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February 2016, Wellington, New Zealand | REPORT 137

MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS

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MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS

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

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5 February 2016

The Hon Amy Adams
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

**NZLC R137—MODERNISING NEW ZEALAND’S EXTRADITION AND MUTUAL
ASSISTANCE LAWS**

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Sir Grant Hammond
President

Foreword

Historically, persons who commit crimes have from time to time decamped from the jurisdiction in which the crime was committed. In the simplest terms, they hope to escape the long arm of the law. This gives rise to the necessity for one jurisdiction to seek the assistance of another jurisdiction in investigating criminal matters and extraditing, or returning, the alleged malefactor to the country where the crime was committed to stand trial. Transnational crime is also increasingly prevalent, with crimes committed in one country while key evidence of the wrongdoing or the profits of the offending is found in another.

The legal problems highlighted by these sorts of incidents have always posed their own difficulties. But things have become even more difficult and new challenges are imposed by an ever more interdependent world. We now live in a world of instant communications and commerce, and shared problems of (for example) security, the environment, trade and health. All these increasingly and pervasively link individuals without any regard to national boundaries.

As Justice Stephen Breyer of the United States Supreme Court has recently put it, “judicial awareness can no longer stop at the border”.¹

In particular, the issue arises today as to how a court can effectively protect basic rights when faced with acute security threats. This problem has taken on a particular and compelling urgency as those threats, notably terrorism, have grown amorphous and heedless of borders.

New Zealand is not without law in this subject area. In particular we have the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992. But as we have said, these are complex and convoluted statutes that are difficult to follow.² Both statutes fail to come to grips with the realities of New Zealand’s place within a globalised environment. They fail to provide a framework through which to balance New Zealand’s role within the international community and the values important to New Zealanders in this context, which include protecting the rights of those accused of crimes overseas and protecting those here from unwarranted investigations from abroad.

The Commission has struggled with the important and complex questions raised by these issues. We propose a new Extradition Bill designed to give New Zealand a modern, fit-for-purpose extradition regime that is sufficiently flexible to survive future challenges, but also sufficiently robust to ensure that New Zealand values are protected.

In our view, the interests of both law enforcement and justice require that extradition processes are as efficient as possible, taking account of the need to protect the rights of the persons sought.

The Commission also identified certain features as key aspects of the Mutual Assistance in Criminal Matters Act 1992 that need improvement, strengthening and simplification.

We have recommended new legislation: a new Extradition Act, and a new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act. We have done so after appropriate consultation and having regard to the regimes in place in other countries so that action taken under either Act, when adopted, will we think accord with New Zealand’s values within the wider context of this country’s international obligations.

1 Stephen Breyer *The Court and the World: American Law and the New Global Realities* (Borzo Books, New York, 2015).

2 See Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [1.7].

The exercise has been demanding and I express the Commission's thanks to all who have devoted their attention and time to this area of great current significance and importance.



Sir Grant Hammond
President

Acknowledgements

The Law Commission gratefully acknowledges all the people and organisations that provided input during this review. We would particularly like to thank the individuals, organisations and government departments who made submissions or expressed their views during consultation meetings. A list of all those who provided comment, including through formal submissions, can be found in Appendix A.

During the course of the review we were fortunate to discuss the issues raised in this Report with members of the Bench, in both New Zealand and Canada. We also spoke to officials in Australia, Canada and the United Kingdom who have specialised expertise in extradition and mutual assistance law. We are particularly grateful for all of their time and input.

In addition we are very grateful for the valuable contribution of the Parliamentary Counsel Office. We would like to acknowledge the work of Bill Moore, Cathy Rodgers and Alana Belin on the two draft Bills, which form an integral part of this Report.

The Commissioners responsible for this review were Geoff McLay and Judge Peter Boshier. The legal and policy advisers for this Report were Kate Salmond, Paul Comrie-Thomson and Kristen Ross. We also acknowledge the contribution of past and present legal and policy advisers who have undertaken work on this project: Marion Clifford, Susan Hall and Bridget Fenton and of our law clerks Asher Emanuel, Jacob Meagher and Henry Hillind.

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Summary

WHAT IS WRONG WITH THE CURRENT LAW

- 1 This Report outlines our recommended approach to extradition and mutual assistance³ as set out in our Issues Paper. The case for reform remains as we expressed it in the Issues Paper:⁴

The Extradition Act and [the Mutual Assistance in Criminal Matters Act] are complex and convoluted statutes that are difficult to follow. Both statutes fail to come to grips with the realities of New Zealand's place within a globalised environment. They fail to provide a framework through which to balance both New Zealand's role within the international community and the values that will always remain important to New Zealanders in protecting the rights of those accused of crimes overseas or protecting those here from unwarranted investigation from abroad.

PRINCIPAL PROPOSALS FOR A NEW EXTRADITION ACT

- 2 Our proposed Extradition Bill is designed to give New Zealand a modern, fit-for-purpose extradition regime that is sufficiently flexible to survive future challenges, but also sufficiently robust to ensure that New Zealand values are protected.

An integrated scheme for extradition

- 3 As we signalled in our Issues Paper, our Bill would provide for an integrated scheme that would achieve the necessary and appropriate balance between protecting the rights of those for whom extradition is sought, and providing an efficient mechanism for extradition.
- 4 Our Bill would establish a Central Authority that would be responsible for receiving, managing and executing all extradition requests.⁵ In our Issues Paper, we suggested that responsibility for the streamlined “backed-warrant” (or “simplified”) process would remain with the New Zealand Police, but we now recommend that the Central Authority be responsible for both standard and simplified extraditions.⁶ Importantly, it would be the Central Authority's role, in the first instance, to consider whether to commence an extradition proceeding. This would involve assessing the likelihood of success. The Central Authority would also be formally responsible for overseeing the entire extradition process from the time a request arrives until the moment a person sought is discharged or extradited from New Zealand.
- 5 We have recommended that all extradition applications should be heard in one court, the District Court, with appropriate pathways for appeal and review. We have suggested that, given the complexity of extradition proceedings, consideration is given to establishing a small pool of judges who would in fact adjudicate extradition cases. While we have actively considered whether “more serious” extraditions should be heard in the High Court, we have rejected that

3 Unless the context otherwise requires, we use the term “mutual assistance” to refer to the process by which New Zealand provides or requests assistance to or from another state in the investigation or prosecution of crime under the Mutual Assistance in Criminal Matters Act 1992 or our Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill]. This is often also referred to as “mutual criminal assistance” or “mutual legal assistance”: see William Gilmore (ed) *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press, Cambridge, 1995) at xii. We acknowledge in other contexts that the broader term “mutual assistance” may refer to assistance provided by one state to another generally.

4 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [1.7].

5 Extradition Bill, cls 12 and 14.

6 See discussion in Issues Paper, above n 4, at [4.13] and [4.17]–[4.19].

option. The seriousness of the crimes for which the extradition is sought is not a predictor of complexity, or of human rights concerns. Moreover, splitting extraditions would risk diluting the pool of experience judges will develop. There is an argument that the High Court might deal with standard extraditions while simplified extraditions might remain in the District Court. This runs into the same difficulty of impeding the consolidation of judicial expertise; therefore, if it was felt that standard extradition proceedings should be in the High Court then we would recommend that it deals with all extradition matters.

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

- 6 Our proposed Bill would resolve much of the complexity in the current Act as to how to give effect to the treaties New Zealand has either inherited or concluded.⁷ As we explained in our Issues Paper, the current Act has made the technical requirements of those treaties the major focus of much of the extradition litigation that has occurred, causing considerable delay. Our proposed reforms aim to make it clearer how international obligations might supplement the extradition procedure in the new Act.
- 7 Our proposed Bill contains a simpler approach to categorising countries. Two distinct procedures would apply, depending on which country makes the extradition request. There is no evidential inquiry into requests from approved countries (Australia and other close extradition partners like the United Kingdom) and they may use the simplified procedure in the Bill.⁸ All other countries must present a summary of the evidence against the person sought (the "Record of the Case") on which the Court would determine liability for extradition. These countries must use the standard extradition procedure.⁹
- 8 Australia is in a unique position. Under the Bill some of the requirements in the simplified extradition procedure do not apply if the requesting country is Australia. There is a less onerous test for whether an offence is extraditable¹⁰ and, unlike for other countries, Australia is not required to provide certain formal assurances.¹¹ These exemptions reflect the particularly close relationship New Zealand has with Australia.

Reducing delay

- 9 In our view, both the interests of law enforcement and the administration of justice require that extradition processes be as efficient as possible, taking account of the need to protect the rights of the person sought.
- 10 Our proposed Bill creates a procedure that we believe will make the extradition process far more efficient. We recommend a number of innovations designed to improve efficiency. The Notice of Intention to Proceed, for instance, will clearly identify the basis on which a person is sought for extradition, and give that person the information needed to defend the case. This will reduce unnecessary confusion. We have also recommended a number of case management mechanisms, such as an Issues Conference, at which likely issues can be raised at an early stage. This means that if a person sought for extradition is going to raise human rights concerns, early judicial attention can be brought to how those issues will be resolved.

⁷ New Zealand's current extradition treaties are listed in sch 3 of the Extradition Bill.

⁸ Extradition Bill, pt 2, sub-pt 3.

⁹ Extradition Bill, pt 2, sub-pt 2.

¹⁰ Extradition Bill, cl 7(1)(a).

¹¹ Under cls 23(2)(c) and 24 of the Extradition Bill, all non-approved countries must provide assurances as to "speciality", re-extradition, and the duty of candour and good faith, as part of making an extradition request. Countries must provide similar assurances under cl 123(3) in order to be approved to use the simplified procedure. Given that Australia is automatically recognised as an approved country by virtue of the definition in cl 5, there is no statutory requirement for it to provide similar assurances.

- 11 We recommend a single appeal route rather than the current regime, which almost encourages a multiplicity of separate appeals, judicial reviews and habeas corpus applications. We do not think it is appropriate to remove habeas corpus or judicial review procedures. We prefer instead to make the need for such reviews as limited as possible, and provide that where they are required they should be dealt with at the same time as the appeal process.

The protection of rights

- 12 We have placed great emphasis in our Bill on protecting the rights of the person sought. The new Act would provide for real protection of rights where necessary. Perhaps most importantly from a human rights perspective is the role that we see the new Central Authority performing in making a judgement as to whether an extradition request ought to proceed, and in formally taking carriage of the extradition proceeding.
- 13 Human rights concerns are reflected in two principal ways:
- (a) We have comprehensively reviewed our proposed procedures against the protections within the New Zealand Bill of Rights Act 1990 (NZBORA), including those rights that apply only to those charged with offences. As we said in the Issues Paper, some of those rights cannot apply in the same way simply because the extradition process is not, and should not try to be, a criminal process designed to establish the guilt or innocence of the person sought.¹² However, we have taken the approach that the Bill ought to reflect the rights in NZBORA that are applicable given the nature of extradition.
 - (b) We have also given the Court two principle roles in protecting the rights of the respondent:
 - (i) The Court would be given a meaningful judicial role in evaluating the evidence of alleged offending in standard extradition proceedings, but one that does not go as far as requiring a pre-emptive trial of the case in New Zealand. It is an important feature of the nature of extradition proceedings that the person whose extradition is sought is not on trial. Evaluating the strength of the evidence in determining the guilt or innocence of the person is to be left to the trial court in the requesting country.
 - (ii) The new Act would give the Court the sole responsibility for deciding nearly all of the grounds for refusing surrender.¹³ Only a few grounds would be reserved for sole consideration by the Minister. This would allow the significant matters of the personal circumstances of the individual sought for extradition, the values of New Zealand's legal system, and the human rights record of the requesting country to be considered directly and openly by the Court.¹⁴

PRINCIPAL PROPOSALS FOR MUTUAL ASSISTANCE

- 14 In our Issues Paper, we identified the following as key aspects of the Mutual Assistance in Criminal Matters Act 1992 (MACMA) that needed improvement, strengthening and simplification.

¹² Issues Paper, above n 4, at [1.28]–[1.29].

¹³ Extradition Bill, pt 2, sub-pt 1.

¹⁴ The grounds on which the Minister “must or may” refuse extradition are related to the death penalty and to bilateral extradition treaties: Extradition Bill, cl 21.

Gateway role

- 15 MACMA serves as a gateway, allowing a foreign country access to New Zealand's domestic powers and techniques for the investigation and prosecution of crime, and restraint and forfeiture of property derived from crime.
- 16 Our Bill is designed to make it clear that the default position is that the Central Authority can grant any foreign country access to the same law enforcement measures that can be used domestically, subject to the same domestic constraints. From there, the Bill sets out necessary additional preconditions and protections, both of a general nature, and of a specific nature in relation to particular types of request.
- 17 Although the Bill will facilitate access to criminal assistance in New Zealand, the primary responsibility for providing that assistance will lie with New Zealand law enforcement authorities. The primary responsibility for executing a search warrant, for instance, will remain with the New Zealand Police, who will also be accountable domestically for how that search is conducted.

Gatekeeper role

- 18 MACMA also serves as a gatekeeper, ensuring that access to New Zealand tools is provided only in appropriate circumstances, and that the rights of any individuals affected by the request are sufficiently protected.
- 19 Not all requests for assistance will be appropriate, especially when first made. Our proposed Bill strengthens this gatekeeping role by clarifying the grounds under which assistance should, or can be, refused. Our Bill makes it clear that New Zealand values will remain central and of crucial concern to the approval process.

Mutual assistance and New Zealand's international obligations

- 20 As we wrote in our Issues Paper, international treaties are likely to vary the processes by which New Zealand provides assistance to foreign countries. Our proposed Bill sets out how those international obligations might vary the processes and procedures around providing assistance. However, most mutual assistance treaties are explicitly subject to domestic law. Therefore, our Bill provides the baseline requirements, which must be met but may be supplemented by treaty.

Clarifying the relationship with other forms of mutual assistance

- 21 We have given in-depth consideration to the relationship between formal mutual assistance provided under MACMA and our proposed Bill, and other mutual assistance arrangements between regulatory agencies and their foreign counterparts. These various relationships should be made clear. Interagency mutual assistance agreements will become more prevalent over the coming years.
- 22 Our Bill is clear that such regulatory agency arrangements are not affected by our reforms, to the extent they do not involve coercive assistance such as the use of a search warrant. If they do, then they must be specifically authorised by another statute or comply with the proposed Bill.
- 23 Furthermore, we remain concerned that agencies entering such agreements should be mindful of the importance of making sure that New Zealand's values are reflected in those agreements, and so we have suggested an oversight role for the Central Authority.

Provision of information held by government departments

- 24 In our Issues Paper, we were critical of the use of the Official Information Act 1982 by the New Zealand Central Authority, on behalf of foreign authorities, to satisfy requests for information held by other New Zealand government departments. We have provided a bespoke regime in the new Bill to address this issue. The regime is designed to allow such requests to be granted in the same way that they might be granted if the request came from another New Zealand government department. In doing so, we have replicated the general structure of providing assistance under our Bill. The Central Authority will determine whether the request for assistance should be granted; but in general terms it will be the information-holding agency that will decide whether the reason for which the information is sought is compatible with what would otherwise have been its obligations to the individual concerned under the Official Information Act and the Privacy Act 1993.

Part 1

BACKGROUND AND CONCEPTUAL ISSUES



Chapter 1

Introduction

OUR MAJOR RECOMMENDATION

- 1.1 We recommend the enactment of a new Extradition Act and a new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act (Mutual Assistance Act).

ORIGINS OF REFERENCE

- 1.2 Both the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992 (MACMA) are essential parts of New Zealand's response to the globalised world in which we live, and the reality that both criminals and their crimes cross our borders. The Extradition Act represents New Zealand's commitment to the international community that New Zealand should not be a place to which those who commit crimes in other countries can flee with impunity. MACMA gives effect to New Zealand's commitment to assist foreign criminal investigations and prosecutions.
- 1.3 Both statutes are, however, in need of reform. Both are overly complex and in parts difficult to follow, create unnecessary difficulties, and in the case of the Extradition Act require conflicting procedures that can lead to unnecessary delay. A first principles review of the Extradition Act and of MACMA was referred to the Commission by the then Minister of Justice in 2013.

THE PRINCIPLES BEHIND OUR REVIEW

- 1.4 This Report recommends enacting a new Extradition Act and a new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Act. With this in mind, Part 4 of this Report includes two draft Bills. These Bills reflect the principles that we set out in our Issues Paper, namely:
- (a) The regimes should facilitate and support New Zealand's international obligations, and its role as an international citizen, in prosecuting and preventing crime.
 - (b) At the same time, the reforms as a whole should promote procedural fairness and protection of the rights of individuals who are the subject of extradition or mutual assistance requests.
 - (c) Purely technical or procedural impediments to achieving (a) and (b) should be minimised in favour of substantive opportunities to provide assistance while at the same time protecting the rights of those being extradited or investigated.¹⁵

¹⁵ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [1.5].

PROGRESS OF THIS REVIEW

- 1.5 We released terms of reference for our review on 1 November 2013, and an Issues Paper in December 2014. That Issues Paper made a large number of proposals for reforming both the Extradition Act and MACMA, and we proposed that both be replaced by new statutes.

SUBMISSIONS RECEIVED

- 1.6 We received seven detailed submissions in response to the Issues Paper: one from the New Zealand Law Society and six from government organisations.

OTHER CONSULTATION

- 1.7 As part of our review, we have also discussed the various issues raised with a range of academics and with those from the legal profession. We have also talked to academics, judges and officials in Australia, Canada and the United Kingdom. We have continued to consult with our expert advisory committee from the government sector.¹⁶ Those officials have provided invaluable insight and feedback. We have also endeavoured to talk with the lawyers who have represented those confronted by extradition. The Bills that form a major part of this Final Report have been workshopped with those groups of people.

THE NATURE AND STRUCTURE OF THIS REPORT

- 1.8 This Report does not seek to replicate the detailed analysis of the underlying issues in our Issues Paper. We envisage that the two should be read alongside each other. The important introduction of key concepts and actors in the Issues Paper is not replicated in this Report.
- 1.9 Part 1 of the Report discusses our general approach to the reference, and the major themes underlying both mutual assistance and extradition. Part 2 then introduces issues that relate to extradition alone, and Part 3 introduces issues relating specifically to mutual assistance. Part 4 contains our draft Extradition and Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bills with commentary. As far as possible, we have aimed to give readers a sense not only of the major policy decisions that lie behind our recommendations, but our intentions of how the practicalities of both extradition and mutual assistance requests should be dealt with by the Central Authority and by the courts. Many of the more theoretical issues are dealt with in the first chapters, and inevitably much of the detail of our recommendations is conveyed through the drafting of the Bills.

RECOMMENDATIONS

- R1 The Extradition Bill attached to this Report, which simplifies and modernises the Extradition Act 1999, should be considered for enactment.
- R2 The Mutual Assistance in Criminal Matters and for the Recovery of Criminal Proceeds Bill, which simplifies and streamlines the Mutual Assistance in Criminal Matters Act 1992, should be considered for enactment.

16 For a list of the organisations that were represented on our expert advisory committee, see Appendix A.

Chapter 2

The core role of the Central Authority

INTRODUCTION

- 2.1 One of our key recommendations is establishing a single Central Authority for extradition as well as mutual assistance. That Central Authority should be the gatekeeper for both types of requests. The Attorney-General should, in our view, be the Central Authority.

INDEPENDENCE FROM POLITICS

- 2.2 An important part of the Central Authority's role is that it should be, and should be seen to be, independent from day-to-day politics. New Zealand has a very long and successful tradition of separating out law enforcement decisions from political decisions. The choice of the Attorney-General as the Central Authority is not intended to blur this important distinction. There is a well-established understanding that although the Attorney is almost always a member of Cabinet, he or she makes law enforcement decisions as a law officer of the Crown rather than as a Cabinet Minister. He or she will rarely be involved in the actual decision-making process as this will often be delegated to the Solicitor-General.¹⁷ At times, however, both mutual assistance and extradition requests will inevitably involve considerations of international relations and obligations that are best dealt with by a Minister. We expect that any Attorney will address the protections we have set out in both our Extradition Bill and our Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) as legal matters. Moreover, mutual assistance requests may also involve weighing up other law enforcement priorities.

MAINTAINING NEW ZEALAND VALUES WITHIN AN INTERNATIONAL CONTEXT

- 2.3 A key part of the Central Authority's role will be to ensure that any action taken under either Bill will accord with New Zealand's values within the wider context of our international obligations. Both the extradition and mutual assistance processes require an assessment of whether the request is in the correct form, but also of whether it is appropriate to engage the New Zealand criminal legal system. Both Bills require an assessment of whether particular grounds exist on which requests either must, or may, be refused.
- 2.4 The Central Authority's role in maintaining New Zealand's values will be particularly significant under our Extradition Bill, as currently no person or body is responsible for conducting extraditions. As we also explain in Chapter 3, at the moment non-Commonwealth countries that do not have a treaty with New Zealand need the permission of the Minister of Justice to commence extradition proceedings.¹⁸ Under our recommendations, the Central Authority will assume this role for all countries whether or not they have a treaty relationship with us.¹⁹

¹⁷ For a detailed discussion of the relationship between the Law Officers, see John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General"(1998) 18 NZULR 197.

¹⁸ Extradition Act 1999, s 60.

¹⁹ Extradition Bill, cls 25 and 38.

- 2.5 Although traditionally consenting to the commencement of the extradition process has been seen as a diplomatic or ministerial function, placing the responsibility with an independent Central Authority is more in line with the rule of law values that underpin our recommendations. However, it is important that in replacing the Minister with the Central Authority the ability remains for New Zealand to refuse to commence extradition proceedings that are not in the interests of justice.²⁰
- 2.6 The question will not be, we emphasise, one of whether a particular legal or criminal-justice system is similar enough to New Zealand's own to entertain an extradition request from that country. Rather, the Central Authority will look at the individual request to determine whether there is a reasonable prospect of extradition.²¹ This will require a preliminary assessment of whether one of the humanitarian protections we have included in the Bill would be likely to prevent extradition,²² including recognition of fundamental fair trial rights²³ and protection against discrimination.²⁴

CENTRAL AUTHORITY'S ROLE IN THE MUTUAL ASSISTANCE BILL

- 2.7 The Central Authority will continue to have a key gatekeeping role in relation to mutual assistance requests.²⁵ It will continue to decide whether the criteria to assist have been met, and assess whether there are grounds that would require the requests to be refused.²⁶ This role will ensure that New Zealand law enforcement mechanisms are only employed in accordance with New Zealand values, and the Central Authority will be accountable for the requests that are granted.

THE NEW CENTRAL AUTHORITY'S ROLE IN THE EXTRADITION BILL

- 2.8 The bigger change to existing law is with extradition. There is currently no Central Authority for extradition. As we explained in our Issues Paper, the way roles and responsibilities are divided under the current extradition regime is complex and compartmentalised. Furthermore, the Extradition Act 1999 itself is unclear as to who should carry out particular tasks.²⁷ Establishing a Central Authority will resolve these issues and will make it plain which agency has overall responsibility for extradition within the public sector. All of those we consulted were supportive of this proposal.

A gatekeeping function for extradition

- 2.9 The Central Authority will have a gatekeeping function in the initial assessment of whether an extradition proceeding can commence. This will be similar to its current role under the Mutual Assistance in Criminal Matters Act 1992 (MACMA). The Central Authority will determine whether the extradition request has a reasonable prospect of success. In addition to considering that formality, the Central Authority will be required to form a judgement about the appropriateness of the proceedings, just as New Zealand's own prosecutors form a judgement as to whether domestic criminal proceedings should proceed. We envisage that such a consideration would involve not just whether there is a sufficient case against the person

20 Extradition Bill, cls 25 and 38.

21 Extradition Bill, cls 25(2)(a) and 38(2)(a).

22 Extradition Bill, cls 20–21.

23 Extradition Bill, cl 20(e)(i).

24 Extradition Bill, cl 20(c).

25 Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cl 6.

26 Mutual Assistance Bill, cls 18–19.

27 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [4.5]–[4.6].

sought to justify extradition, but also the realities of the justice system of the country that is making the request, and the degree to which concerns over the grounds of refusal are likely to be satisfied by the time the extradition hearing is completed. In relation to extraditions that are subject to treaty obligations, an important and potentially decisive issue will be the existence of a treaty obligation.

- 2.10 This is an important role. It reflects one of the key aspects of our recommendations: that there should be a standard way of commencing extraditions from any country. At the moment, many extradition requests come from countries with whom we have long-standing criminal justice relationships, and therefore we have fewer concerns about whether substantive criminal proceedings will be conducted in a fashion that New Zealanders will accept as fair. However, we anticipate that over time the number of requests from non-traditional countries will increase, and if there is no treaty confirming that New Zealand is generally accepting of that criminal justice system, there ought to be an expectation that such an evaluation is made before commencing a proceeding. We envisage that this evaluation will be made by the Central Authority, in consultation with the Ministry of Foreign Affairs and Trade, based on readily accessible information.

Responsibility for standard and simplified extraditions

- 2.11 In our Issues Paper, we proposed restricting the Central Authority's main role to standard extraditions, leaving primary responsibility for the backed-warrant (or "simplified") process to the Police, as it is effectively organised now.²⁸ Under this model, the Central Authority was to have only a supervisory role in backed-warrant extraditions. We were conscious of not wanting to interfere with the current efficiencies in the backed-warrant process.
- 2.12 We now recommend, however, that the Central Authority should have primary responsibility for all extraditions, be they standard or simplified extraditions. The New Zealand Law Society expressed concerns about the current approved country regime simply because it does not engage the court in considering evidence. It suggested, however, that these concerns would be alleviated to some extent by the Central Authority providing a further layer of assurance.²⁹
- 2.13 Our recommendation also reflects the submission we received from the Police, who agreed that the current procedure worked well, but continued.³⁰

However, Police considers that the establishment of a central authority covering all aspects of extradition and MACMA provides an opportunity to make further improvements to the backed warrant process. The Central Authority will have overall responsibility for and become the centre of expertise on extradition. It would therefore be well placed to undertake the legal and many other procedural responsibilities currently undertaken by Police. This would include formally receiving the request, reviewing its adequacy, and obtaining the warrant to arrest. Following arrest by Police, the management of legal proceedings and communication with the receiving country could also be managed by the Central Authority. This would greatly simplify current responsibilities and streamline processes.

- 2.14 Crown Law also accepted that while it was not necessary to change the current arrangements, giving responsibility for all extraditions to the Central Authority would facilitate the kind of Central Authority oversight that we envisaged in relation to all extraditions.³¹ We envisage that such a procedure would not remove the Police completely from the process, and we would

28 At [4.19]. The main difference between standard extraditions and the backed-warrant (or simplified) process is that, in backed-warrant cases there is no evidential inquiry. This makes the process more straightforward and faster.

29 New Zealand Law Society Submission at [9].

30 New Zealand Police Submission at 2–3.

31 Crown Law Submission at 3.

expect the Police and the Central Authority to work out how best to coordinate their roles. As the Police observed:³²

... that under this approach, Police would, and indeed must, remain closely involved with each case. This is needed in order to provide support and advice to the Central Authority and other law enforcement agencies, and to manage any risks to the public from individuals subject to extradition requests. A close working relationship between Police and the Central Authority will need to be established, with appropriate protocols and other arrangements as necessary.

2.15 The Police made a further point with which we agree:³³

As also emphasised elsewhere, it is critical that the proposed Central Authority has the resources and expertise to undertake its functions in a timely and effective fashion.

RECOMMENDATION

- R3 There should be one Central Authority that is responsible for processing any incoming or outgoing extradition or mutual assistance request.

The applicant in extradition proceedings

2.16 In our Issues Paper, we suggested the Central Authority should be the formal party that seeks extradition in the courts, rather than the requesting country.³⁴ As we noted, this can seem like a technical point, and one that has, perhaps, received somewhat mixed answers from the courts and from commentators. In our view, having the Central Authority control the conduct of the extradition proceedings is an important part of ensuring that the proceedings are conducted according to New Zealand values.

2.17 Therefore, our draft Extradition Bill contains a provision that makes the Central Authority the applicant in the Court,³⁵ responsible for the litigation and extradition-specific obligations of disclosure that we describe in Chapter 8.³⁶ In performing this role, the Central Authority must act independently of any requesting country.³⁷ Therefore, if it conducts extradition proceedings it is representing the interests of the New Zealand Government, not acting on instructions from the requesting country. To reflect this, the Central Authority will be able, as New Zealand prosecutors are, to discontinue the extradition if it becomes apparent that the interests of justice demand such a course.³⁸ We envisage that if it is apparent to the Central Authority that the Record of the Case is not likely to satisfy the necessary standard, or that one of the grounds for refusal would likely be found to apply, it would either not commence an extradition, or discontinue it once the difficulty has become apparent.

RECOMMENDATION

- R4 The Central Authority should be the applicant in any extradition proceeding.

32 New Zealand Police Submission at 3.

33 New Zealand Police Submission at 3.

34 Issues Paper, above n 27, at [4.31].

35 Extradition Bill, cl 5 (the definition of party).

36 Extradition Bill, cls 14 and 95–99.

37 Extradition Bill, cl 14(5)(a).

38 Extradition Bill, cl 14(2)(c).

Challenging the decision to commence an extradition proceeding

- 2.18 We have considered whether there ought to be a statutory appeal from the Central Authority's decision to commence extradition proceedings. We have rejected a statutory appeal. The reality is that most of the matters the Central Authority will consider in making the decision to commence proceedings will subsequently also be matters the extradition court will examine when determining whether the person sought is liable for extradition. To have a statutory appeal seems to us overkill, and would unnecessarily delay extradition hearings. The rights of the person are sufficiently protected throughout the process as a whole without the need for another appeal here.
- 2.19 We have also considered whether that same reality might make it appropriate to have a restriction on the ability to seek judicial review. Our Bill does not contain a clause preventing such a review. But judicial reviews should not be common and the scope for success should be very narrow. This observation is based on our view that the Central Authority's decision as to whether or not to commence an extradition proceeding is similar to the decision as to whether to prosecute in domestic criminal cases. It has been held that prosecution decisions are reviewable but only in very rare cases, and only in exceptional cases would such a review succeed.³⁹
- 2.20 Again, the reality is that the factors that could provide the basis for a judicial review will almost always be the same factors the Court must consider in the extradition proceeding itself. In response to this point, one could argue that the person sought should not have to go through an entire extradition proceeding just to prove that it was wrongfully commenced at the outset. In many respects we agree with this sentiment. That is why we consider it important that judicial review remains available for those rare cases where an allegation of illegality is made against the Central Authority. In those rare cases, the extradition proceeding could be suspended pending the determination of the judicial review application in the High Court.⁴⁰ For all other cases, however, we envisage that our new, more efficient extradition process will be capable of determining the merits of the proceeding in a sufficiently timely fashion.
- 2.21 For the reasons outlined above we have decided to leave judicial review available under the new Bill. There is only a small risk that extradition proceedings could be delayed, a risk that seems to us to be manageable when compared with the lengths necessary to limit recourse to judicial review.

ATTORNEY-GENERAL OR SOLICITOR-GENERAL

Current situation

- 2.22 The Attorney-General is currently New Zealand's Central Authority under MACMA. As such, the Attorney is responsible for receiving requests for assistance and deciding whether they are to proceed. The Crown Law Office in fact does much of the work on behalf of the Attorney, and the Solicitor-General and his or her deputies are able, in appropriate cases, to make decisions on the Attorney's behalf through the provisions of the Constitution Act 1986.⁴¹
- 2.23 In partial contrast, there is no formal Central Authority for extradition. The Minister of Justice has ostensible responsibility for extraditions to all countries, other than Australia and the United Kingdom. In practice, however, the Minister's involvement is limited to deciding

39 *Greymouth Petroleum Ltd v Solicitor-General* [2010] 2 NZLR 567 (HC) at [37]–[39]. For confirmation of the difficulties of reviewing a decision not to prosecute, see *Osborne v Worksafe New Zealand* [2015] NZHC 2991.

40 The High Court would be entitled to take this course of action by virtue of clause 66(3) of the Extradition Bill.

41 Constitution Act 1986, ss 9A and 9C.

whether requests from non-treaty or non-Commonwealth countries should proceed, and whether particular grounds for refusing an extradition request are made out. The reality is that the Crown Law Office fulfils the central role of processing requests from these countries and conducting any associated litigation. The Police are then responsible for receiving and processing the “backed-warrant” extradition requests from Australia and the United Kingdom. This division of responsibility is unnecessarily complex and would be resolved by appointing a Central Authority.

Our proposals in the Issues Paper

- 2.24 In our Issues Paper, we argued that it made sense for the Central Authority to be the same body for both extradition and mutual assistance.⁴² This reflects much of the reality of the current situation. Working on behalf of the Attorney-General, Crown Law does the work of the MACMA Central Authority, and it assists foreign governments with their extradition requests. There are clear advantages to the same body being a “one stop shop”. None of our submitters disagreed.
- 2.25 In the Issues Paper we then expressly asked whether it was better to have the Attorney-General or the Solicitor-General as the Central Authority.⁴³ We pointed to different advantages of designating the Attorney or the Solicitor as the Central Authority.⁴⁴ Both would act in their capacity as a non-political law officer: namely, the Attorney would emphasise the role of the executive in foreign affairs while the appointment of the Solicitor might emphasise the non-political nature of both processes. We did not prefer any particular option and in practice designating the Attorney, who often delegates the role to the Solicitor, maintains an effective balance and a “best of both” approach. Inevitably either choice would require the Crown Law Office to provide legal and administrative support.

Submissions

- 2.26 Submitters agreed that there should be one Central Authority and the proper Central Authority was the Attorney-General. The Crown Law Office submitted:⁴⁵

We consider the legislation should identify the Attorney-General, rather than the Solicitor-General, as the Central Authority for extradition. A key consideration for our view is the inter-governmental context in which extradition takes place. That context makes it appropriate for a member of the executive, rather than an official, to be identified formally as the Central Authority. Comparable jurisdictions (Australia, Canada and the United Kingdom) appear to take a similar approach. We also agree that it makes sense for the Central Authority for extradition to be aligned with the Central Authority for mutual criminal assistance, and see no reason to change the identity of the latter.

- 2.27 Perhaps the only partial reservation was from the Law Society, which would have preferred an independent stand-alone agency:⁴⁶

Ideally, the central authority would be an independent standalone agency separate from Crown Law, the Police, MFAT and the Ministry of Justice. However, the Law Society recognises that it is desirable to align the extradition and mutual assistance regimes insofar as possible, and that the volume of requests is unlikely to justify the establishment of a separate agency. In that context, the Law Society agrees that the Attorney-General (in practice the Solicitor-General/Crown Law) should assume the role of central authority. At an administrative level Crown Law would need to implement procedures to ensure its

42 Issues Paper, above n 27, [4.21] and [14.26].

43 At Q4.

44 At [4.22]–[4.25].

45 Crown Law Submission at [8].

46 New Zealand Law Society Submission at [8].

objectivity is not compromised when it is required to provide advice and act in proceedings but is also the agency whose decisions and procedures are being challenged

Our recommendation

- 2.28 In line with the submissions we received, we recommend that the Attorney-General should be the Central Authority.
- 2.29 We would expect that most mutual assistance functions will continue to be performed by the Crown Law Office, with only the most important decisions being referred to the Attorney. In extradition, most of the decisions will also be made in Crown Law by the Solicitor-General, or the relevant Deputy Solicitor-General. The Constitution Act provides a general delegation of Attorney-General functions to both the Solicitor-General and to the Deputy Solicitors-General, so it is unnecessary to repeat that ability in either of the specific bills.⁴⁷
- 2.30 Ultimately, we consider that regardless of who performs the functions of the Central Authority, the more important goal in our proposed reform is to provide clarity as to what decisions the Central Authority must make, and the criteria by which they are to be made. In the Bills that are appended to this Report, we have endeavoured to do exactly that.

RECOMMENDATION

R5 The Attorney-General should be the Central Authority.

COMMUNICATION WITH THE REQUESTING COUNTRY

- 2.31 An important part of the role of the Central Authority under both the Extradition and Mutual Assistance Bills will be providing guidance to the foreign country. Much important work is to be done in receiving inquiries and helping foreign countries frame their requests and supporting documents so that they fit the requirements of New Zealand law. This will remain so, even given the flexibility that we have tried to build into the way those requirements are expressed in both Bills.
- 2.32 Under the current statutes, it is not clear whether the Central Authority (in the case of the mutual assistance), or Crown Law (in relation to extradition), are giving “legal advice” when either performs this function and are therefore protected by legal professional privilege. We discussed this problem in our Issues Paper and asked submitters for their views.⁴⁸ The general consensus in the submissions was that this issue should be addressed through specific provisions in each Bill, rather than relying on the ordinary rules of privilege and confidentiality. The submitters also agreed that, while the requesting country should be able to control disclosure of this information through the usual process of claiming and waiving the protection, there should be some kind of override mechanism.
- 2.33 In keeping with the submissions, we have included confidentiality provisions in both Bills.⁴⁹ In the extradition context, this includes a provision that makes it plain that if the Central Authority considers itself obliged to disclose the information (by virtue of a court order or otherwise) then it must advise the requesting country that unless it waives the confidentiality protection and disclosure takes place the Central Authority will need to withdraw the Notice

⁴⁷ See Constitution Act 1986, ss 9A–9C.

⁴⁸ Issues Paper, above n 27, at [4.33]–[4.40] and Q6.

⁴⁹ Mutual Assistance Bill, cl 14; and Extradition Bill, cls 107–112.

of Intention to Proceed and thereby end the proceedings.⁵⁰ We consider that the provisions strike an appropriate balance between maintaining a proper relationship of openness and trust between the Central Authority and the requesting country, and maintaining New Zealand law enforcement values.

RECOMMENDATION

- R6 New extradition and mutual assistance legislation should contain provisions that explain when communication between the New Zealand Central Authority and a foreign central authority or government is confidential.

50 Extradition Bill, cl 112.

Chapter 3

The role of treaties

NO REQUIREMENT FOR A TREATY

- 3.1 Both the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and the Extradition Act 1999 currently allow requests from countries that do not have a pre-existing treaty relationship with New Zealand. However, as we explained in our Issues Paper, the statutes present very different models of how treaties might affect requests that are made.⁵¹ Under MACMA, a request made under a treaty is essentially the same as if it is not made under the treaty. Under the Extradition Act, a treaty can significantly alter several aspects of the extradition process, including expanding the nature of offences that might lead to extradition.
- 3.2 We recommend continuing the ability of all countries to seek mutual assistance and extradition from New Zealand, and indeed our Bills are designed to provide a satisfactory level of assistance to all countries. However, we also propose to replicate the current distinction between the two statutes: the new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) will give all countries the ability to make the same requests with only minor scope for treaties to alter how that assistance is given, while under the Extradition Bill, treaties will enable some extradition requests to be made that could otherwise not be made, and allow for other important variations.

RECOMMENDATION

- R7 A treaty should still not be necessary for an extradition or to provide mutual assistance.

THE DIFFERING NATURE OF EXTRADITION AND MUTUAL ASSISTANCE TREATIES

- 3.3 There are two major differences between the way treaties interact with domestic legislation in relation to mutual assistance and extradition that are important to the way in which we have drafted the proposed Bills:
- First, there is only one mechanism for extraditing a person from New Zealand: The Extradition Act must be used, even if there is a treaty. Mutual assistance is not the same. While the MACMA is one route by which assistance may be given, interagency agreements provide an overlapping but alternative process for co-operation across government and sometimes provide for assistance in the criminal context. We discussed a range of interagency agreements, and bilateral and multilateral treaties and arrangements, in Chapter 13 of our Issues Paper. However, MACMA is the main (but not the only) route by which coercive assistance can be given. Therefore, unlike extradition, a treaty could be relevant to mutual assistance in two ways: a treaty that forms the basis of an interagency scheme could seek to provide an alternative to MACMA, which would require its own legal basis in

⁵¹ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at chs 3 and 13.

domestic law; or a mutual assistance treaty could seek to modify or complement MACMA (as extradition treaties seek to modify or complement the extradition law).

- Second, unlike extradition treaties, there is no history of mutual assistance treaties being given direct effect in domestic legislation. Mutual assistance is a way of tapping into existing domestic law relating to investigative and evidence-gathering powers. Many international instruments are non-binding (for example, the Harare Scheme⁵² and the Financial Action Task Force Standards).⁵³ Those agreements that seek to be binding often contain phrases like: “without prejudice to domestic law”,⁵⁴ “to the extent not contrary to the domestic law”,⁵⁵ and “wherever possible and consistent with fundamental principles of domestic law”.⁵⁶ Given that these international instruments defer, almost entirely, to domestic law, there is not the same concern about expressly using the procedures as described in the treaties.

TREATIES AND OUR EXTRADITION BILL

- 3.4 Under our proposals, a new Extradition Act should provide the basis for extradition. Our basic intention is to provide all countries a procedure for requesting extradition, regardless of their treaty relationship with New Zealand. Some of those treaties necessarily include terms that will be different from those in the procedure under the new Bill.⁵⁷
- 3.5 The current Act takes account of that possibility by providing in section 11 that, subject to some exceptions: “If there is an extradition treaty in force between New Zealand and an extradition country, the provisions of this Act must be construed to give effect to the treaty.”⁵⁸
- 3.6 This section, however, has created some confusion, especially when the procedures and terminologies employed in the treaties are no longer used domestically in New Zealand, and the relationship between those treaties and the grounds for refusal in the current Act have created difficulty.⁵⁹ The effect can be that, rather than helping the extradition process, the treaties can create impediments. Furthermore, they do not expressly recognise human rights in the way that we currently expect our law to do so.
- 3.7 In developing our recommendations we have been conscious of the need to create a space within our new Bill for the treaties to operate. We have, however, tried to do so in a way that does not diminish from the base of what requesting countries can expect and the basic protections required for people who are sought. The result is that we recommend a significant change in our new Bill; that is, the general interpretative provision of section 11 should not be replicated. Instead it should be replaced with a provision that specifically identifies the requirements, procedures and protections in the Bill that may be supplemented by the terms of the treaties.⁶⁰

52 Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002, October 2005 and July 2011 [Harare Scheme].

53 Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (February 2012).

54 See for instance United Nations Convention Against Transnational Organized Crime 2225 UNTS 209 (opened for signature 15 November 2000, entered into force 29 September 2003), art 18(4).

55 See for instance United Nations Convention Against Transnational Organized Crime, above n 54, art 18(17).

56 See for instance United Nations Convention against Corruption 2349 UNTS 41 (opened for signature 21 October 2003, entered into force 14 December 2005), art 46(18).

57 See Issues Paper, above n 51, at ch 3 for a detailed summary of New Zealand’s existing bilateral and multilateral extradition treaties.

58 Extradition Act 1999, s 11(1). The exceptions to this general principle are outlined in s 11(2). The exceptions to the exceptions are then outlined in s 11(3).

59 See the discussion in Issues Paper, above n 51, at [3.47]–[3.60].

60 Extradition Bill, cl 11. This is based on a similar approach taken in the Canadian extradition legislation. For a discussion of this approach, see Issues Paper, above n 51, at [3.72] and [3.76]–[3.79].

The straightforward aspects of the new relationship

3.8 In the following chart we set out areas of likely interaction between New Zealand's current extradition treaties and our proposed Extradition Bill, and explain how those provisions might be supplemented by treaty provisions. Notably, none of New Zealand's existing bilateral extradition treaties are with approved countries. Therefore, this analysis relates only to the standard extradition procedure in the Bill.

AREA	DEFAULT POSITION IN BILL	WHAT THE TREATIES SAY	HOW TREATIES CAN SUPPLEMENT THE DEFAULT POSITION	CLAUSE IN OUR BILL
Existence of a "parallel" New Zealand or treaty offence	There must normally be a parallel offence under New Zealand law.	Treaties usually identify individual offences as extradition offences. ⁶¹	Treaties should be able to <i>expand</i> the definition of "extradition offence" in the Act, but may not limit it. ⁶²	7(1)(a)(ii) and (b)(ii)
Convicted in absentia	The Bill treats a person convicted in absentia as an accused person who has not been convicted.	Some bilateral treaties state that persons convicted <i>in absentia</i> or sentenced to the similar concept of <i>in contumacium</i> should be treated as accused persons. Other treaties are silent on the issue.	There should be no special ability for the in absentia prohibition to be altered in future treaties. ⁶³	6
Necessary documents for issuing provisional arrest warrant	No documents are required but the Judge must be satisfied that: (a) a warrant for arrest has been issued in the requesting country; (b) the person is in New Zealand or on their way there; and (c) it is necessary to issue the warrant urgently.	The modern treaties require: (a) a description of the person and the offence or sentence; (b) a statement regarding the existence of a warrant/ judgment; and (c) an indication of the country's intention to make an extradition request. The Imperial treaties tend to refer generally to "such information or evidence as would justify arrest in the requesting country".	Any express reference to treaty requirements in the Bill is unnecessary. ⁶⁴	71
Speciality and prohibition on return to third countries	Most extradition requests ⁶⁵ must be accompanied by an assurance as to speciality and prohibition on extradition to third countries.	The treaties all contain undertakings as to speciality. Modern treaties also refer to the prohibition on return to third countries.	The speciality requirement is expressly maintained in our Bill, independent of treaties.	23 and 24

61 Bilateral treaties mainly list offences, most of which (but not all) have clear parallels with New Zealand offences. Multilateral treaties designate offences as extradition offences, and many go further and create an obligation to extradite or prosecute.

62 Issues Paper, above n 51, at [3.49]–[3.57] and [5.5]–[5.12].

63 The rule concerning convictions in absentia is widely accepted. Given that current treaties either follow the rule or are silent as to expressing a conflict, it seems appropriate not to provide for a possibility that might override such a long-accepted norm. We note also that the Hong Kong Treaty has a discretionary ground for refusal for convictions in absentia: 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 People's Republic of China (signed 3 April 1998, entered into force 1 October 1998), art 7(4).

64 The treaty requirements will, however, be relevant to the Central Authority's decision whether to apply for a provisional warrant in the first place: Extradition Bill, cl 14(5)(c).

65 The exception is extradition requests from Australia, for which these assurances are not required. See discussion in ch 7.

AREA	DEFAULT POSITION IN BILL	WHAT THE TREATIES SAY	HOW TREATIES CAN SUPPLEMENT THE DEFAULT POSITION	CLAUSE IN OUR BILL
Requests for additional information or evidence	If a judge indicates further information is necessary, the Central Authority may apply for the hearing to be adjourned to allow for it to consult with the requesting country.	Under the four most recent treaties, New Zealand must or may set a deadline for the requesting country to respond, otherwise the person “shall be discharged”. ⁶⁶	There is no need to refer to the treaty obligations.	88
Competing requests	The Central Authority determines the country. ⁶⁷	The four most recent treaties contain a non-exhaustive list of factors. Under the Imperial treaties, it is “the earliest in date” that prevails. ⁶⁸	Any treaty obligation will be a relevant factor in determining competing requests.	25(2)(b)(ii) and 14(5)(c)
Representation	The Central Authority exercises its judgement and will appear in court as the party.	The Hong Kong and Korean treaties provide that the requested country should represent the interests of the requesting country in any extradition proceedings.	Our Bill can be read consistently with the treaties, which should not be able to alter the Central Authority’s independence.	14 and in particular 14(5)(a)
Seizing and surrendering property	The Bill contains provisions dealing with search and seizure on arrest and the return of any property seized. ⁶⁹	All of the treaties state that, to the extent permitted under New Zealand law (and subject to the rights of third parties), New Zealand will surrender any items seized from a requested person at the time of their arrest that could be evidence of the commission of the extradition offence. ⁷⁰	<p>The gathering of information to support the substantive charges behind the extradition should be sought through a mutual assistance request, and governed by the Search and Surveillance Act 2012.</p> <p>There is no real issue of inconsistency, as all treaty obligations are “to the extent permitted under the law of the requested party”.</p>	119 and 120

The slightly more complex areas of interaction

- 3.9 We have taken an approach different from some of the treaties in five other areas, but for the reasons we explain here we do not consider that the departure is significant. In any event, the departure works to the benefit of the requesting state, within a framework that also guards the interests of the person sought.

Provisional arrest

- 3.10 Most of the treaties contain an article specifying that a person who is provisionally arrested must be discharged after a set number of days if New Zealand has not received an extradition request. Many also state that the request must include the “evidence” (that is, the Record of the Case under our new Bill). The treaties sometimes specify as little as 14 days,⁷¹ although some make provision for the Court to set an alternative deadline.⁷²

⁶⁶ Such a discharge does not prevent a further request for extradition: Extradition Bill, cl 58.

⁶⁷ In making this determination, the Central Authority must consider several factors, including the provisions of any extradition treaty: Extradition Bill, cl 14(5)(c). The exception is that, if one of the requests is from the International Criminal Court, the tests in ss 61–66 of the International Crimes and International Criminal Court Act 2000 apply.

⁶⁸ Although most ameliorate that approach with the addition of an ability to waive that claim.

⁶⁹ These provisions aim to replicate the equivalent provisions under domestic law, modified in limited ways to reflect the extradition context.

⁷⁰ Some treaties go further and refer to any items in the person’s possession at all, or any items “if found” that could be evidence or items obtained as a result of the offending (that is, proceeds). In addition, some treaties state that these items should be surrendered even if the person is not extradited in the end due to death or escape.

⁷¹ Examples of specified deadlines include: 14 days in the treaty with Belgium (although it appears that the request does not need to include the full evidence); 30 days in the treaties with Argentina, Columbia, Ecuador, El Salvador, Estonia and Finland; 40 days in the treaty with the Czech Republic; 45 days in the treaties with Fiji, Korea and the United States; 60 days in the treaty with Hong Kong; two months in the treaties with Albania and Argentina; and 90 days in the treaty with Chile: see list of treaties in Schedule 3 to the Extradition Bill, at ch 16 of this Report.

⁷² For example, the treaties with Fiji and Albania: see list of treaties in Schedule 3 to the Extradition Bill, at ch 16 of this Report.

- 3.11 Our Bill states that following a provisional arrest, the Court must set a time by which the Central Authority must file the Notice of Intention to Proceed.⁷³ In setting the timeframe by reference to the Notice of Intention to Proceed, we are opting for a different approach than most of the treaties. That is because our approach does not require “the evidence” to be formally presented within the statutory timeframe. There is a sound policy reason for this: requesting countries may need more time to prepare their evidence as a Record of the Case, as the form will be unfamiliar to most countries and criminal cases are increasingly complex. Under our Bill, the Court would set a later date for disclosure of the Record of the Case so there is an alternative mechanism for ensuring that “the evidence” is presented in a timely manner.⁷⁴ For this reason we do not believe that our proposal is a significant departure from our international obligations.

Arrest

- 3.12 Most of the pre-1947 Imperial treaties contain articles stating that any arrested person must be discharged if sufficient evidence to warrant extradition has not been presented within two months.⁷⁵
- 3.13 Our Bill does not set a time limit between arrest and disclosure of the evidence. We have proposed that, unless a person is arrested under a provisional warrant, the Court must have a preliminary conference within 15 days of a person’s arrest.⁷⁶ At that conference, the Court must set a date for disclosure of the Record of the Case.⁷⁷ We decided not to provide any statutory guidance as to how to choose that date because cases will vary enormously in complexity. We would expect that, in setting the time, judges will use the treaty requirements as a guiding tool.

The standard of evidence

- 3.14 The standard of evidence required is broadly the same in all the treaties. If the person is accused of an extradition offence the evidence must “justify committal for trial” in New Zealand. If the person has been convicted of an extradition offence the evidence must “prove that the person is identical to the person who was so convicted”.
- 3.15 Committal no longer exists in New Zealand. Nowadays the mechanism for testing whether there is sufficient evidence to justify a trial is found in section 147 of the Criminal Procedure Act 2011. This section allows for charges to be dismissed for want of evidence. As we discuss in Chapter 9, our Bill sets a new standard based on the “no case to answer” test in section 147, in relation to extradition requests for accused persons. We consider that, in substance, this test is the same as the old test applied in committal proceedings so, despite the variance in language, our view is that there is no issue of inconsistency with the treaties.

Admissibility and authentication

- 3.16 The treaties all state that duly authenticated documents “shall be admitted” as evidence in New Zealand extradition proceedings. The authentication provisions in the treaties then vary.
- 3.17 Most of the modern treaties refer generally to “documents”, whereas the older treaties (and the United States treaty) expressly mention primary documents in the form of warrants, depositions and other statements given under oath, judgments and judicial certificates.

⁷³ Extradition Bill, cl 72(2).

⁷⁴ Extradition Bill, cl 30(2)(a).

⁷⁵ For example, the treaties with Argentina and Belgium; see list of treaties in Schedule 3 to the Extradition Bill, at ch 16 of this Report.

⁷⁶ Extradition Bill, cl 27(2)(b).

⁷⁷ Extradition Bill, cl 30(2)(a).

- 3.18 All but one of the treaties require two forms of verification for such documents; namely, a signature or the certificate of a judge, magistrate or other officer of the state, and either the oath of a witness or the seal of a state ministry. Some provide that alternative forms of authentication may be used instead, if that is permissible under New Zealand law.
- 3.19 Under our Bill, the requesting country will need to produce a Record of the Case to prove that the criteria for extradition are met.⁷⁸ For requests relating to convicted persons, the Bill states that the Record of the Case must attach the official documents recording the conviction and, if applicable, the sentence and the extent to which it has been served.⁷⁹ Such a Record will then be admissible if it is accompanied by a certificate prepared by a judicial or prosecuting authority, which states that the documents in the Record of the Case are accurate and complete.⁸⁰ For requests relating to accused persons, the evidence must be presented in summarised form. The Record is then admissible if an investigating authority or prosecutor provides a detailed certification as to the availability and sufficiency of the evidence, and the requesting country's compliance with the duty of candour and good faith.⁸¹ These certification requirements are discussed further in Chapter 9. We consider that, although different, these authentication requirements are in keeping with the spirit behind the authentication articles in the treaties. Both aim to ensure that the provenance of the supporting documentation is clear.

Grounds for refusal

- 3.20 In the Issues Paper, we proposed that while treaties should be able to add grounds for refusal or expand the application of existing grounds, no treaty should be able to limit or override any of the statutory grounds.⁸² We explain how we envisage this relationship will work in practice in Chapter 5, which discusses the grounds for refusal in detail.

TREATIES AND OUR MUTUAL ASSISTANCE BILL

- 3.21 In addition to interagency agreements, New Zealand is a party to the following international instruments:
- **Bilateral mutual assistance treaties** with Hong Kong, China, Korea and the United States. The first three of these treaties are general and broadly follow the format of the United Nations Model Treaty on Mutual Assistance and MACMA. The United States treaty is specific. It relates solely to providing assistance through automated fingerprint and DNA matching. MACMA was amended by the Mutual Assistance in Criminal Matters Amendment Act 2015 to give effect to this treaty.
 - **Multilateral crime agreements** including the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Narcotics Convention), against Transnational Organised Crime (UNTOC), against Corruption (UNCAC), against Torture (CAT), against the Taking of Hostages, on the Prevention and Punishment of Crimes against Internationally Protected Persons, and on Cybercrime (the Budapest Convention, yet to be ratified). These agreements contain a varying degree of detail as to the mutual assistance obligations between the parties in relation to specified crimes.

78 Extradition Bill, cl 33(1).

79 Extradition Bill, cl 33(3)(d).

80 Extradition Bill cl 33(3)(a) and (e).

81 Extradition Bill, cl 33(2)(a) and (f).

82 Issues Paper, above n 51, at 86.

- **Non-binding instruments** including the Harare Scheme and the Financial Action Task Force Standards. These instruments provide important and detailed guidance as to what should be in mutual assistance legislation.

3.22 Clearly the non-binding instruments should not modify or supplement our proposed Bill. However, we have mentioned these instruments here because we recognise the importance of making our Bill as consistent as possible with the guidance in these schemes. That is what we have sought to achieve.

Areas of possible modification

Existing treaties

3.23 We have reviewed New Zealand's binding mutual assistance treaties to identify where they contain additional detail to that contained in our proposed Bill. The table below reflects how we see that interaction working in future.

AREA	OUR BILL WITHOUT REFERENCE TO THE TREATY	WHAT THE TREATIES SAY	OUR PROPOSALS AND REASONS
Form and content of incoming requests	A request must relate to a criminal matter (including certification thereof) or criminal proceeds matter, and must include any information required in relation to a specific type of assistance, or required by regulations.	The treaties often contain detailed rules as to the form and content of requests.	The treaties may require additional information but they should not derogate from any required information.
Urgency	The Bill contains no urgency procedure.	Several treaties provide for requests to be made orally or via certain forms of communication in urgent situations, with the written request or formal confirmation to follow.	Urgency can be dealt with operationally.
Costs	Our Bill provides that if assistance would impose an excessive burden, the Central Authority may require a reasonable cost contribution, subject to treaty obligations (cl 22).	Both the bilateral and multilateral agreements begin with the presumption that the requesting party bears the costs, but some treaties provide exceptions.	Our Bill is explicitly made consistent with treaty obligations.
Grounds for refusal	Our Bill has two types of grounds: grounds where the Central Authority must refuse to provide assistance (cl 18), and grounds where the Central Authority may refuse to provide assistance (cl 19).	Several treaties state that no request should be refused on the grounds of "bank secrecy" ⁸³ or because the "offence is also considered to involve fiscal matters". ⁸⁴ No treaty contains any obviously new grounds for refusal, but they do use different words to cover similar concepts.	The Bill expressly provides that the Central Authority must take account of New Zealand's international obligations (cl 19(3)). None of the grounds on which the Central Authority must refuse are inconsistent with our treaty obligations.
Postponing, conditional and partial assistance	Assistance may be provided subject to conditions (cl 22).	Most of the treaties state that assistance may be postponed if it would interfere with a domestic criminal matter, but before postponing the requested country must consult about the possibility of conditional assistance.	The Bill is consistent with the obligations in the treaties.
Providing reasons for refusing	The Bill provides that reasons must be given.	Reasons must be given for any refusal or postponement.	The Bill is consistent with the treaty obligations.

⁸³ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (opened for signature 20 December 1988, entered into force 11 November 1990); United Nations Convention against Corruption, above n 56; and United Nations Convention Against Transnational Organized Crime, above n 54.

⁸⁴ United Nations Convention against Corruption, above n 56; United Nations Convention Against Transnational Organized Crime, above n 54; and Convention on Cybercrime CET 185 (opened for signature 23 November 2001, entered into force 1 July 2004).

AREA	OUR BILL WITHOUT REFERENCE TO THE TREATY	WHAT THE TREATIES SAY	OUR PROPOSALS AND REASONS
Use of material provided	Our Bill provides that the requesting country must give an undertaking as to “speciality” (cls 30 and 34).	The treaties all contain such an assurance. Some contain the caveat that, if prior notification is not possible, the material may still be used for a new exculpatory purpose. ⁸⁵ Some also state that, if requested, the material provided must be returned.	The return of material is simply an extra assurance, and the Central Authority can authorise use of the information for a new exculpatory purpose. ⁸⁶
Transfer of witnesses including prisoners	We are proposing detailed provisions governing this form of assistance. Specific assurances will be required.	Several treaties contain very detailed articles regarding the transfer of witnesses, including prisoners. These articles contain the types of assurances that the Bill will require. Notably, some of the treaties deviate from our proposed Bill in relation to the assurance that the witness will not be prosecuted for additional offending. ⁸⁷	Assurances given generally in a treaty are likely to be sufficient to meet the requirement of the Bill.
Additional types of assistance	Our Bill provides that a form of assistance can be granted so long as it is legally available, and subject to the requirements of New Zealand law.	The various treaties refer to several additional types of assistance.	In our view, our Bill fully complies with the types of assistance mentioned in the treaties.

Future treaties and other agreements

- 3.24 Our proposed Bill will specify, in several instances, that the Central Authority cannot provide a type of assistance unless the requesting country has provided specific assurances (for example, in relation to search and surveillance assistance, interim restraining orders and transfer of witnesses). To facilitate timely search assistance, New Zealand may wish to negotiate a treaty or other agreement in advance with certain countries (such as Australia) so that the requisite assurances do not always need to be provided on a case-by-case basis.⁸⁸ Our Bill has been drafted to facilitate this.

RECOMMENDATION

- R8 An extradition or mutual assistance treaty should only be able to modify the statutory process in limited ways. The areas of possible modification should be expressly identified in the legislation.

⁸⁵ United Nations Convention against Corruption, above n 56; and United Nations Convention Against Transnational Organized Crime, above n 54.

⁸⁶ See commentary to cls 30 and 34 of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], in ch 17 of this Report.

⁸⁷ The Hong Kong treaty states that no additional charges may be laid for 21 days (as opposed to 15, which is in our Bill and the other treaties). This provides more protection than our Bill. No legislative recognition is needed to give effect to that. The Korea, Hong Kong and China treaties state that no additional charges may be laid except for perjury, making false declarations or contempt in relation to the giving of evidence. The Bill makes explicit recognition of “proceedings that are similar to perjury and that have been agreed as an exception in a [mutual assistance] treaty”: cl 33(1)(d)(iii).

⁸⁸ Mutual Assistance Bill, cl 29.

Chapter 4

The relationship with the New Zealand Bill of Rights Act

INTRODUCTION

- 4.1 Some rights and freedoms are of such fundamental importance to New Zealand that they have been given statutory recognition in the New Zealand Bill of Rights Act 1990 (NZBORA), and are subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.⁸⁹ New Zealand recognises that some of these rights and freedoms should apply generally, while others apply specifically to persons arrested or detained, or charged with an offence.⁹⁰ In addition to NZBORA, New Zealand has also affirmed some of the rights it views as being of fundamental importance in international treaties and conventions.⁹¹ Accordingly, any framework that allows for the New Zealand government to provide assistance to a foreign government in the investigation, prosecution and punishment of crime must have some mechanisms to protect the rights of individuals in New Zealand who would be affected.
- 4.2 This chapter discusses how our proposals for the New Zealand procedures in the new Extradition Bill and Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) are consistent with New Zealand's human rights obligations.
- 4.3 Another major point of recognition for New Zealand's human rights obligations comes in the assessment that the Central Authority, the courts and, in limited cases, the Minister undertakes when considering the grounds for refusal. These important matters are dealt with in Chapter 5, and in the commentary to the grounds for refusal clauses in both Bills.

EXTRADITION

The criminal process rights in NZBORA

- 4.4 While some rights in NZBORA apply generally, for example sections 21 (the right to be free from unreasonable search and seizure) and 22 (the right not to be arbitrarily detained), other rights apply only in relation to someone charged with an offence.⁹² This creates an issue for extradition proceedings as in that context there is no New Zealand offence for which someone is being charged.
- 4.5 Where a foreign government has requested New Zealand to surrender a person so that person can be tried or punished for a criminal offence of which they have been accused or convicted in that foreign country, the request will either be refused or result in an extradition proceeding in

⁸⁹ New Zealand Bill of Rights Act 1990, s 5.

⁹⁰ New Zealand Bill of Rights Act 1990, ss 24–25.

⁹¹ See for example International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

⁹² New Zealand Bill of Rights Act 1990, ss 24–25.

New Zealand. Those are the only two options. A proceeding must be held to determine whether the person should be extradited to the foreign country before any extradition can take place.

- 4.6 An extradition proceeding has both domestic and international characteristics. Although the requesting party makes the request for the extradition, it will always be the receiving body in New Zealand that notifies the court and requests an arrest warrant to be issued. Furthermore, an extradition proceeding cannot be easily classified as civil or criminal.⁹³ The proceeding does not call for a trial in New Zealand; the judge is not required to determine whether the person sought is guilty of the crime for which they have been accused or convicted. Rather, under our Bill the judge must determine whether there is an extraditable person,⁹⁴ an extradition offence⁹⁵ and whether any of the statutory grounds for refusing to surrender the person sought apply.⁹⁶ For requests under the standard procedure, the judge must also consider whether there is a case for the respondent to answer based on the evidence presented by the requesting country.⁹⁷ Even in these circumstances, the extradition hearing is not “treated as a trial on the merits because that approach would involve questioning the foreign state’s judicial system”.⁹⁸
- 4.7 By majority, the Supreme Court recently held in *Dotcom v United States of America (Extradition)* that the two sections providing criminal process rights in NZBORA are not engaged in extradition proceedings because a person who is sought for extradition is not “charged with an offence” in the way those sections envisage.⁹⁹ The Supreme Court acknowledged the strong line of authority in overseas jurisdictions that had concluded that the nature of the extradition process does not attract criminal process rights. For instance in *Kirkwood v United Kingdom*, it was held that while an extradition hearing involves a limited examination of the issue to be decided at trial, it does not constitute or form part of the process for determination of guilt or innocence.¹⁰⁰
- 4.8 The majority in *Dotcom (Extradition)* held that sections 24 and 25 of NZBORA are framed to protect the rights of persons who are to be the subject of the criminal trial process, not the extradition process, which has a different limited purpose. McGrath and Blanchard JJ noted:¹⁰¹
- We see no sound basis in human rights jurisprudence or otherwise for an interpretation of the criminal process rights protections in the BORA that would apply them to an extradition hearing. Their application would change the preliminary nature of the hearing and give it an altogether different character.
- 4.9 However, not all the criminal process rights in NZBORA are inapplicable. McGrath and Blanchard JJ went on to note in relation to their determination of what natural justice might nevertheless require:¹⁰²

The determination of whether requested persons are eligible for surrender is made under a judicial process. The Extradition Act requires a hearing, meaningful judicial assessment of whether the evidence

93 We understand that extradition proceedings may be classified as civil proceedings for the purpose of court management processes in New Zealand. However, the case law indicates that they are “criminal proceedings, albeit of a very special kind”: *R (Government of the United States of America) v Bow Street Magistrates’ Court* [2006] EWHC 2256 (Admin), [2007] 1 WLR 1157, cited favourably in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 [*Dotcom (Extradition)*].

94 Extradition Bill, cl 5 defines an “extraditable person”.

95 Extradition Bill, cls 7–8 define “extradition offence”. This is discussed further in ch 6.

96 Extradition Bill, cls 20–21 set out the grounds for refusal. Clauses 34 (standard) and 44 (simplified) explain when the Court may determine that a person is liable for extradition.

97 Extradition Bill, cl 34(4)(c) and 34(5). This inquiry is discussed further in ch 9.

98 *Bujak v District Court at Christchurch* [2009] NZCA 257.

99 *Dotcom (Extradition)*, above n 93.

100 *Kirkwood v United Kingdom* (1984) 6 EHRR 373 (ECHR).

101 *Dotcom (Extradition)*, above n 93, at [115].

102 At [184].

relied on by the requesting state demonstrates a prima facie case, and a judicial standard of process in making the decision. The Act also gives requested persons the right to contest fully their eligibility for surrender, including by calling evidence themselves and making submissions to challenge the sufficiency and reliability of the evidence against them. The record of case procedure does not limit requested persons' ability or right to do this. The consequence is that an extradition hearing under the Extradition Act has the same adversarial character as a committal hearing. All these features reflect a high content of natural justice in the process.

- 4.10 We have adopted this approach in framing our Extradition Bill, namely that while the values contained in many of the rights in section 24 and 25 of NZBORA remain important in the context of extradition and fall within broad rubric of natural justice, they might need to be altered to fit this context.¹⁰³

The right to natural justice

- 4.11 Section 27 of NZBORA provides for the right to justice. Subsection (1) provides that:

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

- 4.12 The principles of natural justice concern procedural fairness. Observing natural justice principles has traditionally required compliance with the right to hear the other side, and the right to be free from bias by the decision maker. The principles operate to ensure a fair decision is reached by an objective decision maker.
- 4.13 As indicated above, the Supreme Court in *Dotcom (Extradition)* discussed the applicability of section 27 of NZBORA to extradition proceedings. The Court held that in the exercise of its public functions under the Extradition Act, the court is a public authority determining the rights of persons, such as the appellant's liberty and freedom of movement, and accordingly, the right to natural justice must be observed in extradition.¹⁰⁴ It then clarified that the "content of the right to natural justice, however, is always contextual".¹⁰⁵
- 4.14 The right to natural justice, for instance, imports a disclosure requirement, but as the majority emphasised, it has to be within the context of extradition. In the Extradition Bill, we have included a requirement that, in standard extraditions, if the person sought is accused of an extradition offence, the requesting country must produce evidence to show that there is a criminal case for that person to answer.¹⁰⁶ We propose that this evidence should be presented to the Court as a summary, rather than presenting all the actual evidence.¹⁰⁷ In a criminal proceeding, section 27 would entitle a person facing trial in New Zealand to receive a copy of all of the witness statements and other evidence the prosecutor seeks to rely on at the hearing, prior to the hearing itself. However, as recognised by the Supreme Court, in an extradition proceeding disclosure would require something less, as what is involved is not a full trial where the court is concerned with matters of final proof of guilt.

103 See also Glazebrook J's judgment in *Dotcom (Extradition)*, above n 93. Glazebrook J disagreed with McGrath and William Young JJ, finding that ss 24–25 of the New Zealand Bill of Rights Act 1990 do apply in the extradition context, but she acknowledged that the application of those provisions is "subject to any necessary modifications related to the nature of the extradition proceedings": at [277].

104 At [118] per McGrath and Blanchard JJ.

105 At [120] per McGrath and Blanchard JJ.

106 Extradition Bill, cl 34(4)(c). The evidential inquiry is discussed further in ch 9.

107 Extradition Bill, cl 33(2)(d).

- 4.15 But, importantly, under our proposal the Record of the Case would also require the disclosure of any known evidence that could substantially undermine the case.¹⁰⁸ In the context of an extradition hearing, these disclosure rights are appropriate and would comply with section 27.

HOW THE EXTRADITION BILL REFLECTS NZBORA

- 4.16 In developing our policy for the Extradition Bill we analysed the rights contained in sections 21–27 of NZBORA and broke them down into the following categories:

- those that unquestionably apply to the extradition process, and are either provided for in our Bill or would simply apply as a matter of general law;
- those that cannot directly apply because the person sought is not charged with an offence in New Zealand, but should apply by analogy – we consider that the values behind these rights should be reflected in the new Bill but in a way that is moulded to fit the extradition context; and
- those that do not apply to the extradition proceedings in the way that they apply in criminal cases (for example, the right to a jury trial).

- 4.17 **Category One** – rights that apply directly to the extradition process.

NZBORA SECTION	SUMMARY OF RIGHT	CLAUSES IN THE BILL	HOW THE BILL REFLECTS NZBORA PRINCIPLES
21	Protection against unreasonable search or seizure.	119 and 121	The Extradition Bill will only allow for search associated with arrest and extradition in terms that are similar to the current position in the Search and Surveillance Act 2012. Other non- warranted searching – for example, to investigate the offence in the foreign country – will not be authorised by this Bill.
22	Right not to be arbitrarily arrested or detained.	28, 29, 40, 41, 57, 68, 71, 72, 75–80	The Bill contains provisions governing arrest and detention. The provisions in our Bill closely mirror existing domestic bail procedures.
23(1)(a)	Right to be informed of the reason for arrest or detention.	n/a	A separate provision is not needed in the Extradition Bill. The NZBORA provision is directly applicable as the arrest will happen in New Zealand.
23(1)(b)	Right to consult and instruct a lawyer without delay when arrested or detained.	n/a	The NZBORA requirement that everyone who is arrested is entitled to a lawyer is clear, and there is little that would be achieved by repeating that in the Extradition Bill.
23(1)(c)	Right to habeas corpus and lawful detention.	47(2)(b)(ii)(A)	The Bill contains a provision that prevents any extradition from occurring before a person has had a chance to make a habeas corpus application. There is nothing in our Bill that would make habeas corpus unavailable.
27(1)	The right to natural justice.	n/a	There is no need to specifically replicate this right in the Bill for two reasons. First, it applies directly. Second, several provisions in the Act are designed to reflect the right to justice, for instance those governing the disclosure regime, the general principles and the entitlements of respondents.
27(2)	The right to judicial review.	66 and 69	There is nothing in the Bill to prevent a person sought from seeking judicial review of a determination made by any public authority during extradition proceedings. The Bill does state, however, that the judicial review should be heard alongside any appeal unless that course of action would be impractical. We consider that this is appropriate in the context of extradition and that it does not curb the right to judicial review in any way because of the flexibility we have built into the Bill.
26(2)	Double jeopardy.	20(d)	Double jeopardy is a ground for refusal under the Bill.

108 Extradition Bill, cl 23(3)(d) and 23(3)(e)(i).

4.18 **Category Two** – rights that do not apply directly to extradition but that inform the provisions of the Bill. Principally this is because no New Zealand offence exists.

NZBORA SECTION	SUMMARY OF RIGHT	RELEVANT PROVISION IN THE BILL	HOW THE EXTRADITION BILL REFLECTS NZBORA PRINCIPLES
23(2)	The right to be charged promptly or released.	28(2)(a), 40(2)(a), 71, 74	<p>It is an essential part of our Bill that the person sought should know exactly why they are sought, the charge in the foreign jurisdiction, and the parallel New Zealand or treaty offences. The closest thing to charging in the extradition context is the process of filing the Notice of Intention to Proceed (NIP), which commences proceedings.</p> <p>Under the new Bill, the NIP must be filed before arrest unless the person is arrested by virtue of a provisional arrest warrant. If a provisional arrest warrant is issued, the Central Authority will have 15 days (simplified)/45 days (standard) to file the NIP.</p>
23(3)	Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.	28(4), 40(5), 71(1)	<p>This right is to limit the intrusion on a person's right to liberty as far as possible, and requires that detentions be under judicial supervision. That is equally relevant when a person is arrested in extradition proceedings. Our Bill provides that an arrested person "must be brought before the District Court at the earliest opportunity".</p>
23(4)	The right to silence and against self-incrimination.	16(1)(a)	<p>This right is to protect defendants against self-incrimination at trial. While the right as framed in NZBORA does not technically apply, because the arrest is not for a New Zealand offence but is part of an extradition process, we consider that the values underlying the right should be equally respected in the extradition context.</p> <p>There is a risk that without a warning about the right to silence, a person arrested under the Extradition Bill might volunteer information to the New Zealand Police about the underlying foreign criminal charges. Given the voluntary nature of the statement, the Police may feel obliged to pass this information on to the requesting country. It would then depend on the foreign country's laws whether it could be admitted at trial. We do not think that this would be appropriate.</p>
24(a)	The right to know the details of your charge.	95(1), 96(1)	<p>This right is to ensure that any charged person truly understands, as soon as possible, why they have been charged.</p> <p>As explained above, the closest analogy to charging in the extradition context is the filing of the NIP. This will either be filed before arrest, or within 45 days of issuing the arrest warrant. Under the Bill, a copy of the NIP and the extradition request must be disclosed to the respondent within 15 days of the arrest or the filing of the NIP, whichever is latest. This provision is designed to ensure that the respondent knows the nature of the proceedings, in detail, as soon as possible.</p>
24(b)	The right to bail unless there is just cause for continued detention.	75, 76, 77	<p>The Bills contain specific provisions governing bail that are similar to those that apply domestically. As under the Bail Act 2000, our proposed bail provisions create a presumption in favour of bail for those accused of criminal offending and a presumption against bail for those allegedly convicted of criminal offending and those who are found liable for extradition and are awaiting appeal or the extradition itself.</p>
24(c)	The right to consult and instruct a lawyer.	16(1)(b), 17	<p>It is important for the person sought to be able to consult with a lawyer following initial, further and final disclosure. In particular, they will need advice on whether to consent to extradition, or oppose it, before the Issues Conference. The Bill also provides that no person may be extradited without first having had the opportunity to get legal representation.</p>
24(d)	The right to adequate time and facilities to prepare a defence.	16(1)(c)	<p>It is important that a respondent is given the opportunity to meaningfully engage in extradition proceedings, as their liberty is at stake. We believe our Bill sets up an appropriate regime.</p>

NZBORA SECTION	SUMMARY OF RIGHT	RELEVANT PROVISION IN THE BILL	HOW THE EXTRADITION BILL REFLECTS NZBORA PRINCIPLES
24(f)	The right to free legal assistance.	16(1)(d), 17	We have included specific provisions that the person sought should be eligible for legal aid as if they were facing a criminal charge. It is very important for respondents under the Extradition Bill to be able to receive legal aid. Legal assistance is clearly required to meaningfully engage in extradition proceedings.
24(g)	The right to an interpreter.	16(1)(e)	We have proposed the provision of interpreters and translation facilities. Extradition is more likely than most proceedings to require these facilities.
25(a)	Everyone has, at minimum, the right to a fair and public hearing by an independent and impartial court.	81	The principles underlying this right apply equally in the extradition context and are replicated in the presumption that Court hearings will be held in public.
25(b)	The right to be tried without undue delay.	4(c)	Various provisions in the Bill require proceedings to be undertaken within particular timeframes unless extensions are granted by the judge. The need to avoid undue delay is also recognised as one of the underlying principles in the Bill.
25(d)	The right not to be compelled to be a witness or to confess guilt.	16(1)(a)	Nothing in the Bill compels the respondent/any person to be a witness or to confess guilt, but the Bill does guarantee the respondent's right to silence as to the foreign offence throughout the procedure.
25(e)	The right to be present at the trial and to present a defence.	16(1)(f)	Like the rights in s 24(c), (d), (f) and (g) of NZBORA, this right ensures that defendants can participate in their trials. There is a clear analogy to extradition in this regard.
25(h)	The right, if convicted of the offence, to appeal.	59, 61, 64	Under the new Bill, all respondents will be able to appeal by way of general appeal to the High Court, and from there with leave to the Court of Appeal and the Supreme Court.
25(i)	The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.	n/a	This reflects an important general principle in New Zealand law, and we would expect that the age of a person sought would be a factor in the decision of the Central Authority to proceed.
26(1)	No one shall be liable to conviction of any offence on account of any act or omission that did not constitute an offence by that person under the law of New Zealand at the time it occurred.	n/a	We would expect this to be a factor in the decision of the Central Authority to proceed with an extradition.

4.19 **Category Three** – rights that do not apply in the extradition context because the right is only relevant to trial or sentencing procedure.

NZBORA SECTION	SUMMARY OF RIGHT	RELEVANT PROVISION IN THE BILL	HOW THE EXTRADITION BILL REFLECTS NZBORA PRINCIPLES
24(e)	Trial by jury for an offence of two years' imprisonment or more.	n/a	<p>The right to a jury trial cannot apply to extradition as the form of the trial is a matter for the requesting country.</p> <p>Fairness of the ultimate trial is an important consideration for the Central Authority in commencing the extradition and for the Court in considering possible grounds of refusal. There cannot necessarily be an expectation of a jury trial in a country that does not have juries for domestic cases.</p>
25(c)	To be presumed innocent until proven guilty.	n/a	<p>Extradition proceedings do not involve a conclusion as to guilt or innocence.</p> <p>Again, the fairness of the ultimate trial is an important consideration for the Central Authority and the Court.</p>

NZBORA SECTION	SUMMARY OF RIGHT	RELEVANT PROVISION IN THE BILL	HOW THE EXTRADITION BILL REFLECTS NZBORA PRINCIPLES
25(f)	To examine witnesses.	92, 93	Traditionally, evidence in extradition proceedings has been presented in written, rather than oral form. This is for the practical reason that this is a preliminary step in a criminal proceeding and most of the evidence will be sourced from overseas. Our Bill, however, recognises that in rare circumstances oral examination of a witness may be necessary and provides an oral evidence order process to enable that to take place. In Canada, this process has been held to be consistent with the right to justice under the Canadian Charter of Rights and Freedoms. ¹⁰⁹ The right to justice (s 27), the right to present a defence (s 25(e)) and the right to a fair hearing (s 25(a)) provide sufficient protection in regard to any evidence that is necessary to make out a reason why extradition should be refused.
25(g)	The right to the lower penalty provided in statute if the penalty has changed.	n/a	This right is irrelevant to extradition. This is a matter that will be governed by the law of the country that seeks the extradition.

HOW THE MUTUAL ASSISTANCE BILL REFLECTS NZBORA

- 4.20 The relationship between NZBORA and our Mutual Assistance Bill is easier to state. Our Bill does not abrogate the current principle that assistance cannot be granted unless it is consistent with New Zealand law, including NZBORA and statutes like the Search and Surveillance Act 2012. There can, for instance, be no searches other than by normal New Zealand legal processes. Where because of the subject matter the normal New Zealand procedures cannot apply directly to a foreign request, we have closely aligned the requirements of the equivalent processes provided for in our Bill with those in the law applying to domestic cases. For example, in our provisions relating to foreign criminal proceeds claims, we have been careful to set out the same protections that would apply in the domestic context.
- 4.21 A request that would compromise New Zealand values should not make it through the Central Authority's vetting process, and if the Central Authority is concerned about the possibility of, say, evidence provided from New Zealand being used in a death penalty case, then it should seek assurances as to how that risk might be mitigated.

RECOMMENDATION

- R9 The values underlying the New Zealand Bill of Rights Act should continue to inform extradition and mutual assistance legislation, and should be recognised more prominently.

¹⁰⁹ *United States of America v Ferras* 2006 SCC 33, [2006] 2 SCR 77 at [94].

Chapter 5

Grounds for refusal

INTRODUCTION

- 5.1 The scope and application of the grounds for refusal in extradition and mutual assistance do not neatly align. Certain grounds are unique to each of the mutual assistance or extradition contexts, and even where the grounds are similar in substance, their application is different. This means that whereas extradition *must* be refused in almost all circumstances where the decision maker is satisfied that a ground is engaged,¹¹⁰ the new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) provides more latitude for the Central Authority to assess the likelihood that a ground will in fact be engaged.¹¹¹ Additionally, in the context of mutual assistance, the Central Authority has room to balance the risk of a ground applying against New Zealand's international obligations and whether or not providing assistance would otherwise be in the interests of justice.¹¹²
- 5.2 In this chapter we first explain how we have designed the ground for refusal process in relation to extradition, and then in relation to mutual assistance.

EXTRADITION

Role of the grounds for refusal

- 5.3 Extradition treaties and the statutes that give effect to them have always contained grounds for refusal. Traditionally they have given assurance that the requested state can legitimately refuse to extradite in a particular case, while remaining generally committed to the extradition relationship. We dealt with some of that history in our Issues Paper.¹¹³
- 5.4 The grounds for refusal have an enhanced importance in our new Bill. We have greatly simplified the procedure for making extradition requests to New Zealand, and suggested that countries using the standard procedure should be allowed to present summaries of evidence in the form of a Record of the Case, rather than real evidence. Although logically procedural inefficiency, for instance through requiring the presentation of actual evidence, is not a valid substitute for necessary human rights protection, there has sometimes been a sense both in New Zealand and elsewhere that such inefficiency does provide a degree of added protection to the person sought by delaying or preventing extradition from taking place.

110 The exception being where there is a ground in a treaty, which the treaty provides *may* (as opposed to *must*) apply: see Extradition Bill, cl 21(2).

111 It makes sense to provide some room here for the Central Authority to move, particularly in relation to those areas where New Zealand has provided exceptions to the absolute double jeopardy rule; that is: (1) where the accused has committed an administration of justice offence resulting in a "tainted acquittal" (Criminal Procedure Act 2011, s 151); or (2) where there is "new and compelling evidence" not available at the time of the first trial, which indicates with a high degree of probability that the accused is guilty of the offence acquitted (Criminal Procedure Act 2011, s 154). Australia has also made double jeopardy a discretionary ground for refusal: Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(2)(c).

112 This is the effect of the Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cl 23(3). This assessment also has implications in relation to our decision to extend all grounds for refusal to the investigation stage. In its submission, Police expressed concern that extension of grounds for refusal to the investigation stage would undermine its ability to collaborate with other agencies. We envisage that the considerations in cl 23(3) should act to ameliorate any inappropriate implications of this extension.

113 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at 87.

- 5.5 As we explained in our Issues Paper, human rights protections are an essential part of an extradition regime and our approach to this review.¹¹⁴ However, these should be directly addressed by the Central Authority in deciding whether to bring,¹¹⁵ and then continue, an extradition proceeding, and by the Court when asked to consider such protections by someone resisting extradition.¹¹⁶

The individual grounds for refusal

- 5.6 The grounds and the way in which they are worded in clauses 20 and 21 of our new Bill reflect the grounds that we put forward in our Issues Paper. We provide detailed commentary on each of these grounds alongside the Extradition Bill in Part 4. By way of brief summary, the grounds are as follows:

(a) **Torture** – The Court must refuse extradition:¹¹⁷

...if there are substantial grounds for believing that the respondent would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting country.

This ground is based on New Zealand's obligations under the Convention against Torture¹¹⁸ and the International Covenant on Civil and Political Rights.¹¹⁹ The wording has been chosen carefully to align with those obligations and with the Immigration Act 2009, which gives effect to the obligations in an immigration context.¹²⁰

- (b) **Political offence** – The Court must refuse extradition if “the relevant extradition offence is a political offence”.¹²¹ This is a traditional ground for refusal that is contained in all of New Zealand's bilateral extradition treaties. We have included a definition of “political offence” in the Bill. This definition recognises that the understanding of what is a political offence has evolved over time. Now many multilateral treaties exclude certain offences – for example, terrorist acts – from being recognised as political offences for extradition purposes. This reflects an increasing intolerance for those who endanger life and liberty in pursuit of a political cause. By including a definition in the Bill, we have tried to strike an appropriate balance between giving the reader a clear understanding of what is meant by this ground, while providing sufficient flexibility to accommodate the evolving jurisprudence on this point.

(c) **Non-discrimination** – The Court must refuse extradition if:¹²²

... 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

114 At [1.27] and 22.

115 At ch 14.

116 At ch 15.

117 Extradition Bill, cl 20(a).

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

119 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], art 6.

120 Immigration Act 2009, s 130.

121 Extradition Bill, cl 20(b).

122 Extradition Bill, cl 20(c).

- (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.

This ground is common to all Commonwealth jurisdictions and reflects New Zealand's human rights obligations in relation to discrimination as outlined in the International Covenant on Civil and Political Rights. As proposed in the Issues Paper, we have expressly added age, sexual orientation and disability as potential forms of discrimination. Explicit inclusion of these factors accords with the Human Rights Act 1993.

- (d) **Double jeopardy** – The Court must refuse extradition where 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”.¹²³ Again, double jeopardy is a traditional ground for refusal, which is reflected in all of New Zealand's bilateral extradition treaties. As proposed in the Issues Paper, we have framed this ground with reference to New Zealand's domestic double jeopardy law. This makes the task more familiar to New Zealand judges and allows for greater subtlety in how the ground is applied.
- (e) **Injustice and oppression** – The Court must refuse extradition if:¹²⁴

... 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.

This is a new ground in New Zealand extradition law but it is based on similar grounds in several Commonwealth jurisdictions. Most particularly, it draws from the jurisprudence that has developed in relation to the equivalent ground in the Canadian Extradition Act. “Unjust” is directed primarily at the risk of prejudice to the person sought in the conduct of the foreign trial. “Oppressive” is directed more at hardship to the person sought that arises from their personal circumstances. The two examples given in the Bill are designed to reflect this distinction and to illustrate that the threshold for engaging this ground is very high. In Canada, the injustice or oppression must “shock the conscience” before the ground will be engaged.¹²⁵ Notably, we envisage that the person sought may call on New Zealand's obligations under international human rights law in support of a submission that their exceptional circumstances are of a “humanitarian nature”. We do not intend this ground to be satisfied by considerations that do not meet this high standard. Extradition should not be refused because a foreign justice system operates in a different way or extradition has significant consequences for the person sought.

- (f) **Must refuse under a treaty** – The Court must refuse extradition if “a ground applies on which extradition must be refused under a bilateral extradition treaty”.¹²⁶ We have reviewed New Zealand's existing bilateral extradition treaties and all of the “must refuse” grounds overlap substantially with the other grounds for refusal the Court must consider. This is discussed further at the end of this chapter. The reason for limiting this provision to bilateral, as opposed to multilateral treaties, is that the grounds for refusal in the multilateral treaties overlap with both the Court and the Minister's grounds. For that reason, we did not want to create an avenue for double decision making. Furthermore, we

123 Extradition Bill, cl 20(d).

124 Extradition Bill, cl 20(e).

125 *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.

126 Extradition Bill, cl 20(f).

were conscious that it would be inappropriate for the Court to apply the Refugee Convention¹²⁷ directly (which contains a ground for refusal based on a person's refugee status) as there are already New Zealand agencies responsible for giving that Convention domestic effect.¹²⁸ This is discussed further in Chapter 11.

(g) **The death penalty** – The Minister must refuse extradition if:¹²⁹

... 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 that the sentence will not be carried out.

This ground reflects New Zealand's commitment to the abolition of the death penalty internationally.¹³⁰ As proposed in the Issues Paper, we have drafted the Bill so that there is no discretion in death penalty cases. If the death penalty may be imposed and the assurance is not satisfactory in any way, the Minister must refuse the extradition.

(h) **May refuse under a treaty** – The Minister may refuse extradition if a ground “applies under a bilateral extradition treaty” and relates to citizenship or extraterritoriality or is specifically reserved for a Minister.¹³¹ This ground is discussed at the end of this chapter.

5.7 One ground that we have not included in the Bill, which is recognised in the current Act, relates to persons who are detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a facility as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Under the current Act, the extradition of such persons must be refused. We agree that these persons should not be extradited, but we do not think that this should be considered at the end of an extradition proceeding. Instead, we consider that significant mental health concerns should be addressed at the outset. Under the Bill, the Central Authority may take such matters into account in deciding whether to commence extradition proceedings. In addition, the Court may make a formal finding that the person is unfit to participate in extradition proceedings, due to mental impairment.¹³² Such a finding will result in the person being discharged.

5.8 Overall, the grounds for refusal in the Bill have been drafted to accommodate two overriding concerns:

- (a) New Zealand's commitment to its own domestic human rights values and to international human rights law means that New Zealand should not extradite where those interests are likely to be compromised in the requesting country in a way that might shock the New Zealand conscience.
- (b) Extradition should not be frustrated by the simple assertion that differences in the way suspects are treated, trials are conducted or offenders are punished, would be in breach of New Zealand law. As we outlined above, extradition only works if countries acknowledge the importance of comity and of focusing on the substance of what legal and justice systems do.

127 Convention Relating to the Status of Refugees 189 UNTS 150 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

128 Namely, the Refugee Status Branch of the Immigration New Zealand Group in the Ministry of Business, Innovation and Employment and the Immigration Protection Tribunal.

129 Extradition Bill, cl 21(1).

130 New Zealand is party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1642 UNTS 414 (opened for signature 15 December 1989, entered into force 11 July 1991).

131 Extradition Bill, cl 21(2).

132 Extradition Bill, cls 82–85.

Central Authority vetting

- 5.9 Under our Bill, it will be incumbent on the Central Authority to judge the likelihood of an extradition succeeding before commencing the proceeding.¹³³ We expect that part of that judgement will involve a preliminary assessment of whether the extradition request is likely to trigger substantive issues concerning grounds for refusal, and the degree to which those issues are likely to be resolved by the time that they are considered in the extradition hearing, or might be appropriately dealt with by way of undertakings from the requesting country.
- 5.10 A concern that a ground for refusal might be engaged should not necessarily prevent the Central Authority from commencing the extradition, as that concern might be displaced during the process leading up to the hearing, in the Issues Conference, or resolved by undertakings better sought further along the extradition process. Nor do we expect the Central Authority to second guess possible claims that might be made by the person sought. But equally, at times the Central Authority might refuse to commence extradition proceedings because of concerns over the grounds for refusal.

Who decides?

- 5.11 One of the most difficult issues in writing this final Report has been deciding which of the grounds for refusal should be determined by the Court and which should be determined by the Minister of Justice. As we detailed in our Issues Paper, one of the difficulties of the current Act is the number of grounds that must be considered by both the Court and the Minister.¹³⁴ As suggested in that Paper, decisions should be made once, by the person or institution best placed to make that determination.
- 5.12 We were concerned in our Issues Paper that the extensive role played by the Minister of Justice in determining grounds for refusal was somewhat at odds with the general New Zealand commitment that law enforcement decisions should be made by an expressly non-political actor. Traditionally, there has been a counter concern that the sorts of considerations that might go into determining whether a ground for refusal has been made out are, quintessentially, diplomatic. This particular justification perhaps no longer rings as true as it once did if grounds for refusal are viewed as reflecting international human rights minima that ought to be objectively assessed. We were also concerned in making our suggestion that if grounds were left to the Minister of Justice, the Minister's determination would inevitably be judicially reviewed, causing delay.
- 5.13 On the other hand, we recognised that some grounds, such as the death penalty, torture, or inhumane treatment might be better assessed by the Minister than by a court because of the nature of the likely evidence and the importance of undertakings by the requesting government as to how the person sought might be treated on return.
- 5.14 As we suggested in the Issues Paper,¹³⁵ we now recommend that both the death penalty and, where provided for by a treaty, citizenship and extraterritoriality be dealt with by the Minister. As we explain below, after careful consideration we also recommend that all other grounds be dealt with by the courts.

133 Extradition Bill, cls 25(2)(a) and 38(2)(a).

134 Issues Paper, above n 113, at ch 15.

135 At [8.36].

Submissions

- 5.15 The submissions requested clarity as to who was to make the final decision, and were supportive of courts making most of the decisions throughout the process. The New Zealand Law Society would have preferred that the Court deal with all grounds that were not specifically added by treaty. Crown Law and the Police were a little more guarded, agreeing that the Court was the correct institution unless there was likely to be the need for assurances. We also had extensive discussions with our expert advisory committee about the ramifications of switching decisions from the Minister to the Court.

Our general preference: the Court

- 5.16 Our starting point is that the Court is the most appropriate institution to make decisions about grounds for refusal. This is consistent with the basic starting point of the New Zealand constitution that law enforcement decisions are made by non-political actors, albeit that in the case of extradition the Minister might be acting in a non-political capacity.¹³⁶ Moreover, it is our belief that with the exception of the death penalty, the other refusal grounds fall squarely within the kinds of decisions that courts might normally undertake domestically: considerations of fairness of trial, the nature of an offence, discrimination and the like.
- 5.17 There are a number of reasons to favour a ministerial determination in relation to the death penalty. Once raised, the death penalty ground will often involve gaining undertakings, and further investigations and monitoring. In our view that is best undertaken by a government department. Although similar issues arise with the way that a requested person might be treated in prison on return, in the end we have been able to coherently divide those considerations from others that might be considered under the oppression ground. One of our major concerns has been to avoid double consideration of the same issues. As we still believe that the oppression ground is better dealt with by the Courts, we have decided to keep the torture and inhumane treatment ground within the Court's jurisdiction.

Treaties and the grounds for refusal

- 5.18 In the Issues Paper we proposed that, while treaties might be able to add grounds for refusal or expand the application of existing grounds, no treaty should be able to limit or override any of the statutory grounds for refusal.¹³⁷

What supplementary grounds for refusal exist?

- 5.19 We reviewed the bilateral and multilateral treaties looking for those grounds for refusal (whether worded as such or not) that are substantially different from the proposed grounds in our Bill. In summary, they are:
- (a) "Extradition may be refused if the respondent is a New Zealand citizen/subject/national". All 45 of New Zealand's bilateral extradition treaties contain an article to this effect. Some specifically state that this discretion is to be exercised by the "executive authority" (Fiji, United States). Some clearly link the discretion to the possibility of the requested state prosecuting its citizen/subject/national for the alleged crime instead (Hong Kong, Korea). One states that naturalised citizens may not be refused for this reason (Ecuador). Others provide no further guidance.

¹³⁶ John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 204.

¹³⁷ Issues Paper, above n 113, at ch 8, key proposals box.

- (b) “Extradition must be refused if the respondent has been sentenced or would be liable to be tried and sentenced in the requesting country by an extraordinary or ad hoc court or tribunal” (Fiji, Hong Kong).
- (c) “Extradition may be refused if the requesting country intends to exercise extra-territorial jurisdiction to prosecute or sentence the person sought and New Zealand would not have extraterritorial jurisdiction in the same circumstances” (Korea).
- 5.20 The Minister is best placed to consider the citizenship and extraterritorial grounds as they are discretionary in a way that we do not think is easily resolvable by a court. This is because they imply something further than just whether a particular person is a citizen, or whether a particular enforcement is “extra-territorial”.
- 5.21 The extraordinary or ad hoc tribunal ground is more susceptible to judicial decision. It could be considered by either the Court or the Minister. We have decided, however, that it should be considered by the Court.¹³⁸ This reflects our overriding policy that, wherever possible, the Court should determine the grounds for refusal.
- 5.22 As a practical matter, however, we have retained an ability for New Zealand to specify in future treaties that a ground should be determined by the Minister rather than the Court.

Could refusal based on a statutory ground breach a treaty obligation to extradite?

- 5.23 This issue was discussed at length in the Issues Paper. We concluded:¹³⁹

To the extent that our proposed grounds for refusal may seem to be inconsistent with pre-existing bilateral treaties, we think that those grounds in those bilateral treaties would have been inconsistent with the international norms.

The issue is complex.¹⁴⁰

- 5.24 We have been mindful of this issue in the way that we have drafted the Bill. We do not believe that there is a significant conflict with any of New Zealand’s extradition obligations, although there are conflicts in language used, which are unavoidable. Overall, those treaty obligations should be interpreted in accordance with general international understanding about extradition, or overlaid with international human rights obligations and, as this is the approach we have taken in our Bill, there is no direct conflict. We foresee three grounds in our Bill that are likely to generate the most discussion relating to pre-existing treaties:

- **The non-discrimination ground.** This is not in New Zealand’s pre 1947 Imperial bilateral extradition treaties but it has developed out of the traditional political offence ground. It also largely corresponds to the non-discrimination articles in the International Covenant on Civil and Political Rights (ICCPR) and has some overlap with the persecution requirement of the Refugee Convention. Also, it already exists under the Extradition Act 1999.

¹³⁸ Extradition Bill, cl 20(f).

¹³⁹ Issues Paper, above n 113, at [8.17].

¹⁴⁰ In *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People’s Republic of China* [2001] 3 NZLR 463 (CA) at [18], Keith J stated that the protection against torture in the Extradition Act 1999 justifiably overrides the bilateral extradition treaties because the protection against torture is in “a very widely accepted multilateral treaty”. Later in *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289, the Supreme Court was asked to examine whether art 33 of the Refugee Convention, above n 127, had been amended by the later Convention against Torture, above n 118, and the ICCPR, above n 119. Keith J stated, at [50], that the rules in the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980) governing the amendment of one treaty by a later treaty are “designed for treaties that create bilateral rights and obligations” and “concern the application of successive treaties relating to the same subject-matter”. His Honour commented: “They do not easily apply to the present situation where the obligations of art 33 are in substance unilateral as well as being owed erga omnes (to all the other parties collectively).”

- **The “cruel, inhuman or degrading treatment or punishment”** aspect of the torture ground. This has not developed to the point of *jus cogens* (unlike the prohibition against torture) but again, it is in the ICCPR.
- **The “unjust and oppressive” ground.** As explained above, the word “unjust” relates to concerns about the proceedings in the requesting country. “Oppressive” relates to the personal circumstances of the person sought. Our intention is that this should be defined with reference to minimum standards of international human rights law to capture our desire to tie the ground to developments in this area.

RECOMMENDATIONS

- R10 All of the statutory grounds for refusing extradition (as opposed to those contained in a treaty) should be framed so that if they apply, extradition must be refused. There should be no discretion.
- R11 All extradition requests should be subject to the same grounds for refusal, regardless of the requesting country.
- R12 Each ground for refusal should be determined by either the Court or the Minister, not both. Most of the grounds for refusal should be determined by the Court. Only the death penalty ground and certain treaty grounds should be reserved for the Minister.

MUTUAL ASSISTANCE

The discretionary nature of most of the grounds in the Bill

- 5.25 Under the new Mutual Assistance Bill, in contrast to the Extradition Bill, all but two of the grounds for refusal are drafted in discretionary terms.¹⁴¹ The key reason for the difference in approaches is that whereas in the extradition context a person is being delivered to another country where there is a direct risk that the issue the ground addresses will be engaged, this is less clear in the mutual assistance context.
- 5.26 It may be, for example, that there is a risk that providing assistance could form part of an investigation that ultimately leads to charges for which the death penalty is a possible punishment. However, it may be significantly more likely that that assistance would lead to other charges not engaging the death penalty. At the other extreme, it may be that the request seems trivial, but it would be in the interests of justice to assist with the particular request in the interests of international cooperation in combatting transnational crime. As such, it is important that the Central Authority is able to balance the likelihood that a ground is likely to be engaged against New Zealand’s commitment to combatting transnational crime.
- 5.27 It is important to make clear, however, that making refusal a matter of judgement does not imply that the Central Authority will grant the assistance as a matter of course. Any granting of assistance must take into account New Zealand values in determining whether a ground for refusal applies, and whether those underlying values mean that assistance should not be given notwithstanding the general desire to assist in international law enforcement. For instance, if a

¹⁴¹ The two grounds upon which assistance must be refused in cl 22 the Mutual Assistance Bill are: (1) that there are substantial grounds for believing the request was made for a discriminatory purpose; and (2) that any person will be subjected to torture, or inhumane or degrading treatment, if the assistance is provided. In relation to discriminatory purpose, it is appropriate that there is no discretion as this relates to the purpose of the request itself: There is not a risk the ground may apply – it either applies or it does not. It is also important in demonstrating New Zealand’s commitment to its international obligations under the ICCPR, above n 119. As for torture, given that the prohibition against torture under the Convention against Torture, above n 118, and in customary international law has such significance, it is difficult to justify providing assistance where a risk of torture exists. See Issues Paper, above n 113, at [15.50].

real prospect exists that the death penalty might result from New Zealand granting assistance, we would expect an application would be declined unless sufficient assurances to the contrary can be obtained.¹⁴²

A general discretion to refuse

- 5.28 MACMA does not currently include a general discretion to refuse assistance beyond the specific grounds, and such a provision is uncommon in mutual assistance statutes internationally and in international schemes. Even so, the Australian Act does include such a provision,¹⁴³ and in the Issues Paper we queried whether New Zealand's statute should also include a general discretion to refuse assistance if it is appropriate in the circumstances that the assistance should not be provided.¹⁴⁴
- 5.29 There was support from the Law Society, the Police and the Office of the Privacy Commissioner for such a discretion, on the basis that it provides a safety mechanism in circumstances where a request could not otherwise be refused under the statute.¹⁴⁵ Support was tempered, however, by a concern that including such a general discretion could be perceived to reduce New Zealand's commitment to mutual assistance. On this basis Crown Law did not support inclusion of a general ground for refusal, arguing that it might make New Zealand vulnerable to criticism that considerations other than those identified in specific grounds may inappropriately be playing a part in decisions on particular requests.¹⁴⁶
- 5.30 Nevertheless, we think the general discretion provides important scope to decline requests that New Zealanders would consider inappropriate, but where refusal does not fit neatly into another ground for refusal. Clause 23(3) is intended to guide the appropriate exercise of the discretion, requiring that the Central Authority take into account New Zealand's international obligations and the interests of justice relevant to the case: on the one hand, this includes the important role New Zealand must play in combatting transnational crime; on the other, the Central Authority will not fulfil a request where it would be inconsistent with New Zealand values. This guidance demonstrates New Zealand's commitment to providing mutual assistance internationally and should allay concerns that New Zealand is taking into account inappropriate considerations in exercising the general discretion to refuse. Finally, the requirement in clause 25 that reasons must be given for a refusal to provide assistance provides additional assurance that only appropriate considerations are taken into account.

RECOMMENDATIONS

- R13 Most of the grounds for refusing a mutual assistance request should be drafted in discretionary terms.
- R14 The Central Authority should have a general discretion to refuse a mutual assistance request in appropriate circumstances.

142 The judgement involved in determining whether or not a ground for refusal applies can be seen particularly in relation to the assessment as to whether the investigation, prosecution or proceedings underlying the request are of a political character. As such, instead of defining "political offence" in the new Bill, we have suggested that assistance may be refused if "the request relates to an investigation or a prosecution or proceedings of a political character". Although Police and the New Zealand Law Society were supportive of including a definition of "political offence" (in contrast to Crown Law, who pointed out the inherent difficulties of reaching such a definition), we do not think it is appropriate in the mutual assistance context. We think our approach allows the Central Authority scope to assess whether or not the request is of a political nature: the key inquiry the Central Authority ought to be making in this context.

143 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 8(2)(g).

144 Issues Paper, above n 113, at [15.57].

145 New Zealand Law Society submission at [76]; New Zealand Police submission at 12; and Office of the Privacy Commissioner submission at 2–3.

146 Crown Law submission at [95].

Part 2

EXTRADITION



Chapter 6

Extradition offence

INTRODUCTION

- 6.1 At the heart of any extradition is the offence that the person sought has allegedly committed in the requesting country or the offence for which they have already been convicted. But the existence of a foreign offence alone is not sufficient. There are additional requirements. For instance, for an incoming extradition request, the offence:¹⁴⁷
- (a) must be sufficiently serious (the seriousness threshold) and there must be a similar or comparable offence in New Zealand (dual criminality); or
 - (b) the offence must be listed as an extradition offence in a treaty.
- 6.2 Our draft Bill maintains these basic requirements but seeks to express them more clearly. We also propose one significant departure from the current Extradition Act 1999 and that relates to the seriousness threshold (as indicated by the maximum penalty), which we consider should be raised to two years for all countries except Australia.
- 6.3 In this chapter, we explain the policy behind the “extradition offence” test in the new Bill and outline how we envisage this test will work in practice.

POSSIBLE AREAS OF REFORM

Dual criminality

- 6.4 Our Issues Paper asked how the wording of the dual criminality requirement in the current Act might be changed.¹⁴⁸ Only the Police argued for a substantial change.
- 6.5 Police submitted that the requirement for dual criminality should be significantly reduced or removed:¹⁴⁹

The technical and other problems that this can create are well described in the Issues paper. Some countries are slower to pass legislation and recognise new offences (e.g. cybercrime). Different approaches are also taken to the use of standalone offences or more general provisions. Some countries also have a different view on what constitutes criminal behaviour. For example dealing synthetic drugs is not an offence in Thailand.

Removing dual criminality may also increase the speed in which extradition applications are progressed, as it would remove the need to consider the requesting country’s legislation to ensure there is a corresponding offence to New Zealand.

Other safeguards, such as provisions around discrimination and political offences, provide an opportunity to manage any risks associated with removal of dual criminality. Alternatively, if the dual criminality requirement is retained, Police would support provisions that enable a much ... broader

¹⁴⁷ Extradition Act 1999, ss 4 and 11(1), which allows a treaty to override the definition of “extradition offence” in the Act, in the event of an inconsistency. See *Government of the United States of America v Cullinane* [2003] 2 NZLR 1 (CA) at [55].

¹⁴⁸ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [5.13]–[5.22] and Q 10.

¹⁴⁹ New Zealand Police Submission at 4.

interpretation than at present, and would ideally avoid requests being delayed or rejected on technical rather than substantive grounds.

- 6.6 We accept that sometimes the requirement might be seen to frustrate law enforcement aims, especially when there has been perhaps broad agreement that New Zealand should change its law to take account of something generally recognised to be criminal, but is yet to do so. With the exception of Australia, we have not, however, recommended abolishing the dual criminality requirement. The requirement might create difficulties, but it is also an important assurance to those who are in New Zealand that their actions will be judged against New Zealand law (or against treaties that have been entered into by the New Zealand Government and approved by Parliament).¹⁵⁰
- 6.7 For those reasons, the dual criminality provisions in our Bill largely replicate the current Act.¹⁵¹ It is, however, more apparent on the face of the Bill that the dual criminality requirement does not apply if an offence is recognised as an extradition offence under a treaty.¹⁵² This may deal with some circumstances where New Zealand is yet to implement international obligations through creating New Zealand offences.

RECOMMENDATION

R15 The dual criminality requirement should be retained as part of the “extradition offence” test, in relation to extradition requests from all countries except Australia.

Relying on dual criminality even if there a treaty offence

- 6.8 A further issue we explored in our Issues Paper was whether a country that has a treaty with New Zealand that specifies offences ought to be able simply to rely on an equivalent New Zealand offence, even if our domestic offence is broader than the treaty offence. At the moment such countries have to apply to the Minister of Justice to be treated as non-treaty countries. Submitters were agreed that that this was appropriate, but that care needed to be taken not to restrict the ability of the requesting country to rely on an offence as specified in a treaty. Crown Law observed on this point:¹⁵³

It is not appropriate to diminish the circumstances in which extradition may be granted under an existing treaty. If the Treaty offers an alternative route to extradition which is not available under the statutory definition, that alternative should remain. If the Treaty and the statutory definition don’t cover the criminal concept underlying the foreign offence, the Treaty definition should be able to be relied on if the person sought would be eligible under that definition but not the statutory definition.

- 6.9 We agree, and the way in which we have drafted the provisions in our draft Bill is designed to make the reliance on the treaty offence unnecessary.

Level of potential punishment

- 6.10 The current Act requires that both the foreign offence alleged and its equivalent New Zealand offence have the potential to result in at least 12 months’ imprisonment. In our Issues Paper,

150 The Executive is responsible for negotiating and signing treaties, but a treaty must be implemented into New Zealand law by Parliament (if the treaty necessitates any changes to domestic law). On the treaty-making process in New Zealand, see “The Treaty making process in New Zealand” New Zealand Ministry of Foreign Affairs & Trade < www.mfat.govt.nz > .

151 Compare Extradition Bill, cls 7–8 to the Extradition Act 1999, ss 4–5.

152 Extradition Bill, cl 7(1)(a)(ii) and 7(1)(b)(ii).

153 Crown Law submission at [15].

we raised the possibility of changing that threshold to two years' imprisonment.¹⁵⁴ Our principal reason for suggesting the change was to better reflect the categorisation in the Criminal Procedure Act 2011, as covering only the more serious offences for which the accused person can elect a jury trial for domestic offences. The New Zealand Law Society in its submission agreed that the threshold could be appropriately increased, as did Crown Law, which was worried that the 12-month threshold would not deter more trivial requests. Crown Law pointed out the two-year threshold was within the bounds of article 2 of the United Nations Model Treaty, is consistent with the London Scheme for Extradition within the Commonwealth, and has resonance with New Zealand's current jury trial threshold.

- 6.11 We now recommend increasing the threshold to two years and have drafted our Bill accordingly.¹⁵⁵ The reality is that if the offences involved would not be classified by either the foreign country or by New Zealand as possibly justifying a two-year penalty, it is difficult to justify extradition proceedings. As discussed in Chapter 7, however, we have not raised this threshold for Australia.

RECOMMENDATION

R16 The seriousness threshold in the "extradition offence" test should be raised from a maximum penalty of 12 months' imprisonment to a maximum penalty of 2 years' imprisonment, in relation to extradition requests from all countries except Australia.

EXTRADITION OFFENCE IN THE BILL

One of the criteria for extradition

- 6.12 Given the significance of the "extradition offence" test, it is worth explaining how we envisage this test will work in practice.
- 6.13 Under our new Bill two criteria must be met in all extradition cases: there must be an "extraditable person"¹⁵⁶ and an "extradition offence".¹⁵⁷ For standard extraditions there is a third criterion of there being "a case to answer".¹⁵⁸ This is discussed in Chapter 9.
- 6.14 To determine whether there is an "extraditable person", the Court must, in effect, decide whether the person is the same person as the one described in the extradition request, and whether he or she has been accused or convicted of a foreign offence. In most cases, determining identity and the status of the person in the foreign criminal justice system is likely to be a relatively straightforward exercise. Once that step is complete, the Court will need to determine whether the foreign offence is an extradition offence. The Bill requires an examination of the foreign offence and any relevant domestic offence or treaty offence.¹⁵⁹

The need to identify the parallel offence in the Notice of Intention to Proceed

- 6.15 An important innovation in the Bill is that the Central Authority must file a Notice of Intention to Proceed (NIP). This is discussed further in Chapter 8. Here it is sufficient to note that one of the main purposes of the NIP is for the Central Authority to identify at the outset the basis

¹⁵⁴ Issues Paper, above n 148, at [5.25].

¹⁵⁵ Extradition Bill, cl 7(1)(b)(i)(A) and 7(1)(c)(i).

¹⁵⁶ Extradition Bill, cl 34(4)(a) and 44(4)(a).

¹⁵⁷ Extradition Bill, cl 34(4)(b) and 44(4)(c).

¹⁵⁸ Extradition Bill, cl 34(4)(c).

¹⁵⁹ Extradition Bill, cl 7.

upon which it states that the foreign offence is an extradition offence. As explained above, two options are available: there can be an equivalent New Zealand offence, or there can be a treaty offence. We describe this as the parallel offence and, as explained above, this offence is important because it is the basis not only for determining whether there is an extradition offence, but also for determining whether there is a case to answer, as discussed in Chapter 9.

The place of the foreign offence

- 6.16 Without the allegation of a foreign offence there is no possibility of extradition. Our Bill requires that offence to be identified at the very beginning of the proceedings in the original request made to the Central Authority.¹⁶⁰ Moreover, the foreign offence should be identified to the person sought in the NIP.¹⁶¹ The aim is to make it clear from the outset the offence for which extradition is sought. This is important because “extradition offence” is defined in our Bill with reference to the foreign offence. Thus, the question for the judge is: is the foreign offence an extradition offence?
- 6.17 Significantly, however, our Bill makes it clear that for the third criterion (which only applies to standard extraditions) the judge will be concerned with whether there is a case to answer in terms of the New Zealand equivalent offence or the treaty offence. The foreign offence is largely irrelevant to this inquiry, as we discuss in Chapter 9.

Place of domestic offence

- 6.18 Without an equivalent New Zealand offence there can be no extradition, unless there is a relevant treaty offence or the request is from Australia. The existence of an equivalent New Zealand offence fulfils the dual criminality requirement. To determine whether this requirement is met, the Court must consider whether the conduct constituting the foreign offence, if committed in New Zealand at the time it is alleged to have occurred, would, if proved, have constituted an offence against New Zealand law. The Bill contains guidance on how this exercise should be conducted.¹⁶² In short, the two offences must have a degree of similarity, but it does not matter if the acts or omissions are categorised or named differently, or if the constituent elements of the offence differ.¹⁶³
- 6.19 In relying on the fiction that the facts behind foreign offending occurred in New Zealand, sometimes there will be no parallel offence for technical reasons because of the way the New Zealand offences are described. The best example of this relates to tax law. A person may be charged with tax evasion in one country but it will never be the same as tax evasion in New Zealand as there will inevitably be significant differences in the way the countries structure their tax regimes. In keeping with the current Act, we have expressly recognised the difficulty with tax offending and dual criminality in the Bill.¹⁶⁴
- 6.20 In other areas, the Court will always need to exercise a degree of judgement in deciding whether the two offences are similar enough to justify extradition. There is developing case law internationally that recognises a “doctrine of transposition” that may help judges in this regard. It applies to enable certain traits of the foreign country to be transposed into the New Zealand context to allow the dual criminality assessment to take place.¹⁶⁵ However, we consider that beyond tax offending it is difficult to draw a bright line in relation to what it is and is

160 Extradition Bill, cl 23(2)(c)(ii).

161 Extradition Bill, cls 26(2)(e)–(f) and 39(2)(a)(v)–(vi).

162 Extradition Bill, cl 8.

163 Extradition Bill, cl 8(2).

164 Extradition Bill, cl 8(3).

165 See for example *Norris v Government of the United States of America* [2008] UKHL 16, [2008] All ER 1103.

not appropriate to transpose. Accordingly, we have left this matter to be developed through case law rather than statute. Taken to the extreme, the exercise of transposing the traits of the foreign country could undermine the entire point of having a dual criminality requirement. In the end, we consider that judges are best placed to address these issues on a case-by-case basis with reference to the general guidance we have provided in the Bill and the specific exception for tax offending.

Place of treaty offence

- 6.21 The current law provides that the requesting country can rely on the existence of an offence in a treaty rather than relying on an equivalent New Zealand offence. The ability to add offences that are not recognised in New Zealand, through treaties, is an important part of current international practice. Our draft Bill continues this approach but states the position more transparently.¹⁶⁶

¹⁶⁶ Extradition Bill, cl 7(1)(a)(ii) and 7(1)(b)(ii).

Chapter 7

Categorisation of countries

INTRODUCTION

- 7.1 In this chapter, we discuss the categorisation of countries under the Extradition Bill. This is important as some countries will be entitled to use the simplified extradition procedure under the Bill, while others will need to use the standard procedure. We also discuss whether Australia should be in a special category of its own given its close relationship with New Zealand.

HOW MANY CATEGORIES?

Current situation

- 7.2 The current Extradition Act 1999 contains multiple distinctions between requesting countries. In terms of procedure, the most important relates to the backed-warrant procedure for designated countries (currently Australia and the United Kingdom) that governs whether evidence of the alleged offending must be presented.¹⁶⁷ Other important distinctions relate to exemptions that enable some countries (such as Canada, the Czech Republic, the United States, and Tonga) to present evidence in the “Record of the Case” format.¹⁶⁸ The Act also makes a seemingly important distinction between countries that are members of the Commonwealth extradition scheme¹⁶⁹ or those with whom we have a treaty, as both sets of countries can commence extradition proceedings without reference to the Minister of Justice.¹⁷⁰ The Minister of Justice can, however, allow an extradition proceeding to be commenced from any country.¹⁷¹

Our proposal

- 7.3 In our Issues Paper, we proposed two main categories: approved countries and all other countries. Approved countries would be able to rely on a simplified procedure for extradition, while all other countries would use the standard procedure using the Record of the Case process to establish that there is a sufficient case to justify extradition.¹⁷²

Submissions

- 7.4 The submissions we received all supported a simplification of categories. The New Zealand Law Society, for instance, wrote:¹⁷³

There is a strong principled case for consistency of treatment of all countries, with robust safeguards applying to requests irrespective of historical relationships. To the extent any departure from procedural protections is based on political considerations, the Law Society is not well placed to address them.

¹⁶⁷ Extradition Act 1999, pt 4, particularly ss 39–40.

¹⁶⁸ Extradition Act 1999, ss 17 and 25.

¹⁶⁹ 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.

¹⁷⁰ Extradition Act 1999, ss 13–16.

¹⁷¹ Extradition Act 1999, s 60.

¹⁷² Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [6.16]–[6.17].

¹⁷³ New Zealand Law Society Submission at [19].

Our recommendation

- 7.5 We recommend that there be two main categories of countries recognised in the Act. As we explain, in some limited contexts like the addition of extradition offences, a treaty between New Zealand and another country will be able to supplement provisions of our draft Bill.
- 7.6 Our approach to categorisation means that New Zealand will be able to provide the same minimum standard of extradition to all countries. The process has the clear advantage that the kinds of assistance that we can give countries will not depend on whether there has been prior diplomatic negotiation.
- 7.7 We have been conscious in making this recommendation that the diplomatic process has been invaluable for New Zealand to assure itself of the appropriateness of extradition to a particular country. While the Commonwealth Scheme for Extradition,¹⁷⁴ for example, has been an important part of the history of New Zealand extradition law, the reality of its future is that we are as likely to field requests from less traditional partners as we are from the traditional. Indeed, the nature of international travel means that we are quite likely to receive a request from any country, even one which has had limited diplomatic engagement with New Zealand, or which might have simply not have thought that they might need to request extradition from New Zealand until the necessity arose.
- 7.8 This recommendation is only possible because of our other key recommendation: that there be a formal Central Authority, and it makes an independent determination as to the appropriateness of commencing an extradition proceeding. In doing so, the Central Authority will inevitably consider whether the requesting country is one in which there will be a fair trial, as well as addressing other human rights concerns. As we have explained, the Central Authority will take account of the existence of an international obligation, and where relevant a treaty with a requesting state will be an important matter for it to consider.

RECOMMENDATION

R17 There should be two main categories of countries in new extradition legislation. Requests from approved countries should be processed using the simplified extradition procedure. Requests from all other countries should be dealt with using the standard extradition procedure.

IS THERE A SPECIAL CASE FOR AUSTRALIA?

- 7.9 In our Issues Paper we expressly addressed whether our new Bill ought to place Australia in a different position to all other countries.¹⁷⁵ We asked this not just because of New Zealand's close relationship with Australia, but because the reality is that most extradition traffic is with Australia, and Australia has a legal system that is very similar to New Zealand's. We raised the possibility of treating Australia differently in three ways:
- (a) that the grounds for refusal ought not to apply to Australian requests even if they were to apply to other approved countries;
 - (b) that the existence of a similar New Zealand offence would not be required before there can be extradition; and

¹⁷⁴ London Scheme for Extradition within the Commonwealth, above n 169.

¹⁷⁵ Issues Paper, above n 172, at [6.22]–[6.24] and Q 13.

- (c) that there be no requirement that Australia not prosecute for an offence that was not the reason for extradition (otherwise known as speciality).

Grounds for refusal

- 7.10 We have not recommended that the grounds of refusal should either be different or not considered for Australian requests.
- 7.11 Given the similarity between Australia and New Zealand, and the close connections between the legal systems and societies, it may well be that such grounds will seldom succeed. In this vein, the New Zealand Police submitted:¹⁷⁶

Given New Zealand's special relationship with Australia and the United Kingdom, Police believe that further differentiation within Category I countries is warranted to provide that only some of the refusal grounds apply to Australia and the United Kingdom.

- 7.12 On balance, however, we have decided not to remove the possibility that a ground of refusal might be satisfied in a request from Australia. This is not because we expect that there will often be occasions where the grounds will be successfully raised, but that we think it undesirable to essentially prevent New Zealand courts from enquiring into a human rights ground once it has been raised. Many of the delays we have been told about in the case of Australia where grounds have been unsuccessfully raised will be avoided by having those grounds considered by the Court at the extradition hearing, after having been raised by the respondent at the Issues Conference.

Speciality

- 7.13 In our view there is no principled reason to now require Australia to give an undertaking as to speciality. Nothing has changed since 1999 that merits restoring that requirement.

How New Zealand currently treats Australia

- 7.14 The speciality rule provides that if New Zealand extradites a person to a requesting country, then that country may only prosecute or detain that person for the offence that was the subject of the extradition request, unless the person is first given the opportunity to leave the country *or* New Zealand gives specific permission. The prohibition on return to a third country works in a similar way. The extradited person must be given the chance to leave the requesting country *or* New Zealand must give specific permission before that country may extradite them on to a third country. The speciality rule and the prohibition on return to a third country are important protections for the person sought, as they protect against bad faith or an ulterior motive on the part of the requesting country.
- 7.15 Under Part 3 of the current Extradition Act, the Minister of Justice may not extradite any person unless some kind of undertaking as to speciality and return to a third country is given.¹⁷⁷ Under Part 4, the Minister can only recommend that a country be designated to use the backed-warrant process if satisfied that the country will comply with the speciality rule and the prohibition on return to a third country.¹⁷⁸ None of these provisions apply to Australia because the Act automatically designates Australia an approved country.

¹⁷⁶ New Zealand Police Submission at [33].

¹⁷⁷ Extradition Act 1999, s 30(5).

¹⁷⁸ Extradition Act 1999, s 40(3)(c)–(d).

- 7.16 This is not a technical point or an oversight. It is clear from the Extradition Act 1988 (Cth) that Australia will abide by the speciality rule and the prohibition on return to a third country in relation to every country, other than New Zealand.¹⁷⁹
- 7.17 Bearing these observations in mind, any further relaxation of the speciality rule between New Zealand and Australia (as suggested in the Issues Paper)¹⁸⁰ could only benefit New Zealand. The Australian Act does not require New Zealand to comply with the speciality rule, so all that remains to be done is for the New Zealand Act to reflect this fact and we have done so in our Bill.¹⁸¹
- 7.18 The most important point is that a policy decision had already been made in 1999 to put Australia in a sub-category all of its own, in recognition of the particularly close and trusting relationship New Zealand has with it. It would be difficult to reverse that policy now unless there was significant concern that this approach does not work appropriately.
- 7.19 New Zealand's relationship with Australia has not cooled since 1999; instead it has strengthened. The recent enactment of the Trans-Tasman Proceedings Act 2010 is evidence to that effect. Of particular note is that the Agreement underlying the Trans-Tasman Proceedings Act specifically acknowledges "each Party's confidence in the judicial and regulatory institutions of the other Party".¹⁸²

How Australia currently treats New Zealand

- 7.20 Part III of the Australian Extradition Act 1988 (Cth) governs extradition from Australia to New Zealand. The Part allows for a simplified indorsed warrant process, which is broadly analogous to New Zealand's extradition arrangements in relation to Australia. Using the simplified process, New Zealand only needs to make an application in the appropriate statutory form, attach an arrest warrant for indorsement and produce affidavit evidence that the relevant person is in Australia. Of particular note is that there is no requirement for:
- a formal extradition request to be made;
 - supporting documents to be provided;
 - the offence to meet a particular threshold of seriousness;

179 Section 42 of the Australian Extradition Act 1988 (Cth) states: Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:

- (a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
 - (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or
 - (ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or
- (b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered.

We do not believe that this allows Australia to act with an ulterior motive when making an extradition request to New Zealand. Instead it reflects New Zealand's position that it trusts Australia so much that these particular protections are unnecessary.

180 Issues Paper, above n 172, at [6.22] and [11.14]–[11.17].

181 Australia will automatically be an approved country by virtue of the definition of approved country in cl 5 of the Bill. This means that it can avoid giving a general undertaking as to speciality to become an approved country under cl 123(3).

182 Agreement between the Government of New Zealand and the Government of Australia on the Trans-Tasman Court Proceedings and Regulatory Enforcement [2013] ATS 32 (signed 24 July 2008, entered into force 11 October 2013) at preamble.

- dual criminality; or
- speciality.

7.21 Further, instead of the usual “extradition objections” applying, the only bar to extradition is for reasons of: triviality, bad faith, delay or any other reason it would be “unjust, oppressive, or too severe a punishment to surrender the person to New Zealand”.

Preserving speciality for other countries

7.22 We have considered whether our policy in relation to Australia could, however, be extended to all approved countries under the new Act. While that would mean not having a specific carve-out for Australia, it might limit the number of countries that New Zealand would feel comfortable approving.

7.23 Given that our intention is that over time more countries may be approved, we recommend not extending the exemption further than Australia, despite the fact that Australia will then be in a sub-category on its own. We have drafted our new Bill accordingly.

Dual criminality

7.24 Under the Extradition Act there are two components to the main extradition offence test that all countries must currently satisfy:¹⁸³

- (a) dual criminality – that the behaviour alleged amounts to a crime in the requesting country and under New Zealand law; and
- (b) a seriousness threshold – currently that the offence must be punishable by 12 months’ imprisonment.

7.25 In relation to Australia, there is a strong case for removing the dual criminality component. In our view, the similarity between the two countries makes it highly unlikely that Australia and New Zealand would fundamentally disagree as to whether conduct should be viewed as criminal. Therefore, the task of assessing dual criminality in every extradition case is, in relation to Australia, largely redundant. In fact, the assessment may be counterproductive in some cases where technical differences between the two country’s laws prevent otherwise appropriate extraditions from taking place. Furthermore, if in the future there was a case where the Central Authority considered the Australian Police had taken an overly heavy-handed approach in charging, our proposed new unjust and oppressive ground for refusal could be interpreted to refuse extradition.

The seriousness threshold

7.26 The case for removing the seriousness component of the extradition offence requirement is, in our view, more complex. Some form of cut-off line is needed. In Australia, the position is that a New Zealand extradition request can simply be refused if the offence is so trivial that extradition would be unjust or oppressive. This provides flexibility, but it does not provide clear guidance to the Australian authorities and the issue is not dealt with until the end of the court proceedings. In this regard, New Zealand’s current seriousness threshold is clearer and more efficient.

7.27 One difficulty with the seriousness threshold, however, is that we are recommending raising it for all other countries from requiring a possible penalty of 12 months’ to a possible period

183 Extradition Act 1999, ss 3–4.

of two years' imprisonment to better align with the threshold for jury trials in New Zealand.¹⁸⁴ However, this change would make extradition to Australia more difficult under the Bill than under the 1999 Act, which only requires a minimum penalty of 12 months' imprisonment. We recommend that we keep the current threshold of 12 months in relation to requests made to and from Australia and have drafted our new Bill accordingly.¹⁸⁵

RECOMMENDATION

R18 There should be a different test for "extradition offence" if the extradition request is from Australia.

STANDARD AND SIMPLIFIED PROCEDURES

Overview

- 7.28 We propose two extradition procedures: the simplified procedure will be reserved for approved countries, and the standard procedure will be used by all other countries. The principal difference between the two procedures will be that approved countries will not be required to produce evidence of the alleged offending. This replicates one of the current divisions in the present Act.¹⁸⁶ Our proposal, however, differs from the current Act in not further delineating countries that must use the standard procedure as to how, for instance, they must establish a sufficient case to justify extradition.

Criteria for approval to use the simplified procedure

- 7.29 The 1999 Act has little guidance as to how to evaluate whether a country should be a designated country that can use the backed-warrant procedure. In our Issues Paper, we suggested that the new Act include specific criteria. We proposed criteria that focused on a range of factors centred on the nature of New Zealand's previous extradition relationship with a particular country, including extradition treaties, the nature of a particular country's legal system, and that country's commitment to the protection of human rights.¹⁸⁷ The criteria we have included in the Bill have been carefully chosen so as not to preclude civil law jurisdictions, which might have significant differences to the way in which New Zealand conducts its own criminal trials, or indeed Common Law jurisdictions to which a ground of refusal such as the death penalty might apply unless there are sufficient undertakings.¹⁸⁸ The essential question that ought to remain is whether the nature of the foreign country's legal procedure makes unnecessary the added stage of a New Zealand evaluation of whether there is a case to answer.

184 Criminal Procedure Act 2011, s 4(1)(k): Jury trials are only available to persons charged with a category 3 and 4 offence, or an offence punishable with a term of imprisonment with a maximum term exceeding two years or more.

185 Extradition Bill, cl 7(1)(a)(i).

186 Extradition Act 1999, pts 3 (standard) and 4 (backed warrant).

187 Issues Paper, above n 172, at [6.37]–[6.43].

188 Extradition Bill, cl 123.

A universal approach to the grounds for refusal

- 7.30 We also considered whether the person sought ought to be able to raise grounds for refusal in the simplified procedure. In our Issues Paper, we suggested that it was unlikely that grounds for refusal arguments would succeed in the case of an approved country, due to the nature and values of that country's criminal justice system. However, it would be difficult, and perhaps undesirable, to prohibit the making of such an argument.¹⁸⁹ We also suggested that there should not be separate subcategories of approved countries.¹⁹⁰ We were concerned that removing the grounds for refusal might prevent countries from being added to the approved country category in the first place. It still seems to us better, as a matter of principle, that a country with the potential to impose the death penalty might nevertheless be considered an approved country, if it were to otherwise satisfy our criteria. In the case of such a country an extradition would still not occur unless there was sufficient undertaking that the death penalty would not be imposed, but the country would not have to establish in each case that there was sufficient evidence to justify the extradition.

¹⁸⁹ Issues Paper, above n 172, at [8.137]–[8.138].

¹⁹⁰ At [8.137]–[8.138].

Chapter 8

Overview of court procedure

INTRODUCTION

- 8.1 In our Issues Paper, we proposed that a new Extradition Act should contain its own tailor-made procedural rules. We suggested that currently too much litigation relates to procedural issues rather than substantive matters. We said that many of the problems are caused by using procedural rules in the extradition context that were devised in other contexts.¹⁹¹
- 8.2 The powers and jurisdiction of the District Court, which hears these cases at first instance, presently rely upon a mixture of statutory provisions, some of which have generally been abolished but retained only for extradition purposes.¹⁹² There is a great amount of cross-referencing and repetition. A cleaner, more accessible code is required.
- 8.3 It is also important to focus on what the extradition task is. To be clear on what it is and what it is not, sets a proper basis for the court procedure. The purpose of an extradition hearing is not to decide ultimate guilt or innocence, but rather to decide whether or not a person sought to be extradited should be sent overseas to a foreign requesting country to answer, by way of trial or sentence, charges in that country. Approached in this way, procedures can be customised so that they are relevant to the task and not simply generic and ill-suited.
- 8.4 We have approached our task by looking afresh at what procedure and jurisdiction is required. Having identified the fundamentals, we have consulted, in particular, the judiciary in order to audit what we believe is required, and to ensure that we have not overlooked incorporating important and relevant provisions.

RECOMMENDATION

R19 New extradition legislation should contain its own, tailor-made procedural rules.

JURISDICTION

- 8.5 All extradition requests should be heard and determined in the District Court.¹⁹³ Rights of appeal from decisions given should flow. However, as we discuss at the end of this chapter, the ordinary appeal and judicial review paths should be limited in some key respects.
- 8.6 New extradition legislation should provide the Court with specific jurisdiction and powers to enable it to conduct extradition hearings with greater efficiency. We have included a variety of procedural provisions in the Bill that are relatively prescriptive in this regard. These cases are few in number so we consider this level of statutory guidance to be appropriate.

191 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at ch 9, key proposal box.

192 Extradition Act 1999, s 22(1)(b) and 22(4).

193 See Summary of this Report at [5].

- 8.7 We have, however, tried to allow for flexibility in relation to the powers the Court may exercise.¹⁹⁴ Extradition proceedings have the potential to involve the full range of criminal offending and complex humanitarian concerns may well arise. Therefore, judges need to be able to call upon a wide range of powers to address the full gambit of issues. To assist judges in the exercise of those powers, the Bill contains a provision outlining the principles that should be applied when making any decision under the Act.¹⁹⁵

RECOMMENDATION

R20 All extradition requests should be heard and determined in the first instance in the District Court.

SPECIALISATION

- 8.8 For the most part, extradition cases arise in the centres of greatest immigration, such as Auckland, Manukau, Wellington and Christchurch.¹⁹⁶ The procedure in the Bill is quite technical and, in addition, we have suggested prescriptive timelines for events in order to minimise delay.¹⁹⁷ Therefore, there could be merit in extradition applications being managed as a special category within the District Court's vast and broad business, and thus heard by a selection of judges.
- 8.9 Our view is that if certain judges are designated to manage and hear extradition cases, this may assist in disposition. We therefore recommend the following process: When an application is filed in a main centre with a number of judges, a judge or certain judges could be designated by the Chief Judge to be available for extradition cases. And so, when an arrest warrant is sought, a case could be referred to a designated judge in the first instance. Of course practical considerations need to apply and we acknowledge that, where there is a sense of urgency and a designated judge is unavailable, a non-designated judge might need to undertake this particular task.
- 8.10 Our suggestion is, however, that once the first appearance takes place, the application is assigned to a designated judge and the Preliminary and Issues Conferences (if required) are scheduled to occur when that judge is available. Thereafter, the particular case would remain docketed to the individual judge until disposition. It seems to us that this may enhance efficiency and timeliness.

THE NATURE OF THE COURT'S TASK

- 8.11 As described in Chapter 7, there will be two types of extradition cases: "standard" and "simplified".¹⁹⁸ For both types of case the Court's task will be two-fold. First, it will need to determine whether the criteria for making an extradition order are satisfied. Second, it will need to decide whether there are any statutory reasons not to make the order.¹⁹⁹

194 Extradition Bill, cls 87–88.

195 Extradition Bill, cl 4.

196 We have purposefully not included in the Extradition Bill a provision specifying where the District Court proceedings must be held, beyond stating that they must be held where the NIP is filed: cl 75. We envisage that they will only be held in the three main centres to allow for the desired judicial and practitioner specialisation to develop. To combat any inconvenience for the respondent, we envisage that the Court Remote Participation Act 2010 procedure would be used wherever possible and that legal aid would cover the expense of any necessary travel.

197 By way of example see Extradition Bill, cl 27(2), which states that the preliminary conference must be held within 15 days of the respondent's arrest or the filing of the notice of intention to proceed, whichever is the later.

198 Extradition Bill, pt 2, sub-pt 2 (standard extradition procedure) and 3 (simplified extradition to approved countries).

199 Extradition Bill, cls 34 (standard) and 44 (simplified).

- 8.12 The main difference between standard and simplified cases is that in simplified cases no inquiry is held into the evidence against the person sought for extradition. Instead these cases will focus heavily on the existence of a foreign arrest warrant. The foreign warrant will be a central document in simplified cases.²⁰⁰
- 8.13 The simplified procedure will only be available to requesting countries that have been classified by New Zealand as “approved countries” under the Act.²⁰¹ We envisage that at the outset Australia and the United Kingdom will be the only approved countries.²⁰²

HOW TO START AN EXTRADITION CASE

- 8.14 Any extradition proceeding will be commenced by filing a document called a “Notice of Intention to Proceed” (NIP)²⁰³ and we have included a form in Part Four of our Report setting out what we think this should look like. The jurisdiction of the Court will be based on this document.
- 8.15 The NIP is like the charging document in a criminal proceeding. It will be filed by the Central Authority, who is the applicant.²⁰⁴ It will identify the respondent and the requesting country, and it will specify the foreign offence or offences that the respondent has been charged with, or convicted of, in the foreign jurisdiction.²⁰⁵ Most importantly, the NIP will also indicate the basis upon which the Central Authority considers that each foreign offence meets the test for being an “extradition offence” under our Act.²⁰⁶ More specifically, the NIP will identify the New Zealand offence or the offence listed in an applicable treaty that the Central Authority considers best fits the conduct underlying the alleged foreign offending (the parallel offence). The parallel offence will then play an important role in the extradition proceedings. In all proceedings it will be central to whether the test for existence of “an extradition offence” is met. Also, in standard cases the parallel offence will provide the judge with the framework for conducting a comparative inquiry into the sufficiency of the foreign evidence contained in the Record of the Case. This inquiry is discussed in detail in Chapter 9.
- 8.16 The main aim of the NIP is for the Central Authority, the respondent and the Judge to be aware, at all times throughout the proceedings, of the basis upon which the Central Authority intends to seek determination that the respondent is liable for extradition at the end of the hearing.
- 8.17 When the NIP is filed in Court, the Central Authority will also make an application for an arrest warrant in standard cases,²⁰⁷ or for endorsement of the foreign warrant in simplified cases.²⁰⁸ In support of such an application, the Central Authority will also need to provide information as to the respondent’s identity.²⁰⁹ That information will usually be in the form of a written statement from a New Zealand Police Officer.

200 The Extradition Bill provides that in simplified cases the foreign arrest warrant must be attached to the extradition request (cl 37(2)(c)), must also be attached to the NIP (cl 39(2)(b)), may be endorsed by the District Court (cl 40(2)) and if endorsed, may be used by the New Zealand Police to arrest the respondent (cl 40(3)).

201 Extradition Bill, cl 36.

202 Extradition Bill, cl 123 governs the approval process.

203 Extradition Bill, cls 26 and 39.

204 Extradition Bill, cls 5 and 14(1).

205 Extradition Bill, cls 26(2)(b)–(c) and (e)–(f) and 39(2)(a)(ii)–(iii) and (v)–(vi).

206 Extradition Bill, cls 26(2)(g)–(h) and 39(2)(vii)–(viii).

207 Extradition Bill, cl 28(1).

208 Extradition Bill, cl 40(1).

209 This is to satisfy the requirement in clauses 28(2)(b) and 40(2)(b) that the “respondent is, or is suspected of being, in New Zealand or on the way to New Zealand”.

- 8.18 Our procedure envisages that as an extradition case proceeds, details pertaining to the NIP may need to be amended from time to time.²¹⁰ We think that such flexibility is essential and, of course, judicial procedure will ensure that a respondent is made aware of, and accommodated in relation to, amendments.²¹¹ We envisage this as being similar to the process of amending a charge in domestic criminal proceedings. When the judge is finally in a position to determine whether or not the respondent is liable for extradition, it may be on a different basis or taking into account different specific factors than upon which the original notice was issued.
- 8.19 As there is a substantial difference between standard and simplified cases, it will be important at the very outset of a proceeding for the court registrar and the judge to know which category applies. Therefore, we suggest that the Central Authority should develop a standardised format for these notices. That format should identify in the heading whether it is a standard or simplified case. A further distinguishing feature is that a simplified NIP will attach the foreign arrest warrant.²¹²
- 8.20 Before a NIP is filed in Court, a request to extradite would have been conveyed by a requesting country to New Zealand and that request will in the first instance be screened by the Central Authority.²¹³ This process is discussed in detail in Chapter 2. In short, the Central Authority must check that all of the criteria required in either of the two types of extradition cases are capable of being met and that the circumstances of the case merit commencing the proceeding.
- 8.21 In some situations where the person sought to be extradited is in New Zealand, but where there is a risk of imminent flight, arrest might be required before the Central Authority has received and vetted a formal extradition request. We acknowledge this and have therefore built into our procedure a provisional arrest warrant process, which should be used when arrest is the necessary first step. Our research tells us that these cases will be few, but we acknowledge that where arrest is sought in these circumstances, care must be taken to ensure that more comprehensive information is provided by the requesting country and any NIP is filed in a timely fashion following execution of the provisional arrest warrant.

RECOMMENDATION

- R21** An extradition proceeding should be commenced by the Central Authority filing a Notice of Intention to Proceed.

FIRST APPEARANCE AND BAIL

- 8.22 When the respondent has been arrested under an ordinary or provisional warrant, they must be brought before the Court promptly, as in all arrest cases.²¹⁴ In provisional arrest warrant cases, one of the important tasks of the Court at this appearance will be to set a deadline for the Central Authority to file a NIP.²¹⁵ The Bill contains guidance as to the appropriate deadline in standard and simplified cases.²¹⁶ In all cases, the question of bail will need to be addressed.

210 Extradition Bill, cl 90.

211 Extradition Bill, cl 90(3) and 90(5) empower the Court to set a new timetable for extradition proceedings in response to an amendment of the NIP.

212 Extradition Bill, cl 39(2)(b).

213 Extradition Bill, cls 25 and 38.

214 Extradition Bill, cl 28(4), 40(5) and 72(1).

215 Extradition Bill, cl 72(2)(a).

216 Extradition Bill, cl 72(4).

- 8.23 We have tried to mirror the law and procedure relating to bail in the domestic criminal setting. If extradition is sought so that the respondent can be extradited to face trial in the requesting country, there is a general presumption in favour of bail.²¹⁷ If the basis of extradition is because the respondent has already been found guilty or sentenced, and what is sought is completion of the sentencing process, the presumption will be reversed.²¹⁸ Of course, in any case risk of flight will be a highly relevant consideration for bail.²¹⁹ Another important factor is that, by definition, the offence in question will be relatively serious: it will be punishable by at least two years' imprisonment.²²⁰

ISSUES CONFERENCE AND CASE MANAGEMENT

- 8.24 We think that an important next step after a respondent has first appeared in Court should be a subsequent appearance at a conference presided over by the judge. Whether the simplified or standard procedure applies, we see the step of a conference as assisting the timely disposition of the proceeding.
- 8.25 In a simplified extradition case, the Issues Conference will usually be the next step after the first appearance.²²¹ The purpose of the Issues Conference is spelt out in our Bill,²²² but the overarching purpose is to check on details, ascertain what is in dispute and ready the case for hearing.
- 8.26 For a standard extradition case, more steps in the process will be required. That is because these cases will involve an evidential inquiry, as we discuss in Chapter 9. That inquiry will require the Court to assess a Record of the Case prepared by the requesting country.²²³ The Record of the Case will summarise the evidence that is available for trial in the requesting country. Depending on the complexity of the criminal case against the person sought, the requesting country may need more or less time to prepare the record in the appropriate form. We have recognised this by stating that a "preliminary conference" must occur in standard extradition cases within 15 working days of the first appearance.²²⁴ At that conference, the Court should set dates for the disclosure of the Record of the Case and the Issues Conference, in consultation with the parties.²²⁵ The only rule is that the Issues Conference must be held at least 15 working days after the Record of the Case has been filed to give the respondent sufficient time to become familiar with it.²²⁶
- 8.27 Our view is that it is important for the Court to prescribe reasonable timeframes in both standard and simplified cases. These conferences are a way to ensure that extradition cases proceed to hearing in a fair and efficient manner.
- 8.28 Shortly, we set out the nature of the extradition hearing and our recommended procedure. At a conference, one of the enquiries the judge might make is whether or not the extradition hearing could benefit from being in two parts: the first to decide whether or not extradition should be ordered; and the second, whether, having regard to any ground for refusal that is raised,

217 Extradition Bill, cl 75(3).

218 Extradition Bill, cl 76(2).

219 Extradition Bill, cl 75(4)(a)(i).

220 Extradition Bill, cl 75(4)(b)(iii).

221 The parties may agree that no Issues Conference is necessary in a simplified extradition proceeding; Extradition Bill, cl 41(4)(a)(ii).

222 Extradition Bill, cls 31 and 42.

223 Extradition Bill, cl 33(1).

224 Extradition Bill, cl 27(2).

225 Extradition Bill, cl 30(2)(a).

226 Extradition Bill, cl 30(2)(b).

that order should be made or not. Efficient disposition of the case will be assisted by a judge addressing these issues at the Issues Conference.

DISCLOSURE

- 8.29 An extradition hearing is not designed for the purpose of determining guilt or innocence, and so, it is not undertaken in a procedural nature directly comparable to a criminal trial. Nor is an extradition hearing recognisably a civil matter. The adopted procedure borrows from both criminal and civil areas. Accordingly, disclosure should be tailored to the Court's specialised task. It is important for the respondent to know the basis upon which the request to extradite has been made and what evidence is relied upon. It is equally important for the respondent to be aware that the hearing does not present an opportunity to raise issues of guilt or innocence, and thus completely departs from both civil and criminal trials in that important respect.
- 8.30 The Record of the Case is designed to disclose to the respondent a summary of the evidence the requesting country is relying upon to justify their extradition request. However, the judge will have the power to adjourn the case if, in the judge's view, the Central Authority should be given the opportunity to obtain further information or evidence from the requesting country.²²⁷ It is worth making the point that we are talking here about information or evidence that is necessary in order to understand the Record of the Case and to determine whether it proves that there is a case to answer. We consider that this adjournment process appropriately recognises that the Central Authority is the applicant in the proceedings, and should be responsible for communicating with the requesting country.
- 8.31 Of course this disclosure will occur at different stages.²²⁸ When a NIP is filed, it will be at the initial arrest stage. When in standard cases the Record of the Case is filed – and this will occur before the Issues Conference – most of the relevant information should be to hand. The judge can request further information from the Central Authority if that seems important. Finally, when the stage has been reached for the extradition hearing, both parties must disclose any evidence they intend to rely upon relevant to a ground for refusal. We think it entirely proper that complete disclosure occurs before the extradition hearing so that the subsequent steps can occur on an informed basis, particularly since disclosure is a fundamental right for the person sought.

RECOMMENDATION

R22 Extradition legislation should specify what must be disclosed as part of the proceedings.

THE EXTRADITION HEARING

- 8.32 When a judge hears and determines liability for extradition, the judge will do so on what is set out in the NIP, the other documentation filed and submissions made.
- 8.33 We envisage that, as a general rule, extradition hearings will occur having regard to documentary evidence and submissions made.²²⁹ Such is the nature of the task that we see oral evidence as only being necessary in exceptional cases. We discuss this evidence further in Chapter 10.

²²⁷ Extradition Bill, cl 88.

²²⁸ Extradition Bill, cls 95–98.

²²⁹ For a further discussion see ch 10.

- 8.34 The criteria for extradition and the grounds for refusal are extensively discussed elsewhere in this Report. Here it is sufficient to recap that in a standard extradition the judge must determine whether there is an “extraditable person”, “an extradition offence” and “a case to answer” as evidenced by the Record of the Case.²³⁰ If those criteria are met, the Judge should go on to consider whether any of the grounds for refusal are engaged. In most instances, it is incumbent on the respondent to raise these grounds, but there is no formal requirement for the respondent to provide an evidential basis for that submission. Where a ground for refusal is based on one of New Zealand’s international human rights obligations, the Central Authority will be obliged to explain why, in its view, the ground does not apply.²³¹
- 8.35 As indicated earlier, the judge may decide to divide the extradition hearing in two, allowing the criteria for extradition to be determined in a separate hearing from the grounds for refusal.²³² This may be necessary in cases that have a cross-over with immigration proceedings, as discussed in Chapter 11.
- 8.36 If the judge is satisfied that none of the grounds for refusal apply that the Court is to consider, he or she may then need to decide whether to refer the case to the Minister for a determination of the death penalty or a discretionary treaty ground.²³³ If one of these grounds is referred to the Minister, then the Bill contains guidance on the timeframe for the adjournment. The central factor here will be the likelihood that the Minister will need to obtain an undertaking from the requesting country. In the absence of an undertaking, we expect that this decision could be made within 30 days.²³⁴
- 8.37 If the Minister does seek an undertaking then greater flexibility is necessary, to accommodate the type of delays that are inevitable during diplomatic negotiations. It is important, however, that the decision is still made with some haste as the person sought will be in custody or on bail in the interim. To strike a balance between these considerations, the Bill requires the Minister in such cases to make the determination “as soon as is reasonably practicable”.²³⁵ The Minister must also keep the Court and the parties updated as to his or her progress.²³⁶ In the meantime, we envisage that the Court would maintain oversight by regularly adjourning the matter.
- 8.38 If the Minister directs the Court that a ground for refusal does apply, then the Court must discharge the respondent and the proceedings come to an end. If, however, the Minister directs that the referred ground does not apply, then the Court will make a formal finding that the respondent is liable for extradition.²³⁷
- 8.39 In simplified extradition proceedings, what the judge must be satisfied of is much more confined because there is no evidential inquiry.²³⁸ The other matters to be considered are technically the same, although we envisage that, as a matter of practice, there is likely to be less robust debate as to whether the grounds for refusal apply in simplified cases. In addition, given the nature of the grounds the Minister must consider under the Bill, there will be little scope for a case to be referred to the Minister. That is so, at least with reference to the current approved countries (Australia and the United Kingdom), neither of whom have the death penalty or a bilateral extradition treaty with New Zealand.

230 Extradition Bill, cl 34(4).

231 Extradition Bill, cl 34(3).

232 Extradition Bill, cls 31(3)(b) and 42(3)(b).

233 Extradition Bill, cls 34(7)(b) and 44(5)(b).

234 Extradition Bill, cls 35(4) and 45(4).

235 Extradition Bill, cls 35(3)(b) and 45(3)(b).

236 Extradition Bill, cls 35(3)(a) and 45(3)(a).

237 Extradition Bill, cls 34(2)(b)(ii) and 44(2)(b)(ii).

238 Extradition Bill, cl 44(4).

MAKING A FINDING OF LIABILITY AND THE EXTRADITION ORDER

- 8.40 At the end of the extradition hearing, the Central Authority will formally apply for the respondent to be found liable for extradition on the basis outlined in the NIP.²³⁹ If the judge is satisfied on the evidence that the respondent should be extradited, the judge will announce that decision. The liability finding must specify the foreign offence or offences for which the respondent is being found liable for extradition.²⁴⁰ That offence or those offences must have been included in the NIP.²⁴¹
- 8.41 As we explain below, the liability finding may then be appealed. At the end of the appeal process, if the liability finding stands, the District Court will issue the final extradition order. This order generally must be effected within two months of the date of issue.²⁴²

APPEALS AND JUDICIAL REVIEW

- 8.42 The balance to be struck in extradition cases is, on the one hand, ensuring that an application is dealt with efficiently, but on the other hand, ensuring that access to justice rights are properly addressed.
- 8.43 We think this is best achieved by providing that once a judge has made liability finding on the NIP, whether the respondent is liable or not, there should be a general right of appeal in relation to that decision by either party, in which they can raise any issue at all that they wish. We are concerned that successive appeals on interlocutory issues and the availability of judicial review may be used by some respondents for the prime purpose of achieving delay. Our proposal is to clarify what rights both a respondent and the Central Authority has in relation to appeals and judicial review.
- 8.44 After the judge's decision, either party may appeal against that decision by filing a notice of appeal within 15 working days.²⁴³ The High Court will hear and determine that appeal and may confirm the decision made by the court below, vary it or set it aside in whole or in part.²⁴⁴
- 8.45 By making the grounds for appeal this wide, our wish is to enable any matter that a party wishes to test to be argued upon appeal. We think this is preferable to successive appeals on interlocutory orders. Our proposal is that the parties have one right of appeal against a decision of the District Court, and that after the High Court has dealt with that appeal, the Court of Appeal and Supreme Court may grant leave to hear a further appeal but on the very limited grounds that we have specified.
- 8.46 In addition to a right of appeal, either party is, of course, in a position to apply for a judicial review of a decision taken, for instance, that of a Minister. We think it preferable that a judicial review should be filed at the same time as the first appeal to the High Court so that the judicial review may be heard alongside any appeal.²⁴⁵

239 Extradition Bill, cls 34(1) and 44(1).

240 Extradition Bill, cl 47(2)(a).

241 Extradition Bill, cls 34(1) and 44(1).

242 Extradition Bill, cl 57.

243 Extradition Bill, cl 59(2).

244 Extradition Bill, cl 60(1).

245 Extradition Bill, cl 66.

RECOMMENDATION

- R23 Either party should be able to appeal to the High Court against a finding that the respondent is, or is not, liable for extradition. The appeal should be a general appeal.

Chapter 9

The evidential inquiry

INTRODUCTION

- 9.1 An extradition request must relate to a person who has been accused or convicted of criminal offending. If the subject has been accused, the question arises as to whether New Zealand should assess the strength of the evidence against that person before agreeing to their extradition.
- 9.2 We examined this question in Chapter 7 of our Issues Paper and proposed that, for the vast majority of countries, there should be an inquiry into the case against the person sought. This is what happens under the Extradition Act 1999.²⁴⁶ Almost all of those we consulted agreed with this proposal. What divided submitters, however, was the nature of the court inquiry and the form of the evidence that should be presented.
- 9.3 In this chapter, we examine these two issues and recommend how the evidential inquiry should be conducted in the future.

THE NATURE OF THE INQUIRY

- 9.4 The current test for the evidential inquiry in the Extradition Act 1999 is based on the historical concept of committing a person for trial. The Court must be satisfied that:²⁴⁷
- ... the evidence produced or given at the hearing would, according to the law of New Zealand, but subject to this Act,—
- (i) in the case of a person accused of an extradition offence, justify the person's trial if the conduct constituting the offence had occurred in the jurisdiction of New Zealand.

Which offence?

- 9.5 The current test focuses on whether there is sufficient evidence in relation to the New Zealand or treaty offence (the parallel offence) not the foreign offence.²⁴⁸ We recommend that new extradition legislation should retain this approach. We have, however, tried to express this more clearly in the Bill.²⁴⁹
- 9.6 At first glance, this approach may seem counterintuitive as the person will never be put on trial in the requesting country for the parallel offence. The parallel offence, however, is the fundamental reason why New Zealand is willing to entertain an extradition request. There must be either dual criminality or a prior agreement to extradite for that type of offending. This

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

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

248 *Re McVey* [1992] 3 SCR 475 at 526; and *Norris v Government of the United States of America* [2008] UKHL 16 at [89].

249 The Bill requires the Central Authority to identify the equivalent New Zealand or treaty offence in the notice of intention to proceed (NIP): Extradition Bill cl 18(2)(g). The Court must then determine whether there is a case for the respondent to answer in relation to the offence identified in the NIP under cl 24(3)(b), based on the evidence contained in the Record of the Case. The former is written by the New Zealand Central Authority as it is the charging sheet; the Record of the Case by the requesting country as it summarises the evidence against the person sought.

requirement is central to deciding whether there is an extradition offence. It is also central to any assessment of the requesting country's evidence.

- 9.7 Furthermore, asking the New Zealand courts to routinely identify and apply the legal ingredients of foreign offences would pose practical difficulties. As the Supreme Court of Canada commented in *Re McVey*:²⁵⁰

... [to] require evidence of foreign law beyond the documents now supplied with the requisition would cripple the operation of extradition proceedings ... Flying witnesses in to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law.

- 9.8 We recognise that, for treaty offences, the practical difficulty of identifying the essential elements may still arise, particularly as offences listed in treaties are often expressed in imprecise terms and there may be limited case law on point.²⁵¹ However, as with all treaties, what is required is for the ordinary meaning to be given to the terms in the treaty in their context and in light of its object and purpose.²⁵² For an example of how this is done in practice see the Court of Appeal's analysis in *Government of United States v Cullinane*.²⁵³

What evidence?

- 9.9 The current test requires the Court to identify the “conduct constituting the [foreign] offence” as described in the requesting country's evidence.²⁵⁴ In the Bill, we have avoided using this phrase as we do not want the Court to conflate the evidential inquiry with any dual criminality aspect of the extradition offence test.²⁵⁵
- 9.10 We have, however, tried to make it plain in the Bill that in carrying out the evidential inquiry, the Court is not confined to examining the evidence solely as it relates to the elements of the foreign offence. As explained above, the foreign offence is largely irrelevant to this exercise. Instead, the Court is looking at the totality of the conduct as described in the evidence.²⁵⁶
- 9.11 In the second half of this chapter we discuss the evidence in detail. Here it is sufficient to note that we envisage two possible sources for the evidence: a Record of the Case prepared by the requesting country; and, in limited circumstances, evidence presented by the respondent.²⁵⁷ The reason for limiting the Central Authority's evidence to the Record of the Case (as opposed to the extradition request itself or other documents provided by the requesting country) is that the Record is the only document certifying that the summarised evidence is available for trial, and was gathered in accordance with the requesting country's law or would justify a trial in that country.

250 *Re McVey*, above n 248.

251 The Imperial treaties commonly include the following offences: “Any malicious act done with intent to endanger the safety of any person travelling or being upon a railway”; “malicious injury to property if such an offence be indictable”, “child-stealing” and “threats by letter or otherwise with intent to extort money”: for example, the treaties with Argentina, Belgium and Greece: see list of treaties in the schedule to the Extradition Bill, at ch 16 of this Report.

252 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(1).

253 *Government of United States v Cullinane* [2003] 2 NZLR 1 (CA) at [74]–[77] and [82]–[91].

254 Extradition Act 1999, s 4(2).

255 See the discussion of the extradition offence test in ch 6 and in the commentary to cls 7–8 of the Extradition Bill in pt 4.

256 Extradition Bill, cl 34(5).

257 Extradition Bill, cl 33(1) and 34(6).

What standard of proof?

- 9.12 The current test requires the Court to determine whether there would be sufficient evidence to “justify the person’s trial” if the conduct had occurred in New Zealand. Before the committal proceedings were abolished in 2013, a person’s trial was justified under New Zealand law if there was a *prima facie* case against them.²⁵⁸

The case for a new test

- 9.13 The *prima facie* case test is founded in the common law, rather than statute. It is commonly understood as: “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”.²⁵⁹ As submitters repeatedly told us, the current test for the evidential inquiry is too complicated: it is not clear on the face of the statute and relies heavily on common law. It is based on the notion of committal for trial, which no longer exists in New Zealand. Moreover, some submitters argued that the standard of proof (that being, a *prima facie* case) is simply too high.
- 9.14 Our view is that some complexity is unavoidable given the cross-border nature of extradition. We agree, however, that a clearer statutory test is needed that does not rely on the old language of committal.

Assessing the options for a new test

- 9.15 The central component of any new test will be the standard of proof. Throughout the consultation process we discussed various possible phrases and concepts in this regard including: “a *prima facie* case”, “a case to answer”, “a credible case”, “a plausible case”, “on the balance of probabilities”, “probable cause”, “reasonable suspicion” and “good cause to suspect”.
- 9.16 In developing our recommendation for the appropriate standard, we focused on three main criteria.
- 9.17 First, we wanted to recognise that an extradition proceeding should not be a mini-trial. One of the fundamental principles of extradition is that the determination of guilt or innocence is reserved for the foreign country. For this reason, we were not attracted to the options that require an assessment of the likelihood that the person sought actually committed the offence. These options import a notion of weighing the requesting country’s evidence against defence evidence. All of the proposed tests based on arrest or charging standards (that is: “probable cause”, “reasonable suspicion” and “good cause to suspect”) fall into this category. These standards are appropriate in an investigation setting, where the process of gathering evidence is ongoing. If the preparation of a prosecution case is largely complete and such tests are applied, a mini-trial is unavoidable. That is so, regardless of how low the threshold for certainty might be.
- 9.18 Second, we wanted to ensure that the test would result in a meaningful judicial determination. Put another way, we did not want the standard of proof to be so low that the evidential inquiry would amount to a rubber-stamping exercise. Again, this deterred us from adopting a standard based on suspicion.²⁶⁰

258 Summary Proceedings Act 1957, s 184G (repealed); and *Auckland City Council v Jenkins* [1981] 2 NZLR 363.

259 In an extradition context, see *United States of America v Ferras* [2006] 2 SCR 77 at 85 citing this aspect of *United States of America v Shepard* [1977] 2 SCR 1067 at 1080 with approval. In a New Zealand context, see *R v Flyger* [2001] 2 NZLR 721 (CA), as explained in *Parris v Attorney-General* [2004] 1 NZLR 519 (CA) at [14], which has now been encapsulated in statute in s 147(4)(c) of the Criminal Procedure Act 2011.

260 In the United States they use the “probable cause” standard and then apply a rule that the defence cannot produce any evidence. This combination creates a threshold that, to our minds, seems too low.

- 9.19 Third, we wanted to use a standard that would be familiar to New Zealand courts and practitioners. Several submitters stressed to us that extradition proceedings are rare. Furthermore, there will only be an evidential inquiry if the request is not from an approved country and relates to an accused, rather than a convicted person. Therefore, a completely new standard could take a long time to bed-in and become properly understood.
- 9.20 These criteria led us to conclude that the best option would be to develop a test based on the standard for dismissing a charge under section 147 of the Criminal Procedure Act 2011, and in particular the phrase “the court is satisfied that there is no case to answer” in section 147(4)(b). This is the test that applies in a judge-alone trial. In an extradition context, however, the onus needs to be reversed as the applicant (that is the Central Authority) should prove that there is an evidential basis for extradition, rather than the respondent proving that the case should be dismissed. Therefore, the test would need to be reframed in the positive, requiring that “the court is satisfied that there is a case for the respondent to answer”.²⁶¹
- 9.21 We prefer this phraseology to the jury trial formulation, which is: “the Judge is satisfied that, as a matter of law, a properly instructed jury could reasonably convict the defendant”. In relation to extradition, it seems inappropriate to use phrases such as “a properly directed jury” and “as a matter of law”. These phrases may create confusion about which aspects of New Zealand law and procedure should be considered.
- 9.22 We acknowledge that the “no case to answer” test in section 147(4)(b) is a modern statutory formulation of the *prima facie* case standard. Our view is that this standard is not too high to be replicated in an extradition context. Rather, we consider that the difficulty with the current legislation is that it does not contain sufficient guidance as to how this standard should be applied by the Court in practice.
- 9.23 An additional benefit of the “case to answer” standard we propose is that it broadly aligns with the Canadian test,²⁶² allowing us to continue to call on their jurisprudence as an analogue jurisdiction. This is important given the rarity of standard extradition proceedings in New Zealand and their inherent complexity.

The need to spell out the test in the Bill

- 9.24 While we recommend wording similar to section 147(4)(b), we do not mean to suggest that the Court’s approach should be the same in all respects. We are choosing that wording because it reflects best the standard to which evidence should be judged. We are not choosing that wording to adopt other aspects of section 147. That section was drafted with New Zealand criminal proceedings in mind and could be amended without considering the consequences for extradition.
- 9.25 Additionally, cross-referencing could have unintended consequences. For example, as noted above, under section 147(4)(b) the applicant must show that there *is no case to answer*. In an extradition context, however, the Central Authority must prove that there *is a case to answer*. We would not want cross-referencing to cause confusion, or to reverse this onus of proof.
- 9.26 Confusion could also be caused by the court’s power to dismiss a charge for abuse of process under section 147. Case law confirms that the section may be used in this way.²⁶³ We are not convinced, however, that it is appropriate for the Court to consider abuse of process arguments

²⁶¹ Extradition Bill, cl 34(4)(c).

²⁶² Extradition Act SC 1999 c 18, s 29(1)(a).

²⁶³ *Spratt v Savea* DC Christchurch CRI-2014-009-1492, 29 April 2014.

during the evidential inquiry in extradition proceedings.²⁶⁴ It is not that these arguments are unimportant in extradition proceedings, but rather that they are better dealt with using extradition-specific mechanisms.

- 9.27 For instance, the Bill we have drafted has universally applicable grounds for refusal that are designed specifically to address abuse of process type arguments.²⁶⁵ These cover issues such as double jeopardy, the impossibility of a future fair trial (for instance through delay or discrimination) and ulterior motive in bringing a prosecution. We do not want cross-referencing to force the courts to examine these issues twice: once in the evidential inquiry, through an ill-equipped domestic lens; and a second time in relation to the grounds for refusal.

Our recommendation

- 9.28 For all of these reasons, we recommend a tailor-made test for the evidential inquiry that borrows language from section 147(4)(b) of the Criminal Procedure Act 2011 and the associated case law.
- 9.29 We have included this test in the Bill. The test states that the Court must determine whether there is a case for the respondent to answer in respect of the New Zealand or treaty offence identified in the NIP.²⁶⁶ This makes it plain that the parallel offence, not the foreign offence, is the one that matters for the purpose of the evidential inquiry. Furthermore, the Central Authority is responsible for identifying the parallel offence and must keep the NIP up to date throughout the proceedings.²⁶⁷
- 9.30 We have also included a definition of “a case to answer” in our Bill based on the common law principles that have developed around section 147(4)(b) of the Criminal Procedure Act and its predecessors. We did so to ensure that the test is, and remains, appropriate in an extradition context. We have attempted to translate the case law into appropriate statutory language that will be familiar to New Zealand practitioners. That is why the Bill refers to the existence of evidence that “if accepted as accurate at the respondent’s trial, would establish each essential element” of the offence identified in the NIP.²⁶⁸ In line with the case law, we clarify further that the extradition judge should “disregard only evidence that is so unreliable that it could not have any probative value”.²⁶⁹

RECOMMENDATION

- R24 There should continue to be an evidential inquiry in standard extradition proceedings. In conducting the inquiry the Court should determine whether there is a case to answer in respect of each offence identified in the Notice of Intention to Proceed.

264 This occurred under the current Extradition Act 1999. The Court of Appeal was called on to determine whether abuse of process arguments could be raised during the evidential inquiry given the cross-referencing to committal proceedings. It found that there was limited scope for such arguments but noted the extensive overlap with other provisions in extradition legislation: see *Bujak v Republic of Poland* [2007] NZCA 392, [2008] 2 NZLR 604.

265 Extradition Bill, cl 20.

266 Extradition Bill, cl 34(4)(c) and 34(5).

267 Extradition Bill, cls 26(2)(g)–(h) and 90.

268 Extradition Bill, cl 34(5)(b).

269 Extradition Bill, cl 34(5)(a). See also the Canadian approach of excluding “manifestly unreliable” evidence as discussed by the Supreme Court of Canada in *United States of America v Ferras*, above n 259, at [40].

ON WHAT EVIDENCE SHOULD THE COURT BASE ITS DECISION?

The Record of the Case

- 9.31 In the vast majority of cases, the only evidence relevant to the Court's inquiry will be the evidence of the alleged offending, as collated by the requesting country and presented to the Court. In our Issues Paper, we proposed that in future this evidence should always be presented in the form of a Record of the Case. We suggested that in relation to an accused person, a Record of the Case should summarise the evidence that is available for the foreign trial, but the primary evidence need not be attached. We noted that this would be very similar to the Canadian approach and proposed that we closely follow the Canadian model in new extradition legislation.²⁷⁰

How it works in Canada

- 9.32 We understand that in Canada the International Assistance Group in the Canadian Department of Justice is responsible for processing incoming extradition requests. It receives between 100 and 150 extradition requests each year, most of which relate to accused persons, and the requests attach a Record of the Case. These Records tend to range from between five and 20 pages depending largely on the complexity of the alleged offending.
- 9.33 The International Assistance Group works closely with requesting countries to ensure that they understand the requirements of the Canadian system. Those requirements have been distilled into the following practical guidance given to potential requesting countries on how to prepare a Record of the Case in relation to an accused person:²⁷¹

In the case of a person sought for prosecution, the Record of the Case must summarize the evidence which is available for use in the prosecution for the particular offence or offences. It is important to note that a summary of the facts of the case is not sufficient. There must be a detailed summary of the actual evidence in support of each of the alleged offences. This may be in the form of a hearsay statement prepared by an investigating officer or magistrate.

For example, Mr. Smith is charged with the murder of Mr. Jones. It is alleged that Mr. Smith confronted Mr. Jones outside a bar in front of several people and shot him at point blank range. Mr. Smith died in hospital. The Record of the Case should include a summary of the following types of evidence:

- The statements of the witnesses to the shooting, including their identification of Mr. Smith, which should be tied to an exhibited photograph;
- The statements of the police who attended at the scene and/or arrested Mr. Smith, including a summary of any fingerprint evidence, attaching the fingerprints taken and tying them to the accused;
- The statements of attending officials responsible for the transport of Mr. Jones to hospital;
- The statements of the hospital officials with respect to his treatment and death and a summary of any autopsy report, linking that report to the victim;
- A summary of any ballistic or other physical evidence which is available.

While it is not necessary to do so, you may attach statements, reports or other documents to the summary.

²⁷⁰ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [7.90].

²⁷¹ International Assistance Group "Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition: Extradition – General Overview" Organization of American States < www.oas.org >; and see Government of Canada "Extradition Requests to Canada" Department of Justice < www.justice.gc.ca > .

The Record of the Case itself should not contain a reference to the offence charged in the requesting state or to any other information required under the treaty. It should contain exclusively a summary of the evidence in the case.

...

Where the person is sought for prosecution, the Record of the Case must be certified by a judicial authority or a prosecutor. The authority who provides the certification must be able to attest that the evidence summarized in the Record of the Case is available for trial and either:

- (i) is sufficient under the law of that state to justify prosecution, or
- (ii) was gathered according to the law of that state.

The appropriate authority to give the certification, as well as the choice between (i) and (ii), will depend upon the nature of your legal system. Generally, we anticipate that common law countries will provide a certification by a prosecutor in accordance with (i) while civil law countries will have a judicial authority certify in accordance with (ii).

- 9.34 The Canadian Act also requires a country seeking the extradition of a convicted person to prepare a Record of the Case.²⁷² The requirements for this type of Record are different and are discussed further in Chapter 10.

The concerns raised during consultation

- 9.35 Throughout the consultation we mainly encountered cautious support for our Record of the Case proposal. Prosecuting agencies and defence practitioners alike told us that a summary of the evidence would greatly assist them in understanding the foreign case. Further, it would avoid our courts becoming bogged down in potentially voluminous and confusing primary evidence. As noted in our Issues Paper, a Record of the Case would also theoretically have the benefit of being easier for civil law countries to prepare.²⁷³
- 9.36 All of those we consulted, however, identified areas of concern. The common issues raised were:
- (a) What mechanisms would exist for quality control?
 - (b) Could the respondent argue that the Record is simply unreliable?
 - (c) Would New Zealand's usual rules of evidence apply to the content of the Record of the Case?
 - (d) Could evidence gathered in New Zealand be included in a Record of the Case? If so, what rules of admissibility would apply to that evidence?
 - (e) Would the Court be able to ask to see the primary evidence if it had concerns?
 - (f) Could the requesting country produce the primary evidence if it wanted to?
 - (g) Could a Record of the Case be amended or supplemented during the extradition proceedings?
 - (h) How would the respondent challenge a Record of the Case?
- 9.37 Our view is that these concerns are surmountable and should be addressed in new extradition legislation. We explain how our Bill deals with each of these concerns below.

272 Extradition Act SC 1999 c 18, ss 33(1)(b) and (3)(b).

273 Issues Paper, above n 270, at [7.45]–[7.48] and [7.88].

Quality control

- 9.38 In the Bill, we have made the Central Authority, as the applicant, primarily responsible for quality control. It is not obliged to accept a low quality Record of the Case²⁷⁴ and can withdraw a NIP at any time.²⁷⁵ We view this as being broadly analogous to the domestic practice of the Solicitor-General, and the Crown Prosecutors under him or her, assuming responsibility for Crown prosecutions.²⁷⁶

Reliability

- 9.39 A Record of the Case in Canada is not just a summary of the evidence. It must be accompanied by what is known in Canada as a “certification”. This is a document prepared by the foreign prosecutor or investigating judge, which provides the Canadian authorities with an assurance that the evidence is available for trial and was collected legally or is sufficient to justify a trial in the requesting country.²⁷⁷ This certification creates a presumption of reliability, which is in keeping with the principle of comity that underlies all extraditions.²⁷⁸
- 9.40 We have included this approach in our Bill but have added an additional safeguard.²⁷⁹ We consider that the certification needs to acknowledge the requesting country’s duty of candour and good faith.²⁸⁰ We discussed this duty in Chapter 9 of the Issues Paper.²⁸¹ In short, a requesting country is obliged to reveal any information that it is aware of that could seriously undermine the prosecution case.²⁸² By formally acknowledging this good faith duty through the certification process, our courts can have confidence that the requesting country is aware of it and is acting in compliance with it.

Rules of evidence and admissibility

- 9.41 Our recommended Bill mirrors the Canadian approach to admissibility, as described by the Supreme Court of Canada in *The United States of America and Canada v Anekwu*.²⁸³ In brief, a Record of the Case is admissible if it is properly certified.²⁸⁴
- 9.42 This general proposition is subject to one exception.²⁸⁵ The exception relates solely to evidence gathered in New Zealand. This evidence must be capable, in substance rather than form, of being admissible in evidence in a domestic criminal trial. If it is not, then the evidence is inadmissible in the extradition proceedings and must be excised from the Record of the Case.²⁸⁶

274 Extradition Bill, cl 25.

275 Extradition Bill, cl 14(2)(c).

276 Criminal Procedure Act 2011, pt 5, sub-pt 2.

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

278 *United States of America v Ferras*, above n 259, at 93.

279 For the certification requirement, see Extradition Bill, cl 33(2)(f). For the presumption of reliability, see cl 92(3).

280 This duty was described by the Privy Council in *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [35]:

There are many respects in which extradition proceedings must, to be lawful, be fairly conducted. But a requesting state is not under any general duty of disclosure similar to that imposed on a prosecutor in English criminal proceedings. It does, however, owe the court of the requested state a duty of candour and good faith. While it is for the requesting state to decide what evidence it will rely on to seek a committal, it must in pursuance of that duty disclose evidence which destroys or very seriously undermines the evidence on which it relies. It is for the party seeking to resist an order to establish a breach of duty by the requesting state.

This duty was then recognised by the New Zealand Supreme Court in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [58] and [67] per Elias CJ, [150]–[152] per McGrath and Blanchard JJ, [228]–[238] per William Young J and [264]–[265] per Glazebrook J.

281 Issues Paper, above n 270, at [9.30].

282 Extradition Bill, cl 33(2)(f)(i). See also cls 33(2)(e) and 112.

283 *The United States of America and Canada v Anekwu* 2009 SCC 41.

284 Extradition Bill, cl 92(1)(a).

285 *The United States of America v Anekwu*, above n 283, contains a detailed discussion of how this exception works in practice.

286 Extradition Bill, cl 92(2).

The rationale behind this additional requirement is simple. We want to ensure that evidence gathered in New Zealand complies, in substance, with New Zealand law.²⁸⁷

- 9.43 In practical terms, this means that a Record of the Case may summarise evidence that was gathered in New Zealand, if that evidence is available for the foreign trial. There is no need to present this separately as primary evidence, to comply with the hearsay rules in our Evidence Act 2006.²⁸⁸ If, however, New Zealand-gathered evidence is summarised in this way, the Record of the Case must clearly identify the origins of the evidence. The Court may then consider whether the underlying evidence would comply with New Zealand's rules of evidence, putting to one side the fact that the evidence has been presented in a summarised form.

Primary evidence

- 9.44 The Bill makes it plain that a requesting country may attach any document it likes to its Record of the Case.²⁸⁹ Nevertheless, the Record of the Case must still contain a summary of the evidence and the certification.²⁹⁰ These requirements cannot be avoided, as they provide requisite clarity and indicia of reliability.
- 9.45 Whether or not to attach the primary evidence is ultimately a decision for the requesting country. However, the Court may advise the Central Authority that, without further information, it will find there is no case to answer.²⁹¹ This would then give the requesting country a chance to amend the Record of the Case to provide the primary evidence if that was the only way of dealing with the Court's concerns. For example, if the respondent rebutted the presumption that the Record is reliable, then the requesting country may wish to provide the primary evidence in order to elucidate its case. As the example suggests, we envisage that the requesting country will only provide primary evidence in rare cases. If a practice developed of asking for this evidence more frequently, it would undermine our policy for introducing the Record in the first place.

Supplementing the Record

- 9.46 The Bill clarifies that a Record of the Case may be amended or supplemented at any time and that the Court may require a further certification.²⁹² The Court should, however, only admit an amended or supplementary Record of the Case where doing so creates no unfair prejudice to the person sought.²⁹³

287 There is overlap here with the process for providing mutual assistance in criminal matters. Under our Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], which we discuss in Part 3 of this Report, a foreign Central Authority will need to provide the New Zealand Central Authority with certain assurances as to the use that information provided under the Bill will be put to in the foreign country: Mutual Assistance Bill, cls 30(1) and 34. For instance, in search and surveillance cases we have proposed that the foreign Central Authority should agree, in advance, to comply with any ruling from a New Zealand court as to the legality or reasonableness of the use of any power; cl 35(1)(b)(vi). In such cases, we would expect the New Zealand Central Authority to advise the requesting country that it should remove the evidence from the Record of the Case, in compliance with their mutual assistance assurance, prior to presenting the Record of the Case to the Court.

288 Extradition Bill, cl 92(2) makes it plain that the hearsay rules in the Evidence Act 2006, pt 2, sub-pt 1 do not apply for the purpose of determining whether the New Zealand gathered evidence would, in substance, be admissible in a domestic trial.

289 Extradition Bill, cl 33(4).

290 Extradition Bill, cl 33(2)(d) and 33(2)(f).

291 Extradition Bill, cl 88.

292 Extradition Bill, cl 91.

293 To clarify this point, cl 91 of the Bill could be amended to include a leave requirement. Although, even as drafted we would expect the Court to adjourn the proceedings and/or to disallow the amendment if there would be undue prejudice to the respondent.

Mounting a challenge

- 9.47 Our general understanding is that in Canada, Records of the Case are commonly challenged by:
- (a) disputing identification;
 - (b) applying to excise inadmissible Canadian-gathered evidence;
 - (c) identifying gaps and/or inconsistencies evident on the face of the Record;
 - (d) undermining the reliability of key evidence, to the point where it has no evidential value; and
 - (e) refuting the availability of key evidence for trial in the foreign jurisdiction.²⁹⁴
- 9.48 We envisage that these avenues for challenge would be equally available under our recommended new extradition legislation.

The possibility of respondent evidence

- 9.49 This was a controversial issue during consultation. Some submitters called for respondent evidence to be heavily constrained, to prevent the evidential inquiry from becoming a trial. Other submitters argued that such constraints would make extradition proceedings one-sided and unfair. In our view, the issue can be resolved by relying on the fundamental principle that only relevant evidence is presumptively admissible. To clarify the position we have drafted a provision stating that the Court must consider respondent evidence if it is relevant to the “case to answer” test.²⁹⁵ In practice, scope for such evidence is limited.
- 9.50 The test requires the Court to assess the prosecution case as if it can be proved at trial. In all but the most exceptional circumstances, questions of credibility and weight must be reserved for the finder of fact in the requesting country. Therefore, evidence that offers a defence (for example, alibi evidence) or an alternative interpretation of the Record is not relevant. To be relevant, respondent evidence would need to be capable of proving that crucial evidence in the Record of the Case:
- (a) has absolutely no probative value;
 - (b) was gathered in New Zealand in a way contrary to New Zealand law and should be excised from the Record; or
 - (c) is not available for trial in the requesting country.
- 9.51 The Canadian case law demonstrates that such circumstances arise very rarely.²⁹⁶

RECOMMENDATION

R25 In conducting the evidential inquiry, the Court should consider a Record of the Case prepared by the requesting country and, where relevant to the test, evidence offered by the respondent.

294 *United States of America v Ferras*, above n 259, at 58.

295 Extradition Bill, cl 34(6).

296 By way of example, see *France v Diab* 2014 ONCA 374, (2014) 120 OR (3d) 174; *United States of America v Anderson* 2007 ONCA 84; and *United States of America v Mach* (2006) 70 WCB (2d) 318 (ONSC).

Chapter 10

Admissible evidence

INTRODUCTION

- 10.1 Under the Extradition Act 1999 evidence is ordinarily presented in an extradition proceeding in writing. This may take the form of formal written statements, documentary evidence and, in some instances, a Record of the Case. There is very limited scope for cross-examination.²⁹⁷
- 10.2 In the Issues Paper, we proposed that this presumption in favour of written evidence should be retained.²⁹⁸ We added that this should be achieved through express provisions in the Extradition Bill rather than by cross-referencing the Summary Proceedings Act 1957 or the Criminal Procedure Act 2011 (as the 1999 Act does).²⁹⁹ There was no opposition to that proposal during the consultation process.
- 10.3 In this chapter, we explain how the Extradition Bill, in conjunction with the Evidence Act 2006, will give effect to our proposal. This builds on our discussion of the Record of the Case in Chapter 9. It also deals with documentary evidence, written statements and oral evidence orders.

THE RECORD OF THE CASE

- 10.4 In Chapter 9 we discussed the Record of the Case procedure, insofar as it applies in accusation cases (as opposed to conviction cases). The Bill sets out the requirements for this type of Record.³⁰⁰ If those requirements are met, then the Record is admissible and there is a statutory presumption that it is reliable.³⁰¹ This is the case regardless of the rules in the Evidence Act relating to hearsay.³⁰²
- 10.5 A second type of Record of the Case (which we did not discuss in detail in Chapter 9) applies in conviction cases.³⁰³ Again, the requirements for this type of Record are based on the Canadian model. The most important requirement is that a judicial or prosecuting authority must certify that the content of the Record is accurate and complete.³⁰⁴ This certification provides the factual basis for the statutory presumption of reliability. Again, if all of the requirements are met, then the Record is admissible.³⁰⁵

297 Extradition Act 1999, ss 22(1)(b) and 43(1)(b); Summary Proceedings Act 1957, pts 5 and 5A (now repealed); and Criminal Procedure Act 2011, s 35.

298 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper].

299 At [9.59]–[9.60].

300 Extradition Bill, cl 33(2).

301 Extradition Bill, cl 92(3).

302 Extradition Bill, cl 92(2)(a).

303 Extradition Bill, cl 33(3).

304 Extradition Bill, cl 33(3)(a) and (e).

305 Extradition Bill, cl 92(1)(a).

OTHER TYPES OF EVIDENCE

- 10.6 The Record of the Case procedure only applies to standard extradition proceedings. Also, it only relates to evidence offered by the Central Authority in respect of the criteria for extradition.
- 10.7 In all other instances (that is, all evidence in simplified extradition proceedings, respondent evidence and ground for refusal evidence) evidence will need to be presented in the form of documentary evidence or written statements. The Court will have a limited power to allow oral evidence. The remainder of this chapter explains how we envisage this will work in practice.

Documentary evidence

- 10.8 The Extradition Bill does not contain any provisions governing documentary evidence. That is because the Evidence Act applies to all court proceedings³⁰⁶ and already contains a subpart on this topic.³⁰⁷ The subpart includes admissibility provisions and provisions that create presumptions as to authenticity. Many of these provisions are directed specifically at foreign evidence.³⁰⁸
- 10.9 We do not consider it necessary or appropriate to create an alternative set of rules for extradition proceedings. Part 9 of the Extradition Act 1999 is illustrative of this point. It contains its own provisions relating to authentication and documentary hearsay.³⁰⁹ As we discussed in the Issues Paper, these provisions are difficult to reconcile with the Evidence Act and to apply in practice.³¹⁰ Simply relying on the Evidence Act avoids this issue. The documentary evidence rules in the Evidence Act are sufficiently flexible to accommodate extradition proceedings and address the areas of concern that we identified in the Issues Paper.
- 10.10 The following provisions in the Evidence Act are particularly relevant to extradition:
- (a) **New Zealand and foreign official documents** – this section creates a presumption of authenticity in relation to various documents including those that purport to have been printed or published with the authority of the judiciary in a foreign country or by an international organisation.³¹¹
 - (b) **Translations** – this section creates a presumption that a translation is accurate, in the absence of evidence to the contrary.³¹²
 - (c) **Presumptions as to New Zealand and foreign official seals** – this section creates a presumption of authenticity in respect of any seal of a foreign country or public body and in respect of any seal or signature of a person holding a foreign public office.³¹³
 - (d) **Evidence of foreign law** – this section outlines a variety of different ways of proving foreign law, including simply producing any document containing the foreign statute that appears to the judge to be a reliable source of information.³¹⁴

306 Evidence Act 2006, s 5.

307 Evidence Act 2006, pt 3, sub-pt 8.

308 Evidence Act 2006, ss 140–144.

309 Extradition Act 1999, ss 75 and 78.

310 Issues Paper, above n 298, at [9.47]–[9.53].

311 Evidence Act 2006, s 141(3)–(5).

312 Evidence Act 2006, s 135.

313 Evidence Act 2006, s 143.

314 Evidence Act 2006, s 144.

Written statements

- 10.11 The Extradition Bill contains an admissibility provision for written statements.³¹⁵ There are two reasons for including this provision in the Bill, rather than simply relying on the Evidence Act:
- (a) First, under the Evidence Act a written statement would qualify as hearsay.³¹⁶ Therefore, to be admissible, the statement would need to meet the statutory criteria for admitting hearsay.³¹⁷ These include an inquiry into whether the maker of the statement is available to give evidence in person and, if so, the likely cost that would entail in terms of time and money³¹⁸ and, potentially, a notice requirement.³¹⁹ Our view is that these criteria are overly cumbersome in the context of an extradition hearing. These hearings will routinely involve statements from foreign witnesses and they are not trials. Furthermore, once a statement is admitted it is ultimately up to the Court to decide how much weight to place on it in making its decision.
 - (b) Second, we wanted to avoid the requirement in the Evidence Act that evidence must be given by oath or affirmation.³²⁰ Foreign jurisdictions use a broad range of differing oath and declaration procedures. We consider that, for the purpose of admissibility, a declaration that the statement is true and was made in contemplation of court proceedings would be sufficient.³²¹
- 10.12 The admissibility provision in the Bill is based on the equivalent provision governing formal written statements in the Criminal Procedure Act.³²² We have, however, included an additional requirement that the circumstances relating to the statement should provide a reasonable assurance that the statement is reliable.³²³ This mirrors one of the other statutory criteria for admitting hearsay under the Evidence Act.³²⁴ We chose to replicate this requirement because it will focus the Court's attention on the critical issue of apparent reliability.

Oral evidence orders

- 10.13 Alongside the admissibility clauses in the Bill, we have included a provision that enables the Court to make an oral evidence order.³²⁵ This is based on the equivalent powers in the Criminal Procedure Act.³²⁶ The threshold for making such an order is high. The Court must consider it necessary to take the person's evidence orally, in order to make a liability determination.³²⁷ Accordingly, the oral evidence must be critical to the entire case.
- 10.14 The Bill also specifies who may be the subject of an oral evidence order.³²⁸ In doing so, it clarifies that such an order may not be made for any person who is associated with a Record of the Case. This includes the drafter of the Record and any person whose evidence is summarised in it. We excluded these people because the Bill contains an alternative process the Court should follow

315 Extradition Bill, cl 92(1)(c).

316 See the definitions of "hearsay statement" and "witness" in s 4 of the Evidence Act 2006.

317 By virtue of the combined effect of ss 17–18 of the Evidence Act 2006.

318 Evidence Act 2006, s 18(1)(b).

319 Evidence Act 2006, s 22. This only applies in criminal proceedings. As explained elsewhere in this Report, extradition proceedings are not clearly criminal or civil.

320 Evidence Act 2006, s 77.

321 Extradition Bill, cl 92(1)(c)(ii). This is language used in s 82(1)(b) of the Criminal Procedure Act 2011 in relation to formal written statements.

322 Criminal Procedure Act 2011, s 82.

323 Extradition Bill, cl 92(1)(c)(iii).

324 Evidence Act 2006, s 18(1)(a).

325 Extradition Bill, cl 93.

326 Criminal Procedure Act 2011, ss 90 and 92.

327 Extradition Bill, cl 93(2).

328 Extradition Bill, cl 93(1).

if it has grave concerns about a Record. In brief, the Court should explain its concerns to the Central Authority and adjourn the hearing.³²⁹ The Central Authority should then discuss the matter with the requesting country. This process is more in keeping with the comity principles that underlie all extraditions and is discussed further in the commentary to the Extradition Bill in Part 4 of this Report.

RECOMMENDATION

- R26 Evidence should ordinarily be presented for extradition hearings in written form. However, in limited circumstances the Court should have the power to make an oral evidence order.

³²⁹ Extradition Bill, cl 88.

Chapter 11

Extradition and refugee proceedings

INTRODUCTION

- 11.1 The Immigration Act 2009 provides that a person may claim “refugee status” in New Zealand under the Convention relating to the Status of Refugees (Refugee Convention), or “protected person status” under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) or the International Covenant on Civil and Political Rights (the ICCPR).³³⁰ Either status entitles the person to certain rights against being deported from New Zealand.³³¹ These claims are determined by government officials in the first instance,³³² with the possibility of an appeal to an independent tribunal.³³³ For the purpose of this chapter we refer to the determination of these claims as refugee proceedings.
- 11.2 It is not uncommon for a person to claim refugee or protected person status under the Immigration Act, and to be the subject of an extradition request. In those circumstances, the overlap between the refugee proceeding and any extradition proceeding would be extensive. Both would involve consideration of alleged criminal offending and the likelihood of serious human rights violations if the person was forcibly returned to a foreign country. The same information/evidence would be relevant to both proceedings. Furthermore, the Refugee Convention, the Convention against Torture and the ICCPR would be directly relevant to both of the final decisions.
- 11.3 The difficulty is that, at present, there is no statutory guidance as to how extradition and refugee proceedings relate to each other. As a result, there is currently potential for the extradition and immigration authorities in New Zealand to make irreconcilable final decisions in relation to the same person.
- 11.4 In this chapter we examine the problem of overlap. We outline the extent of the overlap between extradition and refugee proceedings, and explain our policy for how this overlap should be managed in the future. We include recommendations for clauses that should be in the Extradition Bill and amendments that should be made to the Immigration Act. We have not taken the extra step of including the necessary clauses in our proposed Extradition Bill. That is because the details of those clauses will need to be drafted in conjunction with the amendments to the Immigration Act and with extensive technical assistance from immigration specialists.

THE ISSUES RAISED DURING CONSULTATION

- 11.5 In Chapter 10 of our Issues Paper, we discussed the inter-relationship between refugee and extradition proceedings. We suggested that the Extradition Bill should include statutory bars on extraditing a refugee in breach of the Refugee Convention and on extraditing an asylum seeker

330 Convention relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention], arts 33(1) and 33(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [Convention against Torture], art 3; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], arts 6–7.

331 Immigration Act 2009, s 164.

332 Immigration Act 2009, s 127(1).

333 Immigration Act 2009, s 198.

who is awaiting final determination of their refugee claim.³³⁴ We also raised for discussion the issue of whether information disclosed in one type of proceeding should be available for use in the other.³³⁵

- 11.6 The Ministry of Business, Innovation and Employment provided us with a submission on Chapter 10. The submission indicated to us that our proposed statutory bars were a start, but that much greater reform would be required to address the complex and technical legal issues that currently exist surrounding:
- (a) the impact of one proceeding on the other;
 - (b) the sequencing of these proceedings; and
 - (c) the degree to which the government agencies involved are able to share information with each other.
- 11.7 In light of this submission, we held a series of meetings with immigration specialists, including representatives from the Refugee Status Branch (RSB) and the Immigration and Protection Tribunal (IPT). The RSB is part of the Immigration New Zealand Group in the Ministry of Business, Innovation and Employment. The RSB employs refugee and protection officers, who are responsible for the initial determination of any claim under the Immigration Act.³³⁶ The IPT is an independent tribunal chaired by a District Court Judge. It is responsible for determining any appeal against a decision made by a refugee and protection officer, and considers the claim afresh.³³⁷
- 11.8 In these meetings we explored how the New Zealand authorities should respond if a refugee or an asylum seeker³³⁸ in New Zealand is also the subject of an extradition request. We discussed a variety of different ideas as to how this situation should be resolved and how the relationship between the extradition and refugee proceedings should work in practice.

THE EXTENT OF THE OVERLAP

- 11.9 Any reform of this area of the law requires an understanding of the overlap between the two sets of proceedings.
- 11.10 Under international refugee and human rights law, New Zealand is obliged not to extradite or deport a person if:
- (a) that person is a refugee or an asylum seeker under the Refugee Convention and the Convention does not allow for expulsion;³³⁹
 - (b) there are substantial grounds for believing that the person would be in danger of being subjected to torture if deported or extradited from New Zealand;³⁴⁰ or
 - (c) there are substantial grounds for believing that the person would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported or extradited from New Zealand.³⁴¹

334 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [10.20] and [10.24].

335 At [10.29].

336 Immigration Act 2009, s 127(1).

337 Immigration Act 2009, s 198.

338 An “asylum seeker” is a person whose claim is yet to be determined.

339 Refugee Convention, above n 330, arts 33(1) and 33(2).

340 Convention against Torture, above n 330, art 3.

341 ICCPR, above n 330, arts 6–7.

- 11.11 These “non-refoulement” obligations are owed under the Refugee Convention, the Convention against Torture and the ICCPR, respectively.³⁴² Notably, whether these obligations are engaged in a particular case depends largely on whether the requesting country is also the country where the person is at risk.
- 11.12 In relation to extradition, the non-refoulement obligations are reflected in the grounds for refusal that are considered by the Central Authority, the Court or the Minister. The safeguards concerning speciality and prohibiting re-extradition to a third country provide related protection.
- 11.13 In relation to deportation (as opposed to extradition), these obligations are recognised through Part 5 of the Immigration Act. This Part contains the procedure for granting a person refugee status (if the Refugee Convention applies) or protected person status (if the Convention against Torture or the ICCPR applies).
- 11.14 Below we compare the decisions that are currently made under Part 5 of the Immigration Act to the equivalent decisions that we recommend should be made under our Extradition Bill.³⁴³ The comparison reveals that although there is a high degree of similarity between the decisions, there are also significant differences. Both the similarities and the differences have informed our policy recommendations.

Refugee status

- 11.15 The Refugee Convention is incorporated as a Schedule to the Immigration Act. Under the Convention and the Act a two-part test applies in determining whether a person is a refugee.³⁴⁴ First, there is the “inclusion” test that examines the risk of persecution in the country of origin. Second, there is the “exclusion” test. This examines whether there is a reason to exclude the person from being recognised as a refugee even if their claim of persecution has merit. Finally, in extremely rare circumstances, consideration of whether a refugee should be deported despite their refugee status may be needed, because an exception to the principle of non-refoulement applies.

The inclusion test

- 11.16 Under the Refugee Convention a person’s refugee claim has merit if the person has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in his or her country of nationality or habitual residence, and he or she is unable or unwilling to avail himself or herself of the protection of that country.³⁴⁵ The table below compares this test to the discrimination ground for refusal in the Extradition Bill.

³⁴² For a detailed discussion of the non-refoulement obligations and how they relate to extradition proceedings see Sibylle Kapferer *The interface between Extradition and Asylum* (United Nations High Commissioner for Refugees, Legal and Protection Policy Research Series PPLA/2003/05, November 2003).

³⁴³ For a similar analysis of the non-refoulement obligations and how they are recognised in extradition and immigration proceedings from an international perspective see Kapferer, above n 342.

³⁴⁴ Refugee Convention, above n 330, arts 1A and 1F, which apply by virtue of the Immigration Act, s 129(1).

³⁴⁵ Refugee Convention, above n 330, art 1A(2).

DISCRIMINATION GROUND FOR REFUSAL IN THE EXTRADITION BILL	SIMILARITIES	DIFFERENCES
<p>The Court must refuse to extradite a person if the extradition of the respondent:</p> <p>(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</p> <p>(ii) may result in the respondent being prejudiced at trial, punished, detained or restricted in his or her personal liberty because of any of those grounds.³⁴⁶</p>	<p>The potential reasons for persecution under the Refugee Convention and for discrimination under the Extradition Bill are very similar. To qualify as persecution, mere difference in treatment is not enough. There must be resultant serious harm. Similarly, in the context of extradition, the discrimination must either be the main reason for the request or must prejudice the entire trial or sentencing process.</p>	<p>The extradition ground for refusal is limited to discrimination during the trial and/or punishment process. The concept of persecution in the Refugee Convention contains no such limitation.</p>

11.17 The table shows that, in theory, these decisions are very similar. In practice, a person who is the subject of an extradition request may well make a refugee claim on the basis that the requesting country is persecuting them by pursuing an illegitimate prosecution or punishment.

11.18 However, the two decisions are not the same. For instance, a refugee who faces a risk of general persecution (unconnected to the criminal justice process), would not be protected from extradition by the discrimination ground. Therefore, a finding of persecution or discrimination in one proceeding may inform the other proceeding but should not automatically be determinative.

The exclusion test

11.19 For the purpose of this chapter, there are two notable exclusion grounds in the Refugee Convention.³⁴⁷ Both examine the likelihood that the person has committed serious criminal offending.

11.20 First, a person must be excluded from refugee protection if there are “serious reasons for considering” that he or she “has committed a serious non-political crime outside the country of refuge prior to his or her admission to that country as a refugee”.³⁴⁸ The table below compares this test to the equivalent considerations under the Extradition Bill.

ASPECT OF THE EXCLUSION GROUND IN THE REFUGEE CONVENTION	EQUIVALENT TEST IN THE EXTRADITION BILL	SIMILARITIES	DIFFERENCES
“serious reasons for considering”	<p>In standard extradition proceedings where the person sought is accused of offending, one of the criteria for extradition is that there must be “a case to answer”.³⁴⁹</p> <p>There is no consideration of the strength of the case if the person</p>	Both tests look at whether there is any evidential basis for an allegation of criminal offending.	The “serious reasons” test in the Refugee Convention requires an assessment of the whole criminal case, including the credibility of witnesses and defences. There is no criminal or civil standard of proof nor rules of evidence because it is not a court hearing. ³⁵⁰

³⁴⁶ Extradition Bill, cl 20(c)(i)–(ii).

³⁴⁷ Article 1F(c) of the Refugee Convention contains a third exclusion ground. This applies if: “there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.” This ground would not capture any criminal offending that would not already be captured by the other two exceptions in article 1F. As such it has no additional relevance in the context of extradition.

³⁴⁸ Refugee Convention, above n 330, art 1F(b).

ASPECT OF THE EXCLUSION GROUND IN THE REFUGEE CONVENTION	EQUIVALENT TEST IN THE EXTRADITION BILL	SIMILARITIES	DIFFERENCES
	sought has already been convicted of offending. ³⁵¹		The “case to answer” test in the Bill is the subject of a formal adversarial hearing. Defence evidence and witness credibility are only relevant to the extent that they would amount to a complete and irrefutable answer to the case. ³⁵²
“serious crime”	The existence of an “extradition offence” is one of the criteria for extradition. ³⁵³	Both tests look at the seriousness of alleged criminal offending. Only sufficiently serious offending will qualify.	To be a “serious crime” under the Refugee Convention the crime must be likely to attract a severe penalty, at least a number of years of imprisonment. In determining the likely sentence, the court must take into account all of the circumstances of the crime and the offender, and the likely penalty both in New Zealand and, to a lesser extent, the foreign country. ³⁵⁴ Part of the test for an “extradition offence” in the Bill is whether the maximum penalties for the foreign offence and its New Zealand equivalent are two years’ imprisonment or more or whether the offence is listed as an extradition offence in an applicable treaty. ³⁵⁵ These are generic tests that focus on the type of offending and do not involve any consideration of the facts of the individual case.
“non-political crime”	The Court must refuse an extradition request if the relevant offence is a “political offence”. ³⁵⁶	Both tests examine whether the alleged offending was political in nature. The tests have evolved from the same case law and any distinction would be very minor.	No significant difference.

11.21 As indicated by the table considerable overlap exists between the decisions on whether the criteria for extradition are met and whether a person should be excluded from refugee

349 Extradition Bill, cls 34(4)(c).

350 In *Attorney-General v Tamil X* [2010] NZSC 107 at [39] the Supreme Court stated:

The “serious reasons to consider” standard must be applied on its own terms read in the Convention context. As Sedley LJ has observed, in a passage approved by the United Kingdom Supreme Court, art 1F: “... clearly sets a standard above mere suspicion. Beyond this, it is a mistake to try to paraphrase the straightforward language of the Convention: it has to be treated as meaning what it says.”

The United Kingdom Supreme Court case referred to in this passage is *R (JS (Sri Lanka)) v Secretary of State for the Home Department* [2010] UKSC 15, [2010] 2 WLR 766 at [39] per Lord Brown JSC which in turn cites *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222, (2009) Imm AR 624 at [33].

351 Extradition Bill, cls 34(4)(d).

352 Extradition Bill, cl 34(5)(a).

353 Extradition Bill, cls 34(4)(b) and 44(4)(c).

354 The leading New Zealand Court of Appeal decision defines “serious crime” as “likely to attract a severe penalty, at least in the nature of imprisonment for an appreciable period of years”; *S v Refugee Status Appeals Authority* [1998] 2 NZLR 291 (CA) at [6]. The Court goes on to state at [8] that all of the circumstances of the crime and the offender need to be looked at in assessing the likely penalty and that the penalty in New Zealand and (probably) the foreign country should be taken into account.

355 Extradition Bill, cl 7.

356 Extradition Bill, cl 20(b).

protection under this ground. That is not a coincidence, as this exclusion ground was specifically included in the Refugee Convention to accommodate extradition.³⁵⁷

- 11.22 Because of the different way in which the hearings are conducted, however, for the purpose of the exclusion test in the refugee proceedings it is possible to imagine a case meeting the threshold for there being “a case to answer” for the purpose of extradition, but falling short of there being “serious reasons to consider” that the person committed the offence. Similarly, because the seriousness threshold is lower in extradition cases, a person could commit an offence that would be serious enough to justify extradition but not so serious as to disqualify them from obtaining refugee status. The result is that, unless additional provisions are included in our proposed Extradition Bill (as we recommend at the end of this chapter) a refugee could be found liable for extradition.
- 11.23 The second exclusion ground in the Refugee Convention, is that a person must not be recognised as a refugee if there are “serious reasons for considering” that he or she “has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments”.³⁵⁸
- 11.24 Under our proposed Extradition Bill, an “extradition offence” includes any offence that is listed as an extradition offence in an applicable extradition treaty.³⁵⁹ Crimes against peace, war crimes and crimes against humanity are all identified in widely ratified multilateral treaties as “extradition offences”. They are also all excluded from the definition of “political offence” that we recommend in our Extradition Bill. Therefore, the only difference between this exclusion ground and the criteria for extradition is that described in the table above in relation to the phrases “serious reasons to consider” and “a case to answer”.

Exceptions to the principle of non-refoulement

- 11.25 If a person is a refugee under the Refugee Convention, then the principle of non-refoulement is engaged, which prohibits the forcible removal of the refugee.³⁶⁰ However, the Convention recognises two very limited exceptions to the principle of non-refoulement. These allow for expulsion of a refugee if that person poses a serious danger to either the national security or the safety of the community in the host country.³⁶¹ The Extradition Bill contains no equivalent to these exceptions. If the grounds for refusal apply, then the person must not be extradited regardless of any danger they may pose to New Zealand. This is one area where there is no correlation between the Refugee Convention and the Extradition Bill.

Protected person status

- 11.26 Part 5 of the Immigration Act creates two kinds of protected person status depending on whether the Convention against Torture or the ICCPR is engaged.
- 11.27 In relation to torture, the test for protected person status under the Immigration Act and the equivalent ground for refusal in our Extradition Bill are almost identical. Both directly reflect the language used in the Convention against Torture.³⁶²

357 See Kapferer, above n 342; and James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014).

358 Refugee Convention, above n 330, art 1F(a).

359 Extradition Bill, cl 7.

360 Immigration Act 2009, s 164; and Refugee Convention, above n 330, art 33(1).

361 Immigration Act 2009, s 164; and Refugee Convention above n 330, art 33(2).

362 A person qualifies for protected person status under the Immigration Act if: “there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand”: Immigration Act 2009, s 130(1). Under our proposed Extradition Bill, a request must be refused if: “there are substantial grounds for believing that the respondent would be in danger of being subjected to torture or to cruel, inhumane or degrading treatment or punishment in the requesting country”: Extradition Bill, cl 20(a).

- 11.28 If the ICCPR is engaged, then the test for protected person status is whether there are: “substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”³⁶³ The concept of “cruel treatment” is defined in the Immigration Act as meaning “cruel, inhuman, or degrading punishment or treatment”. Notably, the Immigration Act excludes protection if the cruel treatment is due to “lawful sanctions”.³⁶⁴
- 11.29 As indicated above, the Extradition Bill includes “cruel treatment” as part of the torture ground for refusal. Aside from that difference and the exclusion for “lawful sanctions”, the test related to cruel treatment in the Immigration Act and our proposed Extradition Bill, is similar.
- 11.30 By contrast, the Immigration Act and our Bill take quite different approaches to the ICCPR deprivation of life issue. Our proposed Extradition Bill has no individual ground for refusal that replicates the ICCPR protection against “arbitrary deprivation of life”. Instead, this concept is addressed through the “death penalty” and the “unjust and oppressive” grounds for refusal.
- (a) If the person is at risk of the death penalty, then the Immigration Act and our proposed Extradition Bill will operate in the same way. If there is a real risk that the death penalty will be imposed, the person will not be deported or extradited.
 - (b) If a person is at risk of arbitrary deprivation of life, other than by virtue of the death penalty, we envisage that the person could raise the non-refoulement obligation in the ICCPR to support a submission that extradition must be refused on the basis that it would be oppressive due to exceptional humanitarian circumstances.

What is the significance?

- 11.31 This leaves two significant points that the Extradition Bill must deal with:
- (a) First, given the extensive overlap between the extradition and refugee proceedings, there is a need to ensure that the decisions made in each of the proceedings can be reconciled with each other. To achieve that end, greater information sharing is required between the various government agencies involved.
 - (b) Second, there is a need for guidance on how extradition and refugee proceedings should be sequenced, and the impact that one should have on the other. This is necessary because the same information/evidence is likely to be relevant to both and very similar international obligations are engaged, albeit in a different context.
- 11.32 The remainder of this chapter outlines our recommendations for creating a workable solution to address these matters.

THE NEED FOR SEPARATE PROCEEDINGS

- 11.33 Throughout this Report, we have made it plain that one of our goals in reforming the Extradition Act 1999 is to limit double decision making and avenues for needless delay wherever possible. This raises the issue of whether extradition and refugee proceedings should continue to run in parallel or whether one proceeding should take precedence over the other.
- 11.34 In Canada, the extradition proceeding takes precedence. If an asylum seeker becomes the subject of an extradition order for a non-political crime that is punishable by at least 10 years’ imprisonment, then the person is automatically excluded from protection under the Refugee

³⁶³ Immigration Act 2009, s 131(1).

³⁶⁴ Immigration Act 2009, s 131(5)(a).

Convention.³⁶⁵ We do not recommend this option, as we consider that it over-simplifies the relevant considerations.

- 11.35 In the United Kingdom, the refugee proceeding must be determined first. Under the Extradition Act 2003 (UK), the Secretary of State will refuse to certify an extradition request (certification commences an extradition proceeding) if the person sought has already been recognised as a refugee in respect of the requesting country.³⁶⁶ The Act also states that no extradition order may be made for a person whose refugee claim is outstanding.³⁶⁷ The case law indicates that if a refugee claim is made, the extradition proceeding will ordinarily be adjourned pending a decision on the claim and the court will not make an extradition order if the person is given refugee status.³⁶⁸
- 11.36 The benefit of this approach is that the sequence of the proceedings, and the impact of one on the other, is relatively clear. However, halting the extradition proceeding leaves little scope for information gathered through the extradition process to inform the refugee proceeding. As we explain below, we consider this cross-fertilisation is needed.
- 11.37 As a starting point we prefer the model outlined by the United Nations High Commissioner for Refugees (UNHCR) in its 2008 *Guidance Note on Extradition and International Refugee Protection*.³⁶⁹
- 11.38 The UNHCR recommends that extradition and refugee procedures should be kept separate, but may be run in parallel. We agree with the following reasoning in the *Guidance Note*:³⁷⁰

Extradition and refugee status determinations are distinct procedures, which have different purposes and are governed by different legal criteria. Decision-makers in either area must have specific sets of knowledge, expertise and skills. Where the determination on whether or not the wanted person has a well found fear of persecution is incorporated into the extradition procedure, this may significantly reduce an asylum-seekers opportunity to have his or her claim examined. It may also entail a limitation of legal remedies available in case of a negative status determination. It is the UNHCR's position, therefore, that the decision on the asylum claim and on the extradition request, respectively, should be made in separate procedures.

This does not mean that the two processes should be conducted in isolation. As seen throughout this Guidance Note, whether or not the wanted person qualifies for refugee status has important consequences for the scope of the requested State's obligations under international law with respect to the wanted person, and hence for the decision on the extradition request. At the same time, information related to the extradition request may have an impact on the determination of the asylum claim. In order to reach a proper decision in both the asylum and the extradition procedure, the responsible authorities need to consider all relevant elements.

OUR RECOMMENDATION FOR SEQUENCING THE PROCEEDINGS

- 11.39 By enacting Part 5 of the Immigration Act, Parliament has already determined that the RSB and the IPT should decide whether New Zealand's non-refoulement obligations are engaged under the Refugee Convention, the Convention against Torture and the ICCPR. These institutions

365 Immigration and Refugee Protection Act SC 2001 c 27, s 105(3).

366 Extradition Act 2003 (UK), s 70(2). The provision uses the word "may" but case law has demonstrated that the Secretary of State does not have any real discretion. In such a case, the Secretary of State must refuse the request. See *District Court in Ostroleka, Second Criminal Division (a Polish Judicial authority) v Dytlow* [2009] EWHC 1009 (Admin) at [13].

367 Extradition Act 2003 (UK), s 121.

368 *District Court in Ostroleka, Second Criminal Division (a Polish Judicial authority) v Dytlow*, above n 366; and *Konuksever v The Government of Turkey* [2012] EWHC 2166 (Admin) at [61].

369 United Nations High Commissioner for Refugees *Guidance Note on Extradition and International Refugee Protection* (April 2008).

370 At [61] and [62].

were established to make these kinds of decisions. Unlike the District Court, the RSB and the IPT operate on an inquisitorial basis, without formal rules of evidence. This allows for greater flexibility in gathering and assessing large volumes of information on human rights abuses overseas. Particularly for a refugee claim, we view the Immigration Act as the logical home for this decision even if it has a significant impact on extradition proceedings.³⁷¹ Accordingly, we recommend that no extradition order should be made until any refugee proceeding has been finally determined.

- 11.40 However, we see merit in the District Court deciding whether the criteria for extradition are met before a final decision is made in the refugee proceeding. The main benefit of this approach is that it will show whether there is an evidential basis for the allegation of criminal offending. Ordinarily, this type of evidence is very difficult to obtain in refugee proceedings. That is because the confidentiality provisions in the Immigration Act prevent the RSB and the IPT from making direct enquiries of the foreign country. If, however, extradition proceedings are initiated and run in parallel, then the RSB and the IPT will be able to access crucial information from the foreign authorities. This information will include details about the alleged offending and potentially assurances gathered by the Central Authority or the Minister as to how the person would be treated upon return, during any trial and while serving any sentence.
- 11.41 For the same reason, we consider the Central Authority should have scope (albeit limited) to commence extradition proceedings in relation to a person who already has refugee status. Obviously, the person's refugee status will be a major factor weighing against the likelihood of extradition. The extradition request may, however, contain evidence about criminal offending that the immigration authorities were previously unaware of. This evidence may necessitate the person's refugee status being re-considered and possibly cancelled.
- 11.42 It should be noted that we are not entirely comfortable with the principle of using the disclosure procedures in one proceeding to gather information for a separate proceeding. However, this seems to us to be the best pathway to ensure that appropriate and consistent decisions are made relating to the non-refoulement obligations.

RECOMMENDATIONS

- R27 Where a person is the subject of an extradition request and is also an asylum seeker, there should be scope for extradition and refugee proceedings to be run concurrently.
- R28 The fact that a person has refugee status should not be an automatic bar to commencing extradition proceedings.

UNHCR GUIDANCE

- 11.43 The UNHCR *Guidance Note* contains advice on the types of provisions that should be included in national legislation to ensure that extradition and refugee proceedings can be run alongside each other with an appropriate degree of cross-fertilisation. This advice translates into our three main areas of concern: impact, sequencing and information sharing.

³⁷¹ This is already recognised in s 125(1) of the Immigration Act 2009, which states: "Every person who seeks recognition as a refugee in New Zealand under the Refugee Convention must have that claim determined in accordance with this Act."

Impact

11.44 The *Guidance Note* provides that:

- (a) Extradition legislation should expressly prohibit the extradition of a refugee or an asylum seeker if it would be inconsistent with the non-refoulement obligations under international refugee and human rights law.³⁷²
- (b) The discrimination grounds for refusal should not be relied upon as the sole means of ensuring the non-refoulement of refugees or asylum seekers in refugee procedures.³⁷³
- (c) A determination of refugee status made by appropriate immigration authorities under the Convention should be binding on the state organs or institutions which deal with the extradition request.³⁷⁴
- (d) Extradition authorities may need to examine whether the exceptions to non-refoulement apply, thereby allowing for a refugee to be extradited. If this is the case, then the extradition procedure must offer appropriate procedural safeguards.³⁷⁵
- (e) Extradition proceedings may trigger a re-examination of the requested person's refugee status, resulting in cancellation or revocation proceedings.³⁷⁶
- (f) A refugee claim should not be declared inadmissible solely because it has been submitted after an extradition request has been received by the appropriate authorities, or after the person sought has learned of the request.³⁷⁷

Sequencing

11.45 The issue of sequencing arises if an asylum seeker is the subject of an extradition request. The UNHCR offers the following guidance if the extradition request is from that person's country of origin:³⁷⁸

In UNHCR's view, it would generally be prudent to conduct extradition and asylum proceedings in parallel. This would be beneficial for reasons of efficiency and because the extradition process may result in the availability of information which has a bearing on the wanted person's eligibility for refugee status and would therefore need to be taken into consideration by the asylum authorities. It may however be necessary to withhold a decision on the extradition request until the asylum determination has become final.

11.46 If the extradition request is from a different country, then the UNHCR advises that, under certain circumstances, the asylum seeker may be extradited before his or her refugee claim has been finally determined. For this to be consistent with international refugee and human rights law, the requested state must:³⁷⁹

- (i) establish that extradition to the Requesting State would not expose the asylum seeker to a risk of persecution, torture or other irreparable harm; and

³⁷² United Nations High Commissioner for Refugees, above n 369, at [39].

³⁷³ At [41].

³⁷⁴ At [52].

³⁷⁵ At [52].

³⁷⁶ At [72].

³⁷⁷ At [88].

³⁷⁸ At [66].

³⁷⁹ At [67].

- (ii) in keeping with its primary responsibility for making certain that the asylum claim is determined in line with the criteria of the [Refugee] Convention and internationally accepted standards of fairness and efficiency, ensure that the asylum seeker has access to asylum determination procedures that comply with these standards.

Information sharing

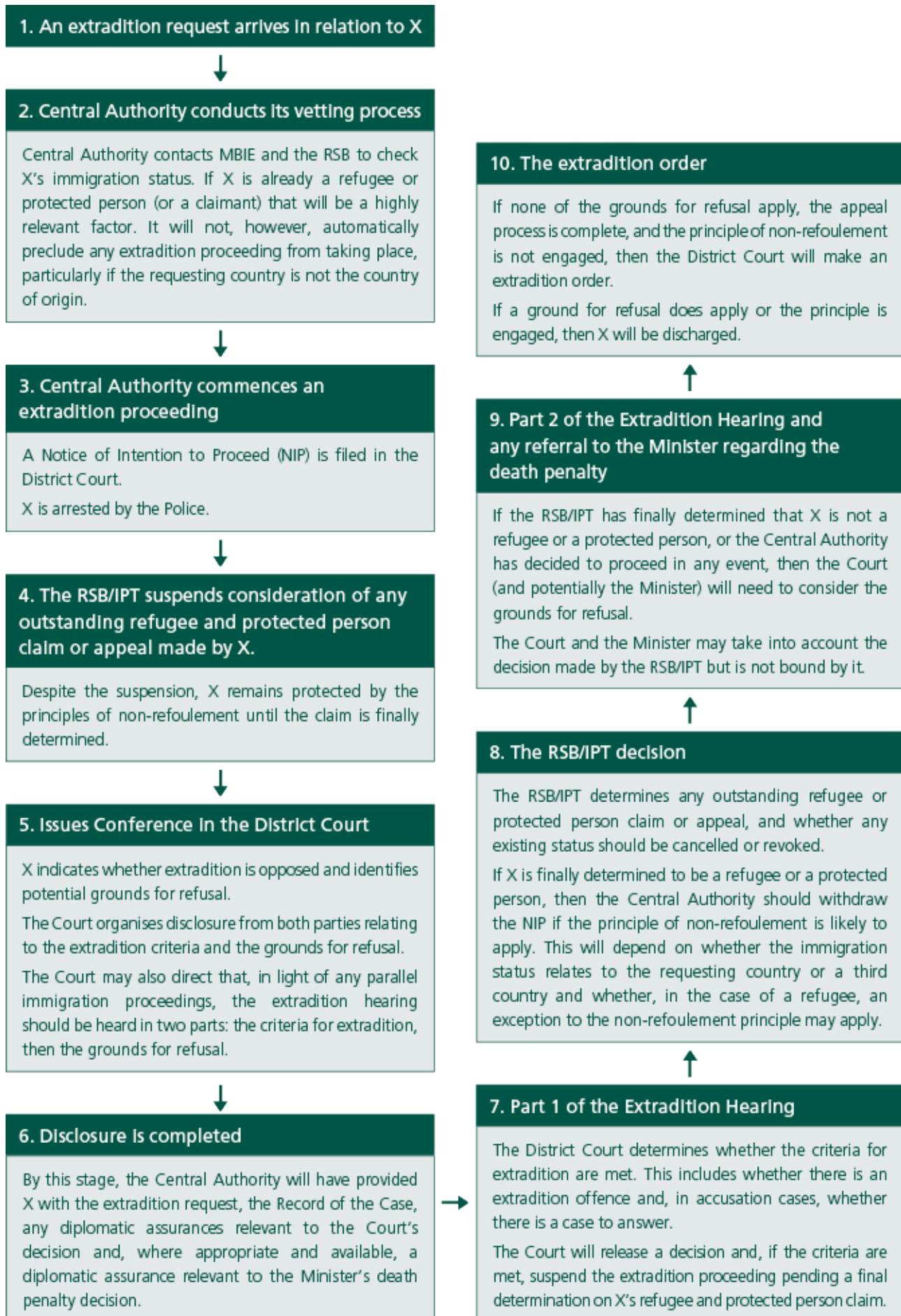
- 11.47 The entire *Guidance Note* is premised on the idea that information gathered for the purpose of extradition proceedings should be shared with immigration officials for the purpose of determining or re-visiting a refugee claim.³⁸⁰
- 11.48 In terms of information sharing in the other direction, the UNHCR repeatedly stresses that, as a general rule, refugee and extradition officials in one state should refrain from revealing any information about a person's refugee status or claim to the authorities of another state unless the individual concerned has given express consent to the sharing of that information. The *Guidance Note* observes that disclosure of such information without a legitimate basis for doing so, or of more information than is necessary for the purpose, may endanger the safety of the refugee or persons associated with them.³⁸¹

Adopting the model in New Zealand

- 11.49 Translating the UNHCR *Guidance Note* model into the New Zealand setting, we recommend that parallel refugee and extradition proceedings should be managed in accordance with the following process chart. The process chart illustrates a default position, but we consider that this model will need to have in-built flexibility to ensure that unusual circumstances can be accommodated:

³⁸⁰ This is evident from the detailed discussion of how immigration officials should evaluate diplomatic assurances given in support of an extradition request, depending on whether the person is a recognised refugee or an asylum seeker and on whether the request is from the person's country of origin or from a third country. See United Nations High Commissioner for Refugees, above n 369, at [24]–[37].

³⁸¹ At [57].



THE REQUIRED LEGISLATION

- 11.50 To give effect to our recommendations, the Extradition Bill and the Immigration Act would need to contain either new or amended provisions relating to:
- (a) confidentiality and information sharing;
 - (b) the Central Authority's vetting decision;
 - (c) powers to temporarily suspend refugee and extradition proceedings;
 - (d) the evidential status of any RSB/IPT decision in extradition proceedings; and
 - (e) a prohibition on making an extradition order in breach of the principles of non-refoulement.

Confidentiality and information sharing

- 11.51 Our expectation is that, in the future, the Central Authority and the Ministry of Business, Immigration and Employment (which includes the RSB) will consult regularly about incoming extradition requests. The Central Authority will need to know the immigration status of any person who is sought for extradition (in case there is a deportation issue, which is a separate matter) and whether the person has claimed, or later claims, refugee or protected person status under Part 5 of the Immigration Act. Conversely, the RSB needs to take into account any information that is disclosed in extradition proceedings that is relevant to a decision under Part 5 of the Immigration Act. This communication poses difficulties in relation to confidentiality.
- 11.52 From the extradition side, the existence of an extradition request must be kept confidential until a Notice of Intention to Proceed is filed and the respondent is arrested. This ensures that the respondent is not alerted to the request and given the opportunity to flee. This general confidentiality requirement is reflected in clause 108 of the Bill. There is, however, an exception in clause 110 that would allow for earlier communication with the RSB.³⁸²
- 11.53 At present, extradition officials hesitate to share this type of confidential information with the RSB. That is because the principles of natural justice that apply in refugee proceedings may require disclosure of that information to the claimant.³⁸³
- 11.54 From the immigration side, confidentiality as to the fact that a person is a refugee, a protected person or a claimant must be maintained at all times unless sections 151 or 152 of the Immigration Act permit disclosure. Examples of permissible disclosures are: to a government agency for the purpose of gathering information to determine the claim or to investigate a matter;³⁸⁴ and for the purposes of the maintenance of the law, including for the prevention, investigation and detection of offences in New Zealand or elsewhere.³⁸⁵ These sections would allow for disclosure to the Central Authority for the purpose of assessing an extradition request.
- 11.55 An important point to make is that the Central Authority would not, however, be able to pass the information on to the requesting country, particularly if that country is the feared agent of persecution. That would breach the Immigration Act. The provision in our proposed

382 Under cl 110 of the Extradition Bill 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.

383 Under s 226(2)(b) of the Immigration Act 2009, if an RSB decision is appealed then the RSB must send "any file relevant to the appeal or matter" to the IPT. Under s 230 the IPT must disclose all potentially prejudicial information in its possession that it intends to rely upon to the appellant, unless that material is classified.

384 Immigration Act 2009, ss 151(2)(a), 151(5)(a) and 152.

385 Immigration Act 2009, s 152(2)(b).

Extradition Bill explaining the Central Authority's independence should help with this.³⁸⁶ It is also worth noting that under the Immigration Act confidentiality may be expressly or impliedly waived by the claimant's words or actions.³⁸⁷ In any event, the Central Authority would need to work closely with the Ministry of Foreign Affairs and Trade to ensure its communications with a requesting country comply with any applicable confidentiality provisions under the Immigration Act. Further, the Court would need to ensure that if such evidence was presented in the extradition proceeding, any reference to that evidence in the judgment would need to be the subject of a suppression order. Again, the Extradition Bill contains a provision that would enable such an order to be made.³⁸⁸

RECOMMENDATION

R29 Extradition and immigration legislation should facilitate information sharing between the Central Authority and the Ministry of Business, Innovation and Employment.

The Central Authority's vetting decision

- 11.56 To reflect our recommendations, clauses 25 and 38 of the Extradition Bill would need to be amended. These clauses govern the Central Authority's decision as to whether to commence extradition proceedings. The amendments should make it plain that:
- (a) in deciding whether to commence extradition proceedings, the Central Authority must consider whether the respondent is, or has been, the subject of proceedings under Part 5 of the Immigration Act and any result of those proceedings; and
 - (b) the Central Authority may nevertheless file a Notice of Intention to Proceed even if the respondent is the subject of an outstanding refugee or protected person claim or appeal under the Immigration Act, or has been recognised as a refugee or protected person.

Suspension of immigration and extradition proceedings

- 11.57 Many different factual scenarios could arise that involve both an extradition request and a claim for refugee or protected person status. In each different scenario, different considerations are at play. The extradition request may be from the respondent's country of origin or a third country. The respondent may have an outstanding claim under the Immigration Act when the request arrives or the claim may already have been determined. All of these scenarios need to be accommodated in any sequencing policy.
- 11.58 Accordingly, we suggest that the Extradition Bill and the Immigration Act should contain enabling procedural provisions rather than firm statutory rules governing sequencing. The appropriate order of the proceedings should be left to operational policies that we envisage would be developed through greater cooperation between extradition and immigration officials.
- 11.59 The most important of these procedural provisions would be suspension provisions. These should empower the RSB, the IPT and the Court to temporarily suspend their respective

³⁸⁶ Extradition Bill, cl 14(5)(a).

³⁸⁷ Immigration Act 2009, s 151(6)

³⁸⁸ Extradition Bill, cl 81, which incorporates subpart 3 of Part 5 of the Criminal Procedure Act 2011. This subpart deals with public access and restrictions on reporting.

decisions. The provisions should also explain the practical ramifications of that suspension. The Immigration Act already contains a suspension procedure that could be amended to apply.³⁸⁹

- 11.60 For the other required procedural provisions, we note that clauses 31(3)(b) and 42(3)(b) of our proposed Bill already make it plain that the Court may direct that the criteria for extradition and the grounds for refusal should be considered at separate hearings. These clauses could, however, be amended to clarify that the Court should be alerted to the existence of any related refugee proceedings at the Issues Conference, and should take those proceedings into account for the purposes of case management. The provision could also clarify that this information should not be shared with the requesting country.
- 11.61 Regarding immigration, it may be beneficial to amend the Immigration Act to clarify that where a person has been recognised as a refugee or protected person under that Act, but the Central Authority nevertheless commences extradition proceedings and the District Court finds that the criteria for extradition are met, then the immigration authorities should formally decide whether to re-open the claim for further consideration.³⁹⁰
- 11.62 Further, the Immigration Act could clarify that if extradition proceedings are suspended pending determination of refugee proceedings then the refugee proceedings should be conducted under urgency. That is because the respondent will either be in custody or on bail until the extradition proceedings are resolved.

RECOMMENDATION

- R30 Extradition and immigration legislation should contain enabling provisions that allow for an extradition proceeding to be suspended pending a determination in a refugee proceeding and vice versa.

The evidential status of a RSB/IPT decision

- 11.63 As indicated above, we envisage that if refugee proceedings result in a final finding that the person is a refugee or a protected person, and the principle of non-refoulement applies, then the Central Authority should withdraw the Notice of Intention to Proceed. This seems more appropriate than the Court dismissing the extradition proceeding on its own motion, as this is the New Zealand Government reaching a conclusion about its international non-refoulement obligations.
- 11.64 If the refugee proceeding results in a final determination that the person is not recognised as a refugee or protected person, then the Court and the Minister should be able to take into account those decisions to determine the grounds for refusal in the extradition proceeding. In relation to

³⁸⁹ Section 135A of the Immigration Act 2009 states:

- (1) This section applies to a claim if the processing of the claim is suspended in accordance with regulations made under section 400.
- (2) For the duration of the suspension, a refugee and protection officer must not—
 - (a) determine the claim in accordance with sections 136 and 137; or
 - (b) make a decision on the claim in accordance with section 138.

Section 135A was added by the Immigration Amendment Act 2013, which related to mass arrivals and people smuggling. The goal was to allow for one-off regulations to be passed to suspend consideration of refugee claims by mass arrivals, seemingly to allow time to collect the relevant evidence.

³⁹⁰ Sections 143–147 of the Immigration Act 2009 deal with cessation and cancellation. The obligation to consider re-opening the claim arises because the extradition proceedings will have alerted the immigration officials to the fact that the exclusion ground in the Refugee Convention may apply. If the exclusion ground does apply then immigration officials are obliged to formally exclude the person from refugee recognition in order to uphold the integrity of the Refugee Convention regime. See Hathaway and Foster, above n 360.

the Court, this may need to be the subject of a specific provision in the Extradition Bill, to avoid the decision being caught by an inadmissibility provision in the Evidence Act 2006.³⁹¹

A prohibition on extradition

11.65 Recognition as a refugee or a protected person does not prohibit extradition outright. The Conventions all allow for extradition to third countries (where the risk to the person is not faced) and the Refugee Convention allows for the extradition of a refugee who is a danger to the public of New Zealand.³⁹² Therefore, as we suggested in the Issues Paper, the Extradition Bill should contain a provision prohibiting the Court from making an extradition order:

- (a) in respect of a respondent who is also a claimant under Part 5 of the Immigration Act or who has been finally recognised as a refugee or protected person under that Act;
- (b) in relation to an extradition request from the country in which the person faces persecution; or
- (c) where that recognition was made or re-confirmed following the Court's finding that the criteria for extradition had been met.

11.66 The prohibition should be subject to the following exceptions:

- (a) a refugee or an asylum seeker may be extradited if one of the exceptions to non-refoulement in the Refugee Convention allows for the extradition of the person; and
- (b) a refugee, an asylum seeker or a protected person may be extradited to any place other than the place in respect of which their refugee or protected person status was granted.³⁹³

11.67 The second exception should be read alongside the clause in the Extradition Bill requiring an assurance from a requesting country that the respondent will not be re-extradited to a third country for offending that pre-dates the original extradition.³⁹⁴

RECOMMENDATION

R31 Extradition legislation should prohibit the extradition of a refugee or an asylum seeker except in limited circumstances.

³⁹¹ Evidence Act 2006, s 50.

³⁹² Refugee Convention, above n 330, art 33(2).

³⁹³ For a comparison see s 164 of the Immigration Act 2009, which explains the circumstances in which a refugee or protected person may be deported.

³⁹⁴ Extradition Bill, cl 24.

Part 3

MUTUAL ASSISTANCE



Chapter 12

The Structure of the new Bill

INTRODUCTION

- 12.1 This chapter details the structure of the new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) included in Part 4 of this Report.

A PRINCIPLES-BASED STATUTE

- 12.2 As outlined in the Issues Paper, the purpose of the Law Commission's review of both the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and the Extradition Act 1999 has been to ensure that the Acts contain processes that are efficient, effective and not overly complex or unnecessarily expensive.³⁹⁵
- 12.3 We have sought to reflect the following principles in the context of mutual assistance:
- (a) Powers and investigative techniques that are available to domestic authorities should also be available for use in response to requests for assistance in foreign investigations and prosecutions.
 - (b) New Zealand must keep pace with international developments on mutual assistance and ensure its legislative regime gives effect to its international obligations in this area.
 - (c) New Zealand must ensure that it has sufficient oversight and control of any mutual assistance it provides and that it balances law enforcement needs and human rights values.³⁹⁶
- 12.4 In the Issues Paper, we proposed that MACMA should be replaced or substantially redrafted.³⁹⁷ In order to achieve the purpose and reflect the principles stated above, we have decided that a new Act is warranted. In the Mutual Assistance Bill included in this Report, we have aimed for a future-proofed, principles-based statute with a focus on the Central Authority and its role as the gateway and gatekeeper.

The Central Authority's role as the gateway and gatekeeper

- 12.5 It is appropriate to focus on the role of the Central Authority because requests for assistance, both through MACMA and our Bill, must all be processed by the Central Authority.³⁹⁸ Further, and more importantly, it is the Central Authority that is the key to ensuring that assistance is granted only in accordance with New Zealand values.

³⁹⁵ Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [1.2] and [12.1].

³⁹⁶ At [12.32].

³⁹⁷ At 5 (key proposals).

³⁹⁸ See Mutual Assistance in Criminal Matters Act 1992, s 25; and Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cls 8 (Central Authority) and 20 (Making a request).

- 12.6 Fundamentally, for incoming requests,³⁹⁹ the mutual assistance legislation regulates access to the investigatory and prosecutorial powers of New Zealand authorities. The Central Authority's role in this regard is one of both "gateway" to and "gatekeeper" of those New Zealand powers in relation to requests from foreign countries.
- 12.7 In its role as a gateway, the Central Authority authorises appropriate requests from foreign countries that seek to use New Zealand's domestic powers and techniques to investigate and prosecute crime, and to restrain and seek forfeiture of property derived from crime. It also facilitates the fulfilment of the request and transfer of any information or evidence.
- 12.8 In its role as gatekeeper, the Central Authority ensures that access to New Zealand tools is provided only in appropriate circumstances, and that the rights of individuals affected by those requests are sufficiently protected. In our Bill, three primary criteria must be met in any case for the Central Authority to be satisfied that authorisation of the assistance requested is justified.
- 12.9 First, the request is valid under the Mutual Assistance Bill – that is:
- (a) it is a request made by a foreign central authority to the New Zealand Central Authority for assistance;
 - (b) that can be provided lawfully in New Zealand;
 - (c) in relation to a criminal matter or the recovery of criminal proceeds; and
 - (d) is the least intrusive means available in New Zealand of fulfilling the request.
- Second, the request does not fall within any of the grounds for refusal upon which the request must be refused.⁴⁰⁰ Third, the request does not fall within any of the grounds for refusal upon which the request may be refused, where it would not otherwise be in the interests of justice and in line with New Zealand's international obligations to provide the assistance.⁴⁰¹
- 12.10 Additionally, where the Bill deals with any particular type of assistance, the request must meet any requirements unique to that specific type of assistance.⁴⁰² For instance, New Zealand must reach agreement with the foreign country on a number of matters specified in clause 35(1)(b) before it may authorise providing assistance in relation to requests for warrants or orders under the Search and Surveillance Act 2012.
- 12.11 Once these criteria have been satisfied, the Central Authority may authorise that the assistance be provided, at which point, for the most part, domestic procedures will be engaged.
- 12.12 We think this provides a relatively simple and efficient method for assessing whether any request should be authorised, without being overly prescriptive as to the type of assistance that may be requested, and without creating special rules applicable to requests from particular countries.

399 Dealt with in Mutual Assistance Bill, pt 2; and Mutual Assistance in Criminal Matters Act 1992, pt 3. To reflect the practical importance of the provisions relating to incoming requests as compared with outgoing requests, we have opted to deal with incoming requests before outgoing requests in the Bill. This is the opposite of the approach contained in the 1992 Act.

400 Mutual Assistance Bill, cl 22 (Grounds on which assistance must be refused).

401 Mutual Assistance Bill, cl 23 (Grounds on which assistance may be refused).

402 These are: requirements relating to the obtaining of evidence, information, documents, articles or things, including under the Search and Surveillance Act 2012 (cls 30–34); requests for search warrants or production and examination orders under the Search and Surveillance Act 2012 (cls 35–40); requests for the service of summons (cl 45); applications for interim foreign restraining orders (cl 47); registration of foreign restraining and forfeiture orders (cl 48); and requests for search warrants or production and examination orders under the Criminal Proceeds (Recovery) Act 2009 (cls 50).

Giving effect to international commitments⁴⁰³

- 12.13 While MACMA recognised international obligations through a categorisation of countries,⁴⁰⁴ as noted above we have started with the presumption that New Zealand will give the same level of assistance to all countries. That is, a request from *any* country that crosses the hurdles above will be authorised by the Central Authority.
- 12.14 This leaves the question as to how New Zealand fulfils its international obligations with certain countries. The Bill creates a baseline of obligations. Provided the baseline requirements are met, international mutual assistance treaties may then supplement the Bill in particular ways.⁴⁰⁵

Criminal matters and proceeds matters

- 12.15 Another major change to the structure of MACMA is the way in which the draft Bill deals with requests relating to the recovery of criminal proceeds. The approach in MACMA was to deem proceeds matters to be criminal matters for the purposes of the Act.⁴⁰⁶ We have taken a different approach, devoting a subpart of the draft Bill to assistance in the recovery of criminal proceeds.⁴⁰⁷ Any request for criminal proceeds must still satisfy the criteria outlined above,⁴⁰⁸ but the specific matters relevant to the assessment of requests in relation to criminal proceeds are set out in a separate subpart. We think this removes an unnecessary element of complexity from the current Act.
- 12.16 For the same reason, we have included a reference to criminal proceeds in the title of the Bill. This makes it more obvious what the Bill actually deals with. We acknowledge that this reference makes the Bill's title somewhat lengthy. We imagine, however, that in practice it would simply be referred to as the Mutual Assistance Act.

REQUESTS FROM NEW ZEALAND

- 12.17 In the Issues Paper, we questioned the value of the substance of what is contained in Part 2 of MACMA, governing outgoing requests.⁴⁰⁹ Much of Part 2 specifies the types of assistance that New Zealand can seek from another country; however, this has no bearing on what a foreign country will or will not agree to provide.
- 12.18 We were urged, however, to retain these provisions in some form on the basis that they make the law easier to apprehend, indicating the types of assistance that may be requested and any criteria to be assessed in relation to that request. Consequently, we have retained this guidance in Part 3 of our Bill, but have simplified the way in which the Bill outlines the types of assistance that may be requested, and the requirements associated with outgoing requests.
- 12.19 Clause 53 gives a non-exhaustive list of the examples of types of assistance that New Zealand may request, making it clear that any requests must be lawful in both the foreign country and in New Zealand, and must relate to a criminal matter or to the recovery of criminal proceeds. For criminal matters, clause 54 provides a general requirement that the Central Authority must be “satisfied that a request is appropriate given the level of seriousness of the criminal matter that

403 For further discussion, see ch 3 of this Report.

404 Described in the Issues Paper, above n 395, at [13.32]–[13.48].

405 There are three minor exceptions where a requirement in the Bill may be varied by a treaty. See cls 26, 46 (definition of “foreign restraining order”), and 43(d)(iii), and associated commentary. See also the discussion of mutual assistance treaties in ch 3.

406 Mutual Assistance in Criminal Matters Act 1992, ss 2A–2B.

407 See Mutual Assistance Bill, pt 2, sub-pt 3.

408 Discussed above at [12.8].

409 See Issues Paper, above n 395, at [22.7] and [22.10].

is subject of the request”. Clause 64 provides the general requirements for outgoing requests in relation to criminal proceeds, for which the Central Authority must be satisfied that:

- (a) there are reasonable grounds to believe that criminal proceeds or information that is likely to lead to the recovery of criminal proceeds (whether these are located in New Zealand or overseas) are or is in the foreign country; and
 - (b) the request relates to an investigation or proceedings arising from conduct that constitutes significant criminal activity or a qualifying instrument forfeiture offence.
- 12.20 In addition, we have retained and refined the particular procedures related to outgoing requests, specifically in relation to requests for persons to travel to New Zealand from a foreign country to assist in an investigation or to give evidence,⁴¹⁰ and in relation to the admissibility of evidence.⁴¹¹
- 12.21 While we have refined the provisions dealing with requests for persons to travel to New Zealand, we accept that these provisions remain lengthy. This is not entirely consistent with our principles-based approach, but was necessary to reflect our international obligations.⁴¹² It may be that some of the content of these provisions could be moved to regulations.
- 12.22 Finally, we have retained the guidance that MACMA provides as to the standards New Zealand will apply to outgoing requests; for instance, demonstrating New Zealand’s commitment to the concept of speciality.⁴¹³

410 Mutual Assistance Bill, cl 56–60.

411 Mutual Assistance Bill, cl 55.

412 Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth including amendments made by Law Ministers in April 1990, November 2002, October 2005 and July 2011 [Harare Scheme].

413 Mutual Assistance in Criminal Matters Act 1992, s 23; and Mutual Assistance Bill, cl 61. See the discussion in Issues Paper, above n 395, at [22.8]–[22.9].

Chapter 13

Managing the overlap with interagency mutual assistance schemes

INTRODUCTION

- 13.1 The Mutual Assistance in Criminal Matters Act 1992 (MACMA) does not establish an exclusive code for assisting foreign countries in relation to criminal matters. As provided in section 5, nothing in the Act “derogates from existing forms of co-operation (whether formal or informal) in respect of criminal matters between New Zealand and any other country”, nor does it prevent “the development of other forms of such co-operation”.⁴¹⁴ As other forms of cooperation have proliferated, some overlap with MACMA has arisen.
- 13.2 This chapter addresses that overlap between assistance to be provided under the new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill), and interagency mutual assistance schemes (interagency schemes) – those various cooperation arrangements between New Zealand regulatory and law enforcement agencies, and their foreign counterparts.
- 13.3 A large number of such arrangements are already in force, and the parameters and terms of each differ significantly. They do not appear to be causing any significant problems in practice. In light of that, we do not propose fundamentally to alter this form of providing assistance. Rather, our concerns are twofold. First, to the extent that there is overlap between MACMA and particular interagency regimes, there is no clear rule directing which should apply. Secondly, there is a lack of common safeguards across all interagency regimes, which risks becoming even more pronounced as these arrangements proliferate.
- 13.4 To address these concerns, we make two recommendations in this chapter:
- (a) Where there is overlap, a provision should be included providing guidance as to whether it is more appropriate for the assistance to be provided under the new Mutual Assistance Act, or under the particular interagency schemes.⁴¹⁵
 - (b) The Central Authority should publish and maintain guidelines for safeguards that must be considered for inclusion in any new or renegotiated interagency schemes. The Central Authority would also provide advice to agencies negotiating these arrangements on how best to comply with the guidelines.⁴¹⁶

⁴¹⁴ The effect of which is retained in Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cl 10.

⁴¹⁵ This guidance is in cl 10(2) of the Mutual Assistance Bill. The subclause does not specifically mention interagency schemes. Instead it refers to a non-Mutual Assistance Act statutory power to provide assistance. This power may, in practice, be exercised by providing assistance under an interagency scheme. On the other hand, the power may be exercised directly. For instance, the Policing Act 1998 has recently been amended to allow the Police to share personal information internationally without necessarily having an interagency scheme. Clause 10(1)–(2) makes it plain that this type of assistance may be provided without recourse to the Mutual Assistance Bill. An interagency scheme is not the only alternative.

⁴¹⁶ Provided for in cl 11 of the Mutual Assistance Bill.

RELATIONSHIP WITH MACMA

- 13.5 As we noted in the Issues Paper, there is a degree of overlap between MACMA and certain interagency schemes.⁴¹⁷ While some types of highly intrusive mutual assistance can only be provided through MACMA, some less intrusive types of assistance can be provided either under MACMA, or directly via an interagency scheme. This is expressly acknowledged in some New Zealand statutes. For instance, section 32(2)(f) of the Financial Markets Authority Act 2011 provides that in determining whether to comply with a request by an overseas regulator the Financial Markets Authority (FMA) must take into account whether “it would be more appropriate for the request to be dealt with under” MACMA. The problem is that it is uncertain when it will be appropriate to use MACMA, and when it will be appropriate to use the interagency scheme. As such, we think it is necessary to include guidance in a new statute.
- 13.6 In our consultation on the Issues Paper, the Police suggested that the primary distinction might be that requests for information should be appropriately made via the interagency regime, whereas requests for evidence should be made via the formal mutual assistance statute. The distinction between evidence and information may, in some circumstances, be a useful guide as to whether a request should be made under the Bill rather than under the interagency scheme. However, it does not properly explain when a request *must* be made under the Bill rather than an alternative scheme. To our mind the better distinction is between coercive (which must be done under the Bill, unless specifically provided for under another enactment),⁴¹⁸ and non-coercive measures (which may be done under the interagency scheme or the Bill, depending on which is more appropriate in the circumstances).⁴¹⁹ Whether the request can be said to be for information or evidence does not adequately explain that distinction.
- 13.7 Furthermore, while the distinction is employed in some interagency schemes,⁴²⁰ we are not convinced it is workable in this context. Fundamentally, we think it would expect too much of the foreign country. If the foreign country has received the information for investigatory purposes and then wants to use it as evidence, and the foreign country has no requirement that the evidence be in a particular form or obtained via a formal mutual assistance process, it would be unreasonable for New Zealand still to require the country to reapply for the same information to be taken as evidence. This is particularly so in relation to requests from Civil Law jurisdictions where the distinction between information and evidence is not as clear as it is in Common Law jurisdictions.⁴²¹
- 13.8 Furthermore, it is not a distinction consistent with all interagency schemes. For example, section 31 of the Financial Markets Authority Act 2011 provides the FMA with the power to “obtain information, documents, or *evidence* that ... is likely to assist the FMA in complying” with a request by an overseas regulator,⁴²² and provides that the “FMA may transmit the

417 Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at [19.18].

418 There are a few interagency regimes which allow the New Zealand agencies to use coercive measures to fulfil a request from a corresponding foreign agency, but these powers are specifically provided for in statute. See for example s 51 of the Serious Fraud Office Act 1990.

419 A request may be more appropriate under the Bill because of the level of formality required by the requesting country, or because the assistance requested, though non-coercive, is not specifically provided for by the interagency regime. See the discussion below at [13.9].

420 For example Commerce Act 1986, s 99J.

421 See Shannon Cuthbertson “Mutual Assistance in Criminal Matters: The Challenges of the Common Law Tradition” [2012] JCCL 69 at 74, where the author discusses the “often limited understanding and acceptance by civil code jurisdictions for evidence to be provided in compliance with strict evidentiary requirements”. The author notes (at n 11, citing JF Nijboer “Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective” (1993) 41 Am J Comp L 299 at 314):

In common law systems, the inadmissibility of evidence results in the exclusion of evidence from the trial altogether, and the form and source of the evidence is key. [In Civil Law systems], the question tends to be whether the judicial decision on guilt can be properly founded on the evidence [that is, all the information presented to the court].

422 Financial Markets Authority Act 2011, s 31(2) (emphasis added).

information, documents, or *evidence* obtained by it to the overseas regulator”.⁴²³ Consequently, it would be difficult to introduce the suggested distinction between information and evidence as a means of providing guidance as to whether an interagency regime or the Bill is the more appropriate avenue.

- 13.9 Instead, we have provided some guidance in clause 10(2) of the draft Bill. There is a presumption that, where applicable, an interagency regime should be preferred in the event of an overlap. However, there are three exceptions where requests for assistance should be made under the Bill rather than the interagency scheme:
- (a) the foreign country requires the assistance to be provided with a degree of formality (for example, because the requesting country’s laws of evidence requires information to be provided via formal mutual assistance processes);
 - (b) the person or agency considers the provision or obtaining of assistance is better dealt with under the Bill; or
 - (c) the agency needs to use coercive measures to provide the assistance sought (where coercive measures are not provided for in another enactment).⁴²⁴

RECOMMENDATION

R32 Guidance should be included in the mutual assistance legislation to assist agencies where there is an overlap between that legislation and other interagency mutual assistance schemes.

OVERSIGHT OF INTERAGENCY MUTUAL ASSISTANCE REGIMES

What agency should fulfil the oversight role?

- 13.10 We noted in the Issues Paper that any presumption in favour of using an interagency scheme instead of the mutual assistance legislation means that the request will not then be subject to the safeguards in MACMA or the new Bill. Nevertheless, the reality is that these agreements do exist and are likely to continue to proliferate. To address this, we proposed that there should be some central body with limited oversight over all interagency schemes.⁴²⁵
- 13.11 We suggested three options as to who should fulfil this function: (1) the Central Authority; (2) the Privacy Commissioner; or (3) a new stand-alone central authority that would oversee all international cooperation in criminal matters.⁴²⁶ Submitters were generally agreed that the Privacy Commissioner’s scope is too narrow to cover and advise on all the safeguards we would expect to be considered for inclusion in an interagency regime.⁴²⁷ Equally, as noted in Chapter 2, we do not think a stand-alone central authority is warranted at this stage, particularly given the limited role we envisage for this oversight role. We think the Central Authority is the most appropriate option.

⁴²³ Financial Markets Authority Act 2011, s 31(4) (emphasis added).

⁴²⁴ For instance, s 51 of the Serious Fraud Office Act 1990 provides that the Director of the Serious Fraud Office may enter into agreements to supply information to overseas agencies involved in the detection and investigation of cases of fraud, or prosecution of any proceedings that relate to fraud. The Director may exercise the coercive powers available under the Serious Fraud Office Act 1990 to gather information to be provided under such agreements: see *A Ltd v Director of the Serious Fraud Office* HC Auckland CIV-2005-404-6833, 28 March 2007 at [111]–[119].

⁴²⁵ Issues Paper, above n 417, at [19.29].

⁴²⁶ At [19.31]–[19.33].

⁴²⁷ See for example Office of the Privacy Commissioner submission at 15–16. There may, however, be space for a subsidiary role for the Privacy Commissioner. See the discussion at [13.17] of this Report.

The nature of the oversight

- 13.12 We think that the oversight should focus on the establishment or renegotiation of interagency schemes (front-end oversight). Clause 11 of the new Bill therefore provides that the Central Authority would be responsible for publishing and maintaining a set of guidelines to which agencies must have regard when negotiating interagency agreements. Agencies would be required to strive to ensure that the requirements in the guidelines are reflected in any arrangement, to the extent practicable. The Central Authority would also have a role in providing advice to agencies in relation to the guidelines. This front-end oversight will help to ensure that new or renegotiated regimes contain appropriate safeguards and are consistent with other regimes.
- 13.13 The Office of the Privacy Commissioner suggested that ongoing monitoring of the operation of interagency regimes would also be appropriate. This post-hoc oversight might, for instance:
- (a) assess request handling, and the provision of assistance and information to foreign agencies;
 - (b) require verification of compliance with the legislative safeguards by the New Zealand agency; and
 - (c) assess compliance by foreign agencies with their obligations under the particular scheme.⁴²⁸
- 13.14 While we considered such monitoring, we are not sure that such an expansive role is possible. Given the number of interagency schemes already in operation and the information sharing undertaken under those regimes, alongside the inevitable continued proliferation of such arrangements, we think such post-hoc oversight would be too onerous a task for the Central Authority. This is particularly so given it is an extension of the Central Authority's current mutual assistance role under MACMA into the regulatory mutual assistance sphere.
- 13.15 Post agreement monitoring would also risk imposing similarly burdensome obligations on agencies. This was the view of the Commerce Commission which, while agreeing with the proposal for an oversight body in principle, was concerned that reporting requirements would be too onerous.
- 13.16 Finally, any kind of post hoc monitoring may also be difficult in practice where an agency has requirements that preclude it from reporting such information. For instance, Inland Revenue noted that the section 81 restrictions in the Tax Administration Act 1994 would probably constrain what it could report.⁴²⁹

Safeguards to be included in the guidelines

- 13.17 We envisage the Central Authority's guidelines would promote inclusion of the following safeguards in interagency regimes:
- (a) **Purpose** – the purpose of the interagency regime should be made clear, and the type and quantity of information to be shared should be no more than is necessary to facilitate this purpose.
 - (b) **Legality under domestic law** – a New Zealand agency should not, under the arrangement, be required to carry out measures at variance with, or supply information not

428 Office of the Privacy Commissioner submission at 15.

429 Inland Revenue submission.

obtainable, under New Zealand's law or the agency's own administrative practices.⁴³⁰ This would include a protection against providing legally privileged materials.

- (c) **Protection of the information** – the New Zealand agency should have the ability to impose conditions on how the overseas agency may use, and ensure the security of, the information.⁴³¹
- (d) **Privacy protections** – the public interest (for example, in the maintenance of law) in facilitating information sharing under the agreement should be required to be likely to outweigh the privacy risks of doing so. Furthermore, in conjunction with the requirement relating to “protection of the information” above, the arrangement should contain adequate safeguards to protect New Zealanders' privacy. It may be desirable to direct that the agency should consult the Privacy Commissioner in this regard.
- (e) **Double jeopardy** – the agency should be able to refuse to assist with a request under an interagency regime where a criminal proceeding has already been initiated in New Zealand, based on the same facts and against the same person.⁴³²
- (f) **Dual criminality** – the agency should have scope to refuse a request if it relates to the investigation of, or proceedings against, a person for conduct that, if it had occurred in New Zealand, would not be subject to investigation or proceedings under New Zealand law.
- (g) **Public interest or essential national interest** – there should be the ability to refuse to provide information based on public interest or essential national interest.⁴³³
- (h) **Payment of costs** – the regime should include arrangements providing for the payment of costs incurred by an agency in fulfilling a request.
- (i) **A ground for refusal in the new Mutual Assistance Bill, not otherwise covered in the guidelines, would be likely to apply** – although it is unlikely that grounds relating to the death penalty or torture, for instance, are likely to be engaged in arrangements that relate predominantly to assistance in regulatory matters. In those circumstances where a ground for refusal in the new Mutual Assistance Act is likely to arise, the agency should be able to refuse to assist.⁴³⁴

Informing agencies

- 13.18 Given it details the Central Authority's role generally,⁴³⁵ the new Bill is the most appropriate statutory instrument in which to include the Central Authority's obligations to publish guidelines and provide advice. It is, however, an extension into the regulatory sphere as compared with MACMA and the Bill's focus on criminal matters. As such, there is a risk agencies will not have in mind the Central Authority's guidelines, and its role in advising on those guidelines, when negotiating an interagency arrangement.
- 13.19 Therefore, we think the Treaty Officer at the Ministry of Foreign Affairs and Trade should provide agencies with the Central Authority guidelines when agencies are negotiating an

430 See, in relation to Inland Revenue, art 21 of the Convention on Mutual Administrative Assistance in Tax Matters ETS 127 (opened for signature 25 January 1988), as amended by the 2010 Protocol (opened for signature 27 May 2010, entered into force 1 June 2011), given effect in New Zealand through the Double Tax Agreements (Mutual Administrative Assistance) Order 2013.

431 As in, for example, Commerce Act 1986, s 99J.

432 As provided for in, for example, International Organizations of Securities Commission *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2012) at [6(e)(ii)].

433 A ground for refusal along these lines is provided for in both the Mutual Assistance in Criminal Matters Act 1992, s 27(1)(f) and the Mutual Assistance Bill, cl 23(2)(k).

434 See the grounds for refusal in Mutual Assistance Bill, cls 22–23.

435 Mutual Assistance Bill, cl 8.

interagency arrangement, directing an agency to the Central Authority if it seeks advice relating to the guidelines. This is practical, as any agency contemplating entering into an international arrangement is already required to consult with the Treaty Officer.⁴³⁶ We understand, however, that many agencies do not currently comply with this obligation. Therefore, it would be useful for a Cabinet circular to be published reminding agencies of this obligation, as well as providing information about the Central Authority's guidelines under the new Mutual Assistance Act.

RECOMMENDATION

- R33 The Central Authority should be responsible for producing and maintaining guidelines on entering or modifying interagency mutual assistance schemes, and should be available to provide advice to agencies on their application.

436 Cabinet Office *Cabinet Manual 2008* at [7.115].

Chapter 14

Requests for information

INTRODUCTION

- 14.1 This chapter describes the new mechanism we have introduced into the Mutual Assistance in Criminal Matters and for the Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) for the Central Authority to request information from other public sector agencies in fulfilling a mutual assistance request from a foreign country.
- 14.2 As noted in the Issues Paper, in the current Act there are operational issues around requests for information (including personal information). Specifically:⁴³⁷
- (a) There is no provision in the 1992 Act empowering the Central Authority to seek information from a domestic agency,⁴³⁸ and the current use of the Official Information Act 1982 (OIA) for this purpose is inappropriate. Without the OIA, however, the Central Authority does not have any statutory mechanism to compel the agency to respond within a given timeframe.⁴³⁹
 - (b) It is not clear whether the information holder can release any personal information under the Privacy Act 1993.⁴⁴⁰

The new Bill is designed to address these problems.

- 14.3 The Bill also provides parameters around the Central Authority's power to disclose personal information to the foreign country.

INFORMATION REQUESTS FROM THE CENTRAL AUTHORITY TO THE DOMESTIC PUBLIC AGENCY

- 14.4 The Bill makes it clear that the OIA should not be used by the Central Authority to request information from domestic public agencies.⁴⁴¹ As noted in the Issues Paper, the purpose of that Act is to make official information more readily available "to the people of New Zealand",⁴⁴² and it is not entirely clear that the Central Authority is empowered to make such a request of another government department under that Act.⁴⁴³ Instead, the Mutual Assistance Bill expressly provides the Central Authority with the power to request any information held by domestic public agencies needed to fulfil a foreign request for assistance.⁴⁴⁴
- 14.5 The domestic public agency's assessment of that request is also covered by the Bill. The Bill requires the requested agency to provide the information unless a ground for withholding the

⁴³⁷ See generally Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at ch 18.

⁴³⁸ Discussed in the Issues Paper, above n 437, at [18.4]–[18.6]. In this context, "information" is distinct from evidence to be used in a criminal proceeding. The 1992 Act does contain processes for seeking evidence: Mutual Assistance in Criminal Matters Act 1992, ss 31–36.

⁴³⁹ Discussed in the Issues Paper, above n 437, at [18.7]–[18.11] and [18.19]–[18.20].

⁴⁴⁰ Discussed in the Issues Paper, above n 437, at [18.12]–[18.18] and [18.21]–[18.31].

⁴⁴¹ Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cl 12(2).

⁴⁴² Official Information Act 1982, s 4.

⁴⁴³ Issues Paper, above n 437, at [18.9]–[18.11].

⁴⁴⁴ Mutual Assistance Bill, cl 12(1).

information applies. Even though we consider the OIA to be inappropriate for use in this context, the Bill cross-references the withholding grounds in sections 6 and 9(2) of the OIA, making both subject to the balancing test in section 9(1). That test provides that:

... good reason for withholding official information exists ... unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.

- 14.6 The reference to the OIA is appropriate here, as the same issues that would cause a domestic public agency to withhold information under an OIA request will apply in the MACMA context. A key difference, however, is that in making all reasons for withholding information subject to the balancing test in section 9(1) of the OIA, the Mutual Assistance Bill does not follow the OIA's divide into "conclusive reasons for withholding" and "other reasons for withholding". We think this is justified because the recipient of the information is the Central Authority (that is, another government agency), not an individual. The Central Authority is, of course, subject to its own constraints in terms of disclosure of that information.⁴⁴⁵ So, in contrast to requests under the OIA, once the information is disclosed to the Central Authority, it is not irrevocably in the public domain. As such, we think information that would be conclusively withheld in the OIA context may still justifiably be released to the Central Authority in the mutual assistance context.
- 14.7 In practice, of course, we would also expect that the Central Authority would have conversations with the agency in question to determine whether the information does, in fact, need to be withheld, and whether the foreign country's request could be amended, or should be refused.
- 14.8 We have also included an equivalent to section 48 of the OIA providing requested agencies with protection against certain actions where information "is disclosed in good faith".⁴⁴⁶ This is intended to discourage agencies from taking an overly risk-averse approach in deciding whether or not to provide information to the Central Authority. Again, drawing on the OIA is justified because the domestic agencies' consideration is very similar to the considerations that they would take in the domestic context.
- 14.9 Finally, as we noted in the Issues Paper, without having recourse to the OIA the Central Authority cannot require agencies to prioritise a request for information from the Central Authority, and, as a result, it may languish.⁴⁴⁷ As a result, the new Bill includes a requirement that the domestic agency provide the information to the Central Authority within 20 working days, unless an alternative timeframe is agreed between the agency and the Central Authority.⁴⁴⁸

RECOMMENDATION

- R34 The mutual assistance legislation should include a mechanism for the Central Authority to request information from New Zealand public sector agencies.

⁴⁴⁵ Most significantly, in relation to the requesting country, by the grounds for refusal in cls 22–23 of the Bill.

⁴⁴⁶ Mutual Assistance Bill, cl 15.

⁴⁴⁷ Issues Paper, above n 437, at [18.2].

⁴⁴⁸ Mutual Assistance Bill, cl 13(6).

DEALING WITH PERSONAL INFORMATION

- 14.10 As we noted in the Issues Paper, the role of the Privacy Act needs to be clear in relation to requests for information. In the Issues Paper, we raised three options for guarding privacy interests in relation to MACMA requests:
- (a) the information-holder agency ought to bear responsibility for considering privacy risks;
 - (b) the Central Authority ought to bear responsibility for considering privacy risks; or
 - (c) the public benefit in providing assistance in criminal matters outweighs privacy interests.⁴⁴⁹
- 14.11 Ultimately, we have decided that the Central Authority should play the primary role in guarding privacy interests. As we wrote in the Issues Paper, the advantage of making privacy considerations primarily the responsibility of the Central Authority is that:⁴⁵⁰
- ... the Central Authority already has to consider a number of factors in deciding whether to accede to a MACMA request. It seems both inappropriate and inefficient to separate out consideration of the privacy of personal information.
- 14.12 Under our scheme, the Privacy Act 1993 would still apply to information-holder agencies. However, our Bill explicitly provides that the “maintenance of the law” exception in Privacy Principle 11 applies to requests made by the Central Authority on behalf of a foreign country.⁴⁵¹ Privacy Principle 11 provides:
- An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
- (a) that non-compliance is necessary—
 - (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; ...
- 14.13 Although this leaves the information-holder agency with some discretion to refuse to disclose, practically we expect responsibility will fall on the Central Authority to consider whether personal information released to it under this exception should be disclosed to the foreign country.
- 14.14 In view of this, we have included a new ground on which assistance may be refused in clause 23, if “providing the assistance would unreasonably interfere with the privacy of an individual”.⁴⁵² We have also provided a requirement that the Central Authority must develop and maintain guidelines, in consultation with the Privacy Commissioner, in relation to exercising the privacy ground for refusal.⁴⁵³ We think this provides an efficient way to deal with privacy issues, while still providing the degree of protection of personal information New Zealanders would expect.

RECOMMENDATION

R35 The Central Authority ought to be made primarily responsible for guarding privacy interests in relation to mutual assistance requests.

⁴⁴⁹ See discussion in Issues Paper, above n 437, at [18.21]–18.31].

⁴⁵⁰ Issues Paper, above n 437, at [18.25].

⁴⁵¹ Mutual Assistance Bill, cl 13(3)–(4).

⁴⁵² Mutual Assistance Bill, cl 19(2)(j).

⁴⁵³ Mutual Assistance Bill, cl 16.

Chapter 15

Defendant requests under the new Mutual Assistance Bill

INTRODUCTION

- 15.1 As we noted in the Issues Paper, the Mutual Assistance in Criminal Matters Act 1992 (MACMA) is silent on whether it is available for use by defendants.⁴⁵⁴ In this chapter, we recommend including a provision in our new Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill (Mutual Assistance Bill) permitting the making of certain types of requests on behalf of New Zealand defendants.
- 15.2 In relation to incoming requests on behalf a defendant, we recommend that New Zealand should allow such requests to be made provided the request has been made by the relevant foreign central authority. In determining whether or not to provide the assistance, the New Zealand Central Authority would be able to take into account the fact that the request is on behalf of a defendant.

OUTGOING REQUESTS

- 15.3 Although MACMA does not explicitly provide for mutual assistance requests to be made by defendants, it has been held that the mutual assistance system is open to defendant requests. Blanchard J noted in *Samleung International Trading Co Ltd v Collector of Customs* that the Central Authority declining to make a request for assistance, despite being satisfied that reasonable grounds existed to justify a defendant obtaining evidence from a foreign country for use in New Zealand proceedings, would “plainly contravene” section 25(f) of the New Zealand Bill of Rights Act 1990.⁴⁵⁵
- 15.4 We suggested in the Issues Paper that clear statutory guidance on this should be provided. We thought the statute should provide that requests may be made by the Central Authority on behalf of New Zealand defendants, subject to the requirement that the defendant first apply to the trial court for approval. The court would then direct the Central Authority to make the request on behalf of the defendant, while leaving a residual discretion with the Central Authority to decline to make the request if it deemed the request inappropriate in the circumstances.
- 15.5 We still think that the legislation should specifically address the use of the mutual assistance system by defendants, and that the mechanisms should operate broadly in the way we outlined in the Issues Paper.
- 15.6 As we stated in the Issues Paper, central to the matter of whether or not defendants should have access to the mutual assistance system is a question of the defendant’s right to a fair trial.⁴⁵⁶

⁴⁵⁴ See generally Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) [Issues Paper] at ch 20.

⁴⁵⁵ *Samleung International Trading Co Ltd v Collector of Customs* [1994] 3 NZLR 285 (HC) at 10.

⁴⁵⁶ Issues Paper, above n 454, at [20.25].

- 15.7 This is not a novel concept. Indeed, as we noted in the Issues Paper, the notion of providing access to the mutual assistance scheme to defendants has been endorsed by the Commonwealth Law Ministers.⁴⁵⁷ Furthermore, both Australia and the United Kingdom already make specific provision for defence requests in their respective mutual assistance statutes.⁴⁵⁸

Submissions

- 15.8 Submitters' views were mixed on this proposal. The New Zealand Police were most strongly opposed. Police were concerned that such a mechanism might be used speculatively, or as a delaying tactic, and more generally that there would be resourcing implications for both the New Zealand Central Authority and foreign central authorities. In that regard, Police stressed that if any access were to be provided for defendants, it should be strictly overseen by the New Zealand courts to ensure it was being used appropriately.⁴⁵⁹
- 15.9 Police also disagreed with our view in the Issues Paper that providing for defendant requests would mirror the domestic position, whereby the Criminal Disclosure Act 2008 provides that a defendant may apply to the court for an order granting a hearing to determine whether information held by a non-party should be disclosed to the defendant. In that situation, where an application is granted and a hearing takes place, the judge may order the person or agency to disclose the information to the defendant.⁴⁶⁰ In Police's submission, MACMA is not the same. Rather, Police emphasised that MACMA provides the framework for a *government-to-government* service, to facilitate information flows between New Zealand law enforcement agencies and law enforcement agencies in different jurisdictions, and that this service is required because of the complex nature of information-sharing between different jurisdictions.⁴⁶¹
- 15.10 Crown Law also raised concerns. Like the Police, it emphasised that mutual assistance is fundamentally a government-to-government law enforcement mechanism, not to be used for the benefit of individuals. It was also concerned that, given the assistance that may be provided via mutual assistance, it is possible that enabling defence requests would give the defence more coercive powers in relation to overseas material than they have for New Zealand material.⁴⁶²
- 15.11 Nevertheless, Crown Law recognised that there are fair trial arguments to be made on the defence's behalf if the mutual assistance process cannot be used on behalf of the defence. It also submitted that if it is accepted that defendants should have access to the mutual assistance system, the legislation should be amended to allow for this on the basis that issues of process will need clarification, addressing questions of scope and quality control.⁴⁶³

457 See Commonwealth Secretariat *Report of the Oxford Conference on International Cooperation in Criminal Matters* (1999) as cited in Robert Currie "Human Rights and International Mutual Legal Assistance: Resolving the Tension" (2000) 11 Crim LF 143 at 171. The Commonwealth Ministers did not, however, agree to a proposed amendment, which would have made "specific reference to the right of the defence to make such requests", as the Ministers were satisfied that the Scheme already provided avenues for defence requests via the prosecution or order by judicial authority, and were concerned that the proposed amendment would provide an *unqualified* right of defence access that risked placing "enormous pressure on already overburdened mutual assistance systems": see Kimberly Prost "Cooperation in Penal Matters in the Commonwealth" in M Cherif Bassiouni (ed) *International Criminal Law: Volume II – Multilateral and Bilateral Enforcement Mechanisms* (3rd ed, Martinus Nijhoff Publishers, Leiden, 2008) 413 at 426. We agree that an unqualified right of defence access is inappropriate. As such, cls 58–59 of the Mutual Assistance Bill provide strict parameters around the type of assistance that may be requested by defendants and the method for obtaining it: see the discussion at [15.13]–[15.22] of this Report. For discussion of the issue of defendant requests under the Harare Scheme, see Issues Paper, above n 454, at [20.6]–[20.14].

458 Mutual Assistance in Criminal Matters Act 1987 (Cth), s 39A; and Crime (International Co-operation) Act 2003 (UK), s 7(3)(c). For discussion of the approaches taken overseas, see Issues Paper, above n 454, at [20.15]–[20.24].

459 New Zealand Police submission at 17.

460 Criminal Disclosure Act 2008, ss 24–29. See Issues Paper, above n 454, at [20.28].

461 New Zealand Police submission at 17.

462 Crown Law submission at [117]–[118].

463 At [119].

- 15.12 The Law Society thought that there was a strong argument in favour of the mutual assistance system being used to obtain evidence on a defendant's behalf.⁴⁶⁴ Professor Boister also commented that such a procedure would "assist in the quality of criminal justice in New Zealand courts, and is an excellent idea".⁴⁶⁵

Our recommendation

- 15.13 As noted above, we believe that the new Act should explicitly provide for defendant requests. There are two key elements to the draft provision: the process for obtaining assistance; and types of assistance available. We detail both below.

Process for obtaining assistance

- 15.14 We stated a preference in the Issues Paper for the two-step approach contained in section 39A of the Australian Mutual Assistance in Criminal Matters Act 1987 (Cth). Under this approach, a defendant may apply to the court for a certificate stating that it would be in the interests of justice for the Attorney-General⁴⁶⁶ to make a request to the foreign country on the defendant's behalf. If the court issues the certificate, under the second step:

... the Attorney-General must, in accordance with the certificate, make a request on behalf of the defendant to the foreign country for international assistance unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made.

- 15.15 In terms of the first step, the court would only approve the request if satisfied that it is in the interests of justice that the request is made. In line with the Police's submission, we envisage the courts taking a strict approach, focusing particularly on:
- (a) the extent to which the material sought would not otherwise be available;
 - (b) whether it is likely the material sought would be admitted in the New Zealand proceedings;
 - (c) the likely probative value of the material sought in relation to any issue likely to arise in the New Zealand proceeding were that material admitted into evidence; and
 - (d) whether the defendant would be unfairly prejudiced if the material sought were not available to the court.⁴⁶⁷
- 15.16 This is an important step in the process that will ensure the request is appropriate and sufficiently important. It will filter out requests that are merely speculative, made for the primary purpose of delaying the substantive proceedings, or those that are simply ill-advised. The Australian experience gives us confidence that this approach will prevent the risk of overburdening the mutual assistance system. Under the Australian system, requests for obtaining assistance, both incoming and outgoing, are rare. In the period from 2007 to December 2015, the Australian Central Authority only made two requests on behalf of defendants, and received one.⁴⁶⁸
- 15.17 If the court is satisfied that the request is appropriate, it will then direct that the Central Authority make the request unless the Central Authority believes, for reasons other than those

⁴⁶⁴ New Zealand Law Society submission at [102].

⁴⁶⁵ Email from Neil Boister (Professor of Law, University of Waikato) to Geoff McLay (Commissioner, Law Commission) regarding the Law Commission review of the Mutual Assistance in Criminal Matters Act 1992 (13 March 2015).

⁴⁶⁶ The Attorney-General fulfils the role of Central Authority in Australia.

⁴⁶⁷ These requirements align with four of the five requirements in the Australian Act. As noted at [15.18] of this Report, we think the fifth requirement – assessing whether the foreign country is likely to grant the request – is more appropriately assessed by the Central Authority.

⁴⁶⁸ Letter from Mark McCormack (Principal Legal Officer in the International Crime Cooperation Division of the Australian Government Attorney-General's Department) to Geoff McLay (Commissioner, Law Commission) (22 December 2015).

listed in clause 63 (which the court itself must consider), that it would not be appropriate in the circumstances to make the request. This allows the Central Authority to take into account issues such as the general comity of relations between the two countries.

- 15.18 As a part of its assessment, we think that the Central Authority should consider whether the foreign country is likely to grant the request. This is a factor for consideration by the court in Australia, but we think it is better assessed by the Central Authority given that it will likely require research into the history of similar requests, and the history between New Zealand and the country in question; inquiries the Central Authority is better placed to undertake.⁴⁶⁹
- 15.19 This approach leaves the Central Authority at the centre of the mutual assistance process, despite the request coming at the behest of a defendant. We think this is appropriate as it remains true to the character of mutual assistance being fundamentally an intergovernmental arrangement – a point stressed in submissions. A consequence of this, as Crown Law noted in its submission, is that any material received from the foreign country will first be received by the Central Authority (that is, Crown Law). The problem is that many defendants would not want Crown Law to receive the requested material. Despite this, we think it is appropriate that all requests are made to and from the Central Authority. It would be the Central Authority's responsibility to ensure that the appropriate mechanisms are in place to protect defendants' interests. Ultimately, we think that the draft provision achieves the best balance between retaining the government-to-government character of mutual assistance, while helping to ensure a defendant's right to a fair trial. As has been noted in relation to the Australian provision:⁴⁷⁰

This approach has the advantage of leaving with the government the role of dealing with foreign governments in international co-operation issues while at the same time ensuring that the enhanced facilities available to prosecutors do not result in unfair trials.

Types of assistance available to defendants

- 15.20 The other notable feature of the Australian provision is that it restricts the types of assistance the defendant may obtain via the mutual assistance system to those associated with the collection of evidence in relation to criminal matters. There are four categories of assistance a defendant may access:
- the taking of evidence in a foreign country;
 - the production of a document or other article in a foreign country;
 - seizure of a thing in a foreign country; or
 - arrangements for a person in a foreign country to come to Australia to give evidence.
- 15.21 Arguably, this goes too far. As Crown Law noted in its submission, given the type of assistance that may be provided under the mutual assistance scheme, it is possible that enabling defence mutual assistance requests may give the defence more coercive powers in relation to overseas material than they have for New Zealand material. Crown Law singled out assistance in obtaining an article by search and seizure as an example.⁴⁷¹ As a result, it was suggested that the type of assistance New Zealand is prepared to request on behalf of the defence should be limited

⁴⁶⁹ See Issues Paper, above n 454, at [20.37].

⁴⁷⁰ Dianne Stafford "The Role of IAP in Encouraging International Co-operation" (paper presented to the Second Annual Conference and General Meeting of the International Association of Prosecutors "International Cooperation in the Global Village", Ottawa, September 1997) at 7.

⁴⁷¹ As provided for in Mutual Assistance in Criminal Matters 1992, s 20; and Mutual Assistance in Criminal Matters and for Recovery of Criminal Proceeds Bill [Mutual Assistance Bill], cls 35–40.

to that which the defence could achieve for itself in New Zealand.⁴⁷² We agree. In principle, a New Zealand defendant should have the opportunity to access the same information or evidence to which he or she would have access to domestically, to the extent appropriate within the mutual assistance system.

15.22 As such, we think that the statute should provide that a New Zealand defendant may access the mutual assistance scheme to request the following:

- any information held by a person or agency in the foreign country;
- the taking of evidence in the foreign country; and
- arrangements for a person in a foreign country to travel to New Zealand to give evidence.

RECOMMENDATION

R36 New Zealand's mutual assistance legislation should make explicit provision for requests for assistance to be made to foreign countries on behalf of defendants.

INCOMING REQUESTS

15.23 In the Issues Paper, we suggested that New Zealand should be unconcerned as to the original source of an incoming request for assistance. That is a matter for the foreign country and the request should be treated the same as any other mutual assistance request, provided it has been made to the New Zealand Central Authority by the foreign central authority.⁴⁷³

15.24 The submissions we received on incoming requests broadly agreed with our assessment. Police noted that the role of the Central Authority is to ensure mutual assistance applications are authorised appropriately. If it has any concerns about the applicant it can refuse to provide assistance, either on the basis that the request has not been made by the appropriate central authority,⁴⁷⁴ or through the general discretion to refuse.⁴⁷⁵

15.25 We remain of the view, as stated in the Issues Paper, that New Zealand should not be concerned with the ultimate recipient of the material requested, but that the request should be made by the appropriate central authority. No specific provision is required.

⁴⁷² Crown Law submission at [118].

⁴⁷³ This is in accordance with Mutual Assistance Bill, cls 8 and 20(1).

⁴⁷⁴ As required under Mutual Assistance Bill, cl 20(1). See also cl 6 (definition of "foreign Central Authority").

⁴⁷⁵ Mutual Assistance Bill, cl 23(2)(i). See New Zealand Police submission at 17.



Part 4

EXTRADITION AND MUTUAL ASSISTANCE BILLS WITH COMMENTARY



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.

- (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**.

- (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-

- 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

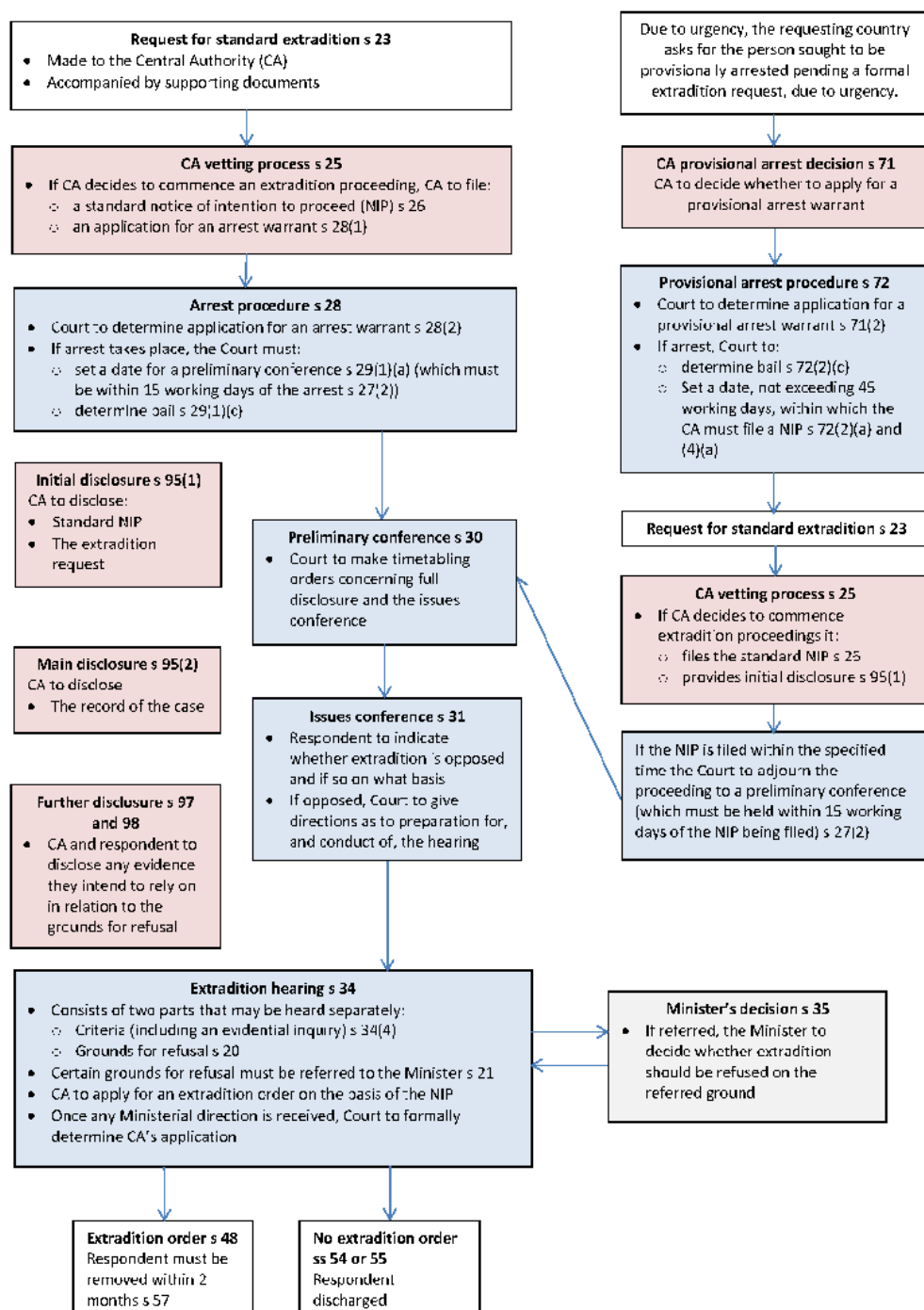
Overview of procedure for extradition from New Zealand

s 19(2), (3)

Part 1

Procedure for countries that are not approved

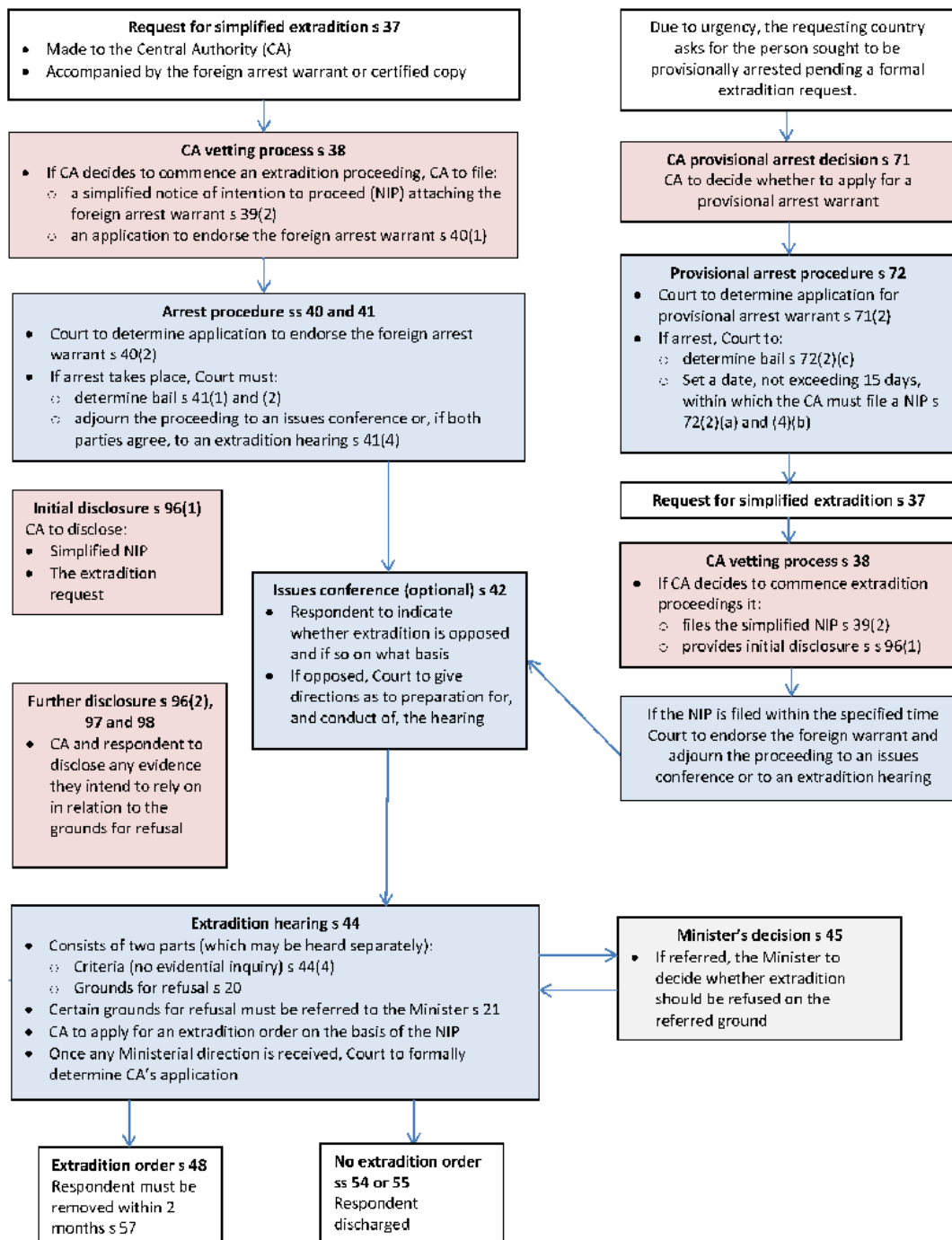
Standard extradition procedure



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)*

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.

Chapter 17

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

INTRODUCTION

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

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

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

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

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

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

The Parliament of New Zealand enacts as follows:

1 Title

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

2 Commencement

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

**Part 1
Preliminary provisions**

3 Purpose

The purposes of this Act are to—

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

Compare: 1992 No 86 s 4

4 Principles

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

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

5 Overview

This Act,—

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

6 Interpretation

In this Act, unless the context otherwise requires,—

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

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

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

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

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

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Part 1 cl 7

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

Compare: 1992 No 86 ss 2–2B, 27(1)(e)

7 Act binds the Crown

This Act binds the Crown.

Compare: 1992 No 86 s 3

8 Central Authority

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

(2) The Central Authority—

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

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

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

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

9 Act not authority for extradition of person

Nothing in this Act authorises—

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

Compare: 1992 No 86 s 6

10 Act not to limit other providing of assistance

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

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

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

Compare: 1992 No 86 s 5

11 Monitoring of interagency mutual assistance schemes

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

Disclosure of agency information to Central Authority and to foreign countries

12 Requests by Central Authority for information held by agencies

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

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

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

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

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

13 Disclosure of information by agencies to Central Authority

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

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

14 Disclosure of agency information by Central Authority to foreign country

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

15 Protection for agencies

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

Compare: 1982 No 156 s 48

16 Guidelines for disclosure of personal information to foreign countries

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

17 Publication of information relating to requests made under section 12

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

Confidentiality of communications between Central Authority and foreign countries

18 Confidentiality of communications between Central Authority and foreign countries

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

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

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

Compare: 2006 No 69 s 53

Part 2

Requests for assistance to New Zealand

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

19 Requests for assistance by foreign countries to New Zealand

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

Examples of types of assistance

Identifying or locating a person.

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

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

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

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

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

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

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

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

20 Making request

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

Compare: 1992 No 86 s 26

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

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

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

22 Grounds on which assistance must be refused

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

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

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

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

23 Grounds on which assistance may be refused

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

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

24 Criminal investigations

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

25 Reasons for refusal to be given

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

Compare: 1992 No 86 s 28

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

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

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

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

27 Authorisation of particular assistance

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

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

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

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

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

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

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

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

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

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

30 Obtaining evidence

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

- (5) Documents that are judicial records or official records and that are not publicly available may be produced or examined only to the extent that they could be produced or examined in criminal proceedings in a New Zealand court.
- Compare: 1992 No 86 ss 31, 32(2)

31 Protection of witnesses

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

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

32 Persons with right to appear and be represented

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

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

Compare: 1992 No 86 s 34

33 Powers of a Judge may be exercised by Registrar

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

Compare: 1992 No 86 s 35

34 Obtaining information

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

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

35 Search and Surveillance Act 2012

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

Example

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

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

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

Compare: 1992 No 86 ss 43, 44

36 Limit on use of Search and Surveillance Act 2012

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

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

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

38 Foreign enforcement officers

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

39 Dealing with things seized or produced

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

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

Compare: 1992 No 86 s 49

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

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

Attendance of person in foreign country

41 Attendance of person in foreign country

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

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

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

42 Additional provisions relating to prisoners

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

43 Undertakings by foreign country requesting attendance of person

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

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

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

Compare: 1992 No 86 s 39

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

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

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

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

Compare: 1996 No 82 ss 41–41B

Service of summons

45 Service of summons

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

Compare: 1992 No 86 ss 51–53

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

46 Interpretation

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

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

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

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

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

foreign qualifying forfeiture offence means—

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

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

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

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

significant foreign criminal activity—

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

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

tainted property—

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

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

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

Compare: 1992 No 86 ss 2–2B

47 Interim foreign restraining orders

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

Compare: 1992 No 86 s 60

48 Registration of foreign orders

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

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

Compare: 1992 No 86 ss 54–56

49 Cancellation of registration of foreign order

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

Compare: 1992 No 86 s 58

50 Search warrants, production orders, and examination orders

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

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

Compare: 1992 No 86 ss 59, 61, 62

51 Asset-sharing agreements

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

52 Criminal Proceeds (Recovery) Act 2009 amended

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

Part 3

Requests by New Zealand for assistance

53 Requests by New Zealand for assistance from foreign countries

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

Examples of types of assistance

Identifying or locating a person.

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

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

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

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

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

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

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

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

Assistance in criminal matters

54 General requirement for requesting assistance in criminal matters

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

Compare: 1992 No 86 ss 9–12, 19–20

55 Admissibility of evidence

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

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

56 Attendance of person in New Zealand

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

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

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

Compare: 1992 No 86 ss 12, 13

57 Detention of foreign prisoners

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

Compare: 1992 No 86 ss 15, 16

58 Penalty not to be imposed for refusal to attend

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

Compare: 1996 No 82 s 14

59 Immunities and privileges

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

Compare: 1992 No 86 s 17

60 Return of person to foreign country

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

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

Compare: 1992 No 86 s 15

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

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

Compare: 1992 No 86 ss 18, 23

62 Request by Central Authority on behalf of defendant

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

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

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

63 Matters relevant to making order under section 62

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

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

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

Assistance to recover criminal proceeds

64 General requirements for requesting assistance to recover criminal proceeds

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

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

Compare: 1992 No 86 ss 21, 22

Part 4

Miscellaneous provisions

65 Certificate of particulars of request by Central Authority

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

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

Compare: 1992 No 86 s 64

66 Authentication of documents

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

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

67 Regulations

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

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

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

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

68 Repeal of Mutual Assistance in Criminal Matters Act 1992

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

Schedule

Amendments to Criminal Proceeds (Recovery) Act 2009

s 52

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

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

Replace section 128 with:

128 Application for interim foreign restraining order

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

128A Order by court

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

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Schedule

Mutual Assistance in Criminal Matters and for
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Sections 30 to 36 apply to an order made under **section 128A**, with any necessary modifications.

After section 134, insert:

134A Registration of foreign restraining order

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

134B Effect of foreign restraining order

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

After section 143, insert:

143A Registration of foreign forfeiture order

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

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

COMMENTARY ON SELECTED PROVISIONS

Clause 6 Interpretation

criminal matter —

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

Commentary

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

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

Clause 8 Central Authority

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

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

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

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

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

Commentary

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

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

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

Clause 10 Act not to limit other providing of assistance

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

Commentary

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

Clause 11 Monitoring of interagency mutual assistance schemes

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

⁴⁹² See ch 12 of this Report for further discussion.

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

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

Commentary

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

Clause 20 Making request

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

Commentary

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

Clause 22 Grounds on which assistance must be refused

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

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

Commentary

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

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

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

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

Clause 23 Grounds on which assistance may be refused

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Clause 24 Criminal investigations

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

Commentary

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

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

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

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

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

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

(3) The Central Authority may agree—

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

Commentary

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

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

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

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

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

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

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

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

Commentary

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

Clause 30 Obtaining evidence

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

Clause 34 Obtaining information

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

Commentary

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

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

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

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

Clause 36 Limit on use of Search and Surveillance Act 2012

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

Commentary

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

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

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

Commentary

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

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

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

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

Clause 43 Undertakings by foreign country requesting attendance of person

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

Commentary

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

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

Commentary

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

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

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

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

Clause 46 Interpretation

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

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

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

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

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

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

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

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

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

Commentary

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

Clause 47 Interim foreign restraining orders

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

Commentary

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

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

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

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

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

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

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

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

Clause 50 Search warrants, production orders, and examination order

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

Commentary

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

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

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

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

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

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

Clause 55 Admissibility of evidence

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

Commentary

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

Schedule—Amendments to Criminal Proceeds (Recovery) Act 2009

Replace section 128 with:

Clause 128 Application for foreign restraining order

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

Clause 128A Order by court

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

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

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

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

...

Commentary

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

After section 134, insert:

Clause 134A Registration of foreign restraining order

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

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

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

Commentary

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

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

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

Appendices



Appendix A

List of submitters and consultees

LIST OF SUBMITTERS

- Crown Law Office
- Financial Markets Authority
- Inland Revenue Department
- Ministry of Business, Innovation and Employment
- New Zealand Law Society
- New Zealand Police
- Office of the Privacy Commissioner

CONSULTATION LIST

The Law Commission consulted with the following persons and organisations during the course of this review:

- Australian Government Attorney-General's Department
- Gregor Allan
- Professor Neil Boister
- Victoria Casey
- Commerce Commission
- Associate Professor Alberto Costi
- Crown Law Office
- Department of Justice, Canada
- Justice Michael Drambot of the Superior Court of Justice in Canada
- Dr Tony Ellis
- Financial Markets Authority
- Christine Gordon QC
- Grant Illingworth QC
- Immigration and Protection Tribunal
- Inland Revenue Department
- Rt Hon Sir Kenneth Keith QC
- Professor Campbell McLachlan QC
- Ministry of Business, Innovation and Employment

- Ministry of Foreign Affairs and Trade
- Ministry of Justice
- Andra Mobberley
- New Zealand Police
- Office of the Privacy Commissioner
- Fletcher Pilditch
- Representatives of the New Zealand Judiciary
- Serious Fraud Office
- United Kingdom Home Office

EXPERT ADVISORY COMMITTEE

The Commission established an expert advisory committee with representatives from the following departments:

- Crown Law Office
- Ministry of Foreign Affairs and Trade
- Ministry of Justice
- New Zealand Police

We are grateful for the valuable contributions made by all submitters and everyone we consulted during this review.

Appendix B

Recommendations

Chapter 1

INTRODUCTION

- R1 The Extradition Bill attached to this Report, which simplifies and modernises the Extradition Act 1999, should be considered for enactment.
- R2 The Mutual Assistance in Criminal Matters and for the Recovery of Criminal Proceeds Bill, which simplifies and streamlines the Mutual Assistance in Criminal Matters Act 1992, should be considered for enactment.

Chapter 2

THE CORE CONCEPT OF A CENTRAL AUTHORITY

- R3 There should be one Central Authority that is responsible for processing any incoming or outgoing extradition or mutual assistance request.
- R4 The Central Authority should be the applicant in any extradition proceeding.
- R5 The Attorney-General should be the Central Authority.
- R6 New extradition and mutual assistance legislation should contain provisions that explain when communication between the New Zealand Central Authority and a foreign central authority or government is confidential.

Chapter 3

THE ROLE OF TREATIES

- R7 A treaty should still not be necessary for an extradition or to provide mutual assistance.
- R8 An extradition or mutual assistance treaty should only be able to modify the statutory process in limited ways. The areas of possible modification should be expressly identified in the legislation.

Chapter 4

THE RELATIONSHIP WITH NZBORA

- R9 The values underlying the New Zealand Bill of Rights Act should continue to inform extradition and mutual assistance legislation, and should be recognised more prominently.

Chapter 5

GROUND FOR REFUSAL

- R10 All of the statutory grounds for refusing extradition (as opposed to those contained in a treaty) should be framed so that if they apply, extradition must be refused. There should be no discretion.
- R11 All extradition requests should be subject to the same grounds for refusal, regardless of the requesting country.
- R12 Each ground for refusal should be determined by either the Court or the Minister, not both. Most of the grounds for refusal should be determined by the Court. Only the death penalty ground and certain treaty grounds should be reserved for the Minister.
- R13 Most of the grounds for refusing a mutual assistance request should be drafted in discretionary terms.
- R14 The Central Authority should have a general discretion to refuse a mutual assistance request in appropriate circumstances.

Chapter 6

EXTRADITION OFFENCE

- R15 The dual criminality requirement should be retained as part of the “extradition offence” test, in relation to extradition requests from all countries except Australia.
- R16 The seriousness threshold in the “extradition offence” test should be raised from a maximum penalty of 12 months’ imprisonment to a maximum penalty of 2 years’ imprisonment, in relation to extradition requests from all countries except Australia.

Chapter 7

CATEGORISATION OF COUNTRIES

- R17 There should be two main categories of countries in new extradition legislation. Requests from approved countries should be processed using the simplified extradition procedure. Requests from all other countries should be dealt with using the standard extradition procedure.
- R18 There should be a different test for “extradition offence” if the extradition request is from Australia.

Chapter 8

OVERVIEW OF COURT PROCEDURE

- R19 New extradition legislation should contain its own, tailor-made procedural rules.
- R20 All extradition requests should be heard and determined in the first instance in the District Court.

- R21 An extradition proceeding should be commenced by the Central Authority filing a Notice of Intention to Proceed.
- R22 Extradition legislation should specify what must be disclosed as part of the proceedings.
- R23 Either party should be able to appeal to the High Court against a finding that the respondent is, or is not, liable for extradition. The appeal should be a general appeal.

Chapter 9

THE EVIDENTIAL INQUIRY

- R24 There should continue to be an evidential inquiry in standard extradition proceedings. In conducting the inquiry the Court should determine whether there is a case to answer in respect of each offence identified in the Notice of Intention to Proceed.
- R25 In conducting the evidential inquiry, the Court should consider a Record of the Case prepared by the requesting country and, where relevant to the test, evidence offered by the respondent.

Chapter 10

ADMISSIBLE EVIDENCE

- R26 Evidence should ordinarily be presented for extradition hearings in written form. However, in limited circumstances the Court should have the power to make an oral evidence order.

Chapter 11

EXTRADITION AND REFUGEE PROCEEDINGS

- R27 Where a person is the subject of an extradition request and is also an asylum seeker, there should be scope for extradition and refugee proceedings to be run concurrently.
- R28 The fact that a person has refugee status should not be an automatic bar to commencing extradition proceedings.
- R29 Extradition and immigration legislation should facilitate information sharing between the Central Authority and the Ministry of Business, Innovation and Employment.
- R30 Extradition and immigration legislation should contain enabling provisions that allow for an extradition proceeding to be suspended pending a determination in a refugee proceeding and vice versa.
- R31 Extradition legislation should prohibit the extradition of a refugee or an asylum seeker except in limited circumstances.

Chapter 13

MANAGING THE OVERLAP WITH INTERAGENCY MUTUAL ASSISTANCE SCHEMES

- R32 Guidance should be included in the mutual assistance legislation to assist agencies where there is an overlap between that legislation and other interagency mutual assistance schemes.
- R33 The Central Authority should be responsible for producing and maintaining guidelines on entering or modifying interagency mutual assistance schemes, and should be available to provide advice to agencies on their application.

Chapter 14

REQUESTS FOR INFORMATION

- R34 The mutual assistance legislation should include a mechanism for the Central Authority to request information for New Zealand public sector agencies.
- R35 The Central Authority ought to be made primarily responsible for guarding privacy interests in relation to mutual assistance requests.

Chapter 15

DEFENDANT REQUESTS UNDER THE MUTUAL ASSISTANCE BILL

- R36 New Zealand's mutual assistance legislation should make explicit provision for requests for assistance to be made to foreign countries on behalf of defendants.