that is designated for a streamlined procedure can be trusted in the criminal rules, systems, and processes that are in place in that country. This would include looking at whether a country has rules preventing an extradited person from prosecution for crimes other than those to which the extradition relates, and from extradition to a third country, as well as whether the wider criminal investigation and prosecution systems include adequate checks and balances.

International human rights reputation

- 6.45 A related factor is a country's human rights record and reputation. These should be of a high standard in order for a country to be categorised in a way that would lead to a simplified process that did not include some of the protections provided by New Zealand courts in extradition proceedings. The right to justice, right not to be deprived of life, and right to freedom from torture are particularly important. The types of indicators that might be used to measure this factor include a country's record in international country reports and before international tribunals and the country's accountability to a multinational court that has jurisdiction over human rights matters.

International agreements and schemes

- 6.46 Where a country has formalised its extradition relationship with New Zealand through a bilateral or multilateral treaty or in its participation in an international scheme, it may suggest that it is appropriate to categorise the country in a way that allows it to use a simplified process for extradition. This is because, in doing this, a country has made a commitment shared by New Zealand to adopt certain approaches and practices to extradition. For instance, membership of the Commonwealth's London Scheme,¹⁹⁷ which includes specific commitments about how extradition will operate, could be a factor that indicates it is appropriate for a country to be in Category 1.

QUESTION

Q13 How should the new Extradition Act distinguish between different countries, and for what purposes and why? Is there a special case for any country, for example, Australia?

¹⁹⁷ London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966.

Chapter 7

Inquiry into the case against the person sought

KEY PROPOSALS

Proposals: There should be no inquiry into the evidence of the offending by persons sought for extradition from Category 1 countries. Such an inquiry should be retained for countries in Category 2. However, the evidential requirements for Category 2 countries should be reduced by allowing evidence to be presented in summarised form.

Rationale: In respect of countries that have been deemed Category 1 countries, it is not necessary for a New Zealand court to inquire into the evidence of the offending before determining eligibility to extradite. In contrast, New Zealand courts should inquire into the evidence against persons sought in Category 2 requests. To improve efficiency and the ability to cooperate with foreign countries, these countries should be able to use the record of the case procedure in which evidence is summarised, rather than provided for, by way of sworn witness statements.

INTRODUCTION

- 7.1 What ought a requesting country have to show about the alleged offence and conduct of the person sought for extradition, and against what standard ought it be judged? This chapter compares the current approach taken in New Zealand to that taken by other countries. We discuss several significant issues that underlie future approaches that New Zealand could choose to take.
- 7.2 We propose the following:
 - There should be no judicial inquiry into the case against the person sought for extradition by Category 1 countries (as it is now for countries under the backed-warrant procedure).
 - There should be a judicial inquiry into the case against the person sought for extradition for requests from Category 2 countries. However, those countries should have to provide the court with a more limited and tailored account of evidence for the purpose of its inquiry. This is akin to the record of the case procedure, which currently applies to countries under Part 5 of the Extradition Act 1999.
- 7.3 The proposed reforms in this chapter are aimed at tailoring the appropriate level of scrutiny of the case against the person to the true nature of extradition proceedings and the relationship between New Zealand and requesting countries. The reduction in requirements proposed in this chapter must be balanced against other proposals in this part of this issues paper, which are designed to add robustness to the scrutiny of extradition requests in the standard procedure: the central authority's vetting of the quality of requests;¹⁹⁸ the court's consideration of broader

¹⁹⁸ Discussed in ch 4.

grounds for refusing surrender, which allow human rights and justice system issues to be examined;¹⁹⁹ and the court's ability to request further information from a requesting country regarding the case against the person, if this is needed.²⁰⁰

Admissibility and standard of evidence required

- 7.4 The Canadian Supreme Court usefully described the distinction between the admissibility of evidence and the standard or sufficiency of evidence in *United States of America v Ferras*.²⁰¹ The admissibility provisions were described by the Court as being “aimed at establishing threshold reliability”, while the standard of evidence determines whether the legal requirements for extradition are satisfied. Extradition legislation or treaties may allow summarised evidence or hearsay evidence and evidence that is not authenticated in the way normally required in domestic cases.²⁰²

Admissible evidence required

- 7.5 Common law countries have traditionally conducted a court inquiry into the case against the person sought for extradition. In contrast, the typical approach in continental Europe, and in many civil law jurisdictions, has been not to conduct an inquiry into the alleged offending but to require only proof of identity and conformity of the request to the treaty and statutory requirements.
- 7.6 Under the “no evidential inquiry” approach, the consideration of the court in the requested country is limited to assessment of the warrant, a summary of the alleged conduct, and the legal provisions relating to the requirements for an extradition offence.²⁰³ Such an approach is not completely unheard of in our legal tradition. A similar no evidential inquiry approach applied under the Fugitive Offenders Act 1881 (Imp) among British dominions that, by reason of their “contiguity or otherwise”, made such a scheme “expedient”.²⁰⁴ Several Commonwealth countries have retained such an approach for extradition between countries that are particularly close.²⁰⁵

Standard required

- 7.7 Where a court inquiry is required, generally a “prima facie” standard applies. This requires that the evidence is such that a reasonably minded jury might convict on the evidence if not contradicted at trial.²⁰⁶ The court in the requested country must be satisfied that a case against the alleged fugitive criminal is made out to a sufficient standard as to allow the case to go to trial under the domestic criminal law of the requested country, had the case arisen there.²⁰⁷ The

199 Discussed in ch 8.

200 Discussed in ch 9.

201 *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77 at [17]. See discussion of the New Zealand Court of Appeal in *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139.

202 These approaches are discussed in more detail in at [9.39]–[9.53].

203 Kimberly Proust “International Co-operation: A Commonwealth Perspective” (2003) 16 SACJ 295.

204 Fugitive Offenders Act 1881 (UK) 44 & 45 Vict c 69, pt II; Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) at [3.37].

205 The Extradition Act 1999 applies the backed-warrant procedure in pt 4.

206 See *Re Schtraks* [1962] 2 All ER 176 at 155. The prima facie case standard appeared in the first extradition treaty between the United States and Great Britain in 1794: Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and The United States of America 1 BFSP 784 (opened for signature 19 November 1794, entered into force 28 October 1795), art 27. From that time, until the late 20th century, every treaty of either the United States or Great Britain included the standard. The prima facie standard was also a part of the Fugitive Offenders Act 1881 (UK), which applied to British dominions (and later to countries of the British Commonwealth), although a lower standard of evidence applied to countries that were “contiguous possessions” of each other: see IA Shearer *Extradition in International Law* (Manchester University Press, Manchester, 1971) at 152–153; and Fugitive Offenders Act 1881 (UK) 44 & 45 Vict c 69, s 5, 12, and 14. By Order in Council 23 August 1883, Australia, New Zealand, and a number of Pacific Islands were declared to be contiguous for the purpose of this Act.

207 Shearer, above n 206, at 150; and Proust, above n 203.

prima facie case approach was used by the United Kingdom and is still used by much of the Commonwealth.

- 7.8 The process used for extradition hearings in countries that use the prima facie standard has essentially been the same as that used in a proceeding leading to committal of a person for trial for a domestic criminal offence. This approach usually requires the requesting country to produce a significant amount of evidence and makes the court's consideration a longer process than occurs in countries where a lower test applies.
- 7.9 Some countries have reduced the difficulty for a country requesting extradition by altering the way in which evidence might be presented. Rules about the admissibility of evidence can be altered from those that are normally required in domestic criminal matters.

CURRENT NEW ZEALAND APPROACHES

- 7.10 New Zealand takes different approaches depending on which category a country falls into under the Act.

Standard procedure

- 7.11 For countries that are subject to the standard procedure under Part 3 of the Act, the approach taken is the traditional common law approach of requiring a court inquiry into the case against the person. The court must be satisfied that:²⁰⁸

... the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—

- (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
- (ii) in the case of a person alleged to have been convicted of an extradition offence, prove that the person was so convicted.

Countries that can use the record of the case

- 7.12 Four countries fall under Part 3 of the Act but are "exempted countries" under sections 17 and 25.²⁰⁹ Those countries are subject to a court inquiry into the case against the person, but they present a *summary* of the evidence against the person, referred to as the record of the case. The record of the case is accompanied by specific assurances from the requesting country about the underlying evidence. These assurances give the summary a presumption of reliability.
- 7.13 The record of the case must be prepared by an investigating authority or prosecutor in the requesting country and "must contain a summary of the evidence acquired to support the request for the surrender of the person and other relevant documents, including photographs and copies of documents".²¹⁰ It can be admitted if it is accompanied by assurances to the effect that:
- the summarised evidence has been preserved for use in the person's trial; and
 - the evidence is sufficient under the law of the requesting country to justify prosecution in that country.

208 Extradition Act 1999, s 24(2)(d).

209 Canada, the Czech Republic, Tonga, and the United States. See Extradition (Exempted Country: Canada) Order 1999; Extradition (Exempted Country: Czech Republic) Order 2003; Extradition (Exempted Country: Tonga) Order 1999; and Extradition (Exempted Country: United States of America) Order 1999.

210 Extradition Act 1999, s 25(2).

- 7.14 Since its introduction in 1999, the record of the case process has seldom been used in New Zealand.²¹¹

Backed-warrant procedure

- 7.15 For countries subject to the backed-warrant procedure under Part 4 of the Act (those being Australia and the United Kingdom), there is no requirement for the court to inquire into the case against the person. These requesting countries need only provide evidence of the arrest warrant, evidence that shows the offence meets the “extradition offence” test, and evidence of the identity of the person before the New Zealand courts can issue a surrender order. It is not the court’s role under the backed-warrant procedure to assess the case against the person.

INTERNATIONAL APPROACHES

- 7.16 Different countries and multinational organisations have developed a variety of approaches to the court’s role in assessing the case against a person sought for extradition. Some common law countries have, in recent years, enacted changes that have moved them closer to the civil law approach. Multinational organisations and multilateral treaties have also had influence in presenting models for extradition to enhance international cooperation.

Common law countries

United Kingdom

- 7.17 The United Kingdom has shifted its approach recently, primarily in light of its closer ties with the rest of Europe. In 1991, it ratified the European Convention on Extradition.²¹² This provided for extradition without the prima facie case requirement in respect of state parties to the Convention. Further reform followed as a result of a 2001 review,²¹³ which found that there were strong arguments in favour of removing the prima facie case requirement for the United Kingdom’s closest extradition partners, particularly where it could have confidence in the overall fairness of their judicial systems.²¹⁴ The review noted two main objections to the prima facie case requirement: the United Kingdom was applying its domestic standard to evidence that would be examined in the requesting country under its own laws anyway; and requesting countries were failing to meet the prima facie standard, merely because they could not present their cases in a way that met the United Kingdom’s evidential requirements.²¹⁵
- 7.18 The United Kingdom’s Extradition Act 2003 provides different approaches for Category 1 countries (European Union countries) and Category 2 countries (non-European Union countries with which the United Kingdom has an ongoing extradition relationship). Extradition can occur with Category 1 countries without any inquiry into the evidence against the person. In relation to Category 2 countries, the court is required to inquire into the case against the person, but the evidential standard that is applicable differs for different countries and varies for different stages in the process.
- 7.19 For a court to issue an arrest warrant for a person requested by any Category 2 country, it must be satisfied that the evidence would justify the issuing of a warrant in the United Kingdom “for

211 The only cases where it has been used have been *Government of the United States of America v Jiang* [2012] DCR 724; and *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355.

212 European Convention on Extradition ETS 24 (opened for signature 13 December 1957, entered into force 18 April 1960). Ratification was given effect to by the European Convention on Extradition Order 1990 (UK).

213 United Kingdom Home Office *The Law on Extradition: A Review* (March 2001).

214 Baker, Perry and Doobay, above n 204, at [8.36]. United Kingdom Home Office, above n 213.

215 Baker, Perry and Doobay, above n 204, at [8.38]. United Kingdom Home Office, above n 213.

the arrest of a person accused of the offence within the judge's jurisdiction".²¹⁶ A "reasonable suspicion" test is applied to this evidence. This is an objective standard and is a lower threshold than the prima facie case standard,²¹⁷ but some evidence is required.²¹⁸ While the arrest warrant standard applies to extradition requests from all Category 2 countries, the nature of the evidence required may be modified for a country if it is so designated by the Secretary of State. If a country is designated for this purpose, it is only required to produce "information" rather than formal "evidence".²¹⁹

- 7.20 At the substantive extradition hearing, the court will consider whether there is evidence that meets the prima facie case test.²²⁰ Again, within Category 2, some countries have been designated by the Secretary of State as being exempt from the prima facie case test.²²¹ Of the 93 countries that are in Category 2, 24 countries, including New Zealand, Australia, Canada, and the United States, have been exempted from having to satisfy the court that there is a prima facie case against the person.²²²

Australia

- 7.21 Australia's extradition law has also undergone a shift away from requiring a court inquiry into the case. The change occurred in 1985 with an amendment to the Extradition Act 1988 (Cth).²²³ The 1988 Act does not require the court to be satisfied that there is a prima facie case against the individual and instead provides a default position that the courts will not inquire into the evidence of the case against the person sought. The primary reason for this reform was to facilitate the conclusion of treaties with civil law countries.²²⁴ The Act applies to a country if regulations are made extending coverage to that particular country. Coverage is extended to countries with which Australia has an extradition treaty as well as a number of designated non-treaty countries. Coverage may be subject to "such limitations, conditions, exceptions or qualifications as are necessary".²²⁵ This means that regulations can preserve the need for the court's inquiry and the prima facie case standard for particular countries. This has been preserved for most Commonwealth countries,²²⁶ although those with which Australia has a close relationship have in the last decade been given the status of "extradition country" by regulation, meaning the no evidential inquiry approach applies.²²⁷ The equivalent of a backed-warrant procedure applies in relation to requests from New Zealand.
- 7.22 The legislation means that the no evidential inquiry approach is the default model for Australia's bilateral extradition treaties. Since moving to the no evidential inquiry approach, Australia has concluded extradition treaties with 38 countries. It would not have been able to negotiate treaties with many of these countries while its extradition law required an inquiry

216 Extradition Act 2003, s 71(3).

217 Baker, Perry and Doobay, above n 204, at [7.39].

218 Baker, Perry and Doobay, above n 204, at [3.19], n 28.

219 Extradition Act 2003 (UK), s 71(4). Countries are designated for the purposes of s 71(4) by the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (UK), art 3.

220 Extradition Act 2003 (UK), s 84(1).

221 Extradition Act 2003 (UK), s 84(7).

222 These 24 countries are designated under the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (UK) and subsequent amendment orders for the purposes of s 84 of the Extradition Act 2003.

223 Extradition (Foreign States) Amendment Act 1985 (Cth).

224 EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 217. Since 1985, Australia has concluded or updated 38 bilateral extradition treaties; see Australian Attorney-General's Department "International crime cooperation arrangements" < www.ag.gov.au > .

225 Extradition Act 1988 (Cth), s 11.

226 Extradition (Commonwealth Countries) Regulations 1988 (Cth).

227 For instance, Canada, United Kingdom, South Africa, and the United States.

into the case against the person sought, as some were unwilling to conduct extradition where such an inquiry is required.²²⁸

- 7.23 There is concern that the courts no longer have a role in safeguarding the rights of an individual who is the subject of an extradition request.²²⁹ The Australian Government rejected a 2004 recommendation of the Joint Standing Committee on Treaties to review the approach that there would not be a court inquiry into the case against the person. This was because it considered the 1988 Act had allowed successful treaty negotiation and increased effectiveness in Australia's participation in international efforts to combat serious and transnational crime.²³⁰
- 7.24 The Australian system has also been criticised for applying more stringent standards to extradition requests from Commonwealth countries than those from civil law countries.²³¹

Canada

- 7.25 Like the United Kingdom and Australia, Canada made changes to its extradition legislation by enacting a new Extradition Act in 1999.²³² It opted to retain the court inquiry into the case against the person sought and the prima facie case standard. Canada attempted to address the difficulties countries were having with cooperating with Canada in extradition by altering the way its extradition partners may present their evidence. It introduced a record of the case process that allows requesting countries to provide a summary of the evidence against the accused person as the basis for the Canadian court's decision on eligibility for extradition.
- 7.26 The Canadian record of the case procedure differs from that currently used in New Zealand in the following significant ways:
- All of Canada's extradition partners may use the record of the case procedure²³³ unless a treaty provides for an alternative.²³⁴
 - Canadian legislation states that a record of the case "may" attach supporting documents.²³⁵ It is not mandatory. Our understanding is that, in practice, records of the case in Canada do not routinely attach any primary evidence, with the possible exception of photographs of the person sought. In most instances, the records simply summarise the evidence that is available for trial in 20 pages or fewer.
 - A certified record of the case is admissible "even if it would not otherwise be admissible under Canadian law".²³⁶ The legislation makes it plain that requesting countries do not need to comply with Canadian rules of evidence in presenting evidence gathered overseas. Deference is given to the processes and rules of the requesting country.
 - A Canadian record of the case may summarise both overseas evidence and evidence gathered in Canada, if that evidence is available for trial in the requesting country. Evidence gathered in Canada must, however, comply with Canadian rules of evidence in substance²³⁷ (as opposed to form).

228 Australian Senate Table Office *Government Response to the Joint Standing Committee on Treaties Inquiry into Australia's Extradition Law and Policy* (17 May 2004).

229 At [3.23]–[3.36].

230 Australian Senate Table Office, above n 228.

231 Joint Standing Committee on Treaties *Extradition – A review of Australia's law and policy* (Report 40, August 2001) at [3.1].

232 Extradition Act SC 1999 c 18.

233 Extradition Act SC 1999 c 18, s 33(3).

234 Extradition Act SC 1999 c 18, s 10(2).

235 Extradition Act SC 1999 c 18, s 33(2).

236 Extradition Act SC 1999 c 18, s 32.

237 Extradition Act SC 1999 c 18, s 32(2).

- 7.27 Prior to the 1999 Act, and also prior to the introduction of the Canadian Charter of Rights and Freedoms 1982,²³⁸ the Canadian courts took a limited view of their role in assessing the case against a person sought for extradition. The Canadian Supreme Court, in the case of *United States of America v Shephard*, held that surrender must follow if there is any evidence upon which a jury could convict and that a judge is not entitled to withdraw a case merely because the evidence is manifestly unreliable, doubtful, or tainted.²³⁹
- 7.28 With the introduction of the 1999 Act, the record of the case approach, and the continued application of the *Shephard* test regarding the limited role of the court, there was concern that Canadian judges were allowing surrender even where it was clear the evidence in the record of the case was unreliable or misleading.²⁴⁰ In *Ferras*, the Supreme Court of Canada found that the record of the case procedure was consistent with the right to a fair hearing as protected by the Charter of Rights and Freedoms and does not allow for a person to be extradited on inherently unreliable evidence.²⁴¹ The Supreme Court commented that, while certification of a record of the case gives it a presumption of reliability, that presumption is rebuttable.
- 7.29 In *Ferras*, the Supreme Court found that the principles of fundamental justice applicable in an extradition hearing require that the person sought for extradition receive a “meaningful judicial determination” of whether the case for extradition has been established to the prima facie case standard.²⁴² The person subject to the request may challenge the extradition by “adducing evidence or making arguments on whether the evidence could be believed by a reasonable jury”, and the judge may engage in a “limited weighing of evidence to determine whether there is a plausible case”.²⁴³ In other words, the extradition proceedings are not merely a rubber-stamp process, but the court’s role is limited to looking at whether the presumption that the record of the case is reliable can be rebutted:²⁴⁴

Under [section] 29(1), the extradition judge is required to determine what evidence is admissible under the Act, and whether the admissible evidence is sufficient to justify committal. The inquiry into admissibility of the evidence depends on the nature of the evidence. Under the record of the case method, the inquiry is whether the certification requirements of the Act have been met. ... The inquiry into the sufficiency of the evidence involves an evaluation of whether the conduct described by the admissible evidence would justify committal for trial in Canada. ... [A] fair extradition hearing that accords with the *Charter* requires that the extradition judge must be able to decline to commit on evidence that is unavailable for trial or manifestly unreliable. ... Section 29(1) requires the extradition judge to assess whether the admissible evidence shows the justice or rightness of committing a person to extradition. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty such that a case could go to trial in Canada.

238 Canada Act 1982 (UK) c 11, sch B pt 1 [Canadian Charter of Rights and Freedoms].

239 *United States of America v Shephard* [1977] 2 SCR 1067; and Anne Warner La Forest *La Forest’s Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 149.

240 Gary Botting “The Supreme Court Decodes the *Extradition Act*: Reading down the Law in *Ferras* and *Ortega*” (2007) 32 QLJ 446 at 456–457.

241 *United States of America v Ferras*, above n 201, at [94(1)].

242 At [26]. The Supreme Court of Canada describes the “meaningful judicial process” as requiring: “an independent judicial phase, an independent and impartial judge and a judicial decision based on an assessment of the evidence and the law”.

243 At [54].

244 At 79–80 (headnote).

United States

- 7.30 Extradition law in the United States requires that there is a court inquiry into the case against the person in all extraditions. It applies a different sufficiency of evidence standard to the prima facie case standard, however. Requests for extradition from the United States must show that there is “probable cause” for the extradition, echoing the test that applies in domestic criminal cases under the United States Constitution for the issue of a warrant of arrest.²⁴⁵
- 7.31 The probable cause standard is generally considered to equate to the need for information sufficient to warrant a reasonable belief that the wanted individual has committed a crime.²⁴⁶ This is an objective test based on the standpoint of a person of reasonable prudence.²⁴⁷
- 7.32 An extradition request must contain evidence or information sufficient to meet the probable cause test. When a request is made, it is checked by the Department of Justice to ensure that it meets the test. It is then sent to the United States Attorney for the district in which the person who is the subject of the request is suspected of being. The Attorney applies to a magistrate or District Judge for an arrest warrant.²⁴⁸ The hearing is limited to an examination of the factual basis for the offence to ensure that all of the requirements for extradition are satisfied and there is sufficient information to support a reasonable belief that the person committed the offence.²⁴⁹
- 7.33 There are considerable limitations on what evidence may be brought in support of the person who is the subject of the request. A rule of non-contradiction prohibits the defence from countering the requesting country’s evidence with contradictory evidence.²⁵⁰ However, there is variation in how this rule is interpreted. Many courts do allow evaluation of the credibility of the requesting country’s evidence,²⁵¹ although generally, the person has no right to present a defence to the charges against him or her.²⁵²

London Scheme

- 7.34 The London Scheme for Extradition within the Commonwealth, which was established in 1966 and amended in 1990 and 2002, is a non-binding framework for extradition agreed to by Commonwealth countries. It includes the requirement for an inquiry into the case against the person sought and the prima facie case standard.
- 7.35 There has, at times, been debate about whether Commonwealth countries should continue to hold to this approach. At a 1986 meeting of Commonwealth Law Ministers, Australia proposed the abolition of the requirement for a court inquiry into the case against the person. Canada, in particular, rejected this proposal. At a 1990 meeting, Canada recommended as a compromise that the court inquiry and prima facie case standard be retained in the London Scheme but that admissibility requirements be relaxed. Canada recommended a process that was later developed into the record of the case approach adopted in Canada’s 1999 Act and

245 The Constitution of the United States of America, amendment IV. The “probable cause” test in the extradition context, however, has not been interpreted as emanating from the constitutional principle, although it is difficult to separate probable cause for extradition from probable cause for an arrest: M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2007) at 878.

246 Thomas Y Davies “Search and Seizure” in Kermit L Hall (ed) *The Oxford Companion to American Law* (Oxford University Press, New York, 2002) 719 at 720.

247 *Ornelas v The United States* 517 US 690 (1996) at 696; and *Illinois v Gates* 462 US 213 (1983) at 238.

248 Baker, Perry and Doobay, above n 204, at [7.50]–[7.53].

249 Jacques Semmelman and Karen Snell “Defending the International Extradition Case” *The Champion* (Washington DC, June 2006) at 23.

250 Jacques Semmelman “The Rule of Non-Contradiction in International Extradition Proceedings: A Proposed Approach to the Admission of Exculpatory Evidence” (2000) 23 *Fordham Int’l LJ* 1295.

251 Semmelman and Snell, above n 249, at 24.

252 Baker, Perry and Doobay, above n 204, at [7.55].

New Zealand's Extradition Act.²⁵³ The record of the case approach to the form and admissibility of evidence is included as an option in the London Scheme.

- 7.36 Although the London Scheme is a non-binding framework, for many years, it has shaped the approach taken to extradition legislation in Commonwealth countries. Australia and the United Kingdom have both made significant steps away from the London Scheme approach to the requirements for evidence of the offending in extradition requests. Although generally opting for a no evidential inquiry approach, Australia does apply the London Scheme approach to most Commonwealth countries. However, it has made regulations that apply a no evidential inquiry approach to a number of Commonwealth and other countries with which it has a particularly close relationship. The United Kingdom has also applied a no evidential inquiry approach to several Commonwealth countries.

Civil law countries

- 7.37 The civil law approach to extradition has been not to require an inquiry into the case against the person sought for extradition. It is not for the courts in these countries to assess the strength of this case. This means that extradition requests to these countries do not require evidence regarding the person's offending. Most civil law systems require only proof of identity and conformity of the request to the treaty and statutory requirements.²⁵⁴ Generally, extradition may be refused in relation to a country's own national. Each country's extradition law determines on what basis it will have an extradition relationship with other countries, such as whether a bilateral extradition treaty is needed or not.
- 7.38 The Council of Europe's European Convention on Extradition 1957 reflects this approach. The Convention requires that extradition requests are supported with a copy of the warrant of arrest, or conviction and sentence order, a statement of the offences with details of time and place, and the relevant legal provisions.²⁵⁵ Parties to the Convention have an obligation to extradite:²⁵⁶

... all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

DOES NEW ZEALAND'S APPROACH NEED REFORM?

- 7.39 Some of the main concerns with New Zealand's current extradition system relate to the difficulties that many countries have in meeting the evidential requirements, the time it takes for these countries to prepare extradition requests, and the delay and complexity involved in eligibility hearings. There has also been concern that some countries are discouraged from making extradition requests of New Zealand because of the perceived difficulties of the system. This potentially leaves people, who may be guilty of serious offences committed overseas, untried and here in New Zealand. This situation is damaging to New Zealand's international reputation.

253 See La Forest, above n 239, at 151–152; and Commonwealth Secretariat *Canadian Revised Draft Proposals for the Amendment of Article 5 of the Commonwealth Scheme* (November 1989).

254 Shearer, above n 206, at 157.

255 European Convention on Extradition ETS 24 (opened for signature 13 December 1957, entered into force 18 April 1960), art 12.

256 European Convention on Extradition, above n 255, art 1.

Balancing the interests of liberty and comity

- 7.40 At the centre of any consideration of what courts ought to require in extradition cases is a tension between promoting international comity between countries for the purpose of combatting crime and protecting the liberty of the individual who is the subject of the request. As Hammond J observed in *Bujak*:²⁵⁷

The judicial role is important because the assessment of whether a person should be surrendered has a significant impact on that person's "liberty interests", as it is sometimes termed. To put this another way, the extradition process puts into opposition a person's liberty interests and international co-operation or comity. ... Courts have had to face the difficulty of on the one hand recognising the significance of comity and acting in a way which properly respects the relevant Treaty with the requesting state, while at the same time applying the specific extradition law and general criminal law within their own jurisdiction in a manner consistent with the laws of that state. The overall problem lies in endeavouring to attain an appropriate balance between comity and liberty.

- 7.41 The interest in comity leads to extradition proceedings that show respect for the criminal proceedings of the requesting state. This can be achieved, for instance, through an approach that removes or reduces the requested country's inquiry into the case against the person by making the extradition hearing more akin to a preliminary hearing than a full trial or by relaxing admissibility of evidence standards for foreign evidence in extradition hearings.
- 7.42 In countries where the interest in protecting the liberty of the person has shaped extradition law, however, it has been emphasised that the courts do have a role in inquiring into the case against the person.²⁵⁸
- 7.43 Countries that have made changes to their extradition law in recent decades have sought to alter the mechanisms that balance liberty and comity. Australia's 1988 reforms promoted the interest of comity in the extradition hearing stage by reducing the court's role in weighing the case against an individual. On the other hand, to ensure it was satisfied with the liberty protections in place in the countries to which it chooses to extradite, it relied on grounds for refusing surrender and the treaty negotiation, or country assessment, stage. Canada also sought to advance comity by making the extradition hearing more accessible to some extradition partners that had found the previous system difficult to work with. During the reform process, there was a sense that the pre-1999 law was not achieving the right balance between liberty and comity because the admissibility rules and sufficiency of evidence requirements were discouraging extradition requests.
- 7.44 In New Zealand, the balance between comity and liberty is currently achieved by treating an extradition hearing as comparable to preliminary proceedings used domestically to hold an accused over for trial. In the words of Hammond J, "the extradition hearing has not been treated as a trial on the merits because that approach would involve questioning the foreign state's judicial system".²⁵⁹ At the same time, the retention of the prima facie case standard for all but backed-warrant cases, as well as the court and Minister's consideration of the grounds for refusing surrender, has kept the emphasis on the liberty interests involved.

257 *Bujak v District Court at Christchurch* [2009] NZCA 257 at [19]–[20].

258 For instance, *United States of America v Ferras*, above n 201, at [25], [34], and [46]–[49].

259 *Bujak v District Court at Christchurch*, above n 257.

Dealing with different approaches of civil law system

- 7.45 Civil law countries find New Zealand's current requirements difficult. This is because New Zealand requires evidence in a form in which civil law countries are not accustomed and will be quite different to that which will be required for their own domestic trial.²⁶⁰ For instance, the central common law concept of an affidavit is completely foreign to civil law countries. The disjunction between the systems' interaction can create considerable expense and delay in New Zealand as it seeks to help civil law countries to meet the requirements.²⁶¹
- 7.46 The traditional common law approach of assessing a prima facie case in the case presented by the requesting country has been seen as a sign that civil law systems are not to be trusted.²⁶² However, the justification of the civil law no evidential inquiry approach to extradition is that extradition is a measure of international judicial assistance in restoring an alleged criminal to the jurisdiction with the best claim to try the person. Assisting the authorities of the requesting country does not involve or require entering upon questions that are the prerogative of that jurisdiction.²⁶³
- 7.47 Australian academic Ivan Shearer has challenged some of the perceptions about the prima facie approach. He argues that the fact that the prima facie case was a requirement for extradition even among the British dominions shows that having a court inquiry to the prima facie standard reflects the serious disadvantages of extradition to the accused person when sent to a distant place to answer for an alleged crime rather than mistrust in the requesting country's legal system. He also considers that the similarities in the extradition hearing process in common law countries to their domestic proceedings is more based on practical convenience than on any conscious desire to apply domestic law and procedure to extradition offences.²⁶⁴
- 7.48 While it seems that different procedures and expectations in civil law and common law legal systems have led to traditionally contrasting approaches to extradition hearings, it may be more valuable now to consider whether the different aspects that have formed the basis of this conflict continue to have weight and should influence New Zealand's extradition law.

Desire for greater international cooperation

- 7.49 There has been a shift internationally towards greater acceptance of the no evidential inquiry standard. This seems to have developed because of the desire for greater international cooperation to combat crime. As noted, several common law countries have adopted a no evidential inquiry approach or have lowered admissibility requirements in order to be able to cooperate in extradition with a greater number of countries. The United Nations Model Treaty on Extradition adopted the same no evidential inquiry approach as the European Convention

²⁶⁰ Proust, above n 203, at 303.

²⁶¹ This was also the situation in Australia prior to the 1988 changes; Joint Standing Committee on Treaties, above n 231, at [3.20].

²⁶² For instance, a committee appointed by Harvard Law School's Research in International Law Programme drew up a draft convention on extradition law and practice in 1932, which left out the prima facie requirement stating that it (Harvard Research in International Law *Codification of International Law: Part I – Extradition* (1935) 29 AJIL Sup 15 at 194 as cited in Shearer, above n 206, at 160):

... seems to rest partly on the suspicion of inadequacy of proceedings under other systems of law, and partly upon the feeling that one who is within the State is entitled to the protection of the State's system of criminal procedure, as well when he is accused of a crime abroad, as when he is accused of a crime within the requested State.

²⁶³ Shearer, above n 206, at 157.

²⁶⁴ At 161.

on Extradition.²⁶⁵ A number of multilateral treaties designed to combat specific transnational crimes have also adopted the no evidential inquiry approach.²⁶⁶

- 7.50 The growing emphasis on cooperation in extradition to combat international crime and improve the enforcement of justice transnationally is not in itself a reason for New Zealand to alter its approach to the evidence required for extradition. However, the benefits for New Zealand in being part of an international system that cooperates more closely in the prosecution of crime may lead to a desire for a reduction in the evidential hurdle to extradition in New Zealand.

Measure of a country's trust in another country's justice system

- 7.51 An implicit line of reasoning for maintaining a greater degree of judicial inquiry is that it provides protection against having to extradite to countries whose justice systems New Zealand may distrust. There is an argument that countries that have very different justice systems to New Zealand and different approaches to natural justice and human rights should have to provide a stronger case that the individual sought has committed the alleged crime.
- 7.52 Applying the higher evidential standard to countries as the default position makes this a rather blunt instrument, however. There are clearly countries to which the prima facie case standard is applied that have strong and reliable records of human rights protection and trustworthy justice systems.
- 7.53 It is also questionable whether the judicial inquiry into the facts of a case is the correct place to address these concerns. They may be addressed more directly and appropriately through categorisation of countries or consideration of the grounds for refusing surrender.
- 7.54 In addition, the court's inquiry into the case against the person based on evidence prepared in a requesting country, whether it meets domestic admissibility requirements or is in summary form, may well be inadequate to determine whether a prosecution is, in fact, unjust or spurious. The distance involved and the differences in processes and language may make it impossible to tell, in which case, little is added by having the greater degree of judicial inquiry.
- 7.55 On the other hand, the very fact of there being a judicial inquiry into the evidence of the offending may deter spurious or unjust requests from being made in the first place. That is, a country may be less likely to present exaggerated or weak evidence directly to a foreign country in an extradition request than it would an arrest warrant for endorsement by the requested country that was based on such evidence. Furthermore, from a defence perspective, without any evidence requirement, it would be virtually impossible to prove that a request was being made in bad faith even if it was.

Disruption and inconvenience of extradition

- 7.56 In the past, the fact that extradition required the transfer of a person to a completely different country – possibly with a different legal system, culture, and language – has been influential in supporting the case for a greater degree of judicial inquiry into the offending. There is no question that extradition still results in a major disruption to a person's life. However, any domestic criminal prosecution is disruptive, and perhaps this is not a reason for guarding particularly against extradition.

265 Model Treaty on Extradition GA Res 45/116, A-Res/45/116 (1990), art 2(2)(b).

266 Many multilateral treaties do not include a requirement for an evidential inquiry, for example: International Convention against the Taking of Hostages 1316 UNTS 205 (opened for signature 17 December 1979, entered into force 3 June 1983) art 10; and International Convention for the Suppression of Financing Terrorism 2178 UNTS 197 (opened for signature 9 December 1999, entered into force 10 April 2002), art 11. Multilateral treaties that do mention the evidential inquiry require parties to endeavour to simplify these requirements, for example: United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (opened for signature 20 December 1988, entered into force 11 November 1990), art 6(7).

Similarity to domestic criminal proceedings

- 7.57 Extradition proceedings in common law countries have traditionally been similar to preliminary committal proceedings in domestic criminal cases. This has provided a familiar process to which the courts can align extradition hearings. This approach makes sense, because both types of proceedings are not themselves the trial of the person for the alleged crime but are a check to determine whether there is a case to hear.
- 7.58 There has recently been a change to criminal procedure in New Zealand to remove the committal hearing for all criminal cases.²⁶⁷ A similar reform occurred in the United Kingdom in 2013.²⁶⁸ The reasoning behind the change in both countries was to make criminal procedure more efficient. It was considered that the committal process did not add any real value to the assessment of the case against the accused.
- 7.59 As a practical effect of the change to domestic law, fewer and fewer judges and counsel will be familiar with the old domestic committal process. There is little sense in extradition law relying on standards based in domestic criminal law when those domestic standards have now moved on.

PROPOSALS AND OPTIONS FOR REFORM

- 7.60 Below, we present and assess the options for reform, under three key questions:
- Should the court be required to inquire into the case against the individual?
 - If there is a court inquiry into the case, to what standard should the court be satisfied that a credible case exists?
 - What evidence should be put before the court to assist in its inquiry?

Should the court be required to inquire into the case against the individual?

- 7.61 In relation to the first question, the options are:
- to shift to a no evidential inquiry approach in the standard procedure; or
 - to retain a court inquiry for countries using the standard procedure.
- 7.62 In reality, each may be employed in relation to different categories of countries under the legislation. In particular, as noted in Chapter 6, we anticipate that the backed-warrant (no evidential inquiry) approach should be retained for at least some countries, as this is an important part of how New Zealand's extradition system operates with countries with which it is particularly close.

Option (a): Shift to a no evidential inquiry approach in the standard procedure

- 7.63 One option is to take the Australian approach and require no evidential inquiry into the particular case against the person sought for all extraditions. This would be similar to an extension of the backed-warrant approach that already applies to extradition requests from Australia and the United Kingdom. This approach would imply that New Zealand has determined to exercise a high degree of trust with the countries with which it allows extradition.

²⁶⁷ See our discussion at [9.56].

²⁶⁸ Criminal Justice Act 2003 (UK), sch 3 (which took effect in 2013).

- 7.64 A shift to a no evidential inquiry approach would enable greater cooperation with countries with which New Zealand has not been able to have an extradition relationship or that have faced difficulties in meeting New Zealand's evidential requirements. This would potentially allow more extradition to occur, which could be seen as enhancing the prosecution of crime internationally.
- 7.65 There are concerns that such an approach would be going too far. The testing of the case against the person sought for extradition has been a key feature of New Zealand's extradition law. It has ensured a certain degree of protection for the individuals involved and has provided a barrier that makes extradition less likely with countries with justice systems about which there are concerns. As noted, Australia's approach is supported by it having negotiated and updated its treaty relationships with a wide segment of the countries to which it extradites. This provides it with an alternative way of being satisfied with a requesting country's justice system.
- 7.66 We do not support the broad extension of the no evidential inquiry approach. While we are in favour of its use for a narrow group of countries with which New Zealand has a close relationship (Category 1 countries), it should not be adopted across the board.

Option (b): Retaining a court inquiry for the standard procedure

- 7.67 We are in favour of retaining the court inquiry for most countries because there is a strong argument that there should be some oversight from the New Zealand justice system in relation to the nature and strength of the case against a person. The responsibility that the New Zealand Government has for such a person arises from the fact that the person is within New Zealand's jurisdiction. The Government should owe those within its borders a duty to take seriously any threats to their liberty. Where the request does not require consideration of the case against the person, because the requesting country has been designated as not requiring one, the New Zealand Government has effectively checked and approved that it is satisfied with the prosecutorial standards of that country at a general level and so does not need to do so in a specific request. Extradition is extreme in the impact it has on the liberty of an individual and the potential for hardship. Our view is that, because of the significant consequences of extradition, the New Zealand approach should be to exercise a degree of caution with regard to extradition requests from most countries.
- 7.68 This approach would retain the present emphasis on protecting the liberty interests of the individual who is the subject of the request. This minimises the risk of extraditing a person to face a spurious or unjust charge because there will be a greater check undertaken by the New Zealand courts.
- 7.69 Alongside improvements to procedure,²⁶⁹ and the proposals later in this chapter to reduce evidential requirements, we consider that, as a whole, our proposed scheme will achieve an appropriate balance between efficiency and cooperation with foreign countries on one hand and protection of the liberty interests and values of New Zealand's justice system on the other.

QUESTION

Q14 Should the new Extradition Act retain an inquiry by the New Zealand courts into the evidence against the person sought for extradition for most countries?

269 See discussion in ch 9.

If there is a court inquiry into the case, to what standard should the court be satisfied that a credible case exists?

- 7.70 If the decision is made to retain a court inquiry into the case against the person sought for extradition for most countries, the legislation will need to set the standard to which the court needs to be satisfied that the extradition is justified.
- 7.71 The question of the factors of which judges must be satisfied, and to what degree, is expressed differently in different contexts, such as issuing warrants for search or arrests, deciding bail applications, or adjudicating guilt. In our view, none of these completely or easily state what we think a judge should do when considering whether there is a sufficient case to justify extradition.
- 7.72 The judge should be reasonably satisfied that the elements of the offence are made out and that there is sufficient evidence in relation to each element. There is a range of ways this judicial task could be expressed:
 - (a) Using the standard for committal for trial (the *prima facie* case).
 - (b) Adopting an “insufficient evidence to proceed” standard (the Criminal Procedure Act standard).
 - (c) Adopting the standard used for the issuing of arrest warrants.

Option (a): Retaining a prima facie case standard

- 7.73 The Extradition Act currently provides that evidence is required that will “justify the person’s trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand”.²⁷⁰ This test was designed when domestic criminal procedure included a committal hearing. The concept of justifying a person’s trial if the offence had occurred in New Zealand made sense within this context. With the removal of the committal hearing, there is now no general stage in criminal proceedings when the question of whether there is sufficient evidence to justify trial is considered.
- 7.74 The main problem with retaining this particular formulation is that it is old and not well understood. The standard comes with the baggage of many years of case law that is unlikely to be helpful in the extradition context. If the committal test is retained for extradition proceedings, consideration will need to be given to how it is spelt out in the statute. Further, a decision to retain a *prima facie* case approach could be seen as a missed opportunity to lower the threshold and reduce one of the key barriers to extradition in the way that Australia did when it shifted to legislation that focused primarily on a no evidential inquiry approach. A shift away from the *prima facie* case standard would be seen as a way of placing greater trust in the legal systems of other countries.
- 7.75 Among the countries that retain a *prima facie* case standard, the form and wording of the test in legislation is fitted to the criminal system in which they operate. In the Canadian legislation, the wording used is that there must be evidence that the conduct would “justify committal for trial in Canada”.²⁷¹ Canada retains the committal process as part of its domestic criminal procedure. In the United Kingdom (in the relatively rare cases that the *prima facie* test applies), there must be “evidence which would be sufficient to make a case requiring an answer by the [defendant] if the proceedings were the summary trial of an information against him”.²⁷² The Australian

²⁷⁰ Extradition Act 1999, s 24(2)(d)(i).

²⁷¹ Extradition Act SC 1999 c 18, s 29(a).

²⁷² Extradition Act 2003 (UK), ss 84(1) and 86(1).

test (which applies in relatively rare cases) has been formulated to achieve uniformity between states:²⁷³

[A] reference to the *prima facie* evidence test being satisfied is a reference to the provision of evidence that, if the conduct of the person constituting the extradition offence referred to in that subsection had taken place in the part of Australia referred to in paragraph (a) of this subsection, would, if uncontroverted, provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence.

- 7.76 Retaining a form of a committal test would preserve a relatively high standard for the inquiry into the evidence. It would allow continuity with the existing law and would not be seen as an erosion of the standard at which New Zealand allows persons to be extradited to another country. The committal test has continued to operate successfully in Canada, where measures were taken to enhance Canada's ability to cooperate in extradition with foreign countries through the form of evidence and admissibility standards instead.

Option (b): Aligning to the new domestic criminal law standard

- 7.77 Section 147 of the Criminal Procedure Act 2011 provides for a different mechanism for filtering out cases that involve insufficient evidence to proceed to trial. The court may dismiss a charge if, in relation to a charge for which the trial procedure is the judge-alone procedure, the court is satisfied that there is *no case to answer*.²⁷⁴
- 7.78 Importing this standard into extradition law would mean that the court could reject an application for extradition where, on the evidence presented, there is no case to answer. This test would have the advantage of alignment to a more familiar domestic criminal law standard, but it has the risk of bringing with it domestic criminal law concerns.

Option (c): Probable cause

- 7.79 New Zealand's extradition law could attempt to adopt a sufficiency of evidence standard that falls in between the *prima facie* case standard and the no evidential inquiry standard. This would require countries to provide evidence that goes some way towards establishing the case against the alleged criminal, but the burden would not be as significant.
- 7.80 The United States' "probable cause" standard equates generally to the standard of evidence required for an arrest warrant to be issued in the United States' domestic criminal law. The extradition judge is asked to determine if there is sufficient evidence to support the reasonable conclusion that a person committed the offence. In addition, the evidence required to show this is not required to meet the general rules of evidence in the United States.²⁷⁵ An arrest warrant test also applies to extradition requests to the United Kingdom for some countries. This standard is known as the "reasonable suspicion" test as it requires sufficient evidence for a reasonable suspicion that the individual committed the offence.
- 7.81 The 2011 Baker Report in the United Kingdom compared the United States' probable cause test and the United Kingdom's reasonable suspicion test. It concluded that there was no significant difference between the two. Both tests are based on reasonableness and equate to the domestic standard of proof that police officers in the United States and United Kingdom must satisfy in order to arrest a suspect.²⁷⁶

273 Extradition Act 1988 (Cth), s 11(5)(b). Aughterson, above n 224, at 218.

274 A second limb of the provision relates to jury trials. It provides that the court may dismiss a charge if, in relation to a charge to be tried or being tried by a jury, the judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant. We have not given further consideration to this formulation because extradition proceedings do not involve a jury.

275 Proust, above n 203, at 304.

276 Baker, Perry and Doobay, above n 204, at [7.42]–[7.44].

- 7.82 This approach attempts to find the correct balance between liberty and comity by allowing the courts to test the case without requiring the submission of large amounts of admissible evidence. It would potentially allow cooperation in extradition with a larger group of countries than is possible under the current law. Bassiouni, a leading United States commentator, considers that the probable cause standard is akin to the prima facie standard as it requires evidence to justify trial and not merely suspicion that the individual has committed the crime.²⁷⁷ These are standards that the New Zealand courts are unlikely to be readily familiar with and may end up being interpreted similarly to the existing law. On the other hand, probable cause might have subtle but appealing focus on the correct judicial assessment of the credibility of the case.

QUESTION

Q15 Should the correct judicial inquiry be whether a judge is reasonably satisfied that there is sufficient evidence in relation to the offence to justify extradition?

What evidence should be put before the court to assist it in its inquiry?

- 7.83 The options are to:
- (a) continue to require the provision of actual evidence; or
 - (b) only require a requesting country to provide a summary of the evidence by way of a record of the case.

Option (a): Require actual evidence

- 7.84 Requiring actual evidence may allow the New Zealand courts to closely scrutinise the process that has gone on in the requesting country. It may, therefore, be better able to determine whether something is amiss. This may be perceived as providing greater protection of the liberty interests of the individual who is the subject of the request.
- 7.85 However, it is not possible for a foreign country to fully present the evidence that would be available during the trial within that country, so there is always a degree of summarising that must necessarily occur. If a requesting country has determined to base an extradition request on fake evidence, it is just as likely to be able to do this in the provision of actual evidence as it is through a record of the case. It is better to have more direct protections against dubious requests, or requests from a country about which there are human rights or justice system concerns, at other points in the scheme rather than attempting to address such concerns in the court's inquiry into the case against the person.

Option (b): Extending and improving the record of the case procedure

- 7.86 An option for reducing the difficulty for requesting countries where there is an inquiry into the case against the person sought for extradition is to expand and improve the record of the case procedure.²⁷⁸ The inclusion of the record of the case procedure in the Extradition Act was an attempt to reduce the evidential burden for foreign countries requesting extradition. So far, only two extradition requests have ever been made to New Zealand using the record of the case procedure.²⁷⁹ Given that the procedure is unique to extradition proceedings, courts and practitioners in New Zealand are relatively unfamiliar with it. This has led to confusion and litigation, including on the issue of whether the record must attach all of the underlying

²⁷⁷ Bassiouni, above n 245, at 880.

²⁷⁸ See above at [7.13]–[7.14].

²⁷⁹ *Government of the United States of America v Jiang* [2012] DCR 724; and *Dotcom v United States of America*, above n 211.

evidence (such as witness depositions and exhibits)²⁸⁰ or whether it only needs to attach documents that it is not feasible for the requesting country to summarise (such as photographs).²⁸¹

- 7.87 These issues are not insurmountable. The record of the case procedure, if given a wider application and amended to provide clarification, has the potential to significantly improve New Zealand's extradition system by enabling more straightforward cooperation with foreign countries. It would provide a balance to other aspects of our proposed scheme under which we are proposing both broadening the grounds for refusal and retaining an inquiry into the evidence of the alleged offending for most countries. These concessions to liberty interests need to be balanced in some way, as New Zealand has international commitments to facilitate extradition. If this is not achieved, New Zealand risks becoming a comparatively difficult country to extradite from and, therefore, a safe haven for international criminals.
- 7.88 A more relaxed approach to the admissibility rules, through greater reliance on the record of the case procedure, would give due recognition to the validity of criminal justice systems that differ significantly from New Zealand. It would indicate that New Zealand has faith in requesting countries to resolve evidential issues through their own processes. It would also align with the approach that has been taken in Canada.
- 7.89 The Supreme Court of Canada's decision in *Ferras* provides reassurance that the Canadian record of the case procedure can be used in a fair manner, and on appropriate occasions, the court itself might ask for more evidence.
- 7.90 We propose that New Zealand's record of the case procedure should be expanded so that it applies to all countries in our proposed Category 2.²⁸² We also propose that the New Zealand provisions regarding the record of the case should be amended to more closely reflect the Canadian model. This would include the following features:
- A non-mandatory requirement to attach supporting documents to the record of the case.
 - The understanding that a record of the case is a brief summary of the evidence available for trial.
 - Clarification that requesting countries do not need to comply with New Zealand rules of evidence in presenting evidence gathered overseas.

QUESTION

Q16 To what extent should requesting countries be able to provide a summary of evidence to satisfy the court regarding the case against the person sought for extradition?

280 *Dotcom v United States of America*, above n 211, at [41] to [45] per Elias CJ dissenting.

281 At [143] to [147] per McGrath J.

282 See ch 6 for discussion of the proposed categorisation of countries in a new Act.

Chapter 8

Grounds for refusing surrender

KEY PROPOSALS

Proposals: The grounds for refusing surrender under the Act should be expanded. New treaties should be able to create new grounds for refusal or expand the application of existing grounds, but no treaty should be able to limit or override any of the statutory grounds. Sole responsibility for considering most of the grounds should lie with the court. The Minister of Justice's role should be limited to considering grounds that require governmental or diplomatic assurances.

Rationale: This will provide a clear point in the extradition process where matters of personal circumstances, human rights, and justice system issues in the requesting countries will be considered. Removing the double handling of consideration of some of the grounds for refusal will improve the efficiency of decision making. It will also indicate that the grounds for refusal are predominantly justiciable issues for consideration by the court based on evidence, rather than political or diplomatic issues for a Minister.

INTRODUCTION

- 8.1 Under the Extradition Act 1999, there are various factors to be considered when the decision is made whether or not a person who is otherwise eligible for extradition should in fact be surrendered to the requesting country. The Act refers to these as “restrictions on surrender”. In this chapter, we refer to these as grounds for refusing surrender. The implication of refusing to surrender the person sought is that generally the person will not be tried in New Zealand.
- 8.2 The Act provides for mandatory and discretionary grounds for refusing surrender. The mandatory grounds are set out in section 7. If any of these grounds are made out, the person must not be surrendered. No extradition treaty concluded after the enacting of the Act can be construed to override section 7.²⁸³ The discretionary grounds are set out in section 8. They provide a discretionary basis on which the decision maker may decide not to surrender a person for extradition. Section 30 sets out further mandatory and discretionary grounds for refusing surrender that the Minister of Justice must consider in making the final decision on whether to extradite, including a broad residual discretion to refuse surrender in section 30(3)(e).
- 8.3 The grounds differ depending on whether or not the extradition is taking place under a pre-existing bilateral treaty (a treaty concluded prior to the Extradition Act 1999).²⁸⁴ Where there is a pre-existing treaty, the grounds for refusal in the Extradition Act 1965 apply. In all other cases, the grounds for refusal in the 1999 Act apply.

²⁸³ The exception to this rule is the bilateral treaties that pre-date the Extradition Act 1999. Those treaties may override s 7 and are subject to the mandatory restrictions on surrender in the Extradition Act 1965 instead. See ss 11(3) and 105 of the 1999 Act and the discussion of this issue in ch 3.

²⁸⁴ For a more detailed discussion, see ch 3.

- 8.4 Consideration of the grounds for refusal occurs after the court has ruled that the person is otherwise eligible for extradition. The grounds for refusal thus act as a check on whether extradition really is desirable and warranted where the law otherwise says that extradition can occur. Consequently, the grounds for refusal should reflect the values that New Zealand wishes to uphold in its cooperation with foreign countries in extradition and protect the individual's human rights.
- 8.5 One of the problems with the existing regime is that the grounds for refusal applying to New Zealand's pre-existing bilateral treaties are narrower than those under the 1999 Act. There is therefore a pressing question as to whether the new Act can or should modernise the grounds applying to the existing treaties. In this chapter, we consider whether it is desirable to enact legislation that essentially modifies the agreements that exist under the pre-existing treaties by making it possible for New Zealand to refuse to surrender a person in a broader range of circumstances.
- 8.6 The grounds for refusal are numerous and are sometimes required to be considered by more than one decision maker. Some of the grounds are currently considered by both the court at the eligibility hearing and the Minister of Justice when determining whether to surrender the person who is the subject of the request. Others are only for the Minister to consider. The grounds are also a disparate mix requiring different types of assessment. Some of the grounds are in the nature of an absolute threshold. Others rely much more on an evaluative assessment of the circumstances of the person and the offending and a balancing of these against the seriousness of the alleged offence. In this chapter, we consider who should be responsible for making determinations about refusal to extradite. We consider whether sole responsibility for most of the refusal grounds should lie with the court on the basis that the grounds are predominantly justiciable issues for consideration by the court based on evidence, rather than political or diplomatic issues for a Minister.
- 8.7 Lastly in the chapter, we turn to consider what the grounds for refusing surrender should be. We consider whether new grounds should be added and whether existing grounds ought to be altered.

EXISTING GROUNDS FOR REFUSAL

Grounds that apply to pre-existing treaties

- 8.8 The bilateral treaties that pre-date the Extradition Act 1999 cannot be construed to override the mandatory restrictions on surrender in the Extradition Act 1965. These include political offence, detention because of mental health, double jeopardy, torture, and the death penalty.
- 8.9 By virtue of section 105 of the 1999 Act, the following grounds for refusal apply to extraditions arising under bilateral treaties that pre-date the Extradition Act 1999. Extradition may be refused where:²⁸⁵
- the person sought is New Zealand citizen;
 - the offence is of a political character or the true intention is to try to punish the person for an offence of a political character;
 - the person has already been tried or punished for the offence;
 - a statutory time limit for prosecuting the offence applies;

285 Extradition Act 1965, ss 5, 5A and 6(4).

- the person may face torture;
- the person may face the death penalty; or
- the person is detained on the grounds of mental health after an acquittal or conviction for an offence in the requested country.

8.10 The first four grounds mirror the position under the treaties. The last three do not feature in the treaties so extend the grounds for refusal originally agreed between the treaty partners.

Grounds that apply to all other extraditions

8.11 The following table sets out the refusal grounds in the 1999 Act, who considers them, and the nature of the grounds.

SECTION	GROUND	COURT OR MINISTER?	NATURE OF GROUNDS
7	Political offence Discriminatory purpose to prosecution or punishment Discrimination: prejudice in trial or punishment Military offence Double jeopardy Detention because of mental health Detention because of intellectual disability	Both	If present, decision maker “must not determine that the person is to be surrendered” A treaty cannot be construed to override them
8	Injustice or oppression due to: <ul style="list-style-type: none"> • triviality • lack of good faith • delay • current prosecution of an offence in New Zealand 	Both	If present, decision maker “may determine that the person is not to be surrendered” A treaty may be construed to override them
30	Restriction applied by the terms of a treaty Torture New Zealand citizenship Death penalty Injustice or oppression due to personal circumstances Speciality Any other reason	Minister	Mixture of grounds that require no surrender and that allow the Minister to determine that the person is not to be surrendered A treaty may be construed to override all except torture and death penalty grounds

FEATURES OF GROUNDS FOR REFUSAL IN OTHER JURISDICTIONS

8.12 Different approaches to the grounds for refusing extradition are taken in Australia, the United Kingdom, and Canada. The approach in Australia is similar to New Zealand’s. The magistrate has a role in considering several factors.²⁸⁶ These factors are then reconsidered

²⁸⁶ Extradition Act 1988 (Cth), ss 19(2) and 7.

- by the Attorney-General, along with further factors that are only for the Attorney-General's decision.²⁸⁷ It is possible for extradition treaties to introduce new grounds for refusal or modify those in the Act. A key difference, however, is that all grounds are mandatory.
- 8.13 Under the United Kingdom's Extradition Act 2003, the majority of the "bars to extradition" are for the consideration of the judge, with a small group determined by the Secretary of State.²⁸⁸ Again, all of the grounds for refusal are mandatory. Also, a judge is prohibited from ordering extradition where to do so would be incompatible with the defendant's rights under the European Convention on Human Rights.²⁸⁹ The bars to extradition under the United Kingdom's Extradition Act do not appear to be able to be modified or removed by treaty.
- 8.14 The Canadian Extradition Act 1999 places responsibility for consideration of all reasons for refusing extradition with the Minister of Justice. Some of these grounds are mandatory, and some are discretionary.²⁹⁰ The Canadian Act clearly spells out certain grounds that apply in all cases and others that may be overruled by the provisions of an extradition treaty (default statutory grounds). A treaty may either specifically state grounds for refusal that apply, in which case, those grounds prevail over the Act, or may be silent on grounds for refusal, in which case, it is taken that none of the default statutory grounds apply.²⁹¹ In doing this, that Act anticipates that treaty negotiators will have canvassed all possible refusal grounds before including them or excluding them from a treaty.²⁹²
- 8.15 The structure of restrictions on surrender in New Zealand's Extradition Act has followed that of the London Scheme for Extradition within the Commonwealth. The London Scheme contains several reasons why extradition must be refused²⁹³ and then reasons why extradition may be refused.²⁹⁴

SUMMARY OF PROPOSALS

- 8.16 We suggest that a new Extradition Act should contain grounds for refusal for all extraditions and that these should reflect modern international and domestic expectations. We also propose simplification of the consideration of grounds by removing factors that are no longer necessary or relevant and by reassigning factors to other aspects of the extradition inquiry where they fit better. This stage of the extradition process ought to provide sufficient protection for the individual sought for extradition and, where it is appropriate, flexibility in the final decision on extradition as merited by the circumstances of each case. At the same time, the appropriate approach should be consistent with the object of having an extradition system that is efficient and that allows New Zealand to cooperate in an effective way with foreign countries for the purpose of combatting crime.
- 8.17 We also propose that bilateral extradition treaties should not be capable of overriding the grounds for refusal in the Act. The treaties should, however, be able to supplement the statutory

287 Extradition Act 1988 (Cth), s 22(3).

288 Extradition Act 2003 (UK), ss 79 and 93. This is the case for category 2 countries, which are the majority of those covered by the Act. In the case of requests from category 1 countries (European Union countries), only the bars to extradition considered by the judge are applicable, and the Secretary of State does not have a role.

289 Extradition Act 2003 (UK), ss 25 and 87. Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

290 Extradition Act SC 1999 c 18, ss 44–47.

291 Extradition Act SC 1999 c 18, s 45. In relation to multilateral treaties, the reasons for refusal contained in a relevant multilateral agreement prevail over the default statutory grounds only to the extent of any inconsistency between the Act and the agreement.

292 Gary Botting *Canadian Extradition Law Practice* (2012 ed, LexisNexis, Markham (Ontario), 2011) at 229.

293 London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed in Kingstown in November 2002), cls 12–13.

294 London Scheme for Extradition within the Commonwealth, above n 293, cls 14–15.

grounds. Our proposed statutory grounds reflect fundamental values and rights that we think ought to be protected in all extraditions. To the extent that our proposed grounds for refusal may seem to be inconsistent with pre-existing bilateral treaties, we think that those grounds in those bilateral treaties would have been inconsistent with the international norms.

- 8.18 Each ground should only be considered by one decision maker – either the court or a Minister. Ministerial decision making should only arise where the factors are solely political or diplomatic or otherwise outside of what would be appropriate for a court to decide. We propose that sole responsibility for most of the refusal grounds should lie with the court on the basis that the grounds are predominantly justiciable issues for consideration by the court based on evidence, rather than political or diplomatic issues. We note that, if a ground is to be determined by a Minister, it will potentially be subject to judicial review.

RELATIONSHIP BETWEEN TREATIES AND GROUNDS FOR REFUSAL IN THE ACT

- 8.19 As explained in Chapter 3, treaties fulfil an important role in New Zealand's extradition law. The relationship between the treaties and the grounds for refusal in the Act, however, is very complicated.
- 8.20 The relationship is governed primarily by section 11 of the 1999 Act. Section 11(1) contains the general rule that the provisions of the Act must be construed to give effect to New Zealand's bilateral extradition treaties. This general rule is subject to the exception in section 11(2) that no treaty may be construed to override the mandatory grounds for refusal in section 7 or the grounds related to the death penalty or torture in section 30. This indicates that the treaties may override the other grounds for refusal in sections 8 and 30 of the Act if there is an inconsistency.
- 8.21 In *Yuen Kwok-Fung*, the leading case in interpreting section 11, Keith J wrote:²⁹⁵
- [16] The process which s 11 of the New Zealand Act requires can perhaps be better thought of as reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent. The strength of the direction recognises the basic principles of international law that treaties must be complied with and that a state cannot invoke its internal law to justify its failure to perform a treaty (arts 26 and 27 of the Vienna Convention on the Law of Treaties). In the specific context of extradition, the Act also recognises those principles in its objective stated in s 12: the Act, among other things, is an Act:
- (a) To enable New Zealand to carry out its obligations under extradition treaties.
- [17] The discretionary grounds provisions help illustrate the operation of s 11(1). If a treaty had no discretionary ground, New Zealand, as the requested state, would not under the treaty be able to refuse surrender on a discretionary ground. To do so would be to breach its basic obligation to surrender the accused person. In such a situation s 11(1) would require s 8 not to be applied or in effect require it to be read out of the Act. By contrast, if, as in the present case, the discretionary grounds in the treaty are broader than those in the Act, they are read into the Act which is then construed appropriately.
- 8.22 This approach was recently confirmed by the Court of Appeal in *Bujak v Minister of Justice*.²⁹⁶
- 8.23 Subsections 11(1) and (2) are particularly significant in relation to New Zealand's imperial bilateral treaties. These treaties do not contain grounds for refusal that are based on the types of humanitarian concerns that are at the root of most of the grounds in sections 8 and 30. Given

²⁹⁵ *Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA) at [16]–[17].

²⁹⁶ *Bujak v Minister of Justice* [2009] NZCA 570 at [47].

- that these treaties create a duty to extradite, the silence in the treaties will override the grounds in sections 8 and 30 (except those related to torture and the death penalty).²⁹⁷
- 8.24 The relationship between the treaties and the Act is further complicated by section 11(3). This provides that section 11 is itself subject to section 105. Section 105 is a savings provision that applies to all bilateral extradition treaties that pre-date the Act. At present, 44 out of New Zealand's 45 bilateral treaties fall into this category.
- 8.25 The practical effect of section 105 is that the pre-1999 bilateral treaties are only subject to the grounds for refusal in the Extradition Act 1965. Section 105 then expressly states that these treaties may, therefore, override the mandatory grounds for refusal in section 7 of the Extradition Act 1999. This means that 44 of New Zealand's bilateral treaties cannot override the grounds in the 1965 Act, which relate to offences of a political character, torture, speciality, detention for mental health reasons, the death penalty, and double jeopardy. These treaties may, however, override the other grounds in section 7 of the 1999 Act concerning discrimination, military offences, and detention for reasons of intellectual disability.
- 8.26 The uncertainty about whether these grounds could actually be ousted by the bilateral treaties arises because there is an additional complicating factor, namely the multilateral treaties concerning extradition. As explained in Chapter 3, some multilateral treaties create an obligation not to extradite a person in certain circumstances. If New Zealand and one of its bilateral treaty partners have also ratified such a multilateral treaty, the obligation not to extradite must be read into the bilateral treaty. The prime example of this type of treaty is the Convention Against Torture.²⁹⁸ All of New Zealand's bilateral treaty partners have ratified the Convention, so the prohibition on returning a person to torture must be read into all of the bilateral treaties.
- 8.27 In *Bujak*, the Court of Appeal observed that New Zealand's imperial treaty with Poland must be read subject to the prohibition on return to torture and that the definition of torture in the Convention might be broad enough to create a prohibition on return to severe mental suffering. It could, then, accommodate at least some serious humanitarian concerns where a public official is involved.²⁹⁹
- 8.28 The Court of Appeal in *Bujak* then went on to discuss the relationship between human rights law and extradition more generally.³⁰⁰ The Court discussed various United Kingdom and Canadian cases. In both countries, there is an express statutory basis for human rights considerations to be taken into account in extradition decisions. The cases, therefore, focused not on whether these issues could be considered but on how stringent the test for refusing surrender should be.
- 8.29 In summarising the overseas authorities, the Court of Appeal noted that humanitarian considerations need to be balanced against the importance of honouring extradition arrangements.³⁰¹ The Court then indicated that, in relation to Mr Bujak, if the prohibition on

297 At [44]–[45].

298 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

299 *Bujak v Minister of Justice*, above n 296, at [29].

300 The Court noted (at [31]) that this relationship has been the subject of extensive academic writing and litigation. In relation to academic writing, see for example Harmen van der Wilt "On the Hierarchy between Extradition and Human Rights" in Erika de Wet and Jure Vidmar (eds) *Hierarchy in International Law: the Place of Human Rights* (Oxford University Press, Oxford, 2012) 148.

301 At [30]–[43].

torture could be read as allowing consideration of humanitarian issues, the test might require the showing of “severe” disadvantage.³⁰² The Court concluded:³⁰³

[I]f the Minister was entitled to take humanitarian considerations into account in the present case, he would be entitled to impose a stringent test. In other words, the Minister would not be entitled to deny the requesting state the ability to try a person for offences committed within its territory on the basis of human rights or humanitarian concerns unless they were sufficient to meet a very high standard, or, as the Canadian Supreme Court put it, unless the suspected offender’s return would shock the conscience. This is, however, subject to the terms of the relevant extradition treaty, which might allow for a less rigorous standard or for more expansive grounds ...

- 8.30 Some of the complexity surrounding the relationship between the Act and the treaties is unavoidable. Nonetheless, we think that, at least in relation to the grounds for refusing extradition, the Act can make this relationship clearer. We propose that treaties should only be able to create new grounds for refusal or expand the application of existing grounds. Our analysis regarding the relationship between the treaties and each of our proposed grounds for refusal is set out in the discussion of each of the grounds below.

DECISION MAKER FOR THE GROUNDS FOR REFUSAL

- 8.31 Some of the grounds for refusal are currently considered by the court and then also by the Minister of Justice. Decision makers should be entrusted with sole responsibility for particular decisions, with the assurance of a robust appeal process where a review is needed.
- 8.32 Our view is that the majority of the grounds should be considered by the court because they fall within the court’s expertise. There are a few grounds that require diplomatic assurances or discretions that should be reserved for a Minister’s decision. This approach would be similar to that taken in the United Kingdom.
- 8.33 Our proposal would involve a significant shift in the nature of the court hearing for extradition. The court would be required to consider an expanded number and type of grounds for refusal. The hearing may therefore become more complex and could involve an additional cost in terms of litigation time and resources, including the potential for additional legal aid costs.
- 8.34 Despite these costs, we consider this move desirable. Under the current system, an in-depth consideration of all the grounds for refusal by the court may well arise in any case if the Minister’s decision on surrender is judicially reviewed or in appeals. It is better to have one clear stage where the grounds would be dealt with comprehensively.
- 8.35 A thorough consideration by the court of the grounds for refusal would be an important protection of the sought person’s interests within the package of reform measures we propose. It also provides an important balance to our proposals in Chapter 7 to allow more streamlined processes to apply to the court’s consideration of the evidence of the person’s offending.³⁰⁴
- 8.36 The division of the proposed grounds for refusal of extradition between the court and the Minister are presented in the following table.

302 At [29].

303 At [43].

304 See above at [7.86]–[7.90].

COURT'S GROUNDS FOR REFUSAL	MINISTER'S GROUNDS FOR REFUSAL
Political offence Discrimination Double jeopardy Mental health or intellectual disability Injustice or oppression (including triviality, bad faith, delay, personal circumstances, and any other sufficient cause) Ground added by treaty, including citizenship (unless reserved by treaty for the court) Torture	Death penalty Ground added by treaty, including citizenship (if decision is reserved by treaty for a Minister)

- 8.37 The proposed shift in the court's role raises issues regarding the admissibility of evidence.³⁰⁵ There are concerns that an ill-resourced person who is sought for extradition might be at a disadvantage. This is not our intention, and we ask whether there is a need for an independent person or organisation to be available to resource individuals with information to fight extradition proceedings. This would assist judges to fairly and robustly address the issues raised before exercising their powers.

QUESTION

Q17 What grounds for surrender ought the courts be considering, and what grounds for surrender ought to be considered by the Minister?

GROUND'S UNDER THE EXTRADITION ACT

- 8.38 This section of the chapter discusses each of the existing restrictions and grounds for refusing surrender from sections 7, 8, and 30 of the 1999 Act.

Section 7 restrictions

- 8.39 Most of the section 7 restrictions on surrender cannot be modified or removed from application by an extradition treaty.³⁰⁶ Our general approach is that the current restrictions on what a treaty can be construed to override should be maintained and quite possibly extended. Consequently, we propose that the section 7 restrictions should continue to be in this category. All of the grounds for refusing surrender in section 7 are of such significance to the basis on which international cooperation in extradition occurs or to the values of the New Zealand criminal justice system that it is essential they are upheld. Thus, we see no reason to alter this status.

Political offence

- 8.40 Section 7(a) provides that a mandatory restriction exists where:
- the offence for which the surrender is sought is an offence of a political character;
- 8.41 The prohibition on extradition for political offences has been in extradition statutes since they were first developed in the 19th century. The restriction applies when the requested person is at odds with the requesting state and, as a result, the extradition is sought for reasons other than

³⁰⁵ See ch 7.

³⁰⁶ See [8.25].

the enforcement of the ordinary criminal law.³⁰⁷ The rationale behind it is that it is inappropriate to punish resistance to political oppression and that “governments should not intervene in the internal political struggles of other nations”.³⁰⁸

- 8.42 As a result of growing international terrorism in the latter part of the 20th century, countries have limited the ambit of the political offence exception to ensure that terrorists could be brought to justice despite crossing national borders.³⁰⁹ Multilateral conventions have excluded terrorism offences, genocide, torture, and hostage-taking from the exception. In its 2003 Extradition Act, the United Kingdom took the step of removing the political offence exception entirely.
- 8.43 New Zealand’s legislation does not define or limit what is meant by “political character”. The provision has not been considered by the courts in New Zealand, and it is unclear what offences are currently covered. Much of what was previously intended to be protected by the political offence restriction is now covered by human rights safeguards, such as the protection against extradition based on discrimination for political opinions (discussed below).³¹⁰ Furthermore, where the offence in question is a political offence that has no equivalent in New Zealand, the dual criminality restriction could be used to refuse the extradition.³¹¹ It could be considered worthwhile retaining the political offence restriction to provide a safeguard in case there is any type of political prosecution that does not fall within one of the other restrictions, but this may not be necessary. It may also have symbolic value in clearly illustrating what extradition cannot be used for, despite being of little practical importance in New Zealand.
- 8.44 One way of modernising this provision, if it is to be retained in new extradition legislation, is to include a definition of “political offence” in the Act, as is the case in the Australian and Canadian Extradition Acts.³¹² The London Scheme also limits the offences to which the exception can apply.³¹³ Such a definition could exclude an offence mentioned in a multilateral extradition treaty to which New Zealand is a party and could list offences that, because of their serious nature, will never constitute a political offence, such as murder or other acts of violence. One of the purposes of such definitions is that an alleged political motivation might be used to mask an act that is in fact simply a crime and, at that, often a grievous act of terrorism.
- 8.45 Although this ground does not add much practically, the values and history behind it are important enough that there is benefit in retaining it. Provided the ground is well defined, achieved by including a definition of “political offence”, there is no danger of people avoiding extradition simply because there is a political motivation for a crime.
- 8.46 Notably, this ground for refusal is in all of New Zealand’s bilateral extradition treaties so no issue of inconsistency needs to be addressed.

307 *R v Governor of Brixton Prison, Ex parte Schtraks* [1964] AC 556; *Cheng v Governor of Pentonville Prison* [1973] AC 931; Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom’s Extradition Arrangements* (Home Office, 30 September 2011) at 38.

308 EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 90.

309 For instance, the United Kingdom did so in enacting the Suppression of Terrorism Act 1978 (UK) in order to ratify the European Convention on the Suppression of Terrorism CETS 90 (opened for signature 1977, entered into force 1978); Baker, Perry and Doobay, above n 307, at [3.29]; and Aughterson, above n 308, at 90–91.

310 See [8.47]–[8.51].

311 See ch 5.

312 See Extradition Act 1988 (Cth), s 5; and Extradition Act SC 1999 c 18, s 46.

313 London Scheme for Extradition within the Commonwealth, above n 293, cl 12.

QUESTION

Q18 Should “political offence” be retained as a ground for refusal, and should a definition of “political offence” be added in the new Extradition Act?

Discrimination

8.47 Subsections 7(b) and (c) provide that mandatory restrictions exist where:

- (b) the surrender of the person, although purportedly in respect of an extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions, or for an offence of a political character;
- (c) on surrender, the person may be prejudiced at his or her trial or punished, detained, or restricted in his or her personal liberty by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions;

8.48 The wording of these restrictions on surrender on the basis of discrimination is substantively the same as those in the Commonwealth jurisdictions to which New Zealand is commonly compared.³¹⁴ The reason is that the principle is included in the London Scheme³¹⁵ and has its genesis in the fugitive offender legislation that applied to extradition between Commonwealth nations.³¹⁶ In reviewing their extradition legislation, none of these countries has altered or removed this ground.

8.49 There is no question that these discrimination restrictions should remain mandatory restrictions in New Zealand. They provide important human rights safeguards and allow the New Zealand Government to refuse extradition where it would conflict with important values in New Zealand’s justice system and society. The ground also aligns with New Zealand’s international human rights obligations, including the International Covenant on Civil and Political Rights (ICCPR).³¹⁷ This is a widely ratified multilateral treaty, and while the discrimination provisions do not expressly refer to extradition, an obligation not to extradite a person in these circumstances may exist. Further, all of New Zealand’s current bilateral treaty partners have ratified the ICCPR. For these reasons, it is appropriate that this ground apply to every extradition request, whether a bilateral extradition treaty is silent on this issue or not.

8.50 While the lists of factors for discrimination in subsections (b) and (c) contain the “or other status” catch-all, the provisions could be modernised by the inclusion of further factors now commonly included in discrimination exceptions to extradition. One of these is sexual orientation, which is now included in the Australian, Canadian, and United Kingdom Extradition Acts.³¹⁸ The Canadian Act also includes age and mental or physical disability as further bases of discrimination. It is clear that the New Zealand provisions are already intended to be broad and inclusive in order to provide a firm bar against extradition where the prosecution, trial, or punishment is discriminatory, thus explicit recognition of these further bases of discrimination would not be an extension of the current law. Explicit inclusion would also be consistent with the Human Rights Act 1993.³¹⁹

314 See Extradition Act 1988 (Cth), s 7(b)–(c); Extradition Act SC 1999 c 18, s 44(1)(b); and Extradition Act 2003 (UK), s 13.

315 London Scheme for Extradition within the Commonwealth, above n 293, cl 13(a).

316 See Fugitive Offenders Act 1881 (Imp) 44 & 45 Vict c 69, s 29A.

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

318 Extradition Act 1988 (Cth), s 7(b)–(c); Extradition Act SC 1999 c 18, s 44(1)(b); and Extradition Act 2003 (UK), s 13.

319 Human Rights Act 1993, s 21.

- 8.51 This ground can appropriately be determined by a judge. It requires an assessment of the likelihood of the discrimination occurring. The House of Lords considered an equivalent United Kingdom provision in *Fernandez v Government of Singapore* and found that this factor required a balancing of the gravity of the consequences of either returning or not returning the person to the requesting country with the likelihood of the discrimination occurring.³²⁰ It was enough to prevent surrender that there was a “reasonable chance” or “serious possibility” of discrimination.³²¹ The United Kingdom courts have also found that it is necessary for the court to assess the state of mind of the prosecuting authority under the provision equivalent to section 7(c).³²²

QUESTION

Q19 Should the current list of discriminatory factors for refusing surrender be extended in the new Extradition Act?

Military offence

- 8.52 Section 7(d) provides that a mandatory restriction exists where:
- the conduct for which the surrender is sought would have constituted an offence under military law only and not an offence under the ordinary criminal law of the extradition country;
- 8.53 While many early extradition treaties were intended to enable the return of military deserters, the modern approach in extradition statutes and treaties has been to exempt military offences from extradition.³²³ The reason for this exclusion is that military offences do not fit well within the purpose of extradition arrangements, which involve cooperation between countries to combat crime. Military offences that are not also an offence under the ordinary criminal law generally relate to matters of military discipline rather than crime.
- 8.54 This restriction does not appear to have ever been relied upon in New Zealand. While extradition should not occur simply for the purposes of military discipline, there is a question as to whether the military offence exemption is relevant and necessary. Some modern extradition arrangements, for instance, the Framework Decision on the European Arrest Warrant,³²⁴ have left the military offence exception out of extradition legislation, as it has little or no practical impact on extradition.³²⁵
- 8.55 It seems that the exclusion of military-only offences could be addressed in the definition of an “extradition offence”, in which case, it would not be a matter for the eligibility stage of the court’s enquiry or the Minister’s discretion. This is similar to the approach taken in the United Kingdom, where the exception for military offences is not included under the “bars to extradition” but rather in defining what an extradition offence is.³²⁶ Our proposal will not affect New Zealand’s existing bilateral extradition treaties, as these treaties were not previously subject to this restriction.³²⁷

³²⁰ *Fernandez v Government of Singapore* [1971] 2 All ER 691 (HL) at 694.

³²¹ At 697.

³²² *Slepčik v Governor of HM Prison Brixton* [2004] EWHC 1224 (Admin) at [23].

³²³ Aughterson, above n 308, at 115.

³²⁴ Council Framework Decision 2005/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190.

³²⁵ Baker, Perry and Doobay, above n 307.

³²⁶ Extradition Act 2003 (UK), ss 137–138.

³²⁷ See [8.25].

QUESTION

Q20 How should the exclusion of military-only offences be dealt with in the new Extradition Act?

Double jeopardy

8.56 Section 7(e) provides that a mandatory restriction exists where:

the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or New Zealand, or has undergone the punishment provided by the law of that country or New Zealand, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence;

8.57 The same rule is affirmed in New Zealand domestic law, in section 26(2) of the New Zealand Bill of Rights Act 1990 (NZBORA): “No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.”

8.58 The objective of the double jeopardy principle, in extradition law, is to ensure that a person is not prosecuted on the same facts in more than one country. As a part of international extradition cooperation, there is an understanding that countries must demonstrate mutual trust in each other’s criminal justice systems.³²⁸

8.59 New Zealand’s double jeopardy exception to surrender is effectively identical to that in the Australian Extradition Act.³²⁹ The provisions refer only to the person being acquitted, pardoned, or punished for the offence in either the requesting country or the requested country. Neither provision states whether the restriction applies where the previous acquittal, pardon, or punishment took place in a third state. The Australian Attorney-General’s Second Reading Speech to the Extradition Bill 1987 illustrates that it was a deliberate choice to leave open the possibility of extraditing where there had been a third country pardon or acquittal.³³⁰ The New Zealand legislation does not currently provide a ground for refusing surrender where there has been a previous acquittal, pardon, or punishment in a third country, and it is unclear how decision makers would handle such a case.

8.60 Some countries take a different approach in their extradition legislation by explicitly including third country actions in the double jeopardy exception. This is the approach taken in the London Scheme.³³¹ In both Canada and the United Kingdom, the double jeopardy ground for refusal relies on consideration of whether their own double jeopardy laws would require the person to be discharged if the person were being tried domestically for the offence that is the subject of the request.³³² This removes the need to spell out whether the exception applies to actions in third countries.

8.61 This more flexible approach imports a country’s domestic double jeopardy law as the standard that must be met in determining whether there is a ground for refusing extradition, which makes the task more familiar to the courts. A key advantage is that this allows the subtlety of domestic double jeopardy law to be available to the extradition consideration. For instance, in the United Kingdom, extradition is barred under this ground where either the later alleged

328 Baker, Perry and Doobay, above n 307, at [4.46].

329 Extradition Act 1988 (Cth), s 7(e).

330 Commonwealth of Australia *Parliamentary Debates* House of Representatives (28 October 1987) 1617 (Lionel Bowen, Attorney-General), as cited in Aughterson, above n 308, at 118. The Australian Attorney-General gave the example of drug offenders who had the means and influence to purchase pardons in some countries as illustration of a situation where Australia may want to extradite despite the double jeopardy rule.

331 London Scheme for Extradition within the Commonwealth, above n 293, cl 13(c).

332 See Extradition Act SC 1999 c 18, s 47(a); and Extradition Act 2003 (UK), s 80.

offence is the same as the earlier offence in both fact and law, or using a broader discretionary jurisdiction based on abuse of process, where a prosecution is based on substantially the same facts as were relied on in the earlier prosecution.³³³ It has become more common for countries to recognise exceptions to the double jeopardy rule where it would be in the interests of justice. Extradition law should take account of the subtleties of domestic double jeopardy.

- 8.62 Double jeopardy is an important ground for refusal, but we do not think New Zealand's legislation should not be prescriptive. The ground should allow flexibility about the concept of double jeopardy.
- 8.63 The double jeopardy rules that apply in the New Zealand domestic context, which must be in line with section 26(2) of NZBORA, are a good benchmark of what should be acceptable in the extradition context.
- 8.64 This restriction involves matters with which the courts are familiar, although the additional element of a foreign country's criminal law undoubtedly makes consideration more complex. It involves a finding on the evidence that a person has already been tried and punished, discharged, or pardoned for the crime concerned.³³⁴ This does not seem to be an issue that requires the involvement of the Minister.
- 8.65 Our proposals will not affect New Zealand's existing bilateral extradition treaties, as these treaties all contain a restriction regarding double jeopardy. The treaties must be interpreted broadly, so this should provide sufficient scope for application of the definition in the Act without violating the obligation under the treaty.

QUESTION

Q21 How should the new Extradition Act deal with the double jeopardy ground for refusal?

Detention because of mental health or intellectual disability

- 8.66 Subsections 7(f) and (g) provide that mandatory restrictions exist where:
- (f) the person is detained in a hospital as a special patient within the meaning of that term in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992;
 - (g) the person is detained in a facility as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
- 8.67 These provisions are designed to protect individuals from extradition in cases where it is considered inappropriate to punish a person for a crime in New Zealand and would therefore, likewise, be inappropriate to extradite. Both subsections apply a statutory test that is straightforward and clear. These matters are clearly within the bounds of what the court can effectively address without the need for consideration by the Executive.
- 8.68 While these provisions seem to be unique to New Zealand's legislation, they should be retained. It may be that other jurisdictions rely on either a decision maker's general discretion to refuse extradition or human rights grounds for refusing extradition in this type of situation.
- 8.69 There is a concern, however, that the provisions are overly narrow in that they require that a specific order has been made and the person is being detained. This will only have come

333 Clive Nicholls and others *Nicholls, Montgomery, and Knowles on the Law of Extradition and Mutual Assistance* (Oxford University Press, Oxford, 2013) at [6.23].

334 Anne Warner La Forest *La Forest's Extradition to and from Canada* (3rd ed, Canada Law Book, Ontario, 1991) at 109.

about where there have been other criminal proceedings against the person in New Zealand. However, there may be other instances where a person's mental health or intellectual disability is such that the courts ought to protect that person from extradition. Rather than relying on the orders in the Mental Health (Compulsory Assessment and Treatment) Act 1992³³⁵ or Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003,³³⁶ a more general test could be included in the Extradition Act. For instance, the Act could state that extradition must be refused if the person is "unfit to stand trial or insane within the meaning of section 23 of the Crimes Act 1961" with regard to any offence. An even wider option might be to prevent the extradition of anyone subject to a compulsory treatment order under sections 29 or 30 of the Mental Health (Compulsory Assessment and Treatment) Act. Alternatively, an expanded ground for refusing extradition based on injustice or oppression may cover these circumstances.³³⁷

- 8.70 New Zealand's bilateral extradition treaties contain a ground for refusal that applies where the person sought is still the subject of proceedings in the requested country. We consider that this ground can be interpreted broadly enough to encompass persons detained for reasons of mental health and intellectual disability. Therefore, there is no conflict between our proposals and New Zealand's existing international obligations.

QUESTION

Q22 Should the basis for the application of the mental health or intellectual disability ground for refusal be expanded in the new Extradition Act? If so, what is the best way of doing this?

Section 8: Discretionary restrictions

- 8.71 Unlike the restrictions in section 7, all of the section 8 restrictions on surrender may be overridden by a bilateral extradition treaty. We consider whether this should continue to be the position in relation to the restrictions discussed below.

Injustice or oppression

- 8.72 Section 8(1) provides that a discretionary restriction exists where it would be unjust or oppressive to surrender a person because of:
- (a) the trivial nature of the case; or
 - (b) if the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
 - (c) the amount of time that has passed since the offence is alleged to have been committed or was committed,
- 8.73 This provision allows the decision maker to consider whether the particular circumstances of the case result in injustice or oppression and whether any such injustice or oppression warrants

335 In order for the definition of a "special patient" in s 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 to apply, a person must be liable to be detained under one of several Acts with varying tests. These are: "unfit to stand trial", "insanity", "mentally disordered", "mentally impaired", "would benefit from psychiatric care and treatment", and mental impairment requiring "the compulsory treatment or compulsory care of the offender either in the offender's interest, or for the safety of the public or for the safety of a person or class of person". See Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 24(1), 34(2)–(3), 38(1), 45(2), and 46; Criminal Procedure Act 2011, s 169(2); and Armed Forces Discipline Act 1971, s 191(1).

336 In order for the definition of a "special care recipient" in s 6(2) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 to apply, a person must be liable to be detained under one of several Acts with varying tests, including "unfitness to stand trial", "insanity", and "intellectual disability". See Criminal Procedure (Mentally Impaired Persons) Act 2003, ss 24(1), 34(2)–(3), and 38(1); and Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 45.

337 See [8.77]–[8.84].

the extradition being barred. This provision provides an important check on extradition by allowing the decision maker to examine the particular circumstances of the individual's case. These grounds appear to encompass a central part of the decision maker's role in checking whether extradition is warranted.

- 8.74 The provision is relatively narrow, being confined to the three grounds listed. The injustice or oppression element is designed to ensure that the grounds in and of themselves are not conclusive.
- 8.75 A few New Zealand cases have addressed section 8(1), with the passage of time being the ground most often considered. In one example, *Wolf v Federal Republic of Germany*, the Court of Appeal considered that the person who was the subject of the extradition request could not rely on an argument that too great a time had passed between the alleged offending and the extradition, because he had entered and lived in New Zealand under a false name. The Court found that section 8 only applies where there is a clear nexus between the circumstances relied upon and the statutory criteria that form the basis of the argument.³³⁸
- 8.76 The injustice or oppression ground for refusing extradition can be found in the London Scheme for Extradition within the Commonwealth and has been incorporated within a number of Commonwealth countries' extradition legislation. This express limitation to extradition is now mostly confined to Commonwealth countries' extradition law.³³⁹
- 8.77 Different countries have different variations on the injustice and oppression ground for refusal. Australia only incorporates it by way of regulation in relation to agreements with specific countries or groups of countries.³⁴⁰ The United Kingdom has injustice or oppression restrictions in the circumstances of delay,³⁴¹ and physical and mental condition.³⁴² The equivalent Canadian ground is unbounded by particular circumstances.³⁴³ Further, the courts in both the United Kingdom and Canada are empowered to refuse extradition where it would be inconsistent with core human rights norms as found in the European Convention on Human Rights³⁴⁴ and the Canadian Charter of Rights and Freedoms.³⁴⁵ In both cases, matters involving injustice and oppression are able to be raised through human rights arguments.
- 8.78 The injustice or oppression ground should not be limited to particular circumstances. It should be wide enough to catch all circumstances where extradition would be unjust or oppressive. The provision could continue to list particular circumstances but could also include a general ground such as "any other sufficient cause", which is the wording used in the London Scheme. The expanded ground should then be able to encapsulate two further discretionary grounds for the Minister, discussed below – "compelling or extraordinary personal circumstances" and "any other reason".
- 8.79 There has been considerable case law on the injustice and oppression ground of refusal, which would help guide the New Zealand courts if the ground is broadened. The words "unjust" and

338 *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) at [60].

339 Aughterson, above n 308, at 157–158.

340 For instance, the Extradition (Commonwealth Countries) Regulations 2010 incorporates the same injustice or oppression ground that applies under the London Scheme for Extradition within the Commonwealth.

341 Extradition Act 2003 (UK), ss 14 and 82.

342 Extradition Act 2003 (UK), ss 25 and 91.

343 Extradition Act SC 1999 c 18, s 44(1)(a).

344 Convention for the Protection of Human Rights and Fundamental Freedoms, above n 289.

345 Canada Act 1982 (UK) c 11, sch B pt 1 [Canadian Charter of Rights and Freedoms]. See Extradition Act 2003 (UK), ss 21 and 87, which provide that a judge must discharge a person if the extradition would be incompatible with the person's rights under the European Convention on Human Rights.

“oppressive” were defined by Lord Diplock in *Kakis v Government of Cyprus* in the following way:³⁴⁶

“Unjust” I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, “oppressive” as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.

- 8.80 In Canada, the arguments under the injustice and oppression ground are often equated with arguments regarding rights under section 7 of the Canadian Charter (the right to life, liberty, and security of person).³⁴⁷ The types of factors that the courts have found must be considered under this ground include humanitarian issues such as the person’s age, health, and family circumstances; the severity of the penalty; abuse of process; the criminal justice system and conduct of proceedings in the requesting country; the timeliness and manner of prosecuting in Canada; and the extradition partner’s status as a responsible member of the international community.³⁴⁸ The courts have found that the Minister of Justice, who is the decision maker on grounds to refuse surrender, has the task of balancing the individual’s personal circumstances against factors militating in favour of extradition.³⁴⁹
- 8.81 The Canadian case law in relation to the application of section 7 of the Charter to extradition has said that the circumstances warranting a refusal to extradite must “shock the conscience” or be “simply unacceptable”.³⁵⁰ This high threshold that must be met before this ground will apply is also evident in United Kingdom case law. For instance, in finding that a delay has been unjust or oppressive, it must be asked whether a fair trial was impossible.³⁵¹
- 8.82 A broad injustice or oppression ground in New Zealand should similarly have a high threshold and should not be a means by which individuals could unjustifiably delay proceedings by raising dubious bases of injustice or oppression.
- 8.83 These are the types of matters that courts are familiar with addressing in domestic cases. The type of decision under this ground can be compared to the role of the Immigration and Protection Tribunal under the Immigration Act 2009, which is given a broad jurisdiction to consider a range of factors, including humanitarian grounds, in deciding appeals on immigration decisions. The Tribunal is considered to be an appropriate forum for this type of decision in that context.
- 8.84 The injustice and oppression ground should be incapable of being overridden by an extradition treaty. This would accord with the way the New Zealand courts currently address these matters. In *Bujak v Republic of Poland*, it was found that the discretionary restrictions in section 8 did not apply because they were overridden by the terms of New Zealand’s extradition treaty with Poland.³⁵² This meant that Mr Bujak’s arguments based on delay could not proceed under section 8. However, the Court of Appeal found that it could consider undue delay as an aspect of abuse of process under the court’s inherent jurisdiction on the basis that the court in extradition proceedings has the same powers as in a preliminary hearing in domestic criminal

346 *Kakis v Government of Cyprus* [1978] 1 WLR 779 at 782–783.

347 Canadian Charter of Rights and Freedoms, above n 345, s 7. See *Hanson v Canada (Minister of Justice)* 2005 BCCA 77, [2005] BCJ 268 at [22].

348 *United States of America v Bonamie* 2001 ABCA 267, [2001] AJ 1334 at [63].

349 *Ganis v Canada (Minister of Justice)* 2006 BCCA 543, [2006] BCJ 3139 at [30].

350 *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at [35] and [63].

351 *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21, [2009] 1 WLR 1038 at [33].

352 *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604 at [18].

proceedings.³⁵³ The Court's decision means that the passage of time aspect of the injustice and oppression ground is already treated as effectively non-excludable.

QUESTION

Q23 Should the injustice or oppression ground for refusal be expanded in the new Extradition Act?

Prosecution in New Zealand

8.85 Section 8(2) provides:

A discretionary restriction on surrender exists if the person has been accused of an offence within the jurisdiction of New Zealand (other than an offence for which his or her surrender is sought), and the proceedings against the person have not been disposed of.

8.86 Under this ground, extradition may be refused where a prosecution for a New Zealand offence is pending against the individual sought for extradition. This cannot be the same offence for which extradition is sought.

8.87 Section 8(2) is an unusual provision, and comparable jurisdictions do not provide for this ground. While it seems sensible that the New Zealand authorities should be able to address any outstanding charges in New Zealand before extraditing a person, this does not seem an appropriate factor to include in the grounds for refusing surrender. It is better dealt with as a procedural aspect of the extradition and could be addressed through section 32, which allows the Minister to delay or refuse surrender where a person is liable to be detained in prison because of a sentence for a New Zealand offence.

QUESTION

Q24 How should the new Extradition Act deal with the situation whereby a prosecution for a New Zealand offence is pending against the individual sought for extradition?

Section 30: Minister-only grounds for refusal

8.88 Section 30 contains further grounds on which the Minister of Justice can refuse to surrender a person for extradition. Some of these grounds direct that the Minister must refuse extradition if certain circumstances are present, while others may or may not result in a refusal to extradite even if they do apply. Two of the grounds, torture and the death penalty, cannot be overridden by a bilateral extradition treaty, while the remainder of the Minister's grounds can be.³⁵⁴ In the discussion of each ground, we consider whether a treaty should be able to be construed to override the ground of refusal.

Any mandatory restriction applied by treaty

8.89 Section 30(2)(ab) provides that the Minister must not determine to surrender a person if:

the Minister is satisfied that a mandatory restriction on the surrender of the person applies under the provisions of the treaty (if any) between New Zealand and the extradition country;

³⁵³ At [30]–[31].

³⁵⁴ Extradition Act 1999, s 11(2)(c).

- 8.90 This provision allows bilateral extradition treaties to contain additional mandatory restrictions on surrender. A new Extradition Act should have a clear and comprehensive list of grounds for refusal that cannot be altered by treaty. We consider that it will be necessary to continue to have a provision like section 30(2)(ab) that requires a further mandatory restriction from a treaty to be applied.
- 8.91 We see no reason why the court should not apply grounds for refusal that stem from treaty obligations, unless they are specifically reserved for a Government Minister in the treaty.

Torture

- 8.92 Section 30(2)(b) contains a prohibition against extradition when there is a strong risk of torture in the requesting country. The Minister must refuse to surrender if:

it appears to the Minister that there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country;

- 8.93 This prohibition ought to be retained, but there are two questions for possible reform. First, should that decision continue to be made by the Minister, or should it be considered by the court as part of its consideration of the application? Second, should the exception be expanded to include inhuman treatment that might not rise to the standard of torture but would nevertheless be unacceptable if it occurred in New Zealand?
- 8.94 The current provision reflects New Zealand's international commitment in the Convention against Torture not to extradite "where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture".³⁵⁵ Torture is defined as:³⁵⁶
- any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
- 8.95 That convention contrasts torture with "other acts of cruel, inhuman or degrading treatment or punishment" that do not amount to torture and places on members an obligation to prevent such treatment in their own jurisdiction.³⁵⁷
- 8.96 New Zealand is also committed under the International Covenant on Civil and Political Rights not to subject anyone to "torture or to cruel, inhuman or degrading treatment or punishment".³⁵⁸ Both commitments are reflected in NZBORA, which prohibits torture or cruel treatment generally in section 9 and requires in section 23(5) that "everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person".³⁵⁹
- 8.97 The Australian Extradition Act contains a similar mandatory ground³⁶⁰ to that in the New Zealand Extradition Act, while both the Canadian and United Kingdom Acts do not have such a prohibition. In the case of the United Kingdom, an extradition must be consistent

³⁵⁵ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, above n 298, art 3(1). Under art 3(2), for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

³⁵⁶ Article 1.

³⁵⁷ Article 16.

³⁵⁸ International Covenant on Civil and Political Rights, above n 317, art 7. The obligation is also given effect to by the Crimes of Torture Act 1989.

³⁵⁹ The relation between the two obligations was considered in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

³⁶⁰ Extradition Act 1988 (Cth), s 15 B.

with the Human Rights Act 1998 (UK) and the European Convention on Human Rights that it incorporates.³⁶¹ Under the Canadian statute, such an extradition would be subject to the direction that the Minister of Justice should refuse extraditions if it would be “oppressive having regard to all the relevant circumstances”.³⁶² In relation to potential treatment that does not amount to torture, there is considerable case law in the United Kingdom and in Europe as to what might amount to a “real risk of ill-treatment of the requisite degree of severity in the receiving state”.³⁶³

- 8.98 There is no question that the prohibition on extradition where there is a substantial risk of torture should be maintained. It is required by both New Zealand’s international obligations and New Zealanders’ expectations. The Convention has been ratified by all of New Zealand’s existing bilateral treaty partners, so no issue with consistency with those treaties arises.
- 8.99 As with the injustice and oppression ground, the type of consideration required under this ground is likely to be suitable for a court and has long been considered by courts in other countries.
- 8.100 The current provision could be expanded to include treatment that might amount to breaches of section 9 of NZBORA.³⁶⁴ This might, however, detract from the simplicity of the current drafting. It may also create a consistency issue with New Zealand’s existing bilateral treaties, as extradition may be sought by countries that do not treat prisoners as New Zealand would, and the expanded ground might then raise the possibility that an extradition will be prohibited on that basis, despite the treaty relationship.
- 8.101 Another alternative would be to add cruel and inhuman treatment falling short of torture as a factor that the decision maker must consider before deciding on extradition. Arguably, such matters can currently be considered by the Minister under the general discretion to refuse extradition “for any other reason” in section 30(3)(e). There may be some advantage in expressly acknowledging this as a ground of potential refusal, either in its own right or under the rubric of a general “injustice and oppression” ground. This may, however, raise an issue of consistency with New Zealand’s existing bilateral treaties.

QUESTION

Q25 How should the torture ground for refusal be addressed in the new Extradition Act?

New Zealand citizenship

- 8.102 Under section 30(2)(c), the Minister is required not to surrender a New Zealand citizen if either the applicable bilateral extradition treaty, an Order in Council designating the requesting country for extradition using the standard procedure, or a specific undertaking or arrangement with the requesting country provide that no New Zealand citizen may be surrendered. If such a treaty, Order in Council, or undertaking or arrangement does not preclude the surrender of New Zealand citizens, the Minister has the discretion under section 30(3)(c) to nevertheless refuse to surrender the person if it would not be in the interests of justice to do so.

³⁶¹ Extradition Act 2003 (UK), s 21.

³⁶² Extradition Act SC 1999 c 18, s 44(1).

³⁶³ See Nicholls and others, above n 333, at [7.28]–[7.41].

³⁶⁴ Section 9 provides: “Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.”

- 8.103 Generally, New Zealand extradition law has followed the common law tradition of not distinguishing New Zealand citizens and non-citizens for the purpose of extradition. The basis for this principle is that persons who have committed an offence should generally be tried and punished by the criminal justice system of the jurisdiction in which they committed the crime.³⁶⁵ These provisions are an exception to this principle where a particular extradition relationship with a country has required this limitation to be included, most likely to reciprocate the requirement of extradition with that country. Where a country is covered by the Act as a backed-warrant country, because it is a Commonwealth country or because the Minister has extended coverage to the country for an individual request under Part 5, there is no discretion to refuse extradition on the grounds that the person is a New Zealand citizen.
- 8.104 We can see no reason why the general approach should be altered. New Zealand law generally does not distinguish between citizens and residents, particularly in terms of the rights and protections available to each. This seems to be an important value to uphold in New Zealand's extradition law. Furthermore, any distinction in treatment between New Zealand citizens and others may be in breach of the right to freedom from discrimination under NZBORA and the Human Rights Act 1993.³⁶⁶
- 8.105 However, it may be that the possibility of this ground being included in the extradition arrangements between New Zealand and another country needs to be preserved in order to implement those arrangements. We propose that this ground is combined with the treaty restriction ground, currently in section 30(2)(ab) and discussed above, rather than being a separate ground for refusal.

QUESTION

Q26 How should the restriction on extraditing New Zealand citizens be addressed in the new Extradition Act?

Death penalty

- 8.106 Section 30(3)(a) allows the Minister to refuse surrender on the grounds that the person sought might be subject to the death penalty. This reflects New Zealand's own abolition of the death penalty³⁶⁷ and its commitment to abolition internationally.³⁶⁸
- 8.107 There are two important questions to be considered. First, is New Zealand's commitment to the abolition of the death penalty appropriately reflected by a refusal ground that is, on its face, discretionary? Second, does framing the ground in this way adequately reflect the likely practice in New Zealand that a person who is subject to the death penalty will never, in fact, be extradited?
- 8.108 Domestic obligations constrain the discretion to extradite where there is a risk that the person would be subject to the death penalty. Section 8 of NZBORA provides that "[n]o one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice".

365 Australian Attorney-General's Department *A new extradition system – a review of Australia's extradition law and practice* (2006) at 28.

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

367 See Abolition of the Death Penalty Act 1989.

368 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1642 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991). New Zealand ratified the Protocol on 22 February 1990; Ministry of Justice "International Covenant on Civil and Political Rights" < www.justice.govt.nz > .

- 8.109 Canada has a similar provision.³⁶⁹ The Supreme Court of Canada has held that it is only in exceptional circumstances that extraditions will be permissible without an undertaking that the extradited person will not be subject to the death penalty on the basis of the guarantees regarding the death penalty in the Canadian Charter of Rights and Freedoms.³⁷⁰
- 8.110 Both Australia³⁷¹ and the United Kingdom³⁷² have mandatory provisions preventing extradition unless there are appropriate assurances that the death penalty will not be imposed or, if imposed, will not be carried out. The United Kingdom position is further entrenched by European Convention on Human Rights obligations that would otherwise prevent extradition without such an undertaking.³⁷³ To give effect to the reality that New Zealand would not extradite a person who is likely to be executed, New Zealand should adopt a provision similar to that in Australia and the United Kingdom. It would state that an extradition cannot take place unless the Minister is satisfied that the death penalty will not be imposed or, if it is imposed, will not be carried out. New Zealand law should not allow exceptional circumstances to override the existence of such a requirement. This would better reflect what is both the reality and the aspiration of New Zealand law and provide a clearer indication to requesting countries as to what they have to undertake before extradition can occur. Our understanding is that such a provision would not create difficulties with New Zealand's existing extradition treaty relationships.
- 8.111 Currently, under section 11, no treaty may be construed to override the death penalty ground. We consider that this ground should have precedence over all of New Zealand's bilateral extradition treaties as it is in line with New Zealand's international obligations and significant values that New Zealanders want to see upheld. In addition, internationally, a number of courts are increasingly finding that the Second Optional Protocol to the International Covenant on Civil and Political Rights creates an obligation not to extradite a person who could be subjected to the death penalty.³⁷⁴
- 8.112 Both Australia and the United Kingdom require that the relevant Minister must be satisfied as to the adequacy of undertaking – in the case of Australia, the Federal Attorney-General, and in the United Kingdom, the Home Secretary. The role of Ministers is indicative of the reality that such undertakings are best sought through diplomatic channels and best evaluated, at least initially, by the Executive. For instance, the Baker Report, which reviewed the United Kingdom's extradition system in 2011, recommended that the Home Secretary retain this role, even though it otherwise recommended that issues under the Human Rights Act 1998 (UK) be dealt with by the courts.³⁷⁵ In our view, a similar approach should be taken in New Zealand.

369 Extradition Act SC 1999 c 18, s 44(2). "The Minister may refuse to make a surrender order if the Minister is satisfied that the conduct in respect of which the request for extradition is made is punishable by death under the laws that apply to the extradition partner."

370 *United States v Burns* 2001 SCC 7, [2001] 1 RCS 283. See Canadian Charter of Rights and Freedoms, above n 345.

371 Extradition Act 1988 (Cth), s 15B:

(3) The Attorney-General may only determine that the person be surrendered to the extradition country concerned if:
 (a) the Attorney-General does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture; and
 (b) the Attorney-General is satisfied that, on surrender to the extradition country, there is no real risk that the death penalty will be carried out upon the person in relation to any offence.

372 Extradition Act 2003 (UK), s 94.

373 The European Court of Human Rights has found that extradition in circumstances where a person was likely to be subject to the death penalty would offend against the protections of the right to life and the prohibition on inhuman or degrading treatment in arts 2 and 3 respectively of the European Convention on Human Rights, above n 289: see *Al-Saadoon and Mufdhi v the United Kingdom* (61498/08) Section IV, ECHR 2 March 2010.

374 See, for instance, the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR); and the Supreme Court of Canada in *United States v Burns*, above n 370.

375 Baker, Perry and Doobay, above n 307, at [9.15]–[9.16].

- 8.113 A judicial review of a decision to surrender might also involve, as it has in Australia, consideration of the process that led to that decision.³⁷⁶ The court, however, would be more concerned with whether the Minister asked himself or herself the right questions and considered the appropriateness of the evidence rather than second-guessing the effectiveness of any undertaking given.

QUESTION

Q27 How should the death penalty ground for refusal be addressed in the new Extradition Act?

Compelling or extraordinary personal circumstances

- 8.114 Section 30(3)(d) provides that the Minister may determine not to surrender a person if:
- ... it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person;
- 8.115 This provision gives the Minister the discretion to take into account compelling or extraordinary personal circumstances of the person who is the subject of the extradition request, including age or health. Under section 32(4), the Minister may also, after deciding to surrender a person, make an order delaying the extradition until after the expiration of a particular period where compelling or extraordinary personal circumstances make it unjust or oppressive to extradite immediately.
- 8.116 Because this is a discretionary ground for the Minister, there may be a temptation to view it as a prerogative-style power to grant mercy. However, the matters to be weighed in deciding this ground are actually those that courts address regularly in sentencing.
- 8.117 Giving this decision to the courts would reduce the personal nature of the assessment and mean that a Government Minister is not faced with difficult decisions that may have significant political pressure attached. The courts are able to provide an objective assessment of risk and seriousness. The power to delay extradition for a period to resolve or treat personal concerns should also be given to the court.
- 8.118 This ground should be combined with the other injustice or oppression grounds discussed above and included in the proposed general injustice or oppression ground for the courts to consider under new extradition legislation. As discussed in relation to that ground, a high threshold would be needed before the ground would apply.

QUESTION

Q28 How should the compelling or extraordinary circumstances ground for refusal be dealt with in the extradition process?

³⁷⁶ See Jo Lennan and George Williams “The Death Penalty in Australian Law” (2012) 34 SLR 659 at 685; and *McCrea v Minister for Customs and Justice* [2005] FCAFC 180, (2005) 145 FCR 269 at [25].

Speciality

8.119 Section 30(5)(d) provides that the Minister must not surrender a person unless by virtue of the requesting country's law, a provision in the applicable extradition treaty, or an undertaking given by the requesting country that the person will not:

... be detained or tried in that country for any offence committed, or alleged to have been committed, before the person's surrender other than—

- (i) an extradition offence to which the request for the person's surrender relates; or
- (ii) any other offence carrying the same or a lesser maximum penalty of which the person could be convicted on proof of the conduct constituting any extradition offence to which the request for the person's surrender relates; or
- (iii) an extradition offence in relation to the country (not being an offence for which the country requested the surrender of the person) in respect of which the Minister consents to the person being so detained or tried; or
- (iv) an offence (not being an extradition offence) for which the person has consented to surrender under section 29; or

8.120 The principle of speciality requires that the person surrendered cannot be prosecuted or punished in the requesting state for offences committed prior to the extradition other than that for which extradition was granted, unless the person is afforded a reasonable opportunity to leave the requesting state.³⁷⁷

8.121 Speciality is a longstanding principle that developed in early extradition treaties because of a concern that a requesting country would prosecute a person for a political offence after having obtained the surrender of the person for a separate offence.³⁷⁸ The rationale behind the principle continues to be that, where extradition is granted for specific offences in accordance with the extradition laws of the requested country, it would amount to false pretences and an abuse of process for the person to be prosecuted for unrelated offences.³⁷⁹

8.122 This provision is an important protection for individuals from being prosecuted for offences for which New Zealand does not allow extradition as well as a protection for the sovereign interests of New Zealand in extradition relationships. The lack of an assurance of speciality continues to be widely included in extradition legislation and treaties as a ground for refusing extradition. This issue has, however, often been addressed when New Zealand has been negotiating an extradition relationship with a country, such as through a treaty or the London Scheme or in consideration of designating a country under the Act. Reciprocity has traditionally been the primary consideration in deciding to proceed with such a relationship, and it continues to have weight. Speciality is an important part of the assessment of whether a country's extradition arrangements are reciprocal.

8.123 An adjunct to the speciality rule is the mandatory ground for refusal in section 30(5) if the Minister does not have, by virtue of the requesting country's law, the applicable extradition treaty, or an undertaking from the requesting country, the assurance that the person will not be surrendered to a third country for prosecution or punishment for an earlier unrelated offence. This provides a similar protection to the individual and the interests of New Zealand against extradition that, in effect, results in prosecution or punishment for an offence that was not tested under New Zealand's extradition law.

³⁷⁷ Baker, Perry and Doobay, above n 307, at [3.28]; Aughterson, above n 308, at 83–84.

³⁷⁸ Baker, Perry and Doobay, above n 307, at [3.28].

³⁷⁹ Aughterson, above n 308, at 84.

- 8.124 Because this ground involves relations between countries and may involve diplomatic assurances, it seems most appropriate for it to remain with the Minister. This is not something that the courts are in the position to assess. However, this is not a ground that requires an evaluative consideration. The required assurances, whether through the requesting country's law, a treaty, or an undertaking, will either be present or they will not.
- 8.125 Speciality is fundamental to whether extradition should occur. We consider that it would be more efficient for speciality to be addressed at the stage that a country is making a request (and thus a matter for the central authority to consider) if it has not already been addressed in the process designating the country into a particular category under the Act.

QUESTION

Q29 How should the principle of speciality be dealt with in the extradition process?

Any other reason

- 8.126 Section 30(3)(e) provides that the Minister may determine not to surrender a person if “for any other reason the Minister considers that the person should not be surrendered”. This section appears to create an unbounded discretion. There is an unresolved question of whether this broad ground is coloured by the nature of the other considerations in section 30.
- 8.127 Without direction about when the discretion should be used, this ground has the potential to create pressure on the Minister, as it appears to put the final decision solely in the Minister's hands. This could lead to political pressure to decide a request in a certain way.
- 8.128 While Australia has retained a general discretion for the Attorney-General to refuse extradition, this is not the case in the United Kingdom and Canada. However, as discussed, those jurisdictions allow a broad range of matters to be considered under a human rights ground, or the general injustice or oppression ground, which we also propose for a new Extradition Act.
- 8.129 It could be argued that, despite the reworking of the grounds in the ways we propose, it is useful to retain a final discretion for the Minister to refuse extradition on any ground. There could be circumstances outside of any of the grounds in the legislation that nevertheless warrant extradition being refused, and it may be helpful for the court not to be the only guardian of the protections for the individual who is the subject of the request. We do not favour this option, as it makes for less clarity and certainty in the grounds for refusal that are available, and it makes for a difficult role for the Minister. It also creates another opportunity for judicial review and the resulting delay to the resolution of proceedings. We raise this as a question for consideration.

QUESTION

Q30 Should the Minister retain a broad discretionary basis to refuse extradition in the new Extradition Act?

FURTHER GROUNDS FOR CONSIDERATION

- 8.130 There are several further grounds for refusal that should be considered. These grounds are present either in another country's extradition legislation or an international scheme.

Forum bars

- 8.131 The United Kingdom has introduced a ground for refusing extradition if refusal would not be in the interests of justice because a substantial measure of the conduct relevant to the alleged offence occurred in the United Kingdom and the offence can thus be prosecuted in the United Kingdom instead. A number of factors are to be considered in deciding whether it is in the interests of justice, including where most of the harm or loss has occurred, the interests of any victims, whether evidence is available for a prosecution in the United Kingdom, potential for delay, and the individual's connections with the United Kingdom.³⁸⁰
- 8.132 The forum bar has the advantage of avoiding extradition for individuals where it is fairer for them to be prosecuted in the requested country. It applies particularly to cross-border crimes and provides a mechanism for deciding who tries the individual. A domestic prosecution is likely to result in less hardship for the individual than extradition.
- 8.133 This may already be covered in New Zealand, in practice, by the provisions that allow a New Zealand prosecution to be completed before an extradition request and the prohibition on double jeopardy. It seems, however, that a specific ground for refusal would give the person sought for extradition the opportunity to raise the option of the offence being tried in New Zealand. It is possible, however, that having a specific ground for refusal could allow an individual to elect to be prosecuted in New Zealand for a crime, such as genocide, that, while theoretically prosecutable in New Zealand, would in fact be very difficult or even impossible to prosecute.
- 8.134 It is unclear the extent to which this ground would be applicable and necessary, or problematic, in New Zealand.

QUESTION

Q31 Should the new Extradition Act include a ground for refusing surrender on the basis that the offence would be more appropriately prosecuted in New Zealand?

No counsel present

- 8.135 The London Scheme for Extradition within the Commonwealth includes a discretionary ground for refusing extradition where:
- judgment was rendered in the requesting country and the person was not present; and
 - no counsel appeared for the person, or counsel was present but not permitted to participate in proceedings.³⁸¹
- 8.136 This ground is concerned with fair trial rights in the requesting country. Under our proposed revised grounds, concerns about lack of or inadequate legal representation at trial could be addressed under the general injustice or oppression ground.

QUESTION

Q32 Should the new Extradition Act have extra protections in relation to fair trial rights in the requested country? If so, what protections are necessary?

³⁸⁰ Extradition Act 2003 (UK), new s 19B inserted by the Crime and Courts Act 2013, sch 20, cl 3 (yet to take effect).

³⁸¹ London Scheme for Extradition within the Commonwealth, above n 293, cl 14(a).

IS THIS STEP IN THE EXTRADITION PROCESS NECESSARY FOR CATEGORY 1 COUNTRIES?

- 8.137 For countries where the types of objections that arise under the grounds for refusal are very unlikely to occur, this step arguably makes no real contribution to the extradition system. Instead, it lengthens the process and merely provides an opportunity for delay. For example, in recent years, several requests from Australia have been faced with attempts to use a personal circumstances ground of refusal to prevent extradition. There is a concern that this unnecessarily delays these otherwise straightforward extradition requests.³⁸²
- 8.138 However, although the scenarios covered by the grounds are unlikely to arise in some countries, it would be difficult to rule all of them out on an absolute basis. Not having these considerations taken into account in Category 1 cases would mean that no country could be added to that category unless New Zealand could be satisfied that there was no possible case in which the grounds might appropriately be invoked. One approach may be for a new Extradition Act to provide that only some of the grounds apply to Australia or all Category 1 countries. For example, the grounds relating to torture and the death penalty could be excluded for those countries because of the strong improbability that torture or the death penalty would ever arise.

QUESTION

Q33 Should there be any exceptions to the applicable grounds for refusal for extradition requests from Australia or from Category 1 countries?

382 *Mailley v District Court at North Shore* [2013] NZCA 266.

Chapter 9

Procedure

KEY PROPOSAL

Proposal: The new Act should contain its own tailor-made procedural rules.

Rationale: At the moment, too much litigation relates to uncertain procedures rather than substantive matters. Some of the problem is caused by using procedural rules in the extradition context that were devised in other contexts.

INTRODUCTION

- 9.1 In this chapter, we ask whether the procedures in the Extradition Act 1999 are clear, suitable, and fair. The processes we discuss are:
- the jurisdiction of the court;
 - the arrest warrant;
 - bail;
 - disclosure;
 - the substantive hearing, in particular, the admissibility of evidence and the conduct of the hearing;
 - appeal; and
 - the Minister's final decision.
- 9.2 Currently, too much of the litigation relates to uncertain procedures rather than substantive matters. We propose that new extradition legislation should contain tailor-made procedural rules.

THE JURISDICTION OF THE COURT

The current law

*Standard proceedings*³⁸³

- 9.3 In standard extradition proceedings, the District Court has the same powers and jurisdiction, and must conduct the proceedings in the same manner, as if it was a domestic “committal hearing” for “an indictable offence” allegedly committed in New Zealand.³⁸⁴ To that end, Parts 5 and 5A of the Summary Proceedings Act 1957 apply.
- 9.4 Committal hearings and indictable offences were, however, abolished in New Zealand by the Criminal Procedure Act 2011. As part of that process, Parts 5 and 5A of the Summary

³⁸³ For full discussion on the standard procedure see ch 2 and Figure 2.

³⁸⁴ Extradition Act 1999, s 22(1)(a).

Proceedings Act were repealed. The Extradition Act was amended to state that, for the purposes of the standard procedure, the Summary Proceedings Act must be read as if the Summary Proceedings Act was still in effect.³⁸⁵

*Backed-warrant procedure*³⁸⁶

- 9.5 The approach to the backed-warrant procedure is more straightforward because it is aligned to the Criminal Procedure Act. The Criminal Procedure Act includes a form of summary proceeding for what it terms category 2 offences, which is applied to the backed-warrant process.³⁸⁷

Problem

- 9.6 The Summary Proceedings Act's provisions were assessed as "out of date and excessively inflexible".³⁸⁸ New Zealand's domestic criminal procedure is now governed by the Criminal Procedure Act 2011. It is difficult to incorporate provisions from the repealed Summary Proceedings Act.

Options for reform

- 9.7 Future extradition legislation could either:
- cross-reference powers and jurisdiction that currently exist under the Criminal Procedure Act 2011 and other legislation;³⁸⁹ or
 - create new powers and jurisdiction that are specific to the extradition context. This could adopt aspects of the old committal procedure but use more modern language.
- 9.8 We think that the appropriate procedural rules for extradition differ so significantly from those in the Criminal Procedure Act that a purpose-built set of procedures is needed for both standard procedure and backed-warrant extraditions.

THE ARREST WARRANT

- 9.9 Under the current regime, regardless of whether an extradition request is subject to the backed-warrant or the standard procedure, the judge must be satisfied that:³⁹⁰
- the person sought is in, or is on their way to, New Zealand; and
 - the request involves an "extradition country,"³⁹¹ an "extraditable person",³⁹² and an "extradition offence".³⁹³

Problems have been created by the uncertainty as to how those matters can be established.

385 Extradition Act 1999, s 22(4).

386 For full discussion on the backed-warrant procedure, see ch 2 and Figure 3.

387 Extradition Act 1999, s 43(1).

388 The general policy statement in the Explanatory Note to the Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) relevantly states: "Over the last 10 to 20 years, the law relating to criminal procedure has attracted increasing criticism. The principal statutes governing criminal procedure are out of date and excessively inflexible."

389 Broadly speaking, this could involve applying the provisions in the Criminal Procedure Act 2011 that enable the filing of evidential statements and testing of evidence before trial with perhaps a cross-reference to ss 82–86 and 92–100 of the Criminal Procedure Act.

390 Extradition Act 1999, s 19 for Part 3 and s 41 for Part 4.

391 An "extradition country" is a country to which the Extradition Act 1999 applies: s 2, definition of "extradition country".

392 An "extraditable person" is a person suspected of, or who has been convicted of, committing an extradition offence: Extradition Act 1999, s 3.

393 An "extradition offence" is an offence under the law of the requesting country punishable by 12 months or more in prison, and which, if that conduct had occurred in New Zealand at the relevant time, would also have been an offence in New Zealand punishable by 12 months or more in prison: Extradition Act 1999, ss 4 and 5.

- 9.10 However, there are significant differences between the backed-warrant and standard procedure in relation to the documentation that must be put before the judge and the form of the final warrant. These differences are set out below:

TYPE OF PROCEDURE	SECTION	FORM OF THE APPLICATION	REQUIRED SUPPORTING MATERIAL	FORM OF THE FINAL WARRANT
Standard procedure (Part 3)	19	<p>The Minister must (in writing):</p> <ul style="list-style-type: none"> • notify the Judge that an extradition request has been made under Part 3; and • request that the Judge issue an arrest warrant. <p>(Note: There is no prescribed form for the Minister's letter.)</p>	"Information" to satisfy the judge of the relevant criteria.	A new domestic arrest warrant.
Backed-warrant procedure (Part 4)	41	The applicant must produce to the judge an arrest warrant for the person sought, issued in the extradition country by a person having lawful authority under the law of that country to issue it.	There is no specific reference to supporting material in section 41.	An endorsement of the foreign arrest warrant.

- 9.11 The table gives the impression that, technically, a judge could be presented with a single document in support of an application for an arrest warrant: a letter from the Minister (under the standard procedure) or the foreign arrest warrant (under the backed-warrant procedure). The reality, however, is that neither of those documents would be capable, on their own, of satisfying the judge.
- 9.12 The Act permits a high degree of flexibility in both the standard procedure and backed-warrant procedure but causes confusion by not giving the parties or the court guidance as to what might be appropriate. In backed-warrant proceedings, applicants are routinely producing exactly the same documents in support of the arrest warrant application as those that are later produced at the substantive hearing. Under both categories in the table above, all documents are provided through affidavit.

Overlap with the substantive hearing decision

- 9.13 At both the arrest warrant stage and the substantive hearing, a judge will need to decide whether there is an "extraditable person", an "extradition country", and an "extradition offence" and whether identity is sufficiently proven. There are some differences in the assessments at the different stages; however, the supporting documentation to be produced and the critical issues at both stages are very similar.
- 9.14 To determine whether a request involves an extradition country, an extraditable person, and an extradition offence, a judge may be called upon to consider complex legal and factual issues, compare foreign with domestic law, and examine treaty obligations.³⁹⁴
- 9.15 The advantage of a judge making a preliminary decision on these critical issues is that it ensures that clearly unmeritorious cases are weeded out before there is any inconvenience caused to the person sought.

³⁹⁴ By way of example, see *Warner v United Kingdom* [2001] 1 NZLR 331 (HC), on appeal at [2001] 1 NZLR 337 (CA); *Poon v Police* [2000] 2 NZLR 86 (HC); *Kim v Prison Manager, Mount Eden Corrections Facility* [2012] NZHC 2417, [2012] NZAR 990; and *Kim v Prison Manager, Mt Eden Corrections Facility* [2012] NZCA 471, [2012] 3 NZLR 845.

Options for reform

Filtering out unmeritorious cases in the standard procedure

- 9.16 New extradition legislation could contain prescriptive provisions surrounding the process of a central authority vetting incoming extradition requests. Any application for an arrest warrant should be accompanied by a certificate from the New Zealand central authority that the foreign central authority has reasonable grounds to believe that there is an extradition country, an extraditable person, and an extradition offence and the reasons why. This is the approach taken in Canada and the United Kingdom.³⁹⁵
- 9.17 The judge's role would then be limited to confirming the correctness of the form of the central authority's certificate, the foreign arrest warrant, and the identity and current location of the person sought.

Challenging an arrest warrant

- 9.18 Currently, it is possible for an arrested person to challenge an arrest warrant either through judicial review or habeas corpus applications (where the Crown can be asked to justify the detention of a prisoner). These applications add to the complexity of proceedings and can delay the extradition process.
- 9.19 We prefer it if the following occurs. There should be two avenues for challenge. The first and fundamentally important opportunity will be when an arrested person is required to be brought before the court at the first available opportunity. This is the time for any person sought to be extradited to raise any matter that they wish to. It will be for the judge to then decide what the response should be. The second opportunity should occur much later on and through a general right of appeal at a final judicial decision. This is the time when the person can raise any issue at all pertaining to the entire process.
- 9.20 If this procedure is firmly understood and followed, we see no necessity in affording the rights of judicial review or habeas corpus. A person has other adequate remedies that are less complex and more efficient.
- 9.21 One of the benefits of this proposal would be that, in the future, habeas corpus applications would largely be limited to the comparatively straightforward issue of identity. The more complex issues relating to the existence of an extradition offence, an extraditable person, and an extradition country would be primarily dealt with in the appeal.³⁹⁶

Technical issues

- 9.22 Three technical matters have been brought to our attention:
- (a) In the backed-warrant procedure, a judge cannot issue an arrest warrant unless satisfied that the person who issued the foreign arrest warrant had "lawful authority to issue it".³⁹⁷ This has led to a cumbersome practice of applicants routinely producing an affidavit from a

395 In Canada, the Minister of Justice must consider certain factors (including whether there is an "extradition offence") and issue an "Authority to Proceed" in the prescribed form before the Attorney-General may make an application for an arrest warrant: see ss 15 and 16 of the Extradition Act SC 1999 c 18. In the United Kingdom, the Secretary of State must issue a "certificate" in the prescribed form and send it to the court if the criteria for a "valid" extradition request are met under Part 2 of their Act (which applies to non-European Union countries): see s 70 of the Extradition Act 2003 (UK).

396 For instance, the provision could contain a statutory time limit for filing an application for review. It could also limit the grounds of appeal available to grounds similar to those that apply in judicial review proceedings. Thus, an appeal might only be available on the basis that the central authority's decision to issue the certificate was the result of an error of law or was a decision that no reasonable decision maker could have reached.

397 Extradition Act 1999, s 41(1).

second foreign judge or official.³⁹⁸ In the context of countries with which New Zealand has a close extradition relationship, this is unnecessary. A judge should be able to take judicial notice of the foreign judge's signature, which could still be challenged if there was any real concern regarding the foreign judge's authority.

- (b) There are mechanisms for the Minister or the court to cancel a provisional arrest warrant if specific criteria are not met within a reasonable timeframe. The Act does not, however, require the court to fix what would be a "reasonable" timeframe in advance. The Act should require the setting of a deadline, which could be extended in certain circumstances.
- (c) The Act does not include a power of the Police to use reasonable force to take a detainee's fingerprints and photographs. This power is available to the Police in relation to standard domestic criminal proceedings.³⁹⁹ This oversight should be fixed.⁴⁰⁰

QUESTIONS

Q34 What role should the new central authority have in processing an extradition request before it gets to the courts?

Q35 In the context of extradition, what should a judge be assessing in an arrest warrant application?

BAIL

- 9.23 The initial appearance is the first time at which the court will consider the issue of bail. Under both the backed-warrant procedure and the standard procedure, the underlying principles concerning bail are the same: the person is not bailable as of right and may not go at large without bail. The Extradition Act then incorporates various provisions from the Bail Act 2000 governing the decisions surrounding whether to grant bail and the conditions of bail that may be imposed.
- 9.24 A review of the case law indicates that this is an area of the Extradition Act that has been working relatively well. There have been numerous appeals against bail decisions in extradition proceedings, but these have largely focused on substantive concerns. This suggests that there is no particular need for modifications to the Bail Act to make it work in an extradition context.
- 9.25 However, there are two aspects of the bail procedure under the Extradition Act that should be updated:
 - The Extradition Act preserves provisions of the Bail Act in the form that they stood prior to being amended by the Criminal Procedure Act.⁴⁰¹ As such, the Act relies on repealed legislation. This needs to be changed.
 - The Act does not currently contain an express power for the court to detain a person whose surrender is sought.⁴⁰² The power to detain is inferred.⁴⁰³ This power should be express in the new statute.

398 Extradition Act 1999, s 78(1)(c)(i). This second official does not, however, provide proof of his or her own authority.

399 Policing Act 2008, s 32.

400 This issue was recently discussed by the High Court in: *Kim v Attorney-General* [2014] NZHC 1383 at [97]–[108].

401 Extradition Act 1999, ss 22(4) and 23(5).

402 *Kim v Prison Manager, Mt Eden Corrections Facility* (CA), above n 394, at [34].

403 By virtue of the wording of the Extradition Act 1999, s 23.

QUESTION

Q36 Do the current bail procedures operate adequately in the context of extradition?

DISCLOSURE

- 9.26 The Extradition Act does not contain clear guidance as to what information should be disclosed between parties under either the standard procedure or the backed-warrant procedure.⁴⁰⁴ The only specific reference to disclosure in the Act is in the provision governing regulation-making powers.⁴⁰⁵
- 9.27 The Extradition Act makes an indirect reference to disclosure in providing that, “so far as applicable and with the necessary modifications”, Part 5 of the Summary Proceedings Act 1957 applies to standard extradition proceedings.⁴⁰⁶ Part 5 contains provisions that require both the prosecutor and the defendant to disclose to each other the evidence that they intend to rely on at the committal hearing.⁴⁰⁷ It is debatable whether these provisions can be applied in an extradition context and the extent to which they would need to be modified to give them practical effect.⁴⁰⁸ Regardless, the Summary Proceedings Act contains a fairly limited disclosure regime, as it does not give the committal judge the power to make a disclosure order.
- 9.28 Until recently, there was the further argument that Part 3 of the Extradition Act might incorporate aspects of the Criminal Disclosure Act 2008. The Extradition Act contains the general principle that a court conducting standard extradition proceedings has the same powers as if the proceedings were a committal hearing.⁴⁰⁹ The Criminal Disclosure Act gave the court in committal hearings the power to make a disclosure order against either party. In a recent majority decision, however, the Supreme Court held that the Criminal Disclosure Act does not apply to standard extradition proceedings because it is not one of the statutes specifically listed in the relevant section and it does not apply independently.⁴¹⁰
- 9.29 Notably, though, the Supreme Court held that the Official Information Act 1982 and the principles of natural justice in the New Zealand Bill of Rights Act 1990 (NZBORA)⁴¹¹ apply independently of the Extradition Act.⁴¹² The Official Information Act only applies to

404 It is worth noting that no issue of disclosure arises if the person sought makes a habeas corpus application. That is because, given the urgent nature of these proceedings, s 7(5) of the Habeas Corpus Act 2001 states that neither party is entitled to general or specific discovery, and the High Court Rules surrounding the discovery and inspection of documents do not apply.

405 Extradition Act 1999, s 120(e). This gives the Governor-General the power to make regulations in relation to “the pre-hearing disclosure of information” and “the powers of the court when information that is required to be disclosed by the regulations is not disclosed”. No regulations have been made for this purpose.

406 Extradition Act 1999, s 22(1)(b).

407 See Summary Proceedings Act 1957, ss 168 and 176.

408 By way of example, the disclosure obligation on the defendant in section 176 of the Summary Proceedings Act only arises if an oral evidence order is issued. In *United States of America v Dotcom* [2012] NZHC 2076, Winkelmann J noted (at [87]) that oral evidence orders are available in extradition proceedings and must be obtained if a person is to give oral evidence in an extradition proceeding. On appeal, Elias CJ disagreed with this observation and commented that oral evidence orders are not required in extradition proceedings because such proceedings will always involve a “committal hearing” as opposed to a “standard committal” (on the papers) under the Summary Proceedings Act (*Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [46] per Elias CJ). The question of when a defendant’s obligation to disclose material might arise was not in issue, so neither Judge addressed this point specifically. Their debate over the availability of oral evidence orders does, however, highlight some of the difficulties in giving sections 168 and 176 practical effect in an extradition context.

409 Extradition Act 1999, s 22(1)(b).

410 *Dotcom v United States of America*, above n 408, at [125] per McGrath and Blanchard JJ, [217] per William Young J, and [273] per Glazebrook J.

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

412 *Dotcom v United States of America*, above n 408, at [74] per Elias CJ, [118] and [122] per McGrath and Blanchard JJ, [212] and [231] per William Young J, and [274] per Glazebrook J.

information already in the possession of the New Zealand Government.⁴¹³ The Court was, however, divided on exactly what the principles of natural justice required in terms of disclosure in extradition proceedings.⁴¹⁴ Thus, the disclosure regime for standard extradition proceedings remains somewhat uncertain.

Options for reform

Guiding principles

9.30 Despite being divided as to result, the Supreme Court in *Dotcom v United States of America* unanimously agreed upon several guiding principles relating to disclosure in extradition proceedings. Significantly, the Court held the following:

- The extent of disclosure is shaped by the nature of the proceeding.⁴¹⁵
- An extradition proceeding is not the equivalent of a domestic criminal trial. Therefore, the person sought is not entitled to the same disclosure as a person facing trial in New Zealand.⁴¹⁶
- Section 27 of NZBORA requires that the person sought is entitled to receive, at least, all of the documents that the requesting country seeks to rely on at the substantive extradition hearing, prior to the hearing itself.⁴¹⁷
- It is up to the requesting country to decide what material it wishes to rely upon at the substantive extradition hearing. There is no obligation for it to present all of the information that it has collected for potential use at trial.⁴¹⁸
- A requesting country is, however, subject to an obligation of candour and good faith to reveal anything that “destroys or very severely undermines” the material that it has put forward.⁴¹⁹ The New Zealand authorities assisting the requesting country have a correlative duty to the court to use their own best endeavours to ensure that the requesting country complies with its obligations in this respect.⁴²⁰
- Relevant material held by the New Zealand authorities (either because it has been provided by the requesting country or it has been generated in New Zealand) could be the subject of a disclosure order under the Official Information Act.⁴²¹

9.31 There remain, however, some gaps in this disclosure regime. For example, the Court was unable to reach agreement as to whether the District Court has a statutory power or inherent jurisdiction to make a disclosure order against a requesting country’s disclosure regime.

413 Notably, most of the information held by the New Zealand authorities will be preliminary communications between Crown Law or the Police and the requesting state regarding the form and content of the extradition request. This type of material is not generally disclosable under the Official Information Act, as privilege and confidentiality exceptions tend to apply.

414 *Dotcom v United States of America*, above n 408, at [185]–[193] per McGrath and Blanchard JJ, [229] per William Young J, and [289]–[301] per Glazebrook J. This raised the related issue of whether the court has inherent jurisdiction to make disclosure orders in extradition proceedings, which also divided the court; majority at [196] per McGrath and Blanchard JJ and [238] per William Young J; minority at [86] per Elias CJ and [309] per Glazebrook J.

415 *Dotcom v United States of America*, above n 408, at [64] per Elias CJ, [186] per McGrath and Blanchard JJ, and [291]–[292] per Glazebrook J.

416 At [57] and [87] per Elias CJ, [190] per McGrath and Blanchard JJ, and [228] per William Young J.

417 At [53] per Elias CJ, [190] per McGrath and Blanchard JJ, [212]–[232] per William Young J, and [281] per Glazebrook J.

418 At [58] per Elias CJ, [153] per McGrath and Blanchard JJ, and [264]–[265] per Glazebrook J.

419 *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [35].

420 *Dotcom v United States of America*, above n 408, at [58] and [67] per Elias CJ, [150]–[152] per McGrath and Blanchard JJ, [228] and [238] per William Young J, and [264]–[265] per Glazebrook J.

421 At [122] per McGrath and Blanchard JJ, [231] per William Young J, and [274] per Glazebrook J.

The court's power to order disclosure

- 9.32 The new extradition legislation should contain a power for the court to make orders regarding disclosure against the central authority or the person sought (to a very limited extent) but not the requesting country. Clear statutory provision should oust any need to rely on inherent jurisdiction.
- 9.33 The court should not be able to order the requesting country to make disclosure. Such orders would not sit comfortably with the principles of comity and mutual respect between governments, and it is inappropriate for New Zealand courts to make disclosure orders against requesting countries. There are other ways of ensuring that the person sought is fairly informed of the case against them.
- 9.34 The court could ask the requesting country (through the central authority) to provide more information on specific points.⁴²² The central authority could then discuss the matter informally with the requesting country, or the issue could be raised through a more formal government-to-government request process.⁴²³ An important point to emphasise is that, ultimately, if a requesting country did not comply with such a request, it would run the risk of the court simply declining the extradition on the basis of insufficient evidence.⁴²⁴

Evidence to be presented by the person sought

- 9.35 Grounds for refusal will be considered at the substantive hearing, and the person sought may wish to adduce supporting evidence. If such evidence is adduced, the requesting state would be entitled to challenge it. This could be done by way of cross-examination, a request for an admissibility ruling, or the production of competing evidence. There needs to be procedure to allow the person sought to produce any proposed supporting evidence to the court and the central authority prior to the substantive hearing. Equally, the central authority would need to produce any competing evidence that the requesting country wishes to produce prior to the hearing as well.

Procedure

- 9.36 Prior to the substantive hearing:
- should the requesting country be obliged to disclose all of the evidence it intends to rely on at the substantive hearing and any information that would “destroy or very seriously undermine” its extradition request;
 - should the person sought be obliged to disclose any evidence that he or she intends to rely on at the substantive hearing in relation to a potentially applicable ground for refusal; and
 - if the person sought raises a ground for refusal, should the requesting country be obliged to disclose any rebuttal evidence it intends to rely on at the substantive hearing?

QUESTION

Q37 Should the new Extradition Act contain a disclosure regime, and if so, what should be its scope and what should it look like?

422 McGrath and Blanchard JJ make a similar suggestion in *Dotcom v United States of America*, above n 408, at [177].

423 Most of New Zealand's bilateral extradition treaties contain a process for making government-to-government requests for further information.

424 See *Dotcom v United States of America*, above n 408, at [181]–[182].

THE SUBSTANTIVE HEARING

- 9.37 We do not propose to radically change the types of matters that must be determined by the court at a substantive extradition hearing. Under the current regime, those matters are:
- whether the requisite supporting documents have been provided to the court;
 - whether there is an extradition offence, an extradition country, and an extraditable person;
 - *for a standard request*, whether the evidence produced or given at the hearing:
 - in the case of a person accused of an extradition offence, would justify the person's trial if the conduct constituting the offence had occurred within the jurisdiction of New Zealand; or
 - in the case of a person alleged to have been convicted of an extradition offence, would prove that the person was so convicted; and
 - whether any of the restrictions on surrender in the Act or in an applicable treaty apply.
- 9.38 In this section, we examine two interrelated questions: What evidence should be considered at a substantive extradition hearing? How should that hearing be conducted?

Evidence

- 9.39 There are four types of documents that may need to be produced at an extradition hearing:
- (a) The supporting documents:
 - *for a standard request*:⁴²⁵
 - an arrest warrant;
 - (if applicable) proof of conviction and any sentence; and
 - a written deposition setting out a description of the offence, the applicable penalty, and the conduct constituting the offence; and
 - *for a backed-warrant request*:⁴²⁶
 - an arrest warrant.
 - (b) Additional information about New Zealand's extradition relationship to the requesting country and the foreign offence.
 - (c) Evidence relating to possible grounds to refuse surrender.
 - (d) *For standard requests only*, evidence of the alleged offending. This evidence is usually presented in written depositions. However, some countries may present it in the form of a record of the case.⁴²⁷
- 9.40 The documents described above will only be considered at a substantive extradition hearing if the applicable evidentiary requirements in the Extradition Act and the Evidence Act 2006 have been complied with. This involves a three-stage process:⁴²⁸
- The document must be relevant.

⁴²⁵ Extradition Act 1999, s 18(4).

⁴²⁶ Extradition Act 1999, ss 41 and 45(2).

⁴²⁷ Extradition Act 1999, s 25. Under our proposals discussed in ch 7, this would apply to more countries.

⁴²⁸ Part 9 of the Extradition Act 1999, which contains the provisions relating to evidence, refers to a court being able to "receive" documents if certain conditions are met (s 74(1)) and to other documents being "admissible as evidence" (ss 75 and 76).

- If the document was generated overseas, it must be duly authenticated.
- Some documents must also comply with the domestic rules of evidence in the Evidence Act.

Relevance

- 9.41 The Evidence Act provides that the starting point is that relevant evidence is admissible, unless an enactment states that it is inadmissible or excluded.⁴²⁹ The Extradition Act does not refer to this fundamental principle, but it does contain provisions that seem to exclude otherwise relevant evidence. For example, the Extradition Act specifically prevents a person sought under the backed-warrant procedure from adducing evidence to contradict the allegations made by the requesting country.⁴³⁰ As the backed-warrant procedure does not involve an inquiry into the case against the person sought, evidence contradicting the alleged offending is simply not relevant to a matter that needs to be determined.
- 9.42 Under the standard procedure, the court must currently determine whether there is a *prima facie* case. The test is basically whether there is some evidence that, if accepted as accurate, would establish each essential element of the alleged offence. Defence evidence is relevant to this test if it is capable of completely answering the prosecution case. For instance, very strong alibi evidence might suffice. Accordingly, a person sought should be entitled to adduce this type of evidence at the hearing, and the new Act should make that clear.
- 9.43 Part 9 of the Extradition Act states that a judge may receive evidence from a person sought that is relevant to a restriction on surrender if the judge considers the evidence to be reliable (whether it is otherwise admissible or not).⁴³¹ This provision could be read as suggesting that the requesting country is not entitled to produce such evidence. However, a requesting country ought to be able to adduce evidence concerning a pleaded restriction on surrender if that evidence is relevant. While the provision in Part 9 reflects that the person sought has the burden of proving that a restriction on surrender applies, this provision should provide that the requesting country may adduce evidence to rebut a submission that a restriction applies.

Authentication

- 9.44 Given the nature of extradition proceedings, most relevant evidence will have been generated overseas. Part 9 of the Extradition Act envisages that this evidence will generally be in the form of foreign depositions (including exhibits), official certificates, or judicial documents (including warrants).⁴³² They must be “duly authenticated” before being admitted as evidence.⁴³³
- 9.45 The authentication provisions in the Extradition Act can be cumbersome to apply:
- The Act does not cross-reference particular New Zealand law that might allow authentication. Part 4 of the Evidence Act is entitled “Evidence from overseas or to be used overseas”, but the only provisions relating to the admissibility of foreign documents relate solely to civil proceedings in the High Court. Extradition proceedings take place in the District Court and are not easily classified as either civil or criminal.

⁴²⁹ Evidence Act 2006, s 7.

⁴³⁰ Extradition Act 1999, s 45(5)(a).

⁴³¹ Extradition Act 1999, s 74.

⁴³² Deposition is broadly defined in s 2 of the Extradition Act 1999 to include statements made on oath, by affirmation, and “before any court or judicial authority if, under the law of the country in which it is made, a person making such a statement falsely is liable to punishment”.

⁴³³ Extradition Act 1999, s 75.

- A second form of permissible authentication is authentication that complies with a bilateral extradition treaty. Given the outdated language that is used in these treaties, this can cause practical difficulties.⁴³⁴
- The third form of authentication requires documents signed by a foreign official to be verified by the oath of a second official or by a state seal. The court may then take judicial notice of the second signature or seal. As discussed above, in relation to the arrest warrant, it is difficult to see what value is added by the second signature or seal in such circumstances.

9.46 These authentication provisions should be simplified. The new extradition legislation should provide:

- a prescribed form for certifying any bundle of overseas documents presented in support of an extradition request;
- that any document purporting to be signed by an official of the requesting state may be admitted as evidence without proof of the signature or the official character of the person appearing to have signed it;⁴³⁵ and
- that the requesting country may choose, if a bilateral extradition treaty applies, to use the authentication process described in the treaty or in the Act.

Compliance with domestic rules of evidence

9.47 The Extradition Act clearly states that all evidence that complies with the Evidence Act is admissible at an extradition hearing.⁴³⁶ The difficulty arises in relation to relevant documents that have been generated overseas. Do these documents need to comply with the provisions of the Evidence Act in order to be admitted at a substantive extradition hearing?

9.48 The doubt arises because, while certain provisions in Part 9 of the Extradition Act aim to relax the domestic rules of evidence in relation to overseas documents, the extent of that relaxation is not clear.

9.49 As discussed above, a court may receive foreign evidence that is relevant to a restriction on surrender if it considers the evidence to be reliable and if the person sought wishes to adduce it. The Act expressly states that such evidence does not need to be “otherwise admissible in a court of law”,⁴³⁷ but it is not clear whether this dispensation applies equally to a requesting country.

9.50 There is no principled reason to distinguish between the person sought and the central authority or requesting country in this regard. If the court is capable of assessing the reliability of this type of document at face value, it should not matter which party it is produced by.

9.51 A second and much more complex issue arises in relation to the evidence of the alleged offending that a requesting country must produce in support of a standard extradition request. This evidence will almost always have been generated overseas. If the record of the case procedure is not used, Part 9 of the Extradition Act applies. Under Part 9, evidence of the alleged offending is admissible if it is duly authenticated and will be admitted even if it contains documentary hearsay.⁴³⁸

434 By way of example, see *Bujak v District Court at Christchurch* HC Christchurch CIV-2008-409-785, 8 October 2008.

435 This could be modelled on s 35 of the Canadian Extradition Act SC 1999 c 18, which states:

A document purporting to have been signed by a judicial, prosecuting or correctional authority, or a public officer, of the extradition partner shall be admitted without proof of the signature or official character of the person appearing to have signed it.

436 Extradition Act 1999, s 77.

437 Extradition Act 1999, s 74.

438 Extradition Act 1999, ss 75 and 76.

9.52 At first glance, the provisions in Part 9 of the Extradition Act seem to suggest that overseas documents are automatically admissible if they are duly authenticated and there is no need to comply with the other domestic rules of evidence in the Evidence Act. The matter is complicated, however, by the requirement in the Extradition Act that the court assessing evidence of the alleged offending must be satisfied that this evidence would “according to the law of New Zealand, but subject to this Act” justify the person’s trial. The relationship between this phrase and Part 9 was considered in the *Bujak* litigation. The upshot of that litigation appears to be that:

- duly authenticated documents are not automatically admissible;⁴³⁹
- such documents must comply with domestic rules regarding hearsay evidence (that is, documentary hearsay is admissible in accordance with Part 9 of the Extradition Act, and other forms of hearsay must comply with the hearsay rules in the Evidence Act);⁴⁴⁰ and
- such documents do not need to comply with the form requirements of domestic criminal procedure, as there is no provision to that effect in the Act.⁴⁴¹

9.53 Requiring compliance with these rules places a huge burden on requesting countries, and it does not necessarily make it any easier for our courts to assess the true significance and reliability of the foreign evidence. It is also clear that New Zealand courts need to apply the law in a way that is broadly consistent with domestic law, taking into account extradition realities.

The conduct of the hearing

9.54 Related to the issue of what evidence the court should consider at a substantive extradition hearing is the more practical issue of how the hearing should be conducted.

The current law – standard procedure

9.55 The Extradition Act states that the court must conduct a standard extradition hearing in the same manner as if it was a domestic committal hearing for an indictable offence allegedly committed in New Zealand.⁴⁴²

9.56 As discussed, committal hearings were abolished in 2013. Even before that, though, committal had become a largely automatic process that occurred without a hearing or submissions from the parties 14 days after formal written statements were filed.⁴⁴³ A committal hearing would take place only if a judge made an order that a witness should give oral evidence.⁴⁴⁴ Thus, the parallels to standard extradition hearings were already becoming blurred prior to the abolition of committal hearings.

439 *Bujak v Republic of Poland* [2007] NZAR 512 (HC) at [46]–[53].

440 At [46]–[53] and [72].

441 *Bujak v District Court at Christchurch*, above n 434, at [35]–[37]; and *Bujak v District Court at Christchurch* [2009] NZCA 257 at [37]–[38]. This litigation was further complicated by the fact that an imperial bilateral extradition treaty applied. The various decisions, however, all noted that s 24(2)(d) of the Extradition Act 1999, which contains the evidential sufficiency test for Part 3 requests, is not capable of being overridden by a treaty. Therefore, the comments of the courts regarding the significance of the phrase “according to the law of New Zealand, but subject to this Act” appear to be applicable to all Part 3 extradition cases, not just those that involve a treaty.

442 Extradition Act 1999, s 22(1)(a).

443 Summary Proceedings Act 1957, s 177(1)(a), repealed by Summary Proceedings Amendment Act (No 2) 2011, s 7(2).

444 Summary Proceedings Act 1957, s 183, repealed by Summary Proceedings Amendment Act (No 2) 2011, s 7(2).

Current law – backed-warrant procedure

- 9.57 The Extradition Act originally stated that backed-warrant hearings should be conducted in the same manner as if a person had been charged with a summary offence in New Zealand (that is, an offence punishable by less than two years' imprisonment).⁴⁴⁵
- 9.58 In 2013, the relevant provision in the Extradition Act was amended.⁴⁴⁶ The reference to the manner in which the backed-warrant proceeding should be conducted was removed. Instead, a court conducting a backed-warrant hearing was simply given the same powers and jurisdiction as if a person had been charged with a category 2 offence for the purposes of the Criminal Procedure Act rather than a summary offence. The amended provision provides even less practical guidance.

Options for reform

- 9.59 A clear structure for extradition proceedings could be achieved in two ways. The new Extradition Act could draw from the Criminal Procedure Act. Alternatively, the Extradition Act could provide for a specific, tailor-made procedure.
- 9.60 On balance, we consider that the unique nature and purpose of extradition proceedings warrants the creation of a tailor-made procedure. Extradition proceedings are rare and complicated. Therefore, there is a need to place a clear structure around them. There is one existing domestic procedure – based on section 147 of the Criminal Procedure Act – that could be relied upon, as it is in some ways analogous to what is sought to be achieved in extradition proceedings.⁴⁴⁷ However, the analogy only goes so far. Some aspects of section 147 are inapt in the extradition context. It is preferable that the work be done to devise a procedure that, at every step, takes account of the particular type of proceedings at hand. This will need to include provisions governing practical matters such as witness summonses, adjournments, representation, name suppression, and orders.

QUESTION

Q38 Should the substantive extradition hearing process have its own rules for evidence and procedure?

APPEAL

Current law

- 9.61 Once there has been a substantive extradition hearing in the District Court and a decision as to whether or not the person sought is eligible for surrender, either party may appeal that decision. The appeal is to the High Court, and it may only be made on a question of law.⁴⁴⁸

⁴⁴⁵ Extradition Act 1999, s 43(1)(a), replaced by Criminal Procedure Act 2011, s 413.

⁴⁴⁶ Extradition Act 1999, s 43(1)(a).

⁴⁴⁷ Section 147 of the Criminal Procedure Act 2011 gives the court the power to dismiss a domestic criminal charge at any time before or during the trial, up until the verdict is given. Now that committal has been abolished, s 147 embodies the new mechanism for filtering out cases that involve insufficient evidence to proceed to trial. It is possible that the new Extradition Act could direct the court to conduct extradition hearings as if they were hearings to determine an application to dismiss a charge under s 147.

⁴⁴⁸ Extradition Act 1999, s 68.

- 9.62 Despite there being provision for only one appeal, limited to questions of law, in the Extradition Act, in practice, extradition proceedings are subject to a great many appeals. There are two reasons for this:
- Extradition proceedings involve a series of preliminary decisions being made prior to the substantive hearing. Some of these decisions trigger appeal or review processes in other Acts. For instance, a decision to arrest a person sought may be challenged by making a habeas corpus application,⁴⁴⁹ and a decision to grant or refuse that person bail may be appealed under the Bail Act.⁴⁵⁰ For other preliminary decisions (such as the ministerial decision to initiate proceedings and court decisions on disclosure and admissibility), there is no statutory right of appeal, but judicial review is available.⁴⁵¹
 - The complex interrelationship between the Act and New Zealand's bilateral extradition treaties creates ample grounds for appeal.
- 9.63 It has thus become common for one extradition request to generate a series of interrelated but separate appeals and reviews to the High Court. The High Court decisions are then inevitably appealed to the Court of Appeal and may also be considered by the Supreme Court.⁴⁵² By way of example, one recent extradition request to New Zealand was the subject of an appeal and two judicial reviews in the High Court,⁴⁵³ four appeals to the Court of Appeal,⁴⁵⁴ and two unsuccessful leave applications to the Supreme Court.⁴⁵⁵ It took six years for New Zealand to process this request.
- 9.64 There is clearly the need for a person sought to be able to meaningfully challenge an extradition request in the courts.⁴⁵⁶ Equally, a requesting country should be afforded the opportunity to challenge the validity of any court decision affecting the outcome of its request.⁴⁵⁷ We doubt, however, that New Zealand's current appeal and review practice is the most appropriate way of meeting those needs.

Options for reform

- 9.65 As a guiding principle, we consider there should be one general right of appeal to the High Court and thereafter appeal only to a higher court by leave. Provisions in the Act should make it plain that, at the general appeal, the parties may challenge any or all of the decisions made by the judge during the course of the extradition proceedings.
- 9.66 We acknowledge this proposal has its own consequences. A strong argument could be made that matters such as disclosure and admissibility need to be resolved sequentially and speedily rather than waiting until the final decision has been made. We consider, however, that this concern is balanced by the greater efficiency and transparency of the proposed appeal process.

449 Habeas Corpus Act 2001, s 6.

450 The relevant provisions in the Bail Act 2000 are s 44 (in relation to pt 4 proceedings) and s 49(2) as it read prior to the commencement of the Criminal Procedure Act 2011 (in relation to pt 3 proceedings). These provisions apply by virtue of ss 23(3), 23(5)(b), and 43(4) of the Extradition Act 1999.

451 Judicature Amendment Act 1972, s 4(1).

452 Judicature Act 1908, s 67; and Supreme Court Act 2003, ss 12 and 14.

453 *Bujak v Republic of Poland*, above n 439; *Bujak v District Court at Christchurch*, above n 441; and *Bujak v Minister of Justice* HC Wellington CIV-2009-485-2266, 18 November 2009. Mr Bujak also applied to the High Court for an interim order: *Bujak v Minister of Internal Affairs* HC Wellington CIV-2009-485-1884, 3 November 2009.

454 *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604; *Bujak v District Court at Christchurch*, above n 441; *Bujak v Minister of Justice* [2009] NZCA 570; and *Bujak v Minister of Internal Affairs* [2009] NZCA 522.

455 *Bujak v District Court at Christchurch* [2009] NZSC 96 and *Bujak v Minister of Justice* [2010] NZSC 8.

456 This accords with the principles of natural justice protected under s 27 of the New Zealand Bill of Rights Act 1990.

457 This accords with the interests of comity as discussed throughout this issues paper.

In addition, we envisage that the tailor-made procedural rules proposed throughout this chapter should reduce the confusion surrounding disclosure and admissibility.

- 9.67 Another consequence of our proposal is that there would still be three possible tiers of appeal in extradition proceedings. This reflects the usual hierarchy of the courts and our proposal that extradition proceedings should originate in the District Court.

QUESTION

Q39 Should the new Extradition Act provide that any issue sought to be challenged should be done by means of one general right of appeal against the District Court's substantive decision to the High Court?

THE MINISTER'S DECISION

- 9.68 Court proceedings result in one of three outcomes. The court may find that the person sought is:
- not eligible for surrender, in which case the person is discharged;⁴⁵⁸ or
 - eligible for surrender, in which case the court will either:
 - transfer the case to the Minister of Justice for the final decision on surrender;⁴⁵⁹ or
 - decide there is no reason to transfer the case to the Minister and make a surrender order (this option is only available in relation to a backed-warrant extradition request).⁴⁶⁰
- 9.69 The Extradition Act does not set out any procedural rules that apply if the Minister is called upon to make a final decision on surrender. Instead, the process is left entirely to the Minister's discretion.

Current practice

- 9.70 Our understanding is that the Minister of Justice currently calls for written submissions from both parties and then makes a decision based on advice from officials at the Ministry of Justice and Crown Law. The parties are then notified of the decision by letter, and if the Minister decides that the person should be surrendered, the surrender order is signed. The order is then executed by the New Zealand Police.
- 9.71 Under the Extradition Act, this process must be completed within two months of the date on which the Court's eligibility decision became final, otherwise the person sought may apply to the High Court to be discharged.⁴⁶¹

The need for reform

- 9.72 Where a ministerial decision is required, there should be some statutory guidance surrounding the procedure that should be followed. Such an approach would be more transparent than the current practice because the Minister and the parties would know what to expect in advance.

⁴⁵⁸ Extradition Act 1999, ss 26(4) and 46(4).

⁴⁵⁹ Extradition Act 1999, ss 30 and 48.

⁴⁶⁰ Extradition Act 1999, s 47.

⁴⁶¹ Extradition Act 1999, ss 36 and 57.

- 9.73 The new extradition legislation should continue to place a timeframe around the Minister's decision. That is because the liberty of the person sought is at stake, so he or she is entitled to have their case resolved in a timely manner. It is important, however, not to be overly prescriptive in this regard, as most of these cases will require complex diplomatic discussions.

Options for reform

- 9.74 Bearing these observations in mind, we recommend that new extradition legislation should provide for the following:
- Both parties should be allowed to make written submissions to the Minister of Justice attaching any information that they consider to be relevant.
 - The new Act should contain a timetable for the provision of submissions. In this regard, the person sought should have to file their submissions first but should also have the opportunity to file a brief reply to any submissions filed on behalf of the requesting country. To prevent this process becoming too rigid, the Minister should be able to grant an extension of time to the parties on request.
 - The new Act should state that the Minister must consider the written submissions of the parties and advice from Ministry officials in reaching his or her decision. Ideally, Crown Law should not be involved in drafting the ministerial advice if it is appointed as the central authority under the new extradition regime.
 - The new Act should set a deadline by which the Minister must have conveyed his or her decision to the parties. This deadline should be calculated from the date the last submissions are received, to ensure that any extensions given to the parties by the Minister do not cut into his or her substantive decision-making time.
 - The new Act should provide that any surrender order will expire if the person sought has not been removed from New Zealand within a certain period of time. This will ensure that New Zealand authorities give due priority to executing the surrender order for the benefit of all of the parties. There would, however, need to be a mechanism to allow for an extension to the surrender order if the New Zealand authorities are unable to locate the person sought despite making reasonable efforts.
- 9.75 Once the Minister has made a final decision on surrender, the only possible remaining step is that either party may apply for a judicial review. New extradition legislation should allow for the review to be heard alongside any appeal against the Court's eligibility decision. This is a practice that has developed in Canada, and it has the potential to be a more efficient use of time and resources.

QUESTION

Q40 Does the new Extradition Act need to provide for procedural rules governing the Minister's final decision on surrender?

Chapter 10

Refugee proceedings and extradition

INTRODUCTION

- 10.1 In some cases, an extradition request relates to a person who is also the subject of refugee status proceedings. The interaction of these two distinct areas of law can lead to complex substantive and procedural issues. Because an extradition request requires consideration of whether a person should be removed from New Zealand and sent to another country, there may be a direct conflict with a person's claim that they require asylum in New Zealand and protection from return to another country. New Zealand has international obligations in both areas, and there can be tension between humanitarian values of protecting individuals from persecution and international cooperation in the suppression of crime.⁴⁶²
- 10.2 This chapter first looks at New Zealand's international obligations relating to refugees and asylum seekers.⁴⁶³ It then outlines the relevant domestic legislative provisions regarding refugees and asylum seekers and the intersection with extradition law. We discuss issues raised by the interrelationship between refugee proceedings and extradition proceedings, before looking at potential reforms in this area that should be considered.

INTERNATIONAL OBLIGATIONS

- 10.3 New Zealand is a party to the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol.⁴⁶⁴ The Refugee Convention defines the term "refugee" as applying to any person who:⁴⁶⁵
- ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.
- 10.4 The Refugee Convention sets out the obligations of state parties and those of the refugees to their past states. In article 33, it codifies the fundamental principle of "non-refoulement", which means that refugees cannot be forcibly returned to countries where they face persecution. Article 33(1) provides:
- No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

⁴⁶² EP Aughterson *Extradition: Australian law and procedure* (Law Book Co, Sydney, 1995) at 36.

⁴⁶³ Those who have left their home country and are seeking refugee status in another country, but the decision on that status is still pending.

⁴⁶⁴ Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954); and Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967).

⁴⁶⁵ Convention Relating to the Status of Refugees, above n 464, art 1(A)(2).

- 10.5 Under the Refugee Convention, the principle of non-refoulement also applies to persons who meet the definition criteria but have not had their refugee status formally recognised.⁴⁶⁶ The United Nations High Commissioner for Refugees has clarified that the principle applies not only to a refugee's country of origin but to any other country where he or she has reason to fear persecution related to the grounds in the refugee definition or from where he or she could be sent to country where there is a risk of such persecution.⁴⁶⁷
- 10.6 The principle of non-refoulement, under both the Convention and customary international law, is applicable in the context of extradition.⁴⁶⁸ This is illustrated by the wording of article 33(1), which refers to the expulsion or return of a person "in any manner whatsoever".
- 10.7 There are exceptions to the principle of non-refoulement where article 33(2) applies. Article 33(2) states:
- The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
- 10.8 Other international human rights agreements to which New Zealand is a party also establish non-refoulement obligations. These include, for example, the Universal Declaration of Human Rights,⁴⁶⁹ the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁷⁰ and the 1966 International Covenant on Civil and Political Rights.⁴⁷¹
- 10.9 In a particular case, these non-refoulement obligations under international refugee and human rights law may be in opposition to the duty to extradite under a bilateral or multilateral extradition treaty. In such a situation, the international refugee and human rights obligations prevail over any obligation to extradite.⁴⁷² This primacy derives from the nature of the refugee and human rights obligations and their place within the hierarchies in the international legal order.⁴⁷³

466 United Nations High Commissioner for Refugees *Guidance Note on Extradition and International Refugee Protection* (April 2008) at [11].

467 At [12]. See also United Nations High Commissioner for Refugees *Note on Non-Refoulement* (EC/SCP/2, 23 August 1977) at [4].

468 United Nations High Commissioner for Refugees, above n 466, at [8]–[10].

469 Universal Declaration of Human Rights GA Res 217/A, III (1948), art 14(1) provides: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

470 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987). Article 3 applies expressly to extradition in providing:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

471 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). Articles 6 and 7 prohibit the arbitrary deprivation of life and torture and other cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee has interpreted this as encompassing the principle of non-refoulement where return to another country creates a risk of such treatment; United Nations Human Rights Committee *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) at [9], HRI/GEN/1/Rev 1 (1994) at 30.

472 United Nations High Commissioner for Refugees, above n 466, at [21].

473 At [22]. Article 103 of the Charter of the United Nations establishes the prevalence of Charter obligations over those stemming from other international agreements. In addition, under Articles 55(c) and 56 of the Charter, Member States of the United Nations are bound to work towards the achievement of the purposes of the United Nations, which include universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

CURRENT LAW IN NEW ZEALAND

- 10.10 The Immigration Act 2009 implements New Zealand's obligations under the Refugee Convention. Part 5 of the Act addresses refugee and protection status determinations, with the stated purpose of determining to whom New Zealand owes obligations under the Refugee Convention and Protocol.⁴⁷⁴
- 10.11 The principle of non-refoulement is implemented by the Act providing that "[n]o person who is recognised as a refugee or a protected person in New Zealand, or who is a claimant, may be deported under this Act."⁴⁷⁵ However, this provision specifically does not cover extradition, as extradition is excluded from the meaning of "deported" under the Act.⁴⁷⁶
- 10.12 There is no prohibition in the Extradition Act 1999 on extraditing a refugee or asylum seeker. Indeed, there is no reference in the Act to refugee or asylum seeker, nor does the Act specify any special process where the subject of an extradition request is a refugee or asylum seeker. However, some aspects of the issues facing refugees or asylum seekers might be considered under the section 8 grounds for refusing surrender, in particular, refusing surrender in light of discrimination on the basis of race, ethnic origin, religion, nationality, sex, other status, or political opinions.⁴⁷⁷ These grounds are similar to those upon which a person may be found to be a refugee under the Refugee Convention, thus the principle of non-refoulement may apply and require that the person not be extradited.
- 10.13 The only New Zealand case that has addressed an aspect of the interaction between the two regimes is *Attorney-General v X*, although this looked at the issue of disclosure of information rather than the main issue of the conflict in the obligations to refugees and the obligation to extradite.⁴⁷⁸ This was an appeal against the decision of the Refugee Status Appeals Authority on whether the Immigration Act permits the disclosure of confidential matters in the refugee proceedings to government officials considering a possible extradition request in relation to the same person. The Supreme Court agreed with the Authority (and overturned decisions of the High Court and Court of Appeal) to find that the Immigration Act did permit this disclosure in limited and controlled circumstances.⁴⁷⁹

INTERRELATIONSHIP BETWEEN REFUGEE AND EXTRADITION DECISIONS AND PROCEEDINGS

- 10.14 International refugee protection and criminal law enforcement are not mutually exclusive.⁴⁸⁰ The Refugee Convention is not a complete shield against prosecution where refugees or asylum seekers have engaged in criminal conduct,⁴⁸¹ yet where the person who is the subject of the extradition request is a refugee or asylum seeker, his or her special protection needs must be taken into consideration.⁴⁸²

⁴⁷⁴ Immigration Act 2009, s 124.

⁴⁷⁵ Immigration Act 2009, s 164.

⁴⁷⁶ Immigration Act 2009, s 10.

⁴⁷⁷ Extradition Act 1999, s 8(b)–(c). See discussion of these grounds for surrender in ch 8.

⁴⁷⁸ *Attorney-General v X* [2008] NZSC 48, [2008] 2 NZLR 579.

⁴⁷⁹ At [16], discussed below.

⁴⁸⁰ United Nations High Commissioner for Refugees, above n 466, at [2].

⁴⁸¹ Convention Relating to the Status of Refugees, above n 464, art 1F provides that the Convention does not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
 (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

⁴⁸² United Nations High Commissioner for Refugees, above n 466, at [2].

- 10.15 The refugee proceedings and the extradition proceedings are separate decisions made on different bases by different decision makers, but they may have some impact on each other, and there is crossover in the factors that may be relevant to each. The grounds for finding that someone is a refugee may be similar to those that can be used to refuse surrender, but they are not conclusive as to one another in their respective procedures. This is because they derive from different statutory authorities and are subject to separate authoritative decision-making procedures.⁴⁸³ When refugee status is granted at the time of or prior to an extradition request, the circumstances are usually such that the person will not be surrendered for extradition, but refusal of an extradition request does not confer refugee status on the person.⁴⁸⁴
- 10.16 A finding that someone is a refugee would only be conclusive for refusing extradition if there is a statutory provision making it so. The United Kingdom's Extradition Act 2003 contains a provision that effectively does this. The Secretary of State may refuse to certify an extradition request and send it to the court for consideration if the person who is the subject of the request is a refugee.⁴⁸⁵ This provision is intended to prevent extradition proceedings that are bound to result in the extradition being barred under the discrimination ground for refusal.⁴⁸⁶ Although the provision uses the word "may", case law has demonstrated that the Secretary of State does not have any real discretion. In such a case, the Secretary of State must refuse the request.⁴⁸⁷
- 10.17 Even if the finding that a person is a refugee is not determinative or binding under a statute for the purpose of refusing an extradition request, it is likely the same factors that lead to the refugee decision will direct the extradition decision maker that the extradition should be refused because of discrimination or prejudice or because the offence in question is a political offence.
- 10.18 In the case of *Németh v Canada (Justice)*,⁴⁸⁸ the Canadian Supreme Court sets out the relationship between a refugee status decision and an extradition decision. Given that the Canadian and New Zealand legislation in relation to both refugees and extradition in this area is similar, this case illustrates the likely position in New Zealand if the New Zealand courts were given the opportunity to explore the issue further. The Canadian Supreme Court considered that the grounds for refusing extradition under their Extradition Act could be interpreted consistently with the Refugee Convention. However, it found that the Minister of Justice was not bound under the Extradition Act to refuse the surrender of a refugee. The refugee decision was not determinative for the purposes of the extradition decision, but the Court noted that the ground for refusing surrender should be read broadly as protecting a refugee against refoulement where there is risk of prejudice on the listed ground. Additionally, the Minister was obliged to consider the discrimination ground for refusing surrender when the person is a refugee from the requesting state, and refusal on the basis of this ground was held to be mandatory if the conditions that led to the refugee status still exist.⁴⁸⁹
- 10.19 A further point to note is that the Refugee Convention protects an asylum seeker whose refugee claim has not yet been determined from refoulement. This means that the requested country cannot extradite an asylum seeker to his or her country of origin while the refugee claim is being

483 M Cherif Bassiouni *International Extradition: United States Law and Practice* (5th ed, Oxford University Press, New York, 2007) at 93.

484 At 199.

485 Extradition Act 2003 (UK), s 70(2).

486 Clive Nicholls and others *Nicholls, Montgomery, and Knowles on the Law of Extradition and Mutual Assistance* (Oxford University Press, Oxford, 2013) at [4.38].

487 *District Court in Ostroleka, Second Criminal Division (a Polish Judicial Authority) v Dytlow* [2009] EWHC 1009 (Admin) at [13].

488 *Németh v Canada (Justice)* 2010 SCC 56, [2010] 3 SCR 281.

489 *Németh v Canada (Justice)*, above n 488, 283–284.

considered.⁴⁹⁰ As a consequence, where there is an extradition request in relation to an asylum seeker, the extradition decision should not be made until the refugee decision has been made.

POSSIBLE REFORMS TO THE EXTRADITION ACT

A bar on determining extradition proceedings before refugee proceedings are determined

- 10.20 Consideration should be given to introducing a requirement in statute that, where there are concurrent refugee and extradition proceedings in respect of the same person and relating to the country from which the person has left, the decision on extradition should not be able to be made until the refugee status has been finally determined, including any appeals. This is because it is not possible to know what New Zealand's obligations in respect of the person are until their refugee status is known. The findings on refugee status will inevitably impact upon the extradition decision.⁴⁹¹ However, the introduction of this type of bar would have the disadvantage of delaying the resolution of extradition proceedings.
- 10.21 In *Attorney-General v X*, the Supreme Court held that it was correct for the Refugee Status Appeals Authority to attempt to resolve the application for refugee status prior to the resolution of any question of extradition.⁴⁹² In the interests of clarity, it may be helpful for this direction about the sequencing of the decisions to be spelt out in legislation.
- 10.22 The United Kingdom's Extradition Act includes provisions stating that a person cannot be extradited until his or her claim for asylum has been determined.⁴⁹³ However, these provisions apply only in cases where the asylum claim was made after the extradition request was received. This limitation has been the subject of criticism and calls for change. The 2011 Baker Report found it surprising that the Act did not cover cases where asylum is claimed before the extradition proceedings, especially in light of clear case law that an asylum seeker should not be returned to his or her state of origin without appropriate inquiry into the alleged persecution.⁴⁹⁴ It recommended that the protection in the Act be extended to apply to asylum claims made by a person before the extradition proceedings have commenced.⁴⁹⁵
- 10.23 The United Nations Office of the High Commissioner for Refugees (UNHCR) has provided guidance to parties to the Refugee Convention about the sequencing of decisions on extradition and refugee status. It recommends that a person's refugee status needs to be resolved before the extradition decision can be made, advising that a country is obligated to do this on the basis of international refugee and human rights law.⁴⁹⁶ The UNHCR considers, however, that it is prudent for countries to conduct extradition and refugee proceedings concurrently because of increased efficiency and because the extradition process may result in the availability of information that has a bearing on the person's eligibility for refugee status.⁴⁹⁷

Prohibition on extradition of refugees to country of origin

- 10.24 Consideration should also be given to including an explicit statutory prohibition on the extradition of refugees to their country of origin or to a country that would return them to

490 United Nations High Commissioner for Refugees, above n 466, at [31].

491 United Nations High Commissioner for Refugees, above n 466, at [64].

492 *Attorney-General v X*, above n 478, at [17].

493 Extradition Act 2003 (UK), s 39 (applying to category 1 countries) and s 121 (applying to category 2 countries).

494 Scott Baker, David Perry and Anand Doobay *A Review of the United Kingdom's Extradition Arrangements* (Home Office, 30 September 2011) at [9.52]; and *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, [2005] 2 AC 1.

495 Baker, Perry and Doobay, above n 494, at [9.53].

496 United Nations High Commissioner for Refugees, above n 466, at [64]–[65].

497 United Nations High Commissioner for Refugees, above n 466, at [66].

their country of origin. This would directly reflect New Zealand's international obligations in relation to refugees.

- 10.25 Such a provision could be similar to section 70(2) of the United Kingdom's Extradition Act. However, unlike the United Kingdom provision where the Secretary of State "may" refuse to proceed with the extradition request, it may be better to use mandatory wording to better reflect the international obligation of non-refoulement of a refugee.
- 10.26 The UNHCR Guidelines suggest that explicit provisions should be enacted in national legislation to obligate authorities to refuse the extradition of a refugee or asylum seeker where it would be inconsistent with a country's non-refoulement obligations under international refugee and human rights law. The UNHCR considers that this would constitute an important safeguard, even though the principle is binding under international law regardless of whether there is a legislative provision.⁴⁹⁸
- 10.27 There may be some concerns about linking the two processes, however. A prohibition on extraditing refugees would limit the ambit of the decision maker's role in extradition proceedings and make it subject to a separate statutory decision-making process. Explicit mention of refugee status in extradition legislation could encourage persons subject to an extradition request to apply for refugee status as a way of delaying resolution of the extradition proceedings.
- 10.28 It should be noted that the international law obligation not to extradite a refugee does not apply where the requesting country is not the country from which the person has sought refuge. The United Kingdom courts have found that the statutory restrictions on determining an extradition claim while an asylum claim is in process do not prevent extradition to a third country. It is up to the court to consider whether a real risk exists that the requesting country might send the person back to the country from which he or she is seeking refuge. Where there is such a risk, the best option is likely to be to allow the asylum claim to be determined before the extradition proceedings.⁴⁹⁹

QUESTION

Q41 How should the relationship between extradition proceedings and refugee proceedings be clarified?

DISCLOSURE OF PROCEEDINGS

- 10.29 A further issue to be considered relates to disclosure of the fact and content of one type of proceedings for the purpose of the other. At this stage, we are unsure whether statutory reform is necessary, but we wish to raise the issues for consideration.
- 10.30 There are relatively tight confidentiality provisions that apply in relation to refugee proceedings. The case of *Attorney-General v X* illustrates that it is not straightforward for the courts to determine whether information sharing from refugee proceedings to those investigating the possibility of extradition proceedings was possible. The Supreme Court overturned the decision of the High Court (which had been upheld by the Court of Appeal) that there was an absolute duty of confidence and found that the Immigration Act 1987 permits

⁴⁹⁸ United Nations High Commissioner for Refugees, above n 466, at [39].

⁴⁹⁹ *Dos Santos v Cascais Court Second Criminal Chamber, Portugal* [2010] EWHC 1815 (Admin), [2010] All ER (D) 123 (Jun).

information about the application for refugee status to be disclosed to officials who require the information to consider the extradition.

- 10.31 However, since *Attorney-General v X*, the Immigration Act 2009 has been brought into force. The provision relating to confidentiality as to the fact that a person is claiming or has been granted refugee status, and the particulars of the claim or status, has been altered from the provision that was relevant in the case.⁵⁰⁰ The new confidentiality section specifically allows disclosure of the fact of a claim, or particulars relating to a claim, “for the purposes of the maintenance of the law, including for the prevention, investigation, and detection of offences in New Zealand or elsewhere”.⁵⁰¹ This would cover disclosure for the purpose of an extradition request.
- 10.32 This reform has made the law clearer in this area. However, the UNHCR has cautioned against information about refugee status and pending refugee proceedings being made available to the authorities of another country, unless the person has given express consent to the sharing of this information. Disclosure of the refugee’s personal information or matters pertaining to the refugee claim without a legitimate basis for doing so would breach the refugee’s right to privacy and could endanger the safety of the refugee or persons associated with him or her.⁵⁰² Consequently, in its dealings with the country requesting extradition, the requested country must balance the legitimate interest of the requesting country in prosecuting persons responsible for criminal acts, which may justify the disclosure of certain personal information, with the potential risks of sharing the information about the refugee. It may be that the requested country must refrain from transmitting personal information to the requesting country.⁵⁰³
- 10.33 There may also be a concern in relation to whether the tribunal considering a refugee application should be made aware of an extradition request or preliminary inquiries that may result in an extradition request. Arguably, the tribunal should also have access to information and evidence raised in the extradition request. If this type of disclosure is not provided, relevant information may not be heard. However, there is a concern that the person who is the subject of the extradition proceedings and refugee claim will be alerted to extradition proceedings before he or she has been arrested and may flee.

QUESTION

Q42 Is further statutory reform needed to address any disclosure concerns regarding refugee proceedings and extradition proceedings?

500 Immigration Act 2009, s 151. Compare s 129T of the 1987 Act, which was in question in *Attorney-General v X*, above n 478.

501 Immigration Act 2009, s 151(2)(b).

502 United Nations High Commissioner for Refugees, above n 466, at [57].

503 United Nations High Commissioner for Refugees, above n 466, at [58].

Chapter 11

Extradition to New Zealand

INTRODUCTION

- 11.1 This chapter addresses another important aspect of New Zealand's extradition law: the extradition of persons to New Zealand at New Zealand's request. The Extradition Act 1999 contains some detail on specific aspects of making a request and dealing with the surrendered person once he or she has been sent to New Zealand. This chapter examines a few technical issues with extradition to New Zealand that have been identified as being in need of reform.

PART 6 OF THE EXTRADITION ACT 1999

- 11.2 Part 6 of the Extradition Act addresses extradition to New Zealand. It sets out who has the authority to make a request to another country for the extradition of a person who is accused or has been convicted of an offence against New Zealand law and how such a request should be made.⁵⁰⁴ The procedures in Part 6 are subject to alternative procedures being prescribed in a treaty or arrangement with another country.
- 11.3 Unlike the parts of the Act addressing extradition from New Zealand to another country, Part 6 is limited to a few procedural provisions rather than setting out the legal tests as to when extradition to New Zealand can occur. Where New Zealand makes a request for the extradition of a person from another country, it is that country's extradition law and any treaty obligations that will dictate what information needs to be provided, what needs to be proved, and what the grounds for denying the extradition are.
- 11.4 It seems necessary to continue to include an equivalent of Part 6 in any new Extradition Act in order to set out which New Zealand authorities can make a request and how. We are not aware of any significant problems with the operation of Part 6 of the Act, so at this stage, do not envisage that major reform is needed.

Who should make a request for extradition of a person to New Zealand?

- 11.5 Section 61 of the Act requires that an extradition request by New Zealand must be made by either:
- the Minister of Justice for countries covered by the standard process under Part 3;
 - the Commissioner of Police (or delegate) for countries covered by the backed-warrant process under Part 4; or
 - if the law of the requested country requires the request to be authorised by some other specified person, that person.⁵⁰⁵

The section also provides that a request can be made by anyone permitted by the law of the requested country, if there is no treaty or arrangement in place specifying who must make the

504 Extradition Act 1999, s 61.

505 Extradition Act 1999, s 61(1).

request.⁵⁰⁶ The effect of this is that, if the law of the foreign country is silent on who can make the request, New Zealand law allows any person to make the request.

- 11.6 This open position regarding who is authorised to make a request has led to different approaches being taken over time. Requests have been made by the Attorney-General, Solicitor-General, and Minister of Justice.
- 11.7 It would be more satisfactory for the Act to be clear as to who should make a request where the law of the extradition country does not specify that a particular person must make the request. The most straightforward option is to make this a responsibility of the proposed central authority.⁵⁰⁷ The central authority would be in receipt of all of the relevant information and would have access to expertise at Crown Law to advise on the request. It makes little sense to require that a separate Minister make the request, as he or she would then need to be briefed, adding unnecessary time and complexity to an outgoing request. As with incoming requests and with the current law, we see no issues with the Commissioner of Police (or delegate) being able to make a request for a person from a Category 1 country to ensure that the streamlined process is retained for these countries.

Arrest warrants

- 11.8 The Extradition Act interacts with the Criminal Procedure Act 2011 in relation to arrest warrants for persons outside of New Zealand who are the subject of an extradition request from New Zealand. Generally, other countries' extradition law will require that there is a New Zealand arrest warrant. For instance, under the Australian Extradition Act 1988 (Cth), the New Zealand arrest warrant must be endorsed by a magistrate or judge before an Australian arrest warrant can be authorised.⁵⁰⁸
- 11.9 Under the Criminal Procedure Act, in relation to any arrest warrant, the New Zealand Police must show that reasonable efforts have been made to serve the summons on a defendant.⁵⁰⁹ On its face, this requirement applies to arrest warrants in extradition cases also, where the defendant is outside of New Zealand. If a summons is to be served in the case of an extradition request, it must be done by the requested country's authorities. This can only be done through a mutual legal assistance request under the Mutual Assistance in Criminal Matters Act 1992.⁵¹⁰
- 11.10 The main problem with serving a summons on a defendant in another country is that there is a good chance that the person would flee the country as a result of being alerted to the extradition request. This would undermine the extradition proceedings. The new Extradition Act should therefore make it clear that it is not necessary to serve a summons for an arrest warrant for a person in another country who is the subject of an extradition request from New Zealand.

Certificates of time in custody

- 11.11 There is a technical issue relating to the formal provision of certificates recording the time a person has spent in custody overseas prior to extradition.⁵¹¹ These certificates are important, as they allow time spent in custody in the requested country to be considered as pre-sentence

506 Extradition Act 1999, s 61(3)(b).

507 See proposal for the central authority and discussion of who the central authority should be in ch 4.

508 Extradition Act 1988 (Cth), s 28.

509 Criminal Procedure Act 2011, s 34.

510 Mutual Assistance in Criminal Matters Act 1992, s 19. It was accepted in *Civil Aviation Authority v Heavylift Cargo Airlines Pty Ltd* [2008] NZCA 76, [2008] 2 NZLR 391 at [15] and [27] that the normal service provisions in the then applicable provisions of the Summary Proceedings Act 1957 did not apply to service of a summons outside of New Zealand. It was held that the only way to serve a summons overseas is in conformity with a request under s 19 of the Mutual Assistance in Criminal Matters Act 1992.

511 Extradition Act 1999, s 62.

detention under the Parole Act 2002.⁵¹² Pre-sentence detention is deemed to be a part of the sentence served by an offender.⁵¹³

- 11.12 In their experience with requests to the countries that fall under the backed-warrant procedure (Australia and the United Kingdom), the New Zealand Police have had considerable difficulty in obtaining these certificates. In practice, the Department of Corrections is able to obtain the required information directly from Interpol.
- 11.13 The Extradition Act could better serve this process by setting out the means by which time in custody in the requested country can be officially notified in a more flexible way. This would ensure the Department of Corrections is able to receive official notification of the time spent in custody in the requested country for the purposes of the Parole Act.

Speciality

- 11.14 Section 64 of the Extradition Act 1999 provides that a person who is surrendered to New Zealand following an extradition request will not be tried for another offence committed before the surrender, unless the person has had the opportunity of leaving New Zealand or the country that surrendered the person consents to the additional prosecution.⁵¹⁴
- 11.15 Many countries do not allow extradition to a country unless that country can guarantee speciality, as indeed New Zealand itself does in section 30(5).⁵¹⁵ Section 64 usefully gives this guarantee to other countries in a way that is clear and unambiguous. It avoids the need for the other country to seek assurances about speciality from the New Zealand Government.
- 11.16 The speciality requirement is not included in Australia's Extradition Act 1988 (Cth) in regards to requests for extradition to Australia from New Zealand.⁵¹⁶ Consequently, it is possible for a person extradited to Australia from New Zealand to be tried for offences that occurred prior to the extradition offence without having to give the person the opportunity to leave the country prior to being charged or getting consent from New Zealand. This cannot occur in the reverse situation when a person is extradited to New Zealand from Australia.
- 11.17 It may be worth considering whether the speciality requirement should be omitted in the law applying to extradition to New Zealand from Australia. This would allow New Zealand to try extradited persons for other offences that occurred prior to the extradition once they have been surrendered by Australia. The trust, close proximity, mobility, and relatively high number of extraditions between the two countries may tell against the need for the speciality limitation.

Removals of foreign nationals after serving sentence

- 11.18 There is an issue with section 92 of the Act, which relates to the return of a person who has been extradited to New Zealand to face trial and is acquitted or completes his or her sentence. It should be clarified that a person who "ceases to be serving the sentence" includes a person who is on parole.⁵¹⁷ Uncertainty with the current wording of this section has created difficulties for the New Zealand Police.

⁵¹² Parole Act 2002, s 91(3).

⁵¹³ Parole Act 2002, s 90(1).

⁵¹⁴ This is the principle of speciality, which means that a person can only be tried in the requesting country after surrender for the offence or offences to which the extradition related. See [2.12] for further explanation.

⁵¹⁵ See above at [8.119]–[8.125].

⁵¹⁶ Extradition Act 1988 (Cth), s 42.

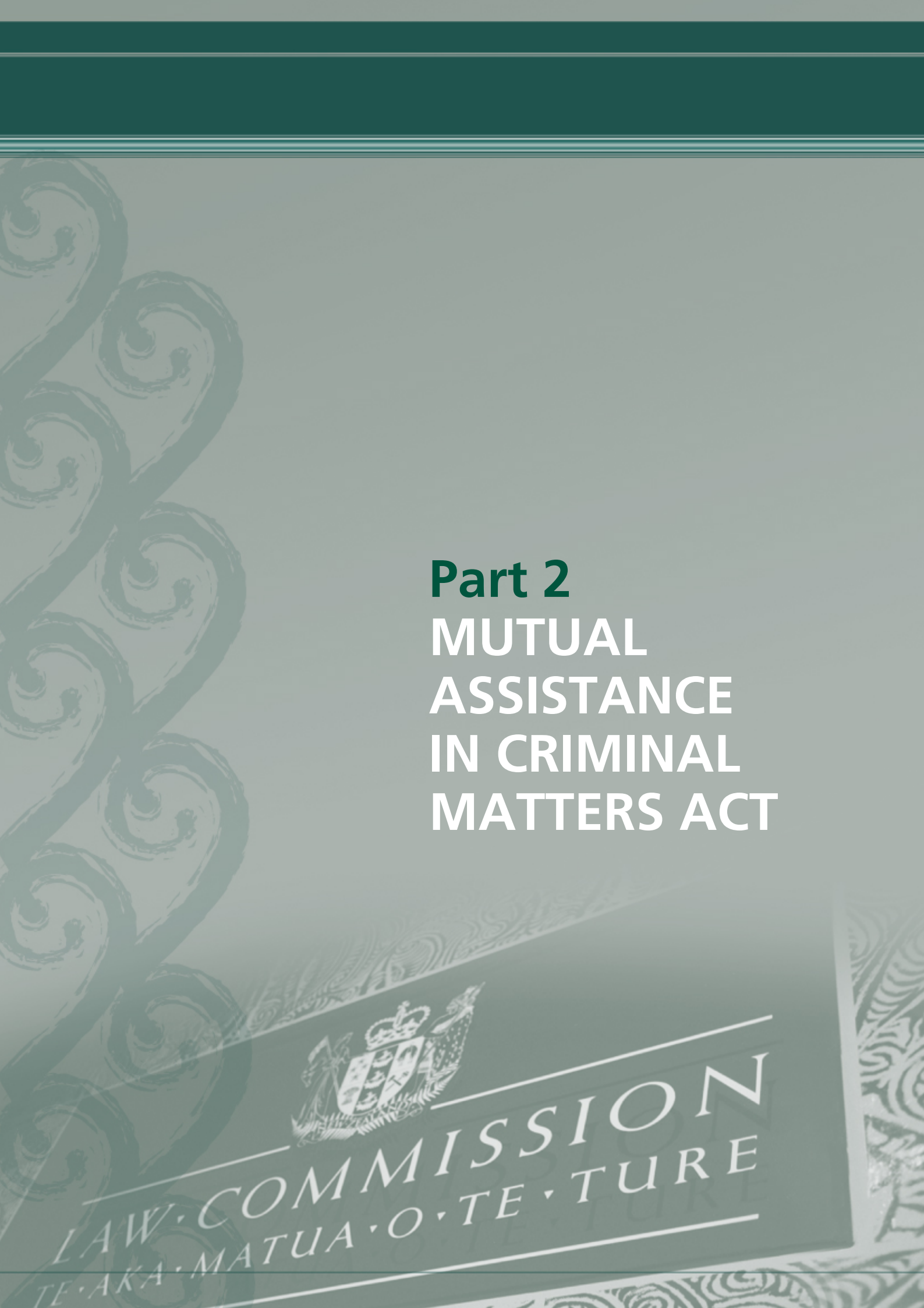
⁵¹⁷ Extradition Act 1999, s 92(b).

- 11.19 Some of the technical requirements of Part 11 of the Extradition Act, which addresses the removal of foreign nationals from New Zealand, are currently creating practical difficulties for New Zealand authorities. The Parole Board is often willing to grant parole if it knows that a foreign national is going to be removed. However, the Minister cannot issue the removal order until the person ceases to be serving the sentence. In order to achieve the removal of a foreign national, New Zealand agencies must carefully coordinate their procedures and the practical arrangements, such as flights, availability of escorts, and transit and travel documentation, in order to achieve the tight 48-hour timeframe for the person to be removed following service of the removal order.⁵¹⁸ These matters should be made more workable in a new Act.

QUESTION

Q43 How do we need to adjust the law to deal with outgoing extradition requests from New Zealand?

⁵¹⁸ Extradition Act 1999, s 96(4).



Part 2

MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT



Chapter 12

Introduction

OVERVIEW

- 12.1 Along with a review of the Extradition Act 1999, the Law Commission has been asked to review the Mutual Assistance in Criminal Matters Act 1992 (MACMA) to ensure it contains processes that are efficient, effective, and not overly complex or unnecessarily expensive but that also provide important checks and balances to protect those being investigated.⁵¹⁹
- 12.2 MACMA is New Zealand's primary statute governing the process New Zealand uses to provide and obtain foreign assistance in criminal investigations and prosecutions. The process is known as "mutual legal assistance",⁵²⁰ and it includes, for example, assisting foreign countries in identifying and locating persons and serving legal documents. Mutual legal assistance can also involve coercive actions such as the execution of searches and the recovery of assets. Foreign countries cannot undertake these actions in their own right as their powers are limited by the general principle that law enforcement is territorial. Legislation such as MACMA is therefore essential because, as one commentator put it, criminals "work in a borderless world, whilst the authorities that pursue them are constrained by borders".⁵²¹ MACMA can therefore be regarded as gateway legislation in that it allows foreign countries a route through which they can access the tools New Zealand uses when investigating and prosecuting criminal activity.
- 12.3 This gateway role is coupled with an important gatekeeping function. MACMA contains detailed direction on the form a request must take and the criteria that must be present for assistance to be considered. It also contains an extensive range of grounds on which a request must or may be refused. Each request is scrutinised and decided on a case-by-case basis. As the designated Central Authority under the Act, the Attorney-General is given the primary responsibility for the gatekeeper role.⁵²² In the case of coercive orders, such as searches or restraint of proceeds of crimes, it is also necessary for the Central Authority to seek either a warrant or an order from a court in the same way as a domestic law enforcement agency. These two doors through which requests of a coercive nature must pass – the first being the Central Authority, the second being the court process – provide an additional safeguard. The gatekeeping function in MACMA ensures that foreign assistance is only provided in the appropriate circumstances and the rights of individuals in New Zealand affected by the request are sufficiently protected.

⁵¹⁹ See Appendix A for full terms of reference.

⁵²⁰ "Mutual legal assistance" is "the process whereby one state provides assistance to another in the investigation and prosecution of criminal offences": William Gilmore (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press, Cambridge, 1995) at xii. Note that "mutual legal assistance" is to be distinguished from "mutual assistance", the latter referring to assistance provided by one state to another generally.

⁵²¹ Neil Boister *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) at 3.

⁵²² The role of the Central Authority is discussed in ch 14. This is to be distinguished from the central authority we have proposed in Part 1 of this issues paper.

- 12.4 The gateway and gatekeeping functions of the Act are clearly related to requests received by New Zealand (incoming requests). While MACMA also contains some provisions on requests made by New Zealand (outgoing requests), the ability for New Zealand to make requests is dependent on assistance the foreign country can provide under its own legislation.
- 12.5 In the 20 years since MACMA was enacted, the landscape for transnational crime has changed significantly and the ability for criminals to work in a “borderless world” has dramatically expanded. The world has witnessed considerable advancements in technologies and communications, rapid expansion of global markets, and a marked increase in the use of international travel and the breadth of destinations travelled to. This has increased the opportunity for the evidence and the proceeds of crime to be located in different countries.
- 12.6 As international crime grows and the need to combat what has been termed “international criminal procedure”⁵²³ expands, it is timely to undertake a review of MACMA. The likely impact of developments over time was recognised back in 1992 when the Bill was undergoing its third reading, with a Member of Parliament expressing that “[i]n time, [MACMA] will have to be extended because, of course, criminals can go as far as aeroplanes will fly”.⁵²⁴

THE LEGISLATION

- 12.7 Prior to the 1980s, crime was often regarded by legal systems as a local matter, and there was a limited framework through which countries could assist one another.⁵²⁵ Aside from extradition, assistance was limited to forms of informal cooperation such as cooperation between national police forces through Interpol.⁵²⁶
- 12.8 During the 1980s, there were considerable developments on mutual legal assistance at an international level. The biggest influence on New Zealand in this area was the 1986 Commonwealth Scheme for Mutual Assistance in Criminal Matters (Harare Scheme). The Scheme was adopted by Commonwealth Ministers at a Law Ministers’ meeting in Harare in 1986 to increase assistance between Commonwealth governments in criminal matters. The New Zealand Government was represented at that meeting by the then Attorney-General, Geoffrey Palmer.⁵²⁷
- 12.9 In April 1992 the Mutual Assistance in Criminal Matters Bill was introduced.⁵²⁸ It was described as a Bill “designed to make easier the provision and obtaining by New Zealand of international assistance in criminal matters”.⁵²⁹ In the second reading, the then Attorney-General, Paul East, explained that:⁵³⁰

The Bill sends a message to those involved in crime at an international level: that New Zealand recognises that in the 1990s the enforcement of criminal law can no longer stop at national borders. Countries must be prepared to co-operate with one another in order to bring offenders to justice and to deprive them of the proceeds of their crimes. The Bill shows that New Zealand is prepared to play its part in the fight against international crime.

523 Robert Currie “Human Rights and International Mutual Legal Assistance: Resolving the Tension” (2000) 11 Crim LF 143 at 145.

524 (15 September 1992) 529 NZPD 10877 per Hon Richard Prebble.

525 C Nicholls, C Montgomery and J B Knowles *The Law of Extradition and Mutual Assistance* (2nd ed, Oxford University Press, Oxford, 2007) at [17.04].

526 Interpol is the world’s largest international police organisation, with 190 member countries. Every Interpol member country has a national central bureau that links national police with the global network.

527 This scheme will be discussed in more detail in ch 13.

528 Mutual Assistance in Criminal Matters Bill 1992 (151–1).

529 (30 July 1992) 527 NZPD 10180.

530 (20 August 1992) 528 NZPD 10827.

- 12.10 The passage of the Bill was smooth. On 25 September 1992, the Bill was given Royal Assent, and MACMA came into force on 1 April 1993.

Purpose of MACMA

- 12.11 The object of MACMA is to facilitate the provision and obtaining of international assistance in criminal matters, including:⁵³¹
- (a) the identification and location of persons:
 - (b) the obtaining of evidence, documents, or other articles:
 - (c) the production of documents and other articles:
 - (d) the making of arrangements for persons to give evidence or assist investigations:
 - (e) the service of documents:
 - (f) the execution of requests for search and seizure:
 - (g) the forfeiture of—
 - (i) tainted property; and
 - (ii) property of persons who have unlawfully benefited from significant criminal activity or significant foreign criminal activity; and
 - (iii) instruments of crime; and
 - (iv) property that will satisfy all or part of a foreign pecuniary penalty order:
 - (h) the location of property that may be forfeited:
 - (i) the recovery of property to satisfy foreign pecuniary penalty orders:
 - (j) the restraining of dealings with property, or the freezing of assets, that may be forfeited.
- 12.12 Countries are compelled to seek mutual legal assistance for such activities because their borders represent the geographical boundaries of their enforcement jurisdiction. Common law countries were initially hesitant about the provision of mutual legal assistance because of the traditional understanding that criminal law is local, and in providing legal assistance, they would be enforcing another state's criminal law. Civil law countries viewed it as simply providing assistance to other states to enforce their own laws over criminal offences that concerned them. In any respect, today it is widely accepted that "the provision of legal assistance does not mean that the requested state exercises the requesting state's sovereign power; rather, it uses its own power to do something for the requesting state".⁵³²

When may MACMA assistance be sought?

- 12.13 As the name of the Act suggests, assistance under MACMA only applies in respect of criminal matters. The term "criminal matters" is defined in the Act as "criminal investigations and criminal proceedings", both of which are further defined in the Act:⁵³³
- "Criminal investigations" means an investigation certified by either the Attorney-General (for outgoing requests) or the central authority of the requesting country (for incoming requests) having been commenced in respect of an offence committed, or suspected on reasonable grounds to have been committed or to be likely to be committed, against the law of the country in which the actions occurred.

⁵³¹ Mutual Assistance in Criminal Matters Act 1992, s 4.

⁵³² Boister, above n 521, at 197.

⁵³³ Mutual Assistance in Criminal Matters Act 1992, s 2.

- “Criminal proceedings” means proceedings certified by either the Attorney-General (for outgoing requests) or the central authority of the requesting country (for incoming requests), having been instituted in respect of an offence committed, or suspected on reasonable grounds to have been committed, against the domestic law of the country in which the actions occurred. This includes the trial of a person for the offence and any proceedings to determine whether or not a person should be tried for the offence.
- 12.14 The point at which government assistance under MACMA can be sought was canvassed in the Harare Scheme discussions in the 1980s. At that time, New Zealand argued that no request for assistance should be permitted until criminal proceedings had actually been instituted. Underlying this view were fears that information or evidence could be used for purposes unrelated to the criminal matter originally relied upon or that a premature request could alert a prospective defendant.⁵³⁴ Australia, on the other hand, argued that Commonwealth cooperation should extend to mutual assistance in investigating serious crime and should include preventive action.⁵³⁵
- 12.15 The Harare Scheme provides that:⁵³⁶
- For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.
- 12.16 This was seen as a compromise between the two differing positions on the timing of mutual legal assistance requests. The fears associated with the ability to access assistance before the commencement of a proceeding were minimised by the inclusion of a provision in the Scheme prohibiting the use of information or evidence in connection with any matter other than the criminal proceeding specified in the request without the prior consent of the requested country.⁵³⁷

Types of assistance under MACMA

- 12.17 MACMA lists specific types of assistance that New Zealand can provide and obtain. These are contained in the purpose section of the Act,⁵³⁸ and they are repeated and expanded upon in Part 2 of the Act, which governs outgoing requests, and Part 3 of the Act, which governs incoming requests.
- 12.18 These specific types of assistance can be broadly classified in two categories:
- Administrative assistance: these provisions enable the Central Authority to arrange the assistance.
 - Court assistance: these provisions permit the necessary judicial intervention that is required for the assistance to be provided.

⁵³⁴ David McClean “Mutual Assistance in Criminal Matters: The Commonwealth Initiative” (1998) 37 ICLQ 177 at 182.

⁵³⁵ McClean, above n 534, at 182.

⁵³⁶ 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 [2(2)].

⁵³⁷ Harare Scheme, above n 536, at [31(3)].

⁵³⁸ Mutual Assistance in Criminal Matters Act 1992, s 4.

ADMINISTRATIVE ASSISTANCE	COURT ASSISTANCE
<ul style="list-style-type: none"> • Locating or identifying persons • Serving documents • Arranging attendance of a person (including a prisoner) in a foreign country 	<ul style="list-style-type: none"> • Evidence for a criminal proceeding • Obtaining and enforcing a general search warrant • Obtaining and enforcing a search warrant, production order, examination order, or interim foreign restraining order relating to the recovery of proceeds of crime • Registering and enforcing a foreign restraining order or foreign forfeiture order

12.19 Although MACMA lists particular types of assistance that are available, the Act is not limited to the types of assistance specifically named in the Act. Section 4 expressly notes that the Act facilitates international assistance in criminal matters “including” specific types of assistance. Section 26, which governs the form of the request, is broad and provides that each request by a foreign country shall specify the nature of the assistance being sought.

12.20 Requests for types of assistance that do not have their own specific provisions in MACMA are made and fulfilled under section 5 of the Act, which provides that:

5 Act not to limit other provision of assistance

Nothing in this Act—

- (a) derogates from existing forms of co-operation (whether formal or informal) in respect of criminal matters between New Zealand and any other country; or
- (b) prevents the development of other forms of such co-operation.

We understand that common requests that are made under section 5 include requests for information and requests to undertake interviews of voluntary witnesses.

Who is responsible for processing the request?

12.21 MACMA designates the Attorney-General as the Central Authority for mutual legal assistance. Every request under the Act is to be “made by the Attorney-General”,⁵³⁹ and every request by a foreign country under the Act is to be made “to the Attorney-General” or “to a person authorised by the Attorney-General, in writing, to receive requests by foreign countries”.⁵⁴⁰

12.22 The Act contains a number of safeguards that the Attorney-General must consider before agreeing to a request. In practice, the role is largely delegated to the Solicitor-General and carried out by Crown Law, the Office of the Solicitor-General.

What is the process for a request?

Outgoing requests

12.23 Part 2 of MACMA provides that New Zealand can make a formal request for assistance to any country.⁵⁴¹ Although the Act permits this, the country receiving the request may have its own requirements that New Zealand will need to satisfy.

12.24 In most cases, outgoing requests originate from the New Zealand Police. Some requests also originate from government departments or agencies that investigate or prosecute criminal

⁵³⁹ Mutual Assistance in Criminal Matters Act 1992, s 8.

⁵⁴⁰ Mutual Assistance in Criminal Matters Act 1992, s 25.

⁵⁴¹ Mutual Assistance in Criminal Matters Act 1992, s 7.

offences such as the Serious Fraud Office. The formal outgoing requests are prepared by counsel at Crown Law. Sometimes, the issuing of a formal request is preceded by an inquiry of the foreign country as to what the mutual assistance requirements of that country are or whether the foreign country would be likely to provide the assistance sought. Often, such inquiry is made on New Zealand's behalf by the New Zealand embassy in the foreign country. Most outgoing requests are sent to the foreign country through diplomatic channels.

- 12.25 The Act does not prescribe the form that requests to foreign countries should take. Again, this will largely be dependent on the requirements of the foreign country.

Incoming requests

- 12.26 MACMA sets out the form that requests shall take.⁵⁴² The request also requires substantial supporting documentation. MACMA provides significantly more detail regarding the process for requests made by foreign countries to New Zealand. This is because New Zealand has full control over such requests. Part 3 of the Act provides that an incoming request can be made by a prescribed foreign country, a convention country, or any foreign country on an ad hoc basis.⁵⁴³ In practice, there appears to be little difference in the way requests from these three types of countries are processed.
- 12.27 Incoming requests sometimes come through diplomatic channels, via the Ministry of Foreign Affairs and Trade. Once the request arrives at Crown Law, it is assessed for compliance with MACMA. If further information is required from the foreign country making the request, counsel dealing with the file will contact the requesting country to obtain the necessary information. If the request complies with MACMA, the Deputy Solicitor-General may consent to the request. Once a request is consented to, Crown Law will instruct the New Zealand authority that is responsible for providing assistance. We understand that, in most cases, this will be the Police through the national Interpol office. Crown Law will continue to supervise the request, and in most cases, any documentation obtained pursuant to the request will be returned to Crown Law so that Crown Law can provide the material to the requesting country. Before forwarding the material to the foreign country, Crown Law will check the documentation to ensure it is duly authenticated and in order.

GUIDING PRINCIPLES OF THE MACMA REVIEW

Assistance and international obligations

- 12.28 As the landscape for transnational crime continues to expand, there has been a vast amount of activity surrounding mutual legal assistance on the international stage. There has been a move towards recognising that foreign assistance can, and should, be provided through a wide variety of mechanisms. Countries should authorise their competent authorities to use the most efficient means to cooperate⁵⁴⁴ and “to co-operate with each other to the widest extent possible for the purposes of criminal matters”.⁵⁴⁵

⁵⁴² Mutual Assistance in Criminal Matters Act 1992, s 26.

⁵⁴³ Mutual Assistance in Criminal Matters Act 1992, ss 24 and 25A. Prescribed foreign countries are those countries identified by Regulations made under MACMA and currently are Australia; Fiji; Hong Kong Special Administrative Region of the People's Republic of China; Niue; the Republic of Korea; the United Kingdom; and the United States. Convention countries are countries that are party to certain conventions as listed in the schedule to MACMA.

⁵⁴⁴ Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012) at recommendation 40.

⁵⁴⁵ Harare Scheme, above n 536, at [1(1)].

- 12.29 New Zealand has an important role to play in combating cross-border crime. We aim to be a good world neighbour and should ensure we are assisting foreign countries in the best way that we can. Where appropriate, this will entail making available tools that New Zealand can employ in domestic criminal matters to foreign investigations and prosecutions.

Law enforcement and human rights

- 12.30 Underlying the gateway and gatekeeping roles of MACMA is the need to strike an appropriate balance between law enforcement and the protection of human rights. While mutual legal assistance does not involve the direct and far-reaching intrusion into the personal liberty of the individual that occurs in extradition, with the surrendering of a person to a foreign country for trial, it still has important human rights implications. This is because, for example, the provision of witness documents could lead to the securing of a conviction and subsequent execution of a person.
- 12.31 International criminal cooperation presents the challenge of balancing the protection of the individual with the larger, international societal interest in combating crime.

Guiding principles

- 12.32 The observations made above have shaped the following guiding principles of this MACMA review:
- Powers and investigative techniques that are available to domestic competent authorities should also be available for use in response to requests for assistance in foreign investigations and prosecutions.
 - New Zealand must keep pace with international developments on mutual assistance and ensure its mutual assistance regime gives effect to its international obligations in this area.
 - New Zealand must ensure that it has sufficient oversight and control of any mutual assistance it provides and that it balances law enforcement needs and human rights values.

These are supplementary to the global principles of this review.⁵⁴⁶

LAYOUT OF PART 2 OF THIS ISSUES PAPER

- 12.33 New Zealand has made a number of commitments at an international level as to how it will provide assistance to foreign countries in criminal matters. In Chapter 13, we look at the relationship these international commitments have with MACMA and examine whether the current approach is the best way to give effect to New Zealand's existing and future international commitments in this area.
- 12.34 Chapters 14 and 15 discuss the gatekeeping role of the Central Authority. Chapter 14 looks broadly at the role of the Central Authority and who is best placed to carry out this function. Chapter 15 discusses the grounds for refusal and considers whether reform is warranted through the amendment of any existing ground or the addition of further grounds.
- 12.35 Chapters 16–18 discuss some of the specific types of assistance available under MACMA and the emerging issues in these areas. These chapters cover search and surveillance, proceeds of crime, information requests, and the interviewing of voluntary witnesses during a criminal investigation.

⁵⁴⁶ See ch 1 at [1.5].

- 12.36 In Chapter 19, we examine the mutual assistance processes that take place between New Zealand regulatory agencies and their foreign counterparts (inter-agency mutual assistance regimes). Mutual assistance is not limited to, but may include, assistance in criminal matters. These regimes pose a challenge in criminal matters because it is sometimes unclear at what point the inter-agency mutual assistance regime should give way to MACMA. In this chapter, we consider how to manage the overlap that exists between MACMA and inter-agency mutual assistance regimes.
- 12.37 It is currently not clear whether MACMA can be used by defendants. In Chapter 20, we ask whether MACMA should be amended to expressly provide for defence requests and, if so, what that amendment should look like.
- 12.38 Chapter 21 considers some compliance issues that have been raised with us about MACMA. These include the use of new technology in MACMA and whether MACMA ought to include a procedure for urgent requests or a procedure for contributing to the costs of undertaking a request.
- 12.39 While much of the focus of the Act and this issues paper is on incoming requests, Chapter 22 looks at the provisions in MACMA that govern outgoing requests. As mentioned earlier, the ability for New Zealand to make requests is dependent on assistance the foreign country can provide under its own legislation. In this chapter, we look at the value of having provisions relating to outgoing requests. In the second part of the chapter, we consider section 63, which exists to ensure that evidence received by New Zealand will be admissible in criminal proceedings in a New Zealand court. While there is no doubt this is a valuable and necessary provision, concerns have been raised about the ease of securing evidence in accordance with the requirements of this section.

QUESTION

Q44 Does this issues paper set the right balance between the gateway and gatekeeper mechanisms necessary in MACMA?

Chapter 13

Giving effect to international commitments

INTRODUCTION

- 13.1 New Zealand has made a number of commitments at an international level as to how it will provide assistance to foreign countries in criminal matters. The enactment of the Mutual Assistance in Criminal Matters Act 1992 (MACMA) was, in essence, driven by the desire to give effect to some of New Zealand's earliest commitments in this area. Over the years, the Act has been amended to give effect to later commitments that have been made.
- 13.2 In this chapter, we look at the relationship between these international commitments and MACMA, examining whether the current approach is the best way to give effect to New Zealand's existing and future international commitments in this area. The chapter first identifies the key international agreements under which New Zealand has made commitments (to varying degrees) on mutual assistance in criminal matters.⁵⁴⁷ We have divided these into four categories:
- Multilateral mutual assistance: agreements between a group of countries on mutual assistance in criminal matters generally.
 - Bilateral mutual assistance treaties: agreements that New Zealand has with individual countries on mutual assistance in criminal matters generally.
 - Multilateral crime agreements: agreements that relate to particular crimes and include some commitments that relate to mutual assistance in criminal matters.
 - Multilateral regulatory agreements: agreements that are often more in a regulatory context and relate to a particular subject matter but include some commitments on mutual assistance in criminal matters.
- 13.3 Our preliminary view is that the current framework in MACMA for recognising international commitments needs reform. Our preferred approach is for the Act to start from the presumption that New Zealand will give the same assistance through the same procedure to all countries. This "basic" level of assistance would be set out in MACMA. Then, depending on the country applying for the assistance and the specific mutual legal assistance commitments that New Zealand has with the requesting country (via a treaty, convention, or some other agreement), some elements of the process would be able to be varied.

⁵⁴⁷ Note that the term "agreements" is used in the broadest sense to cover treaties, conventions, and schemes which are political commitments and not legally binding.

KEY INTERNATIONAL COMMITMENTS

Multilateral mutual assistance

The Commonwealth Scheme for Mutual Assistance in Criminal Matters (Harare Scheme)

- 13.4 The Harare Scheme was adopted by Commonwealth Law Ministers in 1986. The Scheme provides a framework for cooperation on criminal matters between Commonwealth countries. It includes provisions on specific types of assistance, the procedure for effecting transmission of requests, and grounds for refusing requests. The purpose of the Scheme is to encourage and enable countries to cooperate with each other to the widest extent possible for the purpose of criminal matters.⁵⁴⁸
- 13.5 The Harare Scheme is a voluntary and non-binding instrument. Member countries are encouraged to cooperate in accordance with the Scheme by adopting legislative or other measures as necessary to implement its provisions.⁵⁴⁹ As one commentator noted, the voluntary nature of the Scheme provides countries with:⁵⁵⁰
- ... considerable flexibility to implement the provisions of the whole Scheme progressively, giving due consideration to the complexity of an area of law which was new to most of them, the availability and allocation of resources, and existing legislative and constitutional obstacles in their countries.
- 13.6 The Scheme was last revised in 2011 and is now supplemented by the Commonwealth Model Legislation.⁵⁵¹ The Model Legislation is intended as a guide to assist member countries to implement the 2011 revisions to the Scheme. It cannot simply be adopted wholesale without having regard to the country's own legislative and administrative frameworks.⁵⁵²
- 13.7 The Harare Scheme was the key driver for the enactment of MACMA, and along with other Commonwealth countries, to date, New Zealand has closely aligned its Act with it.

United Nations Model Treaty on Mutual Assistance in Criminal Matters

- 13.8 The United Nations Model Treaty on Mutual Assistance in Criminal Matters was adopted by the General Assembly in 1990.⁵⁵³ The Model Treaty is not a treaty that states ratify. Rather, it can be used as a template by state parties who are negotiating a treaty between themselves on mutual assistance in criminal matters.⁵⁵⁴ The Model Treaty includes, for example, provisions on specific types of assistance, procedures for effecting transmission, and grounds for refusing assistance. The Model Treaty also contains footnotes indicating how states may choose to alter the obligations included.
- 13.9 There are many similarities between the Model Treaty and bilateral mutual assistance treaties that New Zealand has with China, Hong Kong, and Korea, in particular, the headings and structure.⁵⁵⁵

548 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 [1(1)].

549 At [1(4)].

550 Vimalen Reddi "The Commonwealth Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth, The Harare Scheme: an appraisal" (2012) 38 CLB 119 at 122.

551 Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014).

552 See Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014), at the headnote.

553 Model Treaty on Mutual Assistance in Criminal Matters GA Res 45/117, A/RES/45/117 (1990), subsequently amended by GA Res 53/112, A/RES/53/112 (1999) [UN Model Treaty].

554 Roger Clark, discussing a category of United Nations model treaties of which the UN Model Treaty is one example, described model treaties as "a kind of international formbook or collection of precedents"; see Roger S Clark "United Nations Model Treaties on Cooperation in the Criminal Process" (1992) 18 CLB 1544 at 1544.

555 Although there is no express mention of the UN Model Treaty in these bilateral treaties.

Bilateral mutual assistance treaties

13.10 Over the years, New Zealand has entered into treaties with individual countries on mutual assistance in criminal matters, these being:

- Agreement with the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters (entered into in 1998);⁵⁵⁶
- Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters (entered into in 1999);⁵⁵⁷ and
- Treaty with the People's Republic of China on Mutual Legal Assistance in Criminal Matters (entered into in 2006).⁵⁵⁸

13.11 These treaties have similar but not identical content to that in MACMA. They set out the form and procedure for a request, conditions around specific types of assistance, and grounds for refusing assistance and are likely to have been drafted using the UN Model Treaty as a guide.

13.12 Each treaty contains a similar provision to the effect that:⁵⁵⁹

a request is to be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

Under MACMA, the treaties are interpreted as building on the assistance that could otherwise be granted by MACMA. They can, for example, provide greater flexibility in relation to procedure. This is done by allowing countries to make a request as a “prescribed foreign country”.⁵⁶⁰

Multilateral crime agreements

United Nations Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances

13.13 The United Nations Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances came into force in 1990.⁵⁶¹ It provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals, and for international cooperation. The purpose of the Convention is to promote cooperation among the parties to more effectively address illicit traffic in narcotic drugs and psychotropic substances.⁵⁶²

13.14 In carrying out their obligations under the Convention, parties are to “take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems”.⁵⁶³ New Zealand ratified the Convention in 1998 and is currently one of 189 state parties. MACMA primarily gives effect

556 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 [1999] NZTS 6 (signed 3 April 1998, entered into force 1 March 1999) [Treaty with Hong Kong].

557 Treaty between the Government of New Zealand and the Republic of Korea on Mutual Legal Assistance in Criminal Matters [2004] NZTS 4 (signed 15 September 1999, entered into force 30 March 2000) [Treaty with South Korea].

558 Treaty between New Zealand and the People's Republic of China on Mutual Legal Assistance in Criminal Matters [2008] NZTS 1 (signed 6 April 2006, entered into force 1 January 2008) [Treaty with China].

559 See for example, art 6(2) of the Treaty with Hong Kong, above n 556; and art 5(1) of the Treaty with China, above n 558.

560 Discussed at [13.34]–[13.40].

561 United Nations Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (opened for signature 20 December 1988, entered into force 11 November 1990). New Zealand ratified this Treaty on 16 December 1998.

562 Article 2(1).

563 Article 2(1).

to it by allowing for countries to make a request to New Zealand in accordance with the convention as a “convention country”.⁵⁶⁴

The United Nations Convention against Transnational Organised Crime (UNTOC)

- 13.15 UNTOC came into force in 2003.⁵⁶⁵ It contains a series of measures against transnational organised crime, including the creation of domestic criminal offences (participation in an organised criminal group, money laundering, corruption, and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance, and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities. The purpose of the Convention is to promote cooperation to prevent and combat transnational organised crime more effectively.⁵⁶⁶
- 13.16 The obligation on each party to the Convention is similar to the obligations in the United Nations Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances. Parties are to take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of their domestic law, to ensure the implementation of its obligations under the Convention.⁵⁶⁷
- 13.17 New Zealand ratified UNTOC in 2002 and is currently one of 179 state parties. MACMA primarily gives effect to the Convention by allowing foreign countries to make a request to New Zealand in accordance with the convention as a “convention country”.⁵⁶⁸

United Nations Convention against Corruption (UNCAC)

- 13.18 UNCAC came into force in 2005.⁵⁶⁹ The Convention aims to combat corruption through prevention, criminalisation, international cooperation, and asset recovery. The specific purposes of UNCAC are:⁵⁷⁰
- to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
 - to promote, facilitate, and support international cooperation and technical assistance in the prevention of, and fight against, corruption, including in asset recovery; and
 - to promote integrity, accountability, and proper management of public affairs and public property.
- 13.19 Provisions in UNCAC specify how international cooperation and assistance should be rendered. The obligations on parties are similar to the obligations in the above conventions. Parties are required to take the necessary measures to ensure the implementation of its obligations under UNCAC “in accordance with fundamental principles of its domestic law”.⁵⁷¹
- 13.20 There are currently 171 state parties to UNCAC. While New Zealand signed the Convention in 2003, it has not yet ratified it.

⁵⁶⁴ Discussed at [13.41]–[13.46].

⁵⁶⁵ United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 28 September 2003). New Zealand ratified this Treaty on 19 July 2002.

⁵⁶⁶ Article 1.

⁵⁶⁷ Article 34(1).

⁵⁶⁸ Discussed at [13.41]–[13.46].

⁵⁶⁹ United Nations Convention against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005). New Zealand has not ratified this Treaty, but it was signed on 10 December 2003.

⁵⁷⁰ Article 1.

⁵⁷¹ Article 65(1).

Financial Action Task Force (FATF) international standards on combating money laundering and the financing of terrorism and proliferation

- 13.21 FATF is an intergovernmental policy-making body that aims to combat money laundering, terrorist financing, the financing of proliferation of weapons of mass destruction, and other related threats to the integrity of the international financial system. FATF has developed Recommendations⁵⁷² (supplemented by a Methodology)⁵⁷³ that are recognised as the international standard for combating money laundering, the financing of terrorism, and proliferation of weapons of mass destruction.
- 13.22 The Recommendations set standards for legal, regulatory, and operational responses and include standards on mutual legal assistance generally⁵⁷⁴ and mutual legal assistance in freezing and confiscation.⁵⁷⁵ First issued in 1990, the Recommendations were revised in 1996, 2001, 2003, and most recently in 2012.
- 13.23 As one of the 34 members of FATF, New Zealand must:⁵⁷⁶
- endorse and support the Recommendations and the Methodology (as amended from time to time);
 - agree to undergo a mutual evaluation during the membership process for the purposes of assessing compliance with FATF membership criteria, using the Methodology applicable at the time of the evaluation, as well as agreeing to submit subsequent follow-up reports; and
 - agree to participate actively in the FATF and to meet all the other commitments of FATF membership, including supporting the role and work of the organisation.
- 13.24 Although the standards are not binding, compliance is achieved through the mutual evaluation monitoring process. As both a member of FATF and the Asia/Pacific Group on Money Laundering, a FATF-style regional body, New Zealand is committed to implementing the Recommendations.
- 13.25 MACMA gives effect to the FATF Recommendations by providing a range of mechanisms that enable New Zealand to provide mutual legal assistance for use in money laundering and the financing of terrorism investigations and prosecutions.

Multilateral regulatory agreements

- 13.26 Aside from the international agreements discussed above that are in respect of purely criminal matters, New Zealand is also a party to a number of international agreements that contain mutual assistance commitments that are often primarily of a regulatory nature but may have a criminal element. Although these agreements generally do not have a direct impact on MACMA, there may be some crossover with the assistance that can be provided under the agreements and under MACMA.⁵⁷⁷ We have chosen to discuss two of these agreements to provide an example.

⁵⁷² Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012).

⁵⁷³ Financial Action Task Force *Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (February 2013).

⁵⁷⁴ Financial Action Task Force, above n 572, at recommendation 37.

⁵⁷⁵ Financial Action Task Force, above n 572, at recommendation 38.

⁵⁷⁶ See Financial Action Task Force “Process and criteria for becoming a FATF member” (2014) < www.fatf-gafi.org > .

⁵⁷⁷ See the discussion in ch 19.

International Organisation of Securities Commissions' (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)

13.27 IOSCO is an international body that comprises 124 securities regulators from around the globe, including the New Zealand Financial Markets Authority (FMA). IOSCO sets the global standards in the securities sector and, following the events of 11 September 2001, explored how securities regulators could expand cooperation and information sharing internationally. From this came the 2002 MMoU, which, among other things, sets out requirements on the information that can be exchanged between members, how it is to be exchanged, the types of information that can be compelled, and the permissible use of information.

13.28 The scope of assistance under the MMoU includes:⁵⁷⁸

- providing information and documents held;
- obtaining information and documents; and
- taking or compelling a person's statement or, where permissible, testimony under oath.

13.29 The MMoU does not itself create legally binding obligations or supersede domestic laws.⁵⁷⁹ However, as part of the rigorous process of becoming a signatory, the applicant member must produce evidence of the law that would allow it to comply with the MMoU. The MMoU currently has signatories from 97 member agencies and a further 12 who have committed to seeking the legal authority necessary to enable them to become full signatories. The FMA became a signatory to the MMoU in 2003. The legal authority that enables the FMA to comply with the MMoU is in the Financial Markets Authority Act 2011.⁵⁸⁰

Organisation for Economic Co-operation and Development (OECD) Convention on Mutual Administrative Assistance in Tax Matters

13.30 The OECD is made up of 34 member countries that cooperate on matters relating to economic growth and financial stability. The amended OECD Convention on Mutual Administrative Assistance in Tax Matters came into force in 2011.⁵⁸¹ The object of the Convention is to promote international cooperation for the better operation of national tax laws, while respecting the fundamental rights of taxpayers. The Convention authorises the tax authorities of the signatory countries to assist each other in the following:⁵⁸²

- Exchange of information: exchange of information arrangements enable tax authorities to assist each other in the detection and prevention of tax evasion and tax avoidance.
- Unpaid tax recovery: assistance in recovery enables tax authorities in recovering unpaid tax from absconding taxpayers.
- Service of documents: assistance in the service of documents supports assistance in recovery by ensuring that documents such as notices of assessment and reminders reach the taxpayer concerned.

578 International Organisation of Securities Commissions *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002) at [7(b)].

579 At [6(a)].

580 Financial Markets Authority Act 2011, ss 25 and 31.

581 OECD Convention on Mutual Administrative Assistance in Tax Matters ETS 127 (opened for signature 25 January 1988), as amended by the 2010 Protocol (opened for signature 27 May 2010, entered into force 1 June 2011).

582 Article 1(2).

- 13.31 New Zealand signed the Convention on 26 October 2012. It was given legislative force through the Double Tax Agreements (Mutual Administrative Assistance) Order 2013 and came into force for criminal tax matters from 1 March 2014. For all other exchange of information matters, it will come into force from 1 January 2015.

THE RELATIONSHIP BETWEEN NEW ZEALAND'S INTERNATIONAL COMMITMENTS AND MACMA

- 13.32 As crimes continue to become more sophisticated and transnational, and the international commitments New Zealand makes to assist in criminal matters continue to grow, we need to ensure that MACMA can recognise international obligations in a way that is flexible enough to allow for future commitments. Currently, this occurs primarily through the categorisation of countries. Direct amendments are also made to the Act to implement specific international commitments when required.

Categorisation of countries

- 13.33 The categorisation of countries is set out in Part 3 of MACMA, which governs incoming requests. Section 24 sets out three categories of countries that may apply for assistance and the conditions attached to each. Specifically it provides:

- (1) A request for assistance under this Part may be made by—
 - (a) any prescribed foreign country;
 - (b) subject to section 24A and section 24B, any convention country;
 - (c) subject to section 25A, any foreign country—
 - (i) that is not a prescribed foreign country or a convention country; or
 - (ii) that is a prescribed foreign country but where the request is not made in that capacity; or
 - (iii) that is a convention country but where the request is not made in that capacity.

Prescribed foreign countries

- 13.34 A prescribed foreign country is defined as “any country (other than New Zealand) that is declared by regulations made under this Act to be a foreign country to which Part 3 applies”.⁵⁸³ Current regulations deem the following countries to be prescribed foreign countries: Australia, Fiji, Hong Kong, Niue, South Korea, China, the United Kingdom, and the United States of America.
- 13.35 MACMA regulations can specify conditions to alter the application of Part 3 for a prescribed foreign country.⁵⁸⁴ In particular, MACMA states that the application of Part 3 to a prescribed foreign country may be subject to any limitations, conditions, exceptions, or qualifications relating to the provision of assistance in criminal matters that are necessary to give effect to a treaty with New Zealand.⁵⁸⁵

⁵⁸³ Mutual Assistance in Criminal Matters Act 1992, s 2.

⁵⁸⁴ Mutual Assistance in Criminal Matters Act 1992, s 65(2).

⁵⁸⁵ Mutual Assistance in Criminal Matters Act 1992, s 65(2)(b).

13.36 Prescribed foreign countries can be divided into two subcategories: those that have a treaty on mutual legal assistance with New Zealand and those that do not. Where there is a bilateral treaty between New Zealand and the prescribed foreign country, such a classification allows rules in that treaty to be incorporated into the application of Part 3. An example of this is the treaty New Zealand has with Hong Kong, which permits urgent requests to be made orally and confirmed in writing within 10 days.⁵⁸⁶ Under MACMA, there is no such provision for oral requests. The Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (Hong Kong Special Administrative Region of the People's Republic of China) Regulations 1999 states:⁵⁸⁷

Part 3 of the Act applies to the Hong Kong Special Administrative Region of the People's Republic of China subject to any limitations, conditions, exceptions, or qualifications that are necessary to give effect to the treaty.

This allows the oral procedure in the treaty to be available for MACMA requests made by Hong Kong.

13.37 New Zealand currently has applicable bilateral treaties with three of the eight prescribed foreign countries: Hong Kong, South Korea, and China. It is not clear on what basis the other five countries were so categorised; however, there appear to be a number of factors informing such a determination, including:

- an expectation of reciprocity of treatment between countries; and
- whether mutual assistance requests are common between these countries, given high levels of trade, travel, and familial connections.

13.38 The benefit for a prescribed foreign country that does not have a bilateral treaty is that the request will be subject to a less discretionary process than under the "ad hoc request" process.⁵⁸⁸

13.39 For those prescribed foreign countries that have a mutual legal assistance treaty with New Zealand, it is not always clear what specific aspects of that treaty can be incorporated into the request. The regulations do not state the particular limitations or exceptions to MACMA. These can only be ascertained by comparing the treaty text to the provisions in MACMA.

13.40 This can be difficult, and the position can sometimes be uncertain. For example, the Treaty with South Korea provides that assistance may be postponed on the grounds that an ongoing criminal or criminal proceeds investigation could be prejudiced.⁵⁸⁹ By contrast, this is a ground for refusal under MACMA.⁵⁹⁰ This gives rise to ambiguity. It is not clear whether the Treaty with South Korea provides an exception to the Act in this particular situation. Such ambiguity risks causing considerable difficulty for New Zealand in dealing with requests.

586 Treaty with Hong Kong, above n 556, art V(1).

587 Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (Hong Kong Special Administrative Region of the People's Republic of China) Regulations 1999, reg 3.

588 See discussion at [13.47]–[13.51].

589 Treaty with South Korea, above n 557, art 3(3).

590 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(e).

Convention countries

- 13.41 Convention countries are those countries party to the 31 conventions listed in the table in the Schedule to MACMA.⁵⁹¹ This includes some of the conventions discussed above. The Schedule also lists the domestic offences that correspond with the conduct prohibited by the convention. For example, pursuant to the Schedule, the New Zealand offences that correspond to conduct prohibited under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 19 December 1988, are the following sections of the Misuse of Drugs Act 1975:
- Section 6 Dealing with controlled drugs
 - Section 9 Cultivation of prohibited plants
 - Section 10 Aiding offences against corresponding law of another country
 - Section 12A Equipment, material, and substances used in production or cultivation of controlled drugs
 - Section 12AB Offence to knowingly import or export precursor substances for unlawful use
 - Section 12B Laundering proceeds of drug offences
 - Section 12C Commission of offences outside New Zealand
- 13.42 A convention country can request assistance in accordance with a listed convention provided the request relates to criminal matters arising from the commission or suspected commission of an offence that, if committed within New Zealand, would constitute a corresponding offence.⁵⁹²
- 13.43 This category is New Zealand's attempt to ensure that requests made pursuant to a convention are dealt with in a manner consistent with that convention, although still in conformity with the fundamental provisions of New Zealand law.
- 13.44 If this convention country is also a prescribed foreign country but makes the request in its capacity as a convention country, MACMA sets out the rules of interaction:⁵⁹³
- Interaction with the treaty: where there is a mutual legal assistance treaty between New Zealand and the convention country, the request for assistance is to be dealt with in the manner specified in that treaty, unless (or except to the extent that) to do so would be inconsistent with the convention. If the treaty excludes any of the offences listed in column 2 of the Schedule, or limits the types of assistance that may be requested in relation to those offences, the exclusion or limitation does not apply.
 - Interaction with regulations: where the convention country is subject to conditions, exceptions, or qualifications as specified in the regulations due to its prescribed foreign country status, and the regulations exclude any of the offences listed in column 2 of the Schedule or limit the types of assistance that may be requested in relation to those offences, the exclusion or limitation does not apply.
- 13.45 Similar to the problem with prescribed foreign countries, MACMA is not absolutely clear on the exact interaction between the convention and each individual element of the Act itself.

591 Mutual Assistance in Criminal Matters Act 1992, s 2.

592 Mutual Assistance in Criminal Matters Act 1992, s 24A.

593 Mutual Assistance in Criminal Matters Act 1992, s 24B.

Other countries

- 13.46 Any foreign country can make an ad hoc request for assistance. In addition to the requirements of the Act, countries making an ad hoc request are also subject to section 25A.⁵⁹⁴ This includes a country that is a prescribed foreign country or a convention country, where that country is not making the request in either of those capacities.⁵⁹⁵
- 13.47 Section 25A(2) provides that, in deciding whether the request should be accepted, the Attorney-General must consider:
- any assurances given by that country that it will entertain a similar request by New Zealand for assistance in criminal matters;
 - the seriousness of the offence to which the request relates;
 - the object of this Act as specified in section 4; and
 - any other matters the Attorney-General considers relevant.

Thus, the Attorney-General has the greatest discretion over whether he or she will permit an ad hoc request for assistance.

- 13.48 While this ad hoc category is not in itself problematic, it does contain some additional considerations for the Attorney-General to consider, which a foreign country may wish to avoid. As we noted in the discussion on prescribed foreign countries, it is unclear on what grounds a country can become a prescribed foreign country. It would be useful for the Act to specify what a country would need to do in order to be deemed a prescribed foreign country.

Direct amendments

- 13.49 One way in which MACMA can give effect to New Zealand's international commitments is through direct amendments to the Act itself.
- 13.50 This has been attempted in the Organised Crime and Anti-corruption Legislation Bill on the sharing of DNA information, which was introduced on 25 June 2014.⁵⁹⁶ Currently, the law does not allow DNA profile information to be shared with overseas agencies for the purpose of criminal investigations and prosecutions.⁵⁹⁷ This became a concern in examining the agreement New Zealand entered into with the United States of America on Enhancing Cooperation in Preventing and Combating Crime (PCC Agreement).⁵⁹⁸ The PCC Agreement provides for the reciprocal exchange of fingerprint data and relevant underlying information between the United States and New Zealand, as permitted by each country's domestic legislation, for the purpose of preventing and combating crime. It became clear that New Zealand's current legislation does not allow it to give effect to this agreement. As a result, some amendments have been proposed to the Criminal Investigations (Bodily Samples) Act and MACMA to allow access to DNA profile information pursuant to a MACMA request.⁵⁹⁹ The proposed amendments to

594 Mutual Assistance in Criminal Matters Act 1992, s 24(1).

595 Mutual Assistance in Criminal Matters Act 1992, s 25A(1). This could conceivably be the case, for example, where a convention country, which is not also a prescribed foreign country, cannot satisfy the requirements of s 24A and so does not make the request in their capacity as a convention country.

596 Organised Crime and Anti-corruption Legislation Bill 2014 (219-1).

597 The Criminal Investigations (Bodily Samples) Act 1995 prohibits access to or disclosure of information stored in the profile databank, except for the purpose of forensic comparison by the Police in relation to alleged offending in New Zealand, for the purpose of making information available pursuant to the Privacy Act 1993 or for the purpose of administering the DNA profile data: see Criminal Investigations (Bodily Samples) Act 1995, s 27.

598 Agreement between the Government of New Zealand and the Government of the United States of America on Enhancing Cooperation in Preventing and Combating Crime (signed 20 March 2013, not yet in force).

599 Organised Crime and Anti-corruption Legislation Bill 2014 (219-1), cls 39 and 58.

MACMA provide that the DNA request must relate to an offence that corresponds to a New Zealand offence that is punishable by imprisonment of more than one year. The proposed one-year timeframe came directly from the PCC Agreement, which applies to offences that are punishable by a maximum term of more than one year's imprisonment.

A NEW FRAMEWORK

- 13.51 MACMA currently recognises that direct amendments to the Act will not always be necessary to give effect to New Zealand's international commitments and has developed a categorisation of countries framework to try and give effect to some of these commitments. While we agree that such a mechanism, which avoids the need for constant amendment to the Act itself, is appropriate, the current framework is difficult to work with, and a clearer, more efficient design is required.
- 13.52 We propose that MACMA should start from the presumption that New Zealand will give the same assistance to all countries. This assistance would be detailed in the Act. The Act would set out the "minimum" or "basic" level of assistance New Zealand would provide for all countries.
- 13.53 International mutual legal assistance agreements could supplement the Act in some ways. Similar to the position taken in Part 1 of this issues paper, MACMA would need to contain express provisions that spell out which provisions can be affected by international agreements and in what way. This would provide absolute certainty for New Zealand in dealing with requests. Any supplementary elements could not be inconsistent with the domestic laws.
- 13.54 Supplementary elements could be procedural, such as urgency and cost-sharing elements, where an international agreement required them. We also think that further grounds for refusal could supplement the grounds in the Act. However, we think it would be difficult for international agreements to add additional types of assistance.
- 13.55 Currently MACMA is too detailed and specific and needs to be more principle based. In this way, it could cater to the principle that, where appropriate, tools that New Zealand can employ in domestic criminal matters should be made available to foreign investigations and prosecutions.

QUESTIONS

- Q45 What do you think about our proposed approach of having a basic procedure set out in MACMA for all countries, which could be supplemented through international agreements?
- Q46 In thinking about a potential redrafting of MACMA, how closely do you think the Act needs to align with the Harare Scheme and its supplementary Model Legislation? Is consistency with the Commonwealth significant?

Chapter 14

The Central Authority

INTRODUCTION

14.1 The gatekeeping function of the Mutual Assistance in Criminal Matters Act 1992 (MACMA) is carried out by the Central Authority. This mechanism was imported directly from the Harare Scheme. At that time, it was seen as being fundamental to the efficient working of mutual assistance arrangements. As one commentator observed, an essential prerequisite of a working mutual assistance system is a central authority that “devotes as many resources as possible to learning the laws and systems of at least the major countries from which assistance is likely to be sought”.⁶⁰⁰ In recent decades, a central authority has been advocated as best practice in all forms of international mutual assistance in criminal matters.⁶⁰¹

14.2 The Commonwealth Model Legislation on Mutual Assistance in Criminal Matters provides:⁶⁰²

The [Attorney-General/appropriate body] shall be designated as the Central Authority for [enacting country], and references in this Act to the Central Authority are to the [Attorney-General/appropriate body] acting in that capacity.

Like most Commonwealth countries, New Zealand appointed the Attorney-General as its Central Authority. Section 8 of MACMA provides that every request made by New Zealand under the Act is to be “made by the Attorney-General”, and section 25 provides that every request by a foreign country under the Act is to be “made to the Attorney-General”.⁶⁰³

14.3 This chapter first looks at the gatekeeping role of the Central Authority. We then consider whether the Attorney-General is best suited to this position. The appropriateness of having a Central Authority to transmit MACMA requests is not in question.

14.4 In Part 1 of this issues paper, we have suggested there should be a Central Authority that is formally charged with the oversight of extradition in New Zealand. We discussed whether the Central Authority should be the Solicitor-General or the Attorney-General, to further emphasise that decisions as to how an extradition proceeds are not to be political ones. We recognise there may be different considerations in relation to mutual assistance, for example, stronger international relations aspects. However, on balance, if the Solicitor-General is given formal responsibility for the progress of extradition proceedings, in our view, the Solicitor-General should also have formal responsibility for MACMA requests.

600 Dianne Stafford “Mutual Legal Assistance in Criminal Matters: The Australian experience” (1991) 17 CLB 1384 at 1390.

601 The United Nations Convention against Transnational Organised Crime and the Protocols Thereto 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 28 September 2003) requires parties to designate a central authority for the purposes of mutual legal assistance (art 18(13)). The Model Treaty on Mutual Assistance in Criminal Matters GA Res 45/117, A/Res/45/117 (1990), subsequently amended by GA Res 53/112, A/RES/53/112 (1999) [UN Model Treaty], includes art 3, which requires each state party to designate a central authority or authorities. Also see Asian Development Bank and Organisation for Economic Co-operation and Development *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (2007) at 64; and Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2013) at recommendations 37(b) and 27, providing that countries should use a central authority or another established official mechanism, for effective transmission and execution of requests.

602 Commonwealth Model Legislation on Mutual Assistance in Criminal Matters (2014), cl 6.

603 Or “to a person authorised by the Attorney-General, in writing, to receive requests by foreign countries”. Where the latter occurs, and a request by a foreign country is made to a person authorised by the Attorney-General in writing, the request is taken to have been “made to the Attorney-General”: Mutual Assistance in Criminal Matters Act 1992, s 25(2).

ROLE OF THE CENTRAL AUTHORITY

- 14.5 As we noted in Chapter 12, one of the core functions of MACMA is to provide a gateway for foreign countries to access the tools New Zealand uses when investigating and prosecuting criminal activity. Importantly, this gateway function is coupled with a gatekeeping role, which is given to the Central Authority. The Central Authority is responsible for ensuring foreign access to New Zealand tools is only provided in the appropriate circumstances and that the rights of individuals affected by those requests are sufficiently protected. This is facilitated through a number of mechanisms in the Act that function as checks on whether providing the assistance is desirable and acceptable for New Zealand.

Form requirements

- 14.6 MACMA requires that all incoming requests must specify:⁶⁰⁴
- the purpose of the request and nature of the assistance being sought;
 - the person, agency, or authority that initiated the request; and
 - whether the foreign country is making the request in their capacity as a prescribed foreign country or a convention country.
- 14.7 The incoming request also requires substantial supporting documentation. Incoming requests are to be accompanied by:⁶⁰⁵
- a certificate from the foreign central authority confirming that the request is made in respect of a criminal investigation or criminal proceedings within the meaning of MACMA;
 - a description of the nature of the criminal investigation or criminal proceedings and a statement setting out a summary of the relevant fact and law;
 - details of the procedure that the foreign country wishes to be followed in New Zealand in giving effect to the request, including details of the manner and form in which any information is to be supplied to the foreign country pursuant to the request;
 - a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes;
 - details of the period within which the foreign country wishes the request to be complied with;
 - if the request involves a person travelling from New Zealand to the foreign country, details of allowances to which the person will be entitled and of the arrangements for accommodation for the person while the person is in the foreign country pursuant to the request;
 - any other information required to be included with the request under a treaty or other arrangement between New Zealand and the foreign country; and
 - any other information that is likely to be of assistance.

604 Mutual Assistance in Criminal Matters Act 1992, s 26.

605 Mutual Assistance in Criminal Matters Act 1992, s 27.

Although the amount of supporting documentation may appear administratively burdensome, it tends not to create delay in application and processing times because compliance is relatively easy. For example, a sentence in a covering letter is all that is needed to satisfy the “certificate” requirement.⁶⁰⁶

- 14.8 This material assists the Attorney-General in determining whether New Zealand may be able to provide the requested assistance to the foreign country. Failure to comply with form requirements will not necessarily preclude the request from being accepted, as the Attorney-General has discretion to grant the request despite non-compliance in this area.⁶⁰⁷

Checks on specific types of assistance sought

- 14.9 While MACMA applies broadly in respect of criminal matters, both the stage of the criminal matter and the penalty level of the offence as provided in the requested country may be relevant in whether New Zealand is able to provide certain types of assistance. For example, while New Zealand can assist in locating or identifying persons or serving documents, in respect of a criminal investigation or proceeding in the foreign country,⁶⁰⁸ it can only assist in organising for the attendance of a prisoner in a foreign country in respect of a criminal proceeding that has been instituted in the foreign country or where there is a criminal investigation of a foreign serious offence.⁶⁰⁹ Similarly, New Zealand can only assist in obtaining a search warrant relating to evidentiary material where the offence to which the investigation or proceeding relates is punishable in the foreign country by two years’ imprisonment or more.⁶¹⁰
- 14.10 Some types of assistance in MACMA are more intrusive and may impinge on the rights of individuals more greatly. By restricting the availability of some types of assistance to the advanced stages of a prosecution or to more serious offending, there is an additional gatekeeping function operating.

Grounds for refusing a request

- 14.11 As part of the Attorney-General’s decision on whether to grant the requested assistance to the foreign country, MACMA sets out grounds under which the request for assistance *must be* refused (“mandatory” grounds) and grounds under which the request *may be* refused (“discretionary” grounds).⁶¹¹ Whether any such grounds exist is to be determined “in the opinion of the Attorney-General”.

606 There is no set form for this certificate. However, Crown Law advises that a formal covering letter from the central authority that confirms that the request came from the central authority and certifies that the request is made in respect of a criminal investigation or proceeding within the meaning of the Act would be appropriate.

607 Mutual Assistance in Criminal Matters Act 1992, s 27(5).

608 Mutual Assistance in Criminal Matters Act 1992, ss 30 and 51–52.

609 Mutual Assistance in Criminal Matters Act 1992, s 38.

610 Mutual Assistance in Criminal Matters Act 1992, s 43.

611 Mutual Assistance in Criminal Matters Act 1992, s 38.

14.12 The following table summarises the mandatory and discretionary grounds:

MANDATORY GROUNDS – SECTION 27(1)	DISCRETIONARY GROUNDS – SECTION 27(2)
Political offence	Dual criminality
Discrimination	Extraterritoriality
Double jeopardy	Offence could not be prosecuted in New Zealand because of lapse of time or other reason
Military offence	Death penalty
Prejudice to sovereignty, security, or national interests	Prisoner requested to give evidence but would not be in public interest or prisoner's interests
Person requested to give evidence does not consent to travel to the foreign country	Prejudice to a criminal investigation in New Zealand
Assistance unlawful or not authorised under MACMA	Prejudice to the safety of any person
	Excessive burden on resources or triviality
	Request not in correct form

These grounds act as a check in relation to whether providing the assistance is desirable and acceptable for New Zealand.⁶¹²

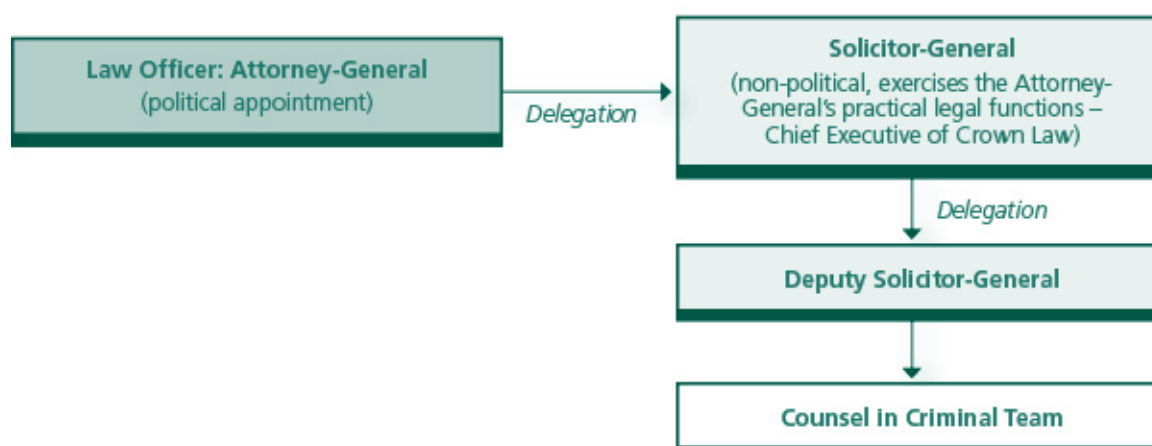
14.13 The Central Authority can also impose conditions on providing the assistance.⁶¹³

WHO IS BEST PLACED TO UNDERTAKE THIS FUNCTION?

14.14 We understand that, in practice, the powers conferred on the Attorney-General are delegated to the Solicitor-General. Formal requests for mutual assistance are received and prepared by the Crown Law Office. Counsel in the Criminal Team prepare outgoing requests and assess incoming requests (usually in consultation with the originating agency) and then refer the requests to the Deputy Solicitor-General (Criminal) who, on delegated authority from the Solicitor-General, consents to the request being actioned or sent.

14.15 The diagram prepared by Crown Law, and reproduced below, sets out how this works:⁶¹⁴

The Central Authority



⁶¹² Each ground is discussed in ch 15 in detail.

⁶¹³ Mutual Assistance in Criminal Matters Act 1992, s 29.

⁶¹⁴ Crown Law “Central Authorities” < www.crownlaw.govt.nz > .

- 14.16 Delegation between these three actors is permitted by the Constitution Act 1986. The Solicitor-General may perform the functions of the Attorney-General⁶¹⁵ and may in turn delegate powers to a Deputy Solicitor-General with the Attorney-General's written consent.⁶¹⁶ The fact that a Deputy Solicitor-General performs a function is, in the absence of proof to the contrary, sufficient evidence of his or her authority to do so.⁶¹⁷
- 14.17 The appropriateness of delegation in the MACMA context was recently considered by the High Court in *Commissioner of Police v Dotcom*.⁶¹⁸ Section 54(2) of MACMA provides that the Attorney-General may authorise the Commissioner of Police to apply to the High Court to register a foreign restraining order (FRO). In this case, the Deputy Solicitor-General authorised the Commissioner of Police to apply to register the FRO. The Respondent argued that the Attorney-General could not delegate this function because section 25 of MACMA establishes a regime governing decision making that cannot be circumvented by recourse to the Constitution Act's general delegation provisions.⁶¹⁹ This was rejected by the Court, which held that section 25 relates to the receipt of requests and does not require or authorise the Attorney-General or his or her delegate to do anything in relation to a request.⁶²⁰
- 14.18 The main policy argument against permitting the delegation was that the Attorney-General's function is pivotal as a safeguard against what could amount to arbitrary and oppressive conduct arising from the registration of an FRO made overseas on an ex parte basis.⁶²¹ In addition, it was argued that the grounds for refusal under section 27 of MACMA are highly political and should be considered by the Attorney-General.⁶²²
- 14.19 However, Potter J accepted that the delegation based on the Constitution Act provisions was appropriate.⁶²³ The rationale for authorisation being issued by the Deputy Solicitor-General, rather than the Attorney-General, is found in a constitutional convention. The convention provides that, except in exceptional cases,⁶²⁴ it is not appropriate for the Attorney-General to exercise statutory powers in criminal matters but rather to leave decisions regarding the exercise of these powers to the Solicitor-General or delegate.⁶²⁵ Potter J held that to require the Attorney-General to have direct and personal involvement would breach convention and may give the detrimental appearance of political influence.⁶²⁶ Further, prohibiting this delegation would require the Attorney-General's involvement in numerous other types of requests made under Part 3, an untenable administrative burden.⁶²⁷ The Court noted that:⁶²⁸

615 Constitution Act 1986, s 9A.

616 Constitution Act 1986, s 9C(1).

617 Constitution Act 1986, s 9C(5).

618 *Commissioner of Police v Dotcom* [2012] NZHC 634.

619 At [31(e)].

620 At [35].

621 At [31(d)].

622 At [31(d)].

623 At [68]–[69].

624 The only example in recent memory is the decision to stay proceedings in 1991 arising from the sinking of the *Rainbow Warrior*, a case that raised issues of New Zealand's diplomatic and economic relationships with other countries: *Commissioner of Police v Dotcom*, above n 618, at n 22.

625 *Commissioner of Police v Dotcom*, above n 618, at [55]. The existence and importance of this convention has been discussed in, for example, John McGrath "Principles for Sharing Law Official Power – the Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197; and Law Commission *Criminal Prosecution Report* (NZLC R66, 2000) at [36]–[38].

626 At [66].

627 At [67]. The Court gave examples: "These include assistance in locating or identifying persons believed to be in New Zealand, obtaining evidence in New Zealand, obtaining attendance of persons to give evidence or assistance in relation to criminal matters in a foreign country, and attendances of prisoners in a foreign country."

628 At [67].

It is not credible to suggest that the Attorney-General should, or for that matter could, be personally involved in relation to such a range of mundane functions. Further, to do so would be inconsistent with his constitutional role in the justice system.

Not only is it an administrative burden for the Attorney-General but it is also inconsistent with the convention for the Attorney-General to exercise this power.

- 14.20 In light of the constitutional convention preventing the Attorney-General from exercising this statutory power, alongside the following points, we consider whether the Attorney-General is the right person for the Central Authority role.
- 14.21 Usually, an individual rather than an agency is named in statute in such a role, and as we noted in Part 1 of this issues paper, there are two options for who should be named as the Central Authority: the Attorney-General or the Solicitor-General.
- 14.22 The Attorney-General is both a political and non-political actor, as he or she is both a Cabinet Minister and the senior law officer of the Crown. In the law officer role, the Attorney-General is a non-political actor responsible for the administration of the criminal law. In exercising this role, the Attorney-General provides advice to Cabinet and exercises statutory decision-making responsibilities, particularly in relation to the criminal justice system. The Attorney-General has the obligation to act on these matters independently and free from political considerations.
- 14.23 Most of the Attorney-General's functions are delegated to the Solicitor-General, who, as well as holding office as the junior law officer of the Crown, is the Chief Executive of the Crown Law Office. As noted above, the Solicitor-General can, by statute, exercise almost all of the statutory functions of the Attorney-General.⁶²⁹ This is particularly important in allowing the Solicitor-General to assume responsibility for functions that should be undertaken independently of the political process, most notably in the criminal law.
- 14.24 The Attorney-General would be the most appropriate person to act as the Central Authority if it is considered that the Central Authority's role should reside in an executive decision maker who is accountable to Cabinet. The Attorney-General would be able to provide senior oversight and a political viewpoint where necessary. If it is considered that the process be completely non-political, the Solicitor-General is the better choice.
- 14.25 In Part 1 of this issues paper, we have suggested that there should be a Central Authority that is formally charged with the oversight of extradition in New Zealand. We discussed whether the Central Authority should be the Solicitor-General or the Attorney-General, to further emphasise that decisions as to how an extradition proceeds are not to be political ones. Some MACMA requests will require a balancing between the Government's desire to cooperate and the reality that cooperation will be relatively resource intensive and take away from resources for domestic law enforcement. This may be felt to be political and would suggest that the Attorney-General may be best placed in the role as the Central Authority for MACMA requests.
- 14.26 However, it would be helpful to align the Central Authority for MACMA with the proposed central authority for extradition. This would allow a coordinated approach to the assistance New Zealand provides to foreign countries in criminal matters, which is particularly beneficial where a foreign country's request involves both extradition and MACMA proceedings. On balance, if the Solicitor-General is given formal responsibility for the progress of extradition proceedings, in our view, the Solicitor-General should also have formal responsibility for MACMA requests.

629 Constitution Act 1986, s 9A.

QUESTION

Q47 Who is the appropriate person to be designated as the Central Authority under MACMA?

PRIVILEGE

- 14.27 Crown Law raised with us the uncertain nature of the protection that might be accorded to communications made between it and requesting governments in the context of its role as the Central Authority.
- 14.28 As discussed in Part 1 of this issues paper, in the non-litigation context, such communications will be protected under a number of grounds in the Official Information Act 1982 or the Privacy Act 1993, most notably as information provided in confidence by foreign governments. In the litigation context, it is possible that such communications might be covered by legal professional privilege and hence not available for discovery or disclosure, but this is not certain and depends on whether a foreign country might be considered a client seeking legal advice.
- 14.29 Arguably, much of a request to the Central Authority will involve significant communication back and forth that one would expect of a legal adviser assisting a client through a difficult process.
- 14.30 Similar to the position taken in Part 1 of this issues paper, we are not in favour of deeming communications between a requesting country and the Central Authority to be privileged in the same way as more traditional requests for legal advice. We prefer a separate provision in MACMA that communications between the Central Authority and the requesting country ought not to be disclosed unless in the interests of justice. Such a provision would allow the Central Authority to make a disclosure when required by fairness, and it would allow the requesting country to withdraw the application if it preferred that to making the necessary disclosure. The separate provision has the advantage of clearly preserving the independent role of the Central Authority.

QUESTION

Q48 Should MACMA expressly provide that communications between the Central Authority and the requesting country ought not to be disclosed unless in the interests of justice?

Chapter 15

Grounds for refusing assistance

INTRODUCTION

- 15.1 The Mutual Assistance in Criminal Matters Act 1992 (MACMA) includes grounds on which the Attorney-General can decline a request for assistance from a foreign country. These are set out in section 27. They are divided into two types: “mandatory” grounds for refusal and “discretionary” grounds for refusal. The grounds for refusal act as a check to ensure that providing assistance is not objectionable or contrary to New Zealand’s legal system. They provide key protections for the individuals who may be affected by requests from foreign countries, including the protection of human rights and fundamental legal values.
- 15.2 There are similarities between these grounds and the grounds for refusing surrender under the Extradition Act 1999.⁶³⁰ However, whereas an extradition request involves a particular type of action that has serious implications for the individual concerned, there is considerable diversity in the type of assistance requested under MACMA and the degree to which providing this assistance impacts on individuals. Because of this, discretionary grounds are more suitable in the MACMA context, and consequently, the list of discretionary grounds is much longer under MACMA than under the Extradition Act.
- 15.3 This chapter examines the grounds for refusing assistance in the current Act and considers whether reform is necessary, either by amendment of any existing ground, the deletion of existing grounds, or the addition of further grounds.
- 15.4 We are not aware of particular problems that are being caused by the current grounds for refusal. We consider, however, that it is timely to review how well the grounds meet international best practice and compare with other jurisdictions.

MANDATORY GROUNDS

Political offence

- 15.5 Sections 27(1)(a) and (b) of MACMA provide that assistance must be refused if, in the opinion of the Attorney-General:⁶³¹
- (a) 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 is alleged to have been committed or was committed, an offence of a political character; or
 - ...
 - (b) 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;

⁶³⁰ See ch 8.

⁶³¹ Section 27(1)(ab) and (ba) provides the same ground in relation to certain civil proceedings that are deemed to be criminal proceedings under MACMA. These are proceedings relating to the proceeds of crime.

15.6 The political offence ground for refusal is also included in the Extradition Act,⁶³² and its inclusion in MACMA is for the same fundamental reason: it has long been considered inappropriate for a country to intervene in the internal political struggles of another.⁶³³

15.7 The political offence ground has become more limited over time to ensure that argument on the existence of a political motivation is not used to prevent assistance being given in relation to the legitimate investigation or prosecution of a criminal act. Some countries, and international conventions and schemes, have made it clear that the scope of the political offence ground is relatively narrow. For instance, the Australian Act defines “political offence” in the same way as the Australian Extradition Act, which provides:⁶³⁴

political offence, in relation to a country, means an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country), but does not include:

- (a) an offence that involves an act of violence against a person’s life or liberty; or
- (b) an offence prescribed by regulations for the purposes of this paragraph to be an extraditable offence in relation to the country or all countries; or
- (c) an offence prescribed by regulations for the purposes of this paragraph not to be a political offence in relation to the country or all countries.

The Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (Harare Scheme) provides that an offence is not of a political character if it is within the scope of an international convention to which both the requesting and the requested countries are parties.⁶³⁵

15.8 As we have suggested in our review of extradition, one option for reform is to add a definition that limits the scope of the political offence exception in MACMA. This could be similar to the definition in Australia. This would ensure New Zealand law is in line with international best practice and would provide greater clarity about how this ground should operate.

QUESTION

Q49 Should a definition of “political offence” be added in MACMA to ensure that this ground for refusal is not interpreted too broadly?

Discrimination

15.9 Section 27(1)(c) provides that assistance must be refused if, in the opinion of the Attorney-General:⁶³⁶

there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice to a person on account of the person’s colour, race, ethnic origin, sex, religion, nationality, or political opinions;

632 Extradition Act 1999, s 7.

633 See discussion at [8.40]–[8.46].

634 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 3; and Extradition Act 1988 (Cth), s 5.

635 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(2)].

636 Section 27(1)(ca) provides the same ground in relation to certain civil proceedings that are deemed under MACMA to be criminal proceedings. These are proceedings relating to the proceeds of crime.

- 15.10 The ability to refuse assistance on the grounds of discrimination provides important human rights safeguards to individuals who may be affected by a request and ensures New Zealand aligns to its fundamental values when assisting other countries.
- 15.11 The discrimination ground of refusal is very similar to the grounds for refusing surrender under the Extradition Act.⁶³⁷ In that discussion, we suggested it may be desirable to expand the bases of discrimination covered by the ground in the extradition context to include sexual orientation, age, and disability in order to modernise the provision and reflect the changes in comparable jurisdictions.⁶³⁸ We think the same should apply in MACMA. This would demonstrate New Zealand's broad commitment to avoiding assisting other countries where the criminal investigation or prosecution is discriminatory and would be consistent with the Human Rights Act 1993.⁶³⁹

QUESTION

Q50 Should the bases for refusing assistance due to discrimination be explicitly extended in MACMA to include sexual orientation, age, and disability?

Double jeopardy

- 15.12 Section 27(1)(d) provides that assistance must be refused if, in the opinion of the Attorney-General:
- the request relates to the prosecution of a person for an offence in a case where the person—
- (i) has been acquitted, convicted, or pardoned by a competent tribunal or authority; or
 - (ii) has undergone the punishment provided by law,—
- whether in the foreign country, in New Zealand, or elsewhere, in respect of that offence or of another offence constituted by the same act or omission as that offence;
- 15.13 This ground of refusal reflects the principle of double jeopardy, which provides that no one who has been finally acquitted or convicted of an offence shall be tried or punished for it again. It accords with the New Zealand Bill of Rights Act, which applies the principle to New Zealand's domestic law.⁶⁴⁰
- 15.14 In Part 1 of this issues paper, we discussed the scope of the double jeopardy ground, including whether it prevented extradition where a person had been convicted or acquitted in a third country.⁶⁴¹ The MACMA provision, however, does not need further clarification, as it explicitly applies where the person has been acquitted, convicted, pardoned, or punished in a third country.

⁶³⁷ Extradition Act 1999, s 7(b) and (c). See discussion at [8.47]–[8.51]. Note that the extradition provisions are slightly wider in prohibiting surrender where there is discrimination on account of any “other status” in addition to the bases mentioned in this provision of MACMA.

⁶³⁸ At [8.50]–[8.51].

⁶³⁹ See s 21 of the Human Rights Act 1993, which includes sexual orientation, age, and disability as prohibited grounds of discrimination.

⁶⁴⁰ New Zealand Bill of Rights Act 1990, s 26(2).

⁶⁴¹ See discussion at [8.56]–[8.65].

- 15.15 An issue is whether it is appropriate for this ground to be mandatory. The Australian Act was amended in 2011 to make the double jeopardy ground discretionary⁶⁴² on the basis that mutual legal assistance should be available in appropriate circumstances, such as where there is fresh evidence that was not available at the original trial.⁶⁴³ It may be appropriate for New Zealand to similarly adopt a discretionary approach to allow for the same flexibility.

QUESTION

Q51 Should the double jeopardy ground for refusal in MACMA become a ground that may be refused rather than a ground that must be refused?

Military offence

- 15.16 Section 27(1)(e) provides that assistance must be refused if, in the opinion of the Attorney-General:

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 ordinary criminal law of New Zealand;

- 15.17 This ground has traditionally been included because military offences that are not also offences under the ordinary criminal law generally relate to matters of military discipline rather than crime. Although the ground is rarely, if ever, applicable, given its inclusion in other international schemes and domestic laws, its inclusion in MACMA remains valid.⁶⁴⁴

Prejudice to sovereignty, security, or national interests

- 15.18 Section 27(1)(f) provides that assistance must be refused if, in the opinion of the Attorney-General:

the granting of the request would prejudice the sovereignty, security, or national interests of New Zealand;

- 15.19 Grounds of this type have long been included in mutual legal assistance agreements.⁶⁴⁵ It is considered essential that a country is not forced to do anything against its own interests when undertaking mutual legal assistance. While this ground is mandatory, the Attorney-General would likely have some discretion in determining whether a matter does in fact prejudice New Zealand's sovereignty, security, or national interests.

⁶⁴² Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(2)(c), which was inserted by Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012 (Cth), sch 3, cl 14.

⁶⁴³ Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth) (explanatory memorandum) at [3.60]–[3.61].

⁶⁴⁴ Such as the Model Treaty on Mutual Assistance in Criminal Matters GA Res 45/117, A/Res/45/117 (1990), subsequently amended by GA Res 53/112, A/RES/53/112 (1999) [UN Model Treaty], art 4(1)(f); and the Harare Scheme, above n 635, at [8(1)(b)]; and in other countries' mutual assistance legislation.

⁶⁴⁵ See for instance the European Convention on Mutual Assistance in Criminal Matters 472 UNTS 185 (opened for signature 20 April 1959, entered into force 12 June 1962), art 2(b).

Refusal to give evidence

15.20 Section 27(1)(g) provides that assistance must be refused if, in the opinion of the Attorney-General:

in the case of a request made pursuant to section 37 or section 38 for the attendance of any person in that foreign country, the person to whom the request relates is not prepared to give his or her consent to the transfer;

15.21 Section 37 relates to a request for the attendance of a person to give evidence or assistance in the foreign country. Section 38 refers to the same but in relation to a request for a prisoner in New Zealand.

15.22 This ground reflects the principle that New Zealand will not force a person to go to another country for the purposes of mutual legal assistance. It seems to be somewhat unique to New Zealand's mutual assistance law, but it is justified, as mutual legal assistance to a foreign country is not a sufficient reason to impinge on individual rights and freedoms.

QUESTION

Q52 Should the refusal to give evidence be a ground under which the request must be refused in MACMA?

Unlawful or unauthorised

15.23 Section 27(1)(h) provides that assistance must be refused if, in the opinion of the Attorney-General:

the request is for assistance of a kind that cannot be given under this Act, or would require steps to be taken for its implementation that could not be lawfully taken;

15.24 This ground means that New Zealand must not provide assistance that is not authorised under MACMA or where carrying out the request would involve some activity that is unlawful under New Zealand law. This ground is commonly included in mutual legal assistance schemes,⁶⁴⁶ and it can be seen as an offshoot of the ground for refusal in section 27(1)(f), as it allows New Zealand to place primacy on its own law rather than another country's law.

DISCRETIONARY GROUNDS

Dual criminality

15.25 Section 27(2)(a) provides that assistance may be refused if, in the opinion of the Attorney-General:⁶⁴⁷

the request relates to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law;

15.26 This provision reflects the principle that assistance should be given only where the offence to which the assistance relates is paralleled by an offence in New Zealand. This principle has become less significant over time. When the Harare Scheme was first drafted, dual criminality was a major issue and was included as a discretionary ground for refusing assistance. However,

⁶⁴⁶ For instance, Harare Scheme, above n 635, at [8(1)(f)]; UN Model Treaty, above n 644, art 4.

⁶⁴⁷ Section 27(2)(ab) provides the same ground in relation to certain civil proceedings that are deemed under MACMA to be criminal proceedings. These are proceedings relating to the proceeds of crime.

more recent international agreements have not strictly followed this position. The 2011 version of the Harare Scheme omits the dual criminality ground and instead encourages each country to render assistance in the absence of dual criminality.⁶⁴⁸

- 15.27 It is appropriate to give the decision maker discretion, as there may be cases where, notwithstanding the failure to meet the dual criminality requirement, it is right to assist because the offending is of a nature that New Zealand would want to prevent and see prosecuted. Furthermore, there are conceivably cases where the offending to which the request relates is not of a type that New Zealand would consider criminal, and the dual criminality ground allows these requests to be declined.

Extraterritoriality

- 15.28 Section 27(2)(b) provides that assistance may be refused if, in the opinion of the Attorney-General:⁶⁴⁹

the request relates to the prosecution or punishment of a person in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law;

- 15.29 The extraterritoriality ground comes into play as a way of challenging the requesting country's jurisdiction over the offence because New Zealand would not consider that it has jurisdiction over such an offence due to the location of the offending. This ground allows the decision maker to place priority on upholding sovereignty over cooperation to combat crime. This has been the traditional common law approach.

- 15.30 When mutual legal assistance was reviewed in Australia in 2006, the option of removing this ground was considered, and in 2011, it was repealed. The explanatory memorandum to the amending Bill stated:⁶⁵⁰

Many countries exercise extraterritorial jurisdiction for criminal offences and Australia now asserts extraterritorial jurisdictions for a number of offences, such as terrorism, war crimes, crimes against humanity, genocide and child sex tourism. As a result, the extraterritoriality ground of refusal in paragraph 8(2)(b) is rarely used and will be repealed from the [Act].

- 15.31 It was noted, however, that this would not affect the protections provided by the Act, because it would still be possible to refuse a request if the dual criminality ground applied and because the Australian Attorney-General also retains a broad general discretion to refuse a request. We explore a general discretion option below.⁶⁵¹

QUESTION

Q53 Should the extraterritoriality ground for refusing a request be retained in MACMA?

648 Harare Scheme, above n 635, at [10].

649 Section 27(2)(ba) provides the same ground in relation to certain civil proceedings that are deemed under MACMA to be criminal proceedings. These are proceedings relating to the proceeds of crime.

650 Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth) (explanatory memorandum) at [3.52].

651 See the discussion at [4.60].

Death penalty

15.32 Section 27(2)(ca) provides that assistance may be refused if, in the opinion of the Attorney-General:

the request relates to the prosecution or punishment of a person for an offence in respect of which the person may be or has been sentenced to death by the appropriate authority in that requesting country, and that requesting country is unable to sufficiently assure the Attorney-General 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;

15.33 As with the death penalty ground in the Extradition Act, this ground for refusal reflects New Zealand's own abolition of the death penalty and its commitment to this internationally.⁶⁵²

15.34 In Part 1 of this issues paper, we raised the option of whether the death penalty should become a mandatory ground for refusal whereby extradition is prevented unless there are appropriate assurances that the death penalty will not be imposed or, if imposed, will not be carried out.⁶⁵³

15.35 The possibility of making the death penalty a mandatory ground for refusal could be considered in relation to mutual legal assistance. On the one hand, the assistance requested may be removed from the actual prosecution and punishment of an offence. Also, the person who is the subject of the criminal investigation may not be within New Zealand's jurisdiction.⁶⁵⁴ However, it may be objectionable for New Zealand to contribute to a criminal investigation, even at an early stage, where there is any chance of the death penalty being invoked. Arguably, a commitment to the prohibition of the death penalty brings with it an obligation on abolitionist states to refrain from assisting the use of the death penalty by those states that retain it. This is an emerging obligation in international human rights law.⁶⁵⁵

15.36 There has been considerable debate on this issue in Australia. Several cases in the last decade, involving both the statutory mutual legal assistance regime and police-to-police cooperation, have highlighted the risks of Australian agencies assisting countries in drug crime investigations.⁶⁵⁶ Australia's Mutual Assistance in Criminal Matters Act 1987 retains discretion for the Attorney-General to nevertheless provide assistance, despite the possibility of the death penalty being imposed on the person whose suspected criminal activity is the subject of the mutual legal assistance request. This applies where "special circumstances" are present.⁶⁵⁷ The term "special circumstances" is not defined in the legislation, but it seems that a limited interpretation was intended. Examples provided include where the assistance being sought relates to exculpatory evidence or where the requesting country has provided an undertaking that the death penalty will not be imposed or carried out.⁶⁵⁸ Where there has been no charge or conviction on a capital offence, the Act provides that the Attorney-General may refuse the request if the death penalty may be imposed and "after taking into consideration the interests

⁶⁵² See discussion at [8.106]–[8.113].

⁶⁵³ At [8.110].

⁶⁵⁴ Bharat Malkani "The Obligation to Refrain from Assisting the Use of the Death Penalty" (2013) 62 ICLQ 523 at 550.

⁶⁵⁵ Malkani, above n 654, at 531.

⁶⁵⁶ This includes the "Bali Nine" case where nine Australian citizens were arrested in Bali in 2005 in connection with an attempt to smuggle heroin from Indonesia to Australia. The Australian Federal Police provided information to the Indonesian National Police about the plot, which led to the arrests. Several of the Bali Nine were sentenced to death following the trial, and following numerous appeals, two remain on death row. See Lorraine Finlay "Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia" (2011) 33 Syd LR 95.

⁶⁵⁷ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(1A).

⁶⁵⁸ Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996 (Cth) (explanatory memorandum) at [60].

of international criminal cooperation, is of the opinion that in the circumstances of the case the request should not be granted”.⁶⁵⁹

- 15.37 Despite calls for change prior to and during the review of the legislation,⁶⁶⁰ the 2011 Amendment Act did not remove the Attorney-General’s discretion. The Act did, however, expand application of the provision so that it applies not only where a person has been charged with or convicted of a capital offence, but where a person has been arrested or detained on suspicion of having committed such an offence.
- 15.38 The provision in New Zealand’s Act is less discretionary than Australia’s. The Attorney-General may only refuse assistance where the requesting country is unable to provide sufficient assurances that the death penalty will not be applied. Section 27(2)(ca), therefore, appears to place New Zealand in line with international best practice to refrain from assisting the use of the death penalty.

Excessive burden or triviality

- 15.39 Section 27(2)(g) provides that assistance may be refused if, in the opinion of the Attorney-General:
- the provision of assistance—
- (i) would impose an excessive burden on the resources of New Zealand; or
- (ii) relates to a matter that is trivial in nature;
- 15.40 This ground of refusal provides the New Zealand Government with a level of control while meeting its mutual legal assistance obligations. New Zealand should not be obligated to provide assistance that goes beyond what is reasonable. The provision is qualified by the requirement that the Attorney-General must first consult with the central authority of the requesting country to try to agree on conditions that would allow the request to be granted before the request can be refused on this ground.⁶⁶¹
- 15.41 Both the United Nations Model Treaty on Mutual Assistance in Criminal Matters and the Harare Scheme include provisions enabling parties in some circumstances to consult and agree as to how costs should be borne.⁶⁶² While including excessive burden as a ground for refusal is not problematic, we consider it would be worthwhile to develop a provision that specifically enables cost to be the subject of consultation and conditions between the countries. This option is discussed in Chapter 20.

⁶⁵⁹ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(1B).

⁶⁶⁰ For example, see United Nations Human Rights Committee *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee* CCPR/C/AUS/CO/5 (2009) at [20], where the United Nations Human Rights Committee recommended in 2009 that Australia should ensure:

... it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State, and revoke the residual power of the Attorney-General in this regard.

The Standing Committee review of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth) received submissions from the Australian Human Rights Commission, the Human Rights Law Centre, the Australian Lawyers Alliance, and the Law Council of Australia arguing that the Attorney-General’s discretion to grant assistance in “special circumstances” should be removed or limited to the provision of assistance in cases where the assistance is exculpatory in nature; see House of Representatives Standing Committee Social Policy and Legal Affairs *Advisory Report: Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011* (12 September 2011) at 35.

⁶⁶¹ Mutual Assistance in Criminal Matters Act 1992, s 27(3).

⁶⁶² UN Model Treaty, above n 644, art 20; Harare Scheme, above n 635, at [7].

- 15.42 The triviality basis of section 27(2)(g) reflects the principle that there should be a threshold of seriousness to warrant New Zealand's involvement in a criminal investigation in another country. It was added to MACMA in 2009 in line with developments internationally, as evidenced by its addition to the Harare Scheme in 2011.⁶⁶³ The Harare Scheme contains a more detailed triviality ground that provides reciprocity as the reason justifying refusal to assist.⁶⁶⁴

By reason of the trivial nature of the alleged offending or the low value of the likely penalty or any property likely to be forfeited or confiscated, the requested country would not have made a similar request to another country in connection with a like criminal matter arising in the requested country.

QUESTION

Q54 Should the ground for refusing a request based on triviality be rephrased in MACMA to contain some additional detail on what might constitute triviality?

Incorrect form

- 15.43 Section 27(2)(h) provides that assistance may be refused if, in the opinion of the Attorney-General:
- the request does not comply with the requirements of section 26 [relating to the correct form of the request].
- 15.44 A request will not be refused solely on this ground unless the Attorney-General has requested further information from the requesting country, which the requesting country has failed or refused to provide, and the request may be granted even though its form does not comply with the Act's requirements.⁶⁶⁵
- 15.45 This ground is primarily a basis on which New Zealand can request further information where a request is inadequate. It is suggested that this provision does not fit well within the grounds for refusing assistance, as it does not relate to a problem with the nature or circumstances of the assistance requested. It may be better to provide the ability to request further information where a request is inadequate, and to not proceed with a request that continues to fail to meet the correct form, in a separate provision.

QUESTION

Q55 Should a request in the incorrect form be a ground for refusal in MACMA?

Other discretionary grounds

- 15.46 Several of the grounds in section 27(2) have in common the rationale of upholding New Zealand's sovereignty and allowing New Zealand's legal values to override a request for assistance from a foreign country. These include where the request:
- relates to the prosecution or punishment of an offence that could no longer be prosecuted if it occurred in New Zealand because of the lapse of time or for any other reason;⁶⁶⁶

⁶⁶³ David McClean "Mutual Assistance in Criminal Matters: The Commonwealth Initiative" (1998) 37 ICLQ 177 at 183.

⁶⁶⁴ Harare Scheme, above n 635, at [8(1)(g)].

⁶⁶⁵ Mutual Assistance in Criminal Matters Act 1992, s 27(4)–(5).

⁶⁶⁶ Mutual Assistance in Criminal Matters Act 1992, s 27(2)(c).

- is for a prisoner to attend another country to provide evidence or assistance, and the granting of the request:
 - would not be in the public interest; or
 - would not be in the interests of the person to whom the request relates;⁶⁶⁷
- could prejudice a criminal investigation or proceeding in New Zealand;⁶⁶⁸ and
- could prejudice the safety of any person (whether within or outside of New Zealand).⁶⁶⁹

15.47 Because these grounds are discretionary, a decision maker may find that, despite one of the grounds applying, the request still has merit. Discretionary grounds are a matter of balancing interests for the Attorney-General. These grounds reflect fundamental values and rights that New Zealand thinks ought to be protected in all requests.

POSSIBLE FURTHER GROUNDS FOR REFUSAL

Torture

- 15.48 There is no ground for refusal of assistance in MACMA where the assistance may result in a person being in danger of being subjected to torture. MACMA does, however, allow the Attorney-General to refuse a request for assistance where provision of the assistance would be likely to prejudice the safety of somebody⁶⁷⁰ and where the request would prejudice the sovereignty and national interests of New Zealand.⁶⁷¹ This means that, where torture is in issue, the Attorney-General is likely to find that the request can be refused. However, the omission of an explicit torture ground does seem somewhat anomalous, especially given that it is a mandatory ground for refusing extradition under the Extradition Act.⁶⁷²
- 15.49 The difference between the mutual legal assistance legislation and the extradition legislation may have arisen because the Convention against Torture explicitly includes an obligation not to extradite where there are substantial grounds for believing a person would be in danger of torture.⁶⁷³ The Convention does not mention mutual legal assistance. As with the death penalty, it could be argued that there is not as close a relationship between the provision of mutual assistance in a criminal matter and the risk of a person being subjected to torture as there is with extradition. In extradition, the risk is that a person within New Zealand's jurisdiction will be sent to a country where torture may be a feature of the justice system.
- 15.50 Yet, the prohibition against torture under the Convention and in customary international law has such significance now that it is difficult to justify the provision of assistance where torture is a risk. The inclusion of torture as a ground of refusal under MACMA will enhance and clarify New Zealand's position against torture. It would be consistent with New Zealand's international obligations under the Convention. Australia has recently amended its mutual legal assistance legislation to include a mandatory ground for refusing assistance where "there are

667 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(d).

668 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(e).

669 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(f).

670 Mutual Assistance in Criminal Matters Act 1992, s 27(2)(f).

671 Mutual Assistance in Criminal Matters Act 1992, s 27(1)(f).

672 Extradition Act 1999, s 30(2)(b).

673 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 16.

substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture”.⁶⁷⁴

QUESTION

Q56 Should MACMA include a mandatory ground for refusing a mutual assistance request where there are substantial grounds for believing that a person would be in danger of being subjected to torture if the assistance was given?

Speciality

- 15.51 Once information is transferred to the requesting country, how it is used is largely dependent on the requesting country’s domestic law. New Zealand needs to be confident that it is only going to be used for the purpose stated in the request.
- 15.52 Section 23 of MACMA, which governs outgoing requests, stipulates that information obtained by New Zealand must be used for the purpose stated in the request, unless permission is given for it to be used for another purpose. However, there is no similar statutory rule governing incoming requests providing that the Attorney-General needs some assurance from the requesting country that the material to be provided will be used solely for the requested purpose.
- 15.53 Such a provision is not common in overseas legislation. Despite this, the United Kingdom Home Office Guidelines on mutual legal assistance provide that:⁶⁷⁵

Where a requesting authority wishes to use evidence obtained from the UK for a different purpose to that stated in the original [mutual legal assistance] request, or to share the evidence with a third country, a formal request to do so must be made in writing by the original requesting state to the relevant central authority in the UK unless otherwise stated in treaty. The additional request must contain the following information:

- The central authority’s reference number for the original request;
- What evidence is to be used/shared;
- How this evidence will be used/shared;
- Why this evidence is needed in this investigation / court proceedings.

Given that a country requesting the United Kingdom’s assistance must seek permission before using material for a different purpose, there is an implied suggestion that the initial request would not be granted if the requesting country was free to use the material for any purpose.

- 15.54 The United Nations Model Treaty on Mutual Assistance has a use for purpose provision,⁶⁷⁶ which is discussed in the commentary on the Model Treaty.⁶⁷⁷ The commentary notes that the rule is analogous to the concept of speciality in extradition law but does not explicitly state the need for this sort of provision beyond saying that it “ensures that information and evidence provided is used solely for the purpose specified in the request”.⁶⁷⁸

⁶⁷⁴ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(1)(ca); Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth) (explanatory memorandum) at [3.27].

⁶⁷⁵ Home Office *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom* (11th ed, London, 2014) at 5.

⁶⁷⁶ UN Model Treaty, above n 644, art 8.

⁶⁷⁷ United Nations Office on Drugs and Crime *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* at [129]–[133].

⁶⁷⁸ At [129].

15.55 The UN Model Law on Mutual Assistance contains two “use for purpose” or speciality provisions. The first suggests:⁶⁷⁹

Upon request of the foreign State, any evidentiary material provided to (name of State) as a result of a request for assistance under this Act:

- (a) may not be used for any purpose other than the investigation, prosecution or judicial proceeding in respect of which the request for assistance was made; and
- (b) is inadmissible as evidence in any proceedings other than the proceedings in respect of which it was obtained,

unless the central authority of (name of State) has approved its use for those other purposes [or the material has been made public in the normal course of the proceedings for which it was provided].

The alternative provides that:⁶⁸⁰

The central authority of (name of State) shall have the power to enforce conditions or limitations on use of evidence obtained pursuant to a request for assistance imposed by the foreign State and accepted by (name of State). The courts of (name of State) shall have the power to issue an order accordingly.

15.56 This alternative provision suggests that the requested state might impose conditions before granting a request, specifically that the requested state is assured that material provided will be used only for the requested purpose. The Model Law suggests that the assurance can either be made in a general way through a provision like section 23 or on an ad hoc basis through this alternative provision.

QUESTION

Q57 Should MACMA include a ground that assistance may be refused if, in the opinion of the Attorney-General, there is no assurance that the material to be provided to the requesting country will be solely used for the requested purpose?

General discretion

15.57 Australia’s mutual assistance statute includes a general discretion for the Attorney-General to refuse a request if “it is appropriate, in all the circumstances of the case, that the assistance should not be granted”.⁶⁸¹ This is something that does not appear in the New Zealand Act and seems to be uncommon in mutual legal assistance legislation and international schemes. The advantage of such broad discretion in MACMA is that it would provide a way of declining any request that is deemed inappropriate, whether or not the Attorney-General can fit the reason for the refusal within defined grounds. The disadvantage is that such a ground would be seen as reducing New Zealand’s commitment to mutual assistance in criminal matters internationally.

QUESTION

Q58 Should MACMA include a general discretion to refuse to provide assistance if it is appropriate in all the circumstances that the assistance should not be granted?

679 United Nations Model Law on Mutual Assistance (2007), s 33 (Option 1).

680 United Nations Model Law on Mutual Assistance (2007), s 33 (Option 2).

681 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(2)(g).

GENERAL ISSUES

Stage of the criminal process to which refusal grounds apply

- 15.58 Many of the grounds for refusing assistance explicitly apply to requests for assistance with the prosecution or punishment of an offence. There is a concern that the limitation of the grounds to the prosecution or punishment stage of a criminal matter means that the grounds cannot apply when the request for assistance relates to an early stage in the criminal process.
- 15.59 One of the changes resulting from the recent review of the Australian mutual assistance legislation was the insertion of the word “investigation” into many of the grounds for refusing assistance. These amendments were designed to expand the operation of the grounds to cover the investigation stage of the criminal process as well as the prosecution and punishment stages.⁶⁸²
- 15.60 At present, it seems there is a risk that the statutory grounds for refusing a request would not apply where a request relates to an early stage in a criminal matter. For instance, if New Zealand was asked to provide information or evidence for use in preliminary investigations, prior to any charges being laid, MACMA would not provide statutory grounds for refusing to assist on the basis of the offence being of a political or military character, extraterritoriality, or the death penalty applying. It is suggested that the grounds for refusal should apply broadly to all requests made in the appropriate circumstances.

QUESTION

Q59 Should all grounds for refusal in MACMA relate to the investigation stage of a criminal matter in addition to the prosecution and punishment stages?

Obligation to consider conditional assistance before refusing

- 15.61 A further obligation included in UNCAC is that the requested country must consult with the requesting country to consider whether a request for assistance may be granted subject to terms and conditions before deciding to refuse assistance.⁶⁸³ Presumably, this obligation enhances the possibility for mutual assistance by encouraging countries to work out ways to alleviate a requested country’s concerns. While MACMA allows assistance to be given subject to conditions,⁶⁸⁴ the Act does not contain an obligation to consult and attempt to negotiate conditions before refusing a request. It is not clear whether such an obligation would be helpful and would encourage and allow New Zealand to provide mutual assistance more often or whether this step would add time to the consideration of a request without having major benefits.

QUESTION

Q60 Should New Zealand have a statutory obligation in MACMA to consult with a requesting country to consider whether a request may be granted subject to terms and conditions before deciding to refuse a request?

⁶⁸² Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 (Cth) (explanatory memorandum) at sch 3, pt 1, discussed at [3.2] of the Memorandum.

⁶⁸³ United Nations Convention against Corruption 2349 UNTS 41 (opened for signature 9 December 2011, entered into force 14 December 2005), art 46(26).

⁶⁸⁴ Mutual Assistance in Criminal Matters Act 1992, s 29.

Chapter 16

Proceeds of crime requests

INTRODUCTION

- 16.1 Over the last 30 years, there has been a global effort to eliminate the funding of crime and its financial benefits. Countries have developed a variety of different mechanisms to confiscate the proceeds of crime and instruments of crime. Proceeds of crime are the financial rewards of criminal offending. Instruments of crime are items like boats or houses that are used to commit crimes.
- 16.2 These confiscation mechanisms operate at a domestic level. However, it is increasingly easy for financial and property transactions to take place across national borders, and therefore, international cooperation is needed.
- 16.3 In 2009, New Zealand enacted the Criminal Proceeds (Recovery) Act 2009 (CPRA) to create a new domestic confiscation regime. The Mutual Assistance in Criminal Matters Act 1992 (MACMA) was also amended to create a new regime for giving effect to foreign orders concerning proceeds and instruments of crime.
- 16.4 In this chapter, we examine the relationship between CPRA and MACMA, and we consider whether these Acts align to provide an effective and appropriate regime for enforcing foreign orders. We begin by discussing the legislation and also look at New Zealand's existing international obligations in this area. The chapter then shifts to examine the four stages of the confiscation process to assess whether New Zealand is providing appropriate and effective international assistance.
- 16.5 We find that the current regime is deficient. Firstly, there are technical problems because the language in the statutes is not aligned. Secondly, there are significant gaps in the legislation, particularly in relation to sharing confiscated assets with foreign countries.

Terminology

- 16.6 Countries will variously describe mechanisms to confiscate proceeds and instruments of crime as involving identifying, tracing, freezing, restraining, seizing, forfeiting, confiscating, or disposing of the relevant assets. All of these terms have technical legal meanings, which differ slightly in different jurisdictions. In practice, however, they describe the following four-stage process:
- **The investigation stage:** Law enforcement authorities identify potential proceeds and instruments of crime, which the authorities then trace or monitor.
 - **The restraining stage:** Law enforcement authorities obtain a court order to stop the assets from being dissipated. This may be called a restraining, freezing, or seizing order. The order does not permanently transfer ownership of the assets, but it prevents any further transactions until a court determines the status of the assets.
 - **The forfeiting (confiscation) stage:** A court determines whether the assets actually are proceeds or instruments of crime. If so, the court may order that ownership of the assets be transferred to the country.

- **The disposal stage:** The country decides what to do with the assets by, for instance, paying court costs, placing the assets in a dedicated fund, or sharing the assets with others – possibly victims or foreign countries.

BACKGROUND

Domestic legislation

History

- 16.7 In 1991, New Zealand enacted the Proceeds of Crime Act. This Act allowed for the proceeds of serious criminal offending to be restrained during court proceedings and confiscated following a conviction.
- 16.8 When MACMA was enacted in 1992, provision was made for foreign restraining, forfeiture, and pecuniary penalty orders to be registered in the High Court and to be enforced through the Proceeds of Crime Act.⁶⁸⁵ It also permitted New Zealand authorities to apply for a search warrant or an interim restraining order in respect of tainted property relating to a foreign serious offence and believed to be located in New Zealand.⁶⁸⁶ To give effect to the MACMA provisions, the Proceeds of Crime Act was substantially amended.⁶⁸⁷
- 16.9 Over time, the Proceeds of Crime Act became ineffective, as it failed to address the growing problem of how members of organised criminal groups were often able to distance themselves from the commission of specific offences and therefore avoid being subject to orders.⁶⁸⁸ To address this, CPRA was enacted in 2009. CPRA created a conviction-based regime in relation to instruments of crime and a non-conviction-based regime to deal with proceeds of crime or property assessed to be from unlawfully derived income.
- 16.10 The non-conviction-based regime, or “civil” regime, operates independently of any criminal proceedings that may be under way or contemplated. Under the non-conviction-based regime, two types of confiscation orders are available, namely:
- an assets forfeiture order in respect of tainted property;⁶⁸⁹ and
 - a profit forfeiture order for any unlawfully derived benefits.⁶⁹⁰

Both orders require that the property or benefits in question must have been derived from significant criminal activity, that is, offending punishable by five years’ imprisonment or more, or that has generated at least \$30,000 in profit.⁶⁹¹ Under the conviction-based regime, only an instrument forfeiture order is available,⁶⁹² which is primarily dealt with in the Sentencing Act 2002.⁶⁹³

685 Mutual Assistance in Criminal Matters Act 1992, ss 54 and 55.

686 Mutual Assistance in Criminal Matters Act 1992, ss 59 and 60.

687 Proceeds of Crime Amendment Act 1992.

688 Therefore, the total amount of property confiscated under the Proceeds of Crime Act was relatively small: Criminal Proceeds (Recovery) Bill 2007 (81-1) (explanatory note) at 1.

689 Criminal Proceeds (Recovery) Act 2009, s 50.

690 Criminal Proceeds (Recovery) Act 2009, s 55.

691 Criminal Proceeds (Recovery) Act 2009, s 6, definition of “significant criminal activity”.

692 Criminal Proceeds (Recovery) Act 2009, ss 70 and 71.

693 Sentencing Act 2002, ss 142A–142Q.

MACMA sections 54 to 62

- 16.11 When CPRA came into force, MACMA was substantially amended.⁶⁹⁴ As amended, MACMA allows New Zealand to assist a foreign country by:
- obtaining a search warrant, a production order, or an examination order to identify or trace the relevant property or the owners of that property;⁶⁹⁵
 - obtaining an interim foreign restraining order to secure the relevant property pending a further request;⁶⁹⁶
 - registering and enforcing a foreign restraining order to secure the property pending the resolution of the foreign court proceedings;⁶⁹⁷ or
 - registering and enforcing a foreign forfeiture order.⁶⁹⁸
- 16.12 This assistance is possible only if the request from the foreign country relates to a “criminal proceeding or investigation” concerning proceeds or instruments of crime. The interpretation provision of MACMA extends the definition of “criminal investigation or proceeding” to allow such assistance if the foreign country is using, or intends to use, a non-conviction-based confiscation regime.⁶⁹⁹

International obligations

- 16.13 New Zealand has made extensive commitments as to how it will provide assistance to foreign countries in confiscating proceeds and instruments of crime.

The Financial Action Task Force (FATF) Recommendations

- 16.14 Recommendation 38 of the FATF Recommendations states:⁷⁰⁰

Mutual legal assistance: freezing and confiscation

Countries should ensure that they have authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicate offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences; or property of corresponding value. This authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law. Countries should also have effective mechanisms for managing such property, instrumentalities or property of corresponding value, and arrangements for coordinating seizure and confiscation proceedings, which should include the sharing of confiscated assets.

To assist in complying with this Recommendation, FATF released a best practice paper.⁷⁰¹

The Harare Scheme

- 16.15 Part VI of the Harare Scheme sets out the measures that state parties should consider having in place to assist each other in freezing, restraining, seizing, forfeiting, confiscating, and disposing

⁶⁹⁴ Mutual Assistance in Criminal Matters Amendment Act 2009.

⁶⁹⁵ Mutual Assistance in Criminal Matters Act 1992, ss 59, 61 and 62.

⁶⁹⁶ Mutual Assistance in Criminal Matters Act 1992, s 60.

⁶⁹⁷ Mutual Assistance in Criminal Matters Act 1992, s 54.

⁶⁹⁸ Mutual Assistance in Criminal Matters Act 1992, s 55.

⁶⁹⁹ Mutual Assistance in Criminal Matters Act 1992, s 2(2).

⁷⁰⁰ Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012) at recommendation 38.

⁷⁰¹ Financial Action Task Force *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery* (FATF/OECD, 2012).

of proceeds and instruments of crime. The Model Legislation builds on Part VI of the Scheme and provides model provisions and associated explanatory notes in relation to these issues.

The United Nations Convention against Transnational Organised Crime (UNTOC)

- 16.16 Articles 13, 14, and 18 of UNTOC deal with international cooperation for the purposes of confiscation, the disposal of confiscated proceeds of crime or property, and mutual legal assistance generally.

The United Nations Convention against Corruption (UNCAC)

- 16.17 Asset recovery is explicitly stated as a fundamental principle of UNCAC, and countries are required to take measures that will support the tracing, freezing, seizure, and confiscation of proceeds of corruption. Chapter V of the Convention specifies how this cooperation and assistance should be rendered.

FOREIGN ASSISTANCE PROVIDED BY NEW ZEALAND

- 16.18 MACMA creates a regime that relies on a combination of registering and enforcing foreign proceeds orders and obtaining domestic orders based on foreign evidence. This regime is heavily reliant on adopting provisions from CPRA.
- 16.19 The MACMA regime allows for New Zealand to provide assistance to foreign countries at each of the four stages of the confiscation process.

The investigation stage

- 16.20 International assistance at this stage largely consists of cross-border information sharing and is governed by inter-agency mutual legal assistance agreements of the type described in Chapter 18. For example, a New Zealand bank may have an obligation to report a suspicious financial transaction to the Financial Intelligence Unit within the New Zealand Police, which may then send that information to an interested overseas counterpart in accordance with an information-sharing agreement.
- 16.21 The only role for MACMA at this stage is that a foreign country may request that the Attorney-General obtain an examination order, a production order, or a search warrant on its behalf under CPRA. These orders are designed to assist in gathering information about potential proceeds or instruments of crime, with a view to possibly making an application to restrain the relevant property. All three orders target slightly different information:
- A search warrant may be obtained to seize evidence about any person's interest or control over the property or the property itself.⁷⁰²
 - A production order may be obtained to order a person to produce documents that are in their possession or control that relate to the property.⁷⁰³
 - An examination order may be obtained to order a person to answer questions or produce documents that may be relevant to the proceeds investigation.⁷⁰⁴

702 Mutual Assistance in Criminal Matters Act 1992, s 59; and Criminal Proceeds (Recovery) Act 2009, ss 101, 102, and 110.

703 Mutual Assistance in Criminal Matters Act 1992, s 61; and Criminal Proceeds (Recovery) Act 2009, s 104.

704 Mutual Assistance in Criminal Matters Act 1992, s 62; and Criminal Proceeds (Recovery) Act 2009, s 106.

16.22 Several technical problems have been brought to our attention regarding this type of assistance:

- The empowering provisions in MACMA require that there must be reasonable grounds for the Attorney-General to believe that the “property” is in New Zealand. Therefore, if there is *information* about proceeds or instruments of crime in New Zealand but the property itself is overseas, New Zealand cannot provide assistance. Search warrants, production orders, and examination orders are, however, investigative tools usually used to gather information. Whether the property itself is in New Zealand seems largely irrelevant.
- The empowering provision in MACMA concerning search warrants requires that the “property” must be in New Zealand,⁷⁰⁵ whilst the empowering provisions concerning examination and production orders require that “all or part of the property” must be in New Zealand.⁷⁰⁶ There is no principled basis for this distinction.
- MACMA enables the Attorney-General to authorise the Commissioner of Police to obtain production or examination orders on behalf of a foreign country under CPRA. Before making the CPRA order, a judge must be satisfied that there is reason to believe that the information sought is relevant to an investigation or proceedings “under this Act”,⁷⁰⁷ suggesting orders can only be made if the foreign country is, or will be, pursuing a proceeds action in New Zealand. However, at the investigation stage, the foreign country may not know whether it will initiate a proceeds action. Moreover, while the relevant information is in New Zealand, the property may not be.

These problems could be addressed by fairly straightforward amendments to the relevant legislation.

16.23 There are two further problems:

- MACMA requires that the foreign criminal investigation or proceeding must relate to property that falls within four categories. One category includes property that belongs to a person who has “unlawfully benefited from significant foreign criminal activity”.⁷⁰⁸ While this is defined in CPRA as including a knowledge requirement,⁷⁰⁹ it is not clear whether the person must simply know how the benefit arose or whether that person must also know of the criminal offence. If both are required, such persons will be able to plead ignorance of the law, providing an inappropriate avenue for proceeds of crime to be laundered through third parties.
- Due to the way CPRA is drafted, it is not clear whether proceedings that are related to search warrants, examination orders, and production orders are civil or criminal in nature. This has created confusion as to what the applicable appeal rights are, if any.⁷¹⁰

These two problems are not limited to foreign assistance, but they reflect more general problems with the domestic confiscation regime under CPRA. Further, the issues are not discrete. There would be wide-reaching ramifications both in changing the definition of one of the key concepts in the Act and in classifying proceedings as civil or criminal. The scope of our review does not extend that far.

705 Mutual Assistance in Criminal Matters Act 1992, s 59.

706 Mutual Assistance in Criminal Matters Act 1992, ss 61 and 62.

707 Criminal Proceeds (Recovery) Act 2009, ss 104(1), 105(1), 106(1) and 107(1).

708 Mutual Assistance in Criminal Matters Act 1992, ss 59(1)(b), 61(2)(a)(ii) and 62(2)(a)(ii).

709 Criminal Proceeds (Recovery) Act 2009, s 7.

710 *Commissioner of Police v Burgess* [2012] NZCA 436 at [15]–[35].

The restraining stage

- 16.24 Under MACMA and CPRA, this intervention may take one of two forms. The New Zealand authorities can obtain an interim foreign restraining order, or they can register a foreign restraining order. The aim of these orders is to secure the potential proceeds or instruments of crime whilst foreign confiscation proceedings are conducted.
- 16.25 In accordance with international best practice, New Zealand would ideally register and directly enforce a foreign restraining order.⁷¹¹ However, in many cases, it may not be feasible to wait to obtain a restraining order overseas and then register it in New Zealand, as property might be dissipated in the meantime. In this case, the foreign country can request New Zealand to obtain an interim foreign restraining order.

Interim foreign restraining orders

- 16.26 An interim foreign restraining order is a provisional order to secure property for a period of 28 days, during which a restraining order must be made overseas and then registered in New Zealand.⁷¹² The High Court can extend an interim order for a period of up to three months at one time.⁷¹³
- 16.27 The two potentially significant problems with the current provisions are:
- there are different threshold tests for processing the foreign request by the Attorney-General under MACMA and granting the requests by the High Court under CPRA; and
 - the process for obtaining an interim foreign restraining order may take too long for it to be effective.

The tests for interim foreign restraining orders

- 16.28 The provisions governing interim foreign restraining orders are contained in CPRA.⁷¹⁴ MACMA only contains an empowering provision, which provides that the Attorney-General may authorise the Commissioner of Police to apply for an interim foreign restraining order. The Attorney-General must be satisfied that:⁷¹⁵
- there is a criminal investigation in the foreign country in relation to:
 - tainted property;
 - property that belongs to a person who has unlawfully benefited from significant foreign criminal activity;
 - an instrument of crime; or
 - property that will satisfy some or all of a pecuniary penalty order; and
 - there are reasonable grounds to believe all or part of the property to which the criminal investigation relates is located in New Zealand.
- 16.29 The court must treat an application for such an order as if it is an application for a domestic restraining order and thus must consider whether the property does, in fact, fall within one

711 Financial Action Task Force, above n 701, at [12(b)].

712 Criminal Proceeds (Recovery) Act 2009, s 129(1).

713 Criminal Proceeds (Recovery) Act 2009, s 130.

714 Criminal Proceeds (Recovery) Act 2009, ss 128–131. Notably s 128(3) states that subpt 2 of pt 2 of the Act (relating to restraining orders) also applies to interim foreign restraining orders bar a few specific exceptions.

715 Mutual Assistance in Criminal Matters Act 1992, s 60.

of the four categories of property described above. This requires a much more extensive examination of the foreign evidence than that conducted by the Attorney-General.

- 16.30 The tests applied by the Attorney-General and the High Court should not be so different. The Attorney-General might be satisfied as to the nature of the foreign investigation, but on the same information, the High Court may not have a clear understanding of the connection between the relevant property and the criminal activity.
- 16.31 As a matter of principle, whether there should be an interim foreign restraining order should be determined by the likelihood of a foreign restraining order being obtained and then registered in New Zealand. It is for the foreign court to ultimately decide whether there is sufficient evidence to justify restraint, and there seems no need for a New Zealand court to make a preliminary decision on this matter. Accordingly, we consider that the Attorney-General and the Court should focus on the foreign proceeds investigation and proceedings rather than focusing on the link between the property and the criminal activity. A focus on the foreign proceedings rather than on the substantive case is consistent with international best practice and New Zealand's international obligations.⁷¹⁶

The efficacy of interim foreign restraining orders

- 16.32 The second potentially significant problem with the interim foreign restraining order is delay. Delay can be caused by:

- New Zealand explaining the MACMA and CPRA requirements to the foreign country;
- the foreign country preparing a MACMA request in the requisite form; and
- the Attorney-General considering and authorising the request under MACMA requirements.

Delay undermines the core function of an interim foreign restraining order, which is to secure property as expeditiously as possible pending the registration of a foreign restraining order.

- 16.33 Cabinet has asked whether there is a need for an additional provisional measure to secure property on behalf of a foreign country. The potential features of such a temporary freezing mechanism could be:
- the foreign country could make its request directly to the New Zealand Police or another specialist law enforcement unit;
 - the Police could then apply to either:
 - (i) the Attorney-General for an administrative foreign freezing notice; or
 - (ii) the court for an interim foreign freezing order;
 - the application would be granted if the decision maker has grounds to believe that a mutual legal assistance request for an interim foreign restraining order or to register a foreign restraining order is pending; and
 - the notice or order would be temporary, lasting at least 72 hours but no more than a month, and would expire if the mutual legal assistance request was not received within that timeframe.

⁷¹⁶ For instance, pt VI of the Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014) covers assistance with asset recovery. The explanatory note to Part VI states: "One of the guiding principles in drafting these clauses is that the requested country should, to the extent possible, not interfere with an order obtained in the requesting country. The requested country should instead simply register and enforce the order. However, it will remain possible for a person with an interest in the asset to have the order varied or discharged, if it is in the public interest to do so." See also Financial Action Task Force, above n 701, at [12(b)].

- 16.34 The Model Legislation supplementing the Harare Scheme includes an optional provision that is of similar effect.⁷¹⁷
- 16.35 In our view, there is no particular need for CPRA to contain two separate provisional measures for the following reasons:
- Interim foreign restraining orders are unique to the MACMA context. There is no domestic equivalent.⁷¹⁸ Deviation from the domestic confiscation regime should be kept to the minimum required to give effect to New Zealand's international obligations.
 - New Zealand's international obligations require timely assistance but state that, wherever possible, direct enforcement of foreign orders is preferable to obtaining a domestic order based on foreign evidence.⁷¹⁹
 - The existence of two provisional measures may cause confusion. It may not be obvious which mechanism should be used in a particular case. Further, the New Zealand authorities may find themselves routinely obtaining both types of interim order prior to eventually registering the foreign order. At the least, this would be unnecessarily duplicative.
- 16.36 It would be better to have one process. One possible option would be to move from an order to a notice and allow the Attorney-General to make the notice without reference to a court. As originally drafted, the Criminal Proceeds (Recovery) Bill provided for administrative examination and production notices rather than court orders.⁷²⁰ As the Bill passed through the House, Parliament decided that these notices were sufficiently intrusive as to require judicial oversight.⁷²¹ This is because the order prevents a person from dealing with his or her own property. On the other hand, it is only a temporary measure that could potentially last for as little as 72 hours. If the notice lasted for such a short time, however, this would create an additional difficulty of what to do next, as the foreign country's mutual assistance request would not be ready within that timeframe. In the end, we are not convinced that there is a need for an administrative foreign restraining notice. There is no domestic equivalent to such notices, and we have not been informed of any real-life cases where property was dissipated before a court could be adjourned.
- 16.37 The better option would be to streamline the existing process for obtaining an interim foreign restraining order. The time taken to prepare a formal MACMA request seems to be the main source of delay. One possible solution might therefore be to remove the requirement in MACMA that the Attorney-General must receive the formal request from the foreign country before authorising an application for an interim foreign restraining order.
- 16.38 However, it would not be appropriate for New Zealand to provide this type of assistance solely on the basis of an informal request. The balance between the law enforcement need for expeditious restraint and protecting individual property rights might be struck by the following process:

717 Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014), cl 36.

718 This is because the same concerns surrounding timing do not arise. There is no window of delay caused by waiting for a foreign court to issue a restraining order. As such, there is no need for a provisional or temporary mechanism to secure the property.

719 The Financial Action Task Force, above n 701, advises at [12(b)] that provisional measures should have the following features: "The executing country is able to take freezing or seizing action, within the short timeframes that are necessary to be effective, upon receiving a request for provisional measures. Such requests may be enforced directly or indirectly. However, it should be noted that, as a rule, to the extent that it is not inconsistent with the fundamental principles of a country's domestic law, direct enforcement (i.e. accepting/registering and directly instituting steps to enforce the freezing or seizing order issued by the requesting country) is a more effective and swift way to comply with foreign requests for provisional measures than indirect enforcement (i.e. the executing country will obtain a domestic order using the evidence contained in the foreign request)."

720 Criminal Proceeds (Recovery) Bill 2007 (81-1), cls 111–115.

721 Criminal Proceeds (Recovery) Bill 2007 (81-2) (select committee report) at 4–5.

- (a) The foreign central authority should make the request.
 - Only a central authority could provide an assurance that a formal request for such assistance is pending.
- (b) The New Zealand Central Authority should receive the request.
 - There is still a need for the New Zealand Central Authority to play a gatekeeping role over interim foreign restraining orders. The foreign country is requesting the use of coercive powers, and it would not be appropriate for New Zealand to provide this type of assistance solely on the basis of an informal request.
- (c) The request should contain the requisite assurances that:
 - the foreign central authority understands the MACMA requirements governing the registration of a foreign restraining order and that the relevant MACMA request is pending; and
 - the foreign country will contribute to, or meet, any costs order associated with the interim foreign restraining order proceedings in New Zealand.⁷²²
- (d) In deciding whether to allow an application for an order, the New Zealand Central Authority should consider:⁷²³
 - whether it is likely to receive a MACMA-compliant request from the foreign central authority to register a foreign restraining order within 28 days; and
 - whether the foreign country understands New Zealand's requirements for registering a foreign restraining order and being satisfied with the foreign country's assurance that their pending request is likely to meet those requirements.
- (e) In decided whether to grant an order, the High Court should consider:
 - whether the Attorney-General has followed due process (that is, the court should check that the Attorney-General certifies satisfaction with received assurances).⁷²⁴

QUESTION

Q61 Should the current interim foreign restraining order regime in MACMA be reformed?

Foreign restraining orders

- 16.39 The process for registering a foreign restraining order is largely contained in MACMA. Under MACMA, the Attorney-General may authorise the Commissioner of Police, in writing, to make an application for registration.⁷²⁵
- 16.40 The Commissioner of Police's application must be accompanied by a sealed or authenticated copy of the foreign restraining order. If the court is satisfied that the restraining order is in

⁷²² This is significant because, under s 29 of the Criminal Proceeds (Recovery) Act 2009, 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. By requiring the foreign country to underwrite that undertaking, the financial risk to the New Zealand Government would be substantially decreased.

⁷²³ The Central Authority would not undertake an advanced assessment of the merits of the request, but rather the Central Authority would be required to assess that the foreign country understands New Zealand's requirements for registering a foreign restraining order and being satisfied with the foreign country's assurance their pending request is likely to meet those requirements. This will require an assessment of New Zealand's relationship with the foreign country, the foreign country's understanding of the MACMA requirements, and a preliminary examination of the grounds for refusal to determine whether any obviously apply.

⁷²⁴ As is the case when registering a foreign restraining order, the assessment made by the High Court should be limited to ensuring that the correct procedures have all been followed: Mutual Assistance in Criminal Matters Act 1992, s 56(1).

⁷²⁵ Mutual Assistance in Criminal Matters Act 1992, s 54.

force in the foreign country, it must register the order.⁷²⁶ The foreign restraining order will then have effect in New Zealand as if it was a restraining order made under CPRA, subject to certain exceptions.⁷²⁷

- 16.41 CPRA contains specific procedural rules governing matters such as the process of applying for registration, the duration of registration, and the ability of the court to grant relief to affected third parties.⁷²⁸
- 16.42 Several concerns have been raised regarding the process of registering foreign restraining orders in New Zealand. Two concerns are addressed by the Organised Crime and Anti-corruption Legislation Bill, which proposes:
- extending the period for which foreign restraining orders may be registered beyond the current three-year maximum limit;⁷²⁹ and
 - providing that an application for the registration of a foreign restraining order may be made on a “without notice” basis.⁷³⁰

Legal expenses

- 16.43 There remains a concern as to whether there should be any constraint on a respondent’s ability to pay legal expenses out of restrained assets.
- 16.44 Under CPRA, the High Court may make a domestic restraining order subject to any conditions it considers fit. This may include conditions that provide for expenses (such as living or business expenses) to be met out of a respondent’s restrained property.⁷³¹ The court, however, may not allow legal expenses to be paid out of restrained property.⁷³²
- 16.45 This legal expenses exception does not apply to MACMA foreign restraining orders registered in New Zealand.⁷³³ This means that the High Court currently has discretion to release funds that are subject to a registered foreign restraining order to allow the respondent to pay their legal expenses. If legal proceedings in New Zealand become protracted, this could have a significant effect on the value of the assets that are restrained.
- 16.46 Historically, the Proceeds of Crime Act allowed for restrained funds to be released for legal expenses, regardless of the type of restraining order.⁷³⁴ CPRA changed this position but only in relation to domestic restraining orders. The expectation was that legal aid would be available for respondents. This policy shift was not universally endorsed.⁷³⁵
- 16.47 The relevant provisions of the Legal Services Act 2011 that allow for legal aid also appear to apply to respondents whose property is restrained by virtue of a registered foreign restraining order.

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

727 Mutual Assistance in Criminal Matters Act 1992, s 57.

728 Criminal Proceeds (Recovery) Act 2009, ss 136–139.

729 Organised Crime and Anti-corruption Legislation Bill 2014 (219-1), cl 42.

730 Organised Crime and Anti-corruption Legislation Bill 2014 (219-1), cl 41.

731 Criminal Proceeds (Recovery) Act 2009, s 28(1).

732 Criminal Proceeds (Recovery) Act 2009, s 28(2).

733 Criminal Proceeds (Recovery) Act 2009, s 134(1)(d) states that only ss 28(1), (3) and (4) of the Act apply to registered foreign restraining orders.

734 See *Solicitor-General v Bujak* [2012] NZHC 2453.

735 Criminal Proceeds (Recovery) Bill 2007 (81-2) (select committee report) at 7.

- 16.48 The concern that foreign law, and foreign restraining orders, might contemplate payment of legal fees could explain the different treatment of legal expenses in this context, but that explanation would only apply to some, rather than all, foreign restraining orders.
- 16.49 Arguably, the possibility of a foreign restraining order containing a provision allowing for the release of funds to pay legal fees is covered by section 135 of CPRA, which provides that, if a foreign restraining order is registered in New Zealand, the property “is not to be disposed of, or dealt with, other than is provided for in the order”. If the foreign order contains a provision allowing for the release of funds to pay legal fees, that provision can be given direct effect in New Zealand, that is, the person can apply to the Official Assignee to release funds in accordance with the foreign order.
- 16.50 We do not wish to re-open the debate as to whether the legal expense exception is appropriate in the context of domestic restraining orders. Again, that issue is outside of the scope of our review. However, we see no basis to distinguish between domestic and registered foreign restraining orders in relation to legal expenses. Accordingly, we see the current options as being:
- extending the exception in CPRA so that it applies to both kinds of orders;
 - retaining the High Court’s unfettered discretion for foreign registration orders; or
 - circumscribing the High Court’s discretion. This could be done by creating a presumption against releasing restrained funds for legal expenses if the relevant order is a foreign restraining order. The onus would then shift to the respondent to show why his or her case should be treated as an exception to the norm.

QUESTION

Q62 Should the High Court be able to release funds restrained under a registered foreign restraining order to allow a respondent to pay legal expenses?

The forfeiture stage

- 16.51 We are not aware of any concerns regarding the appropriateness or effectiveness of the assistance that New Zealand provides at the forfeiture stage in the confiscation process.
- 16.52 The Commissioner of Police can register a foreign forfeiture order, which vests the property specified in the foreign forfeiture order in the Crown absolutely.⁷³⁶ The property is then taken into the custody and control of the Official Assignee.⁷³⁷
- 16.53 The registration process itself is similar to the process for registering a foreign restraining order. MACMA empowers the Attorney-General to authorise the Commissioner of Police to make a registration application to the High Court.⁷³⁸ The application must be made on notice. The High Court must then register the foreign forfeiture order if it is satisfied that the order is in force.⁷³⁹ The Court does, however, have the power to grant relief to an individual who has an interest in the forfeited property, in certain circumstances.⁷⁴⁰ This may include the person who is the

⁷³⁶ Criminal Proceeds (Recovery) Act 2009, s 144(a).

⁷³⁷ Criminal Proceeds (Recovery) Act 2009, s 144(b).

⁷³⁸ Mutual Assistance in Criminal Matters Act 1992, s 55.

⁷³⁹ Mutual Assistance in Criminal Matters Act 1992, s 56(1).

⁷⁴⁰ Mutual Assistance in Criminal Matters Act 1992, s 57(4); and Criminal Proceeds (Recovery) Act 2009, ss 148 and 149.

subject of the order. An application for relief must be made to the High Court within six months of the registration of the foreign forfeiture order.

The disposal stage

- 16.54 Unlike the other stages in the confiscation process, the international assistance that New Zealand provides at the disposal stage is not prescribed by statute.
- 16.55 International best practice on confiscation requires that countries be willing to share assets and to enter into general agreements, including formal bilateral asset-sharing agreements, with other countries.⁷⁴¹ In negotiating these general agreements, international treaties and best practice suggest that consideration should be given to:⁷⁴²
- returning property to its legitimate owners;
 - compensating victims of the crime;
 - returning property to the requesting foreign country; and
 - deducting the reasonable expenses of the requested country. This would usually include costs associated with the storage, administration, and realisation of forfeited assets but not the costs of the domestic investigation or proceedings relating to the execution of the mutual assistance request.

These considerations may be prioritised in a different order depending on the nature of the underlying crime.

- 16.56 Given New Zealand's relative size and geographical isolation, it may not be feasible to negotiate a comprehensive round of general asset-sharing agreements. Statutory guidance on New Zealand's preferred approach would, however, help to create a framework for future negotiations, and it would at least provide a greater degree of transparency for foreign countries than is currently the case. This guidance could be as broad as a statement that the Central Authority (in consultation with the Ministry of Foreign Affairs and Trade) may enter into an agreement with the requesting country for the final disposal of the confiscated or forfeited property. Alternatively, it could provide the broad statement and could list, and even prioritise, the considerations that the Central Authority will take into account in making such an agreement.

QUESTION

Q63 Do you think MACMA should acknowledge the ability of the Central Authority to enter into case-by-case asset-sharing agreements with foreign countries?

⁷⁴¹ Financial Action Task Force, above n 701, at [5(d)].

⁷⁴² Financial Action Task Force, above n 701, at [5(d)], [10(d)] and [29]; 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 [29]; and Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014) at cl 39 (Optional Provision).

Chapter 17

Search and surveillance requests

INTRODUCTION

- 17.1 A by-product of the current digital revolution is that it has created new opportunities for crime both domestically and internationally. At an international level, cross-border crime is even more likely to be committed, or at least facilitated, by digital devices, so the need to modernise the law is higher. However, the ability to protect human rights values using the same methods as employed domestically is diminished. Ordinarily, there are two stages of human rights protections. Firstly, there is the need for prior judicial authorisation for investigative action. Secondly, there are strict controls governing the use and retention of any seized material. These controls include: placing limitations on access to the material; ensuring that irrelevant, confidential, and privileged material is disregarded; and providing appropriate remedies for unlawfulness or unreasonableness. If the seized material is sent overseas, it becomes difficult to ensure that this second tier of privacy protections is complied with.
- 17.2 In 2012, New Zealand enacted the Search and Surveillance Act 2012. The purpose of this Act was three-fold.⁷⁴³ It aimed to modernise the laws of search, seizure, and surveillance, to take into account advances in digital technology, whilst finding an appropriate balance between protecting human rights and law enforcement needs. To achieve those goals, the Act introduced a comprehensive set of rules as to how police and non-police powers of entry, search, seizure, and surveillance should be exercised in New Zealand. The Mutual Assistance in Criminal Matters Act 1992 (MACMA) allows foreign countries the ability to access some of New Zealand's domestic tools in this area.⁷⁴⁴
- 17.3 The current search regime in MACMA is inadequate. It only gives foreign countries access to limited search assistance in New Zealand and does not have sufficient inbuilt protections for human rights. MACMA is also inconsistent with the approaches taken in Australia, Canada, and the United Kingdom and by the Council of Europe Convention on Cybercrime (Budapest Convention),⁷⁴⁵ which is the most widely used and ratified international instrument on point.
- 17.4 The search provisions in MACMA allow the New Zealand Police, once authorised by the Attorney-General, to obtain and execute a search warrant in New Zealand on behalf of a foreign country.⁷⁴⁶ This chapter considers whether MACMA should be extended to include the following forms of search and surveillance assistance:
- Obtaining and executing an examination order.
 - Obtaining and executing a surveillance device warrant to allow for:
 - the interception of digital traffic and content data; and
 - the conduct of covert electronic surveillance.

743 Search and Surveillance Act 2012, s 5(a), (b) and (c).

744 These provisions were amended when the Search and Surveillance Act came into force: Search and Surveillance Act 2012, s 335.

745 Council of Europe Convention on Cybercrime ETS 185 (opened for signature 23 November 2001, entered into force 1 July 2004) [Budapest Convention].

746 Mutual Assistance in Criminal Matters Act 1992, ss 43–50.

- Obtaining a declaratory order.
- Obtaining and executing a production order to allow for (amongst other things):
 - the provision of bank and telecommunications records; and
 - the provision of subscriber information that is not publicly available.

Structure of this chapter

- 17.5 We begin this chapter by comparing New Zealand's domestic search and surveillance regime to that which is available under MACMA. We identify the major differences between the two regimes and explore the rationale for those differences. We then look at New Zealand's international obligations in relation to this type of assistance. Finally, we discuss the necessary modifications that would be required to the domestic regime if the search and surveillance tools available under MACMA were extended.
- 17.6 Our view is that MACMA should be extended to provide a wider range of search and surveillance assistance to foreign countries in criminal matters. However, any such extension would need to be accompanied by more transparent and stringent human rights protections. To strengthen the Attorney-General's gatekeeping role in this area, search and surveillance assistance should be subject to strict legislative conditions. Moreover, the Attorney-General should have the discretion to refuse to provide this assistance and should be able to forgo the usual requirement to provide the foreign country with reasons.

COMPARING THE TWO REGIMES

- 17.7 Our comparison of MACMA and the Search and Surveillance Act indicates that New Zealand does not provide foreign countries with access to the full range of search and surveillance powers for criminal investigations and prosecutions that are available domestically.

The Search and Surveillance Act 2012

- 17.8 When the Search and Surveillance Act came into force in 2012, it significantly reformed this area of law in New Zealand. The Act created the following new orders and warrants for use in investigating criminal matters:
- **Examination orders:** These orders require a person to answer questions about specified information.⁷⁴⁷ Non-compliance is an offence.⁷⁴⁸
 - **Surveillance device warrants:** These warrants allow enforcement officers to conduct certain types of surveillance using interception, tracking, and visual surveillance devices.⁷⁴⁹
 - **Declaratory orders:** These are non-binding judicial opinions on the legality and reasonableness of any proposed novel search, seizure, or surveillance activity under the Act.⁷⁵⁰
 - **Production orders:** These orders require a person to produce specified documents in their possession or control.⁷⁵¹ They are a less intrusive alternative to a search warrant.

⁷⁴⁷ Search and Surveillance Act 2012, pt 2, subpt 12.

⁷⁴⁸ Search and Surveillance Act 2012, s 173. Prior to the Act, similar powers had only been available in a regulatory context and in relation to serious fraud and proceeds of crime investigations.

⁷⁴⁹ Search and Surveillance Act 2012, pt 3, subpt 1. Prior to the Act, use of such devices was governed by the Crimes Act 1961, the Misuse of Drug Act 1975, the Summary Proceedings Act 1957, the common law, or not at all.

⁷⁵⁰ Search and Surveillance Act 2012, ss 65–69.

⁷⁵¹ Search and Surveillance Act 2012, pt 3, subpt 2. Prior to the Act, similar powers were commonly available in a regulatory and administrative context and were also available in relation to serious fraud and proceeds of crime investigations.

- 17.9 In addition to introducing these new investigative powers, the Search and Surveillance Act consolidated and reformed the rules surrounding search warrants.⁷⁵² These rules explain how a search warrant is applied for, issued, and executed.⁷⁵³ They also govern the retention and disposal of seized material.⁷⁵⁴ In relation to empowering provisions, however, the Act only provides that the Police may obtain a search warrant in relation to imprisonable offences.⁷⁵⁵ All of the other empowering provisions regarding search warrants are spread throughout various enactments. These are listed in Schedule 2 of the Act and include the power to obtain a search warrant under MACMA.

Current orders in MACMA

Search and seizure

- 17.10 Currently, MACMA contains four provisions governing mutual legal assistance search requests. These provisions explain that a foreign country may request the Attorney-General to assist in obtaining “an article or thing by search and seizure”.⁷⁵⁶ In response, the Attorney-General may authorise a Police officer⁷⁵⁷ to apply for a search warrant if satisfied that:
- there is criminal matter in the foreign country in respect of an offence punishable by imprisonment for a term of two years or more; and
 - there are reasonable grounds for believing that an article or thing relevant to the proceedings is located in New Zealand.
- 17.11 The Police officer must then apply for a search warrant in accordance with the Search and Surveillance Act.⁷⁵⁸ In determining whether to make such an application, an officer must apply a test in section 44(1) of MACMA.⁷⁵⁹ In brief, this requires the officer to be satisfied that the thing is potential evidence of the offending, intended for use in the offending, or something in respect of which the offence was committed.⁷⁶⁰
- 17.12 If a search warrant is issued, the Search and Surveillance Act rules relating to the execution of search warrants and claiming privilege and confidentiality apply, but not the procedures relating to seized or produced materials.⁷⁶¹ Rather, MACMA contains its own procedure for this.
- 17.13 Any material seized must be delivered to the Commissioner of Police.⁷⁶² The Commissioner must then retain custody of the material pending written directions from the Attorney-General as to how it should be dealt with. If the Commissioner receives no directions within one month of the seizure, he or she must arrange for the seized material to be returned to its owners.

752 Search and Surveillance Act 2012, pt 4.

753 Search and Surveillance Act 2012, pt 4, subpts 3 and 4.

754 Search and Surveillance Act 2012, pt 4, subpt 6.

755 Search and Surveillance Act 2012, s 6.

756 Mutual Assistance in Criminal Matters Act 1992, s 43.

757 We understand that the requirement to name a specific individual in the warrant has proven problematic in practice. This is a technical issue that could easily be resolved by mirroring the domestic practice of providing a more generic reference.

758 Mutual Assistance in Criminal Matters Act 1992, s 44(1).

759 Mutual Assistance in Criminal Matters Act 1992, s 44(1).

760 The question of whether there is any sound basis for framing the test differently for the Attorney-General and the courts has been raised with us, given that, substantively, the tests are the same. Again, we see this as a technical issue that could easily be resolved through amendment. Our primary goal in this chapter, however, is to determine the appropriate future direction and substantive content of the search regime under MACMA. As such, we are not yet in a position to resolve technical drafting issues.

761 Mutual Assistance in Criminal Matters Act 1992, s 44(3).

762 Mutual Assistance in Criminal Matters Act 1992, s 49.

What other search and surveillance provisions are available under MACMA?

- 17.14 Prior to 2012, it was clear that the only search or surveillance assistance New Zealand could provide to a foreign country under MACMA was obtaining and executing a search warrant. The situation now is more uncertain for two reasons.
- 17.15 The Search and Surveillance Act provides that production orders and surveillance device warrants are available if a statute is a listed enactment in the Schedule and empowers a law enforcement officer to apply for a search warrant.⁷⁶³ MACMA is listed in the Schedule, but there is a technical argument that such an inclusion is ineffective, as MACMA itself does not empower a law enforcement officer to apply for a search warrant. Instead, it empowers the Attorney-General to authorise such an application. The distinction is significant, because it reflects the Attorney-General's important gatekeeping role and the status of MACMA as a gateway Act. Further, the way in which the relevant MACMA provision is drafted makes it plain that the Attorney-General may only authorise a Police officer to apply for "a search warrant in accordance with section 44 of this Act".⁷⁶⁴
- 17.16 Secondly, the surveillance device warrant regime in the Search and Surveillance Bill was substantially re-drafted during the Select Committee process and was worded in such a way that makes it difficult to apply in a MACMA context.⁷⁶⁵
- 17.17 This gives rise to a question of whether some of the search and surveillance powers in the Search and Surveillance Act 2012 should be made available to foreign countries under MACMA. We discuss the possibility of each of these orders below.

Examination orders

- 17.18 Under the Search and Surveillance Act, the Police may obtain an examination order to require a person to answer questions in relation to identified information, which they have previously refused to answer, at a specified time and place. Failure to comply with such an order is an offence punishable by up to one year's imprisonment.⁷⁶⁶ A person who is subject to such an order may still assert privilege, or escape liability, on the basis of reasonable excuse not to answer the questions.⁷⁶⁷
- 17.19 Under the Act, examination orders may only be made in relation to sufficiently serious suspected offences.⁷⁶⁸ How serious the offence needs to be depends on whether the order is being made in a "business" or "non-business" context. In a business context, examination orders are directed at persons who may hold information in a professional capacity that they do not want to disclose voluntarily. In this context, an examination order may only be made if the offence in question is punishable by five years' imprisonment or more.⁷⁶⁹ In a non-business context, the

⁷⁶³ Search and Surveillance Bill 2009 (45-1) (explanatory note) at pt 3, subpts 1 and 2.

⁷⁶⁴ Mutual Assistance in Criminal Matters Act 1992, s 43(2).

⁷⁶⁵ Search and Surveillance Bill 2009 (45-2) (select committee report) at pt 3, subpt 1. This included introducing new provisions that:

- raised the threshold for obtaining some surveillance device warrants so that certain types of surveillance could only be undertaken in relation to particularly serious offending;
- provided detailed rules surrounding the use, retention, and destruction of raw surveillance data; and
- created extensive reporting requirements.

For instance, s 63 of the Search and Surveillance Act 2012 outlines when raw surveillance data, excerpts from that data, or information obtained from that data may be retained by the "law enforcement agency that collected it". Section 64 then states that, unless such material may be retained under s 63, it must be destroyed. These sections leave no scope for sending such material overseas.

⁷⁶⁶ Search and Surveillance Act 2012, s 173.

⁷⁶⁷ Search and Surveillance Act 2012, ss 138, 139, and 173.

⁷⁶⁸ Search and Surveillance Act 2012, ss 34 and 36.

⁷⁶⁹ Search and Surveillance Act 2012, s 34(a).

offence must be a serious or complex fraud punishable by seven years' imprisonment or more, or an offence committed by an organised criminal group.⁷⁷⁰

- 17.20 In both cases, an application for an examination order may only be made by a Police Inspector or more senior officer, and it must be approved by the Police Deputy Commissioner, Assistant Commissioner, or District Commander.⁷⁷¹ Once an examination order has been issued, the Commissioner or a delegate of the Commissioner must conduct the examination⁷⁷² and provide a formal report to the issuing judge within one month.⁷⁷³
- 17.21 As discussed in Chapter 16, similar examination orders are available to foreign countries under MACMA in relation to proceeds of crime investigations and proceedings.⁷⁷⁴ Given this, and our guiding principle that the tools that New Zealand can employ in domestic criminal matters should, if appropriate, be available for international investigations and prosecutions, our preliminary view is that MACMA should allow for the possibility of obtaining and executing a general examination order on behalf of a foreign country.
- 17.22 Extending MACMA to include this type of assistance raises concerns about:
- whether there should be any scope for a foreign law enforcement officer to assist the Commissioner in conducting the examination, for instance, by observing and providing advice during any breaks;
 - how to provide adequate human rights protections if the transcript of the examination is sent overseas; and
 - how the cost of this assistance should be divided between New Zealand and the foreign country, given that it is likely to be resource intensive.

These concerns may not be so fundamental as to preclude the availability of examination orders under MACMA and could be dealt with through particular provisions.

- 17.23 We envisage that the requirements would need to be at least as stringent as those in the domestic regime:
- The foreign offending would need to meet the same seriousness thresholds as those used in the Search and Surveillance Act, if not higher.
 - The Attorney-General would need to consult with the Police Commissioner regarding the appropriateness and efficacy of providing this assistance.
 - The examination order would need to be approved by the court. This would include the requirement in the Search and Surveillance Act that a judge must be satisfied that a compulsory examination is necessary given the nature and seriousness of the foreign offending, the nature of the information sought, the relationship between the person to be examined and the suspect, and any alternative ways of obtaining the information.⁷⁷⁵
 - The Commissioner of Police (or a New Zealand delegate) would have to conduct the actual examination, in order to ensure that New Zealand rules surrounding privilege and the right against self-incrimination were complied with.
 - The Commissioner (or delegate) would have to provide the usual report to the issuing judge.

770 Search and Surveillance Act 2012, s 36(a).

771 Search and Surveillance Act 2012, s 33.

772 Search and Surveillance Act 2012, s 39(1).

773 Search and Surveillance Act 2012, s 43.

774 Mutual Assistance in Criminal Matters Act 2012, s 62; and Criminal Proceeds (Recovery) Act 2009, s 106.

775 Search and Surveillance Act 2012, s 38(b).

- 17.24 MACMA should also include a requirement that New Zealand and the foreign country must reach an agreement in advance on procedural matters including cost, the role of any foreign law enforcement officer, and the use and retention of the transcript.
- 17.25 Such an agreement might be made on a case-by-case basis or through a general memorandum of understanding or treaty, which would allow New Zealand to screen countries in advance based on their human rights protections. An additional option would be to give the Central Authority discretion to refuse to provide this type of assistance without having to provide reasons.⁷⁷⁶

QUESTION

Q64 Do you think New Zealand should be able to obtain and execute a general examination order on behalf of a foreign country for criminal investigations and prosecutions?

Surveillance device warrants

- 17.26 Domestically, a law enforcement officer must obtain a surveillance device warrant before using a device to:⁷⁷⁷
- intercept or record a private communication;
 - ascertain the location of a person or thing;
 - determine, by means of trespass, whether a thing has been opened, tampered with, or in some other way dealt with;
 - observe or record private activity in private premises or (in certain circumstances) in the curtilage of private premises; or
 - observe or record any activity, by means of trespass.
- 17.27 There are some exceptions to this rule, for example, this type of surveillance may be conducted without a warrant:
- for 48 hours in some emergency situations;⁷⁷⁸ and
 - for an enforcement officer being lawfully in private premises and recording what he or she observes or hears there.⁷⁷⁹
- 17.28 Surveillance device warrants are only available in relation to sufficiently serious suspected offences.⁷⁸⁰ Whether an offence is sufficiently serious depends on the type of surveillance that is proposed. A penalty of seven years' imprisonment is generally required for visual surveillance or an interception device.⁷⁸¹ Only the Police may currently apply for a warrant for these types of surveillance.⁷⁸²

⁷⁷⁶ See ch 15.

⁷⁷⁷ Search and Surveillance Act 2012, s 46.

⁷⁷⁸ Search and Surveillance Act 2012, s 48.

⁷⁷⁹ Provided that the enforcement officer records only those matters that he or she could see or hear without the use of a surveillance device: Search and Surveillance Act 2012, s 47(a).

⁷⁸⁰ Search and Surveillance Act 2012, ss 45 and 51.

⁷⁸¹ Search and Surveillance Act 2012, s 45.

⁷⁸² Section 50 of the Search and Surveillance Act 2012 provides that these powers may be extended to the New Zealand Customs Service and the Department of Internal Affairs by Order in Council, on recommendation of the Minister of Justice. However, so far, no Order in Council has been made under s 50.

- 17.29 If a surveillance device warrant is issued and executed, the Act provides that the responsible law enforcement agency must report to the issuing judge within a month of the warrant expiring.⁷⁸³ The Act also provides detailed rules about the extent to which information obtained as a result of surveillance may be retained by the law enforcement agency that collected it and the circumstances in which such information, or part of it, must be destroyed.⁷⁸⁴
- 17.30 There may be some instances when New Zealand might wish to provide surveillance assistance to a foreign country, for example, the interception of a New Zealand-based phone call concerning an overseas drug trade. We think that surveillance device warrants should be available to foreign countries under MACMA.
- 17.31 As with examination orders, it may be appropriate to consider whether the current seriousness threshold for surveillance device warrants in the Search and Surveillance Act is appropriate or whether a higher threshold is required. The other domestic requirements for a surveillance device warrant in the Search and Surveillance Act would also apply in this context.
- 17.32 There are also concerns as to any role for foreign law enforcement officers in conducting the surveillance and sending surveillance data overseas and the potential cost of this form of assistance. These concerns could be addressed by the Central Authority in deciding whether or not to grant the request. Procedural matters would need to be agreed in advance, and the foreign country would need to provide sufficient undertakings or assurances to satisfy the Central Authority that human rights values would be appropriately protected.
- 17.33 This seems to be the same type of approach that Australia and the United Kingdom have taken in relation to this issue.
- In Australia, surveillance assistance is available to foreign countries but only if the alleged foreign offending is punishable by at least three years' imprisonment and the foreign country has given appropriate undertakings in relation to the use and destruction of surveillance data and any other matter the Attorney-General considers appropriate.⁷⁸⁵ The Attorney-General also has discretion to simply refuse to provide this assistance.
 - In the United Kingdom, interception assistance is available to foreign countries but only if they have signed a treaty to that effect with the United Kingdom.⁷⁸⁶ The Home Office Guidelines set out a number of requirements and restrictions.⁷⁸⁷
- 17.34 We do not consider that the power to conduct surveillance without a warrant in urgent or emergency situations should be extended to foreign countries under MACMA. This is a highly invasive power, covertly exercised in extraordinary circumstances. Despite limiting the assistance New Zealand can provide, we think the Attorney-General's gatekeeping role should never be sidestepped, and the Central Authority's oversight role is even more critical in relation to this kind of investigative action.

783 Search and Surveillance Act 2012, ss 59 to 61.

784 Search and Surveillance Act 2012, ss 63 and 64.

785 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 15CA(1).

786 At present, such requests to the United Kingdom may only be made under arts 17–22 of the Convention on Mutual Legal Assistance in Criminal Matters Between Member States of the European Union OJ C 197 (opened for signature 12 July 2000, entered into force 23 August 2005).

787 Home Office *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom* (11th ed, London, 2014) at 20 provides that a requesting country must: confirm that a lawful interception order has been issued in the requesting state; provide an assurance that any intercept product will be handled in accordance with any restrictions that the Secretary of State may impose; explain why interception is necessary for the purpose of preventing or detecting serious crime; explain why the objectives of the investigation cannot be achieved by other means; explain why interception is proportionate to what is sought to be achieved and explain whether the privacy of any individual not under investigation will be infringed and why the circumstances of the case justify such intrusion.

QUESTION

Q65 Under what conditions should New Zealand be able to obtain and execute a surveillance device warrant on behalf of a foreign country for criminal investigations and prosecutions?

Declaratory orders

- 17.35 The declaratory order regime does not involve the exercise of any investigative power and is not binding on any future court, but it allows the lawfulness of any new method of search or surveillance to be tested before being used. It is a forward-looking regime that was designed, at least in part, to accommodate inevitable advances in technology.
- 17.36 Cross-border crime almost always involves the use of digital technology, and foreign countries may well propose different investigative techniques to combat this than those routinely used in New Zealand. In such cases, obtaining an advisory opinion from a judge, in advance, as to whether the proposal would be consistent with New Zealand's human rights protections would provide much needed transparency and clarity.
- 17.37 As the Search and Surveillance Act is currently drafted, it may already be possible for a law enforcement officer to obtain a declaratory order in relation to potential assistance under MACMA. The situation would be clearer if MACMA or the Search and Surveillance Act contained an express statement to this effect.

Production orders

- 17.38 A production order requires the person who is the subject of the order to provide a law enforcement officer with all of the documents in the order that are in his or her possession or control.⁷⁸⁸
- 17.39 Production orders were designed to be a less intrusive means of carrying out a search in circumstances where the subject of the search is likely to be cooperative.⁷⁸⁹ Banks and telecommunications companies, for example, are likely to prefer complying with production orders.
- 17.40 A further difference between production orders and search warrants is that production orders can be prospective in nature. That is, they can require the person to produce documents covered by the order that come into his or her possession at any time while the order is in force.⁷⁹⁰ The maximum length of such an order is 30 days.⁷⁹¹
- 17.41 There is a strong case for including the obtaining and executing of a production order in the forms of assistance that New Zealand may provide to a foreign country under MACMA. Notably, production orders are already available under MACMA in the context of proceeds of crime investigations and proceedings. The more compelling factors, however, are simplicity and cost. For instance, where a search warrant request is received from a foreign country relating to bank or telecommunications documents, the least expensive and intrusive option is to allow the company in question to retrieve the documents itself.
- 17.42 Given the nature of production orders, another benefit is that foreign law enforcement officers would never need to be involved in the execution of an order.

⁷⁸⁸ Search and Surveillance Act 2012, s 75.

⁷⁸⁹ Search and Surveillance Bill 2009 (45-2) (select committee report) at 11.

⁷⁹⁰ Search and Surveillance Act 2012, s 75.

⁷⁹¹ Search and Surveillance Act 2012, s 76.

- 17.43 The role of foreign enforcement officers and issues of cost are not areas of concern in relation to production orders, in contrast with other forms of search and surveillance assistance. Our only remaining concern with providing this type of assistance under MACMA relates to sending the produced material overseas. However, amendments to MACMA could address this by strengthening the Attorney-General's gatekeeping role in relation to this type of assistance. We outline potential amendments to that effect at the end of this chapter.

QUESTION

Q66 Should New Zealand be able to obtain and execute a production order on behalf of a foreign country for criminal investigations and prosecutions?

INTERNATIONAL OBLIGATIONS

- 17.44 MACMA should give effect to New Zealand's existing international obligations to provide assistance. The leading international instrument in relation to this type of assistance is the Budapest Convention.⁷⁹² The Budapest Convention is a multilateral treaty adopted by the Council of Europe in 2001. It serves both as a guideline for any country developing comprehensive national legislation against cybercrime and as a framework for international cooperation between state parties.
- 17.45 The Convention was based on more than a decade of discussions in the United Nations, the G8, the OECD, and various other European and non-European organisations. As at October 2014, it had been ratified by 43 countries (including Australia, the United Kingdom, and the United States) and signed by an additional 10 (including Canada).
- 17.46 New Zealand is not a signatory to the Convention. However, Part V of the Harare Scheme, of which New Zealand is a member, and the associated Model Legislation were drafted to give effect to the chapter governing international cooperation in the Budapest Convention. Therefore, while New Zealand is not legally bound by the Convention, it has made a non-legally binding commitment to work towards compliance.⁷⁹³
- 17.47 As recently recognised by the Commonwealth Working Group of Experts on Cybercrime,⁷⁹⁴ there are very good reasons for New Zealand to sign and ratify the Budapest Convention including:
- the multilateral nature of the Convention;
 - the number of existing parties;
 - the comprehensive nature of its provisions;
 - its proven practicality;
 - its binding nature;
 - the existence of a support mechanism in that parties to the Convention participate in the Cybercrime Convention Committee of the Council of Europe; and
 - ratification is encouraged by the Financial Action Task Force.

⁷⁹² Budapest Convention, above n 745.

⁷⁹³ Not only is New Zealand a party to the Harare Scheme, it also developed an Action Plan to Fight Cybercrime in 2011 with the Quintet Commonwealth countries (Canada, the United Kingdom, the United States, Australia and New Zealand). The Action Plan concluded that all Quintet countries should take steps to become parties to the Budapest Convention.

⁷⁹⁴ *Report of the Commonwealth Working Group on Cybercrime* (May 2014) at [2.25] and [2.26].

- 17.48 This approach aligns with the extensive work that is being undertaken throughout the public sector at present to address cybercrime and to work towards compliance with the Budapest Convention.
- 17.49 In light of these observations, we consider that the provisions in MACMA should accord with the Budapest Convention wherever that is possible without contravening New Zealand's domestic search and surveillance regime.

International cooperation under the Budapest Convention

- 17.50 Chapter III of the Convention begins by stating the fundamental principle that state parties shall cooperate with each other:
- ... to the widest extent possible for the purposes of investigations or proceedings concerning criminal offences related to computer systems and data, or for the collection of evidence in electronic form of a criminal offence.
- 17.51 After outlining other general principles, the chapter shifts to list specific types of mutual assistance that the state parties are obliged to provide to each other.

Preservation (and limited disclosure) of stored computer data

- 17.52 Under the Convention, one state party may request another to urgently preserve data stored on a computer system in that country's territory, pending a formal mutual assistance request for search and seizure.⁷⁹⁵ This is a temporary measure that is primarily directed at preserving data held by telecommunications companies and other service providers that are routine carriers of data.
- 17.53 Preservation under the Convention may be achieved by "order or otherwise" and must last for at least 60 days.⁷⁹⁶ Notably, the obligation is framed so that a requested country must "take all measures to preserve expeditiously the specified data in accordance with its domestic law".⁷⁹⁷
- 17.54 If a preservation request relates to a specific communication and the requested country discovers that other service providers were also involved in the transmission, the Convention creates an additional obligation.⁷⁹⁸ The requested country must disclose sufficient information about the communication to the requesting country to allow it to identify the other service providers and formulate further preservation requests.
- 17.55 There is currently no general provision in the Search and Surveillance Act allowing for data on a computer system to be preserved, pending the execution of a domestic search warrant or production order. However, it may be that service providers routinely preserve this data for limited periods in their ordinary course of business, and the destruction of data before the Police are able to obtain a search warrant or production order does not seem to have been a problem in domestic cases. In those circumstances, there may be no need for a formal preservation order process or for the service provider to disclose information about other parties to a communication. The relevant data may still be adequately preserved.

⁷⁹⁵ Budapest Convention, above n 745, art 29.

⁷⁹⁶ Budapest Convention, above n 745, art 29(1) and (7).

⁷⁹⁷ Budapest Convention, above n 745, art 29(3).

⁷⁹⁸ Budapest Convention, above n 745, art 30.

- 17.56 Whether this informal preservation process would be sufficient to comply with the Budapest Convention is really a domestic law issue.⁷⁹⁹

Searches of stored computer data

- 17.57 The Convention provides that one state party may request another to search, seize, and disclose data stored by means of a computer system located within the requested country's territory and that a response can be expedited.⁸⁰⁰
- 17.58 New Zealand can already provide this type of assistance to foreign countries. The Search and Surveillance Act explains that the search of a place, vehicle, or thing extends to the search of any computer system or data storage device located there.⁸⁰¹ "Computer system" is defined broadly to include computer networks and internet data accessible from the computer, even if a password is required.⁸⁰² The user may be required to provide passwords. These rules apply equally in a MACMA context.⁸⁰³
- 17.59 Neither the Search and Surveillance Act nor MACMA, however, contain a specific provision enabling the search warrant process to be fast-tracked if there are concerns surrounding loss or modification of stored computer data. At present, a mutual legal assistance request under MACMA must contain advice from the requesting country as to whether urgent compliance is necessary.⁸⁰⁴ If there is a case for urgency, there is scope for the Attorney-General, the Police, and the courts to respond accordingly, without the need for this to be directed by legislation.⁸⁰⁵

Interception of traffic (metadata) and content data

- 17.60 Under the Budapest Convention, the requested country must provide real-time collection of traffic and content data to the requesting country in criminal matters.⁸⁰⁶
- 17.61 Traffic data is the information generated by a computer system about a communication. It may include the communication's origin, destination, route, time, date, size, duration, and the type of underlying service.⁸⁰⁷ This type of interception assistance is, in general, governed by the conditions and procedures provided for under the requested country's domestic law.⁸⁰⁸ The obligation in the Convention requires:⁸⁰⁹
- Each party shall provide such assistance at least with respect to criminal offences for which real-time collection of traffic data would be available in a similar domestic case.
- 17.62 For law enforcement purposes, New Zealand is only able to collect traffic and content data in "real time" using the surveillance device regime in the Search and Surveillance Act. A slightly

799 The explanatory note in relation to cl 27 of the Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014) expressly notes that "this form of assistance can be obtained without the need of a formal request or a legislative basis". Further, the United Kingdom, which has ratified the Budapest Convention, appears to rely on an informal process outside of its Crime (International Co-operation) Act 2003 to preserve stored computer data on behalf of a foreign country. The Home Office's most recent *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom*, above n 787, at 19 states: "Communications companies in the UK normally retain IP data for between 30 days and 12 months. Billing and communications data (cell site) is held for 6-12 months for pay as you go and up to six years for contract phones. Specialised services such as cell dumps are normally only available for a matter of days. It is possible to request the preservation of telecommunications data via Interpol pending the execution of an MLA request."

800 Budapest Convention, above n 745, art 31.

801 Search and Surveillance Act 2012, s 110(h).

802 Search and Surveillance Act 2012, ss 3 and 130.

803 Mutual Assistance in Criminal Matters Act 1992, s 44(3).

804 Mutual Assistance in Criminal Matters Act 1992, s 26(c)(v).

805 The issue of whether MACMA should contain a more detailed urgency procedure of general application is discussed in ch 21.

806 Budapest Convention, above n 745, arts 33 and 34.

807 Budapest Convention, above n 745, art 1(d).

808 Budapest Convention, above n 745, arts 33(1) and 34.

809 Budapest Convention, above n 745, art 33(2).

slower alternative option in relation to routinely stored traffic and content data would be to obtain a prospective production order.⁸¹⁰ This would allow a telecommunications company to disclose the relevant data to the Police, as and when it came into existence. However, New Zealand does not currently provide either of these types of assistance for criminal matters to foreign countries under MACMA.

- 17.63 To fully comply with the interception obligations in the Budapest Convention, New Zealand should amend MACMA to allow its authorities to obtain a surveillance device warrant on behalf of a foreign country. If MACMA was simply extended to include production orders, this might allow for technical compliance.⁸¹¹ Nothing in the Budapest Convention would prevent New Zealand from making these forms of assistance subject to stringent conditions.

QUESTION

Q67 How should powers to intercept data in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?

The Harare Scheme

- 17.64 The Harare Scheme contains two further types of search and surveillance assistance that are not outlined in the Budapest Convention.

Covert electronic surveillance

- 17.65 The Harare Scheme provides assistance for covert electronic surveillance.⁸¹² Such surveillance is defined by reference to the use of a device to transmit, record, or otherwise capture audio product, visual images, or information about position or location.⁸¹³ The definition expressly excludes the use of a device primarily designed for the interception of telecommunications.
- 17.66 A request for covert electronic surveillance must include:⁸¹⁴
- details of any provision of law under which an order or warrant for covert electronic surveillance is required in the requesting state and any provision of law that ensures respect for the rights of those under covert electronic surveillance;
 - a copy of any related order or warrant obtained;
 - information for the purpose of identifying the subject and location of the requested surveillance; and
 - the desired times and duration of the surveillance.
- 17.67 This form of assistance is a catch-all for surveillance requests that do not relate to the interception of telecommunications data governed by other paragraphs in the Harare Scheme and Budapest Convention.⁸¹⁵ Together, the Scheme and the Convention cover the full range of

810 Section 70 of the Search and Surveillance Act 2012 defines “document” in relation to production orders as including: “call associated data and the content of telecommunications in respect of which, at the time an application is made under section 71 for a production order against a network operator, the network operator has storage capability for, and stores in the normal course of its business, that data and content”.

811 That is because the Convention only states that the interception of traffic data must be available in relation to the same range of criminal offences as it would be available for domestically, and a production order could be used to collect traffic data shortly after it is created, if not in real time.

812 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 [26].

813 Harare Scheme, above n 812, at [2(3)] and the associated explanatory note.

814 Harare Scheme, above n 812, at [26(2)].

815 Harare Scheme, above n 812, at [23] and [24]; and Budapest Convention, above n 745, arts 33 and 34.

surveillance currently available in New Zealand under the Search and Surveillance Act. Again, the existence of a best-practice obligation to provide covert electronic surveillance suggests that New Zealand's surveillance device warrant regime should be extended, in principle, to give assistance to foreign countries.

QUESTION

Q68 How should covert electronic surveillance powers in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?

Subscriber information

- 17.68 Under the Harare Scheme, a request may be made for the provision of subscriber information.⁸¹⁶ Subscriber information is any information held by a service provider relating to the name, address, telephone number, email address, Internet Protocol address, or similar identifier associated with a subscriber to any telecommunications service.⁸¹⁷ Such a request may be “directly transmitted to an agency or other authority competent to receive such a request under the laws of the requested country”.⁸¹⁸
- 17.69 In New Zealand, this information may, on occasion, be publicly available.⁸¹⁹ Where it is not, the Attorney-General could provide this form of assistance at present by authorising the Police to obtain subscriber information by executing a search warrant. However, this would be an expensive and time-consuming mechanism for provision of this form of assistance. It would also not be in keeping with the desired emphasis on speed suggested by the reference to *direct* transmission of such requests.
- 17.70 The reference to speed tends to suggest the possibility of skipping the Attorney-General's usual gatekeeping function. We do not think that this would be appropriate, unless the information was publicly available. A production order would, however, provide a less intrusive and less expensive way of providing this form of assistance where the information is private.

NECESSARY MODIFICATIONS TO THE DOMESTIC REGIME

- 17.71 We have reached the view that New Zealand should consider extending MACMA to include the following forms of search and surveillance assistance:
- Obtaining and executing an examination order.
 - Obtaining and executing a surveillance device warrant to allow for:
 - the interception of digital traffic and content data; and
 - the conduct of covert electronic surveillance.
 - Obtaining a declaratory order.
 - Obtaining and executing a production order to allow for (amongst other things):
 - the provision of bank and telecommunications records; and
 - the provision of subscriber information that is not publicly available.

⁸¹⁶ Harare Scheme, above n 812, at [27].

⁸¹⁷ Harare Scheme, above n 812, at [2(3)].

⁸¹⁸ Harare Scheme, above n 812, at [27(1)].

⁸¹⁹ For instance, where it is included in a telephone directory or in contact details provided online.

- 17.72 However, the domestic regimes governing investigative orders and warrants should not be applied in a MACMA context without significant modification in three main areas:
- Allowances may need to be made for foreign law enforcement officials to be involved in assisting with the execution of these warrants and orders. This raises issues of sovereignty, jurisdiction, and compliance with New Zealand law.
 - The domestic mechanisms that New Zealand has in place to provide human rights protections ordinarily take effect after the relevant material is seized, produced, or created. These govern matters such as relevance, use, privilege, admissibility, retention, access, and disposal of the material. If this material is sent overseas, New Zealand may not be in a position to ensure compliance with these protective measures.
 - The issue of cost needs to be addressed, as these can be resource-intensive and expensive investigative activities.
- 17.73 These three areas of necessary modification apply equally in the context of the execution of search warrants under MACMA, particularly where digital devices are involved. At present, MACMA allows the Attorney-General to address these concerns by deciding whether to provide requested search assistance at all or by issuing directions concerning the retention and disposal of the seized material. We question, however, whether MACMA currently contains sufficient guidance as to how the Attorney-General should approach these decisions. The lack of guidance is especially problematic, as the two decisions are inherently interconnected.
- 17.74 Our view is that MACMA should have mechanisms in place to address these concerns, prior to agreeing to provide the assistance sought. We explore what those mechanisms might look like below.

The involvement of foreign law enforcement officers

- 17.75 In processing a mutual assistance request, the New Zealand authorities will never be as familiar with the facts of the underlying case as the foreign law enforcement officers who have carriage of the relevant investigation or proceeding. Issues of language, identification of key actors, and context will routinely arise. There may also be issues with the sheer volume and complexity of the material and the presence of particular subtleties regarding what is and is not relevant. Foreign officers will also have a vested interest in ensuring that any assistance provided by New Zealand complies not only with New Zealand law but also with the laws of their own country governing criminal investigations and proceedings.
- 17.76 These practical realities mean that, on occasion, foreign law enforcement officers have travelled to New Zealand to assist in the execution of a MACMA search warrant. Such involvement may continue to be necessary if MACMA is extended to allow for assistance in obtaining and executing examination orders or surveillance device warrants.
- 17.77 However, the involvement of foreign law enforcement officers in exercising domestic investigative powers raises difficult issues of sovereignty and jurisdiction, including how best to protect New Zealand's human rights values. MACMA is currently silent on this matter.
- 17.78 The Search and Surveillance Act contains various provisions that govern the role that may be played by "assistants" in executing search and surveillance warrants.⁸²⁰ These provisions could potentially be applied to foreign officers. The difficulty we have, however, is that these

⁸²⁰ Search and Surveillance Act 2012, s 3 (the definition of an "enforcement officer"), s 56 (a person may assist in executing a surveillance device warrant if they are supervised at all times by an officer named in the warrant), and s 113 (a person may assist in executing a search warrant, but they are subject to the control of the officer who has overall responsibility for executing the warrant and must be reasonably supervised).

provisions were clearly drafted with the domestic context in mind. The difference between New Zealand and foreign law enforcement officers is that the foreign officers are unlikely to be familiar with New Zealand investigative law and practices, they are not subject to New Zealand disciplinary proceedings or complaints processes, and they will have their own agenda in ensuring compliance with foreign legal requirements. This has the potential to increase the risk of human rights breaches.

17.79 To mitigate that risk, MACMA could state that the role of any foreign law enforcement officer must be agreed upon by the Central Authority and the requesting country up front. Matters to be considered could include:

- identifying the foreign officers who would travel to New Zealand and designating each officer with a specific role;
- limiting the number of foreign officers that may be involved to ensure that adequate supervision is available; or
- agreeing in advance upon the actions that need to take place to ensure compliance with foreign law and identifying who will undertake them.

17.80 This approach seems similar to the United Kingdom, where a request for search assistance must contain the details of any officials from the requesting states who wish to participate in the search and an explanation as to why their presence is necessary.⁸²¹ The Home Office further notes that it prefers for officers from requesting states to be involved in searches where possible. We do not, however, propose stating a preference in MACMA. This matter seems best left to the discretion of the New Zealand Central Authority to be decided on a case-by-case and country-by-country basis.

QUESTION

Q69 How should the issue of the involvement of foreign law enforcement officers in executing search warrants (and potentially examination orders and surveillance device warrants) be dealt with under MACMA?

Dealing with the seized, produced, or created material

17.81 Most of the human rights protections for those who are searched in New Zealand arise from the rules that govern how potential investigative or evidential material is dealt with after the search. These are the rules that regulate:

- the process of dealing with irrelevant information;
- claiming privilege or confidentiality;
- challenging the admissibility of the material; and
- the purposes for which the material may be used, its retention by law enforcement authorities, access to it, and, ultimately, its disposal.

If this material is obtained pursuant to a mutual legal assistance request, it must be sent overseas at some point. Therefore, the ordinary rules governing these matters in the Search and Surveillance Act cannot apply without modification. We briefly discuss each of these issues in turn.

⁸²¹ Home Office, above n 787, at 23–24.

Dealing with irrelevant information

- 17.82 This issue arises in relation to searches of digital devices and surveillance. These activities, by their nature, result in the initial collection of both relevant and irrelevant material. This material should be reviewed by law enforcement authorities, and irrelevant material should be “locked down” or removed to ensure that there is minimal invasion of privacy. In a MACMA context, this raises these interrelated questions:
- Should this review take place in New Zealand?
 - Who should be responsible for performing this task?
- 17.83 By way of example, consider searches of digital devices. The rules in the Search and Surveillance Act explain that, during a search, an enforcement officer may make a forensic copy of any intangible material that could be covered by the warrant (such as a hard drive) and may remove that copy from the premises.⁸²² This can occur even if it is not clear whether there is any relevant material on the hard drive.⁸²³ If, however, a forensic copy is created and removed, section 161 provides that it must be examined off site reasonably expeditiously and destroyed if no evidential material is found.⁸²⁴ This section recognises the importance of forensic copies that contain a mixture of relevant and irrelevant material being retained in their entirety.
- 17.84 While some of these rules apply equally to a search under MACMA, section 161 is expressly excluded from applying in the MACMA context.⁸²⁵ Nonetheless, it is an important principle that should apply in the MACMA context to the extent possible. It raises an obvious question as to where the examination for relevance should take place.
- 17.85 As previously explained, the New Zealand authorities will never be as familiar with the underlying case as the foreign law enforcement officers who are responsible for the criminal investigation or proceeding. The foreign law creating the offence will often be very different to what New Zealand investigators are used to, and the requesting jurisdiction’s rules of evidence may be unfamiliar. Indeed, the material may not be in English. In addition, in many cases, it may not be viable to excise irrelevant material from a forensic copy without affecting its overall integrity. Therefore, operational needs and effectiveness would favour the examination taking place overseas. This would also be the most cost-effective option.
- 17.86 However, we are not sure it would be appropriate to simply send the material to the foreign country for examination before there is some determination of what is relevant. New Zealand law enforcement authorities must minimise the invasion of privacy by at least attempting to identify and “lock down” irrelevant material prior to sending it overseas.
- 17.87 One solution would be for MACMA to create a presumption in favour of forensic copies being initially searched in New Zealand by New Zealand Police or under their supervision. The Central Authority could, however, negotiate a different solution on a case-by-case basis if it was satisfied that sufficient safeguards for the search subject were in place in the requesting country.
- 17.88 Realistically, the Central Authority can only make this assessment after the search, once the scale and nature of the seized material is known and, if it becomes necessary to consider offshore screening, having regard to the case-specific undertakings provided by the requesting country. Such a negotiation might be necessary in relation to surveillance, as, for the assistance to be effective, the data may need to be provided to the requesting country in real time.

822 Search and Surveillance Act 2012, s 110(h).

823 Search and Surveillance Act 2012, s 112.

824 Search and Surveillance Act 2012, s 161.

825 Mutual Assistance in Criminal Matters Act 1992, s 44(3).

QUESTION

Q70 How should MACMA deal with the issue of sending seized (or created) material overseas in response to a request that contains both relevant and irrelevant information?

Confidentiality and privilege

- 17.89 The provisions in the Search and Surveillance Act relating to confidentiality and privilege currently apply to searches under MACMA.⁸²⁶ We envisage that the equivalent provisions would also apply to examination orders, production orders, and surveillance device warrants if MACMA was extended to include these types of assistance.
- 17.90 Given the nature of search warrants, production orders, and examination orders, privilege and confidentiality are likely to be claimed during the exercise of the relevant investigative power or shortly afterwards. The Act then provides a mechanism for the claim to be tested in court.⁸²⁷ Pending resolution of such a claim, a search must be suspended.⁸²⁸ Further, in some instances, it may be necessary to brief an independent third party to identify potentially privileged material and to provide advice to the court. These interim measures may result in both extensive cost and delay. This, in turn, could undermine the effectiveness of the mutual legal assistance process.
- 17.91 This raises the question of whether the material may be sent overseas for privilege and confidentiality claims to be dealt with in the foreign jurisdiction. Clearly, this would not be a problem if the person making the claim consented, but what if they did not? On the one hand, it may seem unnecessary to allow privilege and confidentiality claims to be dealt with in both New Zealand and the foreign jurisdiction. Further, New Zealand may have complete faith in some jurisdictions to address these matters appropriately. On the other hand, resolution of these claims could again be seen as part of the search. This is consistent with the fact that, domestically, this type of material may not be formally seized whilst a claim of privilege remains outstanding.
- 17.92 One option to deal with this issue might be to amend MACMA to state that claims of privilege and confidentiality should be dealt with in New Zealand prior to sending material overseas, wherever that is possible. The cost of this process could be shared with the foreign country, and delays could be minimised by framing the obligation so that only claims raised within a specified timeframe must be the subject of prior resolution. The foreign country could then provide an assurance that it will act in accordance with any later claims successfully made in a New Zealand court. Alternatively, the matter could simply be left to the foreign country to resolve, if the Central Authority felt confident in its justice system.
- 17.93 A similar approach could be taken in relation to surveillance device warrants. Since these are executed covertly, subjects do not have the opportunity to make claims of privilege or confidentiality at the time. For that reason, the Search and Surveillance Act places an obligation on law enforcement officers to take all reasonable steps to avoid intercepting privileged or confidential communications and to destroy the record of such a communication if it is accidentally made.⁸²⁹ Officers may refer any questionable communication to the court for clarification. This process could also be followed in a MACMA context, and again, any later

826 Mutual Assistance in Criminal Matters Act 1992, s 44(3); and Search and Surveillance Act 2012, pt 4, subpt 5.

827 Search and Surveillance Act 2012, s 147.

828 Search and Surveillance Act 2012, s 146.

829 Search and Surveillance Act 2012, ss 140 and 141.

claims could either be left to the foreign country to resolve or could be the subject of assurances that the foreign country would abide by a decision of a New Zealand court.

QUESTION

Q71 How should MACMA deal with the issue of sending potentially privileged or confidential seized (produced or created) material overseas in response to a request?

Admissibility

- 17.94 As we noted in our 2007 report, the key protection available to search targets domestically is the ability to challenge evidential material produced in court (either on the basis that the material is beyond the scope of the search power or was obtained unreasonably in terms of section 21 of the New Zealand Bill of Rights Act).⁸³⁰ In our opinion, a search subject must be entitled to challenge the exercise of a search power in this way even if the relevant evidential or investigative material has been sent overseas. The issue is therefore how to ensure that the material is not used in the foreign trial if a New Zealand court finds that the investigative action undertaken in New Zealand was unlawful or unreasonable.
- 17.95 There are at least two potential ways of resolving this issue. One option would be to refuse to send the material overseas until a New Zealand court has finally determined the legality and reasonableness of the investigative action. We are not in favour of this option. It could easily be used as a delay tactic to undermine the foreign investigation or proceeding. This would undermine the effectiveness of the entire process, especially if there are legitimate operational reasons for the foreign country to access and act on material quickly, in some cases, before the relevant parties become aware of its existence.
- 17.96 The second option, which we prefer, would be to ask the foreign country to provide an assurance that it would act in accordance with any subsequent finding of a New Zealand court regarding the legality or reasonableness of the investigative action. In relation to this issue, there is no option of leaving admissibility to the foreign court to decide, as that court would have no jurisdiction to determine whether the investigative action complied with New Zealand law.

QUESTION

Q72 How should MACMA deal with a New Zealand Bill of Rights Act challenge to an investigative action taken under the Search and Surveillance Act in response to a request?

Collateral use

- 17.97 New Zealand has a legitimate interest in ensuring that any material provided to a foreign country in accordance with a mutual legal assistance request is only used for the purpose for which it was obtained. This protects against abuse of process.
- 17.98 Domestically, arguments of abuse of process would be raised during court proceedings regarding admissibility. That would not, however, be appropriate if the allegation is that a foreign authority is at fault. As a matter of jurisdiction, that would be an issue for the foreign court.
- 17.99 Nevertheless, we consider that, given the intrusive nature of search and surveillance assistance, it would be appropriate for New Zealand routinely to seek assurances from foreign countries

⁸³⁰ Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [7.65].

regarding the use of any material that is provided, prior to agreeing to provide the assistance sought. Notably, New Zealand regularly provides such an assurance whenever it makes a mutual legal assistance request to a foreign country. As discussed in Chapter 21, this is supported by a provision in MACMA that explicitly restricts the use that may be made of material provided to New Zealand.⁸³¹

17.100 We note that making search and surveillance assistance conditional on such an assurance would mirror the approach taken to this issue under the Extradition Act 1999.

QUESTION

Q73 How should MACMA protect against the collateral use of any seized (produced or created) material that is sent overseas in response to a request?

Access, retention, and disposal

17.101 Finally, we note that the Search and Surveillance Act contains extensive rules surrounding access to and retention and disposal of seized, produced, and created material.⁸³² These rules minimise interference with property and privacy rights and uphold the rule of law. To provide similar protection, MACMA could contain the following:

- (a) A presumption in favour of only sending copies of seized or produced material overseas, wherever that is possible. This would include forensic copies of digital devices. Original material could then remain in New Zealand and be the subject of the usual access application process under the Act.
- (b) A requirement that the foreign country should provide an undertaking to:
 - return the relevant material to New Zealand after criminal proceedings have been concluded, thus allowing the New Zealand authorities to retain or destroy it in accordance with the Act; or
 - comply with New Zealand's rules governing retention and disposal, unless compliance would breach their own laws regarding such matters.

QUESTION

Q74 How should MACMA deal with issues of access, retention, and disposal of seized (produced or created) material that is sent overseas in response to a request?

Cost

17.102 As noted throughout this chapter, providing search and surveillance assistance under MACMA may require a significant investment from the New Zealand authorities in terms of both time and resources. This can be problematic, as the customary approach is that the costs of providing mutual legal assistance are borne by the requested country. MACMA provides that the Attorney-General may ask for a contribution towards costs from a requesting country, but at present, this request may only be made if New Zealand is considering refusing the request on the basis of excessive cost. This is not the most diplomatic way of raising such a sensitive issue.

⁸³¹ Mutual Assistance in Criminal Matters Act 1992, s 23.

⁸³² Search and Surveillance Act 2012, pt 4, subpt 6.

- 17.103 In light of this issue, we put forward the option in Chapter 20 of including a provision in MACMA that specifically raises the possibility of a cost contribution as a condition of agreeing to a request. We suggest that this could apply to requests that would lead to “excessive”, “substantial” or “extraordinary costs” and that MACMA could contain a list of matters that would potentially qualify. In our opinion, almost all of the search and surveillance assistance that is currently or potentially available under MACMA should be included on such a list.
- 17.104 Alternatively, New Zealand could consider reversing the costs presumption in relation to search and surveillance assistance. This would, however, be out of line with the general approach taken to this issue overseas, and in turn, there would be concerns about reciprocity.

THE CENTRAL AUTHORITY’S GATEKEEPING ROLE

- 17.105 At present, MACMA gives the Attorney-General discretion to place conditions on providing search assistance⁸³³ and to provide directions to the Commissioner of Police regarding seized material.⁸³⁴ As such, there is already scope in MACMA for some of the issues that we have discussed to be addressed.
- 17.106 What is missing, however, is certainty and simplicity. There are no obvious mechanisms of redress for the subjects of these investigative actions. There is no pre-existing guidance for the Attorney-General, who may be routinely called upon to create appropriate processes for dealing with seized material on a case-by-case basis. There is also no clarity for the general public as to how the costs of this potentially expensive assistance will be met. These are complex issues, and it would be difficult for the Central Authority to resolve such issues in situations where the mutual legal assistance request needs to be processed urgently for operational reasons.
- 17.107 In light of these observations, we are of the view that it would be better if the legislation provided greater guidance on:
- the appropriate role of foreign law enforcement officers;
 - how seized, produced, or created material should be dealt with; and
 - sharing costs.

This guidance should also address the critical question of what matters need to be resolved prior to sending the material overseas.

- 17.108 To mirror the Search and Surveillance Act, MACMA could be amended to include detailed provisions governing these matters within the Act or in regulations. Our preferred option would be to amend MACMA to make the provision of search and surveillance assistance conditional on New Zealand and the foreign country reaching prior agreement on a list of specified matters. Such an agreement could be reached on a case-by-case basis or generically in the form of a treaty or a memorandum of understanding. The latter two options would save time and would allow New Zealand to screen countries in advance. As an additional time-saving measure, the Central Authority could maintain guidelines to set out its preferred approach.
- 17.109 In the absence of any agreement, we consider that the Attorney-General should refuse the request. We suggest also amending MACMA to state that the Attorney-General should not have to provide any reasons to the foreign country in the event of a refusal. This would give the Central Authority room to refuse if, for example, it was not satisfied with assurances that the

833 Mutual Assistance in Criminal Matters Act 1992, s 29.

834 Mutual Assistance in Criminal Matters Act 1992, s 49.

foreign country had given. This approach would be consistent with the Harare Scheme, which contains an optional provision to that effect.

17.110 In our opinion, the preferred option would strike the appropriate balance between international law enforcement needs and New Zealand's commitment to protecting human rights values.

QUESTION

Q75 Should MACMA be amended to make the provision of search and surveillance assistance conditional on New Zealand and the foreign country reaching prior agreement on a list of specified matters?

Chapter 18

Requests for information

INTRODUCTION

- 18.1 In providing assistance requested under the Mutual Assistance in Criminal Matters Act 1992 (MACMA), the Central Authority may need to seek information, including personal information,⁸³⁵ from a domestic government department or agency. While MACMA contains provisions under which the Central Authority can seek some assistance from a domestic government department or agency, it contains no provision that empowers the Central Authority to seek *information*.⁸³⁶
- 18.2 We understand that, once the Central Authority has approved an incoming request for information, the information it requires to satisfy that request will often be obtained from the relevant domestic agency via a request under the Official Information Act 1982. We do not view this as an appropriate use of the Official Information Act. However, **without** the Official Information Act:
- the Central Authority does not have a statutory framework that compels an agency to respond within a given timeframe, there is no requirement for an agency to prioritise the request from the Central Authority, and, as a result, it may languish.
 - it is not clear whether the information holder can release the requested information under the Privacy Act 1993. The Central Authority is required to consider whether or not to approve a request from a foreign country subject only to the criteria expressly stated in MACMA. These criteria do not refer to the Privacy Act or any of its principles. On the other hand, the holder of the information is subject to the Privacy Act. While the Privacy Act permits a domestic agency to disclose personal information to ensure the maintenance of the law, this exception does not appear to extend to the maintenance of foreign law.
- 18.3 Information requests under MACMA are made under the general section 5 provision. This chapter examines in detail the current position with respect to obtaining information pursuant to a section 5 MACMA request. This highlights the inadequacy of the current state of the law and the need for clarification.⁸³⁷ We also briefly discuss a similar issue that arises in respect to another common request made under section 5, this being the interviewing of voluntary witnesses.

835 Personal information is defined in s 2 of the Privacy Act 1993 to mean “information about an identifiable individual” and in s 2 of the Official Information Act 1982 to mean “any official information held about an identifiable person”.

836 In this chapter, “information” is distinct from evidence to be used in a criminal proceeding. The MACMA does contain processes for seeking evidence: see ss 31–36.

837 We note at the outset that it is important to bear in mind the discussion in ch 19 on the proper relationship between MACMA and other information-sharing regimes. In that chapter, we examine the increasing use of agency-to-agency regimes. Our initial proposal is to suggest that, if the assistance can be provided under an agency-to-agency regime, that regime should be used. This would have a direct impact on general information requests under MACMA, and thus the problem discussed in this chapter may reduce over time.

PROCESSING REQUESTS

- 18.4 MACMA contains provisions that provide for the processing of some types of assistance. For example, where a request has been made for assistance in locating a person pursuant to section 30, once the Attorney-General has authorised the request, the:⁸³⁸
- ... Attorney-General shall forward the request to the appropriate agency in New Zealand, and that agency shall use its best endeavours to locate or, as the case may be, identify and locate the person to whom the request relates, and shall advise the Attorney-General of the outcome of those endeavours.
- 18.5 Another example is where a request has been made for assistance in arranging service of process under section 51. Once the Attorney-General has authorised the request, the:⁸³⁹
- ... Attorney-General shall direct the appropriate authority to arrange service, and in such a case the authority shall—
- (a) use its best endeavours to have the process served—
 - (i) in accordance with procedures proposed in the request; or
 - (ii) if those procedures would be unlawful or inappropriate in New Zealand, or if no procedures are so proposed, in accordance with the law of New Zealand.; and
 - (b) if the document—
 - (i) is served, transmit to the Attorney-General for transmission to the foreign country making the request a certificate as to service; or
 - (ii) is not served, transmit to the Attorney-General for transmission to the foreign country a statement of the reasons which prevented the service.
- 18.6 In the examples above, the domestic agency is compelled to carry out the request. However, MACMA does not stipulate a procedure for the forwarding of requests for information to domestic agencies. The Central Authority does not have an empowering provision that enables it to compel the domestic agency to provide it with the requested information. Accordingly, these requests must be made under some authority outside of MACMA.

Official Information Act 1982

- 18.7 Crown Law has told us that it might use the Official Information Act to obtain the requested information under MACMA from the relevant New Zealand agency.
- 18.8 The Official Information Act provides that a department, Minister of the Crown or organisation may be requested to provide official information. The information sought must be specified with due particularity.⁸⁴⁰ The requester can, with reasons, ask that his or her request be treated as urgent.⁸⁴¹ A decision on whether to grant the request must be made and conveyed to the requester as soon as reasonably practicable and within 20 working days of the request being received.⁸⁴² This time limit can be extended for a “reasonable period of time having regard to the circumstances” where there is a large quantity of information or the need to consult other parties.⁸⁴³ If a decision is not made within the time limit, or if there is “undue delay” in actually supplying the information, the request is deemed to have been refused, and the

838 Mutual Assistance in Criminal Matters Act 1992, s 30(3).

839 Mutual Assistance in Criminal Matters Act 1992, s 51(3).

840 Official Information Act 1982, s 12(2).

841 Official Information Act 1982, s 12(3).

842 Official Information Act 1982, s 15(1).

843 Official Information Act 1982, s 15A.

requester can ask the Ombudsman to investigate the refusal.⁸⁴⁴ Requested information should be made available unless there is good reason for withholding it.⁸⁴⁵ The grounds for refusal generally relate to administrative difficulty in complying with the request or to the harm that disclosure may cause.⁸⁴⁶

18.9 The statutory purpose of the Official Information Act is:⁸⁴⁷

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
 - (i) to enable their more effective participation in the making and administration of laws and policies; and
 - (ii) to promote the accountability of Ministers of the Crown and officials,—
 and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

18.10 We do not believe the Official Information Act was intended to be used by the Central Authority for the purpose of accessing information to satisfy a request from a foreign country in respect of a criminal matter. Further, it is unclear whether the Attorney-General, in the capacity as the Central Authority under MACMA, could make such a request. We noted this in our recent report on the Privacy Act:⁸⁴⁸

The very purpose of the [Official Information Act] is to enable “the people of New Zealand”⁸⁴⁹ to get information about government and not the reverse. Moreover, the list of persons who can make requests under section 12 of the [Official Information Act] probably does not include the Crown (although that is not absolutely clear).

18.11 This was also considered in the Law Commission’s recent review of the Official Information Act.⁸⁵⁰ In that report, we noted that the ambiguity about whether public sector agencies can make Official Information Act requests needed to be resolved. In both these reports, we also discussed whether any requests from public sector agencies under the Official Information Act should extend to personal information. We took the view that it is more appropriate for the disclosure of personal information between public sector agencies to be governed by the Privacy Act, and we recommended that the ability of public sector agencies to make information requests to each other under the Official Information Act should not extend to requests for information about people in their personal capacity.⁸⁵¹

844 Official Information Act 1982, s 28(4) and (5).

845 Official Information Act 1982, s 5.

846 See Official Information Act 1982, s 6 (Conclusive reasons for withholding official information), s 7 (Special reasons for withholding official information related to the Cook Islands, Tokelau, or Niue, or the Ross Dependency), s 9 (Other reasons for withholding official information), and s 18 (Refusal of requests). Conclusive reasons for withholding information, set out in s 6, include prejudicing security or defence, prejudicing the maintenance of law, and endangering a person’s safety. Section 9 provides reasons for withholding information, including protecting a person’s privacy and maintaining legal professional privilege. Under s 9, the reasons for withholding must outweigh the public interest in making the information available. Section 18 contains further, largely administrative and procedural, grounds for refusing a request.

847 Official Information Act 1982, s 4.

848 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [8.18].

849 Official Information Act 1982, s 4.

850 Law Commission *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012).

851 *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4*, above n 848, at [8.18]; *The Public’s Right to Know: Review of the Official Information Legislation*, above n 850, at [6.41]–[6.57].

Privacy Act 1993

- 18.12 In New Zealand, personal information held by agencies cannot simply be shared with other agencies. This is because New Zealand has a privacy framework governed by the Privacy Act 1993. This framework is based on the general premise that an agency that holds personal information obtained in connection with one purpose should not use that information for any other purpose. The fundamental nature of the protection of personal information has resulted in agencies taking a risk-averse approach to the sharing of information, even where there are legitimate exceptions in the Privacy Act allowing for such sharing to take place.
- 18.13 The Privacy Act allows for personal information to be shared between public agencies in the following limited circumstances:
- Release in accordance with an authority issued by the Privacy Commissioner.⁸⁵²
 - Release in accordance with Schedule 5 of the Privacy Act (in relation to those agencies who are subject to Schedule 5).⁸⁵³
 - Release in accordance with an information-sharing agreement.⁸⁵⁴
 - Discretionary release of personal information under Privacy Principle 11.⁸⁵⁵
- 18.14 In the MACMA context, a domestic agency could potentially release the information to the Central Authority under one of the exceptions in Privacy Principle 11. Principle 11 places limits on the disclosure of information, subject to a number of exceptions, including an exception where the restriction on disclosure of information would prejudice the maintenance of law, specifically:⁸⁵⁶
- An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
- ...
- (e) that non-compliance is necessary—
- (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;
- 18.15 Foreign assistance approved under MACMA is clearly in accordance with the maintenance of foreign law. The circumstances under which the assistance can be provided and the details that must be provided in respect of a request give solid evidence of this.
- 18.16 However, as observed by the Privacy Commissioner, the maintenance of the law exception was probably not intended to permit disclosure for maintenance of foreign law because:⁸⁵⁷
- ... it is linked to the notion of avoiding prejudice to the maintenance of the law by any “public sector agency” (which means a *New Zealand* public sector agency). This is likely to mean that the prejudice to the law covered may only be in relation to a *New Zealand* law.

852 Privacy Act 1993, s 54.

853 Schedule 5 deals with law enforcement information.

854 Privacy Act 1993, pt 9A.

855 Privacy Act 1993, s 6.

856 Privacy Act 1993, s 6.

857 See Privacy Commissioner *Necessary and Desirable: Privacy Act 1993 Review* (1998) at [2.13.7].

18.17 The sharing of information for the purposes of foreign law enforcement fits uneasily with the Privacy Act. The recently introduced Organised Crime and Anti-corruption Legislation Bill amends the Policing Act 2008 to provide the Police with a power to share personal information with its international counterparts.⁸⁵⁸ The Bill was introduced because of the concern that the present state of the law does not allow New Zealand to share that sort of information. The Regulatory Impact Statement noted that the lack of express legislative authority creates a risk that information sharing will breach the Privacy Act 1993.⁸⁵⁹ The Bill deals with this by including an express provision that provides that the disclosure of personal information is subject:⁸⁶⁰

... to any other enactment, other than the Privacy Act 1993, that limits or restricts the disclosure of information or requires information of a particular kind to be disclosed or obtained in a prescribed manner.

18.18 In practice, we understand that Crown Law relies on the agency that holds the relevant information to advise whether there are any privacy concerns in terms of its provision to the requesting country. Crown Law considers that, as that agency holds the relevant information, it is for that agency to decide whether information should be released, subject to the requirements of the Privacy Act and any requirements in the agency's own legislation. The problem is that some agencies assume that, if Crown Law has approved a request under MACMA, the agency is required simply to provide the requested information.

Need for reform

18.19 We do not believe the Official Information Act was intended to be used by the Central Authority for the purpose of accessing information to satisfy a request from a foreign country in respect of a criminal matter.

18.20 Without an Official Information Act request, however, the Central Authority does not have a statutory framework that compels the agency to action the request and respond within a given timeframe. Our preliminary view is that a specific provision in MACMA could easily resolve this issue.

QUESTION

Q76 Do you think MACMA needs a specific provision that gives the Central Authority a statutory mechanism for requesting information from domestic agencies?

18.21 We also think that the role of the Privacy Act needs to be clear. In clarifying how MACMA should fit with the Privacy Act, the policy question is who, if anyone, ought to guard the privacy of personal information under MACMA requests. We believe there are three possible positions:

- **The information-holder agencies:** Any privacy risks associated with sharing personal information with a foreign country should be considered on a case-by-case basis.
- **The Central Authority:** Any privacy risks associated with sharing personal information with a foreign country should be considered on a case-by-case basis.

858 Organised Crime and Anti-corruption Bill 2014 (219-1).

859 Ministry of Justice *Regulatory Impact Statement: All of Government Response to Organised Crime* (6 June 2013) at [103]–[104].

860 See proposed s 95B(5) of the Policing Act 2008 in cl 61 of the Organised Crime and Anti-corruption Bill 2014 (219-1).

- **Public benefit outweighs privacy interests:** Privacy risks need not be considered on the basis that, as MACMA requests will have been approved by the Central Authority, it is clear that the public benefit afforded by sharing the information will more than likely outweigh any privacy risks.

We discuss each of these positions below and also provide options that could be implemented for each.

The information-holder agencies

- 18.22 The advantage of this approach is that it mirrors domestic law. The clear disadvantage is that the Central Authority has already thoroughly considered the request and deemed it appropriate to provide the assistance. Thus, consideration by another agency is arguably unnecessary.
- 18.23 One option would be to amend the current maintenance of the law exception (Privacy Principle 11) in the Privacy Act to expressly include maintenance of foreign law. This would allow the holder agencies to consider whether to release the information on a discretionary basis. However, as noted by the Law Commission in its review of the Privacy Act, any amendment to the phrase “maintenance of the law” would prove difficult, because it is used in various statutes as a standard form provision and risks impacting on settled understandings of the Principle.⁸⁶¹
- 18.24 More acceptable options may be to either issue a code of practice under the Privacy Act that could elaborate on the maintenance of the law exception in the MACMA context or to create a new exception in Privacy Principle 11 for the disclosure of information in accordance with a MACMA request.

Central Authority

- 18.25 The advantage of taking privacy considerations away from the holder agency and giving these to the Central Authority is that the Central Authority already has to consider a number of factors in deciding whether to accede to a MACMA request. It seems both inappropriate and inefficient to separate out consideration of the privacy of personal information.
- 18.26 One option would be to create a new discretionary ground for refusal in section 27(2) of MACMA to allow the Attorney-General to refuse the request if he or she is not satisfied that privacy rights will be sufficiently protected, for example, where the Attorney-General is not comfortable that the material will only be used for the requested purpose.
- 18.27 We note that a provision in the Privacy Act would still be required to give the holder agency authority to release the information.

Public benefit outweighs privacy interests

- 18.28 It is arguable that any assistance in a criminal matter is of high public benefit and is most likely to outweigh privacy rights. Consequently, it may be unnecessary to consider privacy issues in MACMA requests. This would make a clear statement that responding to foreign requests is always more important than the protection of personal information.
- 18.29 The problem with this approach is that there would be less privacy oversight over information that is shared internationally than there is domestically (which is subject to the discretionary release by the information holder). This position would be inconsistent with one of the guiding principles of the review that the ability to assist foreign countries should not extend beyond what is available domestically.

⁸⁶¹ Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4, above n 848, at [9.11]–[9.13].

18.30 MACMA could be amended to include a provision, similar to section 43D of the Australian Mutual Assistance in Criminal Matters Act 1987 (Cth), which provides that the collection, use, or disclosure of personal information about an individual in response to a mutual legal assistance request under the Australian Act is authorised by law for the purposes of the Australian Privacy Act 1988. Section 43D provides:⁸⁶²

- (1) The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the Privacy Act 1988 if the collection, use or disclosure is reasonably necessary for the purposes of:
 - (a) the provision, or proposed provision, of international assistance in criminal matters by the Attorney General, or an officer of his or her Department, to a foreign country; or
 - (b) the obtaining, or proposed obtaining, of international assistance in criminal matters by the Attorney General, or an officer of his or her Department, from a foreign country.

18.31 An even more direct option would be to insert a provision similar to that in the new Organised Crime and Anti-corruption Legislation Bill on the new Police foreign information-sharing regime, which provides that the disclosure of personal information is subject to any other enactment other than the Privacy Act 1993.⁸⁶³

QUESTION

Q77 How can the relationship between the Privacy Act and MACMA be clarified in the law?

INTERVIEWING VOLUNTARY WITNESSES

18.32 While MACMA contains provisions for the taking of evidence for a criminal proceeding under oath before a court, it does not expressly regulate the taking of evidence when an oath is not required, for example, a voluntary Police interview during an investigation. The Central Authority commonly receives requests of this nature and, similar to information requests, can respond under the general assistance provision in section 5.

18.33 On receipt of such a request, Crown Law checks compliance with sections 26 and 27 of MACMA and will then, if it deems appropriate, authorise the New Zealand Police to visit the witness and obtain a signed statement or sworn affidavit, on a voluntary basis, which contains the requested information. We understand that the lack of regulation for this type of assistance in MACMA causes some concern for the Police, who are unsure whether the individual needs to be told about their rights. Concern also arises around ensuring that the foreign country's officers have not said anything to make the person think they are required to talk.

18.34 Our preliminary view is that a specific provision in MACMA could easily resolve this issue.

QUESTIONS

Q78 Do you think MACMA needs a statutory framework for collecting voluntary evidence?

Q79 Are there any other forms of assistance that MACMA ought to specifically to provide for?

⁸⁶² Mutual Assistance in Criminal Matters Act 1987 (Cth), s 43D.

⁸⁶³ Proposed s 95B(5) of the Policing Act 2008 in cl 61 of the Organised Crime and Anti-corruption Bill 2014 (219-1).

PROVISION OF MATERIAL LAWFULLY OBTAINED

- 18.35 There is no procedure in MACMA for when material that has been lawfully obtained on behalf of Country X can be provided to Country Y. It is therefore unclear whether the Central Authority could provide the documents to Country Y without further court involvement.
- 18.36 The Australian Mutual Assistance in Criminal Matters Act 1987 (Cth) provides:

13A Requests by foreign countries for provision of material lawfully obtained

(1) If:

- (a) a foreign country (the requesting country) has commenced an investigation into, or proceedings in relation to, a serious offence against the laws of the country; and
- (b) that foreign country requests the provision of material relevant to that investigation or those proceedings; and
- (c) the Attorney-General is satisfied that the material requested is:
 - (i) material lawfully obtained by an enforcement agency in Australia; and
 - (ii) material lawfully in the possession of that enforcement agency;

the Attorney-General may, by writing, in accordance with the approved form, authorise the provision of that material to the requesting country.

However, the section goes on to express that it:⁸⁶⁴

... does not permit the Attorney General to authorise the provision to the requesting country of material obtained through the use of a surveillance device unless the request relates to an investigation into, or proceedings in relation to, a serious offence against the laws of that country that is punishable by a maximum term of imprisonment of 3 years or more, by imprisonment for life or by the death penalty.

- 18.37 Currently, MACMA has a double gatekeeping function for a search warrant or other coercive orders in that it requires both agreement by the Attorney-General and successful application to the court. As a practical matter, it should not be necessary to reapply to the court in respect of the same information that has already been lawfully obtained. However, the normal use of both the Central Authority and the courts in the process of undertaking coercive actions to access materials is an important gatekeeping mechanism.

QUESTION

Q80 How should MACMA deal with a request received by a foreign country for material that has already been lawfully obtained under a warrant or order? Should any involvement from the court be required?

⁸⁶⁴ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 13A(2).

Chapter 19

Managing the overlap with inter-agency mutual assistance regimes

INTRODUCTION

- 19.1 In the preceding chapters, we have discussed the process for assistance to foreign countries in criminal investigations and prosecutions that takes place between governments, also known as mutual legal assistance. In this chapter, we examine the mutual assistance processes that take place between New Zealand regulatory agencies and their foreign counterparts or via an international network of national organisations such as Interpol.⁸⁶⁵
- 19.2 “Mutual assistance” refers to assistance provided by one state to another generally, and it can include assistance in criminal investigations and prosecutions. The focus of some of the inter-agency regimes is not on criminal investigation and prosecution, but rather it is to facilitate regulatory compliance and enforcement. Albeit, compliance and enforcement can lead to criminal investigations and prosecutions.
- 19.3 Following the terrorist activity on 11 September 2001 and the global financial crisis, there has been an increasing trend towards direct cross-border agency cooperation on all matters, including criminal matters.⁸⁶⁶ In their 2012 Annual Report, the Serious Fraud Office (SFO) reported that:⁸⁶⁷
- [i]t is becoming apparent that there is a growing need to establish an international network of law enforcement agencies specifically devoted to financial crime prevention and detection.
- These inter-agency regimes can pose a challenge, because it is sometimes unclear at what point these regimes should give way to the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and, particularly, to the protections in MACMA.
- 19.4 In this chapter, we consider how to manage the overlap that exists between MACMA and inter-agency regimes. We start by looking at the nature of inter-agency regimes, including the types of assistance that can be provided and the safeguards included. We then look at where MACMA and these regimes may overlap and the problems this creates, before proposing options for reform.

⁸⁶⁵ Note that, under pt 4, subpt 3 of the Evidence Act 2006, the courts also have an ability to obtain evidence for criminal proceedings, but this is outside the scope of this review.

⁸⁶⁶ For example, see the International Organisation of Securities Commissions *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002). This Memorandum of Understanding was developed following the events of 11 September 2001.

⁸⁶⁷ Serious Fraud Office *Annual Report 2012* at 27.

- 19.5 Our current preference is to move with the international tide, recognising that mutual legal assistance can, and should, be provided through a wide variety of mechanisms.⁸⁶⁸ However, we consider that there needs to be centralised oversight across all inter-agency mutual assistance regimes.

INTER-AGENCY MUTUAL ASSISTANCE REGIMES

- 19.6 Due to the increasing means by which activity can occur across borders, regulators need tools to enable them to access assistance from their foreign counterparts. This is clearly illustrated by a case in which the SFO was involved.⁸⁶⁹

In September 2009, Natural Dairy (NZ) Holdings Limited (Natural Dairy), a company listed on the Hong Kong Stock Exchange, made an announcement of its plan to purchase the New Zealand farm assets of the Crafar family. The plan involved an intermediary in New Zealand, a group of companies called UBNZ, purchasing the farm assets for \$240 million. Natural Dairy undertook to purchase the farm assets from UBNZ for \$500 million.

In September 2010, following concerns raised by the Overseas Investment Office and the New Zealand Police, the SFO opened an investigation into these transactions. A parallel investigation was opened in Hong Kong by the Independent Commission Against Corruption (ICAC). After extensive cooperation – between the two agencies, the SFO consulted ICAC regarding the prospect and nature of charges being laid in Hong Kong.

- 19.7 Charges were subsequently laid. Regulators such as the SFO,⁸⁷⁰ Inland Revenue,⁸⁷¹ the Financial Markets Authority (FMA),⁸⁷² and the Commerce Commission have statute-based mutual assistance regimes.⁸⁷³ The most recent statute-based regime has been introduced by the Organised Crime and Anti-corruption Legislation Bill.⁸⁷⁴ Under this Bill, the New Zealand Police will be able to share personal information with its international counterparts where it is necessary to enable the overseas agency to carry out policing functions in its own jurisdiction. This followed the Agreement on Enhancing Cooperation in Preventing and Combating Crime between New Zealand and the United States of America (PCC Agreement).⁸⁷⁵
- 19.8 The focus of some of the inter-agency mutual assistance regimes is not on criminal investigation and prosecution, but rather it is to facilitate regulatory compliance and enforcement. For example, New Zealand law taxes its tax residents on their worldwide income. Because income can be derived in different countries and New Zealand tax residents do not necessarily live in New Zealand, Inland Revenue needs information-sharing mechanisms with its foreign counterparts to ensure that its residents are complying with this law and, where necessary,

868 See the 2011 revised purpose statement contained in [1(1)] of the 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].

869 Serious Fraud Office, above n 867, at 27.

870 Serious Fraud Office Act 1990, s 51.

871 Under New Zealand law, all tax treaties are given effect by virtue of an Order in Council empowering mechanism in s BH 1 of the Income Tax Act 2007. In particular, see the Double Tax Agreements (Mutual Administrative Assistance) Order 2013, which gives effect to the OECD Convention of Mutual Administrative Assistance in Tax Matters ETS 127 (opened for signature 25 January 1988), as amended by the 2010 Protocol (opened for signature 27 May 2010, entered into force 1 June 2011) [OECD Tax Convention].

872 Financial Markets Authority Act 2011, ss 31–32.

873 Commerce Act 1986, ss 99B–99P; Fair Trading Act 1986, ss 48B–48O; Credit Contracts and Consumer Finance Act 2003, s 113(ea); Telecommunications Act 2001, s 15(ha).

874 Organised Crime and Anti-corruption Legislation Bill 2014 (219-1).

875 Under the PCC Agreement, New Zealand and the United States agreed to exchange information for the purpose of preventing, detecting, and investigating criminal offences. Because there is no specific authority in the Policing Act 2008 that allows the sharing of this information, the Police currently rely on a combination of domestic legislation and international agreements. There was a concern that the present state of the law does not allow the sort of information sharing envisaged by the PCC Agreement. In particular, the lack of express legislative authority is thought to create a risk that information sharing will breach the Privacy Act 1993.

mechanisms to enforce compliance. Compliance and enforcement of the laws for which a regulator is responsible can lead to criminal investigations and prosecutions.

Types of assistance under inter-agency regimes

- 19.9 The main type of mutual assistance that can be provided by a regulator tends to be information sharing. The information that is exchanged is usually information that the regulator holds or can access in carrying out its domestic duties. For example, the FMA can provide documents to its foreign counterparts.⁸⁷⁶
- to enable reconstruction of all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;
 - that identify the beneficial owner and controller of an account; and
 - for transactions, including the amount purchased or sold, the time of the transaction, the price of the transaction, and the individual and the bank or broker and brokerage house that handled the transaction.
- 19.10 We understand that, in practice, the majority of requests relate to a request for information that is already held by the agency. For Inland Revenue, the information exchanged with other countries generally takes the form of accounting information, information on the ownership of legal entities and arrangements, and financial information. However, a regulator will generally be able to obtain information for foreign agencies using its powers to obtain information for domestic purposes. For example, amendments to various Acts in 2012 empower the Commerce Commission to provide compulsorily acquired information and investigative assistance to recognised overseas regulators.⁸⁷⁷ Specifically, the Commerce Commission is able to use its powers to gather information, including by way of search powers, for a recognised overseas regulator or to provide information already gathered to assist the foreign regulator in performing its functions.
- 19.11 Likewise, Inland Revenue can use all of its domestic statutory powers to obtain information for its foreign counterparts. Article 5(2) of the OECD Convention on Mutual Administrative Assistance in Tax Matters, which was given legislative force through the Double Tax Agreements (Mutual Administrative Assistance) Order 2014, provides:

If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested.

The phrase “shall take all relevant measures” is interpreted as giving Inland Revenue the ability to use all of its domestic statutory-given powers to obtain the information requested from a foreign country. This would include, for example, the wide power in section 16 of the Tax Administration Act 1994 enabling the Commissioner of Inland Revenue to access premises to obtain information.

⁸⁷⁶ International Organisation of Securities Commissions, above n 866, at [7]. See the discussion above at [13.27]–[13.29].

⁸⁷⁷ Amendments were made to the Commerce Act 1986, the Fair Trading Act 1986, the Credit Contracts and Consumer Finance Act 2003, and the Telecommunications Act 2001. See Commerce (International Co-operation, and Fees) Amendment Act 2012, cl 5; Fair Trading (International Co-operation) Amendment Act 2012, cl 5; Credit Contracts and Consumer Finance (International Co-operation) Amendment Act 2012, cl 4; and Telecommunications (International Co-operation) Amendment Act 2012, cl 4.

19.12 However, some regulators are not permitted to use their full range of domestic powers to fulfil a foreign agency's request. For example, the FMA's power to enter and search a place or vehicle cannot be exercised for the purpose of providing information to a foreign agency.

Safeguards under inter-agency mutual assistance regimes

19.13 Each inter-agency regime is specific to the regulator. Safeguards may include the following:

- **Confidentiality:** For example, any agreement into which the SFO enters with a foreign counterpart must contain a condition that no person who receives information pursuant to the agreement will disclose the information except for the purpose specified in the agreement or with the consent of all parties to the agreement.⁸⁷⁸
- **Protection of the information:** For example, the Commerce Commission can specify how the overseas regulator is to use the information and keep the information secure.⁸⁷⁹
- **Legality under domestic law:** For example, Inland Revenue cannot carry out measures at variance with or supply information that is not obtainable under New Zealand law or Inland Revenue's own administrative practices.⁸⁸⁰
- **Double jeopardy:** For example, the FMA must refuse to assist where a criminal proceeding has already been initiated in New Zealand based on the same facts and against the same persons.⁸⁸¹

19.14 The difficulty is that there is no consistency of safeguards across inter-agency regimes. This is particularly apparent in two areas: ministerial oversight and the role of the Privacy Act 1993. Both the Commerce Commission and the SFO have ministerial oversight of their international cooperation arrangements,⁸⁸² but the FMA does not. In relation to the application of the Privacy Act, the Commerce Commission must "consult with the Privacy Commissioner on possible privacy issues before entering a cooperation arrangement".⁸⁸³ In contrast, personal information shared under the proposed Police overseas information-sharing regime is not subject to the Privacy Act despite the Privacy Commissioner pushing for an oversight role.⁸⁸⁴

19.15 We think there needs to be consistency with some fundamental safeguards included in all regimes.

QUESTION

Q81 What fundamental safeguards do you think should be included in all inter-agency mutual-assistance regimes?

878 Serious Fraud Office Act 1990, s 51(2)(c).

879 Commerce Act 1986, s 99J.

880 Article 21 of the OECD Tax Convention, above n 871, given effect in New Zealand through the Double Tax Agreements (Mutual Administrative Assistance) Order 2013.

881 International Organisation of Securities Commissions, above n 866, at [6(e)].

882 Serious Fraud Office Act 1990, s 51(1); Commerce Act 1986, s 99F; Fair Trading Act 1986, s 48F; Credit Contracts and Consumer Finance Act 2003, s 113(ea) (incorporates s 99F of the Commerce Act); and Telecommunications Act 2001, s 15(ha) (incorporates s 99F of the Commerce Act).

883 Commerce Act 1986, s 99E(2)(c).

884 Ministry of Justice "Departmental Disclosure Statement: Organised Crime and Anti-corruption Legislation Bill" (21 May 2014) at 9.

INTERACTION BETWEEN MACMA AND INTER-AGENCY REGIMES

- 19.16 MACMA supports inter-agency regimes by stipulating in section 5 that the Act does not derogate from existing forms of cooperation or prevent the development of future forms of cooperation. Section 5 was based on a similar provision in the Harare Scheme to recognise “existing forms of cooperation” such as Interpol.⁸⁸⁵ The drafters of the Harare Scheme also thought it important to allow for future cooperation arrangements between governments and enforcement agencies to be developed. They noted that, in due course, this would be critical in matters such as securities regulation or drug trafficking.⁸⁸⁶
- 19.17 There are certain types of mutual legal assistance that can only be provided under MACMA. This includes assistance that is highly intrusive, such as the taking of evidence for a criminal proceeding and the restraint and forfeiture of proceeds of crime. However, some other less intrusive types of mutual legal assistance under MACMA can also be accessed directly via an inter-agency regime. This includes:
- general requests, such as information requests and the interviewing of voluntary witnesses;
 - locating or identifying persons; and
 - obtaining an article or thing by search and seizure.
- 19.18 The potential for some overlap between MACMA and an inter-agency regime is expressly acknowledged in some of the inter-agency regimes. Both the FMA and the Commerce Commission’s overseas information-sharing regimes contain a legislative provision requiring the agency to consider whether a request should more appropriately be dealt with under MACMA.⁸⁸⁷ However, we think some clarification around this provision is required.
- 19.19 Sometimes, there is uncertainty among foreign and domestic agencies as to whether they should direct a request for foreign assistance to the Central Authority, when a direct request to an agency could achieve the same result. In such “overlap” situations, the use of the Central Authority may be slower. An inter-agency regime is likely to be favoured, because it is a more direct process and it avoids some of the formalities and key safeguards in MACMA. However, avoiding the safeguards and formalities in MACMA could be particularly problematic because of the lack of some fundamental safeguards across all inter-agency regimes.

OPTIONS FOR REFORM

- 19.20 The above discussion highlights that there is a need for reform in this area. The overlap that exists between MACMA and inter-agency regimes is not resolved by any clear rule directing when each regime applies. Further, the lack of some common safeguards and consistent approach across all inter-agency regimes is a cause for concern.

885 Scheme Relating to Mutual Legal Assistance in Criminal Matters Within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002 and October 2005 [Harare Scheme] at [1(1)]. This statement was amended slightly and moved to [1(3)] in 2011 amendments to the Harare Scheme. The Harare Scheme is discussed in more detail in ch 13.

886 See David McClean “Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth with a Detailed Commentary” in William Gilmore (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press, Cambridge, 1995) 112 at 113.

887 Financial Markets Authority Act 2011, s 32(2)(f); Commerce Act 1986, s 99I(5)(c); Fair Trading Act 1986, s 48I(5)(c); Credit Contracts and Consumer Finance Act 2003, s 113(ea) (incorporates s 99I(5)(c) of the Commerce Act); and Telecommunications Act 2001, s 15(ha) (incorporates s 99I(5)(c) of the Commerce Act).

International best practice

- 19.21 There has been an international move towards recognising that foreign assistance can, and should, be provided through a wide variety of mechanisms and that countries should authorise their competent authorities to use the most efficient means to cooperate.⁸⁸⁸ This has been reflected in the recent revision to the purpose of the Harare Scheme, which is now to encourage and enable countries to cooperate with each other to the widest extent possible for the purposes of investigating and prosecuting crime.⁸⁸⁹

Managing the overlap

- 19.22 We consider that there should be a clear statutory rule to the effect that, if the assistance can be provided under an inter-agency mutual assistance regime, that regime should be used.
- 19.23 MACMA would still be the key tool in facilitating mutual legal assistance where there is either no inter-agency regime or the relevant regime is not comprehensive.
- 19.24 One of the guiding principles of this review is that New Zealand must ensure that it has sufficient oversight and control of any mutual assistance it provides and that it balances law enforcement needs and human rights values. In accordance with this principle, our preliminary view is that MACMA should also continue to be the primary tool for foreign countries accessing the Police's coercive powers. This is on the basis that the Police have more widespread and intrusive domestic powers than any regulatory agency and that the monitoring of assistance provided by the Police is therefore necessary. While we accept that other regulators might, in appropriate cases, be able to use their domestic search powers and share information obtained directly with their foreign counterpart, the Police can be distinguished from other regulators because they hold a certain elevated position as the heavy hand of the State.
- 19.25 We are aware that our proposal may not fit easily with the proposed information-sharing provisions in the Organised Crime and Anti-corruption Bill. This Bill, once enacted, would allow the Police to share information directly with its international counterparts.
- 19.26 The provisions of the Bill leave open the possibility that the Police could obtain a search warrant and collect material under that search for domestic purposes, and the information obtained under that search could then be shared with a foreign country under a police information-sharing agreement. Despite this material being lawfully obtained for domestic purposes, the sharing of this material in this direct way could sidestep the fundamental gatekeeping role of MACMA for foreign requests.
- 19.27 While do not want to interfere with legitimate Police practices, we do need to ensure that there is sufficient oversight when foreign countries request material for criminal investigations and prosecutions that have been obtained via coercive measures. One potential solution is that the information agreements to be concluded with other jurisdictions under the Bill should include safeguards similar to those found in MACMA.
- 19.28 The above issue relates to an issue in Chapter 17 regarding the provision of material lawfully obtained on behalf of one country that is then requested by another country. We note that MACMA has a double gatekeeping function for a search warrant or another coercive orders in that it requires both agreement of the Attorney-General and successful application to the court. While it may be inefficient to make another application to the court, we question whether, in the case of coercive powers, this part of the gatekeeping function is still necessary.

⁸⁸⁸ Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012) at recommendation 40.

⁸⁸⁹ Harare Scheme, above n 885, at [1(1)].

Centralised oversight

- 19.29 The key risk with the above proposal – that inter-agency regimes should be used in the first instance for accessing mutual legal assistance – is that the request would not be subject to review by the Central Authority⁸⁹⁰ and the safeguards in MACMA.⁸⁹¹
- 19.30 In our view, there should be some central body with oversight across all inter-agency mutual assistance regimes. An oversight body could ensure inter-agency regimes reflect some common principles/requirements and that there is a consistent approach across all government, to the extent that is possible. This body would not be involved in the transmission of requests.

Option one

- 19.31 We have considered who should perform this oversight role. One option is the Central Authority. With existing expertise in mutual legal assistance, the Central Authority would be well placed to take on this additional oversight role for all mutual assistance regimes. This would avoid having a fractured mutual assistance system and would fit nicely if, as we have proposed in Part 1 of this issues paper, the Central Authority was also responsible for extradition requests. We acknowledge that this would require an increase in resourcing of the Central Authority, but any oversight role will require some funding for this function. The obvious problem we foresee is that the Central Authority is established under MACMA and is responsible for mutual assistance in criminal matters only. As discussed above, inter-agency regimes are for both regulatory and criminal matters.

Option two

- 19.32 A second option is to give the oversight role to the Privacy Commissioner. The Privacy Commissioner already fulfils a watchdog role over domestic information-sharing agreements.⁸⁹² This is a relatively new role that was inserted into the Privacy Act in February 2013.⁸⁹³ Agencies proposing to enter into a domestic information-sharing agreement must consult with the Privacy Commissioner.⁸⁹⁴ Once an agreement has been approved by the Governor-General by Order in Council,⁸⁹⁵ the Privacy Commissioner can publish a report on any privacy issues arising out of it.⁸⁹⁶

Option three

- 19.33 The area of mutual assistance and mutual legal assistance is growing at a rapid pace. A third option is to create a new Central Authority agency that would deal solely to all mutual assistance matters, including mutual legal assistance. The new agency would replace the current Central Authority, which only deals with MACMA requests. The agency would be responsible for the transmission of MACMA requests and have an oversight role of inter-agency mutual assistance regimes.

890 The main advantage of having a Central Authority is to build up expertise in undertaking rigorous screening of foreign assistance requests. This is especially important if the requests are relatively few. It also ensures the request is reviewed by a party that is objective. Conceivably, an agency could respond to a request with less objectivity because it may be focused solely on reciprocity, that is, whether it will get the same type of assistance back. This main disadvantage with having a Central Authority review all requests for assistance, which would include requests that relate to non-criminal matters, is cost. It is difficult to see how these additional resources for a Central Authority can be justified. It appears to us that, provided there are appropriate safeguards in place under individual inter-agency regimes, it is not necessary for a Central Authority to receive and manage all requests.

891 These are discussed in chs 14 and 15.

892 Privacy Act 1993, pt 9A.

893 Inserted by s 8 of the Privacy Amendment Act 2013.

894 Privacy Act 1993, s 96O.

895 Privacy Act 1993, s 96J.

896 Privacy Act 1993, s 96P.

QUESTIONS

- Q82 What is the correct relationship between inter-agency mutual assistance regimes and MACMA?
- Q83 Given the types of assistance that can be undertaken under inter-agency mutual assistance agreements, how do we best ensure that there is sufficient oversight when foreign countries request material that has been obtained via coercive means?

Chapter 20

The ability of defendants to use MACMA

INTRODUCTION

- 20.1 The Mutual Assistance in Criminal Matters Act 1992 (MACMA) is silent on whether it is available for use by defendants. MACMA was originally designed purely to facilitate international cooperation between official bodies, and therefore it could be argued that defence requests should be filtered through the prosecution before access to MACMA is granted. However, arguably, there should be a more formalised/direct process for defendants to access information held by foreign governments for their defence.
- 20.2 In this chapter, we ask whether MACMA should be amended to provide expressly for defence requests and, if so, what that amendment should look like. To facilitate this discussion, we explain the practice that has developed in New Zealand and the debate that has arisen in the context of the Harare Scheme. We also summarise the legislative responses that have been adopted to resolve this issue in Australia, Canada, and the United Kingdom.
- 20.3 In our view, MACMA ought to be amended to provide clear guidance on this issue. For outgoing requests, we consider that a New Zealand defendant should be required to apply to the trial court to obtain approval to use the MACMA process. For incoming requests, we consider that New Zealand should not be concerned as to who the ultimate benefactor of the request might be, as long as the request has been made by the foreign central authority.

NEW ZEALAND PRACTICE

- 20.4 In 1994, a New Zealand defendant facing charges under the Customs Act 1966 applied to the High Court for it to use its inherent jurisdiction to, in effect, make a mutual legal assistance request to Hong Kong.⁸⁹⁷ The High Court found that its inherent jurisdiction did not extend to issuing such a request. The Court held that, in passing MACMA, Parliament expressed an intention that letters of request from New Zealand in criminal matters should be dealt with exclusively via the procedure in Part 2 of that Act.
- 20.5 In reaching this decision, the High Court commented that nothing in MACMA suggests that the Attorney-General may only use his or her power to request assistance on the prosecution's behalf. The Court opined that section 25(f) of the New Zealand Bill of Rights Act 1990 would be breached if the Attorney-General was satisfied that reasonable grounds existed in terms of obtaining evidence for a defendant in a criminal matter for use in a New Zealand court under section 11(1) of MACMA, but nonetheless declined to make a request.

⁸⁹⁷ *Samleung International Trading Co Ltd v Collector of Customs* [1994] 3 NZLR 285 (HC).

THE HARARE SCHEME

- 20.6 Like MACMA, the Scheme Relating to Mutual Legal Assistance in Criminal Matters Within the Commonwealth (Harare Scheme) does not expressly refer to the right of defendants to make a request for assistance. Commentary on the Scheme and discussions of the Commonwealth Law Ministers, who were responsible for drafting the Harare Scheme, indicate, however, that it does permit defence requests if the request is made through an appropriate state authority.
- 20.7 Commentary on the Harare Scheme published in 1995 noted that, in some circumstances, a court could request assistance at the prompting of the defendant. However, the commentator said that “it was thought inappropriate to give the defence itself the right to use the Scheme, which is designed essentially for cooperation between official bodies”.⁸⁹⁸
- 20.8 In 1999, the Commonwealth Law Ministers adopted a recommendation that:⁸⁹⁹
- Court based [mutual legal assistance] channels should be available equally to defence and prosecution and that every country accepted that requests for assistance made by courts on the motion of the defence should, in the interests of justice, be responded to.
- 20.9 This issue was again considered by the Commonwealth Law Ministers in 2002.⁹⁰⁰ They agreed that defendants should have the right to access the mutual legal assistance process, and an amendment “to make specific reference to the right of the defence to make such requests” was proposed.⁹⁰¹ The Ministers, however, were concerned that the actual proposed amendment provided an unqualified right of defence access, which could “place enormous pressure on already overburdened mutual assistance systems”.⁹⁰²
- 20.10 The Ministers concluded that no amendment was necessary and instead considered that the Scheme already provided avenues for defence requests. Defendants could request assistance through the prosecution and, where that was not appropriate, seek an order from a judicial authority for a request to be presented.⁹⁰³ This “filtered” process for defence requests was preferred. It offered “a pragmatic mechanism through which equality of arms could be achieved without allowing unregulated access that could lead to abuse”.⁹⁰⁴
- 20.11 Despite the Ministers’ conclusion, some uncertainty remains. The Ministers emphasised the role of judicial organs as providing an avenue for defence assistance. In the past, the Scheme explicitly permitted that a request may be initiated by a judicial authority, in addition to a law enforcement agency and public prosecution.⁹⁰⁵ This express reference was removed in 2011. The Scheme instead now provides that: “[a] request under the Scheme shall, to the extent possible: (a) specify the agency or authority initiating the request ...”.⁹⁰⁶

898 David McClean “Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth with a Details Commentary” in William Gilmore (ed) *Mutual Assistance in Business and Criminal Matters* (Cambridge University Press, Cambridge, 1995) 112 at 117.

899 Commonwealth Secretariat *Report of the Oxford Conference on International Cooperation in Criminal Matters* (1999) at 8, as cited in Robert Currie “Human Rights and international mutual legal assistance: Resolving the tension” (2000) 11 Crim LF 143 at 171.

900 As explained in Kimberly Prost “Cooperation in Penal Matters in the Commonwealth” in M Cherif Bassiouni (ed) *International Criminal Law Multilateral and Bilateral Enforcement Mechanisms* (Brill, Leiden, 2008) vol 2 413 at 426.

901 Prost, above n 900, at 426.

902 Prost, above n 900, at 426.

903 Prost, above n 900, at 426.

904 Prost, above n 900, at 426.

905 Scheme Relating to Mutual Legal Assistance in Criminal Matters Within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002 and October 2005 at [6(1)].

906 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 [4(1)(a)].

- 20.12 While this makes the ability of a judicial authority to request defence assistance less explicit, it is likely that “agency or authority” would nevertheless include “judicial authority”, hence the Ministers’ conclusion likely still stands.

The Scheme’s purpose

- 20.13 A 2011 amendment to the Scheme’s purpose may further suggest that it applies to defendants. Prior to the 2011 amendments, paragraph [1(1)] stated that the Scheme’s purpose was to “increase the level and scope of assistance rendered between Commonwealth *Governments*”. However, the Scheme’s purpose is now:⁹⁰⁷

... to encourage and enable countries to co-operate with each other to the widest extent possible for the purposes of criminal matters in accordance with this Scheme and their respective domestic laws.

- 20.14 The purpose of the 2011 Scheme is wider and, at least partly, rebuts the argument that the Harare Scheme is solely about cooperation between governments.

APPROACHES TAKEN OVERSEAS

Australia

- 20.15 In Australia, a defendant may apply to the relevant court for a certificate that it would be in the interests of justice for the Attorney-General to make a request to a foreign country.⁹⁰⁸
- 20.16 The Australian Act specifies that the request could concern:⁹⁰⁹
- the taking of evidence in a foreign country;
 - the production of a document or other article in a foreign country;
 - seizure of a thing in a foreign country; or
 - arrangements for a person in a foreign country to come to Australia to give evidence.
- 20.17 The court must give all parties and the Attorney-General the opportunity to submit on the merits of the application.⁹¹⁰ In making its decision, the court may have regard to any relevant matter and must consider:⁹¹¹
- whether the foreign country is likely to grant such a request made by the Attorney-General on behalf of the defendant;
 - the extent to which the material that the defendant seeks to obtain from the foreign country would not otherwise be available;
 - whether the court hearing the proceeding would be likely to admit the material into evidence in the proceeding;
 - the likely probative value of the material, if it were admitted, with respect to any issue likely to be determined in the proceeding; and
 - whether the defendant would be unfairly prejudiced if the material were not available to the court.

907 Harare Scheme, above n 906, at [1(1)].

908 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A(1). “Relevant court” is defined in s 39A(1A).

909 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A(1).

910 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A(2).

911 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A(3).

- 20.18 If the court issues a certificate, a copy is sent to the Attorney-General. The Attorney-General must, in accordance with the certificate, make a request for assistance on behalf of the defendant to the foreign country unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made.⁹¹²

United Kingdom

- 20.19 In the United Kingdom, mutual legal assistance requests are governed by the Crime (International Co-operation) Act 2003. That Act provides defendants prosecuted in the United Kingdom with a mechanism for requesting foreign assistance through the court. Where proceedings have been instituted, a person charged in those proceedings may apply to a judicial authority to make a request for mutual legal assistance.⁹¹³
- 20.20 The Act permits a United Kingdom court (or a prosecuting authority) to submit a request directly to a foreign court or to the appropriate authority for receiving requests in the foreign country.⁹¹⁴ Alternatively, a request by a judicial authority or prosecuting authority may be sent to the Secretary of State⁹¹⁵ for forwarding to the appropriate foreign court or authority.⁹¹⁶
- 20.21 There are clear differences between the Australian and United Kingdom approaches. First, the United Kingdom provision only refers to the Attorney-General “forwarding” the request and does not seem to confer discretion over whether or not to do so. This is consistent with the fact that the United Kingdom court or prosecutor can make a request directly to a foreign authority. However, the Crown Prosecution Service has noted that, as requests for assistance are usually made pursuant to section 74 of the Proceeds of Crime Act 2002, they must be sent to the Secretary of State who will forward them to the requested country if it is appropriate to do so.⁹¹⁷ Regardless, the legislation is not particularly clear on this. In contrast, the Australian provision clearly provides for a two-step process, which gives the Attorney-General discretion over the request.
- 20.22 Secondly, unlike the Australian equivalent, the United Kingdom Act does not state the specific matters that a request may concern. Instead, it simply provides that “any evidence specified in the request for use in the proceedings or investigation” may be requested.⁹¹⁸

Canada

- 20.23 Canada’s mutual legal assistance scheme is different to that in other states because it primarily operates on the basis of bilateral treaties and multilateral conventions. Canada also makes requests for assistance to foreign states with which it does not have a treaty via a non-treaty letter of request issued by a court.
- 20.24 One option available to defendants is a non-treaty court-issued request, permitted under section 709 of the Criminal Code.⁹¹⁹ A party to proceedings, by way of indictment or summary conviction, may apply for an order appointing a commissioner to take the evidence of a witness who is outside of Canada. If successful, the court issues a request seeking evidence in the foreign

912 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A(5). Note that “special circumstances of the case” is not defined further in the Act.

913 Crime (International Co-operation) Act 2003 (UK), s 7(3)(c).

914 Crime (International Co-operation) Act 2003 (UK), s 8(1). In contrast, the earlier United Kingdom legislation did not permit the direct transfer of requests between courts, except in cases of urgency. Instead, the Secretary of State acted as an intermediary (but appeared to have no discretion): see Criminal Justice (International Co-operation) Act 1990 (UK), s 3. This was altered by the 2003 Act.

915 Or the Lord Advocate in relation to Scotland.

916 Crime (International Co-operation) Act 2003 (UK), s 8(2).

917 Crown Prosecution Service “Legal Guidance: International Enquiries” < www.cps.gov.uk > .

918 Crime (International Co-operation) Act 2003 (UK), s 7(2).

919 Criminal Code RSC 1985 c C-46, s 709.

state. Requests for evidence in criminal matters are, by practice, transmitted by the Minister of Justice through diplomatic channels to the foreign state.⁹²⁰ This is much more limited than the procedure in Australia and the United Kingdom, as processes in those states are not limited to taking statements.

SHOULD DEFENCE REQUESTS BE PERMITTED?

The arguments for defendant requests

- 20.25 The main argument for permitting defence requests for assistance is the need for equality of arms. The principle of equality of arms is part of the wider concept of the right to a fair trial. It requires that each party is given a reasonable opportunity to present their case under conditions that do not place that party at a substantial disadvantage vis-à-vis the other party.⁹²¹ If a defendant's right to a fair trial is breached, it "must inevitably result in the conviction being quashed".⁹²²
- 20.26 As one commentator has noted, "... it is not unrealistic to contemplate an unfair trial as a result of evidence beneficial to the defence being irretrievable, perhaps even unknown to the defence, on this basis".⁹²³ Providing a mechanism for defence requests for assistance protects the fairness of criminal proceedings and provides a means of balancing the state's exclusive control over evidence gathering.⁹²⁴ Without such a mechanism, the defence is likely to be precluded from gathering evidence in a foreign state. Permitting defence requests would also limit defendants' ability to derail prosecutions based on breach of fair trial rights challenges.
- 20.27 The importance of the equality of arms concept was recognised by the Commonwealth Law Ministers when considering a possible amendment to the Harare Scheme.⁹²⁵ Similarly, the International Law Association has proposed that states consider "the needs of the indigent individual unable to afford to collect evidence in his defence abroad".⁹²⁶ In New Zealand, the High Court considered, in *Samleung*, that an Attorney-General would breach section 25(f) of the New Zealand Bill of Rights Act if he or she declined to make a request despite being satisfied that there were reasonable grounds to do so.⁹²⁷
- 20.28 One of the guiding principles of this review requires that, where possible, New Zealand should provide assistance to foreign countries, similar to that which is available domestically. In New Zealand, the Criminal Disclosure Act 2008 allows a defendant to apply to the court for an order granting a hearing to determine whether information that is held by a non-party should be disclosed to the defendant.⁹²⁸ If the application is granted and the hearing takes place, the judge may order the person or agency to disclose the information to the defendant.⁹²⁹ Permitting defendants to use MACMA would allow a similar tool to those available for requests domestically.

920 Public Prosecution Service of Canada "Part VIII International Assistance" in *The Federal Prosecution Service Deskbook* at [43.3.3].

921 Sabine Gless "Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle" (2013) 9 *Utrecht L Rev* 90 at 91.

922 Christopher Murray "Defense Requests for International Judicial Assistance: The U.K. Perspective" (1999) 23 *FILJ* 1344 at 1347.

923 Currie, above n 899, at 170.

924 Currie, above n 899, at 171.

925 Prost, above n 900, at 426.

926 International Law Association *Report of the Sixty-Eighth Conference* (Taipei, 24–30 May 1998) at 10, as cited in Currie, above n 899, at 171.

927 *Samleung*, above n 897, at 292. This is discussed in more detail at [20.4]–[20.5] above.

928 Criminal Disclosure Act 2008, s 24(2). The court may grant the application for a hearing based on the likelihood that the information is held by those alleged, or by another person or agency, and that it appears relevant: Criminal Disclosure Act 2008, s 25.

929 Criminal Disclosure Act 2008, s 29(1).

The arguments against defendant requests

- 20.29 The key argument against permitting defence requests is that mutual legal assistance is fundamentally a state-to-state enforcement mechanism designed for governments, not individuals, to seek assistance. The purpose of mutual legal assistance requests is to combat transnational crime and ease procedural difficulties.⁹³⁰
- 20.30 Permitting defence requests is likely to place pressure on an “already overburdened” mutual legal assistance system.⁹³¹ One commentator has noted the desirability of shielding foreign jurisdictions from ill-advised requests from individual criminal defendants.⁹³² There is also a risk that defendants will use foreign requests as a strategy to delay prosecutions, wasting both domestic court time and placing pressure on central authorities.
- 20.31 There is also a serious concern about potential “fishing expeditions” by the defence. This is because the job of the defence is not to prove matters but to raise doubt. Thus, the court may have some difficulty in assessing the relevance of the defendant’s request.
- 20.32 Finally, it is arguable that the fair trial rights of the defendant are protected by domestic exclusionary rules.⁹³³ However, this does not fully address the issue. Although evidence before the court may be excluded by these rules, they do not allow the defence to access other, potentially exculpatory evidence not before the court.

OUR PREFERRED APPROACH

Outgoing requests

- 20.33 While MACMA is currently silent on the issue, there is a strong argument that it should be used to obtain evidence on a defendant’s behalf.
- 20.34 It is not clear whether the defendant would need to apply to the court or whether they could apply directly to the Attorney-General. The Commonwealth Law Ministers’ statements suggest that an application to the court would be required.⁹³⁴
- 20.35 The law should be clarified in this area. The “two-step” process, as adopted in Australia, seems preferable. This process addresses many of the arguments against permitting requests. The court has responsibility for assessing the admissibility and probative value of requested evidence and for determining whether the defendant would be unfairly prejudiced if the material were not available. The court can therefore protect central authorities from ill-advised requests and can limit delaying tactics.
- 20.36 Even if there remains some risk that defendants would delay proceedings while pursuing foreign requests, there is equally a risk that defendants would allege a breach of fair trial rights and seek a stay of proceedings if there were no mechanism available for defence requests.
- 20.37 One oddity in the Australian approach, however, is that the court must have regard to whether the foreign country is likely to grant such a request. Assessing this would likely require research into the history of similar requests and relations between the two countries. Given that most judges have little experience in these sorts of requests, requiring the court to consider this factor may be inappropriate and an unnecessary burden on court time. It makes more sense for the

930 Currie, above n 899, at 170.

931 Prost, above n 900, at 426.

932 Janice Brabyn “Inter-Jurisdictional Co-operation in Criminal Matters: Extradition, Mutual Legal Assistance, Prisoner Transfer to and from the HKSAR” in Raymond Wacks (ed) *The New Legal Order in Hong Kong* (Hong Kong University Press, Hong Kong, 1999) 133 at 151.

933 Currie, above n 899, at 170.

934 See the discussion at [20.9]–[20.10] above.

Attorney-General to have regard to this factor while exercising his or her discretion at the “second step” of the request process. The Attorney-General is also better placed to consider issues such as the general comity of relations between the two countries.

- 20.38 The “two-step” process appears more administratively burdensome. However, permitting a defendant to make a request directly to the Attorney-General would require Crown Law to become familiar with the case and assess issues that are better evaluated by the judge in that case, such as the probative value of the evidence requested.

QUESTIONS

Q84 Do you think MACMA should be clarified to expressly allow it to be used to obtain evidence on a defendant’s behalf?

Q85 If yes, do you think the defendant should be required to apply to the trial court to obtain approval to use the MACMA process?

Incoming requests

- 20.39 The United Kingdom legislation clarifies which foreign individuals and entities can make a defence request to the United Kingdom authority.⁹³⁵ Part 3 of MACMA does not do the same, and we think this should be clarified.
- 20.40 It seems to us that the question of whether the defence may request assistance should be a domestic issue for the foreign country. Provided the request is made to New Zealand from the foreign authority tasked with making such requests, and not directly from the foreign defendant, it should not be refused on the grounds that the evidence is for the defendant.

QUESTION

Q86 Should New Zealand be unconcerned as to who the ultimate recipient of the MACMA request might be, provided the request has been made by the foreign central authority?

⁹³⁵ See Crime (International Co-operation) Act 2003 (UK), s 13. The foreign entities that can make a request are a court exercising criminal jurisdiction, a prosecuting authority, any other authority in such a country that appears to the territorial authority to have the function of making such requests for assistance, and an international authority.

Chapter 21

Procedural concerns

INTRODUCTION

- 21.1 Some procedural concerns with the Mutual Assistance in Criminal Matters Act 1992 (MACMA) have been raised with us. The first issue relates to the use of new technology, such as video links, in the provision of evidence in MACMA. Essentially, it is not clear under MACMA whether new technology can be used in taking evidence pursuant to the Act. It has been suggested that this ought to be expressly clarified. The other two issues relate to procedures currently not provided for in MACMA: a process for dealing with urgent requests and a process for contributing to the costs of undertaking a request. We have been asked to consider whether MACMA ought to contain such procedures.
- 21.2 Each of these three issues will be considered in this chapter. We also encourage comments on other procedural or compliance issues.

NEW TECHNOLOGY IN THE PROVISION OF EVIDENCE

- 21.3 MACMA provides for requests to be made by New Zealand authorities to foreign countries for evidence to be taken for a New Zealand investigation or prosecution⁹³⁶ and for evidence to be taken in New Zealand at the request of a foreign country for a foreign proceeding.⁹³⁷ However, it is not clear whether newer technology (for example, electronic recording and video-link evidence) can be used in taking this evidence.
- 21.4 The use of modern technology in providing evidential assistance to foreign countries has partially been recognised in New Zealand in the Evidence Act 2006. That Act provides that:⁹³⁸
- in a New Zealand proceeding, the New Zealand court may direct that the giving of evidence, the examination of a person giving such evidence, or the making of submissions be done by audio or audio-visual link from Australia;⁹³⁹ and
 - in an Australian proceeding, an Australian court may take evidence, or receive examination or submissions, from New Zealand by audio or audio-visual link.⁹⁴⁰
- 21.5 The Evidence Act also provides that a judge may direct that the witness gives evidence from an appropriate place outside the courtroom, whether in New Zealand or elsewhere.⁹⁴¹

936 Mutual Assistance in Criminal Matters Act 1992, s 10.

937 Mutual Assistance in Criminal Matters Act 1992, s 31.

938 Subpart 1 of pt 4 of the Evidence Act 2006. Note that MACMA works in parallel with subpt 1. See s 153B of the Evidence Act 2006, which notes that subpt 1 is not subject to, and does not override, MACMA.

939 Evidence Act 2006, s 168. When taking the evidence or receiving the examination or submissions, the New Zealand court may exercise in Australia all its powers that it is permitted to exercise in Australia under Australian law: s 169.

940 Evidence Act 2006, s 173. The Australian court may exercise in New Zealand any of its powers, except its powers to punish for contempt and enforce or execute its judgments or process: Evidence Act 2006, s 174.

941 Evidence Act 2006, s 105(1)(a)(ii).

Other countries

- 21.6 Australia recently amended their mutual legal assistance legislation to allow for some modern technology to be used for requests. Foreign countries making requests to Australia pursuant to the Mutual Assistance in Criminal Matters Act 1987 (Cth) can request for evidence to be “taken in Australia for live transmission by means of video link to a courtroom or other place in the requesting country”.⁹⁴² Similarly, Australia can request that a person giving or producing evidence be examined or cross-examined in person or through video link.⁹⁴³ The Australian legislation also enables Australia to make a request to a foreign country arranging for a tape recording to be made of the taking of evidence⁹⁴⁴ and for a foreign country to request that a tape recording be made of evidence taken in Australia.⁹⁴⁵
- 21.7 Further afield, the use of modern technology has been increasing through the work of international criminal tribunals, such as the International Criminal Court, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

Our approach

- 21.8 Using available new technology in taking evidence could be more convenient and reduce costs. Video-link technology would enable a witness to give evidence in a courtroom of the requested country, in real time, to authorities in the requesting country. Cross-examination could also occur at this stage. A tape or video recording of the evidence could be helpful for taking the evidence-in-chief of a vulnerable witness or a witness whose reliability or credibility is in issue.
- 21.9 The incorporation of new technology into MACMA requests would not be difficult. New Zealand courts already use audio-visual links (AVL). The use of this technology is primarily governed by the Courts (Remote Participation) Act 2010. This Act imposes general criteria for considering whether or not to allow the use of AVL for the appearance of any participant in civil or criminal proceedings⁹⁴⁶ and additional criteria to be considered solely in respect of criminal proceedings. The latter are designed to maintain effectively the right to a fair trial by focusing on the ability of the defendant:⁹⁴⁷
- (i) to comprehend the proceedings; and
 - (ii) to participate effectively in the conduct of his or her defence; and
 - (iii) to consult and instruct counsel privately; and
 - (iv) to access relevant evidence; and
 - (v) to examine the witnesses for the prosecution;
- 21.10 The Act involves consideration of the level of contact the defendant has with other participants. It also provides for consideration of any adverse impression that may arise through the defendant or any other participant appearing by means of AVL and whether that adverse impression may be mitigated.⁹⁴⁸

⁹⁴² Mutual Assistance in Criminal Matters Act 1987 (Cth), s 13(1)(a)(iii).

⁹⁴³ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 12(3).

⁹⁴⁴ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 12(1)(b).

⁹⁴⁵ Mutual Assistance in Criminal Matters Act 1987 (Cth), s 13(1)(ii).

⁹⁴⁶ Courts (Remote Participation Act) 2010, s 5.

⁹⁴⁷ Courts (Remote Participation Act) 2010, s 6(a).

⁹⁴⁸ Courts (Remote Participation Act) 2010, s 6.

- 21.11 Our view is that MACMA should be updated to account for new technologies, particularly in the area of taking evidence where it is not available domestically. To “future-proof” the Act, our preference would be to have a general provision allowing for the use of new technology in undertaking requests where that technology is available and its use permitted domestically. We think this is preferable to naming specific new technologies.

QUESTION

Q87 Can you foresee any problems with updating MACMA to account for modern technology where that technology can be used domestically?

URGENT REQUESTS

- 21.12 While MACMA does not include a process for dealing with urgent requests, it does have some specific provisions that may assist:
- Firstly, the Act allows New Zealand to assist in obtaining an interim foreign restraining order.⁹⁴⁹ This order is not available domestically and is specially provided for because of the potential time delay in getting a foreign order ready for registration.
 - Secondly, an urgent procedure may exist in a bilateral mutual legal assistance treaty and may be enforced if the request is made as a prescribed foreign country pursuant to that treaty.⁹⁵⁰ For example, New Zealand’s treaty with Hong Kong permits urgent requests to be made orally and confirmed in writing within 10 days. The MACMA regulations allow this to be incorporated for requests made by Hong Kong.⁹⁵¹
- 21.13 MACMA also specifies that, in making a request to New Zealand, the foreign country should provide details of the period within which it wishes the request to be complied with.⁹⁵²

Other countries

- 21.14 A general urgent request procedure does not appear to be a common feature in mutual legal assistance legislation. For example, neither the legislation in Australia⁹⁵³ nor in the United Kingdom contains such a process. Published guidelines on the matter are more common. Australia’s guidelines state:⁹⁵⁴
- The request should expressly identify any time period within which the assistance is sought, and the reason for this time constraint (such as a pending court proceeding or a time-sensitive investigation). If there is a statutory limitation period on the prosecution of the offence, please provide the relevant dates.
- 21.15 Similarly, guidelines recently published in the United Kingdom stipulate that its central authority will aim to respond to a mutual legal assistance request within 30 days of receipt, with the caveat that, “depending on the nature of the request, this may not always be possible”.⁹⁵⁵

⁹⁴⁹ Mutual Assistance in Criminal Matters Act 1992, s 60. This procedure is discussed in more detail in ch 16.

⁹⁵⁰ See the discussion in ch 13.

⁹⁵¹ Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (Hong Kong Special Administrative Region of the People’s Republic of China) Regulations 1999, sch (Containing the Treaty), art V (1).

⁹⁵² Mutual Assistance in Criminal Matters Act 1992, s 26(c)(v).

⁹⁵³ Note that the legislation does provide for warrants to be issued electronically if the circumstances require urgency, but there is no general procedure for this to occur: see Mutual Assistance in Criminal Matters Act 1987 (Cth), s 38H.

⁹⁵⁴ *Requesting Mutual Legal Assistance in Criminal Matters from G20 Countries: A step-by-step guide* (2012) at 13.

⁹⁵⁵ Home Office *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom* (11th ed, London, 2014) at 9.

The guidance also notes that any reasons for urgency that are clearly stated in the request will be taken into account and asks that the requesting country:⁹⁵⁶

- not mark a request as urgent unless it is urgent;
- detail why a request is urgent, for example, somebody is being detained in custody, somebody is due to be released from custody, pre-trial court appearances or trial dates, there is an immediate risk to individuals, risk of dissipation of assets, and so on; and
- provide the dates of any deadlines that need to be met.

The Harare Scheme

21.16 The Harare Scheme provides that requests shall be in writing unless otherwise agreed.⁹⁵⁷ This is expanded upon in the supplementary Model Legislation, which stipulates that the form of the request shall be in writing except “in a case of urgency”, in which case, “a request may be made and transmitted otherwise than in writing”.⁹⁵⁸ The Model Legislation goes on to state that, where a request has been made other than in writing, “the contents of the request shall be recorded in writing and transmitted within [72 hours] of the initial request being made”.⁹⁵⁹

21.17 The Explanatory Note to the Model Legislation explains that:

The clause makes provision for requests to be made otherwise than in writing (that is, typically by telephone). In such cases, a written record of the request will be made within an appropriate period of time (72 hours is suggested, but this may be modified to suit countries’ administrative arrangements) and held by the Central Authority in lieu of the written request.

This would allow the receiving central authority to begin to process the request.

Our approach

21.18 The problem with creating a statutory urgency procedure with set response-time limits is that timeframes are difficult to predict prior to any details about the request being received. Once the request is received, the Central Authority may have to ask for further details. Timeframes will also depend on who executes the assistance, for example, whether it is a domestic agency or the court.

21.19 We are unsure whether an urgency provision is warranted and easily accommodated. We see the need for reasonable formality and substance before a request should be acted upon. We think that the requirement that the foreign country should provide details of the period within which it wishes the request to be complied with is appropriate, as is a commitment by the Central Authority that it will endeavour to process the request within the requested timeframe. This commitment could be in published guidelines stating that the Central Authority takes any deadlines seriously and will communicate with the requesting country if, for any reason, it does not think the request will be able to be dealt with in the requested timeframe.

956 Home Office, above n 955, at 10.

957 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 [4(2)].

958 Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014), cl 9(1).

959 Commonwealth Model Legislation on Mutual Legal Assistance in Criminal Matters (2014), cl 9(1)(c)(i).

- 21.20 Particular bilateral arrangements could, of course, be reached with certain countries that reflect our relationship with a particular country. The use of urgency is a procedural element that we think could be altered by treaty or convention.⁹⁶⁰

QUESTION

Q88 Do you think MACMA should contain an urgent request procedure?

COST CONTRIBUTION

- 21.21 Requests for mutual legal assistance from New Zealand might require significant resources, particularly where those requests require complex search and surveillance operations or where proceeds of crime are at issue.⁹⁶¹
- 21.22 MACMA does not determine which party to a request should pay. The customary approach, however, is that the costs of executing a request are borne by the requested country.
- 21.23 MACMA allows the Attorney-General to refuse a request for assistance on the basis of excessive costs,⁹⁶² after consulting with the requesting country's central authority about conditions that would enable the request to be complied with.⁹⁶³ However, aside from this, there is no reference in the Act to negotiating the sharing of the costs of a request with the requesting country.
- 21.24 It is our understanding that, despite the significant resources required in carrying out some requests, requests will rarely be declined on the basis of the excessive burden ground for refusal. To raise contribution to the cost of assistance may be seen as undiplomatic and inconsistent with international comity.

Harare Scheme

- 21.25 Expense in providing assistance is recognised as an issue in the Harare Scheme, and cost contribution is provided for.⁹⁶⁴ Previously, a requested country could merely consult with the requesting country as to the terms and conditions for a request, and the requested country could refuse to comply with a request if there was no agreement.⁹⁶⁵ However, a revision of the Scheme in 2011 advanced previous attempts to grapple with the issue by providing:⁹⁶⁶
- (1) The costs of executing a request shall be borne by the requested country, unless otherwise agreed by the countries.
 - (2) Where expenses of a substantial or extraordinary nature are or will be required to execute the request, the countries shall consult in advance to determine the manner in which the costs shall be borne.
 - (3) For the purposes of sub-paragraph (2), substantial or extraordinary expenses may include but are not limited to:
 - a) fees and reasonable expenses of expert witnesses;
 - b) the costs incurred pursuant to paragraph 15;

⁹⁶⁰ See ch 13.

⁹⁶¹ See the discussion on costs in chs 16 and 17.

⁹⁶² Mutual Assistance in Criminal Matters Act 1992, s 27(2)(g).

⁹⁶³ Mutual Assistance in Criminal Matters Act 1992, s 27(3).

⁹⁶⁴ David McClean "Mutual Assistance in Criminal Matters: The Commonwealth Initiative" (1998) 37 ICLQ 177 at 183.

⁹⁶⁵ Scheme Relating to Mutual Legal Assistance in Criminal Matters Within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002 and October 2005 at [13].

⁹⁶⁶ Harare Scheme, above n 957, at [7].

- c) the costs of establishing and operating live video links or other audiovisual means, and the interpretation and transcription of such proceedings;
- d) the costs of temporarily transferring persons in custody pursuant to paragraph 16;
- e) the costs incurred for the interception of telecommunication; and
- f) the costs incurred for conducting surveillance.

Option of a specific cost-contribution provision

- 21.26 MACMA could include a provision that specifically raises the option of cost contribution as a condition of agreeing to certain requests. This might apply only where a request would lead to expenses that met a threshold as to substantial or extraordinary expense. This may require the Attorney-General to consult to ascertain estimated costs.
- 21.27 The Attorney-General would have the discretion to take into account matters such as whether the resources needed for the request are proportional to the level of seriousness of the offence. The closeness of the relationship with the requesting country and the demands of reciprocity should also influence the decision.
- 21.28 Placing a statutory obligation on the Attorney-General to consult with the requesting country would alleviate some of the diplomatic difficulty and the hesitancy in raising the issue of costs with a requesting country. Similar to the urgency procedure, we believe a specific cost-contribution provision could be removed by treaty or convention rules.⁹⁶⁷

QUESTIONS

- Q89 How should MACMA deal with the costs associated with undertaking requests on behalf of a foreign country?
- Q90 Are there any other areas that are problematic or deficient in MACMA?

⁹⁶⁷ See ch 13.

Chapter 22

Outgoing requests

INTRODUCTION

- 22.1 While the focus of this issues paper has been on the gateway and gatekeeping functions of the Mutual Assistance in Criminal Matters Act 1992 (MACMA) that relate to incoming requests, Part 2 of the Act governs outgoing requests New Zealand makes to foreign countries.
- 22.2 In this chapter, we first discuss the value of Part 2 of the Act. As we mentioned in Chapter 12, the application of Part 2 depends on what assistance foreign countries can actually provide under their own legislation. The value of Part 2 is therefore questionable. Secondly, we consider section 63 – in Part 4 of the Act – which exists to ensure that evidence received by New Zealand will be admissible in criminal proceedings in a New Zealand court. While there is no doubt that this is a valuable and necessary provision, concerns have been raised about practical difficulties it creates.

THE VALUE OF PART 2

What provisions does Part 2 contain?

- 22.3 Part 2 of MACMA contains 17 sections that relate solely to outgoing requests. Part 2 commences by stipulating that “[a] request for assistance pursuant to this Part may be made to any foreign country”⁹⁶⁸ and “shall be made by the Attorney-General”.⁹⁶⁹
- 22.4 The next 14 sections specify the types of assistance that the Attorney-General can request, the circumstances under which these can be requested, and how some of the processes for providing the requested assistance are to be carried out. The specific types of assistance include:
- locating or identifying persons;⁹⁷⁰
 - obtaining evidence;⁹⁷¹
 - arranging attendance of persons, including foreign prisoners, in New Zealand;⁹⁷²
 - serving documents;⁹⁷³
 - obtaining articles or things;⁹⁷⁴
 - enforcing orders under the Criminal Proceeds (Recovery) Act 2009;⁹⁷⁵ and
 - issuing a warrant or order in a foreign country.⁹⁷⁶

968 Mutual Assistance in Criminal Matters Act 1992, s 7.

969 Mutual Assistance in Criminal Matters Act 1992, s 8.

970 Mutual Assistance in Criminal Matters Act 1992, s 9.

971 Mutual Assistance in Criminal Matters Act 1992, ss 10–11.

972 Mutual Assistance in Criminal Matters Act 1992, ss 12–18.

973 Mutual Assistance in Criminal Matters Act 1992, s 19.

974 Mutual Assistance in Criminal Matters Act 1992, s 20.

975 Mutual Assistance in Criminal Matters Act 1992, s 21.

976 Mutual Assistance in Criminal Matters Act 1992, s 22.

- 22.5 The sections closely mirror the specific types of assistance listed in Part 3 that foreign countries can request from New Zealand.⁹⁷⁷
- 22.6 Section 23, the final section in Part 2, concerns the purpose for which information received via a foreign request is used.⁹⁷⁸ It stipulates that the information must be used for the purpose stated in the request, unless permission is given for it to be used for another purpose.

The value of Part 2

- 22.7 Part 2 specifies the type of assistance that New Zealand can seek from another country. However, it has no bearing on what a foreign country will and will not agree to provide. Part 2 provides clear guidance as to the New Zealand standards on outgoing requests. This may be important for some foreign countries.
- 22.8 Several countries with regimes similar to MACMA have an equivalent to section 23. The United Kingdom provision is almost identical, providing that, unless the appropriate overseas authority gives consent, evidence obtained pursuant to a foreign request can only be used for the requested purpose.⁹⁷⁹ Australia's legislation provides that the material must be used for the requested purpose unless the Attorney-General gives approval – a slightly different approach given that Australia's Attorney-General, rather than the foreign country that provided the material, makes this decision.⁹⁸⁰
- 22.9 It may be that a foreign country can respond to a request from New Zealand only if it has an assurance from New Zealand that any information obtained will be solely used for the requested purpose. However, on review, it does not appear that foreign countries require a statutory assurance to this effect.⁹⁸¹ We nevertheless believe the inclusion of section 23 in MACMA is valuable. It shows New Zealand's commitment to the concept of speciality, and it is likely to be beneficial especially where the requesting country does not have a close relationship with New Zealand.
- 22.10 The value of sections 9 to 22 is less clear. The mutual legal assistance legislation in Australia and the United Kingdom contain similar provisions for outgoing forms of assistance. However, the text of the original Harare Scheme, on which MACMA is primarily based, does not contain specific provisions for outgoing forms of assistance, and the United Nations Model Law on Mutual Assistance only includes a brief part concerning outgoing requests.

QUESTION

Q91 What mechanism is required to enable New Zealand to make mutual legal assistance requests to foreign countries?

977 There are some differences, however, in the circumstances under which the request can be made. For example, the Act provides that New Zealand can request assistance in obtaining an article or thing in respect of any criminal matter (s 20), but an article or thing can only be obtained from New Zealand in respect of a foreign criminal investigation or proceeding of an offence that is punishable in the foreign country by two years' imprisonment or more (s 43).

978 Mutual Assistance in Criminal Matters Act 1992, s 23.

979 Crime (International Co-operation) Act 2003 (UK), s 9(2).

980 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 43B.

981 As noted in ch 15, countries, including New Zealand, do not appear to have a similar statutory rule governing incoming requests that a country may only grant a request if it has an assurance that the material given to the requesting country will be solely used for the requested purpose. The Commission is of the view that this should be a consideration for the Attorney-General in his or her grounds for refusal: see the discussion at [15.52]–[15.59].

AUTHENTICATION AND ADMISSIBILITY OF DOCUMENTS RECEIVED

22.11 The authentication and admissibility of evidence obtained by New Zealand under a MACMA request is governed by section 63. The provision essentially provides that any foreign evidence that is to be admitted in criminal proceedings in New Zealand must be duly authenticated and will be subject to the general rules of admissibility in New Zealand. It is intended to ensure that evidence received by New Zealand will be admissible in criminal proceedings in a New Zealand court. However, we understand it can be a challenge to submit foreign-sourced evidence in a form that complies with the authentication and admissibility requirements in section 63.

Authentication

22.12 Authentication provides reassurance that the foreign documents are, in fact, what they purport to be. The authentication process in MACMA is contained in section 63(2). Specifically, a document is duly authenticated if:

- (a) it purports to be signed or certified by a Judge, Magistrate, or official in or of a foreign country; and
- (b) either—
 - (i) it is verified by the oath of a witness, or of an official of the Government of a foreign country; or
 - (ii) it purports to be sealed with an official or public seal of the foreign country or of a Minister of State, or of a department or official of the Government, of a foreign country.

22.13 This provision requires documents to be subject to two levels of verification: first, by a judge, magistrate, or official, and then by an oath or a seal. As discussed in Part 1 of this issues paper,⁹⁸² it is hard to see what value is added by the second signature or seal.

22.14 We also understand that some forms of verification may be difficult for some countries to comply with because some civil law jurisdictions do not require evidence to be taken under oath, affirmation, or caution, as those concepts are understood in common law jurisdictions.⁹⁸³ This was recognised in Australia, and in 2008, the concept of “testimony” in the Australian Foreign Evidence Act 1994 was amended to include evidence given under obligation to tell the truth, imposed, whether expressly or by implication, by or under the law of the requested foreign country.⁹⁸⁴ The amendment was intended to facilitate the admissibility of evidence taken in accordance with procedures under a foreign country’s legal system, even though such procedures may diverge from Australian evidentiary requirements.⁹⁸⁵

22.15 Our preference would be to require only one form of verification for authentication purposes and not to limit that verification to one particular form. One option would be for the section to provide a range of acceptable forms of authentication. Alternatively, the section could stipulate that the documentation has been duly authenticated if it has been authenticated in accordance with the law of the requested foreign country.

982 See discussion at [20.22] and [20.44]–[20.46].

983 Foreign Evidence Amendment Bill 2008 (Cth) (explanatory memorandum) at [27].

984 Foreign Evidence Act 1994 (Cth), s 22(1)(aa), as inserted by Foreign Evidence Amendment Act 2008 (Cth), s 7.

985 Foreign Evidence Amendment Bill 2008 (Cth) (explanatory memorandum) at [27].

QUESTION

Q92 How ought evidence obtained by New Zealand under a mutual legal assistance request be authenticated?

Admissibility

- 22.16 Even if the document is duly authenticated, it will not automatically be admissible in criminal proceedings in New Zealand. Section 63(1) of MACMA provides that evidence that is duly authenticated is admissible subject to section 23⁹⁸⁶ and “the rules of law relating to the admission of evidence”.
- 22.17 The “rules of law relating to the admission of evidence” refers to the general rules of admissibility that govern whether a piece of evidence can be admitted as evidence to be considered by the fact finder. These rules are almost entirely contained in the Evidence Act 2006.⁹⁸⁷
- 22.18 Given the differences between civil and common law jurisdictions – in particular, the much more strict evidentiary requirements in common law countries⁹⁸⁸ – obtaining evidence in the correct form can be a real challenge.

Rules of law relating to the admission of evidence in the Evidence Act

- 22.19 New Zealand law requires evidence to be relevant⁹⁸⁹ and that its probative value outweighs any possible prejudicial effect.⁹⁹⁰ In addition to these general evidential rules, the Evidence Act contains a number of specific rules as to admissibility. One such rule, which is likely to be particularly relevant to evidence obtained under MACMA, relates to hearsay statements. A hearsay statement is a statement that was made by a person other than a witness and is offered in evidence at the proceeding to prove the truth of its contents.⁹⁹¹ This is likely to be particularly relevant to evidence obtained under MACMA because the author of the document submitted as evidence is unlikely to be a witness in court and the document is likely to be submitted to prove the truth of its contents. The concern about hearsay statements is that the person who made the statement is not a witness in court, so the evidence contained in the statement cannot be tested by cross-examination. This means the fact finder is not in a position to make the best decision about its validity. Thus, the general rule in the Evidence Act is that a hearsay statement is not admissible.⁹⁹²
- 22.20 Although hearsay may arise in respect of evidence supplied as a result of a MACMA request, it seems that section 18 of the Evidence Act is most likely to permit many, if not most, hearsay statements to be admitted as evidence. Section 18 provides that a hearsay statement is admissible if: (a) the circumstances relating to the statement provide reasonable assurance

986 Section 23 governs the restriction on the use of evidence obtained by New Zealand under a MACMA request. It essentially provides that a New Zealand authority can only use the material obtained under a MACMA request “for the purpose of, or in connection with, the criminal matter to which the request relates” unless consent to use it for another purpose is obtained. There are no issues with having this limitation in the provision.

987 The common law continues to have some influence: see ss 10 and 12 of the Evidence Act 2006. Furthermore, s 5 provides that the Evidence Act operates subject to other enactments, which may contain specific rules on admissibility.

988 S Cuthbertson “Mutual Assistance in Criminal Matters: The Challenges of the Common Law Tradition” [2012] JCCL 69 at 70.

989 Evidence Act 2006, s 7(2). Evidence will be relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding: Evidence Act 2006, s 7(3).

990 Evidence Act 2006, s 8(1)(a) and (b).

991 Evidence Act 2006, s 4.

992 Evidence Act 2006, s 17.

that the statement is reliable; and (b) the maker of the statement is unavailable to be a witness, or undue expense or delay would be caused if they were required to be a witness. Given that documents that are the subject of MACMA requests are likely to have come from state agencies and will therefore be duly authenticated, the reliability requirement in (a) would likely be made out, and given that the maker of the statement is overseas, the requirement in (b) could also arguably be satisfied.⁹⁹³

- 22.21 There may be a more obvious challenge in securing evidence that complies with form requirements under domestic law, such as affidavits and affirmations that are used in New Zealand to present evidence in written form.⁹⁹⁴ We raised this issue above in our discussion of the form requirements for authentication.⁹⁹⁵ The concepts of oath and affirmation, for example, are not used in some civil law jurisdictions.⁹⁹⁶ Most common law jurisdictions face similar challenges, and some have tried to get around this by providing pro forma affidavits, declarations, and statements, depending on what is required. However, even then, material is commonly received that does not comply.⁹⁹⁷

QUESTION

Q93 What domestic rules relating to the admissibility of evidence cause an issue for evidence obtained by New Zealand under a MACMA request?

993 Note that the evidence would still be subject to the procedural requirements in s 22 of the Evidence Act 2006.

994 See form requirements in the High Court Rules, rr 9.68–9.89.

995 See the discussion in [22.14].

996 See Cuthbertson, above n 988.

997 Note that, in Part 1 of this issues paper, we propose that evidence should be admissible if it is obtained in accordance with the law of the requested foreign country. This is because, under extradition, the evidence will just be used in New Zealand for a preliminary trial. It would be unduly burdensome to require the foreign country to translate the evidence to meet New Zealand's evidentiary requirements when the substantive trial will be in the foreign country. The MACMA evidence can be distinguished because it is likely to be used in substantive criminal proceeding in the New Zealand courts.

Appendix A

Terms of reference

The Law Commission has been asked to review the Extradition Act 1999 and Mutual Assistance in Criminal Matters Act 1992. These Acts provide a framework for formal assistance between New Zealand and foreign governments in the investigation and prosecution of crime. The purpose of the review is to ensure that these Acts contain processes that are efficient, effective, and not overly complex or unnecessarily expensive, but that also provide important checks and balances to protect those being investigated and prosecuted.

Context of the review

The review will have regard to:

- (i) the changing international context, including the opportunities and risks posed by globalisation, technological change, increasing international travel and transnational crime, and increasing cooperation between countries;
- (ii) New Zealand's international legal obligations;
- (iii) the wider context of the New Zealand Government's interaction with foreign governments, including the increasing focus on international criminal cooperation at an inter-governmental level;
- (iv) the importance of extradition and mutual assistance in effectively combatting transnational and domestic crime; and
- (v) proper safeguards of the rights of those being investigated or prosecuted for committing crimes.

Objectives of the review

The review will aim to:

- (i) review the alignment of New Zealand's current legislative framework to international obligations relating to extradition and mutual assistance;
- (ii) review the alignment of New Zealand's extradition and mutual assistance framework and mechanisms with international best practice;
- (iii) improve the efficiency, effectiveness and quality of New Zealand's framework and mechanisms for extradition and mutual assistance;
- (iv) consider what changes are required to ensure that New Zealand's legislative framework for mutual assistance and extradition is appropriate for the modern 21st century context; and
- (v) uphold fundamental principles, rights and protections that ought to be present in New Zealand's extradition and mutual assistance scheme, including proper protections of human rights.

Scope of the review

The review will consider:

- (i) the principles and policy of extradition and mutual assistance law;
- (ii) technical issues with the Extradition Act and Mutual Assistance in Criminal Matters Act;
- (iii) the interaction of the Extradition Act and Mutual Assistance in Criminal Matters Act with other legislation and law enforcement cooperation practices, and with other legislation and other bilateral and multilateral treaties; and
- (iv) the extent to which New Zealand's current legislative framework inhibits effective cooperation and imposes unnecessary costs on government.

The review will not consider purely operational matters, including the funding of operational and administrative arrangements.

The review will consider the following issues (in addition to others that arise during the review and particular anomalies in the operation of the Acts):

- (i) modernisation and streamlining of the operation of the Acts;
- (ii) the scope and coverage of the Acts, including the circumstances in which assistance may be provided;
- (iii) the optimum structure for the way in which the New Zealand Government as a whole provides assistance or facilitates extradition, and the role and responsibilities of particular Ministers, departments and agencies within the structure;
- (iv) grounds for denying extradition and mutual assistance;
- (v) authentication and admissibility of evidence/information required for an extradition or obtained pursuant to a mutual assistance request;
- (vi) the form and procedure of eligibility hearings for extradition;
- (vii) the relationship between the mutual assistance legislation and other regimes for the sharing of information relating to the investigation and prosecution of crime within the New Zealand Government and between New Zealand and other governments' law enforcement agencies;
- (viii) the relationship between the Extradition Act and treaty arrangements, including those inherited from the United Kingdom; and
- (ix) review and appeal processes.

Appendix B

New Zealand's bilateral extradition treaties

New Zealand is a party to bilateral extradition treaties with the following:⁹⁹⁸

Under Extradition Act 1999	Republic of Korea (2003)	
Under Extradition Act 1965	Hong Kong (1998) Fiji (1992) United States (1970)	
Imperial treaties	Iraq (1932) Poland (1932) Albania (1926) Lithuania (1926) Estonia (1925) Czechoslovakia (1924) Finland (1924) Latvia (1924) Thailand (1911) Greece (1910) Paraguay (1908) Panama (1906) Nicaragua (1905) Cuba (1904) Peru (1904) Belgium (1901) Servia (1900) San Marino (1899) Spain (1899) Netherlands (1898) Chile (1897)	Romania (1893) Bolivia (1892) Liberia (1892) Portugal (1892) Monaco (1891) Argentina (1889) Columbia (1888) Mexico (1886) Russia (1886) Guatemala (1885) Uruguay (1884) El Salvador (1881) Ecuador (1880) Luxembourg (1880) Switzerland (1880) France (1876) Haiti (1874) Hungary (1873) Iceland (1873) Italy (1873)

⁹⁹⁸ See Ministry of Foreign Affairs and Trade “New Zealand Treaties Online” < www.treaties.mfat.govt.nz > .

Appendix C

Multilateral treaties containing extradition obligations

New Zealand is a party to the following multilateral treaties containing extradition obligations:

- Financial Action Task Force International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (February 2012)
- International Convention for the Suppression of Acts of Nuclear Terrorism 2445 UNTS 89 (opened for signature 14 September 2005, entered into force 7 July 2007)
- United Nations Global Counter-Terrorism Strategy GA Res 60/288, A/Res/60/288 (2006)
- United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2011, entered into force 14 December 2005)
- United Nations Convention Against Transnational Organised Crime and the Protocols Thereto 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 28 September 2003)
- Rome Statute of the International Criminal Court 2187 UNTS 90 (opened for signature 17 July 1998, entered into force 1 July 2002)
- International Convention for the Suppression of Financing Terrorism 2178 UNTS 197 (opened for signature 10 January 2000, entered into force 10 April 2002)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (opened for signature 25 May 2000, entered into force 18 January 2002)
- International Convention for the Suppression of Terrorist Bombings 2149 UNTS 256 (opened for signature 12 January 1998, entered into force 23 May 2001)
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed 17 December 1997, entered into force 15 February 1999)
- Convention on the Safety of United Nations and Associated Personnel 2051 UNTS 363 (opened for signature 15 December 1994, entered into force 15 January 1999)
- United Nations Security Council Resolution 955 establishing the International Criminal Tribunal for Rwanda SC Res 955, S/Res/955 (1994)
- United Nations Security Council Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia SC Res 827, S/Res/827 (1993)
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1678 UNTS 201 (opened for signature 10 March 1988, entered into force 1 March 1992)
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (opened for signature 20 December 1988, entered into force 11 November 1990)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987)

- Convention on the Physical Protection of Nuclear Material and Nuclear Facilities 1456 UNTS 125 (opened for signature 3 March 1980, entered into force 8 February 1987)
- International Convention Against the Taking of Hostages 1316 UNTS 205 (opened for signature 18 December 1979, entered into force 3 June 1983)
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1035 UNTS 167 (opened for signature 14 December 1973, entered into force 20 February 1977)
- Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 105 (opened for signature 16 December 1970, entered into force 14 October 1971)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 UNTS 177 (opened for signature 23 September 1971, entered into force 26 January 1973)
- Single Convention on Narcotic Drugs 520 UNTS 151 (opened for signature 30 March 1961, entered into force 13 December 1964)
- Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 11 December 1948, entered into force 12 January 1951)

Appendix D

List of questions

CHAPTER 3 – GIVING EFFECT TO INTERNATIONAL OBLIGATIONS

- Q1 How can we achieve making the new Act the primary source of New Zealand's extradition law but also, where necessary, give effect to New Zealand's international obligations?
- Q2 How should extradition treaties be able to alter the statutory regime?

CHAPTER 4 – ROLES AND RESPONSIBILITIES

- Q3 Do we need a central authority for extradition?
- Q4 Who should be appointed as the central authority for extradition?
- Q5 What should be the relationship between the role of the New Zealand Police in backed-warrant extraditions and the role of a central authority?
- Q6 How should privilege work in extradition?
- Q7 What is the correct relationship between the administrative decisions and political oversight of extradition?
- Q8 Should the District Court continue to have original jurisdiction for extradition proceedings?

CHAPTER 5 – EXTRADITION OFFENCES

- Q9 How do we best give certainty to the definition of "extradition offence" in the new Extradition Act as well as flexibility to best take into account the need to adjust the definition according to an extradition treaty?
- Q10 Is there a need for more expansive wording on dual criminality in the new Extradition Act? How could this be achieved?
- Q11 What is the correct extradition threshold when someone is accused? What is the correct threshold when someone is convicted?
- Q12 Should the "extradition offence" requirements (or the maximum penalty threshold or dual criminality requirements) differ for some countries?

CHAPTER 6 – CATEGORISATION OF COUNTRIES

Q13 How should the new Extradition Act distinguish between different countries, and for what purposes and why? Is there a special case for any country, for example, Australia?

CHAPTER 7 – INQUIRY INTO THE CASE AGAINST THE PERSON SOUGHT

Q14 Should the new Extradition Act retain an inquiry by the New Zealand courts into the evidence against the person sought for extradition for most countries?

Q15 Should the correct judicial inquiry be whether a judge is reasonably satisfied that there is sufficient evidence in relation to the offence to justify extradition?

Q16 To what extent should requesting countries be able to provide a summary of evidence to satisfy the court regarding the case against the person sought for extradition?

CHAPTER 8 – GROUNDS FOR REFUSING SURRENDER

Q17 What grounds for surrender ought the courts be considering, and what grounds for surrender ought to be considered by the Minister?

Q18 Should “political offence” be retained as a ground for refusal, and should a definition of “political offence” be added in the new Extradition Act?

Q19 Should the current list of discriminatory factors for refusing surrender be extended in the new Extradition Act?

Q20 How should the exclusion of military-only offences be dealt with in the new Extradition Act?

Q21 How should the new Extradition Act deal with the double jeopardy ground for refusal?

Q22 Should the basis for the application of the mental health or intellectual disability ground for refusal be expanded in the new Extradition Act? If so, what is the best way of doing this?

Q23 Should the injustice or oppression ground for refusal be expanded in the new Extradition Act?

Q24 How should the new Extradition Act deal with the situation whereby a prosecution for a New Zealand offence is pending against the individual sought for extradition?

Q25 How should the torture ground for refusal be addressed in the new Extradition Act?

Q26 How should the restriction on extraditing New Zealand citizens be addressed in the new Extradition Act?

Q27 How should the death penalty ground for refusal be addressed in the new Extradition Act?

- Q28 How should the compelling or extraordinary circumstances ground for refusal be dealt with in the extradition process?
- Q29 How should the principle of speciality be dealt with in the extradition process?
- Q30 Should the Minister retain a broad discretionary basis to refuse extradition in the new Extradition Act?
- Q31 Should the new Extradition Act include a ground for refusing surrender on the basis that the offence would be more appropriately prosecuted in New Zealand?
- Q32 Should the new Extradition Act have extra protections in relation to fair trial rights in the requested country? If so, what protections are necessary?
- Q33 Should there be any exceptions to the applicable grounds for refusal for extradition requests from Australia or from Category 1 countries?

CHAPTER 9 – PROCEDURE

- Q34 What role should the new central authority have in processing an extradition request before it gets to the courts?
- Q35 In the context of extradition, what should a judge be assessing in an arrest warrant application?
- Q36 Do the current bail procedures operate adequately in the context of extradition?
- Q37 Should the new Extradition Act contain a disclosure regime, and if so, what should be its scope and what should it look like?
- Q38 Should the substantive extradition hearing process have its own rules for evidence and procedure?
- Q39 Should the new Extradition Act provide that any issue sought to be challenged should be done by means of one general right of appeal against the District Court's substantive decision to the High Court?
- Q40 Does the new Extradition Act need to provide for procedural rules governing the Minister's final decision on surrender?

CHAPTER 10 – REFUGEE PROCEEDINGS AND EXTRADITION

- Q41 How should the relationship between extradition proceedings and refugee proceedings be clarified?
- Q42 Is further statutory reform needed to address any disclosure concerns regarding refugee proceedings and extradition proceedings?

CHAPTER 11 – EXTRADITION TO NEW ZEALAND

Q43 How do we need to adjust the law to deal with outgoing extradition requests from New Zealand?

CHAPTER 12 – INTRODUCTION

Q44 Does this issues paper set the right balance between the gateway and gatekeeper mechanisms necessary in MACMA?

CHAPTER 13 – GIVING EFFECT TO INTERNATIONAL COMMITMENTS

Q45 What do you think about our proposed approach of having a basic procedure set out in MACMA for all countries, which could be supplemented through international agreements?

Q46 In thinking about a potential redrafting of MACMA, how closely do you think the Act needs to align with the Harare Scheme and its supplementary Model Legislation? Is consistency with the Commonwealth significant?

CHAPTER 14 – THE CENTRAL AUTHORITY

Q47 Who is the appropriate person to be designated as the Central Authority under MACMA?

Q48 Should MACMA expressly provide that communications between the Central Authority and the requesting country ought not to be disclosed unless in the interests of justice?

CHAPTER 15 – GROUNDS FOR REFUSING ASSISTANCE

Q49 Should a definition of “political offence” be added in MACMA to ensure that this ground for refusal is not interpreted too broadly?

Q50 Should the bases for refusing assistance due to discrimination be explicitly extended in MACMA to include sexual orientation, age, and disability?

Q51 Should the double jeopardy ground for refusal in MACMA become a ground that may be refused rather than a ground that must be refused?

Q52 Should the refusal to give evidence be a ground under which the request must be refused in MACMA?

Q53 Should the extraterritoriality ground for refusing a request be retained in MACMA?

Q54 Should the ground for refusing a request based on triviality be rephrased in MACMA to contain some additional detail on what might constitute triviality?

- Q55 Should a request in the incorrect form be a ground for refusal in MACMA?
- Q56 Should MACMA include a mandatory ground for refusing a mutual assistance request where there are substantial grounds for believing that a person would be in danger of being subjected to torture if the assistance was given?
- Q57 Should MACMA include a ground that assistance may be refused if, in the opinion of the Attorney-General, there is no assurance that the material to be provided to the requesting country will be solely used for the requested purpose?
- Q58 Should MACMA include a general discretion to refuse to provide assistance if it is appropriate in all the circumstances that the assistance should not be granted?
- Q59 Should all grounds for refusal in MACMA relate to the investigation stage of a criminal matter in addition to the prosecution and punishment stages?
- Q60 Should New Zealand have a statutory obligation in MACMA to consult with a requesting country to consider whether a request may be granted subject to terms and conditions before deciding to refuse a request?

CHAPTER 16 – PROCEEDS OF CRIME REQUESTS

- Q61 Should the current interim foreign restraining order regime in MACMA be reformed?
- Q62 Should the High Court be able to release funds restrained under a registered foreign restraining order to allow a respondent to pay legal expenses?
- Q63 Do you think MACMA should acknowledge the ability of the Central Authority to enter into case-by-case asset-sharing agreements with foreign countries?

CHAPTER 17 – SEARCH AND SURVEILLANCE REQUESTS

- Q64 Do you think New Zealand should be able to obtain and execute a general examination order on behalf of a foreign country for criminal investigations and prosecutions?
- Q65 Under what conditions should New Zealand be able to obtain and execute a surveillance device warrant on behalf of a foreign country for criminal investigations and prosecutions?
- Q66 Should New Zealand be able to obtain and execute a production order on behalf of a foreign country for criminal investigations and prosecutions?
- Q67 How should powers to intercept data in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?
- Q68 How should covert electronic surveillance powers in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?

- Q69 How should the issue of the involvement of foreign law enforcement officers in executing search warrants (and potentially examination orders and surveillance device warrants) be dealt with under MACMA?
- Q70 How should MACMA deal with the issue of sending seized (or created) material overseas in response to a request that contains both relevant and irrelevant information?
- Q71 How should MACMA deal with the issue of sending potentially privileged or confidential seized (produced or created) material overseas in response to a request?
- Q72 How should MACMA deal with a New Zealand Bill of Rights Act challenge to an investigative action taken under the Search and Surveillance Act in response to a request?
- Q73 How should MACMA protect against the collateral use of any seized (produced or created) material that is sent overseas in response to a request?
- Q74 How should MACMA deal with issues of access, retention, and disposal of seized (produced or created) material that is sent overseas in response to a request?
- Q75 Should MACMA be amended to make the provision of search and surveillance assistance conditional on New Zealand and the foreign country reaching prior agreement on a list of specified matters?

CHAPTER 18 – REQUESTS FOR INFORMATION

- Q76 Do you think MACMA needs a specific provision that gives the Central Authority a statutory mechanism for requesting information from domestic agencies?
- Q77 How can the relationship between the Privacy Act and MACMA be clarified in the law?
- Q78 Do you think MACMA needs a statutory framework for collecting voluntary evidence?
- Q79 Are there any other forms of assistance that MACMA ought to specifically to provide for?
- Q80 How should MACMA deal with a request received by a foreign country for material that has already been lawfully obtained under a warrant or order? Should any involvement from the court be required?

CHAPTER 19 – MANAGING THE OVERLAP WITH INTER-AGENCY MUTUAL ASSISTANCE REGIMES

- Q81 What fundamental safeguards do you think should be included in all inter-agency mutual-assistance regimes?
- Q82 What is the correct relationship between inter-agency mutual assistance regimes and MACMA?

Q83 Given the types of assistance that can be undertaken under inter-agency mutual assistance agreements, how do we best ensure that there is sufficient oversight when foreign countries request material that has been obtained via coercive means?

CHAPTER 20 – THE ABILITY OF DEFENDANTS TO USE MACMA

Q84 Do you think MACMA should be clarified to expressly allow it to be used to obtain evidence on a defendant's behalf?

Q85 If yes, do you think the defendant should be required to apply to the trial court to obtain approval to use the MACMA process?

Q86 Should New Zealand be unconcerned as to who the ultimate recipient of the MACMA request might be, provided the request has been made by the foreign central authority?

CHAPTER 21 – PROCEDURAL CONCERNS

Q87 Can you foresee any problems with updating MACMA to account for modern technology where that technology can be used domestically?

Q88 Do you think MACMA should contain an urgent request procedure?

Q89 How should MACMA deal with the costs associated with undertaking requests on behalf of a foreign country?

Q90 Are there any other areas that are problematic or deficient in MACMA?

CHAPTER 22 – OUTGOING REQUESTS

Q91 What mechanism is required to enable New Zealand to make mutual legal assistance requests to foreign countries?

Q92 How ought evidence obtained by New Zealand under a mutual legal assistance request be authenticated?

Q93 What domestic rules relating to the admissibility of evidence cause an issue for evidence obtained by New Zealand under a MACMA request?