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MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS



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Chapter 16

Extradition Bill and commentary

INTRODUCTION

- 16.1 This Part contains our recommended Extradition Bill and commentary on selected provisions.
- 16.2 The Bill is designed to give a clear illustration of our policy. It is indicative drafting only and further work would be required before the Bill would be ready for introduction in Parliament.
- 16.3 The following provisions in the Bill are the subject of commentary:
- Clause 5 – interpretation (approved country, political offence, respondent)
 - Clause 7 – Meaning of extradition offence
 - Clause 13 – District Court has jurisdiction in most matters
 - Clause 14 – Central Authority to conduct extradition proceedings or make extradition request
 - Clause 15 – Central Authority entitlements
 - Clause 17 – No extradition of respondent without the opportunity for legal representation
 - Clause 18 – Extradition by consent
 - Part 2, subpart 1 – Grounds for refusing extradition
 - Clause 20 – Grounds on which the court must refuse extradition
 - Clause 21 – Grounds on which Minister must or may refuse extradition
 - Clause 23 – Extradition request
 - Clause 25 – Central Authority must decide whether to commence extradition proceedings
 - Clause 26 – Commencement of extradition proceedings under this subpart
 - Clause 31 – Issues conference
 - Clause 34 – Determining liability for extradition
 - Clause 37 – Extradition request
 - Clause 49 – Temporary suspension of extradition order in compelling or extraordinary circumstances
 - Clause 52 – Central Authority may direct temporary extradition of respondent
 - Clause 55 – Discharge of respondent if Minister refuses extradition
 - Part 2, subpart 4 – Appeals and judicial reviews (subheading)
 - Clause 59 – Appeals to High Court
 - Part 2, subpart 4 – Unfitness to participate in extradition proceedings (subheading)
 - Clause 85 – Effect of determination under section 83

- Clause 87 – Powers of District Court
- Clause 88 – Court may indicate further information required from requesting country
- Clause 100 – Place of extradition hearing
- Clause 101 – Request for extradition of person to New Zealand
- Clause 104 – Arrest warrant may be issued without prior summons
- Clause 105 – Request for information about time spent in custody overseas
- Clause 113 – Transit
- Clause 118 – Removal orders
- Clause 121 – Search powers to identify and locate respondent

16.4 We have not provided commentary on every provision in the Bill, because the policy behind most of them is clearly outlined in the preceding chapters of this Report. We chose to provide commentary on the provisions listed above because either:

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

Extradition Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Extradition Act **2015**.

2 Commencement

This Act comes into force on [**date**].

Part 1

Preliminary provisions

3 Purpose

The purpose of this Act is to—

- (a) simplify the law of extradition by—
 - (i) clarifying the relationship between extradition treaties to which New Zealand is a party and New Zealand statute law; and
 - (ii) providing that, for most purposes, the procedure to be used for extradition from New Zealand is that set out in this Act; and
 - (iii) removing, wherever possible, the existing requirements for both the courts and the executive branch of government to make decisions on the same issues, and conferring each decision on the decision maker best equipped for the task; and
- (b) facilitate extradition in appropriate cases, while protecting the rights of people subject to extradition proceedings.

4 Principles

In performing a duty or exercising a power under this Act, the Central Authority, a court, the Minister, or any other person or body must, so far as they are applicable and to the extent practicable, take into account the following principles:

- (a) differences between the processes used in the criminal justice systems of other countries and the processes used in the New Zealand criminal justice system should be respected;
- (b) an extradition proceeding does not involve a determination of guilt or innocence;
- (c) extradition proceedings should be concluded without undue delay;
- (d) extradition proceedings should be conducted in a manner that respects the rights of the respondent.

5 Interpretation

In this Act, unless the context otherwise requires,—

accused person or **accused** means a person who is accused of having committed 1 or more offences against the law of a requesting country

approved country means—

- (a) Australia; and

- (b) any other country declared by Order in Council made under **section 123** as an approved country for the purposes of this Act

Australia—

- (a) includes any State or territory of Australia; but
- (b) does not include the external territories

convicted person means a person who has been convicted of 1 or more offences against the law of a requesting country and—

- (a) there is an intention to impose a sentence on the person as a consequence of the conviction; or
- (b) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served

country includes any State, territory, province, or other part of a country

document has the meaning given in section 4(1) of the Evidence Act 2006

extraditable person means a person who is accused or has been convicted of an offence against the law of the requesting country

extradition hearing—

- (a) means a hearing at which the District Court determines whether a respondent is liable for extradition; and
- (b) includes any appeal against the determination

extradition offence has the meaning given in **section 7**

extradition proceeding means—

- (a) a proceeding conducted under this Act; and
- (b) any interlocutory or other application to a court (including an application for judicial review) connected with that proceeding

extradition treaty—

- (a) means any treaty or agreement for the time being in force between New Zealand and any country or countries that contains obligations relating to the extradition of people accused or convicted of offences; and
- (b) includes the treaties listed in **Schedule 3**

Minister means the Minister of Justice

New Zealand Central Authority or **Central Authority** has the meaning given in **section 12**

party, in relation to an extradition proceeding, means—

- (a) the respondent; and
- (b) the Central Authority

political offence—

- (a) means an offence that is committed primarily to advance a political objective; but
- (b) excludes an offence—
 - (i) that is disproportionately harmful; or
 - (ii) for which New Zealand has an obligation under an extradition treaty to extradite or prosecute a person

prison has the meaning given in section 3(1) of the Corrections Act 2004

respondent means a person—

- (a) whose extradition is sought by a request made under **section 23** or **37**; and
- (b) any person arrested under a provisional arrest warrant

sentence of imprisonment, if served in New Zealand, has the meaning given in section 4(1) of the Sentencing Act 2002.

6 Status of persons convicted in absentia

For the purposes of this Act, a person who has been convicted in absentia (that is, while he or she is not present in court) must be treated as an accused person who has not been convicted.

7 Meaning of extradition offence

- (1) In this Act, **extradition offence**—

Australia

- (a) means, in relation to a requesting country that is Australia, an offence to which 1 or more of the following applies:
 - (i) the offence is an offence under the law of the requesting country, for which the maximum penalty is imprisonment for not less than 12 months or a more severe penalty;
 - (ii) the offence is an offence for which extradition may be sought under an extradition treaty;

Any requesting country other than Australia and New Zealand

- (b) means, in relation to any requesting country (other than Australia and New Zealand), an offence to which either or both of the following applies:
 - (i) the offence is—
 - (A) an offence under the law of the requesting country, for which the maximum penalty is imprisonment for not less than 2 years or a more severe penalty; and
 - (B) the offence satisfies the condition in **subsection (2)**:

- (ii) the offence is an offence for which extradition may be sought under an extradition treaty:

Extradition to New Zealand

- (c) means, in relation to an extradition request by New Zealand, an offence to which either or both of the following applies:
 - (i) the offence is one for which extradition may be sought under an extradition treaty:
 - (ii) under New Zealand law, the maximum penalty for the offence is—
 - (A) imprisonment for not less than 12 months (if the request is made to Australia); or
 - (B) imprisonment for not less than 2 years (if the request is made to any other country):

Exclusions

- (d) excludes a military-only offence.
- (2) The condition referred to in **subsection (1)(b)(i)(B)** is that, had the conduct constituting the offence (or equivalent conduct) occurred in New Zealand at the time at which it is alleged to have occurred, it would, if proved, have constituted an offence under New Zealand law for which the maximum penalty is imprisonment for not less than 2 years.
- (3) In determining the maximum penalty for an offence against the law of a requesting country for which no statutory maximum penalty is imposed, a court must consider the level of penalty that can be imposed by a court for the offence.

8 Interpretation provisions relating to offences

- (1) A reference in this Act to conduct constituting an offence is a reference to the acts or omissions, or both, by reason of which the offence has, or is alleged to have, been committed.
- (2) In making a determination for the purposes of **section 7(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.
- (3) An offence may be an extradition offence although—
 - (a) it is an offence against a law of the extradition country relating to revenue (including taxation and customs and excise duties) or foreign exchange controls; and

(b) New Zealand does not impose a tax, duty, or other impost of that kind.

Compare: 1999 No 55 s 5(1)–(3)

9 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

10 Act binds the Crown

This Act binds the Crown.

11 Relationship with extradition treaties

If an extradition treaty is in force between New Zealand and another country, the treaty may modify this Act only in the manner, and to the extent, provided in the following sections:

- (a) **section 7** (which relates to the meaning of extradition offence):
- (b) **section 20** (which relates to the grounds on which the court must refuse extradition):
- (c) **section 21** (which relates to the grounds on which the Minister must or may refuse extradition):
- (d) **section 23** (which relates to the making of an extradition request):
- (e) **section 72** (which relates to the procedure following an arrest under a provisional warrant):
- (f) **section 101** (which relates to a request for the extradition of a person to New Zealand):
- (g) **section 114** (which provides that persons extradited to New Zealand do not have to hold an immigration visa).

12 New Zealand Central Authority

The Attorney-General is the New Zealand Central Authority.

13 District Court has jurisdiction in most matters

The District Court has jurisdiction to conduct extradition hearings and make judicial determinations in most matters under this Act, except appeals (*see sections 86, 87*).

Placeholder

14 Central Authority to conduct extradition proceedings or make extradition request

- (1) Only the Central Authority may conduct extradition proceedings against a respondent.
- (2) The Central Authority may do any of the following in respect of those proceedings:

- (a) refuse to apply for an arrest warrant or a provisional arrest warrant for a respondent;
 - (b) refuse to file a notice of intention to proceed against the respondent;
 - (c) discontinue extradition proceedings against the respondent by withdrawing the notice of intention to proceed.
- (3) If the Central Authority withdraws a notice of intention to proceed, the District Court must—
- (a) cancel any warrant for the arrest of the respondent; or
 - (b) if the respondent is detained under a warrant of arrest or detention issued under this Act, discharge the respondent.
- (4) Only the Central Authority may request the extradition of a person to New Zealand.
- (5) In exercising its powers or carrying out its functions under this section or **Part 2 or 3** the Central Authority must—
- (a) act independently of any requesting country; and
 - (b) apply the provisions of **sections 25 or 38** (as applicable) and any other relevant provisions of this Act; and
 - (c) take into account any applicable international obligations.

15 Central Authority entitlements

The Central Authority is entitled to—

- (a) be represented by a lawyer at any hearing and need not appear in person;
- (b) seek assurances from a requesting country in relation to any of the grounds specified in **section 20** on which the court must refuse extradition.

16 Respondents' entitlements

- (1) Every respondent is, in relation to a matter under this Act, entitled to—
- (a) refrain from making any statement about the offending or alleged offending to which the proceedings relate, and to be advised of that right on arrest;
 - (b) consult and instruct a lawyer;
 - (c) adequate time and facilities to prepare his or her case;
 - (d) receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance;
 - (e) the free assistance of an interpreter if the person cannot understand or speak the language used in court;
 - (f) appear in person or be represented by a lawyer, or both.

- (2) **Subsection (1)(f)** is subject to the provisions of this Act that apply the Courts (Remote Participation) Act 2010.

17 No extradition of respondent without opportunity for legal representation

- (1) Unless a respondent is legally represented or **subsection (2)** applies,—
- (a) a court may not make a determination under **section 34 or 44** that the respondent is liable for extradition;
 - (b) a respondent may not consent under **section 18** to extradition.
- (2) **Subsection (1)** applies if the court is satisfied that the respondent—
- (a) was informed of his or her rights relating to legal representation, including, where appropriate, the right to apply for legal aid under the Legal Services Act 2011; and
 - (b) fully understood those rights; and
 - (c) had the opportunity to exercise those rights; and
 - (d) refused or failed to exercise those rights, or engaged counsel but subsequently dismissed him or her.
- (3) For the purposes of this section, a respondent refuses or fails to exercise his or her rights relating to legal representation if the respondent—
- (a) refuses or fails to apply for legal aid under the Legal Services Act 2011 or applies for it unsuccessfully; and
 - (b) refuses or fails to engage counsel by other means.

18 Extradition by consent

- (1) A respondent may at any time, at an appearance before the District Court (whether in the manner provided in **section 16** or in the manner provided in the Courts (Remote Participation) Act 2010), consent to being extradited to the requesting country in order to face trial, or to serve part or all of a sentence, for 1 or more offences for which the respondent's extradition is sought.
- (2) If the court receives notice of a respondent's consent to extradition, the court may—
- (a) issue a warrant for the respondent to be detained in a prison; and
 - (b) record in writing the offences for which the respondent has consented to being extradited.
- (3) The court may only take the action in **subsection (2)** if—
- (a) the respondent consented before the court to extradition for the offence or offences; and
 - (b) the respondent was legally represented in the proceedings or the provisions of **section 16** were complied with; and

- (c) the court speaks to the respondent in person and is satisfied that the person has freely consented to the extradition in full knowledge of its consequences.
- (4) If the court issues a warrant under **subsection (2)(a)**,—
 - (a) the court may grant bail to the respondent under **section 77**; and
 - (b) the respondent is not bailable as of right; and
 - (c) the respondent may not go at large without bail.

Part 2

Extradition from New Zealand

19 Overview of Part

- (1) **Subpart 1** sets out the grounds on which extradition must or may be refused.
- (2) **Subpart 2** sets out the standard procedure that applies if a country other than an approved country requests the extradition of a person from New Zealand. A diagrammatic overview of this procedure is set out in **Part 1** of **Schedule 2**.
- (3) **Subpart 3** sets out the simplified procedure that applies if an approved country requests the extradition of a person from New Zealand. A diagrammatic overview of this procedure is set out in **Part 2** of **Schedule 2**.
- (4) **Subpart 4** sets out the procedure that applies after a respondent's extradition hearing. This subpart applies whether or not the relevant requesting country is an approved country.
- (5) **Subpart 5** contains procedural provisions relating to extradition from New Zealand. This subpart applies whether or not the relevant requesting country is an approved country.
- (6) This section, and the diagrams referred to in **subsections (2)** and **(3)**, are intended as a guide only.

Subpart 1—Grounds for refusing extradition

20 Grounds on which court must refuse extradition

The grounds on which the court must refuse extradition are as follows:

- (a) that there are substantial grounds for believing the respondent would be in danger of being subjected to torture or to cruel, inhumane, or degrading treatment or punishment in the requesting country;
- (b) that the relevant extradition offence is a political offence;
- (c) that the extradition of the respondent—
 - (i) is actually sought for the purpose of prosecuting or punishing the respondent on account of his or her race, ethnic origin, religion,

- nationality, age, sex, sexual orientation, disability, or other status, or political opinions; or
- (ii) may result in the respondent being prejudiced at trial or punished, detained, or restricted in his or her personal liberty because of any of those grounds:
- (d) that, if the respondent were tried for the relevant extradition offence in New Zealand, the respondent would be entitled to be discharged because of a previous acquittal, conviction, or pardon:
- (e) that the extradition of the respondent would be unjust or oppressive for reasons including (but not limited to)—
 - (i) the likelihood of a flagrant denial of a fair trial in the requesting country; or
 - (ii) exceptional circumstances of a humanitarian nature:
- (f) that a ground applies on which extradition must be refused under a bilateral extradition treaty.

21 Grounds on which Minister must or may refuse extradition

- (1) The ground on which the Minister must refuse extradition is that the respondent has been, or may be, sentenced to death in the requesting country for the extradition offence and the requesting country has not given a satisfactory assurance to the Minister that the sentence will not be carried out.
- (2) A ground on which the Minister may refuse extradition is a ground that—
 - (a) applies under a bilateral extradition treaty to which New Zealand and the requesting country are both party (*see Part 1 of Schedule 3*); and
 - (b) either—
 - (i) relates to citizenship or extra-territorial jurisdiction; or
 - (ii) is identified in the treaty as a ground that must be considered by a representative of the executive branch of government.

Subpart 2—Standard extradition procedure

22 Application of subpart

This subpart applies to extradition requests from any country other than an approved country.

23 Extradition request

- (1) A country to which this subpart applies may request the extradition of a person who is, or is suspected of being, in New Zealand or on the way to New Zealand.
- (2) The request—
 - (a) must be made through diplomatic channels by—

- (i) a diplomatic or consular representative, or a Minister, of the requesting country; or
 - (ii) any other person authorised under an extradition treaty to make an extradition request; and
- (b) must be made to the Central Authority; and
- (c) must include—
 - (i) a statement that the requesting country reasonably believes the respondent is an extraditable person; and
 - (ii) for each offence for which the respondent is sought,—
 - (A) a description of the provision under the law of the requesting country that establishes the offence and the relevant penalty and a summary of the conduct constituting the offence; or
 - (B) any required information about the offence submitted in accordance with the provisions of a relevant extradition treaty; and
 - (iii) an assurance (relating to any trial or detention of the person for offences other than the extradition offence) that complies with **section 24**; and
 - (iv) an assurance that the requesting country has disclosed, and will continue to disclose, any information known to the requesting country that could seriously undermine any prosecution of the respondent as a result of the request; and
- (d) must be accompanied by a warrant for the arrest of the respondent issued in the requesting country or a certified copy of that warrant.
- (3) The Central Authority may waive the requirements under **subsection (2)(c)(iii) or (iv)**, or both, if the Central Authority is satisfied that the requesting country has made a comparable assurance under an extradition treaty.

Compare: 1999 No 55 s 30(5)

24 Requirements for assurance under section 23(2)(c)(iii)

- (1) An assurance under **section 23(2)(c)(iii)** must confirm that the respondent, if extradited to the requesting country, will not, unless the respondent has left or had the opportunity of leaving the country,—
 - (a) be detained or tried in that country for an offence committed, or alleged to have been committed, before the respondent's extradition other than an offence described in **subsection (2)**; or
 - (b) be detained in that country for the purpose of being extradited to another country for trial or punishment for an offence committed, or alleged to have been committed, before the respondent's extradition to the request-

ing country, other than an offence in respect of which the Central Authority consents to the respondent being so detained and extradited.

- (2) The offences referred to in **subsection (1)(a)** are—
- (a) an extradition offence to which the request for the respondent's extradition relates; or
 - (b) any other offence carrying the same or a lesser maximum penalty of which the person could be convicted on proof of the conduct constituting an extradition offence to which the request for the respondent's extradition relates; or
 - (c) an extradition offence in relation to the country (not being an offence for which the country requested the extradition of the respondent) in respect of which the Central Authority consents to the respondent being so detained or tried; or
 - (d) an offence (not being an extradition offence) for which the respondent has consented to extradition under **section 48**.

Commencement of extradition proceedings

25 Central Authority must decide whether to commence extradition proceedings

- (1) If the Central Authority receives a request that complies with **section 23(2)**, the Central Authority must decide whether to commence extradition proceedings against the respondent.
- (2) In deciding whether to commence extradition proceedings, the Central Authority must consider—
 - (a) whether there is a reasonable prospect of extradition; and
 - (b) the following matters, if relevant to the request:
 - (i) any extradition treaty to which both New Zealand and the requesting country are party;
 - (ii) any other request received by the Central Authority for the extradition of the respondent;
 - (iii) whether the respondent could be prosecuted in New Zealand for the offence for which his or her extradition is sought.
- (3) In addition to the matters specified in **subsection (2)**, the Central Authority may take into account any other matter that the Central Authority considers relevant (including any concerns about the reliability of information or assurances provided by the requesting country).

26 Commencement of extradition proceedings under this subpart

- (1) Extradition proceedings under this subpart are commenced by the Central Authority filing a notice of intention to proceed in the District Court.

Extradition Bill

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- (2) A notice of intention to proceed under this subpart must state—
- (a) that the Central Authority has received an extradition request; and
 - (b) the name of the requesting country; and
 - (c) the name and particulars of the respondent; and
 - (d) that the Central Authority seeks a determination that the respondent is liable for extradition; and
 - (e) the offence or offences for which the respondent's extradition is sought; and
 - (f) the particulars of the offence or offences; and
 - (g) the grounds on which the offence or offences are considered to be extradition offences; and
 - (h) either—
 - (i) a description of the provisions in the law of the requesting country creating the offence or offences and the equivalent New Zealand offence provisions; or
 - (ii) a description of the provisions in the law of the requesting country creating the offence or offences and the equivalent offence provisions in the treaty.

27 Procedure following filing of notice of intention to proceed

- (1) If the District Court receives a notice of intention to proceed, the court must set a date for a preliminary conference.
- (2) The preliminary conference must be held no more than 15 working days after the later of—
 - (a) the date on which the notice of intention to proceed was filed in the District Court; or
 - (b) the date of the respondent's arrest (whether under **section 28** or **71**).

*Arrest of respondent***28 Arrest warrant**

- (1) The Central Authority may apply to the District Court for a warrant to arrest a respondent.
- (2) On receiving the application, the court may issue a warrant to arrest the respondent if satisfied that—
 - (a) the Central Authority has filed a notice of intention to proceed that complies with **section 26(2)**; and
 - (b) the respondent is, or is suspected of being, in New Zealand or on the way to New Zealand.

- (3) After the respondent's arrest, the respondent may be detained until the respondent is brought before the District Court.
- (4) The respondent must be brought before the District Court at the earliest opportunity.
- (5) This section and **section 29** do not limit **sections 71 and 72** (which relate to provisional arrest warrants and the procedure following arrest on a provisional arrest warrant).

29 Procedure following respondent's arrest

- (1) If a respondent is brought before the District Court under **section 28(4)**, the court—
 - (a) must set a date for a preliminary conference; and
 - (b) must issue a warrant for the respondent to be detained in a prison; and
 - (c) may grant bail to the respondent in accordance with **section 75** or **76** (as applicable).
- (2) The respondent—
 - (a) is not bailable as of right; and
 - (b) may not go at large without bail.
- (3) A warrant under **subsection (1)(b)** expires—
 - (a) on the date on which the respondent is discharged under any of **sections 54 to 57 and 74**; or
 - (b) on the extradition of the respondent under an extradition order.
- (4) The court's powers under this section must be exercised by—
 - (a) a District Court Judge; or
 - (b) if a District Court Judge is not available, a Community Magistrate or Justice of the Peace.

Preliminary conference

30 Preliminary conference

- (1) A preliminary conference must be presided over by a District Court Judge and must be attended by the Central Authority and the respondent.
- (2) At a preliminary conference, the Judge must—
 - (a) set a date by which the Central Authority must disclose to the respondent the information and evidence specified in **section 95(2)**; and
 - (b) set a date, which must be at least 15 working days after the disclosure date set under **paragraph (a)**, for an issues conference; and
 - (c) satisfy himself or herself that the requirements of **section 16** have been complied with and record that; and

- (d) consider whether any matters raised by the parties need to be resolved before the issues conference and give directions to the parties to assist in the resolution of these matters.
- (3) Despite **subsection (1)**, a preliminary conference may be held in any manner that the Judge thinks fit, including in any way permitted by the Courts (Remote Participation) Act 2010.

Issues conference

31 Issues conference

- (1) An issues conference must be presided over by a District Court Judge and attended by the Central Authority and the respondent.
- (2) At the issues conference, the Judge must—
 - (a) ascertain whether the respondent consents to extradition and, if not, order that an extradition hearing be held; and
 - (b) if a hearing is required,—
 - (i) identify and refine the issues to be determined at the hearing; and
 - (ii) set a date for the hearing.
- (3) At the issues conference, the Judge may, for the purpose of ensuring the fair and efficient resolution of the extradition proceedings, do all or any of the following:
 - (a) if the interests of justice require, direct that any application made by a party to the proceedings be dealt with at a separate hearing before the extradition hearing;
 - (b) direct that the following be considered at separate hearings:
 - (i) the criteria for extradition;
 - (ii) the consideration of any grounds on which the District Court must refuse extradition;
 - (c) make a direction about any other matter, including, but not limited to,—
 - (i) disclosure;
 - (ii) evidence;
 - (iii) translators and interpreters;
 - (iv) representation of the respondent;
 - (v) the respondent's fitness to participate in extradition proceedings;
 - (vi) the conduct of the extradition hearing.
- (4) In considering whether to make a direction under **subsection (3)(b)**, the court must take into account the possibility that the Central Authority may intend to seek assurances from the requesting country in relation to 1 or more of the grounds on which the court must refuse extradition.

- (5) Despite **subsection (1)**, an issues conference may be held in any manner the court thinks fit, including in any way permitted by the Courts (Remote Participation) Act 2010.

32 Respondent's obligations at issues conference

- (1) At the issues conference, the respondent must advise the Judge—
- (a) that the respondent consents to extradition (in which case **section 18** applies and no extradition hearing is required); or
 - (b) that the respondent intends to oppose extradition.
- (2) If the respondent intends to oppose extradition, he or she must specify the grounds on which extradition is opposed and any matters in dispute.

Extradition hearing

33 Record of case must be offered in evidence in extradition hearing

- (1) The Central Authority must offer a record of the case in evidence in an extradition hearing.
- (2) If the respondent is sought for prosecution for an offence in the requesting country, the record of the case must—
- (a) be prepared by an investigating authority or prosecutor; and
 - (b) state the position held by the author and describe the significance of the position within the country's criminal justice system; and
 - (c) describe the author's involvement in preparing the prosecution case against the respondent; and
 - (d) summarise the evidence available to the requesting country for use in the respondent's trial; and
 - (e) identify any information that the requesting country is aware of that could seriously undermine the case against the respondent; and
 - (f) be certified (in the prescribed form (if any)) to confirm that—
 - (i) the record of the case identifies any information known to the requesting country that could seriously undermine the prosecution case against the respondent; and
 - (ii) the evidence summarised in the record of the case—
 - (A) is available for the respondent's trial in the requesting country; and
 - (B) is sufficient under the law of the requesting country to justify prosecution.
- (3) If the respondent is sought for the imposition or enforcement of a sentence, the record of the case must—
- (a) be prepared by a prosecuting or judicial authority; and

- (b) describe the conduct for which the respondent was convicted; and
 - (c) if applicable, state the sentence imposed on the respondent and the time (if any) that has been served against the sentence; and
 - (d) include copies of the official documents recording—
 - (i) the respondents conviction; and
 - (ii) if applicable, the sentence imposed on the respondent; and
 - (e) be certified to confirm that the information provided is accurate and complete.
- (4) A record of the case may include any other documents that the investigating authority or prosecutor considers are reasonably necessary to convey an accurate picture of the matters set out in **subsection (2) or (3)** (as applicable).
- (5) A court must take judicial notice of any certification that purports to be made for the purposes of this section by an investigating authority or a prosecutor from a requesting country.

34 Determining liability for extradition

- (1) The District Court must determine, in respect of each offence for which a respondent is sought under a notice of intention to proceed, whether the respondent is liable for extradition.
- (2) The court must determine that a respondent is liable for extradition in respect of an offence if the court is satisfied that—
- (a) the criteria for extradition have been met; and
 - (b) either—
 - (i) there are no grounds on which extradition should be refused, or the case referred to the Minister, under **subsection (7)**; or
 - (ii) the case has previously been referred to the Minister and the Minister has notified the court that none of the referred grounds for refusal apply; and
 - (c) no order has been made under **section 83** that the respondent is unfit to participate in an extradition proceeding.
- (3) However, for the purposes of **subsections (2)(b)(i) and (7)**—
- (a) the court may decide, without any inquiry, that there are no grounds on which extradition must be refused under **section 20** or must or may be refused under **section 21** unless either or both parties advise the court that 1 or more specified grounds under either or both of those sections may apply; and
 - (b) if either or both parties identify 1 or more such grounds, the court need inquire only into those identified grounds.

Criteria for extradition

- (4) The criteria for extradition are—
- (a) that the respondent is an extraditable person; and
 - (b) that the offence for which the respondent is sought is an extradition offence; and
 - (c) if the respondent is sought for the purposes of prosecution, that there is a case for the respondent to answer in respect of the offence; and
 - (d) if the respondent is sought for the purposes of imposing or enforcing a sentence for the offence, that the respondent was convicted of the offence.
- (5) In determining whether there is a case for the respondent to answer under **subsection (4)(c)**, the court must—
- (a) disregard only evidence that is so unreliable that it could not have any probative value; and
 - (b) consider whether the remaining evidence, if accepted as accurate at the respondent's trial, would establish each essential element of the New Zealand offence or the offence in the extradition treaty identified in the notice of intention to proceed (*see* **section 26(1)**) that corresponds to the extradition offence.
- (6) In making a determination under **subsection (5)**, the court must take into account any relevant evidence offered by the respondent.

Consideration of grounds for refusal or referral to Minister

- (7) If the court is satisfied that the criteria for extradition are met, the court, despite that satisfaction, but subject to **subsection (2)**,—
- (a) must refuse to extradite the respondent if any of the grounds in **section 20** apply; and
 - (b) must refer the case to the Minister for his or her determination if it appears to the court that either of the grounds for refusal of extradition in **section 21** may apply.
- (8) If the court refers the case to the Minister under **subsection (7)(b)**, the court must—
- (a) specify the grounds on which the referral is made; and
 - (b) provide the Minister with copies of any documents submitted during the proceedings that are relevant to the referred grounds.

35 Procedure if proceedings referred to Minister

- (1) If proceedings are referred to the Minister under **section 34(7)(b)**, the Minister must—
- (a) determine whether the grounds set out in **section 21** on which the referral was made apply; and

- (b) if a ground applies that provides the Minister with a discretion to refuse extradition, determine how to exercise that discretion.
- (2) Before making the determination, the Minister—
 - (a) must notify the parties to the proceedings of—
 - (i) the dates by which they must file any submissions in respect of the determination; and
 - (ii) any undertakings that have been given by, or ought to be required from, the requesting country; and
 - (b) if any undertakings are received from the requesting country before the date on which the respondent's submission must be filed, provide a copy of those undertakings to the respondent.
- (3) If the Minister intends to seek an undertaking from the requesting country before making the determination, the Minister must—
 - (a) keep the District Court and the parties to the extradition proceedings updated on progress; and
 - (b) make the determination as soon as is reasonably practicable.
- (4) If the Minister does not intend to seek an undertaking from the requesting country before making the determination, the Minister must make the determination by the date that is 30 working days after the date on which the Minister receives the last of the submissions under **subsection (2)(a)(i)**.
- (5) The Minister must, as soon as practicable after making the determination,—
 - (a) notify the court of his or her determination under this section; and
 - (b) give the parties a summary of the reasons for the Minister's decision.

Subpart 3—Simplified extradition procedure for approved countries

36 Application of subpart

This subpart applies to extradition requests from approved countries.

37 Extradition request

- (1) An appropriate authority in an approved country may request the extradition of a person who—
 - (a) is an extraditable person; and
 - (b) is, or is suspected of being, in New Zealand or on the way to New Zealand.
- (2) The request—
 - (a) must be made in writing to the Central Authority; and
 - (b) must include a statement that the requesting country reasonably believes the respondent is an extraditable person; and

- (c) must be accompanied by a warrant for the arrest of the respondent issued in the requesting country (the **overseas warrant**) or a certified copy of that warrant.

38 Central Authority must decide whether to commence extradition proceedings

- (1) If the Central Authority receives a request that complies with **section 37**, the Central Authority must decide whether to commence extradition proceedings against the respondent.
- (2) In deciding whether to commence extradition proceedings, the Central Authority must consider—
 - (a) whether there is a reasonable prospect of extradition; and
 - (b) the following matters, if relevant to the request:
 - (i) any extradition treaty to which both New Zealand and the requesting country are party;
 - (ii) any other request received by the Central Authority for the extradition of the respondent;
 - (iii) the fact that the respondent could be prosecuted in New Zealand for the offence for which his or her extradition is sought.
- (3) In addition to the matters specified in **subsection (2)**, the Central Authority may take into account any other matter that the Central Authority considers relevant (including any concerns about the reliability of information or assurances provided by the requesting country).

39 Commencement of extradition proceedings under this subpart

- (1) Extradition proceedings are commenced under this subpart by the Central Authority filing a notice of intention to proceed under this subpart in the District Court.
- (2) A notice of intention to proceed—
 - (a) must state—
 - (i) that the Central Authority has received an extradition request; and
 - (ii) the name of the requesting country; and
 - (iii) the name, and provide a description of, the respondent; and
 - (iv) that the Central Authority seeks a determination that the respondent is liable for extradition; and
 - (v) the offence or offences for which the respondent's extradition is sought; and
 - (vi) the particulars of the offences or offences; and
 - (vii) the grounds on which the offence or offences are considered to be extradition offences; and

- (viii) either—
 - (A) a description of the provisions in the law of the requesting country creating the offence or offences and the equivalent New Zealand offence provisions; or
 - (B) a description of the provisions in the law of the requesting country creating the offence or offences and the equivalent offence provisions in the treaty; and
- (b) must be accompanied by the overseas warrant or a certified copy of that warrant.

40 Arrest warrant

- (1) The Central Authority may apply to the District Court for an endorsement of the overseas warrant.
- (2) The court may endorse the overseas warrant if satisfied that—
 - (a) the Central Authority has filed a notice of intention to proceed that complies with **section 39(2)**; and
 - (b) the respondent is, or is suspected of being, in New Zealand or on the way to New Zealand.
- (3) If the overseas warrant is endorsed under **subsection (2)**, the respondent may be arrested by a constable under the warrant.
- (4) After the respondent's arrest, the respondent may be detained until the respondent is brought before the District Court.
- (5) The respondent must be brought before the District Court at the earliest opportunity.
- (6) This section and **section 41** do not limit **sections 71 and 72** (which relate to provisional arrest warrants and the procedure following arrest on a provisional arrest warrant).

41 Procedure following respondent's arrest

- (1) If a respondent is brought before the District Court under **section 40(5)**, the court—
 - (a) must issue a warrant for the respondent to be detained in a prison; and
 - (b) may grant bail to the respondent in accordance with **section 75 or 76** (as applicable).
- (2) The respondent—
 - (a) is not bailable as of right; and
 - (b) may not go at large without bail.
- (3) A warrant under **subsection (1)** expires—
 - (a) on the date on which the respondent is discharged under any of **sections 54 to 57 and 74**; or

- (b) on the extradition of the respondent under an extradition order.
- (4) At the same appearance, the court must—
 - (a) either—
 - (i) set a date on which to hold an issues conference; or
 - (ii) if the parties agree that an issues conference is unnecessary, set a date for the extradition hearing; and
 - (b) satisfy itself that the requirements of **section 16** have been complied with and record that.

42 Issues conference

- (1) An issues conference must be presided over by a District Court Judge and attended by the Central Authority and the respondent.
- (2) At the issues conference, the Judge must—
 - (a) ascertain whether the respondent consents to extradition and, if not, order that an extradition hearing be held; and
 - (b) if a hearing is required,—
 - (i) identify and refine the issues to be determined at the hearing; and
 - (ii) set a date for the hearing.
- (3) At the issues conference, the Judge may, for the purpose of ensuring the fair and efficient resolution of the extradition proceedings, do all or any of the following:
 - (a) if the interests of justice require, direct that any application made by a party to the proceedings be dealt with at a separate hearing before the extradition hearing;
 - (b) direct that the following be considered at separate hearings:
 - (i) the criteria for extradition;
 - (ii) the consideration of any grounds on which the District Court must find that the respondent is not liable for extradition;
 - (c) make a direction about any other matter (including the matters referred to in **section 31(3)(c)**).
- (4) Despite **subsection (1)**, an issues conference may be held in any manner the Judge thinks fit, including in any way permitted by the Courts (Remote Participation) Act 2010.

43 Respondent's obligations at issues conference

- (1) At the issues conference, the respondent must advise the Judge—
 - (a) that the respondent consents to extradition (in which case **section 18** applies and no extradition hearing is required); or
 - (b) that the respondent intends to oppose extradition.

- (2) If the respondent intends to oppose extradition, he or she must specify the grounds on which extradition is opposed and any matters in dispute.

44 Determining liability for extradition

- (1) The District Court must determine, in respect of each offence for which a respondent is sought under a notice of intention to proceed, whether the respondent is liable for extradition.
- (2) The court must determine that the respondent is liable for extradition if the court is satisfied that—
- (a) the criteria for extradition have been met; and
 - (b) either—
 - (i) there are no grounds on which extradition should be refused, or the case referred to the Minister, under **subsection (5)**; or
 - (ii) the case has previously been referred to the Minister and the Minister has notified the court that none of the referred grounds for refusal apply; and
 - (c) no order has been made under **section 83** that the respondent is unfit to participate in an extradition proceeding.
- (3) However, for the purposes of **subsections (2)(b) and (5)**,—
- (a) the court may decide, without any inquiry, that there are no grounds on which extradition must be refused under **section 20** or must or may be refused under **section 21** unless either or both parties advise the court that 1 or more specified grounds under either or both of those sections may apply; and
 - (b) if either or both parties identify 1 or more such grounds, the court need inquire only into those identified grounds.

Criteria for extradition

- (4) The criteria for extradition are—
- (a) that the respondent is an extraditable person; and
 - (b) that an overseas warrant for the respondent's arrest has been endorsed under **section 40(2)**; and
 - (c) that the offence for which the respondent is sought is an extradition offence.

Consideration of grounds for refusal or referral to Minister

- (5) If the court is satisfied that the criteria for extradition are met, the court, despite that satisfaction, but subject to **subsection (3)**,—
- (a) must refuse to extradite the respondent if any of the grounds in **section 20** apply; and

- (b) must refer the case to the Minister for his or her determination if it appears to the court that either of the grounds for refusal of extradition in **section 21** may apply.
- (6) If the court refers the case to the Minister under **subsection (5)(b)**, the court must—
 - (a) specify the grounds on which the referral is made; and
 - (b) provide the Minister with copies of any documents submitted during the proceedings that are relevant to the referred grounds.

45 Procedure if proceedings referred to Minister

- (1) If proceedings are referred to the Minister under **section 44(5)(b)**, the Minister must—
 - (a) determine whether the grounds set out in **section 21** on which the referral was made apply; and
 - (b) if a ground applies that provides the Minister with a discretion to refuse extraditions, determine how to exercise that discretion.
- (2) Before making the determination, the Minister—
 - (a) must notify the parties to the proceedings of—
 - (i) the dates by which they must file any submissions in respect of the determination; and
 - (ii) any undertakings that have been given by, or ought to be required from, the requesting country; and
 - (b) if any undertakings are received from the requesting country before the date on which the respondent's submission must be filed, provide a copy of those undertakings to the respondent.
- (3) If the Minister intends to seek an undertaking from the requesting country before making the determination, the Minister must—
 - (a) keep the District Court and the parties to the extradition proceedings updated on progress; and
 - (b) make the determination as soon as is reasonably practicable.
- (4) If the Minister does not intend to seek an undertaking from the requesting country before making the determination, the Minister must make the determination by the date that is 30 working days after the date on which the Minister receives the last of the submissions under **subsection (2)(a)(i)**.
- (5) The Minister must, as soon as practicable after making the determination,—
 - (a) notify the court of his or her determination under this section; and
 - (b) give the parties a summary of the reasons for the Minister's decision.

Subpart 4—Procedure following extradition hearing

46 Application of subpart

This subpart applies to all extradition proceedings relating to the extradition of a respondent from New Zealand.

47 Procedure following determination that respondent is liable for extradition

- (1) This section applies if the District Court determines under **section 34** or **44** that a respondent is liable for extradition.
- (2) The court must—
 - (a) specify the overseas offence or offences in respect of which the respondent is liable for extradition; and
 - (b) notify the respondent that, unless the respondent waives the right to apply for habeas corpus or to lodge an appeal,—
 - (i) the respondent will not be extradited until the expiration of 15 days after the date of the notice; and
 - (ii) during that time the respondent may do either or both of the following:
 - (A) make an application for a writ of habeas corpus;
 - (B) lodge an appeal under **section 59**.
 - (3) **Sections 54 to 56** apply to the granting of bail to the respondent.

*Extradition of respondent***48 Extradition order**

- (1) The District Court must make an extradition order in respect of a respondent if the court determines under **section 34** or **44** that the respondent is liable for extradition.
- (2) An extradition order must not be made until the later of—
 - (a) the expiry of 15 days after the date of the notice given under **section 47(2)(b)**; or
 - (b) if the respondent lodges an appeal, or an application for review or habeas corpus, in respect of a determination under this Act, the day after the date on which the proceedings are finally determined or are withdrawn.
- (3) However, an extradition order may be made immediately if—
 - (a) the respondent has consented to the extradition under **section 18**; or
 - (b) the respondent has waived—
 - (i) the right to make an application for a writ of habeas corpus within 15 days after the date of the issue of the warrant; and

- (ii) the right, in relation to every offence for which the court has determined that the respondent is liable for extradition, to lodge an appeal under **section 59**.
- (4) If the court makes an extradition order against a respondent,—
 - (a) the Central Authority may arrange for any approvals, authorities, and permissions necessary to facilitate the extradition, including the variation, cancellation, or suspension of a sentence, or of any conditions of a sentence; and
 - (b) the Police may convey the respondent out of the country in accordance with those arrangements.
- (5) **Subsection (4)** is subject to **sections 49 to 53**.
- 49 Temporary suspension of extradition order in compelling or extraordinary circumstances**
 - (1) The District Court may determine that an extradition order comes into effect on a date specified in the order if the court considers that there are compelling or extraordinary circumstances justifying the temporary suspension of the operation of the order.
 - (2) The court may vary the date specified in the order if the circumstances described in **subsection (1)** continue to apply, or no longer apply.
 - (3) In this section, **compelling or extraordinary circumstances** include, without limitation, circumstances relating to the respondent's health.
- 50 Meaning of person not liable to be detained in prison**

For the purposes of **sections 51 to 53**, a person who is **liable to be detained in a prison** does not include a person who is—

 - (a) subject to a suspended sentence of imprisonment that has not been activated; or
 - (b) on parole, home detention, or compassionate release, or is subject to release conditions, under Part 1 of the Parole Act 2002; or
 - (c) subject to a sentence of home detention imposed under section 80A of the Sentencing Act 2002; or
 - (d) at large under section 62 of the Corrections Act 2004; or
 - (e) subject to a community-based sentence (as defined in section 44 of the Sentencing Act 2002).
- 51 Procedure if respondent subject to sentence of imprisonment or is to be sentenced in New Zealand**
 - (1) This section applies if—
 - (a) the District Court has determined that a respondent is to be extradited to the requesting country; but

- (b) the respondent is—
 - (i) liable to be detained in a prison because of a sentence of imprisonment imposed for an offence against New Zealand law; or
 - (ii) yet to be sentenced for an offence against New Zealand law that is punishable by imprisonment.
- (2) The court must make an order for the extradition of the respondent that comes into effect when the—
 - (a) respondent ceases to be liable to be detained under a sentence referred to in **subsection (1)(b)(i)** or subsequently imposed in the circumstances described in **subsection (1)(b)(ii)**; or
 - (b) the Central Authority directs the temporary surrender of the respondent.

52 Central Authority may direct temporary extradition of respondent

- (1) The Central Authority may direct the temporary extradition of a respondent if a court has determined that the respondent is liable to extradition and the Central Authority is satisfied that—
 - (a) it is in the interests of justice that a direction be given under this section; and
 - (b) the requesting country has given to the Central Authority satisfactory undertakings relating to—
 - (i) the taking place of a trial of the respondent in the requesting country for 1 or more of the extradition offences for which the court has determined that the respondent is liable for extradition; and
 - (ii) the return of the respondent to New Zealand; and
 - (iii) the custody of the respondent while travelling to and from and while in the requesting country; and
 - (iv) any other matters that the Central Authority thinks appropriate.
- (2) If a respondent who is subject to a sentence of imprisonment is released from a New Zealand prison under a temporary extradition direction, or is subsequently sentenced to imprisonment for an offence against New Zealand law while subject to the temporary extradition direction, so long as the respondent is in custody in connection with the request (including custody outside New Zealand), the respondent is deemed to be serving that sentence.
- (3) If, while a respondent is in the requesting country under the temporary extradition direction, the respondent ceases to be liable to be detained in New Zealand, the Central Authority must inform the requesting country that it is no longer required to comply with the undertakings referred to in **subsection (1)(b)**.

53 Request for return after temporary extradition

- (1) The court may make an extradition order in respect of a respondent if—

- (a) the respondent is extradited to a requesting country under a temporary extradition direction; and
- (b) the respondent is returned to New Zealand in accordance with the undertaking referred to in **section 52(1)(b)(ii)** or in section 34(1)(b) of the Extradition Act 1999; and
- (c) the requesting country makes a request at any time before the person has ceased to be liable to be detained in a prison in New Zealand, that, when he or she ceases to be so liable, the person be extradited to serve any sentence that was imposed as a result of the person having been temporarily extradited to that country; and
- (d) either—
 - (i) the respondent does not contend that extradition should be refused on an identified ground in **section 20** or **21**; or
 - (ii) if the respondent so contends, the court is not satisfied that the ground or grounds apply.
- (2) An extradition order under this section takes effect on the same day that the person ceases to be liable to be detained in a prison in New Zealand.

Compare: 1999 No 55 s 34

Discharge of respondent

54 Discharge of respondent not liable for extradition

- (1) If a court determines under **section 34** or **44**, or on any appeal against a determination under either of those sections, that a respondent is not liable for extradition, the court must discharge the respondent.
- (2) **Subsection (1)** applies unless—
 - (a) the respondent is subject to another order for detention; or
 - (b) the Judge makes an order under **section 68** that the respondent continue to be detained pending the determination of an appeal.

55 Discharge of respondent if Minister refuses extradition

- (1) If the Minister notifies the court under **section 35(5)(a)** or **section 45(5)(a)** that a ground applies on which the extradition of the respondent has been refused, the court must—
 - (a) cancel the warrant authorising the detention of the respondent in prison; and
 - (b) immediately notify the prison manager or other person in whose custody the respondent is, that the warrant has been cancelled and the respondent must be discharged from custody.
- (2) **Subsection (1)** applies unless the respondent is subject to another order for detention.

56 Discharge of respondent unfit to participate in extradition proceedings

- (1) If a court stays extradition proceedings under **section 83** (as a consequence of determining that the respondent is not fit to participate in an extradition proceeding), the court must discharge the respondent.
- (2) **Subsection (1)** applies unless the respondent is subject to another order for detention.

57 Discharge of respondent if not extradited within 2 months

- (1) A respondent may apply to the High Court to be discharged if the respondent is not extradited and conveyed out of New Zealand—
 - (a) by the date that is 2 months after the date on which an extradition order is made against the respondent under **section 48**; or
 - (b) if an extradition order is made under **section 49, 51, or 53**, by the date that is 2 months after the date that the order takes effect.
- (2) A respondent making an application under **subsection (1)** must provide a copy of that application to the Central Authority as soon as is reasonably practicable.
- (3) If the court receives an application under **subsection (1)** and is satisfied that the respondent has complied with **subsection (2)**, the court may cancel the extradition order.
- (4) In deciding whether to cancel the extradition order, the court may take into account any matters that the court thinks fit.
- (5) If the court cancels the extradition order, the court must order the discharge of the respondent from the place where the person is detained.
- (6) Despite **subsection (5)**, the court must not order the discharge of the respondent if the respondent is liable to be detained under another order for detention.
- (7) If a respondent has been extradited under a temporary extradition direction made under **section 52**, nothing in this section prevents an order being made under **section 53**.

Compare: 1999 No 55 ss 36, 37

58 Discharge of respondent does not preclude further proceedings

The discharge of a respondent under this Part or under the Extradition Act 1999 does not of itself preclude further proceedings, whether or not they are based on the same conduct, to extradite the respondent under this Act.

*Appeals and judicial reviews***59 Appeals to High Court**

- (1) Either party to an extradition proceeding may appeal to the High Court against a determination of the District Court under this Act that the respondent is—

- (a) liable to extradition; or
 - (b) not liable to extradition.
- (2) An appeal under **subsection (1)** must be made within 15 working days of the date of the notice under **section 47(2)(b)**.

60 Determination of High Court

- (1) On an appeal under **section 59** against the decision of the court, the High Court may—
 - (a) confirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision in whole or in part.
- (2) If the High Court sets aside a decision in whole or in part, it may—
 - (a) discharge the respondent in relation to any or all of the offences; or
 - (b) remit the proceedings to the District Court to be reheard in relation to any or all of the offences.

61 Appeal to Court of Appeal

- (1) A party to an appeal under **section 59** may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the determination of the High Court made in relation to that appeal.
- (2) A notice of application for leave to appeal must be filed within 20 working days after the date of the determination appealed against.
- (3) However, the Court of Appeal may, at any time, extend the time allowed for filing a notice of application for leave to appeal.

62 Reasons for which leave may be granted

The Court of Appeal may only grant leave if the court is satisfied that—

- (a) the appeal involves a matter of general or public importance; or
- (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

63 Powers of Court of Appeal

On an appeal under **section 61**, the Court of Appeal has the same powers as the High Court has under **section 60**.

64 Appeal to Supreme Court

- (1) A party to an appeal under **section 61** may, with the leave of the Supreme Court, appeal to the Supreme Court against the determination of the Court of Appeal made in relation to that appeal.
- (2) A notice of application for leave to appeal must be filed within 20 working days after the date of the determination appealed against.

- (3) However, the Supreme Court may, at any time, extend the time allowed for filing a notice of application for leave to appeal.
- (4) All rights of appeal to the Supreme Court under this Act are subject to the Supreme Court Act 2003 (*see*, in particular, sections 12 to 14 of that Act).

65 Determination of Supreme Court

- (1) The Supreme Court may only allow the appeal if satisfied that the determination appealed against is wrong in law.
- (2) Subject to **subsection (1)**, the Supreme Court has the same powers as the High Court has under **section 60**.

66 Relationship between appeals and judicial review

- (1) This section applies if either party intends to bring an appeal under **section 59** and to seek judicial review of any decision related to the proceeding.
- (2) The party must lodge the notice of appeal and the application for judicial review in the same registry of the High Court.
- (3) Unless it considers it impractical to do so, the High Court must combine the hearing and determination of appeal under **section 59** and any judicial review proceedings relating to the same extradition proceeding.

67 Related appeals in Court of Appeal and Supreme Court

The Court of Appeal or Supreme Court must, unless the court considers it impractical to do so, combine the hearing and determination of any appeals brought under **section 61** or **64**, as the case requires, with any appeals brought in relation to a determination of judicial review proceedings made in relation to the same extradition proceeding.

68 Detention pending determination of appeal

- (1) This section applies if the District Court makes a determination under **section 34** or **44** that a respondent is or is not liable for extradition and,—
 - (a) after the court makes the determination,—
 - (i) the Central Authority informs the court that the Central Authority intends to appeal against the determination; or
 - (ii) the respondent informs the court that the respondent intends to appeal against the determination; and
 - (b) the Central Authority or the respondent files a notice of appeal against the determination.
- (2) The court—
 - (a) must issue a warrant for the respondent to be detained in prison; and
 - (b) may grant the respondent bail under **section 77**.
- (3) The respondent—

- (a) is not bailable as of right; and
- (b) may not go at large without bail.

Compare: 1999 No 55 s 70

69 Limitation on bringing judicial review of Minister's decisions under this Act

- (1) An application for judicial review of the Minister's decision under **section 21 and 35**, must be filed in the High Court no later than 20 working days after the date of that decision.
- (2) The High Court may extend the time allowed under **subsection (1)** for filing the application for judicial review if the court is satisfied that the interests of justice require it.

Waiver of rights

70 Waiver of rights to apply for habeas corpus or to lodge appeal

A respondent may, by a waiver in the prescribed form, waive the following rights:

- (a) the right to make an application for a writ of habeas corpus within 15 days after the issue of a warrant of detention; and
- (b) the right, in relation to every offence for which the court has determined that the person is liable for extradition, to lodge an appeal under this Part.

Subpart 5—Procedural provisions relating to extradition from New Zealand

Provisional arrest

71 Provisional arrest warrant

- (1) The Central Authority may if the Authority is satisfied that a requesting country intends to make an extradition request, apply to the District Court for a provisional warrant to arrest a person for whom an arrest warrant has been issued in a country other than New Zealand (the **requesting country**).
- (2) The court may issue a provisional warrant to arrest the person if satisfied that—
 - (a) the requesting country has issued an arrest warrant for the person; and
 - (b) the person is in, or on the way to, New Zealand; and
 - (c) it is necessary for an arrest warrant to be issued urgently.

72 Procedure following arrest under provisional warrant

- (1) A person arrested under a provisional warrant (a **respondent**) must be brought before the District Court at the earliest opportunity.
- (2) If a respondent is brought before the District Court under **subsection (1)**, the court—
 - (a) must set a date by which the Central Authority must file a notice of intention to proceed against the respondent; and
 - (b) must issue a warrant for the respondent to be detained in a prison; and
 - (c) may grant bail to the respondent under **section 75** or **76** (as applicable).
- (3) The respondent—
 - (a) is not bailable as of right; and
 - (b) may not go at large without bail.
- (4) Unless **subsection (6)** applies, the date set under **subsection (2)(a)** must be,—
 - (a) if the requesting country is not an approved country, no more than 45 working days after the date on which the respondent or person first appeared in the District Court following his or her provisional arrest or within any other specified period set out in a relevant extradition treaty;
 - (b) if the requesting country is an approved country, no more than 15 working days after the date on which the respondent first appeared in the District Court following his or her provisional arrest or within any other specified period set out in a relevant extradition treaty.
- (5) **Subsection (6)** applies if an extradition treaty to which New Zealand and the requesting country are party prescribes a period within which an extradition request must be filed following a provisional arrest.
- (6) The date set under **subsection (2)(a)** must allow a period of time for filing the notice that exceeds the period within which the requesting country must file the extradition request.

73 Extension of time for filing notice of intention to proceed

- (1) At any time before the date set by the District Court under **section 72(2)(a)**, the Central Authority may apply to the District Court for an extension of the time available for filing a notice of intention to proceed.
- (2) The District Court must give the respondent a chance to oppose the extension.
- (3) The District Court may, if the court considers an extension to be reasonable in the circumstances, replace the date set under **section 72(2)(a)** with a new date.

- (4) Despite **section 72(4)**, the new date may be more than 45 working days after the date on which the respondent or person concerned first appeared in the District Court following his or her provisional arrest.
- 74 Discharge of respondent if Central Authority fails to file notice of intention to proceed**
- (1) The District Court must discharge a respondent—
- (a) who was arrested under a provisional arrest warrant; and
 - (b) in respect of whom the Central Authority has failed to file a notice of intention to proceed by the date set under **section 72(2)(a)** or, if applicable, **section 73(3)**.
- (2) **Subsection (1)** applies unless an application is pending under **section 73** for an extension of the time available for filing a notice of intention to proceed.

Bail

- 75 Bail following arrest if respondent sought for prosecution**
- (1) This section applies to a respondent sought by an extradition country for the purposes of prosecution who applies to the court for bail.
- (2) The respondent must satisfy the court that bail should be granted if the conduct constituting the offence for which the respondent is sought is comparable to any of the following offences:
- (a) treason (section 73 of the Crimes Act 1961);
 - (b) punishment for being a party to treason (section 76 of the Crimes Act 1961);
 - (c) espionage (section 78 of the Crimes Act 1961);
 - (d) murder (sections 167 and 168 of the Crimes Act 1961);
 - (e) a serious Class A drug offence (as defined in section 17A(4) of the Bail Act 2000).
- (3) In any other case, the court must grant bail to the respondent on reasonable conditions unless the court is satisfied that there is just cause for continued detention.
- (4) In considering whether there is just cause for continued detention, the court—
- (a) must take into account—
 - (i) the extent of any risk that the respondent may fail to appear in court on the date to which the respondent has been remanded; and
 - (ii) any matter that would make it unjust to detain the respondent; and
 - (b) may take into account—
 - (i) whether there is a risk that the respondent may interfere with witnesses or evidence; and

- (ii) whether there is a risk that the respondent may offend while on bail; and
- (iii) the nature of the offence for which the respondent's extradition is sought, and whether it is a grave or less serious one of its kind; and
- (iv) the likelihood that the respondent will be extradited; and
- (v) the seriousness of the punishment to which the respondent is liable, and the severity of the punishment that is likely to be imposed; and
- (vi) the character and past conduct or behaviour, in particular proven criminal behaviour, of the respondent (in New Zealand or in the requesting country); and
- (vii) whether the respondent has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions; and
- (viii) the likely length of time before the extradition hearing; and
- (ix) the possibility of prejudice to the respondent in the preparation of his or her opposition to the extradition order if the respondent is remanded in custody; and
- (x) any other matter that is relevant in the particular circumstances.

76 Bail following arrest if respondent sought for imposition or enforcement of sentence

- (1) This section applies to a respondent sought by a requesting country for the purpose of imposing a sentence, or enforcing a sentence already imposed, on the respondent, if the respondent applies to the court for bail.
- (2) The court must not grant bail to the respondent unless the court is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.
- (3) The onus is on the respondent to show cause why bail should be granted.
- (4) In considering whether it is in the interests of justice to grant bail, the court may take into account—
 - (a) whether the respondent has received, or is likely to receive, a sentence of imprisonment; and
 - (b) the likelihood that the respondent will be extradited; and
 - (c) the likely length of time before the extradition hearing; and
 - (d) whether the respondent has previously breached a condition of bail (in New Zealand or in the requesting country); and
 - (e) the personal circumstances of the respondent and the respondent's immediate family; and

- (f) any other matter that the court considers relevant.

77 Bail following determination that respondent is or is not liable for extradition

- (1) This section applies to a respondent who applies for bail after the court has determined that the respondent—
 - (a) is liable for extradition under **section 34** or **44**; or
 - (b) is not liable for extradition, but—
 - (i) the Central Authority informs the court that the Central Authority intends to appeal against the determination; or
 - (ii) the Central Authority appeals against the determination.
- (2) Either the District Court or the High Court may determine the application for bail.
- (3) If the court has determined that the respondent is liable for extradition,—
 - (a) the court must not grant bail to the respondent unless the court is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so;
 - (b) the onus is on the respondent to show cause why bail should be granted;
 - (c) in considering whether it is in the interests of justice to grant bail, the court may take into account—
 - (i) whether the respondent has received, or is likely to receive, a sentence of imprisonment; and
 - (ii) the length of any sentence received by the respondent; and
 - (iii) the personal circumstances of the respondent and the respondent's immediate family; and
 - (iv) if the respondent has lodged an appeal against the court's determination,—
 - (A) the apparent strength of the grounds of appeal; and
 - (B) the likely length of time before the appeal is heard; and
 - (v) any other matter that the court considers relevant.
 - (4) If the court has determined that the respondent is not liable for extradition but **subsection (1)(b)(i) or (ii)** applies, the court must apply **section 75(3) and (4)** in determining whether to grant bail.

78 Granting bail to respondent aged 17 years or younger

- (1) This section applies to a respondent who is 17 years of age or younger and in respect of whom a warrant of detention is issued under any of the following sections:
 - (a) **section 28**:

- (b) **section 40:**
- (c) **section 71.**
- (2) The court—
 - (a) must grant bail to the respondent; and
 - (b) may impose any conditions of bail that the court thinks fit.
- (3) This section overrides **sections 75 to 77.**

79 Bail on adjournment

If an extradition proceeding is adjourned, the court may grant the respondent bail under **section 54, 55, or 56** (as applicable).

80 Certain provisions of Bail Act 2000 apply to granting of bail under this Act

- (1) The following provisions of the Bail Act 2000 apply, as far as they are applicable and with any necessary modifications, to the granting of bail under this Act:
 - (a) section 18 (bail hearing may be in private):
 - (b) section 19 (publication of matters relating to hearing):
 - (c) section 20(1) (evidence in bail hearing):
 - (d) section 30 (conditions of bail):
 - (e) sections 30A to 30S (relating to electronic monitoring conditions):
 - (f) section 31 (release of defendant granted bail):
 - (g) section 33 (variation of conditions of bail in District Court):
 - (h) section 34 (variation of conditions of bail in High Court, Court of Appeal, or Supreme Court):
 - (i) section 34A (surrender of defendant on bail with EM condition):
 - (j) section 35 (defendant on bail may be arrested without warrant in certain circumstances):
 - (k) section 36A (offence to refuse authorised person entry to EM address):
 - (l) section 37 (issue of warrant to arrest defendant absconding or breaching bail condition or who fails to answer bail):
 - (m) section 38 (failure to answer bail):
 - (n) section 39(1) and (2) (non-performance of condition of bail may be certified and recorded):
 - (o) section 44 (appeal from decision of District Court Judge relating to bail):
 - (p) section 45 (procedure relating to appeal under section 44):
 - (q) section 46 (execution of decision of High Court on appeal relating to bail):
 - (r) section 47 (appeal from decision of High Court relating to bail):

- (s) section 48 (procedure relating to appeal under section 47);
 - (t) section 49 (execution of decision of Court of Appeal on appeal relating to bail);
 - (u) section 50 (execution of decision of Supreme Court on appeal relating to bail);
 - (v) section 52A (period for which warrant for detention in custody may be issued).
- (2) For the purposes of **subsection (1)**, necessary modifications include, without limitation,—
- (a) that a reference in the Bail Act 2000 to a defendant should be read as a reference to a respondent; and
 - (b) that a reference in the Bail Act 2000 to a judicial officer or Registrar should be read as a reference to a Judge, Community Magistrate, or Justice of the Peace; and
 - (c) that a reference in the Bail Act 2000 to a prosecutor or prosecuting authority should be read as a reference to the Central Authority; and
 - (d) that a reference in the Bail Act 2000 to a proceeding for the offence with which the defendant has been charged should be read as a reference to a respondent's extradition hearing; and
 - (e) that a reference in the Bail Act 2000 to the conviction of the defendant should be read as a reference to a determination under **section 34** or **44** that the respondent is liable for extradition; and
 - (f) that a warrant issued under section 46, 49, or 50 of the Bail Act 2000 must be treated for the purposes of a proceeding under this Act as if it had been issued under this section.

Public access to hearings and restrictions on reporting

81 Public access to hearings and restrictions on reporting

The provisions of subpart 3 of Part 5 of the Criminal Procedure Act 2011 apply, with any necessary modifications, to proceedings for the extradition of a respondent to another country.

Unfitness to participate in extradition proceedings

82 Unfitness to participate in extradition proceedings

A respondent is unfit to participate in extradition proceedings if he or she is unable, due to mental impairment, to—

- (a) oppose an application for an extradition order or to instruct a lawyer to do so; or
- (b) decide whether to consent to an application for an extradition order; or

- (c) adequately understand the nature or purpose or possible consequences of the proceedings; or
- (d) communicate adequately with his or her lawyer in relation to the proceedings.

83 Court may find respondent unfit to participate in extradition proceedings

- (1) A court may determine that a respondent is unfit to participate in extradition proceedings.
- (2) The court may make that determination at any time from the commencement of extradition proceedings until the conclusion of the extradition hearing.

84 Process for making determination

- (1) Before making a determination under **section 83**,—
 - (a) the court must receive and consider the evidence of at least 2 health assessors as to whether the respondent is mentally impaired; and
 - (b) if the court is satisfied that the respondent is mentally impaired, the court must give each party the opportunity to be heard, and to present evidence as to whether the respondent is fit to participate in extradition proceedings.
- (2) The court must record its determinations under **section 83** and this section.
- (3) The court must make a determination under **section 83** and this section on the balance of probabilities.

85 Effect of determination under section 83

- (1) If a court determines under **section 83** that the respondent is fit to participate in extradition proceedings, the court must allow the proceedings to continue.
- (2) If the court determines under **section 83** that the respondent is unfit to participate in extradition proceedings, the court must discharge the proceedings and notify a duly authorised officer under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Jurisdiction and powers of court

86 Jurisdiction of District Court to conduct extradition proceedings

The District Court has jurisdiction to deal with extradition proceedings.

87 Powers of District Court

- (1) The District Court may, for the purpose of ensuring that an extradition proceeding is carried out in a fair and efficient manner, and to give effect to the principles in **section 4**, make any order and give any direction that the court thinks fit (including an order to adjourn the proceedings).

- (2) An extradition proceeding may from time to time be adjourned by a judicial officer to a time and place then appointed.
- (3) A Registrar may adjourn any extradition proceeding before the hearing to a time and place then appointed if the respondent is not in custody.
- (4) An order under **subsection (1)** may, without limitation, appoint an amicus curiae to assist the court by gathering evidence and making an independent submission in relation to a ground for refusing extradition.
- (5) However, an order or direction under **subsection (1), (2), or (3)** may not override any provision in this Act or any other enactment.

Compare: 1908 No 89 Schedule 2 r 4.63; 2011 No 81 s 167; Judicature Modernisation Bill cl 82

88 Court may indicate further information required from requesting country

- (1) At any time during an extradition hearing the court may indicate that, without further information from the requesting country, the court may not be able to determine that the respondent is liable for extradition.
- (2) If the court makes such an indication, the Central Authority may apply for the hearing to be adjourned to allow time for it to consult with the requesting country.

89 Respondent in custody may be brought up before expiry of period of adjournment

A respondent who has been remanded in custody may be brought before a court at any time to be dealt with, even if the period for which the respondent was remanded in custody has not expired.

Amendments to court documents

90 Amendments to notice of intention to proceed

- (1) At any time after a notice of intention to proceed is filed under **section 26 or 39**, but before the commencement of the extradition hearing, the Central Authority may file an amended notice that replaces the first notice.
- (2) The filing of an amended notice does not affect any order of a court made in respect of the proceeding before the amended notice was filed.
- (3) However, the court may, on application by either party to the proceeding, do 1 or more of the following:
 - (a) cancel or vary any order made in respect of the proceeding before the amended notice was filed;
 - (b) set a date for a further issues conference;
 - (c) set a new date for the extradition hearing.
- (4) A court may, on application by the Central Authority, amend the notice of intention to proceed at any time after the commencement of the extradition hearing and before the court has made its determination under **section 34 or 44**.

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- (5) If the court amends a notice of intention to proceed under **subsection (4)**, it may—
- (a) set a new date for an issues conference;
 - (b) adjourn the extradition hearing;
 - (c) set a new date for the extradition hearing.

91 Amendments to record of the case

- (1) At any time before the commencement of an extradition hearing, the Central Authority may file—
- (a) an amended record of the case that replaces the first record of the case; or
 - (b) a document that supplements the first record of the case.
- (2) The court is not required to admit in evidence an amended record of the case or any supplementary documents unless the amended record or the documents have been certified in accordance with **section 33(2)(f)** or **(3)(e)** (as applicable).

*Evidence offered in extradition hearing***92 Admissible evidence in extradition hearing**

- (1) The following are admissible in an extradition hearing:
- Standard extradition procedure*
 - (a) a record of the case that complies with **section 33**:
 - Standard extradition procedure and extradition to approved countries*
 - (b) documentary evidence that is not a formal written statement of a person's evidence, if it is admissible under the Evidence Act 2006 in a civil or criminal proceeding;
 - (c) a statement of a person's evidence that—
 - (i) is relevant to a matter in dispute or otherwise relevant to the determination of whether the respondent is liable to extradition; and
 - (ii) contains a declaration (however described) that the statement is true and was made with the knowledge that it could be used in proceedings in a court; and
 - (iii) was made in circumstances that provide a reasonable level of assurance that the evidence is reliable;
 - (d) oral evidence that is admissible under the Evidence Act 2006, in a civil or criminal proceeding, and given in accordance with an oral evidence order.
- (2) Despite **subsection (1)(a)**, any evidence contained in a written record of the case, if it was obtained in New Zealand,—

- (a) may be or contain hearsay; but
- (b) must be disregarded if it would be inadmissible in a civil or criminal proceeding in accordance with any of subparts 2 to 7 of Part 2 of the Evidence Act 2006.
- (3) Subject to **subsection (2)**, the contents of the record of a case are presumed to be reliable, in the absence of evidence to the contrary.
- (4) **Subsections (1)(a) and (c), (2)(a), and (3)** override the Evidence Act 2006.

93 Oral evidence order

- (1) The court may, on the application of a party or on its own motion, make an order requiring a person to give oral evidence if—
 - (a) the person has made, or refused to make, a formal written statement of his or her evidence; and
 - (b) the person has not compiled the record of the case or made a written statement or given evidence that is contained in the record of the case; and
 - (c) the court considers that the person can give evidence that is relevant to a determination of—
 - (i) whether the criteria for extradition are met; or
 - (ii) whether there are grounds on which extradition may or must be refused; and
 - (d) **subsection (2)** applies.
- (2) A court may make an oral evidence order under **subsection (1)** only if the court is satisfied that the evidence proposed to be given is sufficiently important to the determination of whether the respondent is liable to extradition that it would be contrary to the interests of justice not to allow the evidence to be given.

94 Form of admission of evidence in proceedings under this Act

Evidence, other than oral evidence given under an oral evidence order, is admitted in extradition proceedings by the relevant party filing it in the court in accordance with the directions of the court.

Disclosure

95 Disclosure by Central Authority: standard extradition procedure

Initial disclosure

- (1) As soon as practicable after filing a notice of intention to proceed under **section 26** against a respondent, and in any event no later than the date of the pre-

liminary conference, the Central Authority must provide the respondent with copies of—

- (a) the notice of intention to proceed; and
- (b) the extradition request.

Main disclosure: standard extradition procedure

- (2) The Central Authority must, no later than the date set by the Judge under **section 27(2)(a)**, provide the respondent with copies of—
 - (a) the record of the case (if applicable); and
 - (b) any evidence gathered in New Zealand that the Central Authority intends to offer at the extradition hearing; and
 - (c) any information held by the Central Authority that may be relevant to a matter that the court must determine under **section 34** or **44** (other than any information that is confidential under **section 108**).
- (3) The Central Authority must provide the respondent with copies of—
 - (a) any further evidence the Central Authority intends to provide in response to the notification by a respondent that there is a matter in dispute;
 - (b) any other evidence that the Central Authority intends to provide at the extradition hearing.

96 Disclosure by Central Authority: simplified extradition procedure

Initial disclosure

- (1) As soon as practicable after filing a notice of intention to proceed under **section 39(1)**, and in any event no later than the date of the issues conference, the Central Authority must provide the respondent with copies of—
 - (a) the notice of intention to proceed; and
 - (b) the extradition request.

Main disclosure

- (2) The Central Authority must provide the respondent with copies of—
 - (a) any further evidence the Central Authority intends to provide in response to a notification by the respondent that there is a matter in dispute;
 - (b) any other evidence that the Authority intends to provide at the extradition hearing.

97 Further disclosure by Central Authority

- (1) The Central Authority must notify the District Court and the respondent if, at any time after it has disclosed the information specified in **section 95(2)** or **96(2)**, the Central Authority—
 - (a) decides to offer evidence at the extradition hearing not earlier disclosed to the respondent; or

- (b) comes into possession of information not earlier disclosed to the respondent that may be relevant to a matter that the court must determine under **section 34** or **44**.
- (2) The Central Authority must disclose the evidence or information to the respondent as soon as is reasonably practicable.
- (3) If the Central Authority files an amended record of the case or a supplementary document under **section 91**, the Central Authority must disclose the amended record or supplementary document to the respondent as soon as is reasonably practicable.
- (4) If the Central Authority makes a disclosure under **subsection (2)** or **(3)**, the court may set a new date for the respondent's extradition hearing.

98 Disclosure by respondent

If a respondent intends to offer evidence at his or her extradition hearing, the respondent must, no later than 15 working days after the issues conference or at any other time ordered by the court,—

- (a) notify the District Court and the Central Authority that the respondent intends to offer that evidence; and
- (b) disclose the evidence to the party conducting the extradition proceedings.

99 Undisclosed information

- (1) This section applies if, at the extradition hearing of a respondent, the court is satisfied that—
 - (a) evidence sought to be offered by a party is, or is based on, information that should have been disclosed to the other party under this Act; and
 - (b) that information was not disclosed.
- (2) The court may—
 - (a) exclude the evidence; or
 - (b) with or without requiring the evidence to be disclosed, adjourn the hearing; or
 - (c) admit the evidence if it is in the interests of justice to do so.
- (3) **Subsection (2)** does not limit the powers of a court under any other enactment or rule of law to deal with any failure by a party to comply with the directions of the court under this Act.

*Place of extradition hearing***100 Place of extradition hearing**

An extradition hearing must be heard and determined in the registry of the District Court in which the application for the extradition of the respondent was filed.

Part 3

Extradition to New Zealand

101 Request for extradition of person to New Zealand

- (1) New Zealand may request from another country the extradition of a person who—
 - (a) is accused, or has been convicted, of an extradition offence against New Zealand law; and
 - (b) is suspected of being in, or on the way to, the other country.
- (2) The request may only be made by the Central Authority.
- (3) The request may be made—
 - (a) directly to the competent authorities in the relevant country; or
 - (b) through the Minister of Foreign Affairs and Trade to a diplomatic or consular representative, or a Minister, of that country.
- (4) **Subsections (2) and (3)** apply unless a treaty or arrangement with the relevant country, or the law of the relevant country, prescribes a procedure for making requests that is different or supplementary to the procedure set out in **subsections (2) and (3)**.
- (5) If **subsection (4)** applies, the different or supplementary procedure (but only insofar as it relates to the making of requests) must be used.

102 Extradited person to be brought into New Zealand

If a person is extradited to New Zealand in relation to an extradition offence against the law of New Zealand of which the person is accused or for which the person has been convicted (whether or not under a request under **section 101**), the person must be brought into New Zealand and delivered to the appropriate authorities to be dealt with according to law.

Compare: 1999 No 55 s 63

103 Person temporarily extradited to New Zealand

- (1) If a person is temporarily extradited by a country to New Zealand subject to a condition, or because of an undertaking given by the Central Authority, that the person will be kept in custody while the person is in New Zealand, then—

- (a) the person must while in New Zealand be kept in the type of custody that the Central Authority directs in writing; and
 - (b) a direction given under **paragraph (a)** is sufficient authority for the detention of the person in accordance with the terms of the direction; and
 - (c) if a person is directed to be detained in a prison, the Corrections Act 2004, so far as applicable and with the necessary modifications, applies with respect to the person as if the person were a person sentenced to imprisonment for an offence against the law of New Zealand and liable to be detained under that sentence.
- (2) If a person is temporarily extradited by a country to New Zealand subject to a condition, or because of an undertaking given by the Central Authority, that the person will be returned to the country, the Central Authority must arrange for the person to be returned at a time in accordance with the condition or undertaking.
- (3) If the person is being held in custody for the purpose of **subsection (1)** or **(2)**, and the country from which the person was extradited requests the release of the person from custody, the Central Authority must order that the person be released from custody unless the person is otherwise liable to be detained in custody.

Compare: 1999 No 55 s 66

104 Arrest warrant may be issued without prior summons

- (1) If the Central Authority has, or is likely to, request the extradition of a person under **section 101**, a court may issue a warrant for the arrest of that person if the court is satisfied that—
- (a) a charging document has been filed; and
 - (b) there are reasonable grounds to suspect that the defendant is in, or on the way to, another country.
- (2) It is not a requirement that the person be served with a summons, or that any effort be made to serve a summons on the person, before a warrant is issued for the person's arrest.

105 Request for information about time spent in custody overseas

- (1) The Central Authority may issue a certificate specifying—
- (a) the date on which the person was admitted to a prison or any other place to be held in custody in relation to the request;
 - (b) the total period for which the person was detained in custody during the process leading to the extradition of the person to New Zealand in relation to the offence or offences.
- (2) A certificate issued under **subsection (1)**—

- (a) may be based on any information held or gathered by the Central Authority that the Central Authority considers sufficiently reliable; and
- (b) is presumed to be accurate in the absence of any evidence to the contrary.

106 Extradited person not to be tried for previous offence in certain circumstances

- (1) If a person is extradited to New Zealand by a requesting country (other than Australia), the person cannot be tried or detained in New Zealand for an offence committed, or alleged to have been committed, before the person's extradition other than—
 - (a) an offence to which the request for the person's surrender relates; or
 - (b) an offence carrying the same or a lesser maximum penalty for which the person could be convicted on proof of the conduct constituting an extradition offence to which the request for the person's extradition relates.
- (2) **Subsection (1)** applies unless—
 - (a) the person has left, or has had an opportunity of leaving, New Zealand or, in a case where the person was extradited to New Zealand for a limited period, has been returned to the country from which the person was extradited; or
 - (b) the competent authority in the requesting country that extradited the person consents to the person being tried or detained for any other specified offence.

Part 4

Miscellaneous provisions

Subpart 1—Confidentiality

107 Interpretation

In this subpart, unless the context otherwise requires,—

agency means—

- (a) the Central Authority;
- (b) a Minister;
- (c) a department;
- (d) a foreign country;
- (e) any employee, officer, or representative of a person, body, or country listed in **paragraphs (a) to (d)**

communication includes the giving or receiving of any information orally or in writing by any medium of communication

department has the same meaning as in section 2(1) of the Public Finance Act 1989

relevant information, in relation to a person, means information about the location, identity, and immigration status of the person.

108 Confidential communications

- (1) This section applies to communications between—
 - (a) the Central Authority and a foreign country;
 - (b) the Central Authority and a Minister or department of State.
- (2) The following communications to which this section applies are confidential:
 - (a) a communication for the purpose of obtaining advice about an extradition request;
 - (b) a communication containing that advice;
 - (c) a communication indicating that such advice was sought or provided;
 - (d) a communication made for the purpose of preparing for an extradition proceeding (whether or not the proceeding is brought).

109 Effect of confidentiality

- (1) An agency may refuse to disclose confidential communications—
 - (a) to the respondent in any extradition proceeding;
 - (b) to any other person arrested under this Act;
 - (c) in response to a request under the Official Information Act 1982, the Privacy Act 1993, or any other enactment.
- (2) A court—
 - (a) may not order the disclosure, or require the production of, confidential communications; but
 - (b) may direct that extradition proceedings not be commenced or (if already commenced) be stayed or withdrawn unless a confidential communication is disclosed to the court or a party specified by the court within a time ordered by the court.

110 Disclosure to other agencies permitted

An agency may disclose confidential communications to another agency for the purpose of obtaining or providing relevant information about a person who is or may be the subject of an extradition request.

111 Duties of employees, officers, or representatives

- (1) An employee, officer, or representative of an agency (other than a foreign country) must not disclose a confidential communication—

- (a) except for the purposes of carrying out his or her duties in relation to a matter under this Act; or
 - (b) unless authorised for a purpose specified by the Central Authority.
- (2) The Central Authority must advise any Minister or employee, officer, or other representative of a department of State who is a party to a confidential communication of his or her duty to comply with **subsection (1)**.

112 Duty of good faith

- (1) If the Central Authority considers that confidential communications ought, in the interests of justice, to be disclosed to the court or a respondent or if the court gives a direction under **section 109(2)(b)**, it must advise the foreign country that—
- (a) it considers that such disclosure is necessary or the court has given a direction under **section 109(2)(b)**; and
 - (b) the country must either permit the disclosure of confidential communications as proposed by the Central Authority or in accordance with the direction of the court under **section 109(2)(b)** or extradition proceedings will not be commenced or (if already commenced) will be withdrawn.
- (2) If the foreign country does not agree to permit the disclosure of confidential communications (as proposed by the Central Authority or as directed by the court under **section 109(2)(b)**), the Central Authority must either—
- (a) not commence the extradition proceedings to which the proposed disclosure relates; or
 - (b) discontinue those proceedings.

Subpart 2—Provisions relating to presence of persons in New Zealand and removal of persons from New Zealand

113 Transit

A person who is being transported in custody to any country from any other country for the purpose of being extradited may be transported through New Zealand.

Compare: 1999 No 55 s 90

114 Immigration visa not required

- (1) **Subsection (2)** applies to the following persons:
- (a) a person who is extradited or temporarily surrendered to New Zealand in relation to an extradition offence;
 - (b) a person to whom **section 113** applies.

- (2) The person is not required to hold a visa under the Immigration Act 2009 if, and for so long as, the person is in New Zealand in accordance with the provisions of this Act.
- (3) **Subsections (1) and (2)** apply subject to any contrary provision in a relevant extradition treaty.
- (4) If a person is returned to New Zealand to continue serving a sentence of imprisonment after being temporarily surrendered to a requesting country, the status of the person for the purposes of the Immigration Act 2009 is not affected by the fact that the person was temporarily surrendered.

Compare: 1999 No 55 s 91

115 Return of person extradited to New Zealand

- (1) This section applies if—
 - (a) a person accused or convicted of an extradition offence in New Zealand is extradited by a requesting country and, on the completion of proceedings for the offence, the person is acquitted; or
 - (b) a person who was extradited to New Zealand in relation to an extradition offence and was sentenced to a term of imprisonment or any other punishment in respect of that offence is released from prison; or
 - (c) a person who is extradited to New Zealand in relation to an extradition offence is discharged without conviction; or
 - (d) a person accused or convicted of an extradition offence in New Zealand—
 - (i) is surrendered by another country; but
 - (ii) has not had any proceedings brought against him or her for the offence in respect of which the person was surrendered, 6 months after the date of the person's arrival in New Zealand as being surrendered.
- (2) If this section applies, the Central Authority must make a removal order under **section 118** in respect of the person unless, the Central Authority is satisfied that because of special circumstances in relation to the person, it would be inappropriate to order the removal of the person.
- (3) If the Central Authority does not make a removal order in respect of the person, the Central Authority must issue a certificate under **section 116**.

Compare: 1999 No 55 ss 92, 93

116 Certificate giving temporary authority for person to remain in New Zealand

- (1) A certificate issued by the Central Authority under this section—
 - (a) may be issued for a period, not exceeding 3 months, specified in the certificate; and

- (b) may, from time to time, be renewed for a further period not exceeding 3 months; and
 - (c) may, if the Central Authority thinks fit, order that the person named in the certificate be taken into custody.
- (2) The certificate is, while it remains in force, sufficient authority for the person named in the certificate to remain in New Zealand.
- (3) If the Central Authority issues a certificate, the Central Authority may, if the Central Authority thinks fit, refer the person's case to the Minister of Immigration for consideration under section 61 of the Immigration Act 2009, and in that case that section applies for the purposes of this section as if the person were a person required to hold a visa under that Act to be in New Zealand.
- (4) Except as provided in **subsection (3)**, nothing in the Immigration Act 2009 applies to the person named in the certificate while the certificate is in force.
- (5) The Central Authority must cancel a certificate issued under this section, and must make a removal order in respect of the person to whom the certificate applies if—
- (a) the Central Authority referred the person's case to the Minister of Immigration under **subsection (3)** and the Minister of Immigration declined to grant a visa; and
 - (b) there do not appear to the Central Authority to be any other grounds on which the person should remain in New Zealand.

117 Further provisions relating to certificate

- (1) If a certificate issued under **section 116** orders that a person be taken into custody, the certificate is sufficient authority for a constable to arrest the person and take the person into custody.
- (2) A person who is taken into custody under this section must, unless sooner released, be brought before the District Court as soon as possible and, after that, every 21 days while the certificate is in force, to determine in accordance with **subsection (3)** whether the person should be detained in custody or released pending the decisions referred to in **section 116(5)**.
- (3) If a person is brought before a District Court Judge under **subsection (2)**, the Judge may, if the Judge is satisfied that the person is the person named in the certificate,—
- (a) issue a warrant for the detention of the person in custody if the Judge is satisfied that, if not detained, the person is likely to abscond; or
 - (b) order the release of the person subject to such conditions (if any) that the Judge thinks fit.
- (4) A warrant for the detention of the person issued under **subsection (3)(a)** may authorise the detention of the person in a prison or any other place in which the

person could be detained if the person were subject to proceedings under **Part 2**.

118 Removal orders

Placeholder

119 Search and seizure on arrest

- (1) If a warrant for a person's arrest is issued or endorsed under this Act, a constable may—
 - (a) enter any premises or vehicle in which the person is suspected of being; and
 - (b) seize any item or items that he or she finds as a result of observations at the place or in the vehicle that the constable believes may be of evidential value (that is, an item or items found on a plain view search); and
 - (c) search, without further warrant, the person arrested and may seize any thing, including any sum of money, found on the person or in the person's possession if the constable believes on reasonable grounds that—
 - (i) the thing may be evidence as to the commission of any overseas offence in relation to which the warrant to arrest was issued or endorsed or for which the surrender of the person is sought by the extradition country concerned; or
 - (ii) the thing may be dangerous or used to facilitate an escape; and
 - (d) exercise, in relation to the person arrested, the powers conferred by section 32 of the Policing Act 2008 (which relates to the taking of identifying particulars).
- (2) **Subsection (1)(b)** does not authorise—
 - (a) the search of any vehicle or premises for evidential material other than by conducting an inspection of what is in plain view of the constable; or
 - (b) any form of surveillance; or
 - (c) the seizure of any thing from a vehicle or premises that was not in plain view of the constable while inside or outside the vehicle or premises.
- (3) If there is no suitable searcher available at the place where the search is to take place, the person to be searched may be taken to another place to be searched.
- (4) Nothing in this section limits or affects any power under section 11 of the Search and Surveillance Act 2012.

Compare: Extradition Act 1988 s 13(1) (Aust)

120 Return of property

- (1) **Subsection (2)** applies if a person is ordered to be surrendered under this Act.

- (2) The court may if it is advised by the Central Authority that the requesting country has given satisfactory undertakings as to the handling or return of the thing, direct that any thing, including a sum of money, that may be evidence of the offence the person is alleged to have committed or has committed (including any thing seized under **section 119** or any other enactment) be delivered with the person on the person's surrender to the extradition country.
- (3) The court may refuse to direct that any particular thing referred to in **subsection (2)** be delivered with the person if—
 - (a) the Central Authority advises that no satisfactory undertaking has been given in relation to the handling or return of the thing; or
 - (b) the court is satisfied that the thing is required for the investigation of an offence within the jurisdiction of New Zealand; or
 - (c) the possession of the thing by the person would be unlawful in New Zealand.
- (4) If the person cannot be surrendered by reason of his or her death or escape from custody, any thing referred to in **subsection (2)** must, if the court directs, be delivered up to the extradition country.
- (5) **Subsection (6)** applies if a person is discharged under this Act without being surrendered.
- (6) Subject to **subsection (7)**, the court may direct that any thing seized under **section 119** or any other enactment, including a sum of money, be returned to the person.
- (7) The court may refuse to direct that any particular thing referred to in **subsection (6)** be returned to the person if the court is satisfied that the thing is required for the investigation of an offence within the jurisdiction of New Zealand, or the possession of the thing by the person would be unlawful in New Zealand.

121 Search powers to identify and locate respondent

Placeholder

Subpart 3—Other provisions

122 Regulations

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

- (a) amending **Schedule 3** to update the list of bilateral extradition treaties and multilateral treaties containing extradition obligations;
- (b) prescribing forms or periods of time or any other thing required to be prescribed:

- (c) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.

123 Governor-General may declare approved countries

- (1) The Governor-General may, by Order in Council made on the recommendation of the Central Authority, declare a country to be an approved country for the purposes of this Act.
- (2) Before the Central Authority recommends that a country be declared an approved country,—
 - (a) the Central Authority must consider—
 - (i) the country's processes for handling extradition requests from New Zealand; and
 - (ii) the reliability of the country's justice system; and
 - (iii) the country's commitment to the protection of human rights; and
 - (iv) the international agreements and schemes to which the country and New Zealand are both party; and
 - (b) the Central Authority must have received from the country the assurances described in **subsection (3)**.
- (3) The assurances are that, in the event that the country requests the extradition of a respondent from New Zealand, the country—
 - (a) will disclose any information known to the requesting country that could seriously undermine any prosecution of the respondent as a result of the request; and
 - (b) will not, unless the respondent has left or had the opportunity of leaving the country,—
 - (i) detain or try the respondent for an offence committed, or alleged to have been committed, before the respondent's extradition other than an offence described in **subsection (4)**; or
 - (ii) detain the respondent in that country for the purpose of being extradited to another country for trial or punishment for an offence committed, or alleged to have been committed, before the respondent's extradition to the requesting country, other than an offence in respect of which the Central Authority consents to the respondent being so detained and extradited.
- (4) The offences referred to in **subsection (3)(b)(i)** are—
 - (a) an extradition offence to which the request for the respondent's extradition relates; or
 - (b) any other offence carrying the same or a lesser maximum penalty of which the respondent could be convicted on proof of the conduct consti-

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- tuting an extradition offence to which the request for the respondent's extradition relates; or
- (c) an extradition offence in relation to the country (not being an offence for which the country requested the extradition of the respondent) in respect of which the Central Authority consents to the respondent being detained or tried; or
 - (d) an offence (not being an extradition offence) for which the respondent has consented to extradition under **section 18**.
- (5) An Order in Council made under this section is a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

124 Repeal of Extradition Act 1999

The Extradition Act 1999 (1999 No 55) is repealed.

Schedule 1
Transitional, savings, and related provisions

s 9

Part 1
Provisions relating to Act as enacted

1 Application

- (1) This Act applies to—
 - (a) any request received by the Central Authority on or after the commencement of this Act for the extradition of an extraditable person; and
 - (b) any proceedings relating to that request.
- (2) Despite the commencement of this Act, the Extradition Act 1999 continues to apply to—
 - (a) any request made before the commencement of this Act for the surrender of an extraditable person; and
 - (b) any proceedings relating to that request.

Schedule 2

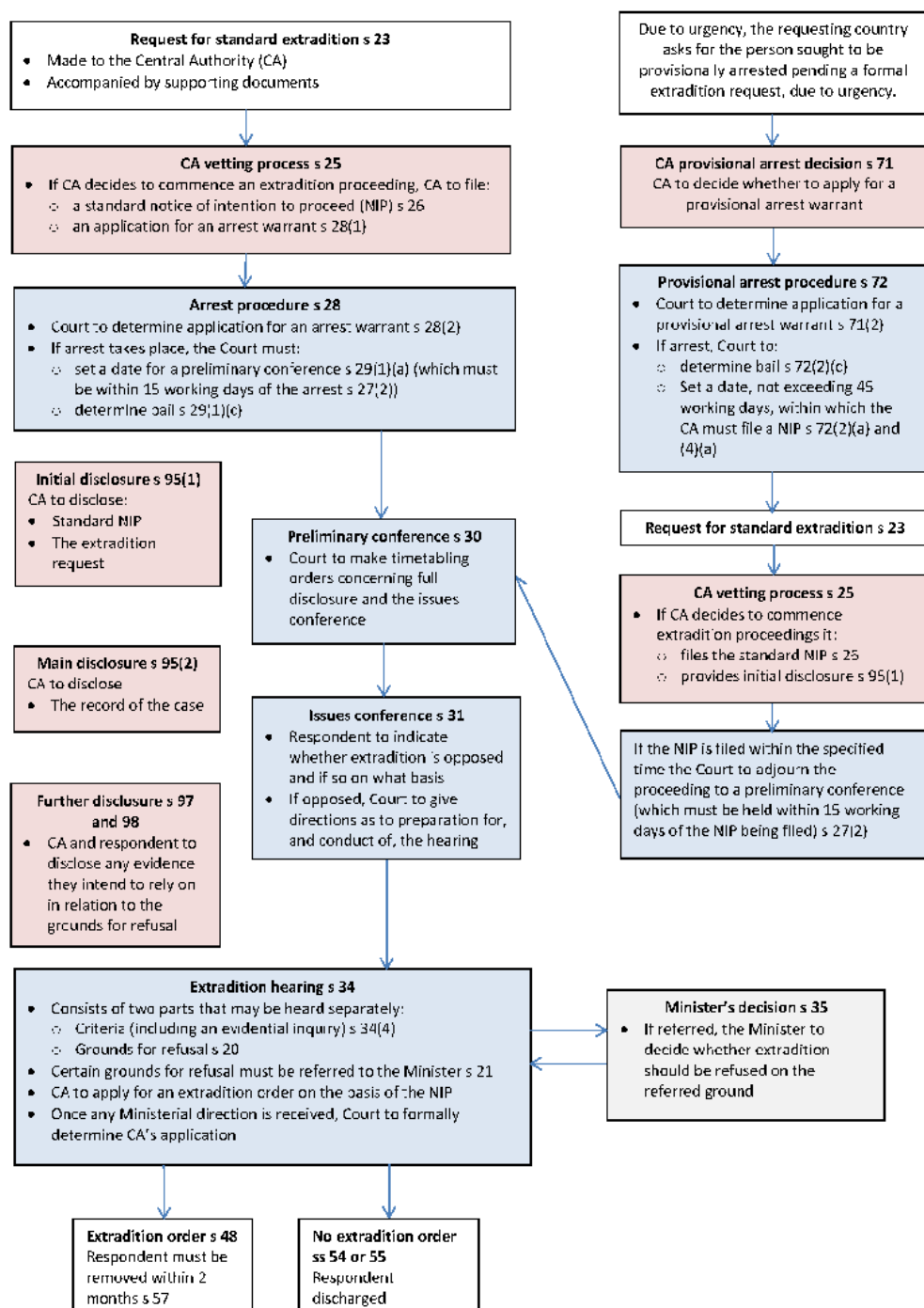
Overview of procedure for extradition from New Zealand

s 19(2), (3)

Part 1

Procedure for countries that are not approved

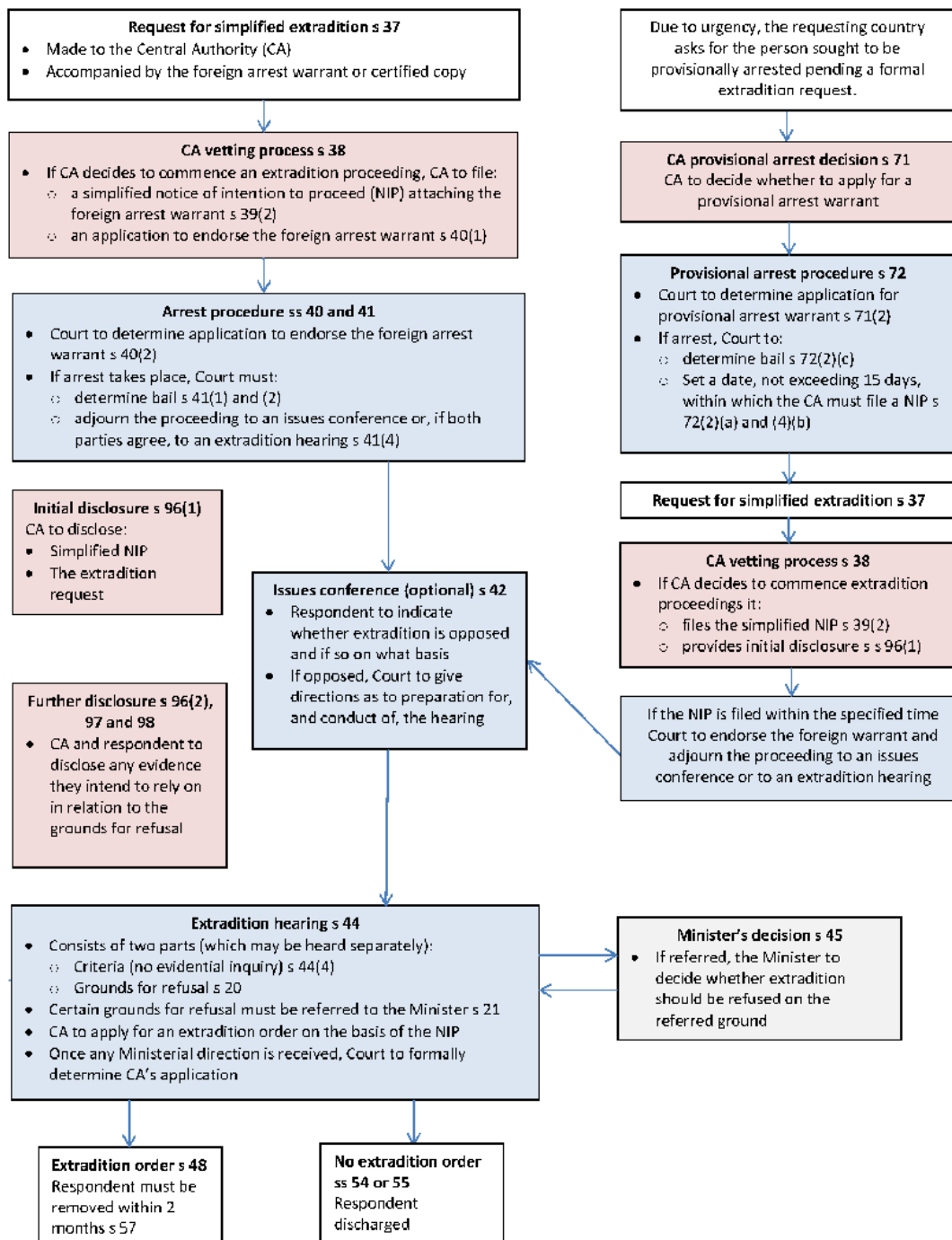
Standard extradition procedure



Part 2

Procedure for approved countries

Simplified extradition procedure



Schedule 3

Extradition treaties

ss 5, 21(2)(a)

Part 1

Bilateral extradition treaties

Under Extradition Act 1999

Republic of Korea

Treaty on Extradition between New Zealand and the Republic of Korea [2002] NZTS 58 (2001)

Under Extradition Act 1965

Hong Kong Special Administrative Region of the People's Republic of China

Agreement for the Surrender of Accused and Convicted Persons between the Government of New Zealand and the Government of the Hong Kong Special Administrative Region of the Republic of China (1998)

Republic of Fiji

Agreement on Extradition between the Government of New Zealand and the Government of the Republic of Fiji [1992] NZTS 3 (1992)

United States of America

Treaty on Extradition between New Zealand and the United States of American 791 UNTS 253 (1970)

Under the Extradition Acts 1870 to 1935 (Imperial)

Albania

Extradition Treaty between the United Kingdom and Albania 67 LNTS 165 and 83 LNTS 444 (1926)

Argentina

Treaty between the United Kingdom and Argentina for the Mutual Extradition of Fugitive Criminals 173 CTS 111 (1889)

Belgium

Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals 190 CTS 170 (1901)*

Bolivia

Treaty between the United Kingdom and Bolivia for the Mutual Surrender of Fugitive Criminals 176 CTS 439 (1892)*

Chile

Treaty between the United Kingdom and Chile for the Mutual Surrender of Fugitive Criminals 184 CTS 125 (1887)*

Colombia

Treaty between the United Kingdom and Colombia for the Mutual Surrender of Fugitive Criminals 171 CTS 29 (1888)*

Cuba

Treaty between the United Kingdom and Cuba for the Mutual Surrender of Fugitive Criminals 196 CTS 347 (1904)*

Czechoslovakia

Treaty between the United Kingdom and Czechoslovakia for the Mutual Surrender of Fugitive Criminals 69 LNTS 106 and 59 LNTS 269 (1924)*

Ecuador

Treaty between the United Kingdom and Ecuador for the Mutual Surrender of Fugitive Criminals 175 CTS 123 (1880)*

El Salvador

Treaty between the United Kingdom and El Salvador for the Mutual Surrender of Fugitive Criminals 158 CTS 483 (1881)*

Estonia

Convention between the United Kingdom and Estonia for the Extradition of Fugitive Criminals 50 LNTS 225 (1925)

Finland

Treaty between the United Kingdom and Finland for the Extradition of Criminals 34 LNTS 79 (1924)

France

Treaty between Great Britain and France for the Mutual Extradition/Surrender of Criminals 151 CTS 35 (1876)*

Greece

Treaty between the United Kingdom and Greece for the Mutual Surrender of Fugitive Criminals 212 CTS 204 (1910)*

Guatemala

Treaty between the United Kingdom and Guatemala for the Mutual Surrender of Fugitive Criminals 166 CTS 273 (1885)*

Haiti

Treaty between the United Kingdom and Haiti for the Mutual Surrender of Fugitive Criminals 148 CTS 279 (1874)*

Extradition Bill

Schedule 3

Hungary

Treaty between the United Kingdom and Austria-Hungary for the Mutual Surrender of Fugitive Criminals 146 CTS 463 (1874)*

Iceland

Exchange of Notes between Iceland and the United Kingdom, Australia and New Zealand relating to the Extension of the Extradition Treaty of 31 March 1873 to certain Mandated Territories 18 LNTS 472 (1937)*

Italy

Treaty between the United Kingdom and Italy for the Mutual Surrender of Fugitive Criminals 145 CTS 463 (1873)

Iraq

Extradition Treaty between the United Kingdom and Iraq 141 LNTS 277 (1933)

Latvia

Treaty between the United Kingdom and Latvia for the Extradition of Fugitive Criminals 37 LNTS 369 (1924)

Liberia

Treaty between the United Kingdom and Liberia for the Mutual Surrender of Fugitive Criminals 178 CTS 63 (1892)*

Lithuania

Treaty between the United Kingdom and Lithuania for the Extradition of Fugitive Criminals 61 LNTS 401 (1926)

Luxembourg

Treaty between the United Kingdom and Luxembourg for the Mutual Surrender of Fugitive Criminals 157 CTS 191 (1880)*

Mexico

Treaty between the United Kingdom and Mexico for the Mutual Surrender of Fugitive Criminals 168 CTS 173 (1886)

Monaco

Treaty between the United Kingdom and Monaco for the Extradition of Criminals 176 CTS 223 (1891)*

Netherlands

Treaty between the United Kingdom and the Netherlands for the Mutual Surrender of Fugitive Criminals 186 CTS 448 (1898)*

Nicaragua

Treaty between the United Kingdom and Nicaragua for the Mutual Extradition of Fugitive Criminals 198 CTS 247 (1905)*

Panama

Treaty between the United Kingdom and Panama for the Mutual Surrender of Fugitive Criminals 202 CTS 327 (1906)*

Paraguay

Treaty between the United Kingdom and Paraguay for the Mutual Surrender of Fugitive Criminals 207 CTS 372 (1908)*

Peru

Treaty between the United Kingdom and Peru for the Mutual Surrender of Fugitive Criminals 195 CTS 20 (concluded 26 January 1904, entered into force in New Zealand 20 May 1907)*

Poland

Extradition treaty between the United Kingdom and Poland 148 LNTS 221 (1932)

Portugal

Treaty between the United Kingdom and Portugal for the Mutual Surrender of Fugitive Criminals 177 CTS 485 (1892)*

Romania

Treaty between the United Kingdom and Romania for the Mutual Surrender of Fugitive Criminals, with Protocol 178 CTS 241 (1893)*

Russia

Treaty between the United Kingdom and Russia for the Mutual Surrender of Fugitive Criminals 168 CTS 303 (1886)

San Marino

Treaty between the United Kingdom and San Marino for the Mutual Extradition of Fugitive Criminals 188 CTS 99 (1899)*

Servia/Yugoslavia

Treaty between the United Kingdom and Servia for the Mutual Surrender of Fugitive Criminals 189 CTS 125 (1900)*

Spain

Treaty between the United Kingdom and Spain for the Mutual Surrender of Fugitive Criminals 153 CTS 75 (1878)*

Switzerland

Treaty between the United Kingdom and Switzerland for the Mutual Surrender of Fugitive Criminals 157 CTS 213 (1880)*

Thailand

Treaty between the United Kingdom and Thailand respecting the Extradition of Fugitive Criminals 213 CTS 128 (1911)*

Uruguay

Treaty between the United Kingdom and Uruguay for the Mutual Surrender of Fugitive Criminals 163 CTS 407 (1884).

*Means that the treaty is the subject of at least 1 supplementary Convention or Exchange of Notes.

Part 2

Multilateral treaties containing extradition obligations

The multilateral treaties containing extradition obligations that New Zealand is a party to include:

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (1984)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 974 UNTS 177 (1971). Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 23 September 1971 CTS 1993/8 (1988)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1678 UNTS 201 (1988). 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf (2005)
- Convention for the Suppression of Unlawful Seizure of Aircraft 860 UNTS 105 (1970)
- Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (1997)
- Convention on the Physical Protection of Nuclear Material and Nuclear Facilities 1456 UNTS 125 (1980)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1035 UNTS 167 (1973)
- Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (1948)
- Convention on the Safety of United Nations and Associated Personnel 2051 UNTS 363 (1994)
- Convention relating to the Status of Refugees 189 UNTS 150 (1951)
- International Covenant on Civil and Political Rights 1435 UNTS 357 and 999 UNTS 171 (1966). Second Optional Protocol to the International Covenant on Civil and Political Rights (1966) Aiming at the Abolition of the Death Penalty [1991] NZTS 13 (1989)
- International Convention against the Taking of Hostages 1316 UNTS 205 (1979)

- International Convention for the Suppression of Acts of Nuclear Terrorism 2445 UNTS 89 (2005)
- International Convention for the Suppression of the Financing of Terrorism 2178 UNTS 197 (2000)
- International Convention for the Suppression of Terrorist Bombings 2149 UNTS 256 (1998)
- International Convention for the Suppression of the Traffic in Women and Children 9 LNTS 416 (1921)
- International Convention for the Suppression of the White Slave Traffic, with Final Protocol 3 LNTS 278 (1910)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2171 UNTS 227 (2000)
- Rome Statute of the International Criminal Court 2187 UNTS 90 (1998)
- Single Convention on Narcotic Drugs 520 UNTS 151 (1961)
- United Nations Convention against Corruption 2349 UNTS 41 (2003)
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (1988)
- United Nations Convention against Transnational Organized Crime and the Protocols Thereto 2225 UNTS 209 (2000).

COMMENTARY ON SELECTED PROVISIONS

Clause 5 Interpretation

approved country means

- (a) Australia; and
- (b) any other country declared by Order in Council made under section 123 as an approved country for the purposes of this Act

Commentary

In the Bill Australia is treated differently than other approved countries. There is a different test for “extradition offence”. Further, Australia is expressly exempted from the usual requirement to obtain assurances as to speciality and non-extradition to a third country. Given Australia’s unique position in the Bill, it is appropriate to automatically recognise it as an approved country.

political offence -

- (a) means an offence that is committed primarily to advance a political objective; but
- (b) excludes an offence—
 - (i) that is disproportionately harmful; or
 - (ii) for which New Zealand has an obligation under an extradition treaty to extradite or prosecute a person

Commentary

We have included a definition of “political offence” in the Bill, because the meaning of this phrase is not intuitive. As explained in the Issues Paper, the understanding of what amounts to a political offence has narrowed significantly over time. This has been the result of changing societal attitudes in the age of terrorism, and the development of alternative human rights protections. In drafting the definition we were conscious of Crown Law’s advice that there is merit in leaving room for case law to develop this concept, particularly in relation to violent crimes. Therefore, we have opted for a definition that provides some general guidance and contains an avoidance of doubt clause to highlight that the multilateral extradition treaties have something to say on this point. The aim of the general guidance is to capture the concepts of “primary purpose”, “political objective” and “disproportionate harm” that are central to the immigration and extradition jurisprudence on this phrase.⁴⁷⁶ The exclusion clause is designed to signal that offences like genocide, hostage-taking, torture and terrorist acts will not be covered.

respondent means a person –

- (a) whose extradition is sought by a request made under section 23 or 37; and
- (b) any person arrested under a provisional arrest warrant

Commentary

We opted for the term “respondent” in this Bill for two reasons. First, we wanted to make it plain that the person sought is not just the subject of the extradition proceeding; that person is a party to those proceedings. Second, we wanted to emphasise one of the fundamental principles in the Bill, which is that an extradition proceeding is not a criminal trial. Therefore, the person sought is not a defendant.

⁴⁷⁶ *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [88]–[90].

Clause 7 Meaning of extradition offence

(1) In this Act, **extradition offence**—

Australia

- (a) means, in relation to a requesting country that is Australia, an offence to which 1 or more of the following applies:
 - (i) the offence is an offence under the law of the requesting country, for which the maximum penalty is imprisonment for not less than 12 months or a more severe penalty;
 - (ii) the offence is an offence for which extradition may be sought under an extradition treaty;

Any requesting country other than Australia and New Zealand

- (b) means, in relation to any requesting country (other than Australia and New Zealand), an offence to which either or both of the following applies:
 - (i) the offence is—
 - (A) an offence under the law of the requesting country, for which the maximum penalty is imprisonment for not less than 2 years or a more severe penalty; and
 - (B) the offence satisfies the condition in subclause (2).
 - (ii) the offence is an offence for which extradition may be sought under an extradition treaty;

Extradition to New Zealand

- (c) means, in relation to an extradition request by New Zealand, an offence to which either or both of the following applies:
 - (i) the offence is one for which extradition may be sought under an extradition treaty;
 - (ii) under New Zealand law, the maximum penalty for the offence
 - (A) imprisonment for not less than 12 months (if the request is made to Australia); or
 - (B) imprisonment for not less than 2 years (if the request is made to any other country).

Exclusions

- (d) excludes a military-only offence.
- (2) The condition referred to in subsection (1)(b)(i)(B) is that, had the conduct constituting the offence (or equivalent conduct) occurred in New Zealand at the time at which it is alleged to have occurred, it would, if proved, have constituted an offence under New Zealand law for which the maximum penalty is imprisonment for not less than 2 years.
 - (3) In determining the maximum penalty for an offence against the law of a requesting country for which no statutory maximum penalty is imposed, a court must consider the level of penalty that can be imposed by a court for the offence.

Commentary

This is a key provision in the Bill. Parts of the definition are prescriptive. For instance, the foreign offence and equivalent New Zealand or treaty offence must be punishable by a particular term of imprisonment. Other aspects, such as the existence of an equivalent offence as described in clause 7(2), will often involve a degree of judicial judgment. The policy behind this definition is discussed in Chapter 6 of the Report. We note here four aspects of the drafting. First, the definition is drafted with reference to the foreign offence. So the question is: Is the foreign offence an extradition offence? This is important because the foreign offence is the one that will ultimately be identified in any extradition order. Second, the headings are designed to draw attention to the fact that different rules apply depending on the country making the request, particularly if the request is to or from Australia. Third, underneath the headings each subsection is broken down into the key components of the relevant definition. This drafting is designed to make it apparent that dual criminality (as described in clause 7(2) and 8) is only relevant if there is an incoming extradition request that is not from Australia or that does not rely on a treaty. If it is an outgoing request, a request from Australia or the offence is said to be an extradition offence because of a treaty, then there is no need to consider whether there is an equivalent offence in New Zealand or the requested country. Further, as discussed in Chapter 6 our policy is not to change the current approach to the dual criminality requirement. Therefore, in this regard clauses 7(2) and 8 use the exact same language as sections 4 and 5 of the 1999 Act. Finally, there is scope for Australia to rely on a definition of extradition offence in a treaty when making a request to New Zealand (clause 7(1)(a)(ii)). We have left this option open because multilateral treaties increasingly identify crimes as extradition offences and there may be symbolic significance in Australia formally relying on such a treaty.

Clause 13 District Court has jurisdiction in most matters

The District Court has jurisdiction to conduct extradition hearings and make judicial determinations in most matters under this Act, except appeals (*see* sections 86, 87)

Placeholder

Commentary

Part 1 of the Bill introduces some of the key concepts and the main participants in extradition proceedings. In that context we consider that it is logical to indicate, early on in the Bill, that the District Court is responsible for conducting extradition proceedings. The downside of this approach is that it separates this provision from the provision identifying the District Court's powers. Those powers need to be introduced later in the Bill, in proximity to the other procedural provisions. To reflect this tension, we have simply included clause 13 as a sign post. This clause is substantially repeated at clause 86.

Clause 14 Central Authority to conduct extradition proceedings or make extradition request

- (1) Only the Central Authority may conduct extradition proceedings against a respondent.
- (2) The Central Authority may do any of the following in respect of those proceedings:
 - (a) refuse to apply for an arrest warrant or a provisional arrest warrant for a respondent;
 - (b) refuse to file a notice of intention to proceed against the respondent;
 - (c) discontinue extradition proceedings against the respondent by withdrawing the notice of intention to proceed.

- (3) If the Central Authority withdraws a notice of intention to proceed, the District Court must—
 - (a) cancel any warrant for the arrest of the respondent; or
 - (b) if the respondent is detained under a warrant of arrest or detention issued under this Act, discharge the respondent.
- (4) Only the Central Authority may authorise the making of a request for the extradition of a person to New Zealand.
- (5) In exercising its powers or carrying out its functions under this section or Part 2 or 3 the Central Authority must—
 - (a) act independently of any requesting country; and
 - (b) apply the provisions of sections 25 or 38 (as applicable) and any other relevant provisions of this Act; and
 - (c) take into account applicable international obligations.

Commentary

This is a key provision in the Bill as it frames the role of the Central Authority. This role is discussed in Chapter 2 of the Report. One of the most important features of this role is that the Central Authority is to act independently of the requesting country. This is squarely stated in clause 14(5)(a) and is reinforced by the language used in clauses 14(2) and 14(5)(b) and (c). The combined effect of clauses 14(2) and 14(5)(b) is that the Central Authority is obliged to be mindful, at all times, of whether it is appropriate to commence and continue with an extradition proceeding. Whether an extradition is appropriate will sometimes be a complex matter, which requires weighing a multitude of factors including those listed in clauses 25 and 38. In particular, we have chosen to emphasise New Zealand's international obligations (including human rights protections and extradition obligations), by expressly referring to these in clause 14(5)(c). This provision is not just referring to New Zealand's bilateral extradition treaties. It refers to the multilateral treaties with extradition obligations as well. These treaties may create a conflict of obligations and we envisage that the Central Authority will need to maintain a close working relationship with the Ministry of Foreign Affairs and Trade to ensure that any conflict is recognised and managed.

Clause 15 Central Authority entitlements

The Central Authority is entitled to—

- (a) be represented by a lawyer at any hearing and need not appear in person;
- (b) seek assurances from a requesting country in relation to any of the grounds specified in section 20 on which the court must refuse extradition.

Commentary

This provision is designed to resolve two practical issues. First, the Central Authority is the Attorney-General. We have no desire, however, to deviate from the current practice of Crown Counsel at Crown Law appearing in extradition proceedings or briefing individual cases to the Crown Solicitors' Network. This is reflected in clause 15(a). Second, diplomatic assurances may be relevant to the grounds for refusal that the Court considers under the Bill. It would not be appropriate, however, for the Court to request these directly from the requesting country, as the assurances are diplomatic in nature and so should be provided on a government-to-government basis. Clause 15(b) clarifies that the onus is on the Central Authority to gather such assurances. This will need to be done in conjunction with the Ministry of Foreign Affairs and Trade.

Clause 17 No extradition of respondent without the opportunity for legal representation

- (1) Unless a respondent is legally represented or subsection (2) applies—
 - (a) a court may not make a determination under section 34 or 44 that the respondent is liable to extradition;
 - (b) a respondent may not consent under section 18 to extradition.
- (2) Subsection (1) applies if the court is satisfied that the respondent—
 - (a) was informed of his or her rights relating to legal representation, including, where appropriate, the right to apply for legal aid under the Legal Services Act 2011; and
 - (b) fully understood those rights; and
 - (c) had the opportunity to exercise those rights; and
 - (d) refused or failed to exercise those rights, or engaged counsel but subsequently dismissed him or her.
- (3) For the purposes of this section, a respondent refuses or fails to exercise his or her rights relating to legal representation if the respondent—
 - (a) refuses or fails to apply for legal aid under the Legal Services Act 2011 or applies for it unsuccessfully; and
 - (b) refuses or fails to engage counsel by other means.

Commentary

This provision is based on section 30 of the Sentencing Act 2002. Section 30 provides that no person may be sentenced to imprisonment without first having the opportunity for legal representation. We consider that, like imprisonment, extradition amounts to a significant limitation on a person's rights to liberty and freedom of movement. Furthermore, the process of being extradited is rare and legally complex. In those circumstances, we consider that the respondent should have statutory entitlements in relation to legal representation. This is reflected in clause 16(1) as well as clause 17.

Clause 18 Extradition by consent

- (1) A respondent may at any time, at an appearance before the District Court (whether in the manner provided in section 16 or in the manner provided in the Courts (Remote Participation) Act 2010), consent to being extradited to the requesting country in order to face trial, or to serve part or all of a sentence, for 1 or more offences for which the respondent's extradition is sought.
- (2) If the court receives notice of a respondent's consent to extradition, the court may—
 - (a) issue a warrant for the respondent to be detained in a prison; and
 - (b) record in writing the offences for which the respondent has consented to being extradited.
- (3) The court may only take the action in subsection (2) if—
 - (a) the respondent consented before the court to extradition for the offence or offences; and
 - (b) the respondent was legally represented in the proceedings or the provisions of section 16 were complied with; and
 - (c) the court speaks to the respondent in person and is satisfied that the person has freely consented to the extradition in full knowledge of its consequences.

(4) If the court issues a warrant under subsection (2)(a),—

- (a) the court may grant bail to the respondent under section 77; and
- (b) the respondent is not bailable as of right; and
- (c) the respondent may not go at large without bail.

Commentary

The respondent's ability to consent to extradition is broadly analogous to pleading guilty to a criminal charge. It largely circumvents the need for an extradition proceeding. We consider that it is worth making this option prominent on the face of the Bill by identifying it early on.

The provision is designed to simplify the process of consenting to extradition. A respondent must consent to extradition in person (that is, not through a lawyer) and the Court must inquire into whether consent is informed and freely given. If those requirements are met then the Court may issue an extradition order. This is different from the current practice where, regardless of consent, the case must be referred to the Minister for consideration of the grounds for refusal. In principle, there is considerable merit in the grounds for refusal being fully explored in every case. In practice, however, we understand that this can cause needless delay in cases where the respondent just wants the matter resolved quickly. We acknowledge that by removing the need for the Court to examine the grounds for refusal there is a risk that a respondent may consent to a highly questionable extradition. We have, however, included safeguards in this provision and more generally in the Bill to protect against this. First, the Central Authority is obliged to assess the merits of any request before commencing an extradition proceeding. If an obvious ground for refusal is likely to apply, then the request should never make it before the Court. Second, we envisage that in cases of concern the Court could explore potential grounds for refusal with the respondent in determining whether their consent is truly informed. If this inquiry leads to apprehension as to the respondent's state of mind, the Court may initiate the process for determining whether they are fit to participate in the extradition proceedings (see clauses 82 to 85). Third, this provision is not mandatory. In extreme cases the Court could use the discretion created by subsection 18(2) to refuse to accept a respondent's free and informed consent. We envisage that this would only occur in instances where the Court is concerned that New Zealand's international obligations to protect against torture, discrimination or the death penalty may be engaged. In such cases, the Court (and/or the Central Authority) would be entitled to insist that the grounds for refusal should be considered in full.

Part 2, subpart 1 – Grounds for refusing extradition

Commentary

The grounds for refusal represent New Zealand's bottom line in responding to extradition requests. Their effect is that sometimes an otherwise valid request will be refused because something about the request or the way in which the person sought would be treated in the requesting country would shock the "New Zealand conscience". Being clear that New Zealand will not extradite in some cases is important for New Zealand's international reputation and for negotiating treaties, as well as in relation to specific cases. The grounds for refusal are identified at the very beginning of Part 2, to emphasise their importance. This structural approach is similar to that taken in the 1999 Act. Initially we were attracted to the idea of structuring Part 2 so that the grounds for refusal appeared chronologically at the point that the Court and the Minister would need to consider them. This would have been a more intuitive approach, but it would not have highlighted the importance of the grounds. It would also have required repetition or extensive cross-referencing between subparts 2 (standard extradition) and 3 (simplified extradition).

Clause 20 Grounds on which the court must refuse extradition

The grounds on which the court must refuse extradition are as follows:

Commentary

As explained in Chapter 5 of the report, this provision is drafted so that all of these grounds either apply or they do not. There is no balancing exercise and there is no discretion for the court to refuse.

- (a) that there are substantial grounds for believing the respondent would be in danger of being subjected to torture or to cruel, inhumane, or degrading treatment or punishment in the requesting country:

Commentary

The policy behind this ground is discussed in Chapters 5 and 11 of the Report. In brief, it reflects New Zealand's international obligations under the Convention against Torture and the International Covenant on Civil and Political Rights. There are two points to note about the drafting. First, the words have been carefully chosen to codify the international obligations. We are confident that the drafting is appropriate in this regard, as it mirrors the wording in sections 130 and 131 of the Immigration Act 2009. These sections recognise the same obligations in the context of deportation, and were redrafted to ensure accuracy at Select Committee stage. Second, this is a ground for the Court to consider, not the Minister. As discussed in the chapters, there are several policy reasons for this. There is also a drafting reason. We opted to expressly recognise the risk of "torture or cruel treatment" as a ground for refusal, to reflect the importance of the international obligations. The reality, however, is that this ground can also be seen as a subset of the "unjust and oppressive" ground and the division is not easily distinguishable. By making the Court responsible for both of these grounds, no artificial distinctions need be drawn. As an alternative we contemplated making the Minister responsible for both grounds. However, this would result in a dramatic increase in the number of cases that would need to be referred to the Minister, as the unjust and oppressive ground is inherently broad. This, in turn, would undermine our policy of making extradition more of a law enforcement exercise, as opposed to a political one. We contemplated drafting the unjust and oppressive ground more narrowly but ultimately rejected this option as well. We consider that this broadly framed ground builds necessary flexibility into the Bill to ensure that the New Zealand authorities can refuse to extradite in appropriate cases. This is discussed further below.

- (b) that the relevant extradition offence is a political offence:

Commentary

As explained in Chapter 5, our policy is to retain the bar on extraditing a person to face trial or punishment for a "political offence" as the restriction still has historical and symbolic value. See the commentary to the definition of political offence above. In drafting the operative clause, we considered treating a political offence like a military offence and excluding it from the definition of extradition offence in clause 7. Conceptually this seemed appropriate. The difficulty, however, was that the question of whether an offence is a political offence is intimately connected to the questions of whether there is an ulterior political motive for the request and whether the person will be discriminated against at trial or in terms of punishment because of their political opinions. The latter questions are squarely grounds for refusal. It makes sense for all of these matters to be considered together and, again, we want to avoid putting the Court in the position of having to draw artificial distinctions.

(c) that the extradition of the respondent—

- (i) is actually sought for the purpose of prosecuting or punishing the respondent on account of his or her race, ethnic origin, religion, nationality, age, sex, sexual orientation, disability, or other status, or political opinions; or
- (ii) may result in the respondent being prejudiced at trial or punished, detained, or restricted in his or her personal liberty because of any of those grounds:

Commentary

The drafting of this clause largely replicates the equivalent grounds for refusal in the 1999 Act. The only significant difference is that, in accordance with what we proposed in the Issues Paper, this clause includes an express reference to discrimination based on age, sexual orientation and disability. This aligns with the approach taken in other Commonwealth jurisdictions. In drafting this clause we considered taking a step further and cross-referencing section 21 of the Human Rights Act 1993, which identifies prohibited grounds of discrimination in New Zealand. This section includes definitions of 'sex', 'age', 'disability', 'political opinion' and 'sexual orientation' for the purposes of identifying discrimination. It also lists five grounds that are not expressly included in our clause, namely marital status, ethical belief, colour, employment status and family status. Despite cross-referencing the Human Rights Act in the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill), we have opted not to cross-reference it in the extradition context. Our rationale is that, in practice, the additional grounds in the Human Rights Act are less likely to arise in an extradition context. Furthermore, the relationship between extradition treaties and the grounds for refusal is much more complex than the same relationship in the mutual assistance context. Therefore, we do not wish to be overly prescriptive in the way this ground is drafted. We have, however, included the catch-all phrase "or other status" to ensure that, in practice, all of the potential reasons for discrimination in the Human Rights Act will be covered.

(d) that, if the respondent were tried for the relevant extradition offence in New Zealand, the respondent would be entitled to be discharged because of a previous acquittal, conviction, or pardon:

Commentary

As proposed in the Issues Paper, we have drafted this clause so that the usual rules in New Zealand governing double jeopardy will apply. There is no need to consider the rules relating to double jeopardy in the requesting country. The advantage of this approach is that it accommodates an acquittal, conviction or pardon in any country, not just New Zealand or the requesting country.⁴⁷⁷ It also allows for the subtleties of our domestic approach to double jeopardy to be taken into account. These subtleties include the new provisions in the Criminal Procedure Act allowing for retrials in limited circumstances where there is a tainted acquittal or new and compelling evidence.⁴⁷⁸ In response to our Issues Paper, the New Zealand Law Society raised concerns about questionable third country pardons and unreliable assertions of "new and compelling evidence". Our view is that these issues could just as easily arise in a domestic context and that, in this instance, there is no compelling reason to create a different rule for extradition.

⁴⁷⁷ See the commentary to s 26(2) of the New Zealand Bill of Rights Act 1990 in Sylvia Bell and others *Brookers Human Rights Law* (online, looseleaf ed, Brookers at [BOR 26.03(1)]), which cites the following Canadian Supreme Court cases on this point: *Corporation Professionnelle des Medecins du Quebec v Thibault* [1988] 1 SCR 1033; *R v Shubley* [1990] 1 SCR 3 at [21]–[24]; and *R v Van Rassel* [1990] 1 SCR 225.

⁴⁷⁸ Criminal Procedure Act 2011, sections 151–156. See also sections 45–48, which relate to special pleas of previous conviction, acquittal or pardon.

- (e) that the extradition of the respondent would be unjust or oppressive, for reasons including (but not limited to)—
 - (i) the likelihood of a flagrant denial of a fair trial in the requesting country; or
 - (ii) exceptional personal circumstances of a humanitarian nature:

Commentary

As discussed in Chapter 5, this ground for refusal, properly understood, is a corner-stone of our reform. It provides space for the Court to refuse an extradition request if it has grave concerns about how the person will be treated by the foreign authorities upon return (the unjust aspect) or about the impact of extradition given the individual's personal circumstances (the oppressive aspect). In drafting this ground we struggled with how best to balance the competing needs for flexibility and certainty. The phrase "unjust or oppressive" in itself is very broad and although it is often used in extradition legislation, its boundaries are not immediately apparent.⁴⁷⁹ We envisage something akin to the Canadian threshold, which requires the circumstances to "shock the conscience"⁴⁸⁰ or be "fundamentally unacceptable to our notions of fair practice and justice."⁴⁸¹ Therefore, to provide some clarity we have included two illustrative examples in the Bill. These are designed, in part, to show that there is a high threshold. The first example relates to fair trial concerns. It covers issues such as abuse of process and delay. The important point to note here is that this must be assessed with reference to the international minimum standards for a fair trial, not by directly applying the relevant provisions in the New Zealand Bill of Rights Act 1990 as if the trial were to be conducted in New Zealand. If we required all foreign trials to be conducted in the same manner that they would be conducted in New Zealand, then very few extraditions would ever occur. Legitimate differences need to be accommodated in criminal justice systems. Judges may find the concept of a "flagrant denial of a fair trial" from the European Court of Human Rights jurisprudence a useful point of departure in considering this ground.⁴⁸² The second example is designed largely to be reminiscent of the "compelling or extraordinary personal circumstances" ground in the current Act.⁴⁸³ This will cover issues such as age, and physical and mental health. We have redrafted this ground, using the language from section 207 of the Immigration Act 2009, in an effort to modernise the concept and to tie it to international human rights law. This has the added benefit of making this ground easier to read in a way that is consistent with the extradition treaties.

- (f) that a ground applies on which extradition must be refused under a bilateral extradition treaty.

Commentary

This ground is limited to bilateral extradition treaties. For the most part, the refusal grounds in multilateral treaties are recognised in the other grounds for refusal. For instance, the "torture or cruel treatment", "discrimination" and "death penalty" grounds have all arisen as a direct response to multilateral treaties. Multilateral treaties will also be relevant to the application of the "unjust and oppressive" ground. The Refugee Convention, however, is not the subject of any of the grounds for refusal and we did not want it to be captured by a generic treaty-based ground. That is because, as we discuss in Chapter 11, we consider that this Convention should be the subject of a separate extradition prohibition, so that it may be determined by the designated immigration authorities rather than by the Court or the Minister in extradition proceedings.

479 See Extradition Act 1999, s 8(1); the 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, art 15(2)(b); Extradition Act 1988 (Cth) s 34(2); Extradition Act 2003 (UK), ss 14, 25, 82 and 91; and Extradition Act SC 1999 c 18, s 44(1)(a).

480 *United States v Burns* 2001 SCC 7, [2001] 1 RCS 283 at [60]; *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779 at [35] and [63]; and *Canada v Schmidt* [1987] 1 SCR 500 at 522.

481 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

482 *Soering v United Kingdom* (1989) 11 EHRR 439 (ECHR).

483 Extradition Act 1999, s 30(3)(d).

Clause 21 Grounds on which Minister must or may refuse extradition

- (1) The ground on which the Minister must refuse extradition is that the respondent has been, or may be, sentenced to death in the requesting country for the extradition offence and the requesting country has not given a satisfactory assurance to the Minister that the sentence will not be carried out.

Commentary

In accordance with our proposal in the Issues Paper, we have drafted this ground so that it is more upfront about New Zealand's position in relation to the death penalty. The Minister must obtain an assurance that the death penalty will not be applied if the death penalty is a potential punishment for the extradition offence according to the law of the requesting country. The Minister must then refuse the extradition unless he or she is satisfied on the basis of the assurance that the death penalty will not be carried out. The Minister has no discretion.

- (2) A ground on which the Minister may refuse extradition is a ground that—
 - (a) applies under a bilateral extradition treaty to which New Zealand and the requesting country are both party (*see* Part 1 of Schedule 3); and
 - (b) either—
 - (i) relates to citizenship or extra-territorial jurisdiction; or
 - (ii) is identified in the treaty as a ground that must be considered by a representative of the executive branch of government.

Commentary

This ground is designed to recognise that two of the grounds for refusal in New Zealand's existing bilateral extradition treaties have been drafted in a way that does not raise a legal question that we can expect a court to answer. These grounds relate to citizenship and extra-territoriality. We have also tried to future-proof the ground so that in future extradition treaties if similar grounds are considered necessary they can be designated directly to the Minister. We recognise that theoretically there is space in the drafting for a discretionary ground for refusal to exist that does not fall into one of the three identified categories. Having reviewed the existing treaties we are confident that there is currently no such ground and we see no reason why such a ground would not be designated to the Minister in the future. On the flipside we see considerable benefit in clarifying the types of cases that will need to be referred to the Minister to consider this ground.

Clause 23 Extradition request

- (1) A country to which this subpart applies may request the extradition of a person who is, or is suspected of being, in New Zealand or on the way to New Zealand.
- (2) The request—
 - (a) must be made through diplomatic channels by—
 - (i) a diplomatic or consular representative, or a Minister, of the requesting country; or
 - (ii) any other person authorised under an extradition treaty to make an extradition request; and
 - (b) must be made to the Central Authority; and

- (c) must include—
 - (i) a statement that the requesting country reasonably believes the respondent is an extraditable person; and
 - (ii) for each offence for which the respondent is sought,—
 - (A) a description of the provision under the law of the requesting country that establishes the offence and the relevant penalty and a summary of the conduct constituting the offence; or
 - (B) any required information about the offence submitted in accordance with the provisions of a relevant extradition treaty; and
 - (iii) an assurance (relating to any trial or detention of the person for offences other than the extradition offence) that complies with section 24; and
 - (iv) an assurance that the requesting country has disclosed, and will continue to disclose, any information known to the requesting country that could seriously undermine any prosecution of the respondent as a result of the request; and
 - (d) must be accompanied by the previous arrest warrant or a certified copy of that warrant.
- (3) The Central Authority may waive the requirements under subsection (2)(c)(iii) or (iv), or both, if the Central Authority is satisfied that the requesting country has made a comparable assurance under an extradition treaty.

Commentary

The requirement that a standard extradition request must be made through diplomatic channels is significant. The involvement of the Ministry of Foreign Affairs and Trade will provide necessary assurance to the Central Authority that any request is authentic and has been made by the appropriate authorities in the requesting country.

Clause 25 Central Authority must decide whether to commence extradition proceedings

- (1) If the Central Authority receives a request that complies with section 23(2), the Central Authority must decide whether to commence extradition proceedings against the respondent.
- (2) In deciding whether to commence extradition proceedings, the Central Authority must consider—
 - (a) whether there is a reasonable prospect of extradition; and
 - (b) the following matters, if relevant to the request:
 - (i) any extradition treaty to which both New Zealand and the requesting country are party;
 - (ii) any other request received by the Central Authority for the extradition of the respondent;
 - (iii) whether the respondent could be prosecuted in New Zealand for the offence for which his or her extradition is sought.
- (3) In addition to the matters specified in subsection (2), the Central Authority may take into account any other matter that the Central Authority considers relevant (including any concerns about the reliability of information or assurances provided by the requesting country).

Commentary

This is one of the key provisions in the Bill. It makes the Central Authority responsible for determining whether an extradition request meets the statutory requirements and whether to commence extradition proceedings. In relation to the latter decision, we have listed some of the relevant considerations but have otherwise left the Central Authority to take account of any other consideration. That is because, like the domestic decision to prosecute, this is an area where there needs to be room for discretion. To guide the Central Authority we have indicated that it should ask whether there is a “reasonable prospect of extradition”. This language is borrowed from the test for the decision to prosecute in the Solicitor-General’s Prosecution Guidelines. As part of that test a prosecutor must endeavour to anticipate and evaluate likely defences and challenges to the evidence. We consider that the Central Authority will need to undertake a similar task for the grounds for refusal and potential challenges to the Record of the Case. In practice, this means that the Central Authority will need to see a draft of the Record of the Case before deciding whether to commence extradition proceedings. The final version of the Record, however, does not need to be disclosed to the respondent and the Court until after the preliminary conference.

Clause 26 Commencement of extradition proceedings under this subpart

- (1) Extradition proceedings under this subpart are commenced by the Central Authority filing a notice of intention to proceed in the District Court.
- (2) A notice of intention to proceed under this subpart must state—
 - (a) that the Central Authority has received an extradition request; and
 - (b) the name of the requesting country; and
 - (c) the name and particulars of the respondent; and
 - (d) that the Central Authority seeks a determination that the respondent is liable for extradition; and
 - (e) the offence or offences for which the respondent’s extradition is sought; and
 - (f) the particulars of the offence or offences; and
 - (g) the grounds on which the offence or offences are considered to be extradition offences: and
 - (h) either -
 - (i) the provisions in the law of the requesting country creating the offence or offences and the equivalent New Zealand offence provisions; or
 - (ii) the provisions in the law of the requesting country creating the offence or offences and the equivalent offence provisions in the treaty.

Commentary

Our concept of a Notice of Intention to Proceed is loosely based on the Canadian concept of an “authority to proceed” (Extradition Act 1999 (Canada) s 15).

This is what we envisage a Notice of Intention to Proceed in a standard extradition procedure might look like:

I [insert name] certify on behalf of the Central Authority that:

1. The Central Authority has received an extradition request from Canada for the extradition of X, a plumber of Auckland.

2. On the basis of the request and other information supplied by Canada the Central Authority intends to seek a determination that X is liable for extradition on the basis that:
 - There is an **extraditable person** as X is accused of committing sexual interference, which is an offence under section 151 of the Canadian Criminal Code RSC 1985 c C-46.
 - There is an **extradition offence** as the Canadian offence of sexual interference is punishable under section 151(a) of the Criminal Code by up to 10 years imprisonment and the conduct constituting the offence would amount to the offence of indecent assault in New Zealand which carries a maximum penalty under section 135 of the Crimes Act 1961 of 7 years' imprisonment.

Clause 31 Issues conference

- (1) An issues conference must be presided over by a District Court Judge and attended by the Central Authority and the respondent.
- (2) At the issues conference, the Judge must—
 - (a) ascertain whether the respondent consents to extradition and if not order that an extradition hearing be held; and
 - (b) if a hearing is required,—
 - (i) identify and refine the issues to be determined at the hearing; and
 - (ii) set a date for the hearing.
- (3) At the issues conference, the Judge may, for the purpose of ensuring the fair and efficient resolution of the extradition proceedings, do all or any of the following:
 - (a) if the interests of justice require, direct that any application made by a party to the proceedings be dealt with at a separate hearing before the extradition hearing;
 - (b) direct that the following be considered at separate hearings:
 - (i) the criteria for extradition;
 - (ii) the consideration of any grounds on which the District Court must find that the respondent is not liable for extradition;
 - (c) make a direction about any other matter, including, but not limited to,—
 - (i) disclosure;
 - (ii) evidence;
 - (iii) translators and interpreters;
 - (iv) representation of the respondent;
 - (v) the respondent's fitness to participate in extradition proceedings;
 - (vi) the conduct of the extradition hearing.
- (4) In considering whether to make a direction under subsection (3)(b), the court must take into account the possibility that the Central Authority may intend to seek assurances from the requesting country in relation to 1 or more of the grounds on which the court must refuse extradition.

- (5) Despite subsection (1), an issues conference may be held in any manner the court thinks fit, including in any way permitted by the Courts (Remote Participation) Act 2010

Commentary

By including an “interests of justice” test in subclause 3(a) we aim to make it clear that pre-trial hearings should not be the norm in extradition proceedings.

Subclause (4) is designed to recognise that, in some cases, it may not be appropriate to obtain a diplomatic assurance concerning a ground for refusal until the Court has determined whether the criteria for extradition have been met. The process of negotiating a diplomatic assurance can be very resource intensive for both New Zealand and the requesting country. It might therefore be more realistic not to incur that expense unless it is necessary. More importantly, however, the weight to be given to an assurance will depend, to some extent, on how current it is. It is desirable for assurances to be given as close as possible to the date when the actual extradition would occur, so that no intervening changes in circumstance can undermine the commitments made.

Clause 34 Determining liability for extradition

- (1) The District Court must determine, in respect of each offence for which the respondent is sought under a notice of intention to proceed, whether the respondent is liable for extradition.
- (2) The court must determine that a respondent is liable for extradition if the court is satisfied that—
- (a) the criteria for extradition have been met; and
 - (b) either—
 - (i) there are no grounds on which extradition should be refused, or the case referred to the Minister, under subsection (7); or
 - (ii) the case has previously been referred to the Minister and the Minister has notified the court that none of the referred grounds for refusal apply; and
 - (c) no order has been made under section 83 that the respondent is unfit to participate in an extradition proceeding.
- (3) However, for the purposes of subsection (2)(b)(i) and (7)—
- (a) the court may decide, without any inquiry, that there are no grounds on which extradition must be refused under section 20 or must or may be refused under section 21 unless either or both parties advise the court that 1 or more specified grounds under either or both of those sections may apply; and
 - (b) if either or both parties identify 1 or more such grounds, the court need inquire only into those identified grounds.

Criteria for extradition

- (4) The criteria for extradition are—
- (a) that the respondent is an extraditable person; and
 - (b) that the offence for which the respondent’s extradition is sought is an extradition offence; and
 - (c) if the respondent is sought for the purposes of prosecution, that there is a case for the respondent to answer in respect of the offence; and

- (d) if the respondent is sought for the purposes of imposing or enforcing a sentence for the offence, that the respondent was convicted of the offence.
- (5) In determining whether there is a case for the respondent to answer under subsection (4)(c), the court must—
 - (a) disregard only evidence that is so unreliable that it could not have any probative value; and
 - (b) consider whether the remaining evidence, if accepted as accurate at the respondent's trial, would establish each essential element of the New Zealand offence or the offence in the extradition treaty identified in the notice of intention to proceed (*see* section 26(1)) that corresponds to the extradition offence.
- (6) In making a determination under subsection (5), the court must take into account any relevant evidence offered by the respondent.

Consideration of grounds for refusal or referral to Minister

- (7) If the court is satisfied that the criteria for extradition are met, the court, despite that satisfaction, but subject to subsection (2),—
 - (a) must refuse to extradite the respondent if any of the grounds in section 20 apply; and
 - (b) must refer the case to the Minister for his or her determination if it appears to the court that either of the grounds for refusal of extradition in section 21 may apply.
- (8) If the court refers the case to the Minister under subsection (7)(b), the court must—
 - (a) specify the grounds on which the referral is made; and
 - (b) provide the Minister with copies of any documents submitted during the proceedings that are relevant to the referred grounds.

Commentary

Subclause (3) is designed to reflect our policy that, generally speaking, the respondent must raise any ground for refusal. We have not included an evidential burden, so a ground could be raised simply by submitting that it applies. The benefit of including this subclause is two-fold. One, it should motivate respondents to identify potential grounds for refusal as early as possible, preferably at the Issues Conference. Two, it provides the Court with scope to inquire into any ground that has not been raised, but it only needs to do so if it thinks that is appropriate. For example, if there is no suggestion from the parties that there is a risk of double jeopardy then we think the Court should have the option of not calling for evidence or submissions on the point. The inclusion of the Central Authority in clause (3) may seem odd. This is necessary, however, because the Central Authority is obliged to ensure that New Zealand is acting in compliance with its international obligations. Accordingly, regardless of whether a ground is raised by the respondent, the Central Authority may need to raise it in order to explain why, despite any indication to the contrary, the ground does not apply. For an explanation of the definition of a case to answer in subclause (5) and (6), see Chapter 9.

Clause 37 Extradition request

- (1) An appropriate authority in an approved country may request the extradition of a person who—
 - (a) is an extraditable person; and
 - (b) is, or is suspected of being, in New Zealand or on the way to New Zealand.

(2) The request—

- (a) must be made in writing to the Central Authority; and
- (b) must include a statement that the requesting country reasonably believes the respondent is an extraditable person; and
- (c) must be accompanied by a warrant for the arrest of the respondent issued in the requesting country (the **overseas warrant**) or a certified copy of that warrant.

Commentary

Under the 1999 Act there are no statutory requirements relating to the form or content of extradition requests to New Zealand under Part 4, which is the backed-warrant procedure. With Australia, a practice has developed whereby such requests are made on a Police-to-Police basis. Our policy is that, from a New Zealand perspective, the Central Authority will be responsible for these requests in the future. However, we want to retain the ability for the Australian Police to send their extradition requests directly to the Central Authority, without having to obtain formal Federal or State Government approval first. For that reason we have included the phrase “an appropriate authority in an approved country” in subsection (1). We envisage that, in relation to other approved countries, the appropriate authorities would be identified during the approval process.

Clause 49 Temporary suspension of extradition order in compelling or extraordinary circumstances

- (1) The District Court may determine that an extradition order comes into effect on a date specified in the order if the court considers that there are compelling or extraordinary circumstances justifying the temporary suspension of the operation of the order.
- (2) The court may vary the date specified in the order if the circumstances described in subsection (1) continue to apply, or no longer apply.
- (3) In this section, **compelling or extraordinary circumstances** include, without limitation, circumstances relating to the respondent’s health.

Commentary

This clause allows the Court to temporarily suspend an extradition order until a specified date. The requirement for the date to be specified in the order is significant. This drafting is designed to avoid the possibility of the clause being used to indefinitely suspend an extradition. It is not an alternative to the grounds for refusal; rather, it recognises that there could be an exigent circumstance that would justify a temporary delay. The clause allows the Court to act compassionately by accommodating a significant one-off event, such as an impending medical procedure or a family funeral. We acknowledge that a respondent might try to use this clause to delay the inevitable. We consider, however, that this risk is manageable. The issue of suspension will not arise until the very end of an extradition proceeding, when the District Court is making the final order. At this stage, the appeal process will have been completed. Therefore, if the application for suspension is declined and the respondent applies for a judicial review, then the review will be discrete. There will only be one, relatively straightforward issue for the High Court to consider, so the risk of a lengthy delay seems minimal. On the flipside, the existence of this clause may enable the Court to address humanitarian concerns that might otherwise need to be taken into account in the context of the “unjust and oppressive” ground for refusal.

Clause 52 Central Authority may direct temporary extradition of respondent

- (1) The Central Authority may direct the temporary extradition of a respondent if a court has determined that the respondent is liable to extradition and the Central Authority is satisfied that—

- (a) it is in the interests of justice that a direction be given under this section; and
- (b) the requesting country has given to the Central Authority satisfactory undertakings relating to—
 - (i) the taking place of a trial of the respondent in the requesting country for 1 or more of the extradition offences for which the court has determined that the respondent is liable for extradition; and
 - (ii) the return of the respondent to New Zealand; and
 - (iii) the custody of the respondent while travelling to and from and while in the requesting country; and
 - (iv) any other matters that the Central Authority thinks appropriate.
- (2) If a respondent who is subject to a sentence of imprisonment is released from a New Zealand prison under a temporary extradition direction, or is subsequently sentenced to imprisonment for an offence against New Zealand law while subject to the temporary extradition direction, so long as the respondent is in custody in connection with the request (including custody outside New Zealand), the respondent is deemed to be serving that sentence.
- (3) If, while a respondent is in the requesting country under the temporary extradition direction, the respondent ceases to be liable to be detained in New Zealand, the Central Authority must inform the requesting country that it is no longer required to comply with the undertakings referred to in subsection (1)(b).

Commentary

This clause is based on section 54 of the 1999 Act. It primarily deals with respondents who are liable for extradition, but who are also the subject of criminal proceedings in New Zealand. The test in subclause (1)(a), however, is broad enough to allow the Central Authority to use this provision in a variety of different circumstances. For instance, in exceptional cases, if there were concerns about a respondent's safety in a requesting country at the end of the foreign country's criminal justice process, then the Central Authority could (depending on the respondent's immigration status) direct that they be returned to New Zealand at the conclusion of their trial and after serving any sentence. Furthermore, if in the future New Zealand signs up to an International Prisoner Transfer Scheme,⁴⁸⁴ the Central Authority may be able to help give effect to such a Scheme by directing temporary extradition solely for the trial and any sentencing. The actual sentence could then be served in New Zealand. In the vast majority of cases, however, we envisage that this provision will only be used to ensure that a respondent may be the subject of simultaneous criminal proceedings in New Zealand and abroad. Furthermore, we envisage that directions for temporary extradition will be rare.

Clause 55 Discharge of respondent if Minister refuses extradition

- (1) If the Minister notifies the court under section 35(5)(a) or section 45(5)(a) that a ground applies on which the extradition of the respondent has been refused the court must—
 - (a) cancel the warrant authorising the detention of the respondent in prison; and
 - (b) immediately notify the prison manager or other person in whose custody the respondent is, that the warrant has been cancelled and the respondent must be discharged from custody.
- (2) Subsection (1) applies unless the respondent is subject to another order for detention.

⁴⁸⁴ For instance the Convention on the Transfer of Sentenced Persons, to which all European Union States, Australia, Canada and the United States are parties: Convention on the Transfer of Sentenced Persons ETS 112 (opened for signature 21 March 1983, entered into force 1 July 1985).

Commentary

Under the 1999 Act the Court determines whether a person is eligible for surrender and then, in most cases, the Minister has the final say. Accordingly, it is the Minister who ordinarily signs the extradition order. Our policy, as reflected in the Bill, is different. We propose that all extradition orders should be made by the Court. The Minister has a more limited role. If a case is referred to the Minister under clause 34 or 44 (which will be relatively rare) then the Minister must determine whether the referred ground for refusal applies, and notify the Court. The Minister's decision itself has no immediate practical effect. That is because the Court retains carriage of the extradition proceeding throughout. That does not, however, mean that the Court may question the Minister's decision. This provision makes it plain that if the Minister notifies the Court that a ground for refusal applies, then the Court must discharge the respondent immediately. By contrast, if the Minister notifies the Court that a ground does not apply then (given that all of the other requirements will have been met) the Court must find the person liable for extradition (see clauses 34(2)(b)(ii) and 44(2)(b)(ii)).

Appeals and judicial reviews (clauses 59–69)

Commentary

The appeal provisions in this Bill are loosely based on equivalent provisions in Part 6 of the Criminal Procedure Act 2011. Prior to the introduction of the Bill additional work will need to be done to determine the exact procedural rules that should apply to these appeals and reviews. That is because extradition proceedings do not neatly fall into the category of criminal or civil proceedings. Our view is that the Rules Committees are best placed to undertake this work, once the details of the Bill have been finalised.

Clause 59 Appeals to High Court

- (1) Either party to an extradition proceeding may appeal to the High Court against a determination of the District Court under this Act that the respondent is—
 - (a) liable to extradition; or
 - (b) not liable to extradition.
- (2) An appeal under subsection (1) must be made within 15 working days of the date of the notice under section 47(2)(b).

Commentary

As proposed in the Issues Paper, this provision creates a general right of appeal to the High Court. Previously this would have been described as appeal on a question of fact or law, although the Criminal Procedure Act has abandoned that distinction. We acknowledge that the 15-day time limit for filing an appeal does not align with the 20-day time limit for filing an application for judicial review of the Minister's decision in cl 69. We do not, however, think that this will make any difference to the High Court's ability to hear the appeal and the judicial review alongside each other, as required by clause 66.

Unfitness to participate in extradition proceedings (clauses 82–85)

Commentary

Our policy in relation to the provisions under this subheading is to adopt the concept of “unfitness to stand trial” from criminal proceedings to the extent possible. This concept is dealt with in sections 4, 7 to 14 and 23 to 27 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. The main difference between that procedure and the procedure in the Bill is that in criminal proceedings the court is required to make a formal finding as to the person's involvement in the alleged offending. If such a finding is made then there is an option of detaining the person for public safety reasons. In extradition proceedings it is not appropriate to make any formal factual findings about the

alleged offending. That is because the determination of guilt or innocence is strictly reserved for the requesting country. Without a finding of involvement, there is also no justification for detaining a respondent for public safety reasons. The sole purpose of these provisions in the Bill is to ensure that no person is subjected to an extradition proceeding unless they are capable of understanding and engaging in the process.

Clause 85 Effect of determination under section 83

- (1) If a court determines under section 83 that the respondent is fit to participate in extradition proceedings, the court must allow the proceedings to continue.
- (2) If the court determines under section 83 that the respondent is unfit to participate in extradition proceedings, the court must discharge the proceedings and notify a duly authorised officer under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Commentary

The power to discharge the proceedings in clause 85 is mandatory. As clarified by clause 58, however, a discharge would not preclude the extradition proceeding from being commenced again in the future (for instance if the person's mental impairment was temporary). The notification requirement in subsection (2) is also mandatory because if a respondent is so mentally impaired that they cannot engage in a court proceeding, then we would expect it to be brought to the attention of the appropriate mental health authorities.

Clause 87 Powers of District Court

- (1) The District Court may, for the purpose of ensuring that an extradition proceeding is carried out in a fair and efficient manner, and to give effect to the principles in section 4, make any order and give any direction that the court thinks fit (including an order to adjourn the proceedings).
- (2) An extradition proceeding may from time to time be adjourned by a judicial officer to a time and place then appointed.
- (3) A Registrar may adjourn any extradition proceeding before the hearing to a time and place then appointed if the respondent is not in custody.
- (4) An order under subsection (1) may, without limitation, appoint an amicus curiae to assist the court by gathering evidence and making an independent submission in relation to a ground for refusing extradition.
- (5) However, an order or direction under subsection (1), (2), or (3) may not override any provision in this Act or any other enactment.

Commentary

One of our most significant policy recommendations is that, except for the death penalty and some treaty grounds, all of the grounds for refusal should be determined solely by the Court. In cases where a respondent submits that a ground applies based on systemic human rights abuses in the requesting country, we recognise that it may be difficult to get appropriate evidence before the Court. That is because of the sheer volume of information, reliable and otherwise, that exists in relation to a country's human rights records. To address this concern, we have created a presumption in favour of written evidence and otherwise relaxed the rules of evidence (see clauses 92 and 93). This provision also gives the Court an express power to appoint an amicus curiae. An amicus would be in the position to review the evidence presented by the parties to ensure that it is complete and is the best evidence that is available at the time.

Clause 88 Court may indicate further information required from requesting country

- (1) At any time during an extradition hearing the court may indicate that, without further information from the requesting country, the court may not be able to determine that the respondent is liable for extradition.
- (2) If the court makes such an indication, the Central Authority may apply for the hearing to be adjourned to allow time for it to consult with the requesting country.

Commentary

The power to adjourn a proceeding to allow the Central Authority to consult with the requesting country is very significant. This is the counter-balance to the fact that the requesting country is not a party to the proceedings under the Bill, and is not subject to New Zealand jurisdiction. For these reasons, and for reasons of comity, it will never be appropriate for the Court to make a disclosure order against the requesting country. We discussed this issue in the Issues Paper and in Chapter 9. The requesting country, however, may well be in possession of information that the Court considers critical to determining the proceeding. If that is the case then the appropriate course of action is for the Court to advise the Central Authority that, without seeing the information, the Court will not be in a position to make a finding that the respondent is liable for extradition. The Court should then adjourn the proceeding to allow the Central Authority to discuss that with the requesting country. If the requesting country would prefer to end the proceedings rather than disclose the information, then that option should be available. We envisage that this power will not be used by the Court routinely and will be reserved for cases where there truly is a vital piece of information missing.

Clause 100 Place of extradition hearing

An extradition hearing must be heard and determined in the registry of the District Court in which the application for the extradition of the respondent was filed.

Commentary

The ordinary rule in domestic criminal proceedings is that a trial must take place in the District Court nearest to where the alleged offending took place or to where the defendant is believed to be.⁴⁸⁵ We have chosen not to replicate this approach in the Bill. Instead we have left the choice of location in the hands of the Central Authority. The provision contains no particular guidance as to where the Notice of Intention to Proceed should be laid, but our view is that these proceedings should only be heard in the three main centres: Auckland, Wellington and Christchurch. These locations are geographically spread, so no respondent should need to travel too far and the cost of that travel would likely be met by legal aid. The Courts (Remote Participation) Act procedures could also be used. The benefit of limiting extradition proceedings to the main centres is that it will allow a pool of specialised Judges and lawyers to develop. As we discussed in Chapter 10, extradition proceedings are rare and complex and there is a need for lawyers and Judges to have specialised training. Our understanding is that, in practice, this may not be much of a deviation from the status quo as the vast majority of persons sought for extradition to date, have been located in Auckland.

Clause 101 Request for extradition of person to New Zealand

- (1) New Zealand may request from another country the extradition of a person who—
 - (a) is accused, or has been convicted, of an extradition offence against New Zealand law; and
 - (b) is suspected of being in, or on the way to, the other country.
- (2) The request may only be made by the Central Authority.

⁴⁸⁵ Criminal Procedure Act 2011, s 14.

- (3) The request may be made—
- (a) directly to the competent authorities in the relevant country; or
 - (b) through the Minister of Foreign Affairs and Trade to a diplomatic or consular representative, or a Minister, of that country.
- (4) Subsections (2) and (3) apply unless a treaty or arrangement with the relevant country, or the law of the relevant country, prescribes a procedure for making requests that is different or supplementary to the procedure set out in subsections (2) and (3).
- (5) If subsection (4) applies, the different or supplementary procedure (but only insofar as it relates to the making of requests) must be used.

Commentary

The 1999 Act is largely silent on the question of which agencies in New Zealand may make an extradition request. There is logic to this policy, as ultimately it is up to the foreign country to decide whether to accept an extradition request or not. However, we have been advised that this approach has created confusion, inconsistency and delay. To remedy this situation this provision, in conjunction with clause 14(4), makes it plain that all extradition requests from New Zealand must be authorised by the Central Authority. These requests will also be made in the name of the Central Authority unless an extradition treaty, arrangement or the law of the requested country expressly requires a different person or agency to make the request. We added the further explanation in subsection (5) to clarify that, while the treaty, arrangement or foreign law may alter the procedure in subsections (2) and (3) for who may make the request and how it should be sent, the request must still be made in accordance with the provisions of the Bill. There is no alternative extradition procedure.

Clause 104 Arrest warrant may be issued without prior summons

- (1) If the Central Authority has, or is likely to, request the extradition of a person under section 101, a court may issue a warrant for the arrest of that person, if the court is satisfied that—⁴⁸⁶
- (a) a charging document has been filed; and
 - (b) there are reasonable grounds to suspect that the defendant is in, or on the way to another country.
- (2) It is not a requirement that the person be served with a summons, or that any effort be made to serve a summons on the person, before a warrant is issued for the person's arrest.

Commentary

Under the Criminal Procedure Act the District Court will only issue a warrant to arrest a defendant if a charging document has been filed, a summons has been issued, and reasonable efforts have been made to serve the summons on the defendant. The last two of these requirements are not appropriate in the context of extradition, because the defendant is believed to be overseas and should not be alerted to the possibility of the extradition request. In those circumstances there is little point in even issuing a summons, which must set a court date for within two months. Therefore, we have included this provision in the Bill, which creates an alternative process for obtaining a warrant in cases where it is likely that an extradition request will be made.

⁴⁸⁶ This is how clause 77 will look. This is slightly different from the current Bill.

Clause 105 Request for information about time spent in custody overseas

- (1) The Central Authority may issue a certificate specifying the—
 - (a) date on which the person was admitted to a prison or any other place to be held in custody in relation to the request;
 - (b) total period for which the person was detained in custody during the process leading to the extradition of the person to New Zealand in relation to the offence or offences.
- (2) A certificate issued under subsection (1)—
 - (a) may be based on any information held or gathered by the Central Authority that the Central Authority considers sufficiently reliable; and
 - (b) is presumed to be accurate in the absence of any evidence to the contrary.

Commentary

This provision is designed to rectify a practical difficulty that was brought to our attention. Under the 1999 Act, if a person is extradited to New Zealand, the requested country is primarily responsible for providing a formal certificate of the time that the person spent in custody overseas prior to being extradited.⁴⁸⁷ This certificate is important under the Parole Act because that time is considered in New Zealand to be pre-sentence detention for the purpose of calculating any resultant sentence.⁴⁸⁸ We understand however, that in practice it has been difficult to obtain these certificates from requested countries. Instead accurate information is usually obtained through Interpol. Accordingly, this provision creates a more flexible approach by allowing the Central Authority to prepare these certificates based on any information that it considers to be sufficiently reliable.

Clause 113 Transit

A person who is being transported in custody to any country from any other country for the purpose of being extradited may be transported through New Zealand.

Commentary

This provision replicates the first two subsections of section 90 of the 1999 Act. It clarifies that a person may be transported in custody through a New Zealand airport, as a result of an extradition between country X and country Y. No extradition proceedings need to take place in New Zealand to accommodate this. We have decided, however, not to take the extra step of creating statutory authority for the foreign police to use New Zealand detention facilities during the transit period. The 1999 Act allows for that to occur. Currently the transferee may be held in custody at the airport for up to 24 hours and after that, a New Zealand constable may apply to the court for an extension order. The Minister may then step in and order the removal of the person if their transportation is not continued within a reasonable time. We are uncomfortable with the policy behind this provision. There is no indication that the constable, the court or the Minister is required to inquire, to any extent, whether due process has been followed to effect the foreign extradition. In those circumstances, it is difficult to understand the rationale for the New Zealand authorities taking an active role in the extradition. There could be issues of public safety but, if that is the case, then it is no different from any other person being transited in custody through New Zealand and the appropriate solution appears to be for the Police and Immigration New Zealand to handle this as an operational matter. We have been advised that, in practice, this issue has not arisen to date and is unlikely to arise in the future. New Zealand is a natural transit point only in relation to the Pacific Islands. Flights to the Islands are regular and a transit period of more than 24 hours is improbable. Bearing that reality in mind, our view is that there is no need to replicate section 90 of the 1999 Act in full in the Bill. A

⁴⁸⁷ Extradition Act 1999, s 62.

⁴⁸⁸ Parole Act 2002, s 91.

similar issue arises in relation to the Mutual Assistance in Criminal Matters Act 1992. Under that Act a prisoner may be transited through New Zealand from country X to give evidence in court proceedings in country Y. Again, unless there will be some inquiry into due process, we do not think that such a person should be held in custody in New Zealand under the Mutual Assistance Bill.

Clause 118 Removal orders

Placeholder

Commentary

Clauses 115 to 118 of the Bill outline the process to be followed after a person has been extradited to New Zealand, and their trial and any sentence has been completed. These clauses largely replicate sections 92 to 96 of the Extradition Act 1999, except that the Central Authority rather than the Minister of Justice has the responsibility for issuing either a removal order or a certificate giving the person temporary authority to remain in New Zealand. We settled on this policy towards the end of the consultation process, after a detailed discussion with Immigration New Zealand about possible alternative options. We have not drafted the clause relating to removal orders because work still needs to be done on how these clauses will operate in practice and, in particular, on how the Central Authority will be notified when the trial or sentence of any extradited person is coming to an end.

Clause 121 Search powers to identify and locate respondent

Placeholder

Commentary

Towards the end of our consultation process, Police advised us of a practical difficulty that it encounters in attempting to identify or locate individuals who are the subjects of extradition requests. Such individuals are usually actively hiding from the authorities. The best evidence of their identity and location is often bank or telephone records. It is not possible to obtain this type of information without a search warrant or a production order. Since there is no suspected offending in New Zealand, the Police cannot obtain such a warrant or order directly under the Search and Surveillance Act 2012. Instead, the country requesting extradition would need to send a separate mutual assistance request to the Central Authority for search assistance. Under our proposed Mutual Assistance Bill, before providing search assistance, the Central Authority and the requesting country would need to enter into an agreement as to how any information seized or obtained as a result of the request would be dealt with in the foreign country. This is not appropriate. In this scenario, the information of identity and location is only relevant to the New Zealand extradition proceeding and will probably never be sent overseas. Accordingly, we recommend that consideration be given to including a provision in the Extradition Bill, allowing the Police to obtain a search warrant or a production order under the Bill for the sole purpose of identifying and/or locating a person sought in an extradition request.