



**UNODC**

United Nations Office on Drugs and Crime

## **Country Review Report of New Zealand**

Review by Cameroon and Turkey of the implementation by New Zealand of articles 15 - 42 of Chapter III. “Criminalization and law enforcement” and articles 44 - 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

## **I. Introduction**

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

## **II. Process**

5. The following review of the implementation by New Zealand of the Convention is based on the completed response to the comprehensive self-assessment checklist received from New Zealand, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Cameroon and Turkey.
6. A country visit, agreed by New Zealand, was conducted in Wellington from 21 to 23 February 2017. The visit was attended by the following reviewing experts:

### **Cameroon:**

- Alfred Etom, National Anti-Corruption Commission

### **Turkey:**

- Can Berk, Prime Ministry Inspection Board
- Bilal Yildiz, Prime Ministry Inspection Board
- Murat Derem, Ministry of Justice

### **III. Executive summary**

#### ***New Zealand***

##### ***1. Introduction: Overview of the legal and institutional framework of New Zealand in the context of implementation of the United Nations Convention against Corruption***

*New Zealand signed the Convention on 10 December 2003 and deposited its instrument of ratification on 1 December 2015.*

*New Zealand is a constitutional monarchy with a parliamentary system of government. The Head of State is Queen Elizabeth II, who is represented by the Governor-General.*

*The following Acts are paramount in the implementation of the Convention: the Crimes Act 1961 (CA), the Secret Commissions Act 1910 (SCA), the Criminal Procedure Act 2011 (CPA), the Criminal Proceeds (Recovery) Act 2009 (CPRA) and the Serious Fraud Office Act 1990 (SFO Act).*

*The institutions most relevant to the fight against corruption are the Serious Fraud Office (SFO), the Ministry of Justice, the Financial Intelligence Unit (FIU), and the Organised Financial Crime Agency of New Zealand (OFCANZ).*

##### ***2. Chapter III: Criminalization and law enforcement***

###### ***2.1. Observations on the implementation of the articles under review***

*Bribery and trading in influence (arts. 15, 16, 18 and 21)*

*While the provisions of the Crimes Act conform to the definition of “public official” in the Convention, specific bribery offences have been established for persons holding legislative and judicial offices (sects. 99, 100, 102 CA).*

*Active and passive bribery of national public officials is criminalized (sects. 100-105 CA). While the promise of an undue advantage is not explicitly included, the provisions are formulated broadly and the judiciary has interpreted them to also cover promises (Field v. R [2011] NZSC 129). Jurisprudence has established a de minimis defence in relation to “gifts of token value which are just part of the usual courtesies of life” (Field v. R [2011] NZSC 129).*

*The indirect commission of the offence is not explicitly included in the bribery offences, and the use of the term “corruptly” introduces an additional element of the offence.*

*Active and passive bribery of foreign public officials and officials of public international organizations is criminalized (105(C) to 105(E) CA). The active foreign bribery offence does not apply if the act alleged to constitute the offence was committed for the sole or*

*primary purpose of ensuring or expediting the performance of a routine government action and the value of the benefit was small (so-called facilitation payments) (sect. 105C (3) CA).*

*Active trading in influence can be covered through the application of section 105 (2) CA; passive trading in influence is separately criminalized (sect. 105(F) CA).*

*Active and passive bribery in the private sector is criminalized (sect. 3 SCA). When the undue advantage is given to an unrelated third party, it needs to be proven that the advantage was given to the third party at the agent's request or suggestion.*

*Money-laundering, concealment (arts. 23 and 24)*

*Money-laundering is criminalized (sect. 243 CA). All offences punishable under domestic law and acts committed abroad that would be offences in New Zealand had they been committed there are predicate offences.*

*If a perpetrator of the predicate offence "deals" with the property proceeds of crime (sect. 243 (1) CA), he or she also commits money-laundering and can be prosecuted for both offences.*

*Concealment is criminalized (sect. 243(3) CA).*

*Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)*

*In the absence of a specific embezzlement offence, theft by a person in a special relationship (sect. 220 CA) and criminal breach of trust (sect. 229 CA) are criminalized.*

*Apart from the corrupt use of information (sect. 105A CA), abuse of functions is not criminalized as separate offence, but can be covered by section 105 CA.*

*Illicit enrichment is not criminalized.*

*Obstruction of justice (art. 25)*

*Conspiring to defeat justice, and the use of threats, bribes or other corrupt means to dissuade a person from giving evidence or to influence a member of a jury, and wilfully attempting in any other way to obstruct, prevent, pervert, or defeat the course of justice, are criminalized (sect. 116 - 117 CA).*

*Specific acts of interfering with the exercise of official duties of certain law enforcement officials (sect. 23 Summary Offences Act (SOA)) or obstructing an SFO investigation (sect. 45 SFO Act) are criminalized.*

### *Liability of legal persons (art. 26)*

*The definition of “person” extends to legal persons (sect. 2 CA, 29 Interpretation Act (IA)), thus establishing their criminal liability for all offences committed by a “person”, without prejudice to the liability of natural persons. While there are no specific provisions establishing the administrative or civil liability of legal persons for offences established in accordance with the Convention (Convention offences), some civil remedies are applicable (e.g., proceedings for breach of economic tort).*

*While all Convention offences are punishable by imprisonment, the court can instead order the payment of a fine (sects. 39, 40 Sentencing Act (SA)).*

*For foreign bribery, legal persons are subject to a fine of up to NZD 5 million or three times the value of the commercial gain (sect. 105(C)(2E) CA), while for obstruction of SFO investigations (sect. 45 SFO Act), corporations can be fined up to NZD 40,000. The court can also impose sanctions such as, in specific cases, the cancellation of the company’s licence or its dissolution.*

### *Participation and attempt (art. 27)*

*Participation, attempt and conspiracy are criminalized (sects. 66, 72, 310 CA).*

*The mere taking of preparatory steps in relation to an offence is only criminalized where explicitly established by law, which is not the case for Convention offences.*

### *Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)*

*Most Convention offences are punishable by a maximum term of imprisonment of between five and seven years or fines. Certain offences criminalizing obstruction of justice are punishable by a maximum of three months to one year imprisonment (sects. 21, 23 SOA, sect. 45 SFO Act). Abuse of a position of trust or authority in relation to the victim is an aggravating circumstance (sect. 9 (f) SA).*

*There are no general immunities or jurisdictional privileges. To prosecute a Minister of the Crown or a Member of Parliament for bribery, the leave of a judge of the High Court is required (sects. 102 (3), 103 (3) CA). To prosecute other public officials for bribery or passive trading in influence, and for the prosecution of bribery in the private sector, the leave of the Attorney-General is required (sect. 106 CA, sect. 12 SCA).*

*New Zealand applies the principle of opportunity (part 5, Crown Law Prosecution Guidelines (CLPG)). The Attorney-General can stay proceedings (sect. 176 CA). There is no statutory plea bargaining system; however, the prosecutor can indicate the starting point of the sentence suggested by the prosecution.*

*The Bail Act (sect. 8) takes into consideration the need to ensure the presence of the defendant in proceedings.*

*The Parole Act establishes that the Parole Board must make its decisions on the basis of all information available to it, which includes information on the gravity of the offence (sect. 7).*

*The State- Sector Act (sect. 57B) contains provisions regarding the breach of minimum standards by a public official. There are no statutory provisions establishing the removal, suspension or reassignment of public officials accused of having committed an offence. Internal codes of conduct establish the applicable disciplinary sanctions.*

*A conviction for a Convention offence does not result in automatic disqualification to hold public office. Members of Parliament are removed from office upon conviction for an offence punishable by two or more years imprisonment or for corrupt practices (sect. 55 (2) (d) Electoral Act). A conviction for certain Convention offences also disqualifies the offender from being a director or involved in the management of a company, including a vast majority of State-owned enterprises (sect. 382 Companies Act).*

*Disciplinary and criminal sanctions can be imposed for the same offence and the respective proceedings can proceed in parallel.*

*The Parole Act and the Sentencing Act foresee measures to promote the reintegration of offenders into society.*

*New Zealand encourages collaboration with the competent authorities through the mitigation of punishment, taking into account e.g. offers of amends or remedial action taken by the offender (sects. 8-10 SA). Immunity from prosecution is possible in certain cases (sect. 12 CLPG), and collaborating offenders can be protected. Assistance provided to foreign authorities can be taken into account when sentencing collaborating offenders (Ong v. R [2012] NZCA 258).*

*Protection of witnesses and reporting persons (arts. 32 and 33)*

*The Evidence Act 2006 (EvA) allows for the anonymity of witnesses in relation to trials for category 3 and 4 offences (sects. 110-114). A comprehensive witness protection programme administered by the police is available before, during or after a trial.*

*To preserve the anonymity of certain witnesses, judges can order a variety of measures, including the giving of evidence by video-link (sect. 116 EvA, sects. 5, 6 Courts (Remote Participation) Act 2010) or screened off from the defendant, or in closed court (sect. 116 EvA). Measures ensuring physical protection can also be taken. Experts can equally benefit from these measures; however, their anonymity cannot be protected.*

*Victims' views and concerns can be presented through victim impact statements (sects. 17AA, 20 Victims' Rights Act 2002).*

*Witnesses can be relocated domestically and internationally, and New Zealand has concluded arrangements in this regard.*

*Protection for reporting persons is established through the Protected Disclosures Act 2000 (PD Act). Persons having made a protected disclosure and claiming to have suffered retaliatory action may have a "personal grievance" (an action or other remedy) against the employer (sects. 17 PD Act, 113 Employment Relations Act 2000).*

*Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)*

*The CPRA provides for the restraint and forfeiture of property derived as a result of "significant criminal activity" without the need for conviction. Significant criminal activity is defined as "activity engaged in by a person that if proceeded against as a criminal offence would amount to offending that consists of or includes one or more offences punishable by a maximum term of imprisonment of 5 years or more, or from which property, proceeds or benefits of a value of NZD 30,000 or more have, directly or indirectly, been acquired or derived" (sect. 6 CPRA).*

*The Sentencing Act establishes conviction-based forfeiture of instruments used in the commission of "qualifying instrument forfeiture offences", which are offences punishable by a maximum term of imprisonment of at least 5 years (sect. 142 N).*

*Most Convention offences comply with these thresholds except for the specific offences established in accordance with article 25(b) of the Convention.*

*Restraining and forfeiture orders can be made (a) in relation to specific property (sects. 24, 50 CPRA), if the court is satisfied that it has reasonable grounds to believe that the property is "tainted property"; (b) in relation to all or part of the respondent's property (sects. 25, 55 CPRA), if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity; or (c) in relation to instruments used in the commission of an offence (sect. 26, 70 CPRA, sect. 142 N SA). The latter does not apply to instruments destined for use in the commission of an offence.*

*Tainted property (sect. 5 CPRA) includes property derived as a result of significant criminal activity that has been transformed or converted. Forfeiture of an asset that has been partially acquired with property derived from significant criminal activity and partially with property acquired from legitimate sources is also possible, as well as forfeiture of any benefits or income derived of any such properties.*

*Restrained and forfeited assets are managed and disposed of by the Official Assignee (sects. 103, 111, 113 CPRA).*

*Bank records can be seized based on a judicial order (sects. 104, 105 CPRA).*

*Offenders are not required to demonstrate the lawful origin of alleged proceeds of crime, but the required evidentiary standards have been lowered by introducing civil forfeiture proceedings (see CPRA).*

*The interests of bona fide third parties are protected (sects. 30, 31 CPRA, 142 L SA).*

*There is no general bank secrecy provision. The Director of SFO may require the production of documents and the supply of information from any person in the banking business (sects. 5, 9 SFO Act). The FIU and the Police can access financial information based on a court order (sects. 104, 105 CPRA; 70-79 SSA; 118, 132, 143 (a) AML Act; principle 11 (a) Privacy Act).*

*Statute of limitations; criminal record (arts. 29 and 41)*

*Most Convention offences are category 3 and 4 offences (sect. 6 CPA) not subject to any statute of limitations (sect. 25 (1), (2) CPA). Some of the offences criminalizing obstruction of justice are category 2 offences, for which a charging document must be filed within 6 months after the commission of the offence (sect. 25 (3) CPA). There is no interruption of the statute of limitations if the alleged offender has evaded the administration of justice.*

*Convictions in certain other States may be taken into account as evidence (sects. 4, 43, 139 EvA) if they comply with a level of propensity or veracity.*

*Jurisdiction (art. 42)*

*New Zealand has established territorial jurisdiction and jurisdiction over offences committed on board a Commonwealth vessel or a New Zealand aircraft (sects. 5, 8 CA). For certain offences committed by or in relation to certain persons, it has also established extraterritorial jurisdiction (sects. 7A, 105D, 105E CA).*

*An offence is deemed to have been committed in New Zealand when any act or omission forming part of any offence or any event necessary to the completion of any offence occurred there (sect. 7 CA).*

*Jurisdiction over offences committed against the State has not been separately established.*

*Consequences of acts of corruption; compensation for damage (arts. 34 and 35)*

*The Government's 3<sup>rd</sup> Rules of Sourcing allow for the exclusion of a supplier from a contract opportunity due to a conviction for serious crimes or offences, or for acts or omissions that adversely reflect on the supplier's commercial integrity (rule 41). Contracts can be rescinded on the grounds of fraudulent misrepresentation (sect. 7 (3) (a) Contractual Remedies Act 1979).*

*In criminal proceedings, a court may impose reparation if an offender has caused loss of or damage to property (sects. 12, 32 (1) SA, sect. 5 IA). In civil law, those having suffered damage as a result of corruption can initiate proceedings based on the law of torts.*

*Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)*

*The SFO is the specialized authority investigating and prosecuting serious or complex financial crime, including corruption offences. The Attorney-General is responsible for the SFO (sect. 29 SFO Act); however, the SFO Director is independent in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such offence or any offence against the SFO Act (sect. 30 SFO Act). The FIU closely cooperates with the SFO and OFCANZ in the investigation of Convention offences. There is no specific protection against dismissal of the SFO Director and the Head of the FIU.*

*OFCANZ has been established to increase inter-institutional cooperation regarding serious and organized crime and investigates and prosecutes money-laundering. The SFO has several memoranda of understanding with other institutions and regularly raises awareness on its mandate.*

*The SFO Director can issue production orders for any documents that may be relevant to a suspected fraud case, and can require any person to answer questions in this regard (sects. 5, 9 SFO Act). Refusal to follow such orders is an offence (sect. 45 SFO Act). The FIU receives suspicious transaction reports (sect. 40 AML Act) and trains financial institutions on anti-money-laundering matters. The SFO has developed a corruption risk assessment tool for companies and, in collaboration with civil society, an anti-corruption online training.*

*The SFO participates at awareness-raising events and has established a dedicated website interface for the reporting of crimes.*

## **2.2. Successes and good practices**

- The personal scope of application of the offence criminalizing bribery in the private sector, extending to any person desiring or intending to be employed by or acting for another person, and to any person by whom an agent intends or desires to be employed or for whom an agent intends or desires to act (art. 21).*
- The absence of immunities or jurisdictional privileges (art. 30, para. 2).*
- The establishment of a civil forfeiture regime (art. 31)*
- The establishment of a Victims Code, setting forth the rights of and services available to victims; and of an offender levy that is used to fund grants for services for victims of serious crimes (art. 32).*

- *Victim impact statements have been used during trials for corruption offences (art. 32, para. 5).*
- *The broad personal scope of application of the Protected Disclosure Act, protecting public and private sector employees, former employees and volunteers reporting serious wrongdoings (art. 33).*
- *The risk assessment tool and online anti-corruption training module available on the SFO website (art. 39, para. 1).*

### **2.3. Challenges in implementation**

*It is recommended that New Zealand:*

- *Monitor the application of the legislation to ensure that the indirect commission of bribery offences is criminalized, and that the additional element of “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform is required (arts. 15, 16, 18, 21).*
- *Amend its legislation to abolish the exception established for so-called facilitation payments (art. 16, para. 1).*
- *While the conduct can be covered through sections 220 and 229 Crimes Act, assess whether the establishment of a separate offence of embezzlement, misappropriation or other diversion of property by a public official would be beneficial (art. 17).*
- *Monitor the application of the legislation to ensure that active trading in influence is criminalized. If the judiciary does not interpret the law in this way in the future, legislative reform shall be considered (art. 18 (a)).*
- *Consider criminalizing illicit enrichment (arts. 19, 20).*
- *Consider establishing a separate offence of embezzlement in the private sector (art. 22).*
- *Specifically criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by all justice and law enforcement officials (art. 25, subpara. (b)).*
- *New Zealand may wish to explicitly criminalize the preparation for Convention offences (art. 27, para. 3).*
- *Ensure that an appropriate statute of limitations period is established for offences established in accordance with article 25 (b) of the Convention, and establish an even longer period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice (art. 29).*

- Consider increasing the sanctions for the category 2 offences criminalizing obstruction of justice (art. 30, para. 1).
- Consider establishing clear procedures to remove, suspend or reassign public officials accused of having committed Convention offences (art. 30, para. 6).
- Consider regulating the disqualification of persons convicted of Convention offences from holding public office and from holding office in an enterprise owned in whole or in part by the State, beyond the scope of section 382 Companies Act (art. 30, para. 7).
- Enable confiscation and seizure in relation to offences established in accordance with article 25 (b) of the Convention. and of instruments destined for use in Convention offences (art. 31).
- New Zealand could monitor whether previous convictions in other States may be considered in criminal proceedings (art. 41).
- New Zealand could establish extraterritorial jurisdiction:
  - over offences committed against the State (art. 42, para. 2 (d));
  - regarding Convention offences not listed in sections 7A, 105D or 105E CA, over offences committed:
    - by or against a national (art. 42, para. 2 (a) and (b)); and
    - By a stateless person who has their ordinary residence in New Zealand (art. 42, para. 2 (b)).
    - By a person who is present in New Zealand and is not being extradited (art. 42, paras. 3 and 4).

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

*Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)*

*Extradition is governed by the Extradition Act 1999 (EA), which sets forth different schemes applying to (a) certain treaty countries, certain Commonwealth countries and certain other countries (part 3 EA); (b) Australia and designated countries (part 4 EA); and (c) to individual requests to which the Act is extended (part 5 EA), and any relevant treaties, which, in general, take precedence (sect. 11 MACMA). New Zealand is party to 45 bilateral extradition treaties.*

*Dual criminality is a fundamental requirement for extradition under the EA (sects. 4, 5 EA), but may not be required under a treaty. Under the EA, all offences*

*punishable in both New Zealand and the requesting country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty are extraditable (sect. 4 EA 1999). Most, but not all Convention offences fulfil this requirement.*

*New Zealand does not make extradition conditional on the existence of a treaty and recognises Convention offences as extraditable offences subject to the requirements of the EA.*

*Extradition is possible for offences that are not extraditable offences to States to which part 3 of the Act applies if the requested person consents to the extradition and all other relevant conditions are satisfied (sect. 29 EA).*

*Convention offences are not considered political offences (sect. 2 (3) (a) (i) EA).*

*Should extradition for the purpose of executing a sentence be refused because the sought person is a national, New Zealand cannot enforce the sentence imposed abroad or the remainder thereof.*

*Nationals can be extradited unless an extradition treaty, an Order in Council under section 16 of the Extradition Act or any arrangements or undertaking among the requesting State and New Zealand provides otherwise (sects. 30 (2) (c), 48 (1) (a) EA). There is no obligation to submit a case for prosecution when a request for extradition is denied on the sole ground that the requested person is a national.*

*New Zealand deems all Convention offences that meet the minimum punishment threshold set forth by the Extradition Act included in its extradition treaties.*

*Expedited extradition proceedings are possible if the requested person consents to extradition (sects. 28, 53 EA), and the timelines established by the Act (sects. 36 and 57) contribute to expediting the extradition once a surrender order is made.*

*Persons requested for extradition can be taken into custody (sects. 19, 20, 41 and 42 EA).*

*Extradition must be refused if it is sought to prosecute or punish the person on discriminatory grounds or would prejudice the requested person's position for discriminatory reasons (sect. 7 EA). Extradition cannot be refused solely on the ground that the offence is also considered to involve fiscal matters.*

*In practice, New Zealand consults with requesting States prior the submission of the extradition request, but does not consult with them prior to refusing extradition. Requesting States have no legal standing in the extradition proceedings.*

*New Zealand cannot transfer sentenced persons or criminal proceedings.*

*Mutual legal assistance (art. 46)*

*Mutual legal assistance (MLA) is regulated by the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and several bi- and multilateral treaties.*

*The MACMA allows for the provision of a wide range of assistance, also with regard to offences for which a legal person may be considered responsible. The taking of statements from or giving of evidence by suspects in New Zealand in response to an MLA request is only possible with the person's consent (sect. 33 (1) MACMA). Witnesses can be compelled to give evidence (sect. 32(1) MACMA).*

*Informally, New Zealand can share information with other countries without a request (sect. 5 MACMA). In practice, New Zealand endeavours to comply with requests to keep information so received confidential.*

*New Zealand does not decline to render assistance on the ground of bank secrecy, but may refuse to render assistance in the absence of dual criminality or when the request relates to proceedings under CPRA but the offence, had it been committed in New Zealand, would not have constituted significant criminal activity (sect. 27 (2) MACMA).*

*New Zealand can consider the Convention as a legal basis for MLA.*

*Sections 38 to 41A of the MACMA address the temporary transfer of persons detained or serving a sentence to another State for the purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings.*

*The Attorney-General is the central authority for MLA (sect. 25 MACMA). This authority has been delegated to the Solicitor-General, and is normally delegated in turn to a Deputy Solicitor-General. In practice, the Crown Law Office (CLO) acts as central authority, of which the Secretary-General of the United Nations has been notified. CLO evaluates incoming MLA requests, advises the Deputy Solicitor-General whether the assistance requested can be granted, and informs the requesting State of this decision.*

*Outgoing MLA requests are prepared by CLO in consultation with the prosecuting agency and consented to and signed by the Deputy Solicitor-General.*

*Requests are accepted in English, and New Zealand has notified the Secretary-General of the United Nations accordingly. Requests can be received by CLO in hard copy and by e-mail. Requests can also be received through the International Criminal Police Organization (INTERPOL). The authorities confirmed that New Zealand accepts oral MLA requests insofar as they are subsequently confirmed in writing.*

*In line with the possibility of hearing witnesses through video link in domestic proceedings, such hearings can also be conducted via videoconference in relation to MLA requests.*

*New Zealand has established the principle of speciality for information received as a result of MLA (sect. 23 MACMA). In practice, New Zealand can comply with requests to keep information confidential, and consults with the requesting State if it would be required to disclose information when executing an MLA request.*

*Section 27 of the MACMA sets forth mandatory and discretionary grounds for refusal of MLA. These grounds do not include the offence also being considered to involve fiscal matters. Requesting States are informed of the reasons for refusal (sect. 28 MACMA).*

*New Zealand consults with the requesting State to ensure that all information required to make a decision on the execution of a request is available, but does not necessarily consult the requesting State prior to refusing assistance. New Zealand can also make the provision of MLA subject to conditions (sect. 29 MACMA).*

*New Zealand bears the ordinary costs of the execution of MLA requests despite the absence of a provision in this regard.*

*New Zealand may, at its discretion share documents that are not publicly available subject to any conditions it may deem appropriate.*

*Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)*

*Law enforcement authorities cooperate through organizations and networks such as INTERPOL, the Egmont Group, the APEC Anti-Corruption Working Group, the Economic Crime Agency Network, the International Anti-Corruption Coordination Centre, and the Pacific Islands Police Chiefs. The SFO and police have liaison officers working in several other jurisdictions, and law enforcement agencies have concluded a number of agreements and memoranda of understanding with international counterparts.*

*Law enforcement agencies can cooperate on the basis of the Convention.*

*The SFO and the Police dispose of Electronic Crime Laboratories to assist with the evidential preservation of information from electronic devices, which can be used when cooperating with other law enforcement agencies. New Zealand also cooperates through the International Association of Computer Investigative specialists.*

*New Zealand could carry out joint operations on the basis of information sharing agreements formed with overseas agencies (sect. 51 SFO Act).*

*On the basis of the Search and Surveillance Act, New Zealand can use special investigative techniques for the investigation of Convention offences. On a case-by-case basis, such techniques can be used at the international level.*

*As relevant evidence, the evidence obtained through special investigative techniques is admissible in court (sects. 7, 8 EvA).*

*The Customs and Excise Bill, which aims at inter alia extending the use of controlled delivery at the international level to most corruption offences, had been presented to Parliament at the time of the country visit.*

### **3.2. Successes and good practices**

- New Zealand reviews and consults with requesting States on draft extradition and MLA requests (art. 44, paras. 1 and 17, art. 46, paras. 1 and 16).*
- New Zealand's role as active provider of technical assistance to law enforcement agencies in the region (art. 48).*
- New Zealand can supply to and receive information from any person in any other country whose functions are or include the detection, investigation or prosecution of fraud (sect. 51 SFO Act).*

### **3.3. Challenges in implementation**

*It is recommended that New Zealand:*

- Ensure that all offences established in accordance with article 25 (b) of the Convention are extraditable (art. 44, paras. 1 and 7).*
- New Zealand may wish to grant extradition in the absence of dual criminality; and to grant accessory extradition in cases in which the requested person does not consent to the accessory extradition and in cases not involving States to which part 3 of the Extradition Act applies (art. 44, paras. 2 and 3).*
- Deem all offences established in accordance with article 25 (b) of the Convention included in its extradition treaties (art. 44, para. 4).*
- If a request for extradition is refused solely on the ground that the sought person is a national, submit the case to its competent authorities for prosecution at the request of the requesting State (art. 44, para. 11).*
- If extradition is refused because the requested person is a national, consider the enforcement of the sentence imposed abroad or the remainder thereof (art. 44, para. 13).*
- Consult, where appropriate, with the requesting State party prior to refusing extradition to provide it with an opportunity to present its opinions (art. 44, para. 17).*
- New Zealand may wish to consider entering into agreements on the transfer of sentenced persons (art. 45).*
- Facilitate the taking of statements from suspects even when they do not consent (art. 46, para. 3 (a)).*
- New Zealand is encouraged not to refuse providing MLA in the absence of dual criminality and when the request relates to proceedings under the CPRA*

*but the offence, had it been committed in New Zealand, would not have constituted significant criminal activity; it should at least render assistance not involving coercive measures in these cases (art. 46, para. 9).*

- *Ensure consultations with the requesting State prior to refusing or postponing the execution of an MLA request (art. 46, para. 26).*
- *Consider the possibility of transferring criminal proceedings (art. 47).*
- *New Zealand is encouraged to further the adoption of the Customs and Excise Bill, ensuring that, for the use of controlled delivery at the international level, it allows methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part, for all Convention offences (art. 50, para. 4).*

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## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

The United Nations Convention against Corruption (UNCAC) was signed by New Zealand on 10 December 2003 and ratified on 1 December 2015.

### **B. Legal system of New Zealand**

#### **Overview of the New Zealand legal system**

New Zealand is a constitutional monarchy with a parliamentary system of government. Our Head of State is the Sovereign, Queen Elizabeth II. The Queen is represented in New Zealand by the Governor-General.

New Zealand does not have a single codified constitution or any form of supreme law that is higher than laws passed in Parliament. Instead, New Zealand's constitution consists of a number of Acts of Parliament, the Treaty of Waitangi, documents issued under the authority of the Queen, relevant English and United Kingdom Acts of Parliament, decisions of the court, and constitutional Conventions. The New Zealand Parliament adopts the law. The Parliament is composed by one single Chamber.

As there is no, technically, supreme norm a breach of treaty would not invalidate the legislation passed by the Parliament but it would lead to amendment. For instance if an act is contradictory to the New Zealand Bill of Rights, the courts could issue a declaration of inconsistency but that would not invalidate the law. Parliament must respond by invalidating the law or not. In any case, Courts always try to interpret the legislation consistent with all the texts that constitute New Zealand Constitution.

An International Treaty is effective only once it fully accepted and entered into force. The Treaty does not constitute itself a source of law.

A Treaty can be ratified only when the national law is consistent with it. Therefore, the national law must be amended, if needed, before the accession to the Treaty.

#### **Judicial organization**

The judges are appointed by the Governor-General upon recommendation of the Attorney-General.

They are four level of jurisdiction:

- District Courts / Specialists Courts
- High Court
- Court of Appeal
- Supreme Court

Higher Courts decisions are binding to lower Courts. The Rule of precedent applies in New Zealand.

### **Offences and types of trials for proceedings under the Criminal Procedure Act 2011<sup>1</sup>:**

Offences are categorized on the basis of maximum penalty. The exception is category 4 offences which are treated differently because of their significant seriousness, complexity or public symbolism.

Each category of offence has a default trial type, being either a Judge-alone trial or a jury trial. In some cases, a Judge-alone trial may be presided over by Justices of the Peace or Community Magistrates.

Defendants charged with offences incurring maximum penalties of 2 or more years' imprisonment have the right to elect trial by jury.

#### Category 1 offence

- An offence punishable with a maximum penalty of a fine only.
- An infringement which is commenced by filing a charging document under the Criminal Procedure Act 2011 rather than by issuing an infringement notice.
- Judge-alone trial in a District Court.

#### Category 2 offence

- An offence punishable by a term of imprisonment of less than two years, or an offence not punishable by a term of imprisonment but punishable by a community-based sentence (for example, an offence under section 11B of the Summary Offences Act 1981 which is punishable by a sentence of community work or a fine of \$500 or both).
- Judge-alone trial in a District Court.
- The High Court may make an order that the proceeding be transferred to that court, in which case the type of trial will be a Judge-alone trial in the High Court.

#### Category 3 offence

- An offence that is punishable by imprisonment for life or by imprisonment for 2 years or more, except those offences listed in Schedule 1 to the Act (category 4 offences).
- Judge-alone trial in a District Court
- The defendant may elect a jury trial, in which case the type of trial will be a jury trial in the District Court.
- The High Court may make a Protocol order that the proceeding be transferred to that court, in which case the type of trial will be either a Judge-alone trial or a jury trial in the High Court (depending on whether the defendant had elected a jury trial or not).
- In some instances, despite a defendant electing a jury trial, the court may order that the trial be conducted by a judge without a jury: see section 102 or 103 (long and complex cases or juror intimidation).

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<sup>1</sup> See <https://www.justice.govt.nz/about/lawyers-and-service-providers/criminal-procedure-act/offence-categories-and-types-of-trials/>

#### Category 4 offence

- An offence listed in Schedule 1 to the Act (for example, murder and manslaughter).
- Jury trial in the High Court.
- In some circumstances the court could order that the trial be conducted by a judge without a jury (long and complex or juror intimidation).

If a proceeding involves a defendant charged with more than one category of offence, the proceeding is conducted under the highest category of offence.

If a proceeding involves more than one defendant, the proceeding is generally to be conducted in accordance with the highest category of offence across both defendants.

Most offences established in accordance with the Convention are category 3 offences, however, schedule 1 of the Criminal Procedure Act 2011 foresees that judicial corruption (sect. 100 Crimes Act 1961), the bribery of a judicial officer etc. (sect. 101 Crimes Act 1961), and corruption and bribery of a Minister of the Crown (sect. 102 Crimes Act 1961) or of a member of Parliament (sect. 103 Crimes Act 1961) are category 4 offences. Obstruction of justice is criminalized through category 2 offences.

#### **New Zealand's efforts to combat corruption**

The authorities indicated that New Zealand had a strong reputation for being free and intolerant of bribery and corruption, and that the country was also widely recognized for its commitment to supporting international efforts to combat such behaviour and offences in all their forms.

New Zealand criminalizes bribery and corruption in both the public and private sectors, challenging traditional conceptions that corruption is purely a public sector issue.

All of New Zealand's bribery and corruption offences apply to individuals and legal persons. This means that an act of bribery or corruption committed by an employee, agent or other intermediary on behalf of an organization may result in a prosecution against the individual in their personal capacity, as well as a prosecution against the organization.

Further, all bribery and corruption offences apply both domestically and extraterritorially. This means that New Zealand citizens, residents, and entities incorporated in New Zealand may be prosecuted for acts of bribery and corruption that occur wholly outside of New Zealand, including when the bribe is paid through a foreign intermediary.

There is no legally binding definition of corruption in New Zealand. However, the definition used by the Asia Development Bank (ADB) and relied on by the Serious Fraud Office (SFO) - the agency responsible for complex or serious fraud investigations and prosecutions - defines corruption as:

*"Behaviour on the part of officials in the public or private sector in which they improperly and*

*unlawfully enrich themselves or those close to them, or induce others to do so, by misusing the position in which they are placed".*

This definition encompasses the private sector, challenging traditional conceptions of corruption which usually limits potential offending to the public sector.

The SFO does not distinguish between public and private sector corruption, and treats potential offending in either context as being sensitive matters of high priority. The Minister responsible for the SFO is the Minister of Police. However, under the Serious Fraud Office Act 1990, the Director of the SFO has complete independence when it comes to operational decisions.

Priority cases for the SFO include all public or private sector bribery and corruption, and any case that could significantly damage New Zealand's reputation for fair and free financial markets minus corruption.

A number of other agencies are also involved in combating corruption. The Ministry of Justice, for example, has general anti-corruption policy responsibility and administers some of the key anti-corruption legislation. The Ministry of Justice works with other agencies and organizations - both domestically and globally - to maintain New Zealand's reputation, support international anti-corruption efforts and strengthen our anti-bribery laws.

New Zealand Police also plays an essential role in enforcing New Zealand's anti-corruption laws, in particular through the Financial Intelligence Unit (FIU) and Asset Recovery Units (ARUs).

The FIU, based at Police National Headquarters Wellington, helps with the detection and investigation of money laundering, terrorist financing and other serious offences. It collects and analyses information about suspicious financial activity supplied by reporting entities and other information sources. The results are shared and used to help all government agencies that have a law enforcement role, financial sector supervisors and other domestic and international partner agencies.

ARUs are located in four regional centres; Auckland, Hamilton, Wellington, and Christchurch. They were established to implement the Criminal Proceeds (Recovery) Act 2009 (CPRA), which came into effect in December 2009.

CPRA cases are investigated using complex forensic accountancy and financial analysis processes, undertaken as part of a whole-of-government approach that includes other agencies such as Customs, the SFO, and the Inland Revenue. The ARUs also collaborate with overseas law enforcement agencies and provide advice on matters relating to proceeds of crime policy and legislation.

The Crown Law Office (CLO) handles requests from other countries for mutual legal assistance in criminal matters.

**Relevant laws, policies and/or other measures to implement the Convention.**

New Zealand legislation is publicly available at [www.legislation.govt.nz](http://www.legislation.govt.nz)

Some of the key pieces of legislation and policies in New Zealand's anti-corruption framework are as follows:

- Organised Crime & Anti-corruption Legislation Bill

The Organised Crime and Anti-corruption Legislation Bill made a number of amendments to New Zealand's anti-corruption frameworks.

Passed by Parliament in November 2015, the Bill amends 15 Acts and introduces a range of measures to tackle illicit activities such as money laundering, bribery and drug-related crime,

Its passage also cleared the way for New Zealand to formally ratify the United Nations Convention against Corruption.

- Offences & enforcement measures

New Zealand has several laws and measures to deter corruption, ensure offenders do not profit from criminal activity and hold offenders to account.

New Zealand's criminal offences relating to bribery are contained in the:

- Crimes Act 1961
- Secret Commissions Act 1910.

### **Crimes Act 1961**

The Crimes Act 1961 part 6 contains criminal offences related to, amongst other things, the corrupt use of official information and the corruption and bribery of:

- The Judiciary
- Ministers of the Crown
- Members of Parliament
- Law enforcement officers
- Public officials.

Penalties include terms of imprisonment of up to 14 years for the most serious cases.

## **Secret Commissions Act 1910**

The Secret Commissions Act 1910 contains bribery and corruption-style offences relevant to the private sector.

## **Criminal Proceeds (Recovery) Act 2009**

If the Police suspect that an individual has benefitted from a bribe or corrupt activity, the Criminal Proceeds (Recovery) Act 2009 allows the Crown to recover the money or property derived from this crime.

The Act allows the Police to apply to the court to freeze or recover money or property derived from crime. This may include the immediate profits of crime (such as the money obtained from accepting a bribe) or the indirect benefits (such as a car purchased using money obtained through fraud). The purpose of the regime is to take the profit out of crime, remove the tools of crime, and potentially compensate victims using recovered criminal proceeds.

Under the Act, the proceeds of crime may be recovered by the Crown regardless of whether the individual has been convicted for criminal offending. Assets can be forfeited if the court is satisfied on the balance of probabilities that the assets were acquired as a result of criminal activity.

## **Office of the Controller and Auditor-General**

The Office of Controller and Auditor-General is central to ensuring the accountability of the public sector. Part of its role is to look closely at the way the public sector uses its money and to report any corrupt use to Parliament.

**Office of Controller and Auditor-General** (external link) <<http://www.oag.govt.nz/>>

The office has 2 units:

- Office of the Auditor-General
- Audit New Zealand.

**The Auditor-General** independently reports on whether public organisations are behaving financially appropriately and are giving full and accurate accounts of their activities.

The Public Audit Act also gives the Auditor-General significant powers to access information.

These powers ensure there is a high degree of transparency surrounding the use of public money. These transparent arrangements are one of the reasons New Zealand is consistently seen as having low levels

of corruption.

**Audit New Zealand** carries out auditing of all types of public sector organisations. An independent body, it enables domestic and international confidence in the thorough and unbiased investigations of New Zealand's public sector finances.

Audit New Zealand website (external link) <<http://www.auditnz.govt.nz/>>

### **Office of the Ombudsman**

The role of the Office of the Ombudsman includes investigating complaints raised against New Zealand central, regional and local government.

The Ombudsman can look into complaints about corrupt behaviour. It can also initiate investigations on its own accord (for example, when no complaint has been laid).

The Ombudsman's powers of investigation apply even in situations where a matter has already been investigated by another agency and a final decision made that can't be appealed.

Office of the Ombudsman website (external link) <<http://www.ombudsman.parliament.nz/>>

### **Official Information Act 1982**

The Official Information Act requires ministers of the Crown, central and local government departments, and organisations that are subject to the legislation, to release when asked official information that is not exempt from the provisions of the Act.

Under the legislation, the Ombudsman can investigate and review any decision about a request for official information.

If the request is unreasonably refused, the Ombudsman can order the information be released.

This helps ensure that information relating to corrupt behaviour can be revealed.

### **State Services Commission code of conduct**

The State Services Commission code of conduct sets out the behaviour expected of state sector workers. The code requires workers to be fair, impartial, responsible and trustworthy. The 'trustworthy' section of the code obliges workers to:

- be honest
- Never misuse their position for personal gain

- Decline gifts or benefits that place them under any obligation or perceived influence
- avoid any activities, work or non-work that may harm the reputation of their organisation or of state services.

State Services Commission code of conduct (external link) <<http://www.ssc.govt.nz/code>>

The code provides the basis for ongoing trust in the State Services. It also protects staff by setting out clear expectations, so that everyone knows their obligations and what is required of them.

For more information, see the State Services code of conduct and the State Services resources for organisations implementing the code of conduct (external link) <<http://www.ssc.govt.nz/code-resources-organisations>>

- International cooperation

New Zealand works closely with other countries in the global fight against corruption. Members of the international community provide each other with as much assistance as possible in investigating and prosecuting bribery.

Several New Zealand laws enable international cooperation.

**Mutual Assistance in Criminal Matters Act 1992**

The Mutual Assistance in Criminal Matters Act 1992 allows New Zealand to request other countries' help in locating people, obtaining evidence, and enforcing orders. It also allows other countries to request New Zealand's help.

New Zealand can consider requests from all countries. A request for assistance may be refused if, amongst other things, it relates to:

- Behaviour that is not an offence in New Zealand
- An offence that carries the death penalty
- Requests that may prejudice someone's safety.

**Extradition Act 1999**

The Extradition Act 1999 governs the removal from and return of people to New Zealand who have been accused of an offence.

The offence must relate to an 'extraditable offence' that:

- carries a maximum penalty of not less than one year's imprisonment in the requesting country, and
- involves behaviour that would have been criminal had it occurred in New Zealand and would have carried a similar penalty.

All New Zealand's bribery offences are extraditable offences.

When an extradition request is made, a court hearing is held to determine if there is a strong case and to make sure the treaty and the law have been complied with.

Extradition can be refused on a number of grounds, including:

- offences of a political character
- offences that carry the death penalty
- Double jeopardy.

### **New Zealand has undertaken assessment of the effectiveness of its anti-corruption measures**

Of particular relevance, in 2009 the Ministry of Justice conducted a National Interest Analysis regarding the Convention (available on Parliament's website at [https://www.parliament.nz/resource/en-nz/50DBSCH\\_SCR5462\\_1/e73e0f6412f2e249705a3fa50593fa18d79e2d80](https://www.parliament.nz/resource/en-nz/50DBSCH_SCR5462_1/e73e0f6412f2e249705a3fa50593fa18d79e2d80)).

Other recent documents of particular relevance include assessments of the OECD Working Group on Bribery in International Business Transactions (available at <http://www.oecd.org/daf/anti-bribery/newzealand-oecdanti-briberyconvention.htm>), and policy work done in the development of the Organised Crime and Anti-corruption Legislation Bill (for examples, see [http://www.justice.govt.nz/about/publication-finder/?Filter\\_Topic=39&Keywords=organised+crime](http://www.justice.govt.nz/about/publication-finder/?Filter_Topic=39&Keywords=organised+crime)).

In relation to mutual legal assistance and extradition, The Law Commission recently completed a Report, Modernising New Zealand's Extradition and Mutual Assistance Laws (R137) (the Report) (available at <http://www.lawcom.govt.nz/our-projects/extradition-and-mutual-assistance-criminal-matters>). The Government responded to the Report on 29 July 2016. The Government accepted the Commission's main recommendations to consider the enactment of the Extradition Bill and Mutual Assistance in Criminal Matters and for the Recovery of Criminal Proceeds Bill, which were attached to the Report. Given the complexity of the matters addressed by the proposed legislation, and the potential costs involved, the Government has directed the Ministry of Justice to undertake further analysis of the Commission's more detailed recommendations.

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## C. Implementation of selected articles

### III. Criminalization and law enforcement

#### Article 15. Bribery of national public officials

##### Subparagraph (a) of article 15

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

##### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand provided the following provisions from the Interpretation Act and the Crimes Act which define “official” and include specific bribery offences for persons holding legislative and judicial offices:

#### **Interpretation Act**

**30 - Person** includes a corporation sole, and also a body of persons, whether corporate or unincorporated.

#### **Crimes Act 1961**

##### **2 Interpretation**

**person, owner**, and other words and expressions of the like kind, include the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district of any local authority, in relation to such acts and things as it or they are capable of doing or owning.

##### **99 Interpretation**

In this Part, unless the context otherwise requires,—

**Bribe** means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect

**Judicial officer** means a Judge of any court, or a District Court Judge, Coroner, Justice of the Peace, or Community Magistrate, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath

**Law enforcement officer** means any constable, or any person employed in the detection or prosecution or punishment of offenders

**official** means any person in the service of the Sovereign in right of New Zealand (whether that

service is honorary or not, and whether it is within or outside New Zealand), or any member or employee of any local authority or public body, or any person employed in the education service within the meaning of the State Sector Act 1988.

### **100 Judicial corruption**

(1) Every judicial officer is liable to imprisonment for a term not exceeding 14 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her judicial capacity.

(2) Every judicial officer, and every Registrar or Deputy Registrar of any court, is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity, not being an act or omission to which subsection (1) applies.

### **101 Bribery of judicial officer, etc.**

(1) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any judicial officer in respect of any act or omission by him or her in his or her judicial capacity.

(2) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any judicial officer or any Registrar or Deputy Registrar of any court in respect of any act or omission by him or her in his or her official capacity, not being an act or omission to which subsection (1) applies.

### **102 Corruption and bribery of Minister of the Crown**

[...]

(2) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any Minister of the Crown or member of the Executive Council in respect of any act or omission by him or her in his or her capacity as a Minister or member of the Executive Council.

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

### **103 Corruption and bribery of Member of Parliament**

...

(2) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any Member of Parliament in respect of any act or omission by him or her in his or her capacity as a Member of Parliament.

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it

is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

#### **104 Corruption and bribery of law enforcement officer**

...

(2) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any law enforcement officer in respect of any act or omission by him or her in his or her official capacity.

#### **105(2) Corruption and bribery of official**

Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him or her in his or her official capacity.

- Sections 100 - 105 of the Crimes Act criminalise bribery and corruption of New Zealand judges, government ministers, members of Parliament, police officers and other public officials. It is also an offence to corruptly use official information or to trade in influence (for example, accept a bribe in return for using one's influence over an official).
- Generally speaking, bribery under the Crimes Act occurs when a person corruptly gives, receives, accepts or obtains a bribe (whether directly or indirectly) for themselves or any other person, with intent to influence that person to act or refrain from acting in their official capacity. A bribe may involve money, gifts, or any other benefit, for example:
  - Money - cash, vouchers, allowances
  - Payments of expenses - school fees, medical bills
  - Favours - offers of housing, employment
  - Preferential treatment - discounts, rebates, refunds
  - Corporate hospitality - gifts, entertainment, travel

#### **New Zealand provided the following examples and case law:**

- *N.N.*

*N.N.* was charged with bribery after allegedly seeking to influence an Auckland Council resource consents officer, by offering a \$1,000 cash payment. *N.N.* was seeking consent to subdivide a property and the application was not progressing favourably. At a meeting with the consents officer he handed her an envelope containing \$1,000 cash. The council employee acted promptly to report the alleged bribe in accordance with the council's protocol. The SFO was notified and, after conducting an investigation, *N.N.* was charged. In 2015 *N.N.* went to trial and defended the charge on the basis of a cultural misunderstanding and that he was rewarding the

consents officer rather than attempting to influence her. N.N. was acquitted on a charge of offering a bribe under Section 105(2).

- Case *Field v. R* [2011] NZSC 129

Taito Phillip Field was found guilty on 11 counts of corruptly accepting benefits in connection with acts carried out by him in his role as a Member of Parliament (laid under s 103(1) of the *Crimes Act 1961*). He was also found guilty on 15 counts of attempting to pervert the course of justice (laid under s 117 of the *Crimes Act*). He was subsequently sentenced to a total of six years imprisonment. [1] He unsuccessfully challenged in the Court of Appeal both the convictions and the sentences imposed. [2] His appeal to this Court is confined to the convictions on the charges of corruptly accepting benefits.

While the promise of an undue advantage is not explicitly included, the provisions are formulated broadly and the judiciary has interpreted them to also cover promises. Jurisprudence has established a *de minimis* defence in relation to “gifts of token value which are just part of the usual courtesies of life”.

The requested leave of a Judge of High Court is always granted to avoid the politicization of the bribery offences. Investigations are possible before the leave is requested. Corruptly has been defined as “having knowingly accepted a benefit in connection with the position.”

**New Zealand provided the following statistical information:**

From 2005 - 2015, New Zealand prosecuted, on average, 4 people per year for offences against sections 100 - 105A of the *Crimes Act 1961*. An average of 1.5 people were convicted of these offences. 17 of the total 44 people charged from 2005 to 2015 were sentenced to either imprisonment or home detention, while 4 were sentenced to community work. 25 people were acquitted (an average of 2.3 per year).

The SFO’s Annual Report for 2015/16 also provides further statistics on performance measures and standards established to monitor the efficiency and effectiveness of managing the three key activities of complaints, investigations and prosecutions.

These are available at: [https://www.sfo.govt.nz/f55,40523/SFO\\_Annual\\_Report\\_FINAL\\_web.pdf](https://www.sfo.govt.nz/f55,40523/SFO_Annual_Report_FINAL_web.pdf), on pages 23 - 26.

Key information from this annual report is set out below:

**Complaints**

Complaints are first evaluated by the Evaluation and Intelligence team to determine whether or not they fit the criteria set for investigations by the SFO. If the matter falls within the mandate of the SFO, the complaint moves to the Part 1 enquiry phase. If not, the complaint is either referred to the appropriate agency, or closed and the complainant is notified.

<b>Actual 2014/15</b>	<b>Performance Measure</b>	<b>Budget Standard 2015/16</b>	<b>Actual 2015/16</b>
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16	<b>Quantity</b>		
	Number of evaluations initiated by the SFO commenced	15	15

77%	<b>Timeliness</b>		
	Percentage of complaints evaluated within 20 working days*	80%	91%

\* Does not include open complaints at the end of the financial year which may still have met the 20 working days measure.

Actual performance: Complaints

Performance this year exceeded the budgeted timeliness standard.

### Enquiries

In 2015/16, the SFO introduced a Part 1 enquiries target (previously referred to as Part 1 investigations) as a result of changes in investigation processes, implemented to realise greater efficiencies. Part 1 enquiries align with Part 1 of the SFO Act, which provides the agency with limited powers to carry out an investigation into the affairs of any person where the Director suspects that the investigation may disclose serious or complex fraud.

The new Part 1 enquiries target enables the SFO to better determine whether allegations of fraud should progress to a full investigation. Distinct Part 1 enquiries and Part 2 investigations targets also provide greater transparency and separation between the two, reflecting our updated operational practices. A new timeliness measure was introduced for Part 1 enquiries (completion within three months). The 2014/15 results are provided for comparison purposes.

Actual 2014/15	Performance Measure	Budget Standard 2015/16	Actual 2015/16
31	<b>Part 1 Investigations Quantity</b>	30-40	31
	Number of Part 1 enquiries commenced		
23%	<b>Timeliness</b>	80%	90%
	Percentage of Part 1 enquiries Completed within three months		

Actual performance: Part 1 enquiries

A more efficient process, including greater clarity as to the work to be conducted during Part 1 enquiries, together with more involvement from the evaluating lawyers (achieved through greater efficiencies gained by outsourcing telephone complaints) to support the Principals have resulted in the timeliness target being exceeded.

### Investigations

Part 2 of the SFO Act provides the SFO with more extensive and coercive powers to investigate matters where there are reasonable grounds to believe that an offence involving serious or complex fraud may have been committed. Once a complaint and Part 1 enquiry meet the criteria, the formal investigation is undertaken by one of the two investigation teams.

2014/15	Performance Measure	Budget Standard 2015/16	Actual 2015/16
15	<b>Quantity</b>		
	Number of formally commenced investigations	20-25	16
30%	<b>Timeliness</b> Percentage of cases	30% of cases within six months	21%
50%	investigated within targeted time	80% of cases within 12 months	42%
N/A	<b>Timeliness and Quality</b>		95%
100%	Percentage of cases for which an Investigation plan is reviewed monthly (new measure 2015/16)		
83%	Percentage of formal post-investigation		
	Reviews that meet the SFO quality criteria (Note 1)	90%	100%

*Actual performance: Investigations*

In 2015/16, New Zealand commenced more Part 2 investigations than for the previous year. Although still below the new performance target, this is considered a stretch target. It is likely we will review the investigations commenced target for the 2017/18 year with a potential target of around 16 to 18 new investigations being more realistic, given the available resources and current work practices.

Part 1 inquiries take less time and resources than a full investigation. In previous years Part 1 and Part 2 were measured together. In 2015/16, the two parts were separated into distinct timeliness measures but the target for Part 2 was not adjusted to account for the effect of this imbalance. It has become evident that the unadjusted target is unrealistic, hence a revised timeliness measure of completing 60% within 12 months has been introduced for 2016/17.

**Prosecutions**

A decision on whether or not to commence a prosecution is made by applying the Prosecution Guidelines issued by the Solicitor-General. The decision is also supported by the advice of Prosecution Panel Counsel and the SFO team assigned to the particular investigation. The Panel member provides the Director with their opinion on the proposed prosecution and reviews the proposed charges.

Actual 2014/15	Performance Measure	Budget Standard 2015/16	Actual 2015/16
6	<b>Quantity</b> Number of cases brought to prosecution	10-12	10
100%	<b>Quality</b> Percentage of formal		
	Post-prosecution reviews that meet the SFO quality criteria	90%	91%

**(b) Observations on the implementation of the article**

The reviewing experts noted that active bribery of national public officials was criminalized in New Zealand under sections 100 to 105 of the Crimes Act 1961.

The definition of “officials” as provided by section 99 of the Crimes Act does not include all categories of officials as provided under article 2 of the Convention. However, New Zealand has established specific bribery offences for persons holding legislative and judicial offices (sections 100 and 102 of the CA). Therefore, all categories of officials are covered by bribery offences.

The reviewing experts highlighted that the promise of undue advantage and the indirect commission were not explicitly covered in the active bribery offences. Moreover, *de minimis* gifts were excluded and the term “corruptly” included in the definition introduced an additional element of the offence which also needed to be proved by the prosecution.

During the country visit, New Zealand indicated that, as shown in *Field v.R [2011] NZSC 129*, the bribery provisions were formulated broadly and covered promises of undue advantages, even if they were not spelt out in the offence. In the same case, the judiciary also interpreted the *de minimis* gift as “gifts of token value which are just part of the usual courtesy of life”.

The indirect commission of active bribery was not explicitly included in the offence.

Therefore, it is recommended that New Zealand monitor the application of the legislation to ensure that the indirect commission of bribery offences is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform is required.

### **Subparagraph (b) of article 15**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

...

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions of the Crimes Act:

#### **Crimes Act 1961**

### **100 Judicial corruption**

(1) Every judicial officer is liable to imprisonment for a term not exceeding 14 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her judicial capacity.

(2) Every judicial officer, and every Registrar or Deputy Registrar of any court, is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity, not being an act or omission to which subsection (1) applies.

### **102 Corruption and bribery of Minister of the Crown**

(1) Every Minister of the Crown or member of the Executive Council is liable to imprisonment for a term not exceeding 14 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a Minister or member of the Executive Council.

[...]

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

### **103 Corruption and bribery of Member of Parliament**

(1) Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a member of Parliament.

[...]

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

### **104 Corruption and bribery of law enforcement officer**

(1) Every law enforcement officer is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.

[...]

### **105(1) Corruption and bribery of Official**

Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or

attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.

New Zealand provided the following examples and case law:

N.N.:

N.N. was a Border Control Officer employed by the New Zealand Customs Service. Between February and April 2013 he corruptly accepted \$26,500 from two individuals in exchange for providing immigration advice. An internal investigation at Immigration New Zealand was referred to the SFO in August 2013. N.N. was subsequently charged with four counts of corruption and bribery under Section 105(1) of the Crimes Act. After pleading guilty N.N. was sentenced to eight months on home detention.

*Case Field v. R [2011] NZSC 129:*

Taito Phillip Field was found guilty on 11 counts of corruptly accepting benefits in connection with acts carried out by him in his role as a Member of Parliament (laid under s 103(1) of the *Crimes Act 1961*). He was also found guilty on 15 counts of attempting to pervert the course of justice (laid under s 117 of the Crimes Act). He was subsequently sentenced to a total of six years imprisonment. [1] He unsuccessfully challenged in the Court of Appeal both the convictions and the sentences imposed. [2] His appeal to this Court is confined to the convictions on the charges of corruptly accepting benefits.

As outlined above under subparagraph 15 (a) of the Convention, while the promise of an undue advantage is not explicitly included, the provisions are formulated broadly and the judiciary has interpreted them to also cover promises. Jurisprudence has established a de minimis defence in relation to “gifts of token value which are just part of the usual courtesies of life”. The requested leave of a Judge of High Court is always granted to avoid the politicization of the bribery offences. Investigations are possible before the leave is requested. Corruptly has been defined as “having knowingly accepted a benefit in connection with the position.”

New Zealand provided the following statistics:

From 2011 - 2015, New Zealand prosecuted 9 people for offences of corruption/bribery of enforcement officers/officials (sections 104(1), 104(2), 105(1), and 105(2) of the Crimes Act 1961). One-third of these people were convicted and sentenced to imprisonment. Two people were sentenced to home detention and four were not convicted.

## **(b) Observations on the implementation of the article**

The reviewing experts formulated the same observations, *mutatis mutandis*, as with regard to article 15 a) of the Convention.

Therefore, it is recommended that New Zealand monitor the application of the legislation to ensure that the indirect commission of bribery offences is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform is required.

## **Article 16. Bribery of foreign public officials and officials of public international organizations**

### **Paragraph 1 of article 16**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions from the Crimes Act establishing the offence of active bribery of foreign public officials and officials of public international organizations:

#### **Crimes Act 1961**

##### **105C Bribery of foreign public official**

(1) In this section and in sections 105D and 105E,-

**Benefit** means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect business includes the provision of international aid employee, in relation to a body corporate or corporation sole, means an individual who is an employee, agent, director, or officer of that body corporate or corporation sole

**Foreign country** includes-

- a. territory for whose international relations the Government of a foreign country is responsible; and
- b. an organised foreign area or entity including an autonomous territory or a separate Customs territory foreign government includes all levels and subdivisions of government, such as local, regional, and national government foreign public agency means any person or body, wherever situated, that carries out a public function under the laws of a foreign country.

**Foreign public enterprise** means-

A company, wherever incorporated, that-

- i. A foreign government is able to control or dominate (whether by reason of its ownership of shares in the company, its voting powers in the company, or its ability to appoint 1 or more directors (however described), or by reason that the directors

(however described) are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise); and

ii. Enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (b)(i) apply; or

A person or body (other than a company), wherever situated, that-

i. a foreign government is able to control or dominate (whether by reason of its ability to appoint the person or 1 or more members of the body, or by reason that the person or members of the body are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise); and

ii. (enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (a)(i) apply foreign public official includes any of the following:

(a). member or officer of the executive, judiciary, or legislature of a foreign country:

(b). a person who is employed by a foreign government, foreign public agency, foreign public enterprise, or public international organisation:

(c). a person, while acting in the service of or purporting to act in the service of a foreign government, foreign public agency, foreign public enterprise, or public international organization

**Public international organisation** means any of the following organisations, wherever situated:

(a). an organisation of which 2 or more countries or 2 or more governments are members, or represented on the organisation:

(b). an organisation constituted by an organisation to which paragraph (a) applies or by persons representing 2 or more such organisations:

(c). an organisation constituted by persons representing 2 or more countries or 2 or more governments:

(d). an organisation that is part of an organisation referred to in any of paragraphs (a) to (c) routine government action, in relation to the performance of any action by a foreign public official, does not include-

i. any decision about-

i. whether to award new business; or

ii. whether to continue existing business with any particular person or body; or

iii. the terms of new business or existing business; or

iv. any action that is outside the scope of the ordinary duties of that

official; or

v.

ii. any action that provides-

- i. an undue material benefit to a person who makes a payment; or
- ii. an undue material disadvantage to any other person.

(2) Every person commits an offence who corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope of the official's authority) in order to-

(a) obtain or retain business; or

(b) obtain any improper advantage in the conduct of business.

(2A) A body corporate or corporation sole commits an offence against subsection (2) if—

- (a) an employee of the body corporate or corporation sole does an act that would constitute an offence under subsection (2); and
- (b) the employee does the act, in whole or in part, with the intent to benefit the body corporate or corporation sole; and
- (c) the employee, in doing the act, is acting within the scope of their authority as an employee of the body corporate or corporation sole.

(2B) A body corporate or corporation sole does not commit an offence under subsection (2) if it has taken reasonable steps to prevent the offence.

(2C) If a body corporate or corporation sole is charged with an offence under subsection (2), it is to be presumed, unless the body corporate or corporation sole puts the matter at issue, that it did not take reasonable steps.

(2D) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 7 years, or a fine, or both.

(2E) A fine imposed under subsection (2D) cannot exceed the greater of—

- (a) \$5 million; or
- (b) if a court is satisfied that an offence occurred in the course of producing a commercial gain, and if the value of that commercial gain can be readily ascertained, 3 times the value of that commercial gain.

(3) This section does not apply if—

- (a) the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and
- (b) the value of the benefit is small.

(4) Subsections (2A), (2B), and (2C)—

- (a) apply only in respect of offences under subsection (2) and section 105D; and

- (b) do not preclude the liability of a body corporate or corporation sole under any other provision of this Act.

### **105D Bribery outside New Zealand of foreign public official**

(1) Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against section 105C.

(2) Subsection (1) applies to a person who is-

- a. a New Zealand citizen; or
- b. ordinarily resident in New Zealand; or
- c. a body corporate incorporated in New Zealand; or
- d. a corporation sole incorporated in New Zealand.

Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against section 105C

New Zealand provided the following explanations, examples and case law:

Section 105C was designed to give effect to the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Amendments made by the Organised Crime and Anti-corruption Legislation Bill (Organised Crime Bill) in 2015 were designed to bring the sections into line with Article 16 of the UN Convention against Corruption 2005.

Under section 105C it is an offence for a person to give, offer, or agree to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by them in their official capacity in order to: obtain or retain business; or obtain any improper advantage in business. Section 105D ensures that the offence of foreign bribery has extra-territorial effect.

New Zealand's foreign bribery offence contains a narrow exception for small payments made to a foreign public official for the sole or primary purpose of ensuring or expediting the performance of a "routine government action".

For this exception to apply, the value of benefit must be small, and the action must be within the scope of the official's ordinary duties, and not involve a decision about awarding new business or continuing existing business.

The Organised Crime Bill further clarified the facilitation payments exception to ensure it does not cover instances where the payment provides either an undue material benefit to the person making the payment, or an undue material disadvantage to any other purpose.

“Bribe” is defined in the Crimes Act as “any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect.” “Corruptly” describes both the conduct and mental state of the defendant; the offender is required to have that degree of deliberate criminal intent necessary not only to perform the act itself, but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party. The term “business” is not specifically defined in section 105C, but bears its normal meaning encompassing all forms of trade and commerce as well as the provision of international aid.

In 2015, the SFO received an anonymous complaint regarding a New Zealand company that supplies goods to Governments in foreign countries. The anonymous complaint alleged that the company in question was paying bribes to foreign government officials for the purpose of securing contracts.

New Zealand provided the following statistics:

The Serious Fraud Office (SFO) thoroughly investigates foreign bribery allegations. As at the end of 2015, the SFO had opened six investigations into bribery of foreign public officials. Two of these were closed with no further action and the other four are being actively investigated. Of these four investigations, two commenced in the previous year.

#### **(b) Observations on the implementation of the article**

During the country visit, New Zealand specified that while SFO was actively investigating foreign bribery allegations, no case had been adjudicated yet as of the date of the country visit. The reason was mainly the lack of information (very little reporting of corruption offences, and in particular foreign bribery ones) and the lack of evidence.

The reviewing experts noted that the active foreign bribery offence as established by section 105 of the Crimes Act does not apply if the act alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance of a routine government action and the value of the benefit was small. As such, New Zealand’s legislation contains an exception for so-called “facilitation payments”.

Regarding the other elements of the offence, the reviewing experts noted that the elements of the foreign bribery offence were the same as the elements of the national bribery offences. Therefore, the reviewing experts reiterated the same observations as under article 15 of the Convention, and recommended that New Zealand monitor the application of the legislation to ensure that the indirect commission of bribery offences is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform is required.

It is also recommended that New Zealand amend its legislation to abolish the exception established for so-called facilitation payments.

#### **Paragraph 2 of article 16**

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Crimes Act 1961**

**105E Corruption of foreign public officials**

(1) Every person specified in subsection (2) who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person in respect of any act or omission by an official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority) is liable to imprisonment for a term not exceeding 7 years.

(2) Subsection (1) applies to-

- a. any foreign public official who has committed the offence while in New Zealand:
- b. any person employed as a foreign public official who has committed the offence while outside New Zealand if the person is-
  - i. a New Zealand citizen; or
  - ii. ordinarily resident in New Zealand; or
  - iii. a body corporate incorporated in New Zealand; or
  - iv. a corporation sole incorporated in New Zealand.

Nothing in this section limits any immunity that a foreign public official or person has under this Act or any other enactment.

New Zealand provided the following examples and case law:

Section 105E, enacted in 2015, complements the offences created by sections 105C and 105D. It is primarily concerned with the conduct of persons who arrange or facilitate bribery of foreign public officials, but also applies to offending by the officials.

New Zealand provided the following statistics:

From 2013 - 2015, New Zealand prosecuted three people for the corrupt use of official information under section 105E of the Crimes Act 1961. Two were convicted (the first was sentenced to home detention; the second to community work) and the third was not convicted.

### **(b) Observations on the implementation of the article**

The reviewing experts noted that the elements of the foreign bribery offence were the same as the elements of the national bribery offences. Therefore, the reviewing experts reiterated the same observations as under article 15 of the Convention, and recommended that New Zealand monitor the application of the legislation to ensure that the indirect commission of bribery offences is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform is required.

### **Article 17. Embezzlement, misappropriation or other diversion of property by a public official**

#### **Article 17**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

#### **219 Theft or stealing**

(1) Theft or stealing is the act of,-

- a. dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property; or
- b. dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.

- (2) An intent to deprive any owner permanently of property includes an intent to deal with property in such a manner that-
- a. the property cannot be returned to any owner in the same condition; or
  - b. any owner is likely to be permanently deprived of the property or of any interest in the property.
- (3) In this section, taking does not include obtaining ownership or possession of, or control over, any property with the consent of the person from whom it is obtained, whether or not consent is obtained by deception.
- (4) For tangible property, theft is committed by a taking when the offender moves the property or causes it to be moved.

### **220 Theft by person in special relationship**

- (1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the Person-
- a. to account to any other person for the property, or for any proceeds arising from the property; or
  - b. to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person.
- (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
- (3) This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.
- (4) For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.

### **240 Obtaining by deception or causing loss by deception**

- (1) Everyone is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,-
- a. obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or

indirectly; or

b. in incurring any debt or liability, obtains credit; or

c. induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or

d. causes loss to any other person.

(1A) Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document or thing capable of being used to derive a pecuniary advantage knowing that, by deception and without claim of right, the document or thing was, or was caused to be, delivered, executed, made, accepted, endorsed, or altered.

(2) In this section, deception means-

a. a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and-

i. knows that it is false in a material particular; or

ii. is reckless as to whether it is false in a material particular; or

b. an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or

c. a fraudulent device, trick, or stratagem used with intent to deceive any person.

## **Sentencing Act 2002**

### **9 Aggravating and mitigating factors**

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:

(b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:

(c) that the offence was committed while the offender was on bail or still subject to a sentence:

(d) the extent of any loss, damage, or harm resulting from the offence:

- (e) particular cruelty in the commission of the offence:
- (f) that the offender was abusing a position of trust or authority in relation to the victim:
- (fa) that the victim was a constable, or a prison officer, acting in the course of his or her duty:
- (fb) that the victim was an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency:
  - (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
  - (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
    - (i) the hostility is because of the common characteristic; and
    - (ii) the offender believed that the victim has that characteristic:
- (ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):
- (hb) the nature and extent of any connection between the offending and the offender's—
  - (i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or
  - (ii) involvement in any other form of organised criminal association:
- (i) premeditation on the part of the offender and, if so, the level of premeditation involved:
- (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time:
- (k) any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:
  - (i) caused a delay in the disposition of the proceedings:
  - (ii) had an adverse effect on a victim or witness.
- (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:
  - (a) the age of the offender:
  - (b) whether and when the offender pleaded guilty:
  - (c) the conduct of the victim:
  - (d) that there was a limited involvement in the offence on the offender's part:
  - (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
  - (f) any remorse shown by the offender, or anything as described in section 10:
    - (fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:
    - (fb) any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement:

- (g) any evidence of the offender’s previous good character:
  - (h) that the offender spent time on bail with an EM condition as defined in section 3 of the Bail Act 2000.
- (3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).
- (3A) In taking into account that the offender spent time on bail with an EM condition under subsection (2)(h), the court must consider—
- (a) the period of time that the offender spent on bail with an EM condition; and
  - (b) the relative restrictiveness of the EM condition, particularly the frequency and duration of the offender’s authorised absences from the electronic monitoring address; and
  - (c) the offender’s compliance with the bail conditions during the period of bail with an EM condition; and (d) any other relevant matter.
- (4) Nothing in subsection (1) or subsection (2)—
- (a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
  - (b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.
- (4A) In subsection (1)(fb), **emergency health or fire services provider** means a person who has a legal duty (under any enactment, employment contract, other binding agreement or arrangement, or other source) to, at the scene of an emergency, provide services that are either or both—
- (a) ambulance services, first aid, or medical or paramedical care:
  - (b) services provided by or on behalf of a fire brigade (as defined in section 2(1) of the Fire Service Act 1975) to save life or property.
- (5) In this section, **procedural requirement** means a requirement imposed by or under—
- (a) the Criminal Procedure Act 2011; or
  - (b) any rules of court or regulations made under that Act; or
  - (c) the Criminal Disclosure Act 2008 or any regulations made under that Act.

New Zealand provided the following explanations, examples and case law:

The New Zealand legislation relating to dishonesty creates a number of different offences, many of which have similar elements. When determining which charge to lay a prosecuting agency makes an assessment of the factual circumstances of the case and selects the offence that best matches those circumstances.

Often the circumstances lend themselves equally to more than one potential offence type, all with similar penalties. In these situations where there is no obvious choice the prosecutor needs to make a selection. For example, the SFO sometimes has the choice of section 240 of the Crimes Act, Obtaining by Deception, or Section 220 of the Crimes Act, Theft by a Person in a Special Relationship.

The SFO has investigated and prosecuted a number of public officials for misappropriating funds under their control, but has done so through the fraud provisions of the Crimes Act rather than the theft provisions.

### **(b) Observations on the implementation of the article**

In the absence of a specific embezzlement offence, several sections of the Crimes Act (1961) such as sections 219, 220 and 240 apply. These offences can be committed both by public officials and other persons under the current legislative framework.

While the conduct can be covered through sections 220 and 229 Crimes Act, it is recommended that New Zealand assess whether the establishment of a separate offence of embezzlement, misappropriation or other diversion of property by a public official would be beneficial.

### **Article 18. Trading in influence**

#### **Subparagraph (a) of article 18**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **105 Corruption and bribery of official**

- (1) Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.
- (2) Everyone is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him or her in his or her official capacity.

New Zealand provided the following information, examples and case law:

In 2013, the SFO received a complaint from a local government authority alleging that a manager responsible for roading projects had received illicit payments and gratuities from a company that was supplying engineering services to that local government authority. The engineering company won contracts valued in excess of ten million dollars over an 8 year period. The SFO allege that the manager who awarded these contracts was influenced by the illicit payments and gratuities he received.

### **(b) Observations on the implementation of the article**

The reviewing experts noted that New Zealand does not have a separate provision criminalizing active trading in influence but referred to a general corruption offence.

During the country visit, the authorities indicated that active trading in influence could be covered through the application of section 105 (2) Crimes Act.

The reviewing experts recommended that New Zealand monitor the application of the legislation to ensure that active trading in influence is criminalized, including the indirect commission of the offence, and that the additional element of “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform should be considered.

### **Subparagraph (b) of article 18**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*[...]*

*(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

#### **Section 105F Trading in influence**

Every person is liable to imprisonment for a term not exceeding 7 years who corruptly accepts

or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person with intent to influence an official in respect of any act or omission by that official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority).

Bribe means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect

## **(b) Observations on the implementation of the article**

The reviewing experts noted that New Zealand criminalized the passive trading of influence. However, the provision of section 105 F of the Crimes Act contains the same elements as the general corruption offence. Therefore, the indirect commission is not explicitly covered and the term "corruptly" represents an additional element to the offence, as outlined under article 15 of the Convention.

It is therefore recommended that New Zealand monitor the application of the legislation to ensure that the indirect commission of the offence is criminalized and that the additional element of "corruptly" does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform should be considered.

## **Article 19. Abuse of functions**

### **Article 19**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

#### **105(1) Corruption and bribery of official**

Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.

### **105A Corrupt use of official information**

Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly uses or discloses any information, acquired by him or her in his or her official capacity, to obtain, directly or indirectly, an advantage or a pecuniary gain for himself or herself or any other person.

New Zealand provided the following statistics:

From 2011 - 2015, New Zealand prosecuted 9 people for offences of corruption/bribery of enforcement officers/officials (sections 104(1), 104(2), 105(1), and 105(2) of the Crimes Act 1961). One-third of these people were convicted and sentenced to imprisonment. Two people were sentenced to home detention and four were not convicted.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that there was no general abuse of functions offence. Section 105(1) of the Crimes Act 1961 can cover the conduct.

### **Article 20. Illicit enrichment**

#### **Article 20**

*Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that it had not implemented the provision under review and referred to the following efforts made to date in order to implement the provision under review:

New Zealand does not have an explicit offence for illicit enrichment, though the misconduct may be captured by other offences under New Zealand law. The Criminal Proceeds Recovery Act 2009 (CPRA) also provides for the recovery of money or property derived from crime.

Under CPRA:

- a. If Police suspect that an individual has benefitted from criminal activity, Police can apply to the court to freeze or recover any proceeds of that crime. The Crown may recover money or property (regardless of whether the individual has been convicted of criminal offending)

if the court is satisfied on the balance of probabilities that those assets were acquired as a result of criminal activity.

- b. Once the Crown proves the connection with criminal activity, the defendant is required to show that their benefit was not derived from criminal activity. CPRA does not require the Crown to prove that particular property was obtained from criminal activity merely that a person has benefited from criminal activity and has property.
- c. The conduct may, however, be covered by other offences in the Crimes Act - depending on the circumstances of the offence.

New Zealand outlined the steps or action that domestic or other authorities would need to take to ensure full compliance with the provision under review and indicated that, to explicitly capture an offence of illicit enrichment, New Zealand would require legislative change.

### **(b) Observations on the implementation of the article**

The reviewing experts noted that New Zealand had not criminalized illicit enrichment.

Therefore, it is recommended that New Zealand consider criminalizing illicit enrichment.

## **Article 21. Bribery in the private sector**

### **Subparagraph (a) of article 21**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Secret Commissions Act 1910**

### **2 Interpretation**

In this Act, unless a contrary intention appears,-

**agent** includes any person who is or has been, or desires or intends to be, employed by or acting for any other person, whether as agent, servant, broker, auctioneer, architect, solicitor, director, or in any other capacity whatever, either alone or jointly with any other person

**Child of any agent** includes a child of a spouse or a civil union partner or a de facto partner of an agent and in section 5(2) child has a corresponding meaning

**Principal** includes any person by whom an agent is or has been, or intends or desires to be, employed, or for whom an agent acts or has acted, or intends or desires to act

**Consideration** means valuable consideration of any kind; and particularly includes discounts, commissions, rebates, bonuses, deductions, percentages, employment, payment of money (whether by way of loan, gift, or otherwise howsoever), and forbearance to demand any money or valuable thing.

### **3 Gifts to agent without consent of principal an offence**

- (1) Every person is guilty of an offence who corruptly gives, or agrees or offers to give, to any agent any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.
- (2) Any gift or other consideration given or offered or agreed to be given to any parent, husband, wife, civil union partner, de facto partner, or child of any agent, or to his partner, clerk, or servant, or (at the agent's request or suggestion) to any other person, shall be deemed for the purposes of this section to have been given or offered or agreed to be given to the agent.

### **16 Persons deemed to be agents within the meaning of this Act**

(1) For the purposes of this Act-

- a. every officer of a corporation and every member of a governing body of a corporation shall be deemed to be an agent of the corporation:
- b. every officer or member of any local authority, Board, Council, committee, or other body of persons, whether incorporated or unincorporated, charged by statute with any public functions shall be deemed to be an agent of that local authority, Board, Council, committee, or other body:
- c. every person in the service of the Crown, or acting for or on behalf of the Crown, or holding any office in the public service, shall be deemed to be an agent of the Crown:
- d. every partner in a firm shall be deemed to be an agent of the firm:

- e. an executor, administrator, or trustee shall be deemed to be an agent of the beneficiaries under the will, intestacy, or trust:
- f. the committee of the estate of a person of unsound mind shall be deemed to be the agent of that person:
- g. an arbitrator, umpire, or valuer shall be deemed to be an agent of every party to the arbitration or valuation:
- h. a liquidator of a company shall be deemed to be an agent of the company.

(2) If by virtue of the provisions of this Act any agent is deemed to be the agent of 2 or more principals in respect of the same matter, this Act shall apply to each of those principals in the same manner as if he was the sole principal.

Nothing in this section shall be so construed as to restrict in any manner the meaning of the terms agent or principal as used in this Act.

## **12 Consent of Attorney-General necessary for prosecution**

- (1) No prosecution for an offence against this Act may be commenced without the leave of the Attorney-General.
- (2) The leave of the Attorney-General may be granted without notice to the defendant and it is not necessary in the charge to state that leave has been granted, or to state the terms of that leave.
- (3) Objections to a charge for want of leave, or for want of conformity to the terms of leave, must be made before a District Court Judge before the trial, and if the District Court Judge is satisfied that leave has not been granted, or
- (4) That the terms thereof have not been conformed to, the District Court Judge must either—
  - (a) permit the prosecutor to withdraw the charge; or
  - (b) dismiss the charge.

New Zealand provided the following explanation, examples and case law:

In 2014 the SFO began investigating a complaint that the Assets Manager at a health care provider had received secret commissions from the owners of two companies that carried out maintenance work for the healthcare provider's vehicle fleet. The SFO investigation found evidence that the Assets Manager negotiated a percentage rebate to be paid to him personally and that the owners of the two vehicle servicing companies agreed to pay this money. The investigation found further evidence that the servicing companies were charging the health care provider for work that was not done and for parts that were not supplied.

Charges of paying a secret commission have been laid against the two business owners who paid the commission. The Assets Manager has been charged with receiving the payments.

New Zealand provided the following statistics:

From 2006 - 2015, New Zealand prosecuted 18 people for offences under the Secret Commissions Act 1910 (or an average of 1.8 people per year). Of these 18 people, 15 were convicted. Eight of these served sentences of imprisonment, five were placed on home detention and one on community detention, and one was sentenced to community work.

### **(b) Observations on the implementation of the article**

New Zealand has criminalized active bribery in the private sector. The reviewing experts noted that the definition is going beyond the requirements of the Convention as the definition of the agent subject to bribery also includes person who “desires or intends to be”.

Reviewing experts also noted that when the undue advantage is given to an unrelated third party, it needs to be proven that the advantage was given to the third party at the agent’s request or suggestion.

However, the additional element of “corruptly” remains and that the indirect commission of the offence was not explicitly covered, and the experts expressed the same considerations in this regard as for articles 15, 16, and 18.

Therefore, it is recommended that New Zealand consider monitoring the application of the legislation to ensure that the indirect commission of the offence of active bribery in the private sector is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform should be considered.

### **(c) Successes and good practices**

The personal scope of application of the offence of criminalizing bribery in the private sector, extending to any person desiring or intending to be employed by or acting for another person, and to any person by whom an agent intends or desires to be employed or for whom an agent intends or desires to act.

### **Subparagraph (b) of article 21**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*[...]*

*(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for*

*another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Secret Commissions Act 1910**

**4 Acceptance of such gifts by agent an offence**

- (1) Every agent is guilty of an offence who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, or solicits from any person, for himself or for any other person, any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.
- (2) Every agent who diverts, obstructs, or interferes with the proper course of the affairs or business of his principal, or fails to use due diligence in the prosecution of such affairs or business, with intent to obtain for himself or for any other person any gift or other consideration from any person interested in such affairs or business, shall be deemed to have corruptly solicited a consideration within the meaning of this section.

**12 Consent of Attorney-General necessary for prosecution**

- (1) No prosecution for an offence against this Act may be commenced without the leave of the Attorney-General.
- (2) The leave of the Attorney-General may be granted without notice to the defendant and it is not necessary in the charge to state that leave has been granted, or to state the terms of that leave.
- (3) Objections to a charge for want of leave, or for want of conformity to the terms of leave, must be made before a District Court Judge before the trial, and if the District Court Judge is satisfied that leave has not been granted, or
- (4) That the terms thereof have not been conformed to, the District Court Judge must either—
  - (a) permit the prosecutor to withdraw the charge; or
  - (b) dismiss the charge.

New Zealand provided the following explanations, examples and case law:

N.N. was CEO of the New Zealand Wine Company Limited (NZWC) between July 2011 and September 2012. During this time, N.N. advised NZWC to enter into a contract to supply wine to an Australian based wine wholesaler. Unknown to NZWC, N.N. arranged to receive from the Australian company a personal commission based on each case of wine sold. A change of personnel at the Australian company revealed the payments N.N. was receiving and this led to a complaint being laid with the SFO. In total N.N. received approximately NZ\$64,000.

In 2015 N.N. went to trial at the Auckland High Court and was found guilty of corruptly accepting

reward for advising NZWC to enter into a contract. He was sentenced to eight months home detention.

### **(b) Observations on the implementation of the article**

The reviewing experts concluded that New Zealand criminalized passive bribery in the private sector.

However, the additional element of “corruptly” remains and that the indirect commission of the offence was not explicitly covered, and the experts expressed the same considerations in this regard as for articles 15, 16, and 18.

Therefore, it is recommended that New Zealand consider monitoring the application of the legislation to ensure that the indirect commission of the offence of active bribery in the private sector is criminalized and that the additional element of the use of the term “corruptly” does not constitute an obstacle to prosecution. If the judiciary does not interpret the law in this way in the future, legislative reform should be considered.

### **(c) Successes and good practices**

As with regard to active bribery in the private sector (art. 21 (a) of the Convention discussed above), a good practice was identified with regard to the personal scope of application of the offence criminalizing bribery in the private sector, extending to any person desiring or intending to be employed by or acting for another person, and to any person by whom an agent intends or desires to be employed or for whom an agent intends or desires to act.

## **Article 22. Embezzlement of property in the private sector**

### **Article 22**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

#### **218 Matters of ownership**

(1) For the purposes of this Part, a person is to be regarded as the owner of any property

that is stolen if, at the time of the theft, that person has-

- a. possession or control of the property; or
- b. any interest in the property; or
- c. the right to take possession or control of the property.

(2) An owner of any property may be guilty of theft against another owner of that property.

### **219 Theft or stealing**

(1) Theft or stealing is the act of,-

- a. dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property; or
- b. dishonestly and without claim of right, using or dealing with any property with intent to deprive any owner permanently of that property or of any interest in that property after obtaining possession of, or control over, the property in whatever manner.

(2) An intent to deprive any owner permanently of property includes an intent to deal with property in such a manner that-

- a. the property cannot be returned to any owner in the same condition; or
- b. any owner is likely to be permanently deprived of the property or of any interest in the property.

(3) In this section, taking does not include obtaining ownership or possession of, or control over, any property with the consent of the person from whom it is obtained, whether or not consent is obtained by deception.

(4) For tangible property, theft is committed by a taking when the offender moves the property or causes it to be moved.

### **220 Theft by person in special relationship**

(1) This section applies to any person who has received or is in possession of, or has control over, any property on terms or in circumstances that the person knows require the person-

- a. to account to any other person for the property, or for any proceeds arising from the property; or
- b. to deal with the property, or any proceeds arising from the property, in

accordance with the requirements of any other person.

- (2) Every one to whom subsection (1) applies commits theft who intentionally fails to account to the other person as so required or intentionally deals with the property, or any proceeds of the property, otherwise than in accordance with those requirements.
- (3) This section applies whether or not the person was required to deliver over the identical property received or in the person's possession or control.
- (4) For the purposes of subsection (1), it is a question of law whether the circumstances required any person to account or to act in accordance with any requirements.

## **240 Obtaining by deception or causing loss by deception**

- (1) Everyone is guilty of obtaining by deception or causing loss by deception who, by any deception and without claim of right,-
  - a. obtains ownership or possession of, or control over, any property, or any privilege, service, pecuniary advantage, benefit, or valuable consideration, directly or indirectly; or
  - b. in incurring any debt or liability, obtains credit; or
  - c. induces or causes any other person to deliver over, execute, make, accept, endorse, destroy, or alter any document or thing capable of being used to derive a pecuniary advantage; or
  - d. causes loss to any other person.

(1A) Every person is liable to imprisonment for a term not exceeding 3 years who, without reasonable excuse, sells, transfers, or otherwise makes available any document or thing capable of being used to derive a pecuniary advantage knowing that, by deception and without claim of right, the document or thing was, or was caused to be, delivered, executed, made, accepted, endorsed, or altered.

- (2) In this section, deception means-
  - a. a false representation, whether oral, documentary, or by conduct, where the person making the representation intends to deceive any other person and-
    - i. knows that it is false in a material particular; or
    - ii. is reckless as to whether it is false in a material particular; or
  - b. an omission to disclose a material particular, with intent to deceive any person, in circumstances where there is a duty to disclose it; or
  - c. a fraudulent device, trick, or stratagem used with intent to deceive any person.

New Zealand provided the following examples and case law:

In 2012 the SFO opened an investigation into the affairs of N.N., the sole director of Company C. Through her company N.N. provided fund management services for a number of clients. The SFO investigation established that N.N. made unauthorized transfers of approximately \$1million from her clients' accounts.

In May 2015 N.N. pleaded guilty to 16 charges of theft by a person in a special relationship and was sentenced to five years and five months' imprisonment.

### **(b) Observations on the implementation of the article**

In the absence of a specific embezzlement offence, theft by a person in a special relationship (sect. 220 CA) and criminal breach of trust (sect. 229 CA) are criminalized.

It is recommended that New Zealand consider establishing a separate offence of embezzlement in the private sector.

### **Article 23. Laundering of proceeds of crime**

#### **Paragraphs 1 and 2 (a-c) of article 23**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*

*(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*

*(b) Subject to the basic concepts of its legal system:*

*(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*

*(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*

*(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*

*(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Crimes Act 1961**

**66 Parties to the commission of offences**

- (1) Every one is a party to and guilty of an offence who-
- a. actually commits the offence; or
  - b. does or omits an act for the purpose of aiding any person to commit the offence; or
  - c. abets any person in the commission of the offence; or
  - d. incites, counsels, or procures any person to commit the offence.
- (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

**67 Conspiracy between spouses or civil union partners**

A person is capable of conspiring with his or her spouse or civil union partner or with his or her spouse or civil union partner and any other person.

**72 Attempts**

- (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
- (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt

to commit it, is a question of law.

- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

### **243 Money laundering**

(1) For the purposes of this section and sections 243A

- act includes an omission,
- conceal, in relation to property, means to conceal or disguise the property; and includes, without limitation,-

(a) to convert the property from one form to another:

(b) to conceal or disguise the nature, source, location, disposition, or ownership of the property or of any interest in the property

**Deal with**, in relation to property, means to deal with the property in any manner and by any means; and includes, without limitation,-

(a) to dispose of the property, whether by way of sale, purchase, gift, or otherwise:

(b) to transfer possession of the property:

(c) to bring the property into New Zealand:

(d) to remove the property from New Zealand

**Interest**, in relation to property, means-

(a) a legal or equitable estate or interest in the property; or

(b) a right, power, or privilege in connection with the property

**Offence** means an offence (or any offence described as a crime) that is punishable under New Zealand law, including any act, wherever committed, that would be an offence in New Zealand if committed in New Zealand

**Proceeds**, in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence

**Property** means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in

any such real or personal property.

- (2) Subject to sections 244, everyone is liable to imprisonment for a term not exceeding 7 years who, in respect of any property that is the proceeds of an offence, engages in a money laundering transaction, knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.
- (3) Subject to sections 244, everyone is liable to imprisonment for a term not exceeding 5 years who obtains or has in his or her possession any property (being property that is the proceeds of an offence committed by another person)-
  - (a) with intent to engage in a money laundering transaction in respect of that property; and
  - (b) knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.
- (4) For the purposes of this section, a person engages in a money laundering transaction if, in concealing any property or by enabling any person to conceal any property, that person-
  - (a) deals with that property; or
  - (b) assists any other person, whether directly or indirectly, to deal with that property.
- (4A) Despite anything in subsection (4), the prosecution is not required to prove that the defendant had an intent to-
  - (a) conceal any property; or
  - (b) enable any person to conceal any property.
- (5) In any prosecution for an offence against subsection (2) or subsection (3),-
  - (c) it is not necessary for the prosecution to prove that the defendant knew or believed that the property was the proceeds of a particular offence or a particular class of offence:
  - (d) it is no defence that the defendant believed any property to be the proceeds of a particular offence when in fact the property was the proceeds of another offence.
- (6) Nothing in this section or in sections 244 or 245 limits or restricts the operation of any other provision of this Act or any other enactment.

(7) To avoid doubt, for the purposes of the definition of offence in subsection (1), New Zealand law includes, but is not limited to, the Misuse of Drugs Act 1975.

### **243A Charges for money laundering**

A person may be charged under section 243(2) or (3) in respect of any property that is the proceeds of an offence to which section 243(2) or (3) applies even though the person who committed the offence— (a) has not been charged with that offence; or (b) has not been convicted of that offence.

### **245 Application of section 243 to acts outside New Zealand**

- (1) Section 243 applies to an act that has occurred outside New Zealand and that is alleged to constitute an offence resulting in proceeds only if-
- a. the act was an offence under the law of the place where and when it occurred; or
  - b. it is an act to which section 7 or 7A of this Act applies; or
  - c. an enactment provides that the act is an offence in New Zealand, and no additional requirement exists for the act to be an offence in the place where and when it occurred.

If a person is charged with an offence under section 243 and subsection (1)(a) applies, it is to be presumed, unless that person puts the matter at issue, that the act was an offence under the law of the place where and when it occurred.

### **310 Conspiring to commit offence**

- (1) Subject to the provisions of subsection (2), everyone who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he or she had committed that offence.
- (2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.

Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted.

New Zealand provided the following explanation, examples and case law:

Section 243 criminalizes money laundering. It creates two different offences: one of money laundering, and one of possession of the proceeds of crime with intent to money-launder those proceeds. Subsection (1) defines, in wide terms, a number of terms and concepts involved in the offence, and subsection (4) specifies the nature of “money laundering”, with subsection (7) confirming that the definition of offence includes the Misuse of Drugs Act 1975”. Subsection (4A) states certain matters which need not be proved by the prosecution, and subsection (5) excludes certain defences. Subsection (6) clarifies that 243 - 245 do not affect the operation of any other statutes or rules of law.

Section 66 treats various classes of person participating in an offence as a party to that offence, and makes all parties equally liable to the prescribed penalty. There are two general categories of parties: people who commit the offence and those who assist or encourage people in the commission of the offence. Subsection (2) provides a supplementary basis for determining party liability. It is primarily directed at offences not intended by some or one of the parties concerned. It covers any offence which, while not the result aimed at, was known by the parties to be a probable consequence of prosecuting a common unlawful purpose.

Under section 243 of the Crimes Act a predicate offence must be a ‘serious offence’, which means an offence punishable by imprisonment for five or more years’ imprisonment (and specified drug offences). This threshold includes the other offences established in accordance with this Convention.

Following amendments made in 2015, section 245 provides that section 243 will apply in all cases where the New Zealand has jurisdiction because the offence took place in New Zealand or because jurisdiction over an offence occurring overseas is claimed, or where a New Zealand statute provides that the act or omission is an offence in New Zealand, without requiring that the act or omission also be an offence in the place where and when it occurred.

Three government agencies are responsible for supervising the various businesses and industries the Act currently applies to. The three supervisors are:

- the Reserve Bank - supervising banks, life insurers and non-bank deposit takers
- the Financial Markets Authority - supervising issuers of securities, trustee companies, futures dealers, collective investment schemes, brokers and financial advisers
- the Department of Internal Affairs - supervising casinos, non-deposit taking lenders, money changers and other reporting entities that are not covered by the Reserve Bank or Financial Markets Authority.

The Ministry of Justice is responsible for policy development and the administration of the legislation. The Ministry also handles all matters related to exemptions from the Act.

The New Zealand Police financial intelligence unit (FIU) receives and analyses suspicious transaction reports. It also issues guidance to reporting entities and the three supervisors about reporting obligations under the Act, and provides information on money laundering and terrorism trends and methods.

The New Zealand Customs Service enforces the Act’s cross-border cash reporting regime.

The AML/CFT national coordination committee ensures that agencies make the necessary connections to ensure the consistent, effective and efficient operation of the AML/CFT regulatory system. The committee, chaired by the Ministry of Justice, includes representatives of each AML/CFT supervisor, the New Zealand Police financial intelligence unit and the Customs Service. Other agencies are invited from time to time where they have an interest in AML/CFT matters.

New Zealand provided the following statistics:

Suspicious transaction reports	2015/ 16	2014/ 15	2013/ 14	2012/ 13
Accepted	8,418	11,69 1	10,35 5	n/a
Rejected	2,011	1,077	1,846	n/a
Total	10,42 9	12,76 8	12,20 1	2,600

The number of accepted suspicious transaction reports (STRs) has decreased by 3,273 STRs to 8,418 in the financial year 2015-16 from 11,691 in the previous financial. A closer analysis by FIU of the reporting suggests two divergent trends have occurred in the two main sectors - over the past year, there was a steady increase in banks' reporting and a significant decrease in STRs from the remittance sector. Both trends have been driven by continuous refinement and improvement of transaction reporting processes by reporting entities, which have led to higher-quality STRs as the AML/CFT regime has matured.

### **(b) Observations on the implementation of the article**

Section 243 of the Crimes Act 1961 criminalizes money laundering in all its aspects.

The reviewing experts noted that if a perpetrator of the predicate offence “deals” with the property proceeds of crime (sect. 243 (1) CA), he or she also commits money-laundering and can be prosecuted for both offences (see below under article 23, subparagraph 2 (e) of the Convention).

The reviewing experts noted that while section 243 CA is applicable to all “serious” predicate offences, case law interprets that term as an offence punishable of 5 years of imprisonment or more. Hence, some concerns remain about the scope of predicate offences in New Zealand. For instance, according to FATF recommendation 3 (the ML offence), where a country apply a threshold approach predicate offences should include the category of serious offences or they comprise the offences punishable by a maximum penalty of more than 1 year’s imprisonment or by a minimum penalty of more than 6 months imprisonment. Reviewing experts noted that all offences punishable under domestic law and acts committed abroad that would be offences in New Zealand had they been committed there are predicate offences.

### **Subparagraph 2 (d) of article 23**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*[...]*

*(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*

**(a) Summary of information relevant to reviewing the implementation of the article**

Following New Zealand's ratification of the UN Convention Against Corruption, on 27 November 2015, copies of New Zealand's anti-money laundering legislation, criminal proceeds legislation and mutual legal assistance legislation were sent to the UNODC. These were provided in electronic and hard copy.

**(b) Observations on the implementation of the article**

Copies of New Zealand's anti-money laundering legislation, criminal proceeds legislation and mutual legal assistance legislation were provided to UNODC after ratification of Convention.

**Subparagraph 2 (e) of article 23**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*[...]*

*(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Bill of Rights Act 1990**

**6 Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

There is nothing in this section to expressly prevent a person from being charged as a principal actor and a party. However, section 6 of the Bill of Rights Act 1990 requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning must be preferred to any other meaning. Section 66 of the Crimes Act would therefore be interpreted consistently with the right to be free from double jeopardy which is affirmed in section 26 of the Bill of Rights Act.

Under section 66 of the Crimes Act 1961, a person is party to and guilty of an offence who:

- actually commits the offence
- does or omits to act for the purpose of aiding any person to commit the offence
- abets any person in the commission of the offence, or
- incites, counsels, or procures any person to commit the offence.

In cases where the person committed the predicate offence and subsequently:

- converted or transferred,
- concealed or disguised,
- acquired, possessed or used

the property, knowing that it was the proceeds of crime, the person could be charged under either offence, as New Zealand law treats these two acts separately

### **(b) Observations on the implementation of the article**

New Zealand implemented the provision under review. If a perpetrator committed both predicate offence and money laundering, he can be prosecuted for both offences.

### **Article 24. Concealment**

#### **Article 24**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following provisions:

#### **Crimes Act 1961**

#### **243 Money laundering**

(1) For the purposes of this section and sections 243A, 244 and 245,-

**Act** includes an omission

**Conceal**, in relation to property, means to conceal or disguise the property; and includes, without limitation,-

(a) to convert the property from one form to another:

(b) to conceal or disguise the nature, source, location, disposition, or ownership of the property or of any interest in the property

**Deal with**, in relation to property, means to deal with the property in any manner and by any means; and includes, without limitation,-

(a) to dispose of the property, whether by way of sale, purchase, gift, or otherwise:

(b) to transfer possession of the property:

(c) to bring the property into New Zealand:

(d) to remove the property from New Zealand

**Interest**, in relation to property, means-

(a) a legal or equitable estate or interest in the property; or

(b) a right, power, or privilege in connection with the property

**Offence** means an offence (or any offence described as a crime) that is punishable under New Zealand law, including any act, wherever committed, that would be an offence in New Zealand if committed in New Zealand

**Proceeds**, in relation to an offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence

**Property** means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in any such real or personal property.

(2) Subject to sections 244 and 245, everyone is liable to imprisonment for a term not exceeding 7 years who, in respect of any property that is the proceeds of an offence, engages in a money laundering transaction, knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.

(3) Subject to sections 244 and 245, everyone is liable to imprisonment for a term not exceeding 5 years who obtains or has in his or her possession any property (being property that is the proceeds of an offence committed by another person)-

(a) with intent to engage in a money laundering transaction in respect of that property; and

(b) knowing or believing that all or part of the property is the proceeds of an offence, or being reckless as to whether or not the property is the proceeds of an offence.

(4) For the purposes of this section, a person engages in a money laundering transaction if, in concealing any property or by enabling any person to conceal any property, that person-

(a) deals with that property; or

(b) assists any other person, whether directly or indirectly, to deal with that property.

(4A) Despite anything in subsection (4), the prosecution is not required to prove that the defendant had an intent to-

(a) conceal any property; or

(b) enable any person to conceal any property.

(5) In any prosecution for an offence against subsection (2) or subsection (3),-

(a) it is not necessary for the prosecution to prove that the defendant knew or believed that the property was the proceeds of a particular offence or a particular class of offence:

(b) it is no defence that the defendant believed any property to be the proceeds of a particular offence when in fact the property was the proceeds of another offence.

(6) Nothing in this section or in sections 244 or 245 limits or restricts the operation of any other provision of this Act or any other enactment.

(7) To avoid doubt, for the purposes of the definition of offence in subsection (1), New Zealand law includes, but is not limited to, the Misuse of Drugs Act 1975.

New Zealand provided the following explanation, examples and case law:

New Zealand does not explicitly criminalize the concealment or retention of property when the person knows that the property is the result of corrupt behaviour. However, section 243(4) of the Crimes Act provides that it is an offence if a person engages in a money laundering transaction if, in concealing any property or by enabling any person to conceal any property, that person:

· deals with that property, or

· assists any other person, whether directly or indirectly, to deal with that property.

“Deals with” includes to dispose of (sale, purchase, gift), transfer possession, and bringing to/removing

from New Zealand.

Early case law held that intent to conceal was not an element of the offence to be proved, although the defendant may have that objective. More recent decisions have required the prosecution to prove that element.

For example, the Court of Appeal in *R v Rolston* [2008] NZCA 431 found at [105] that “the section does not make it an offence to conceal proceeds, but rather to deal in proceeds with the purpose of concealment. Nor does it make it an offence to deal with proceeds in a way which happens to involve concealment (such as wrapping up a pile of banknotes or using coded messages).

Applying this decision in *Marsh v R* [2010] NZCA 130, the Court of Appeal held there was no evidence of “concealment” for the purpose of s 243(4).

Subsection 243(4A) was inserted by the Crimes Amendment Act 2015 to clarify that the prosecution is not required to prove that the defendant had the intent to conceal any property, or enable any person to conceal any property. The intended effect of this amendment is to ensure that the prosecution burden is returned to the position of early case law after enactment of the money-laundering offence in the late 1990s.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that concealment was criminalized (sect. 243(3) CA).

### **Article 25. Obstruction of justice**

#### **Subparagraph (a) of article 25**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **116 Conspiring to defeat justice**

Every one is liable to imprisonment for a term not exceeding 7 years who conspires to obstruct,

prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

### **117 Corrupting juries and witnesses**

Everyone is liable to imprisonment for a term not exceeding 7 years who-

- (a) dissuades or attempts to dissuade a person, by threats, bribes, or other corrupt means, from giving evidence in any cause or matter (whether civil or criminal, and whether tried or to be tried in New Zealand or in an overseas jurisdiction); or
- (b) influences or attempts to influence, by threats or bribes or other corrupt means, a member of a jury in his or her conduct as such (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction, and whether the member has been sworn as a member of a particular jury or not); or
- (c) accepts any bribe or other corrupt consideration to abstain from giving evidence (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction); or
- (d) accepts any bribe or other corrupt consideration on account of his or her conduct as a member of a jury (whether in a cause or matter tried or to be tried in New Zealand or in an overseas jurisdiction, and whether the member has been sworn as a member of a particular jury or not); or
- (e) wilfully attempts in any other way to obstruct, prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

New Zealand provided the following examples and case law:

The penalty for individuals convicted of corrupting juries and witnesses is a term of imprisonment not exceeding 7 years under section 117 of the Crimes Act 1961. The provision is as follows:

#### **Dissuades**

- “Dissuades” means successful dissuasion from giving evidence; the act of dissuasion is not of itself enough (R v N [2013] EWCA Crim 989, where it was held that the statutory offence of intimidating witnesses required proof the witnesses in question were in fact intimidated). The prosecution must show a sufficient connection between the means of dissuasion, such as a bribe, and the non-appearance of the witness. However, attempted dissuasion does not require proof that the person was a witness who was actually to be called to give evidence. All that is required is that the witness has relevant and material testimony to contribute: R v O’Donnell (1991) 7 CRNZ 314 (HC).

## Threats, bribes, and “other corrupt means”

- The definition of ‘threats’ in this context have not been examined in New Zealand case law. It is suggested that any conduct which expressly or impliedly conveys a willingness to injure any person (not necessarily the witness) or to destroy or damage any property may amount to a sufficient “threat” for the purposes of the section (*Director of Public Prosecutions v Mills* [1997] QB 300).
- The phrase “other corrupt means” has also not been discussed by the New Zealand courts. The word “corruption” has been held to mean “conduct conducive to a breach of duty” see *Field v R* [2010] NZCA 556. The influence by a bribe under 177(b) includes the offer of a bribe or an offer of employment: *Munro v R* [1971] NZLR 122 (CA).

## “Attempting to obstruct, etc, the course of justice”

- The prosecution must show that the conduct was more than merely preparatory and that some immediate or proximate connection existed with the intended obstruction of justice (*R v Fawcett* CA113/01, 28 June 2001). In *R v Fawcett*, the test was met by the defendant’s conduct in arranging for a witness to change his statement to a lawyer. By contrast in *R v Cobb* HC Hamilton CRI-2006-019-4626, 17 August 2006, making enquiries of the police as to a relevant matter was no more than a preparatory act. Some positive act will normally be required rather than a mere omission to prevent others from obstructing justice: *R v Clark* HC Hamilton CRI-2006-019-4626, 24 August 2006. Conduct which is sufficiently proximate and done with the necessary intention is an attempt to obstruct the course of justice even if it would not have achieved that result: *R v Beckett* [2015] HCA 38, (2015) 90 ALJR 1, at [44].
- The exercise by an individual of his or her legitimate rights to avoid liability may make the task of the prosecution more onerous, but will not be criminal as a result. However, improper actions designed to avoid such liability may amount to attempts to obstruct, prevent, defeat, or pervert the course of justice: *R v Rafique* [1993] 4 All ER 1 (CA), at 7. The courts have drawn a distinction between a false denial of responsibility for the earlier conduct that allegedly amounted to an offence, and the making of false allegations that another named or described person was responsible for that conduct. The former falls outside paragraph (e) the latter is an attempt to pervert the course of justice: *Cane v R* [1968] NZLR 787 (CA).
- **Liability of lawyers**
- A lawyer may commit an offence under section 117. A lawyer may properly advise a client under investigation for alleged offending as to the client’s legal rights. If, however, counsel suggested to the client answers which were incorrect in fact, or were in the circumstances not answers the client was entitled to give, counsel might, it appears, be obstructing the course of justice; see the discussion in *Sullivan v Ministry of Fisheries* [2002] 3 NZLR 721 (CA), at 733-735. If a lawyer knowingly conceals physical evidence inculpatory of the defendant with intent to obstruct a police investigation, the lawyer will pervert the course of justice: *R v G* HC Wanganui CRI-2006-083-1985, 13 July 2007.
- The prosecution of lawyers is rare and is only usually used for implicit collusion with the offender that is facing the court. Police usually follow up on conflicts of interest or potential impartiality through the Criminal Bar Association of New Zealand. This group has the ability

to remove the authority for a lawyer to work in courts.

**(b) Observations on the implementation of the article**

The reviewing experts note that conspiring to defeat justice, and the use of threats, bribes or other corrupt means to dissuade a person from giving evidence or to influence a member of a jury, and wilfully attempting in any other way to obstruct, prevent, pervert, or defeat the course of justice, are criminalized (sect. 116 - 117 CA).

**Subparagraph (b) of article 25**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*[...]*

*(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Summary Offences Act 1981**

**21 Intimidation**

(1) Every person commits an offence who, with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause that other person reasonably to be frightened or intimidated,-

(a) threatens to injure that other person or any member of his or her family, or to damage any of that person's property; or

(b) follows that other person; or

(c) hides any property owned or used by that other person or deprives that person of, or hinders that person in the use of, that property; or

(d) watches or loiters near the house or other place, or the approach to the house or other place, where that other person lives, or works, or carries on business, or happens to be; or

- (e) stops, confronts, or accosts that other person in any public place.
- (2) Every person commits an offence who forcibly hinders or prevents any person from working at or exercising any lawful trade, business, or occupation.
- (3) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000.

### **23 Resisting Police, prison, or traffic officer**

- (1) Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct,-
- (a) any constable or any authorised officer, or any prison officer, or any traffic officer, acting in the execution of his duty; or
- (b) any other person acting in aid of any such constable, authorised officer, prison officer, or traffic officer.
- (c) any Police dog working under the control of a Police dog handler.

## **SFO Act**

### **45 Offence to obstruct investigation, etc**

- Every person commits an offence, and is liable on conviction,—
  - (a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$15,000;
  - (b) in the case of a corporation, to a fine not exceeding \$40,000,—who,—
  - (c) without lawful justification or excuse, resists, obstructs, or delays any member of the Serious Fraud Office in the exercise of any power conferred by section 9; or
  - (d) without lawful justification or excuse, refuses or fails to—
    - (i) attend before the Director; or
    - (ii) answer any question; or
    - (iii) supply any information; or
    - (iv) produce any document; or
    - (v) provide any explanation; or
    - (vi) comply with any other requirement,—

as required pursuant to the exercise of any power conferred by section 9; or

- (e) in the course of complying with any requirement imposed pursuant to section 5 or section 9, gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is so false or misleading

New Zealand provided the following examples, explanation and case law:

Section 21 of the Summary Offences Act provides that it is an offence to intentionally cause a person (including a person acting in their official capacity) to be frightened or intimidated. It is also an offence to resist or intentionally obstruct any constable, prison officer, or traffic officer acting in the execution of duty (or any person assisting such an officer) or to incite or encourage another to do so.

#### **(b) Observations on the implementation of the article**

Specific acts of interfering with the exercise of official duties of certain law enforcement officials (sect. 23 Summary Offences Act (SOA)) or obstructing an SFO investigation (sect. 45 SFO Act) are criminalized. However, only intimidation is covered and not other means such as threats or physical force. In addition, the personal scope of application of sect. 23 SOA is limited to police, prison or traffic officers.

Therefore, it is recommended that New Zealand specifically criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by all justice and law enforcement officials.

#### **Article 26. Liability of legal persons**

##### **Paragraphs 1, 2 and 3 of article 26**

*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*

*2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Interpretation Act 1999**

### **29 Definitions**

In an enactment,-

[...]

**Person** includes a corporation sole, a body corporate, and an unincorporated body

## **Crimes Act 1961**

### **2 Interpretation**

**person, owner**, and other words and expressions of the like kind, include the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district of any local authority, in relation to such acts and things as it or they are capable of doing or owning.

### **Section 105C (2)**

Every person commits an offence who corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope of the official's authority) in order to-

- (a) obtain or retain business; or
- (b) obtain any improper advantage in the conduct of business.

(2A) A body corporate or corporation sole commits an offence against subsection (2) if-

- (a) an employee of the body corporate or corporation sole does an act that would constitute an offence under subsection (2); and
- (b) the employee does the act, in whole or in part, with the intent to benefit the body corporate or corporation sole; and
- (c) the employee, in doing the act, is acting within the scope of their authority as an employee of the body corporate or corporation sole.

(2B) A body corporate or corporation sole does not commit an offence under subsection (2) if it has taken reasonable steps to prevent the offence.

(2C) If a body corporate or corporation sole is charged with an offence under subsection (2), it

is to be presumed, unless the body corporate or corporation sole puts the matter at issue, that it did not take reasonable steps.

(2D) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 7 years, or a fine, or both.

(2E) A fine imposed under subsection (2D) cannot exceed the greater of- \$5 million; or

(a) if a court is satisfied that an offence occurred in the course of producing a commercial gain, and if the value of that commercial gain can be readily ascertained, 3 times the value of that commercial gain.

(3) This section does not apply if-

(a) the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and

(b) the value of the benefit is small.

(4) Subsections (2A), (2B), and (2C)-

(a) apply only in respect of offences under subsection (2) and section 105D; and

(b) do not preclude the liability of a body corporate or corporation sole under any other provision of this Act.

New Zealand provided the following explanations, examples and case law:

As a general rule liability attaches to a “person”. The term “person” is defined in Part 5, Section 29 of the Interpretation Act 1999, to include a corporation sole, a body corporate, and an unincorporated body. The Crimes Act has a similar definition of a “person”, which includes “any board, society, or company, and any other body of persons, whether incorporated or not...”

Additionally, specific offences in New Zealand law explicitly establish the liability of legal persons for the relevant misconduct; for example, section 105C of the Crimes Act.

As well as the examples listed above, a number of other statutes contain provisions which deal specifically with the liability or punishment of corporations. For example, the Commerce Act 1996 section 90 and Fair Trading Act 1986 section 45 (where if it is necessary to establish the state of mind of the body corporate it is sufficient to show that a director, servant or agent of the body corporate, acting within the scope of that person’s actual or apparent authority, had that state of mind). The Secret Commissions Act 1910 section 13 imposes a fine on a corporation, with a lower amount, or imprisonment for any ‘other person’.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the definition of person in the Crimes Act and in the Interpretation Act encompasses both legal and natural persons, thus establishing their criminal liability for all offences committed by a “person”, without prejudice to the liability of natural persons.

In Section 105 C of the Crimes Act, the liability of legal persons for the bribery of foreign public officials is clearly regulated.

While there are no specific provisions establishing the administrative or civil liability of legal persons for offences established in accordance with the Convention (Convention offences), some civil remedies are applicable (e.g., proceedings for breach of economic tort).

#### **Paragraph 4 of article 26**

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

##### **Sentencing Act**

##### **39 Power to impose fine instead of imprisonment, sentence of home detention, or community-based sentence**

(1) If an enactment provides that a court may sentence an offender to imprisonment but does not prescribe a fine, the court may sentence the offender to pay a fine instead of sentencing the offender to imprisonment.

(2) If an enactment provides that a court may sentence an offender to a community-based sentence but does not prescribe a fine, the court may sentence the offender to pay a fine instead of imposing a community-based sentence.

(2A) If an enactment provides that a court may sentence an offender to a sentence of home detention but does not provide for a fine, the court may sentence the offender to pay a fine instead of imposing a sentence of home detention.

(3) Subsections (1), (2), and (2A) are subject to any express provision to the contrary in the relevant enactment.

##### **40 Determining amount of fine**

(1) In determining the amount of a fine, the court must take into account, in addition to the provisions of [sections 7 to 10](#), the financial capacity of the offender.

(2) Subsection (1) applies whether taking into account the financial capacity of the offender has the effect of increasing or reducing the amount of the fine.

(3) If under an enactment an offender is liable to a fine of a specified amount, the offender may be sentenced to pay a fine of any less amount, unless a minimum fine is expressly provided for by that enactment.

(4) Subsection (4A) applies if a court imposes a fine—

(a) in addition to a sentence of reparation; or

(b) on an offender who is subject to an earlier sentence or order of reparation.

(4A) In fixing the amount of the fine, the court must take into account—

(a) the amount of reparation payable; and

(b) that any payments received from the offender must be applied in the order of priority set out in [sections 86E to 86G](#) of the Summary Proceedings Act 1957.

(5) When considering the financial capacity of the offender under subsection (1), the court must not take into account that the offender is required to pay a levy under [section 105B](#).

## **Crimes Act 1961**

### **Section 105C (2)**

Every person commits an offence who corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope of the official's authority) in order to-

(a) obtain or retain business; or

(b) obtain any improper advantage in the conduct of business.

(2A) A body corporate or corporation sole commits an offence against subsection (2) if-

(a) an employee of the body corporate or corporation sole does an act that would constitute an offence under subsection (2); and

(b) the employee does the act, in whole or in part, with the intent to benefit the body corporate or corporation sole; and

(c) the employee, in doing the act, is acting within the scope of their authority as an employee of the body corporate or corporation sole.

(2B) A body corporate or corporation sole does not commit an offence under subsection (2) if it has taken reasonable steps to prevent the offence.

(2C) If a body corporate or corporation sole is charged with an offence under subsection (2), it is to be presumed, unless the body corporate or corporation sole puts the matter at issue, that it did not take reasonable steps.

(2D) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 7 years, or a fine, or both.

(2E) A fine imposed under subsection (2D) cannot exceed the greater of- \$5 million; or

(a) if a court is satisfied that an offence occurred in the course of producing a commercial gain, and if the value of that commercial gain can be readily ascertained, 3 times the value of that commercial gain.

(3) This section does not apply if-

(a) the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and

(b) the value of the benefit is small.

(4) Subsections (2A), (2B), and (2C)-

(a) apply only in respect of offences under subsection (2) and section 105D; and

(b) do not preclude the liability of a body corporate or corporation sole under any other provision of this Act.

## **SFO Act**

### **45 Offence to obstruct investigation, etc**

Every person commits an offence, and is liable on conviction,—

(a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$15,000:

(b) in the case of a corporation, to a fine not exceeding \$40,000,—

who,—

(c) without lawful justification or excuse, resists, obstructs, or delays any member of the Serious Fraud Office in the exercise of any power conferred by [section 9](#); or

(d) without lawful justification or excuse, refuses or fails to—

(i) attend before the Director; or

- (ii) answer any question; or
- (iii) supply any information; or
- (iv) produce any document; or
- (v) provide any explanation; or
- (vi) comply with any other requirement,—

as required pursuant to the exercise of any power conferred by [section 9](#); or

(e) in the course of complying with any requirement imposed pursuant to [section 5](#) or [section 9](#), gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is so false or misleading.

New Zealand provided the following examples and case law:

Penalties for individuals convicted of bribery and corruption of domestic public officials will generally involve an unlimited fine for individuals and corporations.

Acknowledging the seriousness of foreign bribery, the Organised Crime Bill amended the maximum penalties in section 105C of the Crimes Act to a term of imprisonment not exceeding seven years and/or a fine not exceeding the greater of:

- \$5 million; or
- if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention.

#### **(b) Observations on the implementation of the article**

While all Convention offences are punishable by imprisonment, the court can instead order the payment of a fine (sects. 39, 40 Sentencing Act).

For foreign bribery, legal persons are subject to a fine of up to NZD 5 million or three times the value of the commercial gain (sect. 105(C)(2E) CA), while for obstruction of SFO investigations (sect. 45 SFO Act), corporations can be fined up to NZD 40,000. The court can also impose sanctions such as, in specific cases, the cancellation of the company's licence or its dissolution.

### **Article 27. Participation and attempt**

#### **Paragraph 1 of article 27**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this*

*Convention.*

(a) **Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Crimes Act 1961**

**66 Parties to the commission of offences**

(1) Every one is a party to and guilty of an offence who-

- (a) actually commits the offence; or
- (b) does or omits an act for the purpose of aiding any person to commit the offence; or
- (c) abets any person in the commission of the offence; or
- (d) incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

**310 Conspiring to commit offence**

(1) Subject to the provisions of subsection (2), every one who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he or she had committed that offence.

(2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.

(3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted.

New Zealand provided the following explanations, examples and case law:

New Zealand law criminalizes the participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention, as well as conspiring to commit the offence. The use of section 66 of the Crimes Act is very common across a range of offences.

### **(b) Observations on the implementation of the article**

Participation in any capacity in an offence is criminalized through sections 66 and 310 Crimes Act.

### **Paragraph 2 of article 27**

*2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **72 Attempts**

(1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

(3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

Part 6 of the Crimes Act 1961 contains bribery and corruption offences. 'Attempt' is contained within the wording for the primary offence.

New Zealand provided the following explanations, examples and case law:

In 2012 the SFO commenced an investigation into a trust set up to administer the assets of an iwi (Māori tribe). A trustee of the trust was identified as having engaged in activities that fell outside the trust deed. The SFO investigation found evidence that the trustee requested an upfront payment of \$750,000 in order to offer his support to the proposed development of land administered by the trust.

He proposed that once the project was underway the developer could recoup the \$750,000 from the iwi. The developer was uncomfortable with the dishonest nature of the proposal and rejected the offer.

In 2013 the SFO laid a charge of attempting to procure a secret commission. This particular charge was only one of a number of charges laid in relation to the actions of the trustee. In an effort to expedite proceedings this particular charge was withdrawn but more serious, substantive charges are proceeding.

#### **(b) Observations on the implementation of the article**

Attempts to commit offences established in accordance with the Convention are criminalized through section 72 of the Crimes Act 1961.

#### **Paragraph 3 of article 27**

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following explanations:

The Crimes Act contains the key provisions relating to parties to the commission of an offence, and attempting, aiding, abetting or conspiring to commit an offence.

Section 72 draws a distinction between an act done or omitted with intent to commit an offence or preparation for the commission of that offence which is too remote to constitute an attempt to commit it. Section 72 provides that this distinction is a question of law.

*R v Henderson (1948) 91 CCC 97* states that there must be an act done which displays not only a preparation for an attempt, but commencement of execution, a step in the actual crime itself. The defendant must have taken a “real and practical step” toward the commission of the crime (*Drewery v Police (1983) 3 CRNZ 499*).

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the mere taking of preparatory steps in relation to an offence is only criminalized where explicitly established by law, which is not the case for offences established in accordance with the Convention.

New Zealand may wish to explicitly criminalize the preparation for offences established in accordance with the Convention.

#### **Article 29. Statute of limitations**

## Article 29

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand referred to the following provisions:

#### **Criminal Procedure Act 2011**

#### **6 Categories of offence defined**

(1) In this Act,-

category 1 offence means-

(a) an offence that is not punishable by a term of imprisonment, other than-

(i) an infringement offence; or

(ii) an offence described in paragraph (b) or (c) of the definition of a category 2 offence;  
or

(iii) an offence described in paragraph (b) of the definition of a category 3 offence; or

(b) an infringement offence, if proceedings in relation to that offence are commenced by filing a charging document under section 14, not by the issuing of an infringement notice

category 2 offence means-

(a) an offence punishable by a term of imprisonment of less than 2 years; or

(b) an offence that, if committed by a body corporate, is punishable by only a fine, but that would be punishable by a term of imprisonment of less than 2 years if committed by an individual; or

(c) an offence punishable by a community-based sentence and not punishable by a term of imprisonment

category 3 offence means an offence, other than an offence listed in Schedule 1,-

(a) that is punishable by imprisonment for life or by imprisonment for 2 years or more;  
or

(b) that, if committed by a body corporate, is punishable by only a fine, but that would be punishable by imprisonment for life or by imprisonment for 2 years or more if committed by an individual

category 4 offence means an offence listed in Schedule 1.

(2) If an offence is in a given category, then the following is also an offence in that category:

(a) conspiring to commit that offence:

(b) attempting to commit that offence, or inciting or procuring or attempting to procure any person to commit an offence of that kind that is not committed:

(c) being an accessory after the fact to that offence.

(3) If an offence is punishable by a greater penalty where the defendant has previously been convicted of that offence or of some other offence, the offence is an offence in the category that applies to offences punishable by that greater penalty only if the charge alleges that the defendant has such a previous conviction.

## **25 Time for filing charging document**

(1) A charging document may be filed at any time in respect of a category 4 offence.

(2) A charging document in respect of a category 3 offence-

(a) must be filed within 5 years after the date on which the offence was committed, if an enactment specifies that the penalty for the offence includes a term of imprisonment not exceeding 3 years, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date; or

(b) may be filed at any time in any other case.

(3) A charging document in respect of a category 1 or 2 offence must be filed-

(a) within 6 months after the date on which the offence was committed if an enactment

specifies that the penalty for the offence-

(i) includes a term of imprisonment not exceeding 3 months; or

(ii) does not include a term of imprisonment, but includes a fine not exceeding \$7,500;  
or

(b) within 12 months after the date on which the offence was committed if an enactment specifies that the penalty for the offence-

(i) includes a term of imprisonment greater than 3 months but not exceeding 6 months;  
or

(ii) does not include a term of imprisonment, but includes a fine greater than \$7,500 but not exceeding \$20,000; or

(c) within 5 years after the date on which the offence was committed in any other case, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date.

(4) In the case of a category 1 or 2 offence that is a continuing offence, the time for filing a charging document must be determined under subsection (3) by reference to the maximum fine that may be imposed for the initial offending (or, if there is no separate fine prescribed for the initial offending, the fine prescribed for each day or each instance of offending) without taking into account the amount of any further fines that may be imposed as a result of the offence continuing.

(5) If a body corporate is charged with an offence, the limitation period within which a charging document must be filed is the period that would apply to a natural person charged with the same offence, irrespective of the penalty that may be imposed against the body corporate.

(6) This section is subject to any provision in any other enactment that provides a different limitation period for filing a charging document in relation to an offence.

New Zealand provided the following explanations, examples and case law:

The Criminal Procedure Act 2011 establishes the limitation periods for filing of a charging document. In the case of category 4 offences, a charging document may be filed at any time. The corruption offences in the Crimes Act 1961 defined as category 4 offences are:

- Section 100 Judicial corruption
- Section 101 Bribery of judicial officer, etc.

- Section 102 Corruption and bribery of Minister of the Crown
- Section 103 Corruption and bribery of Member of Parliament

For category 3 offences where the maximum period of imprisonment is more than three years, a charging document may also be filed at any time. This includes all the other corruption offences in the Crimes Act 1961 and Secret Commissions Act 1910 not listed in Schedule 1 of the Criminal Procedure Act.

Moreover, the Crimes Amendment Act 2011 repealed the period of limitation for offences in the Crimes Act 1961. There is, therefore, no statute of limitations for offences established in accordance with this Convention.

### **(b) Observations on the implementation of the article**

Most offences established in accordance with the Convention are category 3 and 4 offences (sect. 6 CPA) that are not subject to any statute of limitations (sect. 25 (1), (2) CPA). Some of the offences criminalizing obstruction of justice are category 2 offences, for which a charging document must be filed within 6 months after the commission of the offence (sect. 25 (3) CPA). There is no interruption of the statute of limitations if the alleged offender has evaded the administration of justice.

It is recommended that New Zealand ensure an appropriate statute of limitations period is established for offences established in accordance with article 25 (b) of the Convention, and establish an even longer period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

## **Article 30. Prosecution, adjudication and sanctions**

### **Paragraph 1 of article 30**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **102 Corruption and bribery of Minister of the Crown**

(1) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any Minister of the Crown or member of the Executive Council in respect of any act or omission by him or her in his or her capacity as a Minister or member of the Executive Council.

### **103 Corruption and bribery of member of Parliament**

- (2) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

### **106 Restrictions on prosecution**

- (1) No one shall be prosecuted for an offence against any of the provisions of sections 100, 101, 104, 105, 105A, 105B, 105C, 105D, 105E, and 105F without the leave of the Attorney-General, who before giving leave may make such inquiries as he or she thinks fit.
- (2) No Judge who holds his or her office subject to a power of removal by the Sovereign on an address of the House of Representatives shall be prosecuted for any such offence except by the Attorney-General in pursuance of a resolution of that House.

### **Sentencing Act 2002**

#### **9 Aggravating and mitigating factors**

- (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

[...]

- (f) that the offender was abusing a position of trust or authority in relation to the victim:

[...]

### **Secret Commissions Act 1910**

#### **Consent of Attorney-General necessary for prosecution**

- (1) No prosecution for an offence against this Act may be commenced without the leave of the Attorney-General.

(2) The leave of the Attorney-General may be granted without notice to the defendant and it is not necessary in the charge to state that leave has been granted, or to state the terms of that leave.

(3) Objections to a charge for want of leave, or for want of conformity to the terms of leave, must be made before a District Court Judge before the trial, and if the District Court Judge is satisfied that leave has not been granted, or that the terms thereof have not been conformed to, the District Court Judge must either—

- (a) permit the prosecutor to withdraw the charge; or  
(b) dismiss the charge.

### **Summary Offences Act 1981**

#### **21 Intimidation**

- (1) Every person commits an offence who, with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause that other person reasonably

to be frightened or intimidated,-

- (a) threatens to injure that other person or any member of his or her family, or to damage any of that person's property; or
  - (b) follows that other person; or
  - (c) hides any property owned or used by that other person or deprives that person of, or hinders that person in the use of, that property; or
  - (d) watches or loiters near the house or other place, or the approach to the house or other place, where that other person lives, or works, or carries on business, or happens to be; or
  - (e) stops, confronts, or accosts that other person in any public place.
- (2) Every person commits an offence who forcibly hinders or prevents any person from working at or exercising any lawful trade, business, or occupation.
- (3) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000.

### **23 Resisting Police, prison, or traffic officer**

- (1) Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct,-
- (a) any constable or any authorised officer, or any prison officer, or any traffic officer, acting in the execution of his duty; or
  - (b) any other person acting in aid of any such constable, authorised officer, prison officer, or traffic officer.
  - (c) any Police dog working under the control of a Police dog handler.

### **45 Offence to obstruct investigation, etc**

- Every person commits an offence, and is liable on conviction,—
  - (a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$15,000:
  - (b) in the case of a corporation, to a fine not exceeding \$40,000,—

who,—

- (c) without lawful justification or excuse, resists, obstructs, or delays any member of the Serious Fraud Office in the exercise of any power conferred by section 9; or

- (d) without lawful justification or excuse, refuses or fails to—
  - (i) attend before the Director; or
  - (ii) answer any question; or
  - (iii) supply any information; or
  - (iv) produce any document; or
  - (v) provide any explanation; or
  - (vi) comply with any other requirement,—

as required pursuant to the exercise of any power conferred by section 9; or

- (e) in the course of complying with any requirement imposed pursuant to section 5 or section 9, gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is so false or misleading

New Zealand provided the following explanations, examples and case law:

Penalties for individuals convicted of bribery and corruption of domestic public officials range from a maximum of seven to 14 years' imprisonment or an unlimited fine for individuals and corporations.

The Organised Crime Bill increased the maximum penalties for all Secret Commissions Act offences to 7 years' imprisonment or an unlimited fine for individuals. Corporations are also liable to an unlimited fine.

Acknowledging the seriousness of foreign bribery, the Organised Crime Bill amended the maximum penalties for this offence to a term of imprisonment not exceeding seven years and/or a fine not exceeding the greater of:

- \$5 million; or
- if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention.

The introduction of a commercial gain formula is a positive change intended to deter both individuals and businesses from making a commercial decision to pay bribes. Further, the new penalties will ensure that individuals convicted of foreign bribery may now incur substantial fines in addition to a term of imprisonment (previously a fine could only be imposed as an alternative to imprisonment).

One example of non-criminal sanctions in New Zealand are forfeiture orders. These apply where a person has been convicted of a qualifying offence and property has been used in commission of the offence. Instrument forfeiture is discretionary where certain circumstances are met; Assets forfeiture, whereby property tainted by significant criminal activity is forfeited to the Crown.

For more information about forfeiture orders, please see the response to article 31 of this Convention.

**(b) Observations on the implementation of the article**

Most offences established in accordance with the Convention are punishable by a maximum term of imprisonment of between five and seven years, or fines. Certain offences criminalizing obstruction of justice are punishable by a maximum of three months to one year imprisonment (sects. 21, 23, SOA; sect. 45, SFO Act). Abuse of a position of trust or authority in relation to the victim is an aggravating circumstance (sect. 9, (f) SA).

However, the experts noted that the sanctions available for category 2 offences criminalizing obstruction of justice were rather limited.

Therefore, it is recommended that New Zealand consider increasing the sanctions for the category 2 offences criminalizing obstruction of justice.

**Paragraph 2 of article 30**

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Crimes Act 1961**

**8A Jurisdiction in respect of certain persons with diplomatic or consular immunity**

(1) This section applies to every person who is-

(a) a head of mission or head of post within the meaning of the Foreign Affairs Act 1988; or

(b) a person who is on overseas service pursuant to section 6 of the Foreign Affairs Act 1988; or

(c) a New Zealand citizen ordinarily resident in New Zealand and who is-

(i) a member of the family of a person described in paragraph (a) or paragraph (b); or

(ii) a member of the staff of a New Zealand overseas post or a New Zealand overseas mission, whether or not an officer or employee of the Ministry of Foreign Affairs and Trade or a person employed under section 10 of the Foreign Affairs Act 1988; or

(iii) an officer or employee of the State services (as defined in section 2(1) of the State Sector Act 1988), or of New Zealand Trade and Enterprise (as established by the New Zealand Trade and Enterprise Act 2003), who is serving in a New Zealand overseas post or a New Zealand overseas mission.

(2) Where-

(a) any person to whom this section applies does, or omits to do, any act outside New Zealand (whether or not the act or omission concerned constitutes an offence under the laws in force in the place where it took place) that, if done or omitted within New Zealand would constitute an offence punishable by imprisonment for 1 year or more; and

(b) that person has immunity from criminal jurisdiction in the place where that act or omission took place; and

(c) that immunity has not been waived (otherwise than to any extent necessary to enable the extradition of that person),-

that act or omission shall be deemed to have taken place within New Zealand.

(3) No charging document may be filed against any person over whom jurisdiction is claimed by virtue of subsection (2) without the leave of the Attorney-General.

(4) Subsection (5) applies to any offence before a charging document may be filed in respect of which the consent of the Attorney-General is required by subsection (3).

(5) Where any person is alleged to have committed an offence to which this subsection applies,-

(a) he or she may be arrested; or

(b) a warrant for his or her arrest may be issued and executed,-

and he or she may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General has not been obtained to the filing of a charging document in respect of that offence; but no further proceedings shall be taken until that consent has been obtained.

## **102. Corruption and bribery of Minister of the Crown**

(1) Every Minister of the Crown or member of the Executive Council is liable to imprisonment for a term not exceeding 14 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a Minister or member of the Executive Council.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any Minister of the Crown or member of the Executive Council in respect of any act or omission by him or her in his or her capacity as a Minister or member of the Executive Council.

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

## **103. Corruption and bribery of member of Parliament**

(1) Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her capacity as a member of Parliament.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any member of Parliament in respect of any act or omission by him or her in his or her capacity as a member of Parliament.

(3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he or she shall have an opportunity of being heard against the application.

## **Secret Commissions Act**

### **12. Consent of Attorney-General necessary for prosecution**

(1) No prosecution for an offence against this Act may be commenced without the leave of the Attorney-General.

(2) The leave of the Attorney-General may be granted without notice to the defendant and it is not necessary in the charge to state that leave has been granted, or to state the terms of that leave.

(3) Objections to a charge for want of leave, or for want of conformity to the terms of leave, must be made before a District Court Judge before the trial, and if the District Court Judge is satisfied that leave has not been granted, or that the terms thereof have not been conformed to, the District Court Judge must either—

New Zealand provided the following explanations, examples and case law:

There are no general immunities or jurisdictional privileges accorded to New Zealand public officials for the offences established in accordance with this Convention. Where a New Zealander holds diplomatic or consular immunity they may be exempt from criminal jurisdiction in the place where that act or omission took place, but they could still be prosecuted as if the act had occurred in New Zealand. They may also be captured by offences for which New Zealand claims extraterritorial jurisdiction, including offences established in accordance with this Convention.

#### **(b) Observations on the implementation of the article**

There are no general immunities or jurisdictional privileges in New Zealand. To prosecute a Minister of the Crown or a Member of Parliament for bribery, the leave of a judge of the High Court is required following provisions of section 102(3) and 103(3) of the Crimes Act 1961. To prosecute other public officials for bribery or passive trading in influence, and for the prosecution of bribery in the private sector, the leave of the Attorney-General is required (section 106 of the CA and section 12, SCA).

#### **(c) Successes and good practices**

The absence of immunities or jurisdictional privileges in New Zealand was highlighted as a good practice in the implementation of article 30, paragraph 2 of the Convention.

#### **Paragraph 3 of article 30**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions and provided additional information:

The Solicitor-General's Prosecution Guidelines ensure that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values. These values aim to achieve consistency and common standards in key decisions and trial practices.

The Serious Fraud Office has also published the Guide to SFO Prosecutions which provide more tailored information about investigations and prosecutions for corruption offences.

### **Criminal Procedure Act**

#### **176 Stay of proceedings**

- (1) The Attorney-General may, at any time after a person has been charged with an offence and before judgment is given, direct that the proceedings be stayed.
- (2) If a direction is given under subsection (1), the relevant proceedings are stayed.
- (3) If a charge is filed against the Crown Law Office in respect of an offence referred to in section 6 of the Crown Organisations (Criminal Liability) Act 2002, any decision to issue a direction under subsection (1) in respect of the proceedings to which the charge relates must be made by the Attorney-General personally.
- (4) The Attorney-General must give notice to the court if he or she gives a direction under subsection (1), but failure to give notice does not affect that direction.

#### **(b) Observations on the implementation of the article**

New Zealand applies the principle of opportunity (part 5, Crown Law Prosecution Guidelines (CLPG)). The Attorney-General can stay proceedings (sect. 176 CA). While there is no statutory plea bargaining system; however, the prosecutor can indicate the starting point of the sentence suggested by the prosecution.

#### **Paragraph 4 of article 30**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

##### **Bail Act 2000**

##### **8 Consideration of just cause for continued detention**

(1) In considering whether there is just cause for continued detention, the court must take into account-

(a) whether there is a risk that-

(i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or

(ii) the defendant may interfere with witnesses or evidence; or

(iii) the defendant may offend while on bail; and

(b) any matter that would make it unjust to detain the defendant.

(2) In considering whether there is just cause for continued detention under subsection (1), the court may take into account the following:

(a) the nature of the offence with which the defendant is charged, and whether it is a grave or less serious one of its kind:

(b) the strength of the evidence and the probability of conviction or otherwise:

(c) the seriousness of the punishment to which the defendant is liable, and the severity of the punishment that is likely to be imposed:

(d) the character and past conduct or behaviour, in particular proven criminal behaviour, of the defendant:

(e) whether the defendant has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions:

(f) the likely length of time before the matter comes to hearing or trial:

(g) the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody:

(h) any other special matter that is relevant in the particular circumstances.

(3) [Repealed]

(4) When considering an application for bail, the court must take into account any views of a victim of an offence of a kind referred to in section 29 of the Victims' Rights Act 2002, or of a parent or legal guardian of a victim of that kind, conveyed in accordance with section 30 of that Act.

(4A) When considering an application for bail, the court must not take into account the fact that the defendant has provided, or may provide, information relating to the investigation or prosecution of any offence, including any offence committed or alleged to have been committed by the defendant.

(4B) However, despite subsection (4A), the court may take into account the cooperation by the defendant with authorities in the investigation or prosecution of any offence if that cooperation is relevant to the court's assessment of the risk that the defendant will fail to appear in court, interfere with witnesses or evidence, or offend while on bail.

(5) In deciding, in relation to a defendant charged with an offence against section 49 of the Domestic Violence Act 1995, whether or not to grant bail to the defendant or allow the defendant to go at large, the court's paramount consideration is the need to protect the victim of the alleged offence.

### **13 Exercise of discretion when considering bail pending sentencing**

(1) If a defendant is found guilty or if a defendant pleads guilty, the court must not grant bail unless it is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.

(2) The onus is on the defendant to show cause why bail should be granted.

(3) When considering the interests of justice under subsection

(1), the court may, instead of the considerations in section 8, take into account the following considerations:

(a) whether the defendant is likely to receive a sentence of imprisonment:

(b) the likely length of time that will pass before the defendant is sentenced:

(c) the personal circumstances of the defendant and the defendant's immediate family:

(d) any other consideration that the court considers relevant.

(4) If the defendant is unlikely to receive a sentence of imprisonment, this must count against the defendant being remanded in custody.

(4A) Despite being satisfied that it would otherwise be in the interests of justice to grant bail, the court may remand the defendant in custody for the purpose described in subsection (4B) if it is satisfied that-

(a) the defendant has breached a condition of bail imposed under section 30(3A); and (b) there is no other reasonable means to achieve the purpose described in subsection (4B).

(4B) The purpose referred to in subsection (4A) is to ensure that the defendant takes the steps necessary for the proceedings to be progressed within a reasonable time frame.

### **14 Exercise of discretion when considering bail pending appeal**

(1) If a person is in custody or subject to a sentence of home detention under a conviction and is appealing the conviction or sentence, or both, the court must not grant bail unless it is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.

(2) The onus is on the appellant to show cause why bail should be granted.

(3) When considering the interests of justice under subsection (1) the court may, instead of the

considerations in section 8, take into account the following considerations:

- (a) the apparent strength of the grounds of appeal:
- (b) the length of the sentence that has been imposed on the appellant:
- (c) the likely length of time that will pass before the appeal is heard:
- (d) the personal circumstances of the appellant and the appellant's immediate family:
- (e) any other consideration that the court considers relevant.

New Zealand provided the following explanations, examples and case law:

Bail laws in New Zealand do not place additional restrictions on the granting of bail specifically for corruption-related offences. The court must release such persons on reasonable terms unless it is satisfied that there is “just cause” for their continued detention. In determining whether “just cause” exists, a court must take into account whether there is a risk that the person may fail to appear in court, interfere with witnesses or evidence, or offend while on bail.

The other factors the court may take into account when making this assessment include:

- the seriousness of the offence with which the person has been charged
- the seriousness of the punishment that could be imposed
- the strength of the evidence
- the person’s character and past conduct, particularly proven criminal behaviour
- whether the person has a history of offending while on bail
- the likely length of time before the matter goes to trial or a hearing, and
- any other special matter relevant to the circumstances.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the Bail Act (sect. 8) takes into consideration the need to ensure the presence of the defendant in proceedings.

#### **Paragraph 5 of article 30**

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Sentencing Act 2002**

### **93 Imposition of conditions on release of offender sentenced to imprisonment for short term**

- (1) A court that sentences an offender to a term of imprisonment of 12 months or less may impose the standard conditions and any special conditions on the offender and, if it does so, must specify when the conditions expire.
- (2) If a court sentences an offender to a term of imprisonment of more than 12 months but not more than 24 months,-
  - (a) the standard conditions apply to the offender until the sentence expiry date, unless the court specifies otherwise; and sections 94, 95, and 96 apply as if the standard conditions had been imposed by order of the court; and
  - (b) the court may at the same time impose any special conditions on the offender and, if it does so, must specify when the conditions expire.
- (2A) The court may specify that conditions imposed under this section expire on-
  - (a) the sentence expiry date; or
  - (b) the date that is a specified period before the sentence expiry date; or
  - (c) the date that is a specified period of up to 6 months after the sentence expiry date.
- (2AB) If the court imposes special conditions on an offender, the special conditions may apply for as long as, but no longer than, the standard conditions apply to the offender.
- (2B) In this section,-sentence expiry date has the meaning given to it in section 4 of the Parole Act 2002 special conditions includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than an electronic monitoring condition as referred to in section 15(3)(f) of that Act, or a residential restriction condition as referred to in section 15(3)(ab) of that Act standard conditions means the conditions set out in section 14(1) of the Parole Act 2002.
- (3) A special condition must not be imposed unless it is designed to-
  - (a) reduce the risk of reoffending by the offender; or

- (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender.
- (4) No offender may be made subject to a special condition that requires the offender to take prescription medication unless the offender-
- (a) has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
  - (b) consents to taking the prescription medication.
- (5) If a court sentences an offender to a term of imprisonment of more than 24 months, it must not impose conditions on the offender's release from imprisonment (and section 18(2) of the Parole Act 2002 applies).
- (6) A court must not impose conditions on an offender's release from imprisonment if-
- (a) the court sentences an offender to an indeterminate sentence of imprisonment; or
  - (b) the court sentences an offender to imprisonment who is already subject to an indeterminate sentence of imprisonment.
- (7) [Repealed]
- (8) If the court sentences the offender to more than 1 term of imprisonment on the same occasion,-
- (a) only 1 order under this section may be made; and
  - (b) that order applies in respect of all the sentences of imprisonment imposed on that occasion.

## **Parole Act 2002**

### **7 Guiding principles**

- (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
- (2) Other principles that must guide the Board's decisions are-
  - (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more

onerous, or last longer, than is consistent with the safety of the community; and

- (b) that offenders must, subject to any of sections 13 to 13AE, be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and
- (c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and
- (d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.

(3) When any person is required under this Part to assess whether an offender poses an undue risk, the person must consider both-

- (a) the likelihood of further offending; and
- (b) the nature and seriousness of any likely subsequent offending.

#### **43 Preparation for hearings**

(1) When an offender is due to be released at his or her statutory release date, or to be considered by the Board for parole, the Department of Corrections must provide the Board with-

- (a) copies of all relevant information relating to the offender's current and previous convictions, including (for example) sentencing notes and pre-sentence reports; and
- (b) if the offender has engaged in any restorative justice processes, any reports arising from those processes; and
- (c) in the case of an offender detained in a prison, a report by the Department of Corrections; and
- (d) [Repealed]
- (e) in the case of an offender currently detained in, or on leave from, a hospital, a report from the responsible clinician (or the most suitable other health professional to provide such a report) concerning the offender and any care programmes that the hospital has put, or intends to put, in place for the offender; and
- (ea) in the case of an offender currently detained in, or on leave from, a secure facility, a report from the compulsory care co-ordinator concerning the offender and the care and rehabilitation plan that has been, or is to be, put in place for the offender; and

(f) in the case of an offender currently detained in a social welfare residence (as described in section 11), a report from the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989.

(2) The Board must take all reasonable steps to give notice to the following people that a hearing is pending:

(a) the offender:

(b) every victim of the offender:

(c) the manager of the prison in which the offender is detained (if applicable):

(d) [Repealed]

(e) the Director of Area Mental Health Services (in the case of an offender currently detained, or on leave from, in a hospital):

(ea) the compulsory care co-ordinator (in the case of an offender currently detained in, or on leave from, a secure facility):

(f) the Police.

(2A) When, under subsection (2)(b), the Board gives notice to a victim that a hearing is pending, the Board must also prepare and send to the victim an explanation of the hearing process and how the victim may participate in that process.

(3) If the hearing relates to an offender who is subject to a long-term sentence, any victim who is notified must be advised that he or she may request information on the offender under section 44.

(4) A failure to notify any person listed in subsection (2)(b) to (f), and a failure to obtain all the information referred to in subsection (1)(a), does not invalidate a hearing.

(5) Any person notified under subsection (2) may write to the Board, by a given date, making submissions on, or giving information relevant to, the substantive matter to be decided.

(6) For the purpose of providing the reports required under subsection (1)(e) and (f), the responsible clinician (or other health professional) referred to in subsection (1)(e), or the chief

executive referred to in subsection (1)(f) (as the case may be), must, on request by the chief executive, supply a report on the relevant offender to the chief executive as required.

New Zealand provided the following explanations, examples and case law:

Persons sentenced to less than two years are released after serving half of their sentence. They are not seen by the Parole Board but may be subject to release conditions imposed by the court that sentenced them.

Unless the court has imposed a longer minimum non-parole period, all persons serving sentences of more than two years become eligible for parole after serving one-third of their sentence. The Parole Board will be supplied with information about the offender, including information on the offender's current and previous convictions. The paramount consideration for early release or parole is the safety of the community, and the Board must also consider the views of victims and the likelihood of future offending.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that the Parole Act establishes that the Parole Board must make its decisions on the basis of all information available to it, which includes information on the gravity of the offence (sect. 7).

#### **Paragraph 6 of article 30**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **States Sector Act 1988**

#### **57 Commissioner may set minimum standards of integrity and conduct**

(1) The Commissioner may set minimum standards of integrity and conduct that are to apply in-

(a) the Public Service:

(b) all or any Crown entities (except for tertiary education institutions and Crown

Research Institutes and any of their subsidiaries):

(ba) companies named in Schedule 4A of the Public Finance Act 1989: (c) the Parliamentary Counsel Office:

(d) the Parliamentary Service.

(2) The Commissioner may set those minimum standards by issuing a code of conduct and applying it to any agency referred to in subsection (1), by written notice to the agency.

(3) The Commissioner may apply a code to any agency or agencies referred to in subsection (1), or to any particular persons or groups of persons undertaking particular functions in such an agency or agencies, with any variations that the Commissioner thinks appropriate in light of the legal, commercial, or operational context of the agency or agencies or of the persons or groups of persons.

(4) The Commissioner's functions include providing advice and guidance to the State services (except Crown Research Institutes and their subsidiaries) on matters, or at times, that affect the integrity and conduct of those within the State services (including, for example, on the interpretation of relevant standards and on the application of a code of conduct in specific cases).

#### **57B Breaches of minimum standards**

The Commissioner may advise the responsible Minister if, in the opinion of the Commissioner, a serious breach of any minimum standard applied to an agency under section 57 has occurred, or is likely to occur.

#### **67 Application to Public Service of Employment Relations Act 2000**

Except as otherwise provided in this Act, the Employment Relations Act 2000 applies in relation to the Public Service.

New Zealand provided the following explanations, examples and case law:

The State Services Commissioner has the power to set minimum standards of integrity and conduct and apply a code of conduct to agencies. Agencies can develop additional or detailed standards if they are consistent with the Commissioner's standards. The Code of Conduct for the State services requires all State servants operate with the highest levels of competence and integrity, including acting lawfully (see: <<http://www.ssc.govt.nz/code>>). Changes to the State Sector Act in 2013 have expanded the application of the Code to include contractors who work in the business of the agency.

Once an agency has been notified in writing by the Commissioner that the code applies to it, the agency, including its employees, is legally required to comply. The legal obligation applies whether or not the code of conduct is mentioned in the terms and conditions of employment agreements.

Most agencies also have internal policies that guide staff on appropriate behaviours and conduct. Breaches of those policies may result in disciplinary action or dismissal. In New Zealand, it is the Employment Relations Authority (ERA), as part of the Judicial branch of government. Section 67 of the State Sector Act provides that the ERA generally applies to the public service. The ERA has exclusive jurisdiction to make determinations about employment relationship problems generally, including disputes about the operation of employment agreements, breaches of an employment agreement and personal grievances: section 161 of the ERA. All employees, as defined in the ERA, are entitled to all the fair process provisions set out in the ERA.

### **(b) Observations on the implementation of the article**

The States Sector Act (sect. 57B) contains provisions regarding the breach of minimum standards by a public official.

However, the reviewing experts noted that there were no statutory provisions establishing the removal, suspension or reassignment of public officials accused of having committed an offence. Internal codes of conduct establish the applicable disciplinary sanctions.

Therefore, it is recommended that New Zealand consider establishing clear procedures to remove, suspend or reassign public officials accused of having committed offences established in accordance with the Convention.

### **Subparagraph 7 (a) of article 30**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office;*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Electoral Act 1993**

#### **47 Registered electors may be members, unless disqualified**

(1) Subject to the provisions of this Act, every person who is registered as an elector of an electoral district, but no other person, is qualified to be a candidate and to be elected a member

of Parliament, whether for that electoral district, any other electoral district or as a consequence of the inclusion of that person's name in a party list submitted pursuant to section 127.

(2) Notwithstanding anything in subsection (1), if a person is disqualified for registration as an elector, that person shall not be qualified to be a candidate or to be elected.

(3) Regardless of anything in subsection (1), a person is not qualified to be a candidate or to be elected unless he or she is a New Zealand citizen.

## **55 How vacancies created**

(1) The seat of any Member of Parliament shall become vacant-

(a) if, otherwise than by virtue of being a head of mission or head of post within the meaning of the Foreign Affairs Act 1988, for one whole session of Parliament he or she fails, without permission of the House of Representatives, to give his or her attendance in the House; or

(b) if he or she takes an oath or makes a declaration or acknowledgement of allegiance, obedience, or adherence to a foreign State, foreign Head of State, or foreign Power, whether required on appointment to an office or otherwise; or

(c) if he or she does or concurs in or adopts any act whereby he or she may become a subject or citizen of any foreign State or Power, or entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power; or

(ca) if he or she ceases to be a New Zealand citizen; or

(cb) if he or she accepts nomination as, or otherwise agrees to be, a candidate for election, or agrees to appointment as-

(i) a member of Parliament (or other governing body) of a country, State, territory, or municipality, in any country other than New Zealand; or

(ii) a member of any governing body of any association of countries, States, territories, or municipalities exercising governing powers, of which New Zealand is not a member (for example, the European Union); or

(d) if he or she is convicted of an offence punishable by imprisonment for life or by 2 or more years' imprisonment, or is convicted of a corrupt practice, or is reported by the High Court in its report on the trial of an election petition to have been proved guilty of a corrupt practice; or

(e) if he or she becomes a public servant; or

(ea) if he or she is appointed as a Returning Officer; or

(f) if he or she resigns his or her seat by signing a written notice that is addressed and delivered to the Speaker; or

(g) if on an election petition the High Court or Court of Appeal declares his or her election void; or

- (h) if he or she dies; or
- (i) if he or she becomes mentally disordered, as provided in section 56.
- (j) [Repealed]

(2) Notwithstanding anything in subsection (1)(c), where a Member of Parliament marries a

person who is a subject or citizen of a foreign State or Power and the laws of that foreign State or Power confer on that member of Parliament by reason of that marriage, citizenship of that foreign State or Power or the rights, privileges, or immunities of a subject or citizen of that foreign State or Power, the seat of a member of Parliament shall not become vacant by reason only of the marriage.

## **80 Disqualifications for registration**

(1) The following persons are disqualified for registration as electors:

(a) a New Zealand citizen who (subject to subsection (3)) is outside New Zealand and has not been in New Zealand within the last 3 years:

(b) a permanent resident of New Zealand (not being a New Zealand citizen) who (subject to subsection (3)) is outside New Zealand and has not been in New Zealand within the last 12 months:

(c) a person who is detained in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a secure facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and to whom one of the following applies:

(i) the person has been found by a court or a Judge to be unfit to stand trial within the meaning of the Criminal Procedure (Mentally Impaired Persons) Act 2003, or has been acquitted on account of his or her insanity, and (in either case) is detained under an order or direction under section 24 or section 31 or section 33 of that Act or under the corresponding provisions of the Criminal Justice Act 1985 and has been so detained for a period exceeding 3 years:

(ii) the person has been found by a court, on conviction of any offence, to be mentally impaired, and is detained under an order made under section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or section 118 of the Criminal Justice Act 1985, and has been so detained for a period exceeding 3 years:

(iii) the person is subject to, and has for a period exceeding 3 years been subject to, a compulsory treatment order made following an application under section 45(2) of the Mental Health (Compulsory Assessment and Treatment) Act 1992

or a compulsory care order made following an application under section 29(1) of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:

(iv) the person is detained under section 46 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, and is a person to whom paragraph (d) would otherwise apply:

(d) a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010:

(e) a person whose name is on the Corrupt Practices List made out for any district.

(2) The Registrar of the court in which any compulsory treatment order or any order under section 24 or section 34 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 is made or any person is convicted of a corrupt practice shall, not later than the fifth day of the month next succeeding the date of the order or conviction, forward to the Registrar of Electors of the electoral district in which the patient or offender was residing a certificate showing the name, place of abode, and description of the patient or offender and particulars of the order or conviction.

(3) Nothing in subsection (1)(a) or (b) applies to-

(a) a person, being-

(i) a public servant or a member of the Defence Force; or

(ii) a head of mission or head of post within the meaning of the Foreign Affairs Act 1988, who is outside New Zealand in the course of that person's duties; or

(iii) an officer or employee of New Zealand Trade and Enterprise established by the New Zealand Trade and Enterprise Act 2003; or

(b) a person who-

(i) is accompanying a person described in subparagraph (i) or subparagraph (ii) or subparagraph (iii) of paragraph (a) who is outside New Zealand in the course of that person's duties; and

(ii) is the spouse, civil union partner, de facto partner, or child of the person referred to in subparagraph (i), or the child of the spouse, civil union partner, or de facto partner of that person.

## **100 Corrupt Practices List**

(1) Where it is proved before the Registrar for any district that any person who is registered or who applies for registration as an elector of the district has, within the immediately preceding period of 3 years,-

(a) been convicted of a corrupt practice; or

(b) been reported by the High Court in its report on the trial of an election petition to have been proved guilty of a corrupt practice,-

the Registrar shall enter the name, residence, and description of that person and particulars of the conviction or report on a list to be called the Corrupt Practices List.

(2) The Registrar shall remove the name of every person from the Corrupt Practices List at the expiration of 3 years from the date of the conviction or report in respect of which his or her name is entered on the list, or sooner if so ordered by the High Court.

(3) Whenever a main roll is printed for the district, a copy of the Corrupt Practices List for the district shall be appended to it and printed and published with it.

(4) Whenever a supplementary roll is printed for the district, a copy of so much of the Corrupt Practices List as has not been printed with the main roll or any existing supplementary roll for the district shall be appended to the supplementary roll and printed and published with it.

## **Local Government Act 2002**

### **Schedule 7 Local authorities, local boards, community boards, and their members Part 1 Provisions relating to local authorities and their members**

#### **1 Disqualification of members**

(1) A person's office as member of a local authority is vacated if the person, while holding office as a member of the local authority,-

(a) ceases to be an elector or becomes disqualified for registration as an elector under the Electoral Act 1993; or

(b) is convicted of an offence punishable by a term of imprisonment of 2 years or more.

(2) If subclause (1)(b) applies,-

(a) the disqualification does not take effect-

(i) until the expiration of the time for appealing against the conviction or decision; or

(ii) if there is an appeal against the conviction or decision, until the appeal is determined; and (b) the person is deemed to have been granted leave of absence until the expiration of that time, and is not capable of acting as a member during that time.

(3) A person may not do an act as a member while disqualified under subclause (1) or while on leave of absence under subclause (2).

## **2 Ouster of office of member**

(1) On proof by affidavit that a member of a local authority is, or has become, or was at the date of appointment or election, incapable of holding office under this Act, a District Court may call on that person to show cause why he or she should not be adjudged to be ousted from office.

(2) If a District Court concludes that the member is or was incapable of holding office, the court may adjudge that person to be ousted from office and that member is ousted from office accordingly.

(3) In proceedings under this clause, the District Court may exercise all the powers and authorities that it may exercise in its ordinary jurisdiction in civil cases, and the procedure of the court applies generally, so far as practicable.

(4) No matter in relation to a disputed appointment or election is to be heard by a District Court under this clause.

(5) If a District Court adjudges that a member be ousted from his or her office, -

(a) the decision is not to take effect -

(i) until the expiration of the time for appealing against the decision; or

(ii) if there is an appeal against the decision, until the appeal is determined; and

(b) the person is deemed to have been granted leave of absence until the expiration of that time, and is not capable of acting as a member during that time.

(6) The person may not do an act as a member while on leave of absence under subclause (5).

## **Local Electoral Act 2001**

### **Section 25 Candidate qualifications**

(1) Every parliamentary elector is qualified to be a candidate at every election to be held under this Act if that person is a New Zealand citizen.

(3) This section is subject to section 58.

New Zealand provided the following examples and case law:

The Electoral Act 1993 provides that the seat of any Member of Parliament will become vacant if they are convicted of an offence punishable by two or more years' imprisonment. This includes offences in

New Zealand law established in accordance with the Convention. The Local Government Act 2002 provides that the same standard applies to people elected to office in a local authority.

The Electoral Act also deems a range of corrupt acts in relation to the electoral system to be a “corrupt practice”. Corrupt practices are generally those acts of corruption which will pose a serious threat to the integrity of the electoral process, such as personation, bribery, or treating.

If a person is convicted of a corrupt practice under the Electoral Act they may be disqualified from enrolling as an elector for a period of three years. Where a person is disqualified as an elector they may not be a candidate or elected to Parliament. That disqualification carries over to local government elections also, by virtue of the Local Electoral Act 2001. Where a Member of Parliament is convicted of a corrupt practice, their seat will become vacant.

Before appointing public servants, departments will make a number of employment checks, including a criminal record check. Previous offences would form part of the consideration, particularly for serious criminal offences.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that a conviction for an offence established in accordance with the Convention does not result automatically to a disqualification to hold a public office.

Only the Electoral Acts provide that Members of Parliament convicted for an offence by two or more years imprisonment or for corrupt practices are removed from office (sect. 55 (2) d Electoral Act).

It is recommended that New Zealand consider regulating the disqualification of persons convicted of offences established in accordance with the Convention from holding public office.

#### **Subparagraph 7 (b) of article 30**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*[...]*

*(b) Holding office in an enterprise owned in whole or in part by the State.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Sentencing Act 2002**

## **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court-

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

## **Parole Act 2002**

### **15 Special conditions**

- (1) The Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on an offender.
- (2) A special condition must not be imposed unless it is designed to-
  - (a) reduce the risk of reoffending by the offender; or
  - (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender; or
  - (d) comply, in the case of an offender subject to an extended supervision order, with an order of the court, made under section 107IAC, to impose an intensive monitoring condition.
- (3) The kinds of conditions that may be imposed as a special condition include, without limitation,-
  - (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
  - (ab) residential restrictions:
  - (b) conditions requiring the offender to participate in a programme (as defined in section 16)
    - to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:
  - (c) conditions that the offender not associate with any person, persons, or class of persons:
  - (d) conditions requiring the offender to take prescription medication:
  - (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:
  - (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions, or conditions of an extended supervision order, that relate to the whereabouts of the offender:

(g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

(3A) If the Board imposes on an offender special conditions relating to residential restrictions (specified under subsection (3)(ab)), -

(a) the offender's probation officer must define the area of the residence specified under section 33(2)(a) within which the offender must remain and show that area to the offender and advise every relevant occupant (as defined in section 34(4)) of the residence of that area; and

(b) the offender must remain within that area.

(4) No offender may be made subject to a special condition that requires the offender to take prescription medication unless the offender-

(a) has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and

(b) consents to taking the prescription medication.

(c) An offender does not breach his or her conditions for the purposes of section 71 if he or she withdraws consent to taking prescription medication, but the failure to take the medication may give rise to a ground for recall set out in section 61.

## **Companies Act**

### **382 Persons prohibited from managing companies**

(1) Where—

(a) a person has been convicted of an offence in connection with the promotion, formation, or management of a company (being an offence that is punishable by a term of imprisonment of not less than 3 months); or

(b) a person has been convicted of an offence under any of sections 377 to 380 or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961,—

(c) [Repealed]

that person shall not, during the period of 5 years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company, unless that person first obtains the leave of the court which may be given on such terms and conditions as the court thinks fit.

(2) A person intending to apply for the leave of the court under this section shall give to the Registrar not less than 10 days' notice of that person's intention to apply.

(3) The Registrar, and such other persons as the court thinks fit, may attend and be heard at the hearing of any application under this section.

(4) A person who acts in contravention of this section, or of any order made under this section, commits an offence and is liable on conviction to the penalty set out in section 373(4).

(5) In this section, the term company includes an overseas company that carries on business in New Zealand.

New Zealand provided the following explanations, examples and case law:

Standard conditions are imposed on all sentences and orders managed by the Department of Corrections. The sentencing court and New Zealand Parole Board can impose standard conditions of release as part of a sentence or as part of parole.

Standard conditions apply to all offenders and can include:

- reporting regularly to community probation
- restrictions on living and working arrangements
- restrictions on associating with certain people, and
- limitations on the offender's ability to move to a new residential address.

Along with standard conditions, the courts and the New Zealand Parole Board may also impose special conditions for all sentences and orders - except for community work and imprisonment.

These conditions are designed to reduce the risk of re-offending by the offender, help the rehabilitation and/or reintegration of the offender and provide for reasonable concerns from the offender's victim. Special conditions can include:

- restricting an offender to a specific residential address
- attending an assessment and complete various rehabilitation programmes
- making sure the offender does not associate with specified person/s or groups of persons
- taking prescription medicine
- prohibiting entering or remaining in specified places or areas, and
- imposing electronic monitoring to restrict an offender's movements for a specific period of time.

**Department of Corrections Annual Report 2014/15**

Corrections reduces re-offending by providing offenders with opportunities for rehabilitation and reintegration through five outputs: case management, rehabilitation, training and education, offender employment and reintegration. Providing these opportunities allows offenders to have the skills and support to lead law-abiding lives after the end of their sentence or order.

Case management focuses on planning and managing a prisoner's rehabilitation and reintegration needs which are reflected in a high quality offender plan for each individual.

Rehabilitation challenges behaviours that lead to offending. When appropriate programmes and pathways are made available and offenders are motivated to take part in them, there is a better chance that they will successfully reintegrate into the community at the end of their sentence or order.

Corrections provides training and education that supports offenders to address lifelong learning barriers and gain recognised qualifications and employment experience.

Offender employment opportunities provided by Corrections look to develop work habits, experience, training and skills, increasing offenders' chances for post-release employment.

Reintegration services managed by Corrections focus on creating pathways for people integrating back into the community, by assisting them to address employment, accommodation, living skills, health/wellbeing, community links and other reintegration needs.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that a conviction for certain offences established in accordance with the Convention disqualified the offender from being director or involved in the management of a company, including a vast majority of State-owned enterprises.

However, this is limited to the scope of section 382 of the Companies Act.

Therefore, it is recommended that New Zealand consider regulating disqualification of persons convicted of Convention offences from holding office in an enterprise owned in whole or in part by the State, beyond the scope of section 382 Companies Act.

#### **Paragraph 8 of article 30**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that, as explained under article 30, paragraph 6 of the Convention, disciplinary and criminal sanctions were not mutually exclusive and could both be imposed for the same offence. Proceedings for disciplinary and criminal matters can run in parallel.

## **(b) Observations on the implementation of the article**

The experts determined that disciplinary and criminal sanctions were not mutually exclusive and could both be imposed for the same offence. Proceedings for disciplinary and criminal matters can run in parallel.

### **Paragraph 10 of article 30**

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Sentencing Act 2002**

#### **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court-

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in

accordance with the hierarchy of sentences and orders set out in section 10A; and

- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

## **Parole Act 2002**

### **15 Special conditions**

- (1) The Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on an offender.
- (2) A special condition must not be imposed unless it is designed to-
  - (a) reduce the risk of reoffending by the offender; or
  - (b) facilitate or promote the rehabilitation and reintegration of the offender; or
  - (c) provide for the reasonable concerns of victims of the offender; or
  - (d) comply, in the case of an offender subject to an extended supervision order, with an order of the court, made under section 107IAC, to impose an intensive monitoring condition.
- (3) The kinds of conditions that may be imposed as a special condition include, without limitation,-
  - (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
  - (ab) residential restrictions:
  - (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:

(c) conditions that the offender not associate with any person, persons, or class of persons:

(d) conditions requiring the offender to take prescription medication:

(e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:

(f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions, or conditions of an extended supervision order, that relate to the whereabouts of the offender:

(g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

(3A) If the Board imposes on an offender special conditions relating to residential restrictions (specified under subsection (3)(ab)), -

(a) the offender's probation officer must define the area of the residence specified under section 33(2)(a) within which the offender must remain and show that area to the offender and advise every relevant occupant (as defined in section 34(4)) of the residence of that area; and

(b) the offender must remain within that area.

(4) No offender may be made subject to a special condition that requires the offender to take prescription medication unless the offender-

(a) has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and

(b) consents to taking the prescription medication.

(5) An offender does not breach his or her conditions for the purposes of section 71 if he or she withdraws consent to taking prescription medication, but the failure to take the medication may give rise to a ground for recall set out in section 61.

New Zealand provided the following explanations, examples and case law:

Standard conditions are imposed on all sentences and orders managed by the Department of Corrections. The sentencing court and New Zealand Parole Board can impose standard conditions of release as part of a sentence or as part of parole.

Standard conditions apply to all offenders and can include:

- reporting regularly to community probation
- restrictions on living and working arrangements
- restrictions on associating with certain people, and
- limitations on the offender's ability to move to a new residential address.

Along with standard conditions, the courts and the New Zealand Parole Board may also impose special conditions for all sentences and orders - except for community work and imprisonment.

These conditions are designed to reduce the risk of re-offending by the offender, help the rehabilitation and/or reintegration of the offender and provide for reasonable concerns from the offender's victim. Special conditions can include:

- restricting an offender to a specific residential address
- attending an assessment and complete various rehabilitation programmes
- making sure the offender does not associate with specified person/s or groups of persons
- taking prescription medicine
- prohibiting entering or remaining in specified places or areas, and
- imposing electronic monitoring to restrict an offender's movements for a specific period of time.

### **Department of Corrections Annual Report 2014/15**

Corrections reduces re-offending by providing offenders with opportunities for rehabilitation and reintegration through five outputs: case management, rehabilitation, training and education, offender employment and reintegration. Providing these opportunities allows offenders to have the skills and support to lead law-abiding lives after the end of their sentence or order.

Case management focuses on planning and managing a prisoner's rehabilitation and reintegration needs which are reflected in a high quality offender plan for each individual.

Rehabilitation challenges behaviours that lead to offending. When appropriate programmes and pathways are made available and offenders are motivated to take part in them, there is a better chance that they will successfully reintegrate into the community at the end of their sentence or order.

Corrections provides training and education that supports offenders to address lifelong learning barriers and gain recognised qualifications and employment experience.

Offender employment opportunities provided by Corrections look to develop work habits, experience,

training and skills, increasing offenders' chances for post-release employment.

Reintegration services managed by Corrections focus on creating pathways for people integrating back into the community, by assisting them to address employment, accommodation, living skills, health/wellbeing, community links and other reintegration needs.

### **(b) Observations on the implementation of the article**

The Parole Act and the Sentencing Act foresee measures to promote the reintegration of offenders into society.

## **Article 31. Freezing, seizure and confiscation**

### **Paragraph 1 of article 31**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

- (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*
- (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Criminal Proceeds (Recovery) Act 2009**

##### **3 Purpose**

- (1) The primary purpose of this Act is to establish a regime for the forfeiture of property-
  - (a) that has been derived directly or indirectly from significant criminal activity; or
  - (b) that represents the value of a person's unlawfully derived income.
- (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to-
  - (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
  - (b) deter significant criminal activity; and

- (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
- (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

## **5 Interpretation**

(1) In this Act, unless the context otherwise requires,-

instrument forfeiture order means an order made under section 142N of the Sentencing Act 2002

instrument of crime means-

- a. property used (wholly or in part) to commit or facilitate the commission of a qualifying instrument forfeiture offence; and
- b. in relation to a qualifying instrument forfeiture offence that is an offence against section 8(1) or (2A) of the Terrorism Suppression Act 2002, includes funds (as defined in section 4(1) of that Act) allocated for the purposes of committing that offence; and
- c. in relation to any property referred to in paragraphs (a) and (b), the proceeds of any disposition of that property or any other property into which that property is converted, after the commission of the qualifying instrument forfeiture offence, except to the extent provided otherwise by any order of a court under this Act or the Sentencing Act 2002, excluding any severable interest or granting relief

## **6 Meaning of significant criminal activity**

(1) (1) In this Act, unless the context otherwise requires, significant criminal activity means an activity engaged in by a person that if proceeded against as a criminal offence 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.

(2) A person is undertaking an activity of the kind described in subsection (1) whether or not-

- (a) the person has been charged with or convicted of an offence in connection with the activity; or
  - (b) the person has been acquitted of an offence in connection with the activity; or
  - (c) the person's conviction for an offence in connection with the activity has been quashed or set aside.
- (3) Any expenses or outgoings used in connection with an activity of the kind described in subsection (1) must be disregarded for the purposes of calculating the value of any property, proceeds, or benefits under subsection (1)(b).

### **7 Meaning of unlawfully benefited from significant criminal activity**

In this Act, unless the context otherwise requires, a person has unlawfully benefited from significant criminal activity if the person has knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in the significant criminal activity).

### **50. Making assets forfeiture order**

- (1) If, on an application for an assets forfeiture order, the High Court is satisfied on the balance of probabilities that specific property is tainted property, the Court must make an assets forfeiture order in respect of that specific property.
- (2) Subsection (1) is subject to [section 51](#).
- (3) The Court must specify in an assets forfeiture order the property to which the order applies and that the property—
  - (a) vests in the Crown absolutely; and
  - (b) is in the custody and control of the Official Assignee.
- (4) Despite subsection (1), the Court may not make an assets forfeiture order in relation to property that no person has claimed an interest in, unless the Court is satisfied, on the balance of probabilities, of the following additional matters:
  - (a) that a restraining order was earlier made in relation to the same property; and
  - (b) that the restraining order has been in place for a period of at least 1 year; and
  - (c) that the Commissioner has contacted or made all reasonable efforts to contact any person the Commissioner believes may have an interest in the property.

(5) If any property that is land is vested in the Crown absolutely as a consequence of an assets forfeiture order made under subsection (3), an interest recorded on the title to the land that is not affected by the assets forfeiture order is not extinguished.

### **55 Making profit forfeiture order**

(1) The High Court must make a profit forfeiture order if it is satisfied on the balance of probabilities that—

(a) the respondent has unlawfully benefited from significant criminal activity within the relevant period of criminal activity; and

(b) the respondent has interests in property.

(2) The order must specify—

(a) the value of the benefit determined in accordance with [section 53](#); and

(b) the maximum recoverable amount determined in accordance with [section 54](#); and

(c) the property that is to be disposed of in accordance with [section 83\(1\)](#), being property in which the respondent has, or is treated as having, interests.

(3) Subsections (1) and (2) are subject to [section 56](#).

(4) A profit forfeiture order is enforceable as an order made as a result of civil proceedings instituted by the Crown against the person to recover a debt due to it, and the maximum recoverable amount is recoverable from the respondent by the Official Assignee on behalf of the Crown as a debt due to the Crown.

### **70. Effect of instrument forfeiture order**

(1) An instrument forfeiture order made under [section 142N](#) of the Sentencing Act 2002 must specify the property to which the instrument forfeiture order relates and that the property—

(a) vests in the Crown absolutely; and

(b) is in the custody and control of the Official Assignee.

(2) If any property that is land is vested in the Crown absolutely as a consequence of an instrument forfeiture order made under subsection (1), an interest recorded on the title to the land that is not affected by the instrument forfeiture order is not extinguished.

## **Sentencing Act 2002**

### **142N Instrument forfeiture orders**

(1) Following a hearing under section 142K, the court may, if it is satisfied that the property described in the notice given under section 142B is an instrument of crime, order that the

instrument of crime or any part of it specified by the court be forfeited to the Crown.

(2) In considering whether or not to make an instrument forfeiture order under subsection (1) in respect of particular property, the court may have regard to-

- a. any matter raised in an application for relief under section 142J; and
- b. the use that is ordinarily made, or was intended to be made, of the instrument of crime; and
- c. any undue hardship that is reasonably likely to be caused to any person by the operation of such an order; and
- d. the nature and extent of the offender's interest in the instrument of crime (if any), and the nature and extent of any other person's interest in it (if any); and
- e. in addition to the matters referred to in section 77(1) of the Criminal Proceeds (Recovery) Act 2009, any other matter relating to the nature and circumstances of the qualifying instrument forfeiture offence or the offender, including the gravity of the qualifying instrument forfeiture offence.

(3) A court that makes an instrument forfeiture order may, if it considers that it is appropriate to do so, by order,-

- f. declare the nature, extent, and value of any person's interest in an instrument of crime; and
- g. declare that the instrument forfeiture order may, to the extent to which it relates to the interest, be discharged under section 85 of the Criminal Proceeds (Recovery) Act 2009.

(4) If the court orders that property (other than money) be forfeited to the Crown, the court must specify in the order the amount that it considers to be the value of the property at the time the order is made.

(5) If a court makes an instrument forfeiture order, the court may give any directions that are necessary or convenient for giving effect to the order.

New Zealand provided the following explanations, examples and case law:

The Criminal Proceeds (Recovery) Act 2009 (the CPRA) repealed and replaced the Proceeds of Crime Act 1991. The CPRA provides a regime for the forfeiture of property derived directly or indirectly from significant criminal activity.

The CPRA has three primary forfeiture orders:

- Instrument forfeiture, where a person has been convicted of a qualifying offence and property has been used in commission of the offence. Instrument forfeiture is discretionary where certain

circumstances are met;

- Assets forfeiture, whereby property tainted by significant criminal activity is forfeited to the Crown. Proceedings are civil and forfeiture is mandatory where certain circumstances exist; and
- Profit forfeiture, by which a person's untainted property is forfeited to the Crown where the person has unlawfully benefited from "significant criminal activity" and has an interest in property. Again, proceedings are civil and forfeiture is mandatory where certain prerequisites exist.

The threshold for "significant criminal activity" is an offence punishable by a maximum term of five years imprisonment or more. Under New Zealand law this covers all the offences established in accordance with this Convention.

There is also an alternative threshold for "significant criminal activity": offending from which "property", proceeds, or "benefits" of \$30,000 or more have been obtained. In that circumstance an order may be imposed even if the specific offences from which the property, proceeds or benefits were derived cannot be proved, or do not carry a maximum penalty of five years' imprisonment or more. See, for example, *Commissioner of Police v Li* [2014] NZHC 479 (respondent allegedly running a cheating service by selling university assignments to Chinese students).

New Zealand Police has been very successful in the application of the CPRA. Success can be attributed to the application of the Act across police nationally with specific targeting by the Police Asset Recovery Units (ARUs).

The ARUs were established in December 2009, specifically to implement the Criminal Proceeds (Recovery) Act 2009 (CPRA), which replaced the Proceeds of Crime Act 1991. There are four ARUs - Northern, Waikato/Bay of Plenty, Central, and Southern - based in Auckland, Hamilton, Wellington, and Christchurch, respectively. Each ARU is staffed by a number of sworn and Non-sworn investigators, forensic accountants, and financial analysts.

The predecessor to the CPRA, the Proceeds of Crime Act, only permitted the forfeiture of assets after a respondent had been convicted of a crime carrying a minimum prison sentence of five years. The CPRA, on the other hand, enables the proceeds of crime to be forfeited using the civil standard of proof ('balance of probabilities') rather than being dependent on securing a criminal conviction.

The CPRA also allows for the forfeiture of property that is regarded as an instrument of a crime if a conviction has been entered. This has been facilitated by amendments to the Sentencing Act 2002, which ensures that forfeiture is a mandatory consideration ahead of criminal sentencing.

The Financial Crime Group, via the ARUs, has an all of government mandate to undertake the restraint and forfeiture of criminally acquired or derived assets, not just for Police, but also for all government law enforcement agencies. These agencies include, but are not limited to, Inland Revenue, Customs, NZ Immigration, the Ministry of Social Development, the Serious Fraud Office, and ACC. The ARUs also work in conjunction with the Organised and Financial Crime Agency NZ (OFCANZ).

The intention of the CPRA is to disrupt, deter, and derail crime, especially in the areas of organised crime and methamphetamine offending. This is achieved by denying criminals the opportunity to either

enjoy the benefits of offending or to reinvest proceeds of crime in further criminal activity. This is crucial to crime prevention. Recent research conducted in Australia at the Institute of Social Science Research, University of Queensland (McFadden et al., 2014, 'Targeting the Profits of Illicit Trafficking through Proceeds of Crime Action') has concluded that every \$1 restrained or forfeited prevents crime to the value of \$3.5. Thus, if a case results in a forfeiture of \$500,000 of cash acquired through methamphetamine dealing crime to the value of \$1.75 million is prevented. Any deterrent effect that results from this forfeiture is an additional benefit.

New Zealand provided the following information on the amount of proceeds of offences established in accordance with this Convention confiscated:

Since 2009, an estimated NZD 318 million worth of assets has been scrutinised by the ARUs. Of that, an estimated NZD151 million worth is the subject of restraining orders and an estimated NZD 36.3m worth of assets has been forfeited to the Crown.

Any property which has a real connection with the offence, the use of which makes it easier to commit the offence, or more difficult for the police to detect, may be said to facilitate the offence (see *Solicitor-General v Piper [2004] DCR 22*).

Something more than an incidental link to the offence is likely to be required. For example, in *R v Bright [2013] NZHC 630*, “property used to facilitate the commission of the crime” was held to include property purchased for that purpose (cultivating cannabis) and also a second property owned by the offender over which a mortgage was given to secure a loan to purchase it where, but for the security over the second property, the first could not have been purchased.

Where part of a property is used to commit or to facilitate the commission of a qualifying offence, the whole of the property may be the subject of an instrument forfeiture or restraining order. When making an instrument forfeiture order the court may order that only specified parts of property used to commit or facilitate the commission of the offence be forfeited.

The Police Association, the body representing the interests of police staff, produces a monthly bulletin. This link <<https://www.policeassn.org.nz/system/files/file/2014-03.pdf>> is to an article (on page 42) celebrating the success of asset recovery.

#### **(b) Observations on the implementation of the article**

The experts noted that CPRA provides for the forfeiture of property derived as a result of “significant criminal activity” without the need for conviction. Significant criminal activity is defined as “activity engaged in by a person that if proceeded against as a criminal offence would amount to offending that consists of or includes one or more offences punishable by a maximum term of imprisonment of 5 years or more, or from which property, proceeds or benefits of a value of NZD 30,000 or more have, directly or indirectly, been acquired or derived” (sect. 6 CPRA).

Most Convention offences comply with these thresholds except for the specific offences established in accordance with article 25(b) of the Convention.

The experts further noted that forfeiture orders can be made (a) in relation to specific property (sects.

24 and 50, CPRA), if the court is satisfied that it has reasonable grounds to believe that the property is “tainted property”; and (b) in relation to all or part of the respondent’s property (sects. 25 and 55, CPRA), if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity; or (c) in relation to instruments used in the commission of an offence (sects. 26 and 70, CPRA, sect. 142N, SA). In particular, the Sentencing Act establishes conviction-based forfeiture of instruments used in the commission of “qualifying instrument forfeiture offences”, which are offences punishable by a maximum term of imprisonment of at least 5 years (sect. 142 N). However, instruments destined for use in the commission of offences established in accordance with the Convention are not subject to confiscation.

Therefore, it is recommended that New Zealand enable confiscation in relation to offences established in accordance with article 25 (b) of the Convention, as well as of instruments destined for use in the commission of offences established in accordance with the Convention.

### **(c) Successes and good practices**

The establishment of a civil forfeiture regime was considered a good practice in the implementation of article 31 of the Convention.

### **Paragraph 2 of article 31**

*2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Criminal Proceeds Recovery Act 2009**

##### **5 Interpretation**

##### **tainted property—**

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

#### **Criminal Proceeds Recovery Act 2009**

## **18 Applying for restraining order**

The following persons may apply for a restraining order:

- a. the Commissioner may apply for a restraining order of the kind described in section 24 or 25 (which relate to restraining specific property or all or part of a respondent's property):
- b. a prosecutor may apply for a restraining order of the kind described in section 26 (which relates to restraining an instrument of crime).

20 Court to which application for restraining order made

An application for a restraining order must be made to,-

- a. in the case of an application made under section 24 or 25, the High Court; and
- b. in the case of an application made under section 26,-
  - i. the High Court, if the offence with which the instrument of crime is associated is for a category 4 offence, or if an order has been made under section 68 or 70 of the Criminal Procedure Act 2011 transferring the proceedings in relation to the offence to the High Court:
  - ii. the District Court, if subparagraph (i) does not apply.

## **24 Making restraining order relating to specific property**

(1) A court hearing an application for a restraining order relating to specific property may, if the court is satisfied it has reasonable grounds to believe that any property is tainted property, make an order that the property (restrained property)-

- a. is not to be disposed of, or dealt with, other than is provided for in the restraining order; and
- b. is to be under the Official Assignee's custody and control.

(2) A restraining order may be made under subsection (1) whether or not there is a respondent in relation to whom the restraining order relates.

25 Making restraining order relating to all or part of respondent's property

- (1) A court hearing an application for a restraining order relating to all or part of a respondent's property may, if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity, make an order that the property it specifies in the order (restrained property)-
- a. is not to be disposed of, or dealt with, other than is provided for in the restraining order;  
and
  - b. is to be under the Official Assignee's custody and control.
- (2) A restraining order made under subsection (1) may relate to any of the following:
- a. all of a respondent's property (including property acquired after the making of the order):
  - b. specified parts of a respondent's property:
  - c. all of a respondent's property (including property acquired after the making of the order) other than specifically excluded property.

## **26 Making restraining order relating to instrument of crime**

- (1) A court hearing an application for a restraining order relating to an instrument of crime may, if either of the circumstances in paragraph (a) or (b) of subsection (2) exist, make an order that the property it specifies in the order (restrained property)-
- a. is not to be disposed of, or dealt with, other than is provided for in the restraining order;  
and
  - b. is to be under the Official Assignee's custody and control.
- (2) The circumstances are-
- a. that-
    - i. the respondent has been charged with a qualifying instrument forfeiture offence; and
    - ii. the court is satisfied it has reasonable grounds to believe that the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offence; or
  - b. that the court is satisfied it has reasonable grounds to believe-
    - i. that the respondent will be charged with a qualifying instrument forfeiture offence

- within 48 hours; and
- ii. that the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offence.

New Zealand provided the following explanations, examples and case law:

Each type of forfeiture order under the CPRA has an associated restraining order. Restraining orders are discretionary and the test for restraint is easier for the Commissioner of Police to satisfy than that for forfeiture as restraint is a temporary and protective mechanism (See: *Commissioner of Police v Vincent [2012] NZHC 2581* at [37]).

At restraint the court is not reaching final determinations, “[t]he judge is not required to make a finding that the relevant property is tainted property or that the particular person did in fact unlawfully benefit from significant criminal activity.” (See *Vincent v Commissioner of Police [2013] NZCA 412* at [45]).

New Zealand Police has four dedicated ARUs consisting of 48 staff specifically established to implement the CPRA. New Zealand Police, via the ARUs, has an all-of-government mandate to undertake the restraint and forfeiture of criminally acquired or derived assets, not just for Police, but also for all government law enforcement agencies.

#### **(b) Observations on the implementation of the article**

The experts noted that CPRA provides for the restraint of property derived as a result of “significant criminal activity” without the need for conviction. Significant criminal activity is defined as “activity engaged in by a person that if proceeded against as a criminal offence would amount to offending that consists of or includes one or more offences punishable by a maximum term of imprisonment of 5 years or more, or from which property, proceeds or benefits of a value of NZD 30,000 or more have, directly or indirectly, been acquired or derived” (sect. 6 CPRA).

Restraining orders can be made in the following situations:

- (a) In relation to specific property if the court is satisfied that it has reasonable grounds to believe that the property is “tainted property”;
- (b) In relation to all or part of the respondent’s property if the court is satisfied it has reasonable grounds to believe that the respondent has unlawfully benefited from significant criminal activity; or
- (c) In relation to instruments used in the commission of an offence. The latter does not apply to instruments destined for use in the commission of an offence.

As for the preceding paragraph of the Convention, it is recommended that New Zealand enable seizure in relation to offences established in accordance with article 25 (b) of the Convention and of instruments destined for use in Convention offences.

#### **Paragraph 3 of article 31**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other*

*measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

**Criminal Proceeds Recovery Act 2009**

**103. Commissioner to transfer property to Official Assignee**

If any property is seized pursuant to a warrant issued under [section 101](#) or [102\(1\)](#) (other than documents or other material believed to be evidence establishing the nature and extent of any person's interest in or control over an instrument of crime or any other property), the Commissioner must arrange for the property to be placed in the custody and control of the Official Assignee as soon as practicable after it is seized, unless otherwise directed by the court that issued the warrant.

**111 Official Assignee to hold property**

If property is seized pursuant to a warrant issued under [section 110](#), or transferred to the Official Assignee under [section 103](#), the Official Assignee must arrange for the property to be kept until it is dealt with in accordance with another provision of this Act.

**113 Retention of seized property if forfeiture order made**

(1) Subsection (2) applies if—

(a) any property is seized pursuant to a warrant issued under [section 110](#) or is transferred to the Official Assignee under [section 103](#); and

(b) but for this subsection, the Official Assignee would be required, under [section 112](#), to arrange for any property to be returned to a person as soon as practicable after the expiry of a restraining order or the determination of an application for a forfeiture order; and

(c) at, or before, the end of that period, a forfeiture order is made in relation to the property.

(2) If a forfeiture order is made in respect of any property that is in the possession of the Official Assignee under [section 111](#) or subsequently comes into the possession of the Official Assignee, the Official Assignee must deal with the property as required by the order.

**(b) Observations on the implementation of the article**

**Paragraphs 4, 5 and 6 of article 31**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other*

*property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Criminal Proceeds Recovery Act 2009**

**5 Interpretation**

**tainted property—**

(c) means any property that has, wholly or in part, been—

(i) acquired as a result of significant criminal activity; or

(ii) directly or indirectly derived from significant criminal activity; and

includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity

**Convert** means, in relation to property, to change it from one form to another, whether by sale or by some other means (for example, selling a car and buying a boat with the proceeds of the sale)

**12 Conversion of restrained property and foreign restrained property**

(1) Restrained property converted into another form (**converted property**) remains restrained property for the purposes of the restraining order to which it is subject and for the purposes of any forfeiture order made in relation to that property, despite the converted property not having been the property that was originally restrained.

(2) Foreign restrained property converted into another form (**converted property**) remains foreign restrained property for the purposes of any foreign restraining order registered in New Zealand and for the purposes of any foreign forfeiture order registered in New Zealand in relation to that property, despite the converted property not having been the property that was originally restrained.

**50 Making assets forfeiture order**

(1) If, on an application for an assets forfeiture order, the High Court is satisfied on the balance of probabilities that specific property is tainted property, the Court must make an assets forfeiture order in respect of that specific property.

(2) Subsection (1) is subject to [section 51](#).

(3) The Court must specify in an assets forfeiture order the property to which the order applies and that the property—

(a) vests in the Crown absolutely; and

(b) is in the custody and control of the Official Assignee.

(4) Despite subsection (1), the Court may not make an assets forfeiture order in relation to property that no person has claimed an interest in, unless the Court is satisfied, on the balance of probabilities, of the following additional matters:

(a) that a restraining order was earlier made in relation to the same property; and

(b) that the restraining order has been in place for a period of at least 1 year; and

(c) that the Commissioner has contacted or made all reasonable efforts to contact any person the Commissioner believes may have an interest in the property.

(5) If any property that is land is vested in the Crown absolutely as a consequence of an assets forfeiture order made under subsection (3), an interest recorded on the title to the land that is not affected by the assets forfeiture order is not extinguished.

## **55 Making profit forfeiture order**

(1) The High Court must make a profit forfeiture order if it is satisfied on the balance of probabilities that—

(a) the respondent has unlawfully benefited from significant criminal activity within the relevant period of criminal activity; and

(b) the respondent has interests in property.

(2) The order must specify—

(a) the value of the benefit determined in accordance with [section 53](#); and

(b) the maximum recoverable amount determined in accordance with [section 54](#); and

(c) the property that is to be disposed of in accordance with [section 83\(1\)](#), being property in which the respondent has, or is treated as having, interests.

(3) Subsections (1) and (2) are subject to section 56.

(4) A profit forfeiture order is enforceable as an order made as a result of civil proceedings instituted by the Crown against the person to recover a debt due to it, and the maximum recoverable amount is recoverable from the respondent by the Official Assignee on behalf of the Crown as a debt due to the Crown.

New Zealand provided the following explanations, examples and case law:

In August 2016 the High Court has made assets forfeiture orders in respect of property to the total value of NZD 42.85 million relating to a single case.

This is the single largest forfeiture that has occurred in New Zealand to date and is the first that relates to crimes alleged to have occurred in China.

The activity underlying the forfeiture orders is alleged money laundering.

This settlement is a full and final settlement of the proceedings under the CPRA without any admission of criminal or civil liability.

Proceedings were commenced in August 2014. Restraining orders were obtained over various items of property associated with the couple, including a penthouse apartment in central Auckland, a number of luxury vehicles, and substantial shareholdings.

Related proceedings were initiated in December 2013 against two associates of the prime offender. They were alleged to have assisted in money laundering and various property associated with them was restrained, including three Auckland properties, a Porsche and Maserati, and over \$4.5 million bank funds.

Once the settlement sum has been paid, the restrained properties, vehicles, shareholdings and third party assets will be released from the restraining orders.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that tainted property (sect. 5, CPRA) includes property derived as a result of significant criminal activity that has been transformed or converted. Forfeiture of an asset that has been partially acquired with property derived from significant criminal activity and partially with property acquired from legitimate sources is also possible, as well as forfeiture of any benefits or income derived from any such properties.

#### **Paragraph 7 of article 31**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this*

*paragraph on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Criminal Proceeds (Recovery) Act 2009**

**104 Application for production order**

- (1) The Commissioner may apply to a Judge for a production order under section 105 if the Commissioner has reason to believe that a person has possession or control of documents that are relevant to an investigation by the Commissioner under this Act or to any proceedings under this Act.
- (2) Every application under this section must be made in the manner provided in relation to a search warrant in sections 99 and 100 of the Search and Surveillance Act 2012, and must contain the following particulars:
  - a. the grounds on which the application is made:
  - b. a description of the document or documents production of which is sought:
  - c. a description of the property or other thing or type of property or other thing to which the document or documents are believed to relate.
- (3) Every person commits an offence who makes an application for a production order that contains any assertion or other statement known by the person to be false.
- (4) Every person who commits an offence against subsection (3) is liable on conviction to imprisonment for a term not exceeding 1 year.

**105 Court may make production order**

- (1) If an application is made under section 104, the Judge may, if satisfied that the Commissioner has reasonable grounds for applying for the order, make an order that the person-
  - a. produce to the Commissioner any specified document or class of documents of the kind referred to in section 104(1) that are in the person's possession or control while the order is in force; or
  - b. make available to the Commissioner, for inspection, any specified document or class of documents of that kind that are in the person's possession or control while the order is in

force.

(2) Every production order must contain the following particulars:

a. the grounds on which the order is issued:

b. a description of the document or documents production of which is required:

c. a description of the property or other thing or type of property or other thing to which the document or documents are believed to relate.

(3) An order made under subsection (1) is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made).

(4) A Judge must not make an order under subsection (1) unless the application contains, or the applicant otherwise supplies to the Judge, any information that the Judge requires concerning the grounds on which the order is sought.

(5) If any document is produced under this section, the Commissioner may do any one or more of the following things:

a. retain the original document produced for as long as is reasonably necessary for the purposes of this Act, provided that a copy of the document is taken and returned as soon as practicable after the document is produced:

b. take copies of the document, or of extracts from the document:

c. if necessary, require the person producing the document to reproduce, or to assist any person nominated by the Commissioner to reproduce, in usable form, any information recorded or stored in the document.

(6) If any person is required to produce any document under this section and fails to do so, the Commissioner may require that person to state to the best of his or her knowledge or belief where the document is.

### **106 Application for examination order**

(1) The Commissioner may apply to a Judge for an examination order under section 107 if the Commissioner has reason to believe that a person is able-

a. to answer questions with respect to any matter that the Commissioner has reason to believe may be relevant to the investigation or to any proceedings under this Act:

- b. to supply any information with respect to any matter that the Commissioner has reason to believe may be relevant to the investigation or to any proceedings under this Act:
  - c. to produce for inspection any documents that the Commissioner has reason to believe are in the person's possession or control or may be relevant to the investigation or to any proceedings under this Act.
- (2) Every application under this section must be made in the manner provided in relation to a search warrant in sections 99 and 100 of the Search and Surveillance Act 2012, and must contain the following particulars:
- a. the grounds on which the application is made:
  - b. a description of the information that is sought:
  - c. a description of the document or documents production of which is sought.
- (3) Every person commits an offence who makes an application for an examination order that contains any assertion or other statement known by the person to be false.
- (4) Every person who commits an offence against subsection (3) is liable on conviction to imprisonment for a term not exceeding 1 year.

**107 Power to require attendance before Commissioner, production of documents, etc.**

- (1) If an application is made under section 106, the Judge may, if satisfied that the Commissioner has reasonable grounds to apply for the examination order, make an order that the person do 1 or more of the things specified in subsection (3) at the time and place specified in the order.
- (2) An order under subsection (1) must contain the following particulars:
- a. the provision under which the order is made:
  - b. a description of the information that is sought:
  - c. a description of the document or documents production of which is sought:
  - d. a description of the property or other thing or type of property or other thing to which the document or documents are believed to relate.
- (3) The things referred to in subsection (1) are-
- a. to attend before the Commissioner:

- b. to answer questions with respect to any matter that the Commissioner has reason to believe may be relevant to the investigation or to any proceedings under this Act:
  - c. to supply any information specified in the order with respect to any matter that the Commissioner has reason to believe may be relevant to the investigation or to any proceedings under this Act:
  - d. to produce for inspection any documents that are specified in the order and that the Commissioner has reason to believe are in the person's possession or control and may be relevant to the investigation or to any proceedings under this Act.
- (4) If any document is produced under this section, the Commissioner may do any one or more of the following things:
- a. retain the original document produced for as long as is reasonably necessary for the purposes of this Act, provided that a copy of the document is taken and returned as soon as practicable after the document is produced:
  - b. take copies of the document, or of extracts from the document:
  - c. require the person producing the document to provide an explanation of the history, subject matter, and contents of the document and to answer any other questions that arise from that explanation and that the Commissioner has reason to believe may be relevant to the investigation:
  - d. if necessary, require the person producing the document to reproduce, or to assist any person nominated by the Commissioner to reproduce, in usable form, any information recorded or stored in the document.
- (5) If any person is required to produce any document under this section and fails to do so, the Commissioner may require that person to state, to the best of his or her knowledge and belief, where the document is.
- (6) If any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection (4) apply in all respects to that document.
- (6) Any person who is required to attend before the Commissioner under this section must, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a lawyer to accompany him or her.

## **Serious Fraud Office Act**

## **23 Act to apply to persons with duty of confidentiality to clients**

(1) The Director may require any person who claims to have a duty of confidentiality to his or her client or customer (including, without limiting the generality of the foregoing, any person carrying on the business of banking)—

- (a) to comply with any requirement imposed under Part 1 or Part 2; and
- (b) in particular, but without limiting the generality of the foregoing, to answer questions, supply information, and produce documents relating to any person whose affairs are being investigated under this Act,—

and sections 5, 6, 9, and 10 shall apply in all respects to any such person, and to the registers, records, accounts, books, or papers of any such person in so far as the Director has reason to believe that they may be relevant to the investigation.

(2) This section shall apply subject to section 24, but notwithstanding any other enactment or rule of law or equity.

New Zealand provided the following explanations, examples and case law:

The CPRA allows for the Commissioner of Police to apply to the court for production orders and examination orders. There is a degree of overlap between production orders and examination orders.

Production orders may require that a person either “produce” a specified document or class of documents or “make available” such a document. It is unclear what the difference is, if any, between these two terms. The Commissioner may retain the document, provided that a copy is taken and returned as soon as practicable; copy the document; and/or require the person producing the document to reproduce, or to assist in the reproduction, of any information recorded or stored in the document.

Examination orders may require persons subject to them to produce for inspection specified documents that may be relevant to an investigation or to proceedings and may also require persons to answer questions about the whereabouts of those documents.

There is no general financial secrecy provision in New Zealand legislation. Institutions such as banks may legally release information to law enforcement agencies in the interests of maintenance of law (Privacy Act 1993, s6, Principle 10) and under search warrants (Search and Surveillance Act 2102, section 6).

### **(b) Observations on the implementation of the article**

The experts noted that bank records can be seized based on a judicial order, in accordance with sections 104 and 105 CPRA.

### **Paragraph 8 of article 31**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful*

*origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Criminal Proceeds (Recovery) Act 2009**

**35 Types of further order**

Without limiting the generality of section 34(1), a court may, on an application under section 33(1), make 1 or more of the following further orders in relation to restrained property:

- a. an order varying the restrained property to which a restraining order relates:
- b. an order varying any condition to which a restraining order is subject:
- c. an order for any person (including, without limitation, the respondent) to be examined by the court or the registrar of the court concerning the nature and location of any restrained property:
- d. an order relating to the carrying out of any undertaking given under section 29:
- e. an order relating to the Official Assignee that-
  - i. regulates the manner in which the Official Assignee may exercise his or her powers or perform his or her duties under a restraining order:
  - ii. determines any question relating to the restrained property (including any question relating to the liabilities of any person holding an interest in the restrained property), or the exercise of the powers, or the performance of the duties, of the Official Assignee:
  - iii. requires the examination, before the Official Assignee, of any person holding an interest in the restrained property or any other person, concerning the nature and location of the restrained property:
  - iv. directs any person holding an interest in the restrained property to furnish the Official Assignee, within the time specified in the order, with a statement on oath setting out any particulars of that interest or that property that the court thinks fit:
  - v. directs the Official Assignee to sell restrained property (including, without

limitation, a business) in order to preserve the value of the restrained property:

- vi. directs the Official Assignee to make mortgage payments or payments in respect of any other encumbrance from the restrained property

### **36 Impact of certain further orders**

(1) A person to whom an order made under section 35(c) or (e)(iii) or (iv) applies, is not excused from answering any question, or furnishing any information, on the ground that compliance with that requirement could or would tend to incriminate that person or subject that person to any penalty or forfeiture.

(2) An examination by the Official Assignee under an order made under section 35(e)(iii) is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

(3) A person required to be examined under an order made under section 35(c) or (e)(iii) must, before being required to comply with any requirements imposed by the order, be given a reasonable opportunity to arrange for a lawyer to accompany the person.

(4) The proceeds of a sale resulting from an order made under section 35(e)(v) are restrained property, despite the proceeds from the sale not being the property that the court originally restrained.

### **166 Admissibility of evidence given to court or Official Assignee**

(1) Subsection (2) applies if-

- a. any person is examined before a court, or a registrar of a court, or the Official Assignee, pursuant to an order made under this Act; or
- b. any person is required to furnish to the Official Assignee a statement on oath.

(2) If this subsection applies-

- a. any self-incriminating statement or disclosure made by the person in response to the question or any self-incriminating statement furnished in response to the requirement is not admissible against that person in any civil or criminal proceedings, other than-
  - i. a proceeding for giving false evidence in the course of the examination or, as the case may require, for making any false statement in any statement so furnished; or

- ii. the prosecution of that person for an offence against section 108 of the Crimes Act 1961 (which relates to perjury) or under this Act in relation to any evidence given by the person that is inconsistent with the statement or disclosure; or
  - iii. the proceedings in relation to which the statement was made or the document was given:
- b. any other evidence provided by the person is admissible in civil or criminal proceedings, subject to any enactment or rule of law to the contrary.

New Zealand provided the following explanations, examples and case law:

New Zealand does not have unexplained wealth laws - where the burden of proof is placed explicitly on the defendant to demonstrate the legitimacy of any wealth - primarily due to lack of evidence of a need for these laws.

While New Zealand does not have unexplained wealth laws, the CPRA, as explained above, establishes a civil forfeiture regime that enables New Zealand authorities to register restraining and forfeiture orders in relation to criminal proceeds. The CPRA regime is also accessible by foreign jurisdictions through a mutual assistance request.

The applicant has the onus of establishing facts which provide the basis for the court to draw the inference as a logical and reasonable conclusion that unexplained bank deposits were the fruits of criminal activity. In *Commissioner of Police v He* the Court indicated that the use of investigative powers, such as the use of examination orders to question the respondent about his or her financial affairs would be expected, rather than treating income as “unverified” or “unexplained”.

However, a person who is required to answer questions about the nature and location of restrained property under an examination order may not refuse to answer those questions because of self-incrimination. But any statement or disclosure made during the examination is admissible in subsequent proceedings only in the limited range of circumstances specified in section 166.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that offenders were not required to demonstrate the lawful origin of alleged proceeds of crime. However, the experts noted the introduction of civil forfeiture proceedings, which had been recognized as a good practice, had lowered the required evidentiary standards for such proceedings under the CPRA.

#### **Paragraph 9 of article 31**

*9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*

(a) **Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Criminal Proceeds (Recovery) Act 2009**

**30 Excluding severable interest from restrained property**

- (1) A person (other than the respondent) who has a severable interest in proposed restrained property or restrained property may apply to the court that is to consider, or has considered, the application for a restraining order to have that person's severable interest excluded from-
  - a. a restraining order that the court may make; or
  - b. a restraining order the court has made.
- (2) The court must exclude a severable interest from proposed restrained property or restrained property at, or after, the time a restraining order is made if the applicant proves on the balance of probabilities-
  - a. that the applicant has an interest in the property to which the restraining order relates; and
  - b. if the order was or is to be made under section 24 or 25, that the applicant has not unlawfully benefited from the significant criminal activity to which the restraining order relates; and
  - c. if the order was or is to be made under section 26, that the applicant was not involved in the qualifying instrument forfeiture offence to which the restraining order relates.
- (3) The court may exclude a severable interest from proposed restrained property or restrained property at, or after, the time a restraining order is made if it considers that it is in the public interest to do so, having regard to all the circumstances, including, without limitation,-
  - a. any undue hardship that is reasonably likely to be caused to any person by the severable interest in property being made or having been made restrained property:
  - b. the gravity of the significant criminal activity or qualifying instrument forfeiture offence with which the property in which the person has a severable interest is associated:
  - c. the likelihood that the interest will become subject to a forfeiture order.

**31 Excluding severable interest from restrained property when applicant mortgagee**

- (1) Subsection (2) applies if-

- a. an applicant to exclude a severable interest from proposed restrained property or restrained property under section 30(1) is a mortgagee; and
  - b. as a result of the mortgagee's application, a court excludes the mortgagee's interest; and
  - c. the property that is the subject of the mortgage is sold in order to exclude the mortgagee's interest from the restrained property.
- (2) If this subsection applies, any proceeds resulting from the sale of the property that are payable to the mortgagor are, if the restraining order is made, restrained property, despite the proceeds from the sale not being property that the court originally restrained.

## **Sentencing Act 2002**

### **142L Court may grant relief from instrument forfeiture order to applicant who establishes interest in property**

- (1) This section applies if—
- (a) a person applies to the court under section 142J for relief from an instrument forfeiture order in respect of an interest in property on the ground set out in section 77(1)(a) of the Criminal Proceeds (Recovery) Act 2009; and
  - (b) the court is satisfied, following a hearing under section 142K, that the applicant has established on the balance of probabilities that the applicant—
    - (i) has an interest in the property to which the instrument forfeiture order relates; and
    - (ii) was not involved in the qualifying instrument forfeiture offence to which the order relates.
- (2) If this section applies, the court must make an order—
- (a) declaring the nature, extent, and value of the applicant's interest in the property; and
  - (b) either—
    - (i) directing the Crown to transfer the interest to the applicant; or
    - (ii) declaring that there is payable by the Crown to the applicant an amount equal to the value of the interest declared by the court; or
    - (iii) directing that the interest not be included in an instrument forfeiture order made in respect of the proceedings that gave rise to the application; or
    - (iv) determining, in accordance with section 142N, not to make an instrument forfeiture order.
- (3) Despite subsection (2), the court may, but is not required to, refuse to make an order under subsection (2) if it is satisfied that—
- (a) the applicant was, in any respect, involved in the commission of the offence in respect of which forfeiture of the property is or was under consideration; or
  - (b) if the applicant acquired the interest at the time of or after the commission of the offence, the applicant did not acquire the interest in the property in good faith and for value.

(4) The court must not make an order under subsection (2)(b)(ii) unless it is satisfied that it cannot reasonably make an order under subsection (2)(b)(i) or (iii) (for example, because the interest of the applicant is not severable from the other property in question).

New Zealand provided the following explanations, examples and case law:

The CPRA allows a person other than the respondent who has a severable interest in property that has been (or may become) subject to a restraining order to apply to have that interest excluded from the order.

There are two types of severance order under section 30 of the CPRA. First, the court must exclude a severable interest if the applicant proves (on the balance of probabilities) that they have that interest, have not unlawfully benefited from the “significant criminal activity”, or were not involved in the “qualifying instrument forfeiture offence” to which the restraining order relates.

In *Commissioner of Police v Briggs [2012] NZHC 2324* at [41], where the innocent third parties owned land on which a house had been built in part with the proceeds of crime, there was no severable interest that could be excluded from the restraining order.

The court may still exclude a severable interest if it is in the public interest even when an applicant cannot prove the grounds listed above.

Police cooperate with banks as both a source for reporting suspicious transactions and often as parties to mortgage agreements. This cooperation means that early in the case investigation such interested parties are identified. This allows section 31 of the CPRA to be administered relatively easily.

#### **(b) Observations on the implementation of the article**

The reviewing experts noted the protection of interests of bona fide third parties as provided in particular by sections 30 and 31 CPRA and section 142 L Sentencing Act.

### **Article 32. Protection of witnesses, experts and victims**

#### **Paragraph 1 of article 32**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Evidence Act 2006**

## **110 Pre-trial witness anonymity order**

- (1) This section and section 111 apply if a person is charged with a category 3 or 4 offence.
- (2) At any time after the person is charged, the prosecution or the defendant may apply to a Judge for an order-
  - (a) excusing the applicant from disclosing to the other party before the trial the name, address, and occupation of any witness, and (except with the leave of the Judge) any other particulars likely to lead to the witness's identification; and
  - (b) excusing the witness from stating in any formal statement, or in giving oral evidence in accordance with an oral evidence order, his or her name, address, and occupation, and (except with leave of the Judge) any other particulars likely to lead to the witness's identification.
- (3) The Judge must hear and determine the application in chambers, and-
  - (a) the Judge must give each party an opportunity to be heard on the application; and
  - (b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.
- (4) The Judge may make the order if he or she believes on reasonable grounds that-
  - (a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed before the trial; and
  - (b) withholding the witness's identity until the trial would not be contrary to the interests of justice.
- (5) Without limiting subsection (4), in considering the application, the Judge must have regard to-
  - (a) the general right of a defendant to know the identity of witnesses; and
  - (b) the principle that witness anonymity orders are justified only in exceptional circumstances; and
  - (c) the gravity of the offence; and
  - (d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) whether it is practical for the witness to be protected prior to the trial by any other means;  
and

(f) whether there is other evidence that corroborates the witness's evidence.

(6) A pre-trial witness anonymity order may be made-

(a) by a District Court Judge who holds a warrant under the District Courts Act 1947 to conduct jury trials;

(b) if the preliminary hearing is held in a Youth Court, by a Judge referred to in section 274(2)(a) of the Children, Young Persons, and Their Families Act 1989:

(c) by a High Court Judge.

### **111 Effect of pre-trial witness anonymity order**

If a pre-trial witness anonymity order is made under section 110,—

(a) the party who applied for the order must give the Judge the name, address, and occupation of the witness; and

(b) no formal statement filed under the Criminal Procedure Act 2011 may disclose the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification; and

(c) during the giving of oral evidence before the trial,—

(i) no lawyer, officer of the court, or other person involved in that process may disclose the name, address, or occupation of the witness, or any other particular likely to lead to the witness's identification; and

(ii) no oral evidence may be given, and no question put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and

(iii) except with the leave of the Judge, no oral evidence may be given, and no question put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and

(d) no person may publish, in any report or account relating to the proceeding, the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification.

### **112 Witness anonymity order for purpose of High Court trial**

(1) This section and section 113 apply if a person is charged with a category 3 or 4 offence.

(2) The prosecution or the defendant may apply to a High Court Judge for a witness anonymity order under this section.

(3) The Judge must hear and determine the application in chambers, and-

(a) the Judge must give each party an opportunity to be heard on the application; and

(b) neither the party supporting the application nor the witness need disclose any information that might disclose the witness's identity to any person (other than the Judge) before the application is dealt with.

(4) The Judge may make a witness anonymity order if satisfied that-

(a) the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and

(b) either-

(i) there is no reason to believe that the witness has a motive or tendency to be dishonest, having regard (where applicable) to the witness's previous convictions or the witness's relationship with the defendant or any associates of the defendant; or

(ii) the witness's credibility can be tested properly without disclosure of the witness's identity; and

(c) the making of the order would not deprive the defendant of a fair trial.

(5) Without limiting subsection (4), in considering the application, the Judge must have regard to-

(a) the general right of a defendant to know the identity of witnesses; and

(b) the principle that witness anonymity orders are justified only in exceptional circumstances; and

(c) the gravity of the offence; and

(d) the importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) whether it is practical for the witness to be protected by any means other than an anonymity order; and

(f) whether there is other evidence that corroborates the witness's evidence.

### **113 Effect of witness anonymity under section 112**

If a witness anonymity order is made under section 112,—

(a) the party who applied for the order must give the Judge the name, address, and occupation of the witness; and

(b) the witness may not be required to state in court his or her name, address, or occupation; and

(c) during the course of the trial no lawyer, officer of the court, or other person

involved in the proceeding may disclose—

- (i) the name, address, or occupation of the witness; or
  - (ii) except with leave of the Judge, any other particulars likely to lead to the witness's identification; and
- (d) during the course of the trial—
- (i) no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to the name, address, or occupation of the witness who is subject to the order; and
  - (ii) except with leave of the Judge, no oral evidence may be given, and no question may be put to any witness, if the evidence or question relates to any other particulars likely to lead to the identification of the witness who is subject to the order; and
- (e) no person may publish, in any report or account relating to the proceedings, the name, address, or occupation of the witness, or any other particulars likely to lead to the witness's identification.

#### **114 Trial to be held in High Court if witness anonymity order made**

(1) In any case where a witness who may be called to give evidence in a criminal trial is the subject of a witness anonymity order made under section 112, the trial must be held in the High Court.

(2) *[Repealed]*

(3) This section has effect despite anything in the Criminal Procedure Act 2011.

#### **118 Witness in Police witness protection programme**

If, at any time after the events that are the subject of a charge, a witness under a Police witness protection programme assumes a new identity, the witness may not be required in any proceeding concerning the charge to disclose his or her assumed name or any particulars likely to disclose his or her new identity.

### **Courts (Remote Participation) Act 2010**

#### **5. General criteria for allowing use of audio-visual links**

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

- (a) the nature of the proceeding:
- (b) the availability and quality of the technology that is to be used:
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—
  - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and
  - (ii) the level of contact with other participants:

(d) any other relevant matters.

## **6. Additional criteria for allowing use of audio-visual links in criminal proceedings**

A judicial officer or Registrar must also consider, when he or she is required to determine under this Act whether or not to allow the use of AVL for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing, and, in particular,—

(a) the ability of the defendant—

(i) to comprehend the proceedings; and

(ii) to participate effectively in the conduct of his or her defence; and

(iii) to consult and instruct counsel privately; and

(iv) to access relevant evidence; and

(v) to examine the witnesses for the prosecution; and

(b) the level of contact the defendant has with other participants; and

(c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.

New Zealand provided the following examples and case law:

Sections 110-119 of the Evidence Act substantially re-enact ss -13B13J of the Evidence Act 1908, which were introduced in 1997. These provisions govern the giving of evidence by anonymous witnesses.

### **(b) Observations on the implementation of the article**

New Zealand, proportionately with the gravity of the crime and the general right of a defendant to know the identity of witnesses, provides efficient protection for witnesses, experts and their immediate family or acquaintances.

### **Paragraph 2 of article 32**

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(a) Establishing procedures for the physical protection of such persons, such as, to the extent*

*necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

*(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Evidence Act 2006**

**Sections 110 – 114** (*quoted above under article 32, paragraph 1 of the Convention*)

**116 Judge may make orders and give directions to preserve anonymity of witness**

(1) A Judge who makes an order under section 110 or 112 may, for the purposes of the giving of oral evidence in accordance with an oral evidence order or the trial (as the case may be), also make any orders and give any directions that the Judge considers necessary to preserve the anonymity of the witness, including (without limitation) 1 or more of the following directions:

- (a) that the court be cleared of members of the public;
- (b) that the witness be screened from the defendant;
- (c) that the witness give evidence by closed-circuit television or by video link.

(2) In considering whether to give directions concerning the mode in which the witness is to give his or her evidence in accordance with an oral evidence order or at the trial, the Judge must have regard to the need to protect the witness while at the same time ensuring a fair hearing for the defendant.

(3) This section does not limit—

- (a) section 365 of the Criminal Procedure Act 2011 (which confers power to deal with contempt of court); or
- (b) section 197 of the Criminal Procedure Act 2011 (which confers power to clear the court); or
- (c) any power of the court to direct that evidence be given, or to permit evidence to be given, by a particular mode.

**118 Evidence act**

If, at any time after the events that are the subject of a charge, a witness under a Police witness protection programme assumes a new identity, the witness may not be required in any proceeding concerning the charge to disclose his or her assumed name or any particulars likely to disclose his or her new identity.

**Criminal Procedure Act 2011**

## **84 Persons who may give evidence under assumed name**

(1) An undercover Police officer (within the meaning of section 108 of the Evidence Act 2006)-

(a) may make a formal statement in the name by which the officer was known during the relevant investigation; and

(b) may authenticate that statement, or any record of evidence prepared under section 99, in that name.

(2) A witness who is the subject of an application for an anonymity order made under section 110 or 112 of the Evidence Act 2006, or who is the subject of an anonymity order made under either of those sections,-

(a) may make a formal statement using the term “witness” followed by an initial or mark; and

(b) may authenticate that statement, or any record of evidence prepared under section 99 in that manner.

(3) This section overrides any contrary provision in this subpart.

## **Courts (Remote Participation) Act 2010**

### **5 General criteria for allowing use of audio-visual links**

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

(a) the nature of the proceeding:

(b) the availability and quality of the technology that is to be used:

(c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including-

(i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and

(ii) the level of contact with other participants:

(d) any other relevant matters.

## **6 Additional criteria for allowing use of audio-visual links in criminal proceedings**

A judicial officer or Registrar must also consider, when he or she is required to determine under this Act whether or not to allow the use of AVL for the appearance of any participant in a criminal proceeding, the potential impact of the use of the technology on the effective maintenance of the right of the defendant to a fair trial, and on his or her rights associated with the hearing, and, in particular,-

(a) the ability of the defendant-

(i) to comprehend the proceedings; and

(ii) to participate effectively in the conduct of his or her defence; and

(iii) to consult and instruct counsel privately; and

(iv) to access relevant evidence; and

(v) to examine the witnesses for the prosecution; and

(b) the level of contact the defendant has with other participants; and

(c) any adverse impression that may arise through the defendant or any other participant appearing by means of AVL, and whether that adverse impression may be mitigated.

New Zealand provided the following explanations, examples and case law:

Sections 110-119 of the Evidence Act provide for witnesses to give evidence anonymously. The Criminal Procedure Act makes related provision for witnesses to make formal statements anonymously.

The Courts (Remote Participation) Act enables the wider use of audiovisual links in New Zealand courts. The Act sets out criteria that must be applied to any decision to use video links. These criteria are specifically designed to protect the fair trial rights of defendants and other participants in the court process.

Section 5 sets out general criteria that must be considered in any decision to use video links at any type of proceeding. The court must examine the nature of the proceeding, including whether it is procedural or a substantive matter. The court must also look at the technology available and how use of that technology will affect all participants in the case. Section 5 also enables the court to take into account any other relevant matters.

In criminal proceedings, section 6 provides additional criteria that must be considered, which relate to the defendant's right to a fair trial and the defendant's ability to comprehend the proceedings, participate in the defence, consult and instruct counsel privately, access relevant evidence, and

examine witnesses for the prosecution.

New Zealand also referred to the New Zealand Police Witness Protection Programme Standard Operating Procedures and indicated that all measures were taken in accordance with NZ Police Witness Protection Programme Standard Operating Procedures and adhere to the Victims' Rights Act 2002.

The Witness Protection Programme was established to protect witnesses, who can be any person who:

- has given, or who has agreed to give, evidence on behalf of the Crown in any proceedings and as a result is the subject of threats, intimidation or violence
- may require protection or assistance under the Witness Protection Programme because of their relationship to, or association with such a person
- may require protection or other assistance under the Witness Protection Programme, for any other reason.

For the purposes of the Witness Protection Programme a witness is a person who is required to give evidence in relation to a serious crime which in these circumstances is:

- any offence against the person punishable by seven years or more imprisonment
- any class A or B drug-dealing offence
- any offence for which a substantial period of imprisonment is likely.

In August 2015, the Manukau District Court, one of New Zealand's biggest courts was upgraded, including the provision of new secure witness technology to protect witnesses from direct contact with defendants.

NZ Police Witness Protection Programme Standard Operating Procedures are well established in relation to enabling a witness to give evidence.

Standard Operating Procedures are to be followed and risk assessments are to be completed when assessing potential candidates for the Programme. This includes ensuring security for the witness is provided and that staff maintain confidentiality.

The protection procedures are dictated by risk assessments and the circumstances of the witness. The test for what level of protection will be provided to a witness is simply what is 'fair and reasonable' in the circumstances.

Witnesses must not financially profit nor suffer unduly from the witness protection programme.

The Witness Protection Programme may apply to any witness once assessed and accepted onto the programme. Protection may need to be extended to the immediate family or acquaintances of a witness

in some cases.

### **(b) Observations on the implementation of the article**

The Evidence Act 2006 (EvA) allows for the anonymity of witnesses in relation to trials for category 3 and 4 offences (sects. 110-114). In addition, to preserve the anonymity of certain witnesses, judges can order a variety of measures, including the giving of evidence by video-link (sect. 116 EvA, sects. 5, 6 Courts (Remote Participation) Act 2010) or screened off from the defendant, or in closed court (sect. 116 EvA).

A comprehensive witness protection programme administered by the police is available before, during or after a trial. Measures ensuring physical protection can also be taken.

While experts can equally benefit from most of the measures referred to above, their identity cannot be protected.

### **Paragraph 3 of article 32**

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that every person under the New Zealand Police Witness Protection Programme was assessed for individual circumstances and appropriate arrangements considered. New Zealand has also entered into arrangements with other States.

### **(b) Observations on the implementation of the article**

Witnesses can be relocated domestically and internationally, and New Zealand has concluded arrangements in this regard.

### **Paragraph 4 of article 32**

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Victims' Rights Act 2002**

**17AA Victim impact statement defined**

- (1) In [sections 17AB to 27](#), *victim impact statement*—
- (a) means information that—
- (i) is ascertained under [section 17](#) from—
- (A) a victim; or
- (B) a person who, under [section 20](#), is treated as a victim; and
- (ii) is to be, or has been, submitted—
- (A) under [section 21AA](#), on request, to a judicial officer for the purpose of giving the accused a sentence indication;
- (B) under [section 21](#) to the judicial officer sentencing the offender; and
- (b) includes any recording, summary, transcript, or other copy of that information.
- (2) In this section, *information* may include any photographs, drawings, or other visual representations provided by the victim.

## **20. Statements by others disadvantaged by offence**

- (1) The prosecutor may, if he or she considers it appropriate to do so, decide to treat as a victim, for the purposes of [sections 17 to 19](#) and [sections 21 to 27](#), a person—
- (a) who was disadvantaged by an offence; and
- (b) from whom information on the effects of the offence has been, or could be, ascertained by or on behalf of the prosecutor; and
- (c) who is not a victim of the offence, a person accused of the offence, or the offender.
- (2) If the prosecutor decides under subsection (1) to treat a person as a victim of an offence, the person must be treated for the purposes of [sections 17 to 19](#) and [sections 21 to 27](#) as if he or she were a victim of the offence.

New Zealand provided the following examples and case law:

The New Zealand Police Witness Protection Programme also applies to victims of offences.

The Victims Code was launched in September 2015. The code sets out how victims of crime can expect to be treated by people working to help them. It explains their rights and what services are available to them, with the intention of ensuring their experience with the justice sector is as stress-free as possible. The code explains 11 victims' rights related to the following five areas:

- receiving information about programmes or services

- receiving information about progress of the case
- the victim's involvement during proceedings
- receiving notifications after sentencing, and
- for victims in the youth justice system, to participate in family group conferences.

The code also lists the principles that are expected to be followed by the agencies and organisations that provide services to victims.

The code is a cross-agency initiative, led by the Minister of Justice. Agencies involved are the Ministry of Justice, New Zealand Police, Department of Corrections, Ministry of Health, Ministry of Social Development, and Ministry of Business, Innovation and Employment.

In New Zealand an offender levy of NZ\$50 is charged to any person or company sentenced in the District or High Court. The levy is used to fund grants for services for victims of serious crime. In 2015/16 there were 3,652 victims who received grants.

#### **(b) Observations on the implementation of the article**

The New Zealand Police Witness Protection Programme also applies to victims of offences. Victims that testify can benefit from the same protection as witnesses. In addition, the Victims' Code provides a useful resource for victims to be informed about their rights.

#### **(c) Successes and good practices**

The establishment of a Victims Code explaining the rights and services available to victims was highlighted as a good practice. In particular, it was noted that compiling such information in one document vastly increased its accessibility and thereby assisted victims in their dealings with the justice sector.

In addition, the introduction of the above-mentioned offender levy as a means of raising funds to provide assistance to victims was considered to be a good practice.

### **Paragraph 5 of article 32**

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Victims' Rights Act 2002**

### **4 Interpretation**

[....]

**victim**—

(a) means—

- (i) a person against whom an offence is committed by another person; and
- (ii) a person who, through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property; and
- (iii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i) or subparagraph (ii), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
- (iv) a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and

(b) for the purposes only of sections 7 and 8, includes—

- (i) a person who, through, or by means of, an offence committed by another person, suffers any form of emotional harm; and
- (ii) a parent or legal guardian of a child, or of a young person, who falls within subparagraph (i), unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; and
- (iii) a person who has experienced domestic violence; and
- (iv) a child or young person residing with a person who falls within subparagraph (iii); and

(c) despite paragraphs (a) and (b), if an offence is committed by a person, does not include another person charged (whether as a principal or party or accessory after the fact or otherwise) with the commission of, or convicted or found guilty of, or who pleads guilty to,—

- (i) that offence; or
- (ii) an offence relating to the same incident or series of incidents as that crime or offence

[....]

### **17AA Victim impact statement defined**

(1) In sections 17AB to 27, victim impact statement—

a. means information that—

i. is ascertained under section 17 from—

a. a victim; or

- b. a person who, under section 20, is treated as a victim; and
- ii. is to be, or has been, submitted-
  - a. under section 21AA, on request, to a judicial officer for the purpose of giving the accused a sentence indication:
  - b. under section 21 to the judicial officer sentencing the offender; and
- b. includes any recording, summary, transcript, or other copy of that information.

(2) In this section, information may include any photographs, drawings, or other visual representations provided by the victim.

### **17AB Purpose of victim impact statements**

The purpose of a victim impact statement is to-

- a. enable the victim to provide information to the court about the effects of the offending; and
- b. assist the court in understanding the victim's views about the offending; and
- c. inform the offender about the impact of the offending from the victim's perspective.

### **20 Statements by others disadvantaged by offence**

(1) The prosecutor may, if he or she considers it appropriate to do so, decide to treat as a victim, for the purposes of sections 17 to 19 and sections 21 to 27, a person—

- (a) who was disadvantaged by an offence; and
- (b) from whom information on the effects of the offence has been, or could be, ascertained by or on behalf of the prosecutor; and
- (c) who is not a victim of the offence, a person accused of the offence, or the offender.

(2) If the prosecutor decides under subsection (1) to treat a person as a victim of an offence, the person must be treated for the purposes of sections 17 to 19 and sections 21 to 27 as if he or she were a victim of the offence.

New Zealand provided the following explanations, examples and case law:

Victim impact statements are obtained and where appropriate are now read out to the offender at hearings. These statements are not compulsory, but give the victim an opportunity to tell the court how the offending has impacted them. This statement details any physical injuries, property loss and other effects (particularly psychological impacts), suffered by the victim. The statement is either read by the

judge before the sentencing, or, with leave of the judge, may be read in open court by the victim and in the presence of the offender before sentence is imposed. Certain victims, such as victims of serious assaults or sexual crimes, are entitled to read their statements as a right (unless the judge considers it inappropriate to do so).

New Zealand also reported having had a victim impact statement in a corruption case, in which a head of department gave a victim impact statement because his department had lost resources in the case.

#### **(b) Observations on the implementation of the article**

The Victims' Rights Act 2002 allows for victim impact statements read out to the offender at hearings optionally by the judge or, with leave of the judge, by the victim in open court and in the presence of the offender. Victim impact statements presenting the views and concerns of victims are presented before a sentence is imposed.

#### **(c) Successes and good practices**

The use of victim impact statements during trials for corruption offences was highlighted as a good practice in the implementation of article 32, paragraph 5 of the Convention.

### **Article 33. Protection of reporting persons**

#### **Article 33**

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Protected Disclosure Act 2000**

##### **3 Interpretation**

[...]

**Serious wrongdoing** includes any serious wrongdoing of any of the following types:

- (a) an unlawful, corrupt, or irregular use of funds or resources of a public sector organisation; or
- (b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or
- (c) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or

- (d) an act, omission, or course of conduct that constitutes an offence; or
  - (e) an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement,
- whether the wrongdoing occurs before or after the commencement of this Act

## **6 Disclosures to which Act applies**

- (1) An employee of an organisation may disclose information in accordance with this Act if—
- (a) the information is about serious wrongdoing in or by that organisation; and
  - (b) the employee believes on reasonable grounds that the information is true or likely to be true; and
  - (c) the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and
  - (d) the employee wishes the disclosure to be protected.
- (2) Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purposes of this Act.
- (3) If an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrongdoing in or by that organisation but the belief is mistaken, the information must be treated as complying with subsection (1)(a) for the purposes of the protections conferred by this Act and by section 66(1)(a) of the Human Rights Act 1993.
- (4) This section is subject to section 6A.

## **17 Personal grievance**

- (1) Where an employee who makes a protected disclosure of information under this Act claims to have suffered retaliatory action from his or her employer or former employer, that employee,—
- (a) if that retaliatory action consists of or includes dismissal, may have a personal grievance, for the purposes of paragraph (a) of section 103(1) of the Employment Relations Act 2000, because of a claim of unjustifiable dismissal, and Part 9 of that Act applies accordingly; and
  - (b) if that retaliatory action consists of action other than dismissal or includes an action in addition to dismissal, may have a personal grievance, for the purposes of paragraph (b) of section 103(1) of the Employment Relations Act 2000, because of a claim described in that paragraph, and Part 9 of that Act applies accordingly.
- (2) This section applies only to employees within the meaning of the Employment Relations Act 2000.

## **18 Immunity from civil and criminal proceedings**

- (1) No person who—
- (a) makes a protected disclosure of information; or
  - (b) refers a protected disclosure of information to an appropriate authority for investigation
- is liable to any civil or criminal proceeding or to a disciplinary proceeding by reason of having made or referred that disclosure of information.
- (2) Subsection (1) applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice.

## **19 Confidentiality**

(1) Every person to whom a protected disclosure is made or referred must use his or her best endeavours not to disclose information that might identify the person who made the protected disclosure unless—

- (a) that person consents in writing to the disclosure of that information; or
- (b) the person who has acquired knowledge of the protected disclosure reasonably believes that disclosure of identifying information

—

- (i) is essential to the effective investigation of the allegations in the protected disclosure; or
- (ii) is essential to prevent serious risk to public health or public safety or the environment; or
- (iii) is essential having regard to the principles of natural justice.

(2) A request for information under the Official Information Act 1982 or under the Local Government Official Information and Meetings Act 1987 (other than one made by a constable for the purpose of investigating an offence) may be refused, as contrary to this Act, if it might identify a person who has made a protected disclosure.

(3) An Ombudsman may—

- (a) provide information and guidance to organisations and employees concerning the circumstances in which anonymous disclosures of information may be made under this Act; and
- (b) otherwise provide advice and assistance to organisations and other persons in relation to the duty specified in subsection (1).

## **Employment Relations Act 2000**

### **103 Personal grievance**

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

- (a) that the employee has been unjustifiably dismissed; or
- (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
- (c) that the employee has been discriminated against in the employee's employment; or
- (d) that the employee has been sexually harassed in the employee's employment; or
- (e) that the employee has been racially harassed in the employee's employment; or
- (f) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation; or
- (g) that the employee's employer has failed to comply with a requirement of Part 6A; or
- (h) that the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H; or
- (i) that the employee's employer has contravened section 67F or 67G(3).
- (j) that the employee's employer has, in relation to the employee,—
  - (i) engaged in adverse conduct for a prohibited health and safety reason; or
  - (ii) contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement).

(2) For the purposes of this Part, a representative, in relation to an employer and in relation to an alleged personal grievance, means a person—

- (a) who is employed by that employer; and

(b) who either—

- (i) has authority over the employee alleging the grievance; or
- (ii) is in a position of authority over other employees in the workplace of the employee alleging the grievance.

(3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

### **113. Personal grievance provisions only way to challenge dismissal**

(1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.

(2) Nothing in subsection (1) prevents an action under this Part to recover—

- (a) wages relating to a period of notice or alleged period of notice; or
- (b) wages or other money relating to the employment prior to the dismissal; or
- (c) other money payable on dismissal.

New Zealand provided the following explanations, examples and case law:

The purpose of the Protected Disclosures Act 2000 (the PDA) is to encourage people to report serious wrongdoing in their workplace by providing protection for employees who want to 'blow the whistle'. This applies to public and private sector workplaces.

Serious wrongdoing includes:

- unlawful, corrupt or irregular use of public money or resources
- conduct that poses a serious risk to public health, safety, the environment or the maintenance of the law
- any criminal offence, and
- gross negligence or mismanagement by public officials.

To make a protected disclosure, a person must be an 'employee' of the organisation they are making the disclosure about. Under the Act, 'employee' includes former employees, home workers, contractors, people seconded to organisations, and volunteers.

Disclosures will be protected if:

- the information is about serious wrongdoing in or by an employee's workplace

- there is reasonable belief the information is true or likely to be true, and
- the employee wants the serious wrongdoing to be investigated.

Disclosures will not be protected if:

- the allegations are known to be false
- the employee acts in bad faith, or
- the information disclosed is protected by legal professional privilege.

Generally speaking, protected disclosures must be made in accordance with an organisation's internal procedures for dealing with information about serious wrongdoing. Public sector organisations are required to have these internal procedures.

Protected disclosures can be made to the head of an organisation if:

- the organisation doesn't have any internal procedures
- the employee reasonably believes that the person they are supposed to make disclosures to is involved in the serious wrongdoing, or is associated with someone who is.

Protected disclosures can be made to an appropriate authority if an employee reasonably believe:

- the head of the organisation is involved in the serious wrongdoing
- it is justified because of urgent or exceptional circumstances
- the disclosure has been made in accordance with an organisation's internal procedures, but there has been no action or recommended action within 20 working days.

If these procedures are followed, there is scope for a protected disclosure to be escalated to an Ombudsman or Minister of the Crown in certain circumstances.

Appropriate authorities include the Ombudsman, the Commissioner of Police, the Controller and Auditor-General, the Director of the Serious Fraud Office, the Inspector-General of Intelligence and Security, the State Services Commissioner, and many others, including the head of every public sector agency and certain private sector professional bodies. The Ombudsman also has a statutory role to provide information and guidance to persons who wish to use the PDA, including those who wish to make anonymous disclosures.

Disclosures relating to an intelligence and security agency should only go to the Inspector-General of Intelligence and Security. Those arising within DPMC, MFAT, the Ministry of Defence, or the New Zealand Defence Force, where they relate to the international relations or intelligence and security matters, should only be made to the Ombudsman.

The PDA provides that no civil, criminal, or disciplinary proceedings can be taken against a person for making a protected disclosure, or for referring one to an appropriate authority.

The PDA also provides that an employee who suffers retaliatory action by their employer for making a protected disclosure can take personal grievance proceedings under the Employment Relations Act.

It is also unlawful under the Human Rights Act to treat whistle-blowers or potential whistle-blowers less favourably than others in the same or similar circumstances. If a whistle-blower is victimised in this way the legal remedies under the Human Rights Act may be available to them.

If a protected disclosure is made, information which identifies the employee will be kept confidential, unless one of the exceptions in the PDA applies.

The exceptions are if the employee consents to the disclosure, or if disclosure is essential:

- to the effective investigation of the allegations
- to prevent serious risk to public health or safety, or the environment, or
- to comply with the principles of natural justice.

Between October 2013 and September 2015 the SFO received 13 complaints from people who self-identified as a whistle-blower. The SFO recognises allegations from whistle-blowers as a priority area and investigates as far as is possible on the information available, including information sought both informally and formally from foreign law enforcement agencies.

The SFO records protected disclosures, and advises the whistle-blower about the existence and implications of the PDA. Best endeavours are made to protect the identity of the whistle-blower (and all confidential informants).

In the Ombudsman's 2014/15 Annual Report it was noted that, since the PDA came into force in 2001, the Ombudsman has received an average of 10 requests per year for guidance and assistance in relation to possible protected disclosures.

In 2014/15, the Ombudsman received 14 and completed 16 requests for guidance and assistance. 75% percent of all requests for guidance and assistance were completed within 6 months of receipt (target 95%). Over the same period, the Ombudsman also responded to 43 informal contacts about Protected Disclosures Act matters.

#### **(b) Observations on the implementation of the article**

Protection for reporting persons is established through the Protected Disclosures Act 2000 (PD Act). Persons having made a protected disclosure and claiming to have suffered retaliatory action may have "personal grievance" (an action or other remedy) against the employer (sects. 17 PD Act, 113 Employment Relations Act 2000).

#### **(c) Successes and good practices**

The broad personal scope of application of the Protected Disclosure Act was highlighted as a good practice in the implementation of article 33 of the Convention as it protects public and private sector employees as well as former employees and volunteers reporting serious wrongdoings.

## **Article 34. Consequences of acts of corruption**

### **Article 34**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

### **Contractual Remedies Act 1979**

#### **7 Cancellation of contract**

- (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.
- (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.
- (3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if-
  - a. he has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
  - b. a term in the contract is broken by another party to that contract; or
  - c. it is clear that a term in the contract will be broken by another party to that contract.
- (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) applies, a party may exercise the right to cancel if, and only if,-

- a. the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
  - b. the effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,-
    - i. substantially to reduce the benefit of the contract to the cancelling party; or
    - ii. substantially to increase the burden of the cancelling party under the contract; or
    - iii. in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
- (5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.
- (6) A party who has substantially the same interest under the contract as the party whose act constitutes the repudiation, misrepresentation, or breach may cancel the contract only with the leave of the court.
- (7) The court may, in its discretion, on application made for the purpose, grant leave under subsection (6), subject to such terms and conditions as the court thinks fit, if it is satisfied that the granting of such leave is in the interests of justice.

### **Government Rules of Sourcing**

Rule 41 (see here <<https://www.business.govt.nz/procurement/pdf-library/agencies/rules-of-sourcing/procurement-government-rules-of-sourcing-v3.pdf>>)

1. An agency may exclude a supplier from participating in a contract opportunity if there is a good reason for exclusion. Reasons for exclusion include:

- a. bankruptcy, receivership or liquidation
- b. making a false declaration
- c. a serious performance issue in a previous contract
- d. a conviction for a serious crime or offence
- e. professional misconduct
- f. an act or omission which adversely reflects on the commercial integrity of the supplier

- g. failing to pay taxes, duties or other levies
- h. a threat to national security or the confidentiality of sensitive government information
- i. the supplier is a person or organisation designated as terrorists by New Zealand Police.

2. An agency must not exclude a supplier before it has evidence supporting the reason for the exclusion.

New Zealand provided the following explanations, examples and case law:

New Zealand's legal system allows people to seek compensation for wrongs against them by initiating civil proceedings, as discussed further in Article 35 below. Remedies may be available under statute or common law, including tort, contract, or another common law principle.

Contracts can be rescinded on the grounds of a fraudulent misrepresentation. Where the contract has been cancelled, damages at common law are preserved by the Contractual Remedies Act 1979, section 10.

The Government Rules of Sourcing provide that a supplier may be excluded from public procurement where the supplier has been convicted of a serious crime. Conviction for a serious crime or offence includes, but is not limited to, a conviction for foreign bribery (getting an advantage in an international transaction by offering bribes to foreign officials).

#### **(b) Observations on the implementation of the article**

The Government's 3rd Rules of Sourcing allow for the exclusion of a supplier from a contract opportunity due to a conviction for serious crimes or offences, or for acts or omissions that adversely reflect on the supplier's commercial integrity (rule 41). Contracts can be rescinded on the grounds of fraudulent misrepresentation (sect. 7 (3) (a) Contractual Remedies Act 1979).

#### **Article 35. Compensation for damage**

##### **Article 35**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Interpretation Act 1999**

### **5 Definitions**

#### **Definitions**

In an enactment,—

[...]

**Person** includes a corporation sole, a body corporate, and an unincorporated body

## **Sentencing Act 2002**

### **12 Reparation**

(1) If a court is lawfully entitled under Part 2 to impose a sentence or order of reparation, it must impose it unless it is satisfied that the sentence or order would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate.

(1A) When considering undue hardship or other special circumstances under subsection (1), a court must not take into account that the offender is required to pay a levy under section 105B.

(2) A sentence of reparation may be imposed, in relation to any particular offence, on its own or in addition to any other sentence.

(3) If a court does not impose a sentence or order of reparation in a case where it is lawfully entitled to do so, it must give reasons for not doing so.

(4) In this section, **order of reparation** means an order under section 106(3)(b), 108(2)(b), or 110(3)(b).

### **32 Sentence of reparation**

(1) A court may impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer-

a. loss of or damage to property; or

b. emotional harm; or

c. loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

(2) Despite subsection (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in paragraph (a) of the definition of victim in section 4.

(3) In determining whether a sentence of reparation is appropriate or the amount of reparation to be made for any consequential loss or damage described in subsection (1)(c), the court

must take into account whether there is or may be, under the provisions of any enactment or rule of law, a right available to the person who suffered the loss or damage to bring proceedings or to make any application in relation to that loss or damage.

- (4) Subsection (3) applies whether or not the right to bring proceedings or make the application has been exercised in the particular case, and whether or not any time prescribed for the exercise of that right has expired.
- (5) Despite subsections (1) and (3), the court must not order the making of reparation in respect of any consequential loss or damage described in subsection (1)(c) for which compensation has been, or is to be, paid under the Accident Compensation Act 2001.
- (6) When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure, or action as described in section 10.
- (7) The court must not impose as part of a sentence of reparation an obligation on the offender to perform any form of work or service for the person who suffered the harm, loss, or damage.
- (8) Nothing in section 320 of the Accident Compensation Act 2001 applies to sentencing proceedings.

New Zealand provided the following explanations, examples and case law:

There are a range of measures in civil law to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for the damage in order to obtain compensation. The main avenue for such an action is to take civil proceedings on the basis of a civil wrong to people and property ('torts').

There is no specific tort that gives rise to the right in the context of corruption. There are, however, a group of torts economic torts that may cover circumstances amounting to corrupt activity. These include conspiracy, procuring a breach of contract, intimidation, unlawful interference and causing loss by unlawful means; see *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 at [216] and *Wagner v Gill* [2014] NZCA 336, [2015] 3 NZLR 157 at [47 - 48].

It is also worth noting that a sentence of reparation may be imposed as part of a successful criminal proceeding for corruption offences - see section 32 of the Sentencing Act 2002 cited above.

#### **(b) Observations on the implementation of the article**

In criminal proceedings, a court may impose reparation if an offender has caused loss of or damage to property (sects. 12, 32 (1) SA, sect. 5 IA). In civil law, those having suffered damage as a result of corruption can initiate proceedings based on the law of torts.

#### **Article 36. Specialized authorities**

## Article 36

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand referred to the following provisions:

#### **Serious Fraud Office Act 1990**

##### **5. Power to require production of documents**

(1) The Director may, by notice in writing, require any person, at the time and place specified in the notice,—

(a) to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to any suspected case of serious or complex fraud:

(b) to answer, to the best of that person's knowledge and belief, questions with respect to the whereabouts or existence of any further documents that may be relevant to the investigation.

(2) Where any document is produced pursuant to this section, the Director may do any one or both of the following things:

(a) take copies of the document, or of extracts from the document:

(b) where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.

(3) Nothing in this section requires any person to supply any other information or to answer any other questions.

(4) [Section 18](#) shall apply to any notice given under this section.

##### **9. Power to require attendance before Director, production of documents, etc**

(1) The Director may, by notice in writing, require—

(a) any person whose affairs are being investigated; or

(b) any other person who the Director has reason to believe may have information or documents relevant to an investigation,—

at the time and place specified in the notice, to do any 1 or more of the following things:

(c) to attend before the Director:

(d) to answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:

(e) to supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:

(f) to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to the investigation.

(2) Where any document is produced pursuant to this section, the Director may do any 1 or more of the following things:

(a) retain the original document produced, provided that a copy of the document is taken and returned as soon as practicable thereafter:

(b) take copies of the document, or of extracts from the document:

(c) require the person producing the document to provide an explanation of the history, subject matter, and contents of the document and to answer any other questions which arise from that explanation and which the Director has reason to believe may be relevant to the investigation:

(d) where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.

(3) Where any person is required to produce any document pursuant to this section and fails to do so, the Director may require that person to state, to the best of his or her knowledge and belief, where the document is.

(4) Where any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection (2) shall apply in all respects to that document.

(5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.

(6) [Section 18](#) shall apply to any notice given under this section.

## **29 Responsible Minister**

For the purposes of the [State Sector Act 1988](#), the Attorney-General shall be responsible for the Serious Fraud Office.

### **30 Independence in matters relating to investigations**

(1) Notwithstanding [section 29](#), in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case or any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently.

(2) Nothing in this section shall limit or affect any power exercisable by the Attorney-General in relation to any proceedings.

### **45. Offence to obstruct investigation, etc**

Every person commits an offence, and is liable on conviction,—

(a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$15,000:

(b) in the case of a corporation, to a fine not exceeding \$40,000,—

who,—

(c) without lawful justification or excuse, resists, obstructs, or delays any member of the Serious Fraud Office in the exercise of any power conferred by [section 9](#); or

(d) without lawful justification or excuse, refuses or fails to—

(i) attend before the Director; or

(ii) answer any question; or

(iii) supply any information; or

(iv) produce any document; or

(v) provide any explanation; or

(vi) comply with any other requirement,—

as required pursuant to the exercise of any power conferred by [section 9](#); or

(e) in the course of complying with any requirement imposed pursuant to [section 5](#) or [section 9](#), gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is so false or misleading.

New Zealand provided the following information on the measures adopted to ensure the independence of the specialized body:

The SFO was established by the Serious Fraud Office Act 1990 in response to the collapse of financial markets in New Zealand at that time. The SFO's role is the detection, investigation and prosecution of

serious or complex financial crime.

The SFO's focus is on investigating and prosecuting criminal cases that will have a real effect on:

- business and investor confidence in our financial markets and economy
- public confidence in our justice system and public service
- New Zealand's international business reputation.

The SFO operates three operational teams; the Evaluation and Intelligence team along with two investigative teams.

The SFO operates under two sets of investigative powers.

- Part 1 of the SFO Act provides that it may act where the Director "has reason to suspect that an investigation into the affairs of any person may disclose serious or complex fraud."
- Part 2 of the SFO Act provides the SFO with more extensive powers where: "...the Director has reasonable grounds to believe that an offence involving serious or complex fraud may have been committed..."

In considering whether a matter involves serious or complex fraud, the Director may, among other things, have regard to:

- the suspected nature and consequences of the fraud and/or;
- the suspected scale of the fraud and/or;
- the legal, factual and evidential complexity of the matter and/or;
- any relevant public interest considerations.

Section 30 of the Serious Fraud Office Act 1990 also provides that "...in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case of any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently."

The Financial Intelligence Unit and OFCANZ also play an important role in combating corruption through law enforcement and cooperate closely with SFO.

There is no specific protection against the dismissal of the Director of SFO or the Head of the FIU.

New Zealand provided the following information on how staff is selected and trained:

The Serious Fraud Office Statement of Intent for 2014 - 2018 states, in relation to personnel, that:

“Our success in achieving our priorities within our limited budget relies on our relatively small workforce, 90 percent of whom perform frontline activities of investigating and prosecuting financial crime. Our aim therefore is to continually increase the skills and knowledge of our employees to improve case management efficiency and thereby enhance our role as an industry leader in the detection, investigation and prosecution of financial crime. In order to meet the challenges of a rapidly changing business and political environment, we will focus on developing an organisational culture that supports high performance, success, teamwork and individual development.

- We will achieve this by:

→→ developing a performance management framework which transparently and directly links employees performance and rewards to the SFO’s outcomes framework and core principles

→→ implementing specific leadership training

→→ building management and leadership skills in defined roles and informal leadership roles within the management of individual cases

→→ ensuring we have a programme that continually develops technical and managerial talent in a manner that motivates high-performing employees and benefits the organisation;

→→ retaining our team of specialist talent and attracting the best people from leading private and public sector agencies

→→ continuing and enhancing our secondment programme to bring new skills and perspectives into the organisation and to support secondments externally to provide our employees with career development opportunities.”

#### **(b) Observations on the implementation of the article**

SFO is the specialized authority investigating and prosecuting serious or complex financial crime, including corruption offences. The Attorney-General is responsible for the SFO (sect. 29 SFO Act); however, the SFO Director is independent in any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such offence or any offence against the SFO Act (sect. 30 SFO Act).

The FIU closely cooperates with the SFO and OFCANZ in the investigation of Convention offences. There is no specific protection against dismissal of the SFO Director and the Head of the FIU.

#### **Article 37. Cooperation with law enforcement authorities**

## **Paragraphs 1 and 2 of article 37**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

Government agencies in New Zealand follow the Crown Law Prosecution Guidelines, issued by the Solicitor General of New Zealand (see answer to paragraph 3 of article 30).

### **Sentencing Act 2002**

#### **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court-

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

### **9 Aggravating and mitigating factors**

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

b. whether and when the offender pleaded guilty:

f. any remorse shown by the offender, or anything as described in section 10:

(fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:

### **10 Taking into account offer or agreement to make amends**

Court must take into account offer, agreement, response, or measure to make amends

(1) In sentencing or otherwise dealing with an offender the court must take into account-

a. any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim:

b. any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur:

c. the response of the offender or the offender's family, whanau, or family group to the offending:

d. any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to-

i. make compensation to any victim of the offending or family, whanau, or family group of the victim; or

ii. apologise to any victim of the offending or family, whanau, or family group of the victim; or

- iii. otherwise make good the harm that has occurred:
  - e. any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.
- (2) In deciding whether and to what extent any matter referred to in subsection (1) should be taken into account, the court must take into account-
  - a. whether or not it was genuine and capable of fulfilment; and
  - b. whether or not it has been accepted by the victim as expiating or mitigating the wrong.
- (3) If a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.
- (4) Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn the proceedings until-
  - a. compensation has been paid; or
  - b. the performance of any work or service has been completed; or
  - c. any agreement between the victim and the offender has been fulfilled; or
  - d. any measure proposed under subsection (1)(d) has been completed; or
  - e. any remedial action referred to in subsection (1)(e) has been completed.

### **Crown Law Prosecution Guidelines, Sect 12 immunities.**

New Zealand provided the following explanations and examples:

The Sentencing Act 2002 provides for mitigation of punishment where an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

For example, N.N. was a financial planning advisor who owned and operated ‘Company A’ and ‘Company B’. He offered financial planning advice and fund management services to clients. His clients initially saw satisfactory returns from sound business practices. However, between 2009 and 2013 the investments N.N. made on behalf of his clients suffered ongoing losses and N.N. began investing outside his clients agreed risk profile in an attempt to recover the lost capital. N.N. also took clients’ money for his own purposes. The cost of N.N.’s offending amounted to approximately \$1.4 million.

N.N. faced five Crimes Act charges of ‘Theft by person in special relationship’ for his conduct. He cooperated with the investigation and prosecution and pleaded guilty at the first opportunity in March 2016. As a result, the sentencing judge gave a 40 percent reduction in a potential sentence to recognize these and other mitigating factors. N.N. was sentenced to three years’ imprisonment.

#### **(b) Observations on the implementation of the article**

New Zealand encourages collaboration with the competent authorities through measures such as the mitigation of punishment, taking into account, for example, offers of amends or remedial action taken by the offender (sections 8 to 10 Sentencing Act).

#### **Paragraph 3 of article 37**

*3. Each State Party shall consider providing for the possibility, in accordance with the fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that the Government agencies in New Zealand followed the Crown Law Prosecution Guidelines, issued by the Solicitor General of New Zealand (see answer to paragraph 3 of article 30).

New Zealand further indicated that:

- The guidelines contain a section of immunities from prosecution:
- On occasions the prosecution case will depend upon the evidence of an accomplice or participant in an offence in order to proceed against a defendant considered to be a greater risk to the public safety, or more culpable.
- Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.
- In such a case it will be necessary for the Crown to consider giving the witness immunity from prosecution. Immunity takes the form of a written undertaking from the Solicitor-General to exercise the power to stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.
- The only person able to give such an undertaking is the Solicitor-General. The only purpose in giving immunity is to enable the Crown to use otherwise unavailable evidence.
- Immunities are to be used sparingly and only in cases where it is demonstrably clear that without the evidence given under immunity the prosecution case is unlikely to succeed, or there is a risk it will be significantly weakened.

- Before agreeing to give immunity, the Solicitor-General will almost invariably need to be satisfied of at least the following matters:
  - That the offence in respect of which the evidence is to be given is serious;
  - That all reasonably available avenues of gaining sufficient evidence to bring a successful prosecution other than relying upon the evidence to be given under immunity, have been exhausted;
  - That the evidence to be given under immunity is admissible, relevant and significantly strengthens the prosecution case;
  - That the witness, while having committed some identifiable offence, is not an equal or greater risk to the public safety than the person to be tried;
  - That the evidence to be given under immunity is apparently credible and, preferably, supported by other admissible material;
    - That no inducement, other than the possibility of an immunity, has been suggested to the witness;
    - That admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.
- The formal opinion of prosecuting counsel (almost invariably the Crown Solicitor) regarding the merits of the immunity will be required.
- The witness who is to testify under immunity should provide a brief of the evidence he or she is to give. That person should be advised that they should seek independent legal advice, the reasonable cost of which will be met by the prosecution. The witness must be advised that should the application for immunity be declined the brief of evidence and any other information obtained from that person in connection with a promise to apply for immunity cannot be used against that person.

**(b) Observations on the implementation of the article**

In certain cases, immunity from prosecution may be granted (sect. 12 CLPG).

**Paragraph 4 of article 37**

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that the measures available for witness protection could also be applied to collaborating offenders.

**(b) Observations on the implementation of the article**

Collaborating offenders can be protected in line with measures in place to protect witnesses.

**Paragraph 5 of article 37**

*5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand noted that assistance provided to foreign authorities can be taken into account when sentencing collaborating offenders. This has been the case in *Ong v. R*[2012] NZCA 258.

**(b) Observations on the implementation of the article**

The sentencing of collaborating offenders can take into account any assistance they may have provided to foreign authorities, and New Zealand has done so in practice.

**Article 38. Cooperation between national authorities**

**Article 38**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Crimes Act**

### **106 Restrictions on prosecution**

- (1) No one shall be prosecuted for an offence against any of the provisions of sections 100, 101, 104, 105, 105A, 105B, 105C, 105D, 105E, and 105F without the leave of the Attorney-General, who before giving leave may make such inquiries as he or she thinks fit.
- (2) No Judge who holds his or her office subject to a power of removal by the Sovereign on an address of the House of Representatives shall be prosecuted for any such offence except by the Attorney-General in pursuance of a resolution of that House.

## **Privacy Act 1993**

### **96A Purpose of Part**

- (1) The purpose of this Part is to enable the sharing of personal information to facilitate the provision of public services.
- (2) To achieve that purpose, this Part-
  - a. provides a mechanism for the approval of information sharing agreements for the sharing of information between or within agencies; and
  - b. authorises exemptions from or modifications to-
    - i. any of the information privacy principles (except principles 6 and 7, which relate respectively to the right to have access to, and correct, personal information):
    - ii. any code of practice (except any code of practice that modifies principles 6 and 7); and
  - c. reduces any uncertainty about whether personal information can be lawfully shared for the provision of the public services, and in the circumstances, described in approved information sharing agreements

## **Serious Fraud Office Act 1990**

### **5 Power to require production of documents**

- (1) The Director may, by notice in writing, require any person, at the time and place specified in the notice,-

- a. to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to any suspected case of serious or complex fraud:
  - b. (b) to answer, to the best of that person's knowledge and belief, questions with respect to the whereabouts or existence of any further documents that may be relevant to the investigation.
- (2) Where any document is produced pursuant to this section, the Director may do any one or both of the following things:
- a. take copies of the document, or of extracts from the document:
  - b. where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.
- (3) Nothing in this section requires any person to supply any other information or to answer any other questions.
- (4) Section 18 shall apply to any notice given under this section.

### **9 Power to require attendance before Director, production of documents, etc.**

- (1) The Director may, by notice in writing, require-
- a. any person whose affairs are being investigated; or
  - b. any other person who the Director has reason to believe may have information or documents relevant to an investigation,- at the time and place specified in the notice, to do any 1 or more of the following things:
    - c. to attend before the Director:
    - d. to answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:
    - e. to supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:
    - f. to produce for inspection any documents which are specified in the notice and which

the Director has reason to believe may be relevant to the investigation.

- (2) Where any document is produced pursuant to this section, the Director may do any 1 or more of the following things:
  - a. retain the original document produced, provided that a copy of the document is taken and returned as soon as practicable thereafter:
  - b. take copies of the document, or of extracts from the document:
  - c. require the person producing the document to provide an explanation of the history, subject matter, and contents of the document and to answer any other questions which arise from that explanation and which the Director has reason to believe may be relevant to the investigation:
  - d. where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.
- (3) Where any person is required to produce any document pursuant to this section and fails to do so, the Director may require that person to state, to the best of his or her knowledge and belief, where the document is.
- (4) Where any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection (2) shall apply in all respects to that document.
- (5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.
- (6) Section 18 shall apply to any notice given under this section.

New Zealand provided the following explanations, examples and case law:

Between 2012 and 2016 the SFO, Department of Internal Affairs and OFCANZ conducted a joint investigation into the class 4 gambling sector. The investigation was initiated by the Department of Internal Affairs who referred the matter to the SFO. OFCANZ offered assistance in their area of expertise. The investigation resulted in charges being laid against four men. These charges are proceeding through the court process.

#### **(b) Observations on the implementation of the article**

OFCANZ has been established to increase inter-institutional cooperation regarding serious and organized crime and investigates and prosecutes money-laundering offences.

The SFO has several memoranda of understanding with other institutions and regularly raises awareness on its mandate.

## **Article 39. Cooperation between national authorities and the private sector**

### **Paragraph 1 of article 39**

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

Under a memorandum of understanding with Police, the SFO is the lead agency for bribery and corruption, so complaints on those matters are referred there in the first instance.

### **Serious Fraud Office Act 1990**

#### **5. Power to require production of documents**

(1) The Director may, by notice in writing, require any person, at the time and place specified in the notice,—

(a) to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to any suspected case of serious or complex fraud:

(b) to answer, to the best of that person's knowledge and belief, questions with respect to the whereabouts or existence of any further documents that may be relevant to the investigation.

(2) Where any document is produced pursuant to this section, the Director may do any one or both of the following things:

(a) take copies of the document, or of extracts from the document:

(b) where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.

(3) Nothing in this section requires any person to supply any other information or to answer any other questions.

(4) Section 18 shall apply to any notice given under this section.

## **9. Power to require attendance before Director, production of documents, etc**

(1) The Director may, by notice in writing, require—

(a) any person whose affairs are being investigated; or

(b) any other person who the Director has reason to believe may have information or documents relevant to an investigation,—

at the time and place specified in the notice, to do any 1 or more of the following things:

(c) to attend before the Director:

(d) to answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:

(e) to supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:

(f) to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to the investigation.

(2) Where any document is produced pursuant to this section, the Director may do any 1 or more of the following things:

(a) retain the original document produced, provided that a copy of the document is taken and returned as soon as practicable thereafter:

(b) take copies of the document, or of extracts from the document:

(c) require the person producing the document to provide an explanation of the history, subject matter, and contents of the document and to answer any other questions which arise from that explanation and which the Director has reason to believe may be relevant to the investigation:

(d) where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.

(3) Where any person is required to produce any document pursuant to this section and fails to do so, the Director may require that person to state, to the best of his or her knowledge and belief, where the document is.

(4) Where any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection (2) shall apply in all respects to that document.

(5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.

(6) Section 18 shall apply to any notice given under this section.

#### **45. Offence to obstruct investigation, etc**

Every person commits an offence, and is liable on conviction,—

(a) in the case of an individual, to imprisonment for a term not exceeding 12 months or to a fine not exceeding \$15,000:

(b) in the case of a corporation, to a fine not exceeding \$40,000,—

who,—

(c) without lawful justification or excuse, resists, obstructs, or delays any member of the Serious Fraud Office in the exercise of any power conferred by section 9; or

(d) without lawful justification or excuse, refuses or fails to—

(i) attend before the Director; or

(ii) answer any question; or

(iii) supply any information; or

(iv) produce any document; or

(v) provide any explanation; or

(vi) comply with any other requirement,—

as required pursuant to the exercise of any power conferred by section 9; or

(e) in the course of complying with any requirement imposed pursuant to section 5 or section 9, gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is so false or misleading.

### **Anti-Money Laundering and Countering Financing of Terrorism Act 2009**

#### **40 Reporting entities to report suspicious activities**

(1) Subsections (3) and (4) apply to reporting entities other than high-value dealers.

(2) Subsection (5) applies to high-value dealers.

(3) If this subsection applies, the reporting entity must, as soon as practicable but no later than 3 working days after forming its suspicion, report the activity, or suspicious activity, to the Commissioner in accordance with section 41.

(4) Nothing in subsection (3) requires any person to disclose any information that the person believes on reasonable grounds is a privileged communication.

(5) A high-value dealer may report a suspicious activity to the Commissioner.

New Zealand indicated that the SFO maintained a website with detailed advice on how to make a complaint to the SFO. In the 2014 financial year the SFO received 536 complaints.

#### **(b) Observations on the implementation of the article**

The SFO Director can issue production orders for any documents that may be relevant to a suspected fraud case, and can require any person to answer questions in this regard (sects. 5, 9 SFO Act). Refusal to follow such orders is an offence (sect. 45 SFO Act). SFO has developed a corruption risk assessment tool for companies and, in collaboration with civil society, and anti-corruption online training.

The FIU receives suspicious transaction reports (sect. 40 AML Act) and trains financial institutions on anti-money-laundering matters.

#### **(c) Successes and good practices**

The corruption risk assessment tool and online anti-corruption training module available on the SFO website were highlighted as good practices in the cooperation between national authorities and the private sector.

#### **Paragraph 2 of article 39**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

- The contact details for law enforcement agencies are well publicised, including on their websites (<https://www.sfo.govt.nz/contact> or <http://www.police.govt.nz/>)
- A Crimestoppers hotline has been established for anonymous reporting.
- Various institutions, including the Ministry of Justice, SFO and the Financial Intelligence Unit, participate in conferences and speak at public events to raise awareness.

#### **(b) Observations on the implementation of the article**

SFO and other institutions participate in awareness-raising events.

## **Article 40. Bank secrecy**

### **Article 40**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Serious Fraud Office Act 1990**

##### **5 Power to require production of documents**

- (1) The Director may, by notice in writing, require any person, at the time and place specified in the notice,-
  - a. to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to any suspected case of serious or complex fraud:
  - b. (b) to answer, to the best of that person's knowledge and belief, questions with respect to the whereabouts or existence of any further documents that may be relevant to the investigation.
- (2) Where any document is produced pursuant to this section, the Director may do any one or both of the following things:
  - a. take copies of the document, or of extracts from the document:
  - b. where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.
- (3) Nothing in this section requires any person to supply any other information or to answer any other questions.
- (4) Section 18 shall apply to any notice given under this section.

## **9 Power to require attendance before Director, production of documents, etc.**

- (1) The Director may, by notice in writing, require-
  - a. any person whose affairs are being investigated; or
  - b. any other person who the Director has reason to believe may have information or documents relevant to an investigation,- at the time and place specified in the notice, to do any 1 or more of the following things:
    - c. to attend before the Director:
    - d. to answer questions with respect to any matter that the Director has reason to believe may be relevant to the investigation:
    - e. to supply any information specified in the notice with respect to any matter that the Director has reason to believe may be relevant to the investigation:
    - f. to produce for inspection any documents which are specified in the notice and which the Director has reason to believe may be relevant to the investigation.
- (2) Where any document is produced pursuant to this section, the Director may do any 1 or more of the following things:
  - a. retain the original document produced, provided that a copy of the document is taken and returned as soon as practicable thereafter:
  - b. take copies of the document, or of extracts from the document:
  - c. require the person producing the document to provide an explanation of the history, subject matter, and contents of the document and to answer any other questions which arise from that explanation and which the Director has reason to believe may be relevant to the investigation:
  - d. where necessary, require the person producing the document to reproduce, or to assist any person nominated by the Director to reproduce, in usable form, any information recorded or stored in the document.
- (3) Where any person is required to produce any document pursuant to this section and fails to do so, the Director may require that person to state, to the best of his or her knowledge and belief, where the document is.
- (4) Where any person is required to supply any information under this section, and does so by producing a document containing that information, the powers conferred by subsection

(2) shall apply in all respects to that document.

(5) Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.

(6) Section 18 shall apply to any notice given under this section.

## **Tax Administration Act 1964**

### **16 Commissioner may access premises to obtain information**

(1) Notwithstanding anything in any other Act, the Commissioner or any officer of the department authorised by the Commissioner in that behalf shall at all times have full and free access to all lands, buildings, and places, and to all documents, whether in the custody or under the control of a public officer or a body corporate or any other person whatever, for the purpose of inspecting any documents and any property, process, or matter which the Commissioner or officer considers necessary or relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, or considers likely to provide any information otherwise required for the purposes of any of those Acts or any of those functions, and may, without fee or reward, make extracts from or copies of any such documents.

(2) Despite sections 103(3)(b)(ii) and 103(7) of the Search and Surveillance Act 2012, the occupier of land, or a building or place, that is entered or proposed to be entered by the Commissioner, or by an authorised officer, must-

- a. provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section; and
- b. answer all proper questions relating to the effective exercise of powers under this section, orally or, if required by the Commissioner or the officer, in writing, or by statutory declaration.

(2A) A person whom the Commissioner or an authorised officer considers necessary for the effective exercise of powers under this section may accompany the Commissioner or the authorised officer to a place.

(3) Notwithstanding subsection (1), the Commissioner, an authorised officer, or a person accompanying the Commissioner or the authorised officer, shall not enter any private

dwelling except with the consent of an occupier or pursuant to a warrant issued under subsection (4).

(4) An issuing officer who, on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of the Search and Surveillance Act 2012, is satisfied that the exercise by the Commissioner or an authorised officer of his or her functions under this section requires physical access to a private dwelling may issue to the Commissioner or an authorised officer a warrant to enter that private dwelling.

(5) [Repealed]

(6) Every person exercising the power of entry conferred by a warrant issued under subsection (4) shall produce the warrant of authority and evidence of identity-

a. on first entering the private dwelling; and

b. whenever subsequently reasonably required to do so.

(6A) The provisions of subparts 1, , 4, 7, 9, and 10 of Part 4 of the Search and Surveillance Act 2012 (except sections 102, 103(3)(b)(ii), 103(4)(g), 103(7), 115(1)(b), 118, 119, and 130(4)) apply. (7) In this section-

issuing officer has the same meaning as in section 3 of the Search and Surveillance Act 2012

private dwelling means any building or part of a building occupied as residential accommodation (including any garage, shed, and other building used in connection therewith); and includes any business premises that are or are within a private dwelling.

## **17 Information to be furnished on request of Commissioner**

(1) Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner, and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.

(1B) For the purpose of subsection (1), information or a document is treated as being in the knowledge, possession or control of a New Zealand resident if-

- a. the New Zealand resident controls, directly or indirectly, a non-resident; and
- b. the information or document is in the knowledge, possession or control of the non-resident.

(1C) For the purpose of subsection (1B) and sections 143(2) and 143A(2)-

- a. in determining whether a non-resident is controlled by a New Zealand resident, the New Zealand resident is treated as holding anything held by a person who is resident in New Zealand, or is a controlled foreign company, and is associated with the New Zealand resident; and
- c. a law of a foreign country that relates to the secrecy of information must be ignored.

(1D) If information is required, or documents must be produced, the Commissioner may require

that the information be furnished, or the documents be produced, to a particular office of the department.

(2) [Repealed]

(3) The Commissioner may, if the Commissioner considers it reasonable to do so, remove and retain any documents produced for inspection under this section for so long as is necessary for a full and complete inspection of those documents.

(4) Any person producing any documents which are retained by the Commissioner under subsection (3) shall, at all reasonable times and subject to such reasonable conditions as may be determined by the Commissioner, be entitled to inspect the retained documents and to obtain copies of them at the person's own expense.

(5) The Commissioner may require that any information or particulars furnished under this section shall be verified by statutory declaration or otherwise.

(6) The Commissioner may, without fee or reward, make extracts from or copies of any documents produced for inspection in accordance with this section.

## **Criminal Proceeds (Recovery) Act 2009**

### **104 Application for production order**

(1) The Commissioner may apply to a Judge for a production order under section 105 if the Commissioner has reason to believe that a person has possession or control of documents that are relevant to an investigation by the Commissioner under this Act or to any proceedings under this Act.

- (2) Every application under this section must be made in the manner provided in relation to a search warrant in sections 99 and 100 of the Search and Surveillance Act 2012, and must contain the following particulars:
  - a. the grounds on which the application is made:
  - b. a description of the document or documents production of which is sought:
  - c. a description of the property or other thing or type of property or other thing to which the document or documents are believed to relate.
- (3) Every person commits an offence who makes an application for a production order that contains any assertion or other statement known by the person to be false.
- (4) Every person who commits an offence against subsection (3) is liable on conviction to imprisonment for a term not exceeding 1 year.

#### **105 Court may make production order**

- (1) If an application is made under section 104, the Judge may, if satisfied that the Commissioner has reasonable grounds for applying for the order, make an order that the person-
  - a. produce to the Commissioner any specified document or class of documents of the kind referred to in section 104(1) that are in the person's possession or control while the order is in force; or
  - b. make available to the Commissioner, for inspection, any specified document or class of documents of that kind that are in the person's possession or control while the order is in force.
- (2) Every production order must contain the following particulars:
  - a. the grounds on which the order is issued:
  - b. a description of the document or documents production of which is required:
  - c. a description of the property or other thing or type of property or other thing to which the document or documents are believed to relate.
- (3) An order made under subsection (1) is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made).
- (4) A Judge must not make an order under subsection (1) unless the application contains, or the applicant otherwise supplies to the Judge, any information that the Judge requires concerning the grounds on which the order is sought.
- (5) If any document is produced under this section, the Commissioner may do any one or more of the following things:

- a. retain the original document produced for as long as is reasonably necessary for the purposes of this Act, provided that a copy of the document is taken and returned as soon as practicable after the document is produced:
  - b. take copies of the document, or of extracts from the document:
  - c. if necessary, require the person producing the document to reproduce, or to assist any person nominated by the Commissioner to reproduce, in usable form, any information recorded or stored in the document.
- (6) If any person is required to produce any document under this section and fails to do so, the Commissioner may require that person to state to the best of his or her knowledge or belief where the document is.

New Zealand provided the following explanations, examples and case law:

There is no general financial secrecy provision in New Zealand legislation. Furthermore, New Zealand enacted the Search and Surveillance Act 2012 (the S&S Act), which provides for enhanced search and surveillance powers to investigate offending.

The S&S Act created a single comprehensive regime to govern the exercise of search and surveillance powers, which was then applied to over 70 different enactments administered and enforced by New Zealand Police and a number of other government agencies. This means that, in appropriate cases, law enforcement agencies can access banking information for use as evidence in corruption cases and the laundering of its proceeds.

There are also specific mechanisms in the Serious Fraud Office Act to require banks to produce information during investigations, and override any other secrecy or privacy issues. In the 2015 Financial year the SFO issued 231 such notices to New Zealand banks under section 9 of the Serious Fraud Office Act.

The Inland Revenue Department also has very wide powers to require financial institutions to provide information. The two key provisions are sections 16 (access to premises) and section 17 (access to information) of the Tax Administration Act 1994. Both sections confer powers on Inland Revenue to obtain information for a number of express purposes and also more generally “for the purpose of carrying out any function lawfully conferred on the Commissioner”. It may also obtain information by requiring any person to attend and give evidence under oath before the Commissioner or an authorised officer. Inland Revenue may also apply to the District Court for an inquiry (including examination of witnesses under oath) to be held before a District Court Judge.

#### **(b) Observations on the implementation of the article**

There is no general bank secrecy provision. The Director of SFO may require the production of documents and the supply of information from any person in the banking business (sects. 5, 9 SFO Act). The FIU and the Police can access financial information based on a court order (sects. 104, 105 CPRA; 70-79 SSA; 118, 132, 143 (a) AML Act; principle 11 (a) Privacy Act).

## **Article 41. Criminal record**

### **Article 41**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

### **Evidence Act 2006**

#### **4 Interpretation**

(1) In this Act, unless the context otherwise requires,-

**Conviction** means,-

- a. in sections 47 to 49, a subsisting conviction entered before or after the commencement of this Act by-
  - i. a New Zealand court or a court-martial conducted under New Zealand law in New Zealand or elsewhere; or
  - ii. a court established by, or a court-martial conducted under, the law of Australia, United Kingdom, Canada, or any other foreign country in respect of which an Order in Council has been made under section 140(5); and
- b. in sections 139 and 140, a subsisting conviction entered before or after the commencement of this Act by a New Zealand or foreign court or a court-martial conducted under New Zealand or foreign law

#### **43 Propensity evidence offered by prosecution about defendants**

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
  - a. the frequency with which the acts, omissions, events, or circumstances that are the subject of the evidence have occurred:
  - b. the connection in time between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - c. the extent of the similarity between the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - d. the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
  - e. whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
  - f. the extent to which the acts, omissions, events, or circumstances that are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,-
  - a. whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - b. whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.

#### **49 Conviction as evidence in criminal proceedings**

- (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.

- (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances,-
- a. permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
  - b. if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
- (3) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the Judge of the purpose for which the evidence is to be offered.

### **139 Evidence of convictions, acquittals, and other judicial proceedings**

- (1) Evidence of the following facts, if admissible, may be given by a certificate purporting to be signed by a Judge, a registrar, or other officer having custody of the relevant court records:
- a. the conviction or acquittal of a person charged with an offence and the particulars of the offence charged and of the person (including the name and date of birth of the person if the person is an individual, and the name and date and place of incorporation of the person if the person is a body corporate):
  - b. the sentencing by a court of a person to any penalty or other disposition of the case following a plea or finding of guilt, and the particulars of the offence for which that person was sentenced or otherwise dealt with and of the person (including the name and date of birth of the person if the person is an individual, and the name and date and place of incorporation of the person if the person is a body corporate):
  - (ba) a record of first warning (within the meaning of section 86A of the Sentencing Act 2002) or a record of final warning (within the meaning of that section) made in respect of a person:
  - c. an order or judgment of a court and the nature, parties, and particulars of the proceeding to which the order or judgment relates:
  - d. the existence of a criminal or civil proceeding, whether or not the proceeding has been concluded, and the nature of the proceeding.
- (2) A certificate under this section is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate.

- (3) The manner of proving the facts referred to in subsection (1) authorised by this section is in addition to any other manner of proving any of those facts authorised by law.
- (4) Subsection (5) applies if-
- a. a certificate under this section is offered in evidence in a proceeding for the purpose of proving the conviction or acquittal of a person, or the sentence by a court of a person to a penalty, or an order made by a court concerning a person; and
  - b. the name of the person stated in the certificate is substantially similar to the name of the person concerning whom the evidence is offered.
- (5) If this subsection applies, it is presumed, in the absence of evidence to the contrary, that the person whose name is stated in the certificate is the person concerning whom the evidence is offered.
- (6) Subpart 1 of Part 2 (which relates to hearsay evidence) does not apply to evidence offered under this section.

#### **140 Proof of conviction by fingerprints**

- (1) A certificate is admissible in evidence to prove the identity of a person alleged to have been convicted in a country of an offence if-
- a. the certificate purports to be signed by a fingerprint examiner; and
  - b. copies of the fingerprints of the person are exhibited or shown on the certificate; and
  - c. the certificate certifies that those copies are copies of the fingerprints of a person who was convicted in the fingerprint examiner's country of the offence of which particulars are given.
- (2) Subsection (3) applies to a certificate that-
- a. purports to be signed by a fingerprint examiner; and
  - b. certifies that the copies of the fingerprints that are exhibited or shown on the certificate made under subsection (1) and the fingerprints of the person in respect of whom a conviction is sought to be proved (a copy of which is exhibited or shown on the certificate made under this subsection) are the fingerprints of the same person.
- (3) A certificate to which this subsection applies is, unless the Judge decides otherwise, evidence that the person in respect of whom the conviction is sought to be proved was

convicted of the offence of which particulars were given in the certificate made under subsection (1).

- (4) The manner of proving a conviction authorised by this section is in addition to any other manner of proving the conviction authorised by law.
- (5) The Governor-General may, by Order in Council, declare that certificates purporting to be made by specified persons or classes of persons in any country other than New Zealand, Australia, United Kingdom, or Canada in respect of convictions for offences committed in that country and to the same effect as certificates under subsection (1) are evidence as if they had been made under subsection (1).
- (6) In this section, fingerprint examiner means a fingerprint examiner who is-
  - a. a member or employee of the Police; or
  - b. a member or employee of a Police force in the United Kingdom; or
  - c. a member or employee of a Police force of Australia or the Police force of a State or territory of Australia; or
  - d. a member or employee of a Police force of Canada or the Police force of a Province or territory of Canada.
- (7) Subpart 1 of Part 2 (which relates to hearsay evidence) and subpart 2 of Part 2 (which relates to opinion and expert evidence) do not apply to evidence offered under this section.

New Zealand also provided the following information:

Section 49 of the Evidence Act 2006 provides that a previous conviction may be admissible as evidence in a criminal proceeding, if that evidence is not otherwise disqualified. A previous conviction may be used as propensity evidence where the criteria of section 43 of the Evidence Act are fulfilled.

Section 49(1) was applied to admit convictions as propensity evidence in *R v P HC Auckland CRI-2009-004-22364*, 23 August 2010. The Court noted that case that no issue arose under section 49(2) because the convictions were the result of guilty pleas.

#### **(b) Observations on the implementation of the article**

The Evidence Act provides for the possibility to take into account convictions in certain other States as evidence (sects. 4, 43 and 139), if they comply with a level of propensity or veracity.

New Zealand could monitor whether previous convictions in other States may be considered in criminal proceedings.

## **Article 42. Jurisdiction**

### **Subparagraph 1 (a) of article 42**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(a) The offence is committed in the territory of that State Party; or*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **5 Application of Act**

(1) This Act applies to all offences for which the offender may be proceeded against and tried in New Zealand.

(2) This Act applies to all acts done or omitted in New Zealand.

##### **7 Place of commission of offence**

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

New Zealand provided the following information:

It is a general principle of New Zealand criminal law that there is jurisdiction over crimes committed in New Zealand. The Crimes Act 1961 codifies this principle. For examples, see previous responses.

#### **(b) Observations on the implementation of the article**

New Zealand has established territorial jurisdiction for offences committed in its territory. As set forth in section 7 A of the Crimes Act, an offence is deemed to have been committed in New Zealand when any act or omission forming part of any offence or any event necessary to the completion of any offence occurred there.

### **Subparagraph 1 (b) of article 42**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*[...]*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Crimes Act 1961**

**8 Jurisdiction in respect of crimes on ships or aircraft beyond New Zealand**

(1) This section applies to any act done or omitted beyond New Zealand by any person-

- a. on board any Commonwealth ship; or
- b. on board any New Zealand aircraft; or
- c. on board any ship or aircraft, if that person arrives in New Zealand on that ship or aircraft in the course or at the end of a journey during which the act was done or omitted; or
- d. being a British subject, on board any foreign ship (not being a ship to which he or she belongs) on the high seas, or on board any such ship within the territorial waters of any Commonwealth country; or
- e. being a New Zealand citizen or a person ordinarily resident in New Zealand, on board any aircraft:

provided that paragraph (c) shall not apply where the act was done or omitted by a person, not being a British subject, on any ship or aircraft for the time being used as a ship or aircraft of any of the armed forces of a country that is not a Commonwealth country.

(2) If a person does or omits to do any act to which this section applies, and that act or omission would, if it occurred within New Zealand, be an offence, under this Act or any other enactment (whether that enactment was passed before or after the commencement of this Act), punishable by imprisonment for life or by 2 or more years' imprisonment, then, subject to the provisions of this Act and that other enactment, the person is liable on conviction as if the act or omission had occurred in New Zealand.

(2A) If any proceedings are taken by virtue of the jurisdiction conferred by this section, it is a defence to prove that the act or omission would not have been an offence under the law of the country of which the person charged was a national or citizen at the time of the act

or omission, if it had occurred in that country.

- (3) Where at any place beyond New Zealand any person who belongs, or within 3 months previously has belonged, to any Commonwealth ship does or omits any act, whether on shore or afloat, not being an act or omission to which subsection (1) applies, and that act or omission would, if it occurred within New Zealand, be an offence punishable by imprisonment for life or by 2 or more years' imprisonment, then this section shall apply in respect of that act or omission in the same manner in all respects as if it had occurred on board a Commonwealth ship.
- (4) The provisions of this section shall have the same operation in relation to the Republic of Ireland and to the citizens thereof, and to ships registered therein or belonging thereto, and to persons who belong or have belonged to those ships, and to all other persons on board those ships, as if the Republic of Ireland were a Commonwealth country and as if the citizens thereof were British subjects.
- (5) This section shall be read subject to the provisions of section 400 .
- (6) In this section, the expression British subject includes a British protected person within the meaning of the British Nationality and Citizenship Act 1948.
- (7) Nothing in this section shall apply with respect to any offence against the Maritime Transport Act 1994 or Part 5A of the Civil Aviation Act 1990.

New Zealand provided the following examples and case law: , including related court or other cases

As above, the Crimes Act 1961 codifies the principle that New Zealand claims jurisdiction over offences committed on a vessel that is flying the flag of New Zealand or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

#### **(b) Observations on the implementation of the article**

New Zealand has established its jurisdiction over offences committed on board a Commonwealth vessel or a New Zealand aircraft.

#### **Subparagraph 2 (a) of article 42**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(a) The offence is committed against a national of that State Party; or*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following provisions :

## **Crimes Act 1961**

### **5 Application of Act**

- (1) This Act applies to all offences for which the offender may be proceeded against and tried in New Zealand.
- (2) This Act applies to all acts done or omitted in New Zealand.

### **7 Place of commission of offence**

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

### **7A Extraterritorial jurisdiction in respect of certain offences with transnational aspects**

- (1) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for any offence against this Act committed in the course of carrying out a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002) or an offence against section 98AA, section 98A, section 98C, section 98D, any of sections 100 to 104, section 105(2), section 116, section 117, section 243, section 298A, or section 298B-
  - a. if the person to be charged-
    - i. is a New Zealand citizen; or
    - ii. is ordinarily resident in New Zealand; or
    - iii. has been found in New Zealand and has not been extradited; or
    - iv. is a body corporate, or a corporation sole, incorporated under the law of New Zealand; or
  - b. if any of the acts or omissions is alleged to have occurred-
    - i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or
    - ii. on board a ship used as a ship of the New Zealand Defence Force; or

- iii. on board a New Zealand aircraft; or
  - iv. (iv) on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or
- c. if a person in respect of whom the offence is alleged to have been committed-
- i. is a New Zealand citizen; or
  - ii. is ordinarily resident in New Zealand; or
- d. in the case of an offence against section 98A, if the group of people with or in which the person to be charged is alleged to have participated are alleged to have as their objective or one of their objectives the obtaining of material benefits by the commission in New Zealand of offences or conduct referred to in paragraph (a) or paragraph (b) of section 98A(2).
- (2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 98C or section 98D
- a. in the case of an offence against section 98C(1) or section 98D if the act or omission is alleged to relate to the entry of a person into New Zealand;
  - or
  - b. in the case of an offence against section 98C(2), if the act or omission is alleged to relate to arranging the bringing of a person to New Zealand.
- (3) (2A) Even if some or all of the acts alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 131B-
- a. if the person to be charged-
    - i. is a New Zealand citizen; or
    - ii. is ordinarily resident in New Zealand; or
    - iii. has been found in New Zealand and has not been extradited; or
  - b. if any of the acts is alleged to have occurred-
    - i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or

- ii. on board a ship used as a ship of the New Zealand Defence Force; or
  - iii. on board a New Zealand aircraft; or
  - iv. on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or
- c. if a person in respect of whom the offence is alleged to have been committed-
- i. is a New Zealand citizen; or
  - ii. is ordinarily resident in New Zealand.

(3) Neither section 8 nor section 400 applies to an offence referred to in subsection (1).

(4) Nothing in subsections (1) to (3) limits or affects-

- a. the application of section 7 to the occurrence in New Zealand of-
  - i. an act or omission forming part of an offence; or
  - ii. an event necessary to the completion of an offence; or
  - iii. the application of section 8A.

#### **105D Bribery outside New Zealand of foreign public official**

(1) Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against [section 105C](#).

(2) Subsection (1) applies to a person who is—

- (a) a New Zealand citizen; or
- (b) ordinarily resident in New Zealand; or
- (c) a body corporate incorporated in New Zealand; or
- (d) a corporation sole incorporated in New Zealand.

(3) Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against [section 105C](#).

(4) [Repealed]

### **105E Corruption of foreign public officials**

(1) Every person specified in subsection (2) who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person in respect of any act or omission by an official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority) is liable to imprisonment for a term not exceeding 7 years.

(2) Subsection (1) applies to—

(a) any foreign public official who has committed the offence while in New Zealand:

(b) any person employed as a foreign public official who has committed the offence while outside New Zealand if the person is—

(i) a New Zealand citizen; or

(ii) ordinarily resident in New Zealand; or

(iii) a body corporate incorporated in New Zealand; or

(iv) a corporation sole incorporated in New Zealand.

(3) Nothing in this section limits any immunity that a foreign public official or person has under this Act or any other enactment.

New Zealand provided the following information:

New Zealand exercises jurisdiction based on the location of the offence, and does not exercise jurisdiction based on an offence being committed against one of its nationals. However, New Zealand may claim jurisdiction where New Zealand nationals have had offences committed against them within our territorial jurisdiction (or where we claim extraterritorial jurisdiction).

#### **(b) Observations on the implementation of the article**

New Zealand has established extraterritorial jurisdiction for offences listed under sections 7A, 105D and 105E of the Crimes Act.

New Zealand could establish extraterritorial jurisdiction for offences committed against a national in relation to offences established in accordance with the Convention that are not listed in sections 7A,

105D and 105E Crimes Act 1961.

### **Subparagraph 2 (b) of article 42**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*[...]*

*(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

### **Crimes Act 1961**

#### **5 Application of Act**

- (1) This Act applies to all offences for which the offender may be proceeded against and tried in New Zealand.
- (2) This Act applies to all acts done or omitted in New Zealand.

#### **7 Place of commission of offence**

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in

New Zealand or not at the time of the act, omission, or event.

#### **7A Extraterritorial jurisdiction in respect of certain offences with transnational aspects**

- (1) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for any offence against this Act committed in the course of carrying out a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002) or an offence against section 98AA, section 98A, section 98C, section 98D, any of sections 100 to 104, section 105(2), section 116, section 117, section 243, section 298A, or section 298B-

a. if the person to be charged-

i. is a New Zealand citizen; or

- ii. is ordinarily resident in New Zealand; or
  - iii. has been found in New Zealand and has not been extradited; or
  - iv. is a body corporate, or a corporation sole, incorporated under the law of New Zealand; or
- b. if any of the acts or omissions is alleged to have occurred-
- i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or
  - ii. on board a ship used as a ship of the New Zealand Defence Force; or
  - iii. on board a New Zealand aircraft; or
  - iv. (iv) on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or
- c. if a person in respect of whom the offence is alleged to have been committed-
- i. is a New Zealand citizen; or
  - ii. is ordinarily resident in New Zealand; or
- d. in the case of an offence against section 98A if the group of people with or in which the person to be charged is alleged to have participated are alleged to have as their objective or one of their objectives the obtaining of material benefits by the commission in New Zealand of offences or conduct referred to in paragraph (a) or paragraph (b) of section 98A(2).
- (2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 98C or section 98D
- a. in the case of an offence against section 98C(1) or section 98D, if the act or omission is alleged to relate to the entry of a person into New Zealand;  
or
  - b. in the case of an offence against section 98C(2) if the act or omission is alleged to relate to arranging the bringing of a person to New Zealand.
- (3) (2A) Even if some or all of the acts alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 131B-

a. if the person to be charged-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand; or

iii. has been found in New Zealand and has not been extradited; or

b. if any of the acts is alleged to have occurred-

i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or

ii. on board a ship used as a ship of the New Zealand Defence Force; or

iii. on board a New Zealand aircraft; or

iv. on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or

c. if a person in respect of whom the offence is alleged to have been committed-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand.

(3) Neither section 8 nor section 400 applies to an offence referred to in subsection (1).

(4) Nothing in subsections (1) to (3) limits or affects-

a. the application of section 7 to the occurrence in New Zealand of-

i. an act or omission forming part of an offence; or

ii. an event necessary to the completion of an offence; or

iv. the application of section 8A.

### **105D Bribery outside New Zealand of foreign public official**

(1) Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against [section 105C](#).

(2) Subsection (1) applies to a person who is—

- (a) a New Zealand citizen; or
- (b) ordinarily resident in New Zealand; or
- (c) a body corporate incorporated in New Zealand; or
- (d) a corporation sole incorporated in New Zealand.

(3) Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against [section 105C](#).

(4) [Repealed]

#### **105E Corruption of foreign public officials**

(1) Every person specified in subsection (2) who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person in respect of any act or omission by an official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority) is liable to imprisonment for a term not exceeding 7 years.

(2) Subsection (1) applies to—

- (a) any foreign public official who has committed the offence while in New Zealand;
- (b) any person employed as a foreign public official who has committed the offence while outside New Zealand if the person is—
  - (i) a New Zealand citizen; or
  - (ii) ordinarily resident in New Zealand; or
  - (iii) a body corporate incorporated in New Zealand; or
  - (iv) a corporation sole incorporated in New Zealand.

(3) Nothing in this section limits any immunity that a foreign public official or person has under this Act or any other enactment.

New Zealand provided the following information:

New Zealand may also exercise extraterritorial jurisdiction in certain circumstances when an offence is committed by a New Zealand national or a person who is ordinarily resident in New Zealand under s 7A of the Crimes Act 1961.

### **(b) Observations on the implementation of the article**

In addition to the extraterritorial jurisdiction established in sections 7A, 105D and 105E Crimes Act 1961, New Zealand could establish extraterritorial jurisdiction in relation to offences established in accordance with the Convention that are not listed in sections 7A, 105D and 105E Crimes Act 1961, when such offences are committed by a national or a stateless person who has their ordinary residence in New Zealand.

### **Subparagraph 2 (c) of article 42**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*[...]*

*(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph (a) (i) or (ii) or (b) (i), of this Convention within its territory; or*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act 1961**

##### **7 Place of commission of offence**

For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

##### **66 Parties to offences**

(1) Every one is a party to and guilty of an offence who-

(a) actually commits the offence; or

(b) does or omits an act for the purpose of aiding any person to commit the offence; or

(c) abets any person in the commission of the offence; or

(d) incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

New Zealand indicated that there were several sections in the Crimes Act which provide for jurisdiction where only part of the offence is not committed in New Zealand. These are as follows:

Section 7 of the Crimes Act deals with the situation where the whole offence is not completed within the territorial jurisdiction of the court. As case law reveals, situations of this kind which can arise are many, varied, and may give rise to difficult jurisdictional problems. This section deems the whole offence to occur within New Zealand, and thus within the jurisdiction of the New Zealand courts, but only if either:

(a) any act or omission forming part of the offence occurs in New Zealand; or (b) any event necessary to the completion of the offence occurs in New Zealand.

- Section 66 provides for parties' liability and states that everyone is a party to and guilty of an offence who:
  - actually commits the offence
  - does or omits an act to aid any person to commit the offence
  - abets any person in the commission of the offence, or
  - incites, counsels, or procures any person to commit the offence.
- Section 66 also provides that where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.
- Preparatory actions are also specifically criminalised under section 243(3)(a) of the Crimes Act (money laundering) which provides that everyone is liable to imprisonment who obtains (or has in their possession) any property (that is the proceeds of an offence committed by another person) with intent to engage in a money laundering transaction in respect of that property.
- Further, section 243(4)(b) of the Crimes Act criminalises assisting any other person, whether directly or indirectly to 'deal' with that property.

## **(b) Observations on the implementation of the article**

With regard to section 7 A of the Crimes Act 1961, an offence is deemed to have been committed in New Zealand when any act or omission forming part of any offence or any event necessary to the completion of any offence occurred there.

### **Subparagraph 2 (d) of article 42**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*[...]*

*(d) The offence is committed against the State Party.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand does not explicitly claim jurisdiction on this ground. However, the authorities indicated that New Zealand may claim jurisdiction where the offence has been committed against New Zealand within its territorial jurisdiction (or where New Zealand claims extraterritorial jurisdiction).

## **(b) Observations on the implementation of the article**

New Zealand could establish extraterritorial jurisdiction over offences committed against the State.

### **Paragraphs 3 and 4 of article 42**

*3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

*4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Crimes Act**

#### **7A Extraterritorial jurisdiction in respect of certain offences with transnational aspects**

- (1) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for any offence against this Act committed in

the course of carrying out a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002) or an offence against section 98AA, section 98A, section 98C, section 98D, any of sections 100 to 104, section 105(2), section 116, section 117, section 243, section 298A, or section 298B-

a. if the person to be charged-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand; or

iii. has been found in New Zealand and has not been extradited; or

iv. is a body corporate, or a corporation sole, incorporated under the law of New Zealand; or

b. if any of the acts or omissions is alleged to have occurred-

i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or

ii. on board a ship used as a ship of the New Zealand Defence Force; or

iii. on board a New Zealand aircraft; or

iv. (iv) on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or

c. if a person in respect of whom the offence is alleged to have been committed-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand; or

d. in the case of an offence against section 98A, if the group of people with or in which the person to be charged is alleged to have participated are alleged to have as their objective or one of their objectives the obtaining of material benefits by the commission in New Zealand of offences or conduct referred to in paragraph (a) or paragraph (b) of section 98A(2).

(2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 98C or section 98D

a. in the case of an offence against section 98C(1) or section 98D, if the act or omission is alleged to relate to the entry of a person into New Zealand;  
or

b. in the case of an offence against section 98C(2) if the act or omission is alleged to relate to arranging the bringing of a person to New Zealand.

(3) (2A) Even if some or all of the acts alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for an offence against section 131B-

a. if the person to be charged-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand; or

iii. has been found in New Zealand and has not been extradited; or

b. if any of the acts is alleged to have occurred-

i. on board a ship registered or required to be registered under the Ship Registration Act 1992; or

ii. on board a ship used as a ship of the New Zealand Defence Force; or

iii. on board a New Zealand aircraft; or

iv. on board an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or

c. if a person in respect of whom the offence is alleged to have been committed-

i. is a New Zealand citizen; or

ii. is ordinarily resident in New Zealand.

(3) Neither section 8 nor section 400 applies to an offence referred to in subsection (1).

(4) Nothing in subsections (1) to (3) limits or affects-

a. the application of section 7 to the occurrence in New Zealand of-

- i. an act or omission forming part of an offence; or
- ii. an event necessary to the completion of an offence; or
- iii. the application of section 8A.

#### **105D Bribery outside New Zealand of foreign public official**

(1) Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against [section 105C](#).

(2) Subsection (1) applies to a person who is—

- (a) a New Zealand citizen; or
- (b) ordinarily resident in New Zealand; or
- (c) a body corporate incorporated in New Zealand; or
- (d) a corporation sole incorporated in New Zealand.

(3) Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against [section 105C](#).

(4) [Repealed]

#### **105E Corruption of foreign public officials**

(1) Every person specified in subsection (2) who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person in respect of any act or omission by an official in the official's official capacity (whether or not the act or omission is within the scope of the official's authority) is liable to imprisonment for a term not exceeding 7 years.

(2) Subsection (1) applies to—

- (a) any foreign public official who has committed the offence while in New Zealand;
- (b) any person employed as a foreign public official who has committed the offence while outside New Zealand if the person is—
  - (i) a New Zealand citizen; or
  - (ii) ordinarily resident in New Zealand; or
  - (iii) a body corporate incorporated in New Zealand; or

(iv) a corporation sole incorporated in New Zealand.

(3) Nothing in this section limits any immunity that a foreign public official or person has under this Act or any other enactment.

New Zealand provided information on the following efforts made to implement the provision under review:

- Paragraph 3 concerns the mandatory initiation of domestic criminal proceedings in lieu of extradition where a person is not extradited on the grounds of nationality. New Zealand has no such mandatory requirement.
- However, New Zealand does comply with paragraph 4 of article 44, which concerns the discretion to prosecute someone where extradition is refused on the grounds of nationality.
- New Zealand law provides that if any element of the offending occurs in New Zealand, then the offence is deemed to have been committed in New Zealand. In addition for those offences that occurred wholly outside New Zealand, many/all of the offences required under the Convention have extraterritorial jurisdiction enabling prosecution in New Zealand.
- In particular, prosecutions can be brought in New Zealand for offences against sections 100-104 and 105(2) of the Crimes Act where the offence occurred wholly outside New Zealand and the person to be charged has been found in New Zealand and has not been extradited.

#### **(b) Observations on the implementation of the article**

While the extraterritorial jurisdiction for offences listed under 7A, 105D and 105E of the Crimes Act may cover certain cases under paragraphs 3 and 4 of article 42 of the Convention, New Zealand has not established its jurisdiction for all cases in which the alleged offender is present in its territory and extradition is refused solely on the ground that the alleged offender is one of its nationals or in any other cases in which the alleged offender is not being extradited.

New Zealand could establish extraterritorial jurisdiction regarding offences established in accordance with the Convention that are not listed in sections 7A, 105D and 105E of the Crimes Act 1961 committed by a person who is present in New Zealand and is not being extradited.

#### **Paragraph 5 of article 42**

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that enforcement agencies in New Zealand were able to consult and coordinate as appropriate with the competent authorities in other States. For example, where NZ Police becomes aware of a parallel investigation, Police will consult the other State Party with a view to coordinating investigative actions.

In 2010, the SFO and the Hong Kong ICAC carried out parallel investigations into conduct which took place in Hong Kong and in New Zealand. The two law enforcement authorities cooperated initially and then coordinated their investigations, leading to a single prosecution in Hong Kong of three individuals, being where the victims were domiciled. The three individuals were shown to have corruptly raised finance of equivalent to approximately NZ\$186 million on the Hong Kong stock exchange to acquire NZ farms via a network of other corporate structures, resulting in imprisonment sentences of between five and eight years three months.

**(b) Observations on the implementation of the article**

Enforcement agencies in New Zealand are able to consult and coordinate as appropriate with the competent authorities in other States.

**Paragraph 6 of article 42**

*6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that the Convention did not exclude the exercise of any criminal jurisdiction established by New Zealand in accordance with its domestic law.

**(b) Observations on the implementation of the article**

There is no provision under domestic or international law that removes the exercise of any criminal jurisdiction established by New Zealand in accordance with its domestic law.

## IV. International cooperation

### Article 44. Extradition

#### Paragraph 1 of article 44

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

#### (a) Summary of information relevant to reviewing the implementation of the article

Extradition is governed by the Extradition Act 1999 (EA), which sets forth different schemes applying to:

- (a) certain treaty countries, certain Commonwealth countries and certain other countries (part 3 EA);
- (b) Australia and designated countries (part 4 EA); and
- (c) individual requests to which the Act is extended (part 5 EA).

New Zealand is party to 45 bilateral extradition treaties which, in general, take precedence over the schemes established in the Extradition Act (sect. 11 EA). The London Scheme for Extradition within the Commonwealth is not applicable in New Zealand.

New Zealand referred to the following provisions:

#### **Extradition Act 1999**

#### **4 Meaning of extradition offence**

- (1) In this Act, extradition offence means, subject to an extradition treaty,-
  - a. in relation to an extradition country, an offence punishable under the law of the extradition country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty, and which satisfies the condition in subsection (2);
  - b. in relation to a request by New Zealand, an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.
- (2) The condition referred to in subsection (1)(a) is that if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had occurred within the jurisdiction of New Zealand at the relevant time it would, if

proved, have constituted an offence punishable under the law of New Zealand for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty.

- (3) For the purposes of determining whether the condition in subsection (2) is satisfied in relation to a particular application for surrender of a person, the relevant time referred to in subsection (2) is the time at which the conduct is alleged to have occurred.
- (4) In determining the maximum penalty for an offence against the law of any foreign country for which no statutory penalty is imposed, regard must be had to the level of penalty that can be imposed by a court for the offence.

### **3 Meaning of extraditable person**

In this Act, a person is an extraditable person in relation to an extradition country if-

- (a) the person is accused of having committed an extradition offence against the law of that country; or
- (b) the person has been convicted of an extradition offence against the law of that country and-
  - i. there is an intention to impose a sentence on the person as a consequence of the conviction; or
  - ii. the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.

#### **Incoming requests:**

The process for handling incoming extradition requests varies depending on the different schemes aforementioned:

1. Schemes (a) and (c) concerning requests from certain treaty countries, certain Commonwealth countries and certain other countries (governed by part 3 EA) and individual requests to which the Act is extended (governed by part 5 EA):

Extradition requests must be transmitted to the Ministry of Justice (MoJ) through diplomatic channels or by other means prescribed in an extradition treaty (sect. 18 EA). The Minister, with assistance from the Crown Law Office and being satisfied that a request is sufficient, may refer it to a District Court judge for issuance of a warrant of arrest and determination of eligibility for surrender (sects. 19 to 24 EA). The Minister may also order extradition proceedings to be discontinued, cancel any arrest warrant and order the discharge of the person (sect. 21 (3) and (4) EA). If the court determines the person is eligible for surrender, then a warrant of detention will be issued (sect. 26 EA). The Minister bears the final responsibility of determining whether a person is to be surrendered (sect. 30 EA). This decision will then be transmitted to the requesting State through diplomatic channels.

2. Scheme (b) concerning requests from Australia and designated countries (governed by part 4 EA):

The Ministry of Foreign Affairs and Trade submits arrest warrants issued in those countries directly to the competent District Court, where the respective judge may endorse the warrant to authorize their execution in New Zealand (sect. 41 EA). If the court is satisfied that the person is eligible for surrender, it must issue a warrant for the person's detention (sect. 46 EA) and a surrender order (sect. 47), unless it refers the case to the Minister (sect. 48 EA) who must then determine whether the person shall be surrendered (sect. 49). If the person is to be extradited, the Minister issues a surrender order (sect. 50 EA) or temporary surrender order (sect. 54 EA).

For all schemes, the District Court's decision can be appealed on questions of law only (sect. 68 EA) and is subject to judicial review (s 27(2) of the New Zealand Bill of Rights Act 1990). The Minister's decisions are not subject to appeal.

The final decision on extradition is communicated to the requesting State through diplomatic channels, and the police services of the requesting and requested States liaise with regard to the practical execution of the request.

### **Outgoing requests:**

Part 6 EA establishes the legal framework for extradition requests made by New Zealand. Outgoing requests for extradition are drafted by the SFO and the prosecution service. The Crown Law Office advises on the draft request, which is then transmitted to the authority that is competent for making the request.

1. For active extradition requests to requested States to which part 3 EA applies (certain treaty countries, certain Commonwealth countries and certain other countries): The Minister of Justice is the competent authority for making extradition requests to these countries.
2. For active extradition requests to requested States to which part 4 EA applies (Australia and designated countries): The Commissioner of Police or his or her delegate is the competent authority.
3. For requests that require authorization by a particular person under the law of the requested State: That person is authorized to make the request (sect. 61 EA).

Requests may be made directly to the competent authorities in the requested State (sect. 61, subsect. 2 EA), but are generally transmitted via diplomatic channels.

### **(b) Observations on the implementation of the article**

New Zealand's Extradition Act establishes a comprehensive framework for extradition to and from New Zealand. However, according to the observations made above with regard to article 25(b) of the Convention, some offences of obstruction of justice are not extraditable due to the punishment thresholds established for these offences.

Therefore, it is recommended that New Zealand ensure that all offences established in accordance with article 25 (b) of the Convention are extraditable.

### **(c) Successes and good practices**

If asked to do so by the requesting State, New Zealand reviews draft extradition requests and consults with the requesting State to ensure their compliance with the requirements established by New Zealand.

## **Paragraph 2 of article 44**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Dual criminality is a mandatory requirement under the Extradition Act 1999. This means that, for all extraditions from New Zealand, except where an applicable treaty alters this principle, extradition will only occur where the conduct involved is criminalized in New Zealand. However; no extradition treaty in force is known to foresee extradition in the absence of dual criminality.

The Extradition Act further clarifies that the reason for the dual criminality requirement is two-fold. First, the requirement underlines the reciprocity in an extradition relationship between two countries. Second, it is considered to be undesirable for a country to assist in the enforcement of criminal law that is unknown in that country's domestic law.

However, New Zealand does not require that the crimes in each country are the same. Rather, the question is whether the criminal conduct in the requesting country, either in total or in part, amounts to criminal conduct in New Zealand. The broader approach is reflected in the wording of section 5 of the Extradition Act. In referring to the "totality of the acts or omissions" and by clarifying that it does not matter whether, under the law of the requesting country and New Zealand, the acts or omissions are categorised or named differently or the constituent elements differ, the Act has attempted to remove the barriers that can be created by a narrow approach to dual criminality.

New Zealand referred to the following provisions:

### **Extradition Act 1999**

#### **4 Meaning of extradition offence**

*Cited above under paragraph 1 of article 44*

#### **5 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 virtue of which the offence has, or is alleged to have, been committed.

(2) In making a determination for the purposes of section 4(2), the totality of the acts or omissions alleged to have been committed by the person must be taken into account and it does not matter whether under the law of the extradition country and New Zealand-

(a) the acts or omissions are categorised or named differently; or

(b) the constituent elements of the offence differ.

(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.

(4) For the purposes of this Act, any vessel or aircraft recognised by the law of any country as belonging to that country is deemed to be within the jurisdiction of and to be part of that country.

(5) If a person has been convicted in his or her absence of an offence against the law of an extradition country, whether or not the conviction is a final conviction, then, for the purposes of this Act, the person is deemed not to have been convicted of that offence but is deemed to have been accused of that offence.

#### **(b) Observations on the implementation of the article**

Dual criminality is a fundamental requirement for extradition under the EA (sects. 4, 5), but may not be required under a treaty. Under the EA, all offences punishable in both New Zealand and the requesting country for which the maximum penalty is imprisonment for not less than 12 months or any more severe penalty are extraditable (sect. 4 EA). In determining dual criminality, New Zealand focuses on the underlying conduct and not the denomination of the offence.

As noted in the observations above under article 44, paragraph 1, most offences established in accordance with the Convention except for certain offences criminalizing obstruction of justice meet the minimum punishment thresholds. Therefore, not all offences established in accordance with the Convention offences are extraditable. Moreover, some offences foreseen in the Convention have not yet been criminalized in New Zealand.

Therefore, New Zealand may wish to grant extradition in the absence of dual criminality.

#### **Paragraph 3 of article 44**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In compliance with section 29 of the Extradition Act, extradition for offences that are not extraditable offences is only possible for States to which part 3 of the Extradition Act applies (certain treaty countries, certain Commonwealth countries and certain other countries).

New Zealand referred to the following provisions:

**Extradition Act 1999**

**Only for part 3 countries**

**29 Consent to surrender for offences that are not extradition offences**

- (1) If—
- (a) either—
    - (i) the court determines under section 24 that a person is eligible for surrender to an extradition country in relation to an extradition offence or extradition offences; or
    - (ii) a person consents under section 28 to being surrendered to an extradition country in relation to an extradition offence or extradition offences; and
  - (b) the extradition country has requested that the person also be surrendered for an offence that is not an extradition offence or offences that are not extradition offences,—
- the court must ask the person whether he or she consents to being surrendered to the country in respect of the offence or any of the offences that are not extradition offences.
- (2) If the person gives his or her consent under this section to being surrendered for an offence or offences referred to in subsection (1)(b), the court must notify the Minister in writing of the offence or offences in respect of which the person has consented.
- (3) The court must not notify the Minister under subsection (2) unless—
- (a) the person was before the court when he or she consented to surrender for the offence or offences; and
  - (b) the person has been legally represented in the proceedings; and
  - (c) the court is satisfied that the person has freely consented to the surrender for the offence or offences in full knowledge of its consequences.

**(b) Observations on the implementation of the article**

As per section 29 of the Extradition Act, New Zealand allows for accessory extradition only to States to which part 3 of the Extradition Act applies (certain treaty countries, certain Commonwealth countries and certain other countries), and only if the sought person consents to the extradition for

offences that are not extraditable.

As accessory extradition is therefore only possible if the sought person consents and cannot be granted for requests made by all States parties to the Convention, New Zealand may wish to grant accessory extradition in cases in which the requested person does not consent to the accessory extradition and in cases not involving States to which part 3 of the Extradition Act applies.

#### **Paragraph 4 of article 44**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand does not require a treaty to extradite or receive extradition requests.

The Extradition Act defines offences of a political character:

#### **Extradition Act 1999**

#### **2 Interpretation**

(3) In this Act, a reference to an **offence of a political character** does not include—

- (a) an offence—
  - (i) that is constituted by conduct of a kind referred to in a multilateral treaty to which New Zealand is a party; and
  - (ii) for which parties have an obligation to extradite or prosecute; or
- (b) any offence in relation to which New Zealand has agreed in writing with another country that the offence will not be treated as a political offence for the purposes of extradition between New Zealand and that country.

#### **(b) Observations on the implementation of the article**

In accordance with section 2(3)(a)(i) of the Extradition Act, the offences established in accordance with the Convention are not considered as political offences.

While New Zealand does not require a treaty for extradition, if a bilateral or multilateral extradition

treaty exists, it takes precedence over the framework established by the Extradition Act. While not all extradition treaties include all offences established in accordance with the Convention, the authorities confirmed during the country visit that New Zealand deems all offences established in accordance with the Convention that meet the minimum punishment threshold of the EA included in its extradition treaties.

As noted above with regard to article 44, paragraph 1 of the Convention, not all offences established in accordance with article 25(b) of the Convention meet this threshold.

Therefore, it is recommended that New Zealand deem all offences established in accordance with article 25 (b) of the Convention included in its extradition treaties.

#### **Paragraphs 5 and 6 of article 44**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and*

*(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

In accordance with the normative framework established by the Extradition Act, New Zealand does not make extradition conditional on the existence of a treaty.

New Zealand clarified that in the case of a country having no extradition treaty with New Zealand and it is neither a Commonwealth country nor a “designated country”, the Governor-General may apply the general extradition provisions in the Extradition Act 1999 to that country by Order in Council (sect. 40 EA). Such an Order may only be made on the recommendation of the Minister of Justice, and it may specify limitations, conditions, exceptions, or qualifications to the application of the provisions. The Minister must not recommend the making of an Order unless being satisfied that the country can surrender persons accused or convicted of a similar range of extradition offences to whom the Order

would relate (sect. 40 (3) EA).

Finally, where there is no Order in Council applying the Act, the Minister of Justice is empowered to grant extradition requests from non-Commonwealth countries that do not have a treaty with New Zealand, or in cases where a treaty applies but the offence in question is not an extradition offence under the treaty (sect. 60 EA).

#### **(b) Observations on the implementation of the article**

The reviewing experts noted that New Zealand does not make extradition conditional on the existence of a treaty. Therefore, the provisions under review are not applicable to New Zealand.

During the country visit, New Zealand clarified that it cannot extradite on the sole basis of the Convention.

#### **Paragraph 7 of article 44**

*7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

As noted with regard to article 44, paragraph 2 of the Convention, New Zealand requires dual criminality for extradition and has established a minimum punishment threshold under the Extradition Act 1999. Most offences established in accordance with the Convention meet the requirements of the threshold. Certain offences of obstruction of justice established in accordance with article 25 (b) of the Convention do not meet the threshold.

##### **(b) Observations on the implementation of the article**

Convention offences are extraditable offences when they meet the requirements of the Extradition Act. However, the offences established in accordance with article 25 (b) of the Convention do not meet the minimum punishment thresholds of the Extradition Act.

Therefore, it is recommended that New Zealand ensure that all offences established in accordance with article 25 (b) of the Convention are extraditable.

#### **Paragraph 8 of article 44**

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the*

*minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

As outlined above, extradition is governed by the Extradition Act 1999 and the applicable bi- and multilateral extradition treaties. In accordance with the Extradition Act, the Minister of Justice takes the final decision on whether extradition of eligible persons shall be granted.

**Extradition Act 1999**

**30 Minister must determine whether person to be surrendered**

(1) If the court issues a warrant for the detention of a person under section 26(1)(a) or section 28(2)(a), the Minister must determine in accordance with this section whether the person is to be surrendered.

(2) The Minister must not determine that the person is to be surrendered-

(a) if the Minister is satisfied that a mandatory restriction on the surrender of the person applies under section 7 or

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

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

(c) if the person is a New Zealand citizen, and-

i. an extradition treaty in force between New Zealand and the extradition country; or

ii. an Order in Council made under section 16 in relation to the extradition country; or

iii. if there is no applicable treaty or Order in Council, any undertakings or arrangement in relation to extradition between New Zealand and the extradition country,-

provide that no New Zealand citizen may be surrendered.

(3) The Minister may determine that the person is not to be surrendered if-

- (a) it appears to the Minister that the person may be or has been sentenced to death by the appropriate authority in the extradition country, and the extradition country is unable to sufficiently assure the Minister 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) it appears to the Minister that a discretionary restriction on the surrender of the person applies under section 8; or
- (c) the person is a New Zealand citizen and-
  - i. if there is a treaty in force between New Zealand and the extradition country, it does not preclude the surrender of New Zealand citizens; or
  - ii. if there is an Order in Council made under section 16 in relation to the extradition country, it does not preclude the surrender of New Zealand citizens; or
  - iii. if there is no applicable treaty or Order in Council in relation to the extradition country, any undertakings or arrangement in relation to extradition between New Zealand and the extradition country do not preclude the surrender of New Zealand citizens-

but the Minister is satisfied that, having regard to the circumstances of the case, it would not be in the interests of justice to surrender the person; or

- (d) without limiting section 32(4), it appears to the Minister that compelling or extraordinary circumstances of the person including, without limitation, those relating to the age or health of the person, exist that would make it unjust or oppressive to surrender the person; or
- (e) for any other reason the Minister considers that the person should not be surrendered.

(4) Subsection (3)(c) applies even if the person is a citizen of both New Zealand and the extradition country.

(5) The Minister must not determine that the person is to be surrendered unless by virtue of-

- (a) the law of the extradition country; or
- (b) a provision of an extradition treaty in force between New Zealand and the extradition country; or
- (c) an undertaking given by the extradition country to New Zealand-  
the person, after being surrendered to the country, will not, unless the person has left or had the opportunity of leaving the country,-

(d) be detained or tried in that country for any offence committed, or alleged to have been

committed, before the person's surrender other than-

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

(e) be detained in that country for the purpose 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 person's surrender to the first-mentioned country, other than an offence in respect of which the Minister consents to the person being so detained and surrendered.

(6) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

#### **(b) Observations on the implementation of the article**

The Extradition Act 1999 and the applicable bi- and multilateral treaties govern extradition and set forth the applicable requirements. The Extradition Act establishes that the Minister of Justice is the final decision-maker with regard to granting extradition.

#### **Paragraph 9 of article 44**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the provisions of the Extradition Act dealing with surrender by consent and establishing timelines for the execution of an extradition once a surrender order has been issued:

#### **Extradition Act 1999**

## **28 Surrender by consent**

- (1) A person may at any time notify the court that he or she consents to being surrendered to the extradition country for the extradition offence or extradition offences for which surrender is sought.
- (2) If the person notifies the court of his or her consent to surrender under subsection (1), then, despite section 24 but subject to subsection (3), the court must—
  - (a) issue a warrant for the detention of the person in a prison or other place authorised in accordance with section 27 of this Act or section 184T(3) of the Summary Proceedings Act 1957 pending surrender; and
  - (b) record in writing the extradition offence or extradition offences in respect of which the person has consented to surrender; and
  - (c) send to the Minister a copy of the warrant of detention and the record made under paragraph (b), together with a copy of the application and any other evidence taken before the court in the case and any other information before it that has not already been sent to the Minister, and such report on the case as the court thinks fit.
- (3) The court must not take the action in subsection (2) unless—
  - (a) the person was before the court when he or she consented to surrender for the offence or offences; and
  - (b) the person has been legally represented in the proceedings; and
  - (c) the court is satisfied that the person has freely consented to the surrender in full knowledge of its consequences.
- (4) Nothing in subsections (1) to (3) prevents a person from giving notice to the Minister after the court orders the detention of the person under section 26 that the person consents to surrender.
- (5) If the court issues a warrant under subsection (2), the court may grant bail to the person.
- (6) If the court grants bail to the person, the court may impose any conditions of bail that the court thinks fit in addition to any conditions that the court may impose under subsections (1) to (3) of section 31 of the Bail Act 2000 (as applied by section 52 of that Act).
- (7) Enactments other than this Act and its provisions that are specified in subsection (2)(a) must be read as they read immediately before the commencement date as defined in section 394 of the Criminal Procedure Act 2011.
- (8) In subsection (6),—
  - (a) section 31 of the Bail Act 2000 must be read as it read immediately before section 7 of the Bail Amendment Act 2011 came into force; and
  - (b) section 52 of the Bail Act 2000 must be read as it read immediately before the commencement date as defined in section 394 of the Criminal Procedure Act 2011.

### **36 Discharge of person if not surrendered within 2 months**

- (1) This section applies if a person is not surrendered and conveyed out of New Zealand under a surrender order or a temporary surrender order made under this Part within 2 months—
  - (a) after the date of the issue of the warrant for the detention of the person under section 26 or section 28(2) pending surrender, if no appeal or application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending; or
  - (b) if an appeal, or an application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending, after the date that the proceedings are finally determined; or
  - (c) if a surrender order is made under section 32(2)(a) or section 32(4), after the date that the order takes effect.
- (2) If this section applies, the person may apply to a Judge of the High Court to be discharged.
- (3) If an application to be discharged is made under subsection (2), the Judge may, on proof that reasonable notice of the intention to make the application has been given to the Minister, unless sufficient cause is shown against the discharge,—
  - (a) discharge the surrender order or temporary surrender order, as the case may be; and
  - (b) order the discharge of the person from the place where the person is detained, if the person is not liable to be detained under any other order for detention.
- (4) Despite subsection (1), no order may be made under this section for the discharge of a person if—
  - (a) it appears to the court that another request has been made under this Act for the surrender of the person, that request having been received—
    - (i) on or before the date on which the warrant referred to in subsection (1)(a) was issued; or
    - (ii) if an appeal or application referred to in subsection (1)(b) was made, on or before the date that the proceedings were finally determined; and
  - (b) a final decision on the surrender of the person in relation to that request has not been made.
- (5) For the purposes of subsection (4), request includes a warrant produced for endorsement under Part 4.

### **53 Surrender by consent**

- (1) A person may at any time notify the court that he or she consents to being surrendered to the extradition country for the extradition offence or extradition offences for which surrender is sought.
- (2) If the person notifies the court of his or her consent to surrender under subsection (1), then, despite section 45 but subject to subsections (3) and (4) of this section, the court must—

- (a) make a surrender order in respect of the person; or
- (b) if the court is required to refer the case to the Minister under section 48(1),—
  - (i) issue a warrant for the detention of the person in a prison or other place authorised in accordance with section 52 of this Act or section 169 of the Criminal Procedure Act 2011 pending surrender; and
  - (ii) record in writing the offence or offences in respect of which the person has consented to surrender; and
  - (iii) send to the Minister a copy of the warrant of detention and the record made under subparagraph (ii), together with a copy of the warrant and all other documents before the court in the case, and such report on the case as the court thinks fit.
- (3) The court must not take the action in subsection (2) unless—
  - (a) the person was before the court when he or she consented to surrender for the offence or offences; and
  - (b) the person has been legally represented in the proceedings; and
  - (c) the court is satisfied that the person has freely consented to the surrender for the offence or offences in full knowledge of its consequences.
- (4) Nothing in subsections (1) to (3) prevents a person whose case is referred to the Minister under section 48(1) from giving notice to the Minister after the court orders the detention of the person under section 46 that the person consents to surrender.
- (5) If the court issues a warrant for the detention of a person under subsection (2)(b)(i), then subsections (2) and (3) of section 46 apply as if the person had been found eligible for surrender.

### **57 Discharge of person if not surrendered within 2 months**

- (1) This section applies if a person is not surrendered and conveyed out of New Zealand under a surrender order or a temporary surrender order made under this Part within 2 months—
  - (a) after the date of the issue of the warrant under section 46(1)(a) or section 53(2)(b)(i) pending surrender, if no appeal or application for review or habeas corpus in respect of a determination under this Act, or any appeal from such an appeal or application, is pending; or
  - (b) if an appeal, or an application for review or habeas corpus, in respect of a determination under this Act, or any appeal from such an appeal or application, is pending, after the date that the proceedings are finally determined; or
  - (c) if a surrender order is made under section 51(2)(a) or section 51(4), after the date that the order takes effect.
- (2) If this section applies, the person may apply to a Judge of the High Court to be discharged.

- (3) If an application to be discharged is made under subsection (2), the Judge may, on proof that reasonable notice of the intention to make the application has been given to the Minister, unless sufficient cause is shown against the discharge,—
  - (a) discharge the surrender order or temporary surrender order, as the case may be; and
  - (b) order the discharge of the person from the place where the person is detained, if the person is not liable to be detained under any other order for detention.
- (4) Despite subsection (1), no order may be made under this section for the discharge of a person if the case has been referred to the Minister under section 48 and—
  - (a) it appears to the court that another request has been made under this Act for the surrender of the person, that request having been received—
    - (i) on or before the date on which the warrant referred to in subsection (1)(a) was issued; or
    - (ii) if an appeal or application referred to in subsection (1)(b) was made, on or before the date that the proceedings were finally determined; and
  - (b) a final decision on the surrender of the person in relation to that request has not been made.
- (5) For the purposes of subsection (4), **request** includes a warrant produced for endorsement under this Part.

#### **65 Return of surrendered person if proceedings not commenced within 6 months**

If—

- (a) a person accused or convicted of an extradition offence in New Zealand is surrendered by an extradition country; and
- (b) proceedings against the person for the offence in respect of which the person was surrendered are not begun within 6 months after the date of the person's arrival in New Zealand on being surrendered—

the Minister may make a removal order under section 96.

#### **(b) Observations on the implementation of the article**

New Zealand has established expedited extradition proceedings for cases in which the requested person consents to extradition (sects. 28, 53 EA). In addition, the Extradition Act establishes timelines that aim at expediting extradition once a surrender order is made.

#### **Paragraph 10 of article 44**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at*

*extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Extradition Act 1999**

**19 Minister may request issue of arrest warrant**

(1) If a request is made under section 18, the Minister may, in writing, notify a District Court Judge that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought.

(2) After receiving a request under subsection (1), the District Court Judge may issue a warrant in the prescribed form for the arrest of the person if the Judge is satisfied on the basis of information presented to him or her that—

(i) the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and

(ii) there are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is an extradition offence.

(3) The Minister may, if the Minister thinks fit, refuse to notify a District Court Judge under this section.

**20 Provisional arrest warrant may be issued**

(1) A District Court Judge may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him or her that-

a. a warrant for the arrest of a person has been issued in an extradition country by a court or a Judge or other person having authority under the law of the extradition country to issue it; and

b. the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and

c. there are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is

an extradition offence; and

d. it is necessary or desirable for an arrest warrant to be issued urgently.

(2) A warrant may be issued under this section even though no request for surrender has been made.

#### **41 Endorsement of warrant issued in extradition country**

(1) If a warrant for the arrest of a person issued in an extradition country by a court or a Judge or other person having lawful authority under the law of the extradition country to issue it is produced to a District Court Judge, and the Judge is satisfied that—

(a) the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and

(b) there are reasonable grounds to believe that—

(i) the person is an extraditable person in relation to the extradition country; and

(ii) the offence for which the arrest of the person is sought is an extradition offence,—

the Judge may endorse the warrant in the prescribed form to authorise its execution in New Zealand.

(2) A warrant endorsed under subsection (1) is sufficient authority for any constable to execute the warrant in accordance with this Part.

#### **42 Issue in New Zealand of provisional arrest warrant**

(1) A District Court Judge may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him or her that—

a. a warrant for the arrest of a person has been issued in an extradition country by a court or a Judge or other person having lawful authority under the law of the extradition country to issue it; and

b. the person is, or is suspected of being, in New Zealand or on his or her way to New Zealand; and

c. there are reasonable grounds to believe that the person is an extraditable person in relation to the extradition country and the offence for which the person is sought is an extradition offence; and

d. it is necessary or desirable for an arrest warrant to be issued urgently.

(2) A warrant may be issued under subsection (1) even though-

- a. a warrant authorising the arrest of the person has not been produced to the Judge for endorsement under section 41; or
- b. such a warrant has been produced, but the Judge requires further information or evidence before endorsing it under section 41.

**(b) Observations on the implementation of the article**

New Zealand can take persons whose extradition is sought into custody: In extradition proceedings, District Court judges can issue arrest warrants (section 19 EA), provisional arrest warrants (sections 20 and 42 EA) or, with regard to requests for extradition from Australia and designated countries governed by part 4 of the Extradition Act, endorse arrest warrants issued in those countries.

A person who is arrested is to be brought before the Court to determine whether he/she will be remanded in custody or released on bail pending a decision on extradition (sections 22, 23, 43 and 44 EA).

**Paragraph 11 of article 44**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Extradition Act 1999**

**30 Minister must determine whether person to be surrendered**

(2) The Minister must not determine that the person is to be surrendered-

(...)

- c. if the person is a New Zealand citizen, and-

- i. an extradition treaty in force between New Zealand and the extradition country; or
  - ii. an Order in Council made under section 16 in relation to the extradition country; or
  - iii. if there is no applicable treaty or Order in Council, any undertakings or arrangement in relation to extradition between New Zealand and the extradition country,-
- provide that no New Zealand citizen may be surrendered.

#### **48 Referral of case to Minister in certain circumstances**

- (1) If the court is satisfied that the grounds for making a surrender order otherwise exist but—
- (a) the person is a New Zealand citizen; or
  - (b) it appears to the court that—
    - (i) there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country; or
    - (ii) the person has been sentenced to death or may be sentenced to death by the appropriate authority in the extradition country; or
  - (c) in the case of a person whose surrender is sought for an extradition offence of which the person has been convicted, the person is liable to be detained in a prison because of a sentence of imprisonment imposed for an offence against the law of New Zealand; or
  - (d) it appears to the court that another request has been made under this Act for the surrender of the person, and a final decision on the surrender of the person in relation to that request has not been made,—
- the court must refer the case to the Minister in accordance with subsection (5).
- (1A) For the purposes of subsection (1)(d), **request** includes a warrant produced for endorsement under this Part.
- (2) Subsection (1)(a) applies even if the person is a citizen of both New Zealand and the extradition country.
- (3) The court is not required to refer the case to the Minister under subsection (1)(a) if—
- (a) Australia is the extradition country; or
  - (b) the extradition country is a designated country and the relevant Order in Council under section 40 contains a provision described in section 40(5).
- (4) If—
- (a) it appears to the court in any proceedings under section 45 that—
    - (i) any of the restrictions on the surrender of the person under section 7 or section 8 apply or may apply; or

- (ii) because of compelling or extraordinary circumstances of the person, including, without limitation, those relating to the age or health of the person, it would be unjust or oppressive to surrender the person before the expiration of a particular period; but
  - (b) in every other respect the court is satisfied that the grounds for making a surrender order exist,—  
the court may refer the case to the Minister in accordance with subsection (5).
- (5) If the court refers the case to the Minister under subsection (1) or subsection (4), the court must send to the Minister a copy of the warrant of detention together with a copy of all other documents before the court in the case, and such report on the case as the court thinks fit.

#### **49 Minister must determine if person to be surrendered if case referred**

- (1) If a case is referred to the Minister under section 48(1)(a) or (b), or section 48(4), or section 53, the Minister must determine in accordance with the grounds set out in subsections (2) to (4) of section 30 whether the person is to be surrendered, as if the case had been referred to the Minister under section 26.
- (2) For the purposes of determining under this section whether the person is to be surrendered, the Minister may seek any undertakings from the extradition country that the Minister thinks fit.

#### **(b) Observations on the implementation of the article**

Nationals can be extradited unless an extradition treaty, an Order in Council under section 16 of the Extradition Act or any arrangements or undertaking among the requesting State and New Zealand provides otherwise (sects. 30 (2) (c), 48 (1) (a) EA). During the country visit, the authorities confirmed that in practice, New Zealand generally does not distinguish between its citizens and citizens of other countries for the purpose of extradition to facilitate the trial of alleged offenders and their potential subsequent punishment, if found to be guilty, by the criminal justice system of the jurisdiction in which the offence was committed.

However, there is no obligation to submit a case for prosecution when a request for extradition is denied on the sole ground that the requested person is a national.

Therefore, it is recommended that if a request for extradition is refused solely on the ground that the sought person is a national, New Zealand submit the case to its competent authorities for prosecution at the request of the requesting State.

## **Paragraph 12 of article 44**

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand's legal framework does not require nationals to be extradited or surrendered only on the condition that the person be returned to New Zealand to serve any sentence imposed as a result of the trial or proceedings for which extradition or surrender was sought.

### **(b) Observations on the implementation of the article**

With regard to extradition of nationals, New Zealand does not require them to be returned to New Zealand for the purposes of serving any sentences imposed. As such, the provision of the Convention under review is not applicable to New Zealand.

## **Paragraph 13 of article 44**

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that its legislation does not provide for the enforcement of a sentence imposed under the domestic law of another country.

### **(b) Observations on the implementation of the article**

In the absence of pertinent enabling legislation, should extradition for the purpose of executing a sentence be refused because the sought person is a national, New Zealand cannot enforce the sentence imposed abroad or the remainder thereof.

It is therefore recommended that if extradition for the purpose of executing a sentence is refused because the requested person is a national, New Zealand consider the enforcement of the sentence

imposed abroad or the remainder thereof.

#### **Paragraph 14 of article 44**

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

##### **Extradition Act 1999**

##### **3 Meaning of extraditable person**

In this Act, a person is an extraditable person in relation to an extradition country if—

- (a) the person is accused of having committed an extradition offence against the law of that country; or
- (b) the person has been convicted of an extradition offence against the law of that country and—
  - (i) there is an intention to impose a sentence on the person as a consequence of the conviction; or
  - (ii) the whole or a part of a sentence imposed on the person as a consequence of the conviction remains to be served.

##### **Bill of Rights Act 1990**

##### **25 Minimum standards of criminal procedure**

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) the right to a fair and public hearing by an independent and impartial court;
- (b) the right to be tried without undue delay;
- (c) the right to be presumed innocent until proved guilty according to law;
- (d) the right not to be compelled to be a witness or to confess guilt;
- (e) the right to be present at the trial and to present a defence;
- (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

- (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

## **(b) Observations on the implementation of the article**

The Extradition Act and the Bill of Rights Act do not distinguish between citizens of New Zealand or of other countries with regard to guaranteeing their fair treatment at all stages of extradition proceedings.

### **Paragraph 15 of article 44**

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provision:

#### **Extradition Act 1999**

##### **7 Mandatory restrictions on surrender**

A mandatory restriction on surrender exists if—

- (a) the offence for which the surrender is sought is an offence of a political character; or
  - (b) the surrender of the person, although purportedly in respect of an extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions, or for an offence of a political character; or
  - (c) on surrender, the person may be prejudiced at his or her trial or punished, detained, or restricted in his or her personal liberty by reason of his or her race, ethnic origin, religion, nationality, sex, or other status, or political opinions; or
  - (d) the conduct for which the surrender is sought would have constituted an offence under military law only and not an offence under the ordinary criminal law of the extradition country;
- or

- (e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or New Zealand, or has undergone the punishment provided by the law of that country or New Zealand, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence; or
- (f) the person is detained in a hospital as a **special patient** within the meaning of that term in section 2(1) of the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
- (g) the person is detained in a facility as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

New Zealand indicated that it had recently refused a request on the basis that the offence was of a political character, although the request was primarily refused because New Zealand did not have an equivalent offence.

### **(b) Observations on the implementation of the article**

In line with the Extradition Act, mandatory grounds for the refusal of extradition exist. These include that extradition must be refused by New Zealand if it is sought to prosecute or punish the person on discriminatory grounds, such as race, ethnic origin, religion, nationality, sex, or other status, or would prejudice the requested person's position for discriminatory reasons (sect. 7 EA).

### **Paragraph 16 of article 44**

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the Extradition Act, which does not include fiscal matters among its mandatory or discretionary grounds for refusal:

#### **Extradition Act 1999**

#### **7 Mandatory restrictions on surrender**

Cited above under article 44, paragraph 15 of the Convention

#### **8 Discretionary restrictions on surrender**

(1) A discretionary restriction on surrender exists if, because of—

- (a) the trivial nature of the case; or
- (b) if the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
- (c) the amount of time that has passed since the offence is alleged to have been committed

or was committed,—  
and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

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

New Zealand indicated that it had extradited people accused of fiscal crimes, such as Slawomir Ryszard Bujak, who was extradited to Poland to face charges of fraud (*Bujak v District Court at Christchurch* [2009] NZSC 96; *Bujak v Minister of Justice* [2010] NZSC 8).

#### **(b) Observations on the implementation of the article**

In line with the Extradition Act, extradition cannot be refused by New Zealand solely on the ground that the offence is considered to involve fiscal matters.

#### **Paragraph 17 of article 44**

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand consults with requesting States prior to the submission of extradition requests and reviews such draft requests if requested to do so by the requesting State. However, during extradition proceedings, the New Zealand Crown Law Office represents the requesting State, and the requesting State is not specifically consulted to provide it with an opportunity to present its opinions and to provide information relevant to its allegation before extradition is refused.

#### **(b) Observations on the implementation of the article**

While New Zealand in practice consults with requesting States prior the submission of the extradition request, the authorities confirmed during the country visit that New Zealand does not specifically consult with them prior to refusing extradition. Requesting States have no legal standing in the extradition proceedings but are represented by the Crown Law Office.

Therefore, it is recommended that New Zealand consult, where appropriate, with the requesting State party prior to refusing extradition to provide it with an opportunity to present its opinions.

#### **Paragraph 18 of article 44**

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the fact that it does not require a treaty to extradite or receive extradition requests. Nevertheless, New Zealand is party to 45 bilateral extradition treaties with the countries listed below:

Extradition Act 1999 Republic of Korea (2003), Extradition Act 1965, Hong Kong SAR (1998), Fiji (1992), United States (1970), Imperial Treaties Iraq (1932), Poland (1932), Albania (1926), Lithuania (1926), Estonia (1925), Czechoslovakia (1924), Finland (1924), Latvia (1924), Thailand (1911), Greece (1910), Paraguay (1908), Panama (1906), Nicaragua (1905), Cuba (1904), Peru (1904), Belgium (1901), Serbia (1900), San Marino (1899), Spain (1899), Netherlands (1898), Chile (1897), Romania (1893), Bolivia (1892), Liberia (1892), Portugal (1892), Monaco (1891), Argentina (1889), Columbia (1888), Mexico (1886), Russia (1886), Guatemala (1885), Uruguay (1884), El Salvador (1881), Ecuador (1880), Luxembourg (1880), Switzerland (1880), France (1876), Haiti (1874), Hungary (1873), Iceland (1873), Italy (1873).

All but four of these bilateral extradition treaties date between 1870 and 1935 and were negotiated by Great Britain on behalf of the entire British Empire. These imperial treaties were concluded with the provisions of the Extradition Act 1870 in mind and were given effect by way of Order in Council of the British Parliament (see schedule 1 of the Extradition Act 1999).

The other four bilateral extradition treaties were negotiated by New Zealand. Two of these treaties (with the United States (1970) and Fiji (1992)) follow a very similar format to the older imperial treaties. That is because these treaties were negotiated with the provisions of New Zealand's Extradition Act 1965 in mind, which essentially mirrored the imperial extradition legislation. New Zealand negotiated a third bilateral treaty under the Extradition Act 1965 (Hong Kong SAR (1998)). The fourth treaty was negotiated with the Republic of Korea in 2003.

**(b) Observations on the implementation of the article**

Though a treaty basis is not required for extradition, New Zealand is party to 45 bilateral extradition treaties facilitating cooperation in this regard.

## **Article 45. Transfer of sentenced persons**

### **Article 45**

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation*

*of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that it was not party to any bilateral or multilateral agreements or arrangements on the transfer to its territory of persons sentenced to imprisonment or other forms of deprivation of liberty. In this regard, the authorities noted that New Zealand government continuously holds the position that its citizens who commit offences overseas should be punished subject to the relevant country's justice system.

In this sense, New Zealand provides assistance to its citizens imprisoned overseas through the Ministry of Foreign Affairs and Trade (MFAT). Based upon its consistent position on this matter, in cases relating to foreign offenders, New Zealand holds that they must stay and serve the sentence on New Zealand's territory.

**(b) Observations on the implementation of the article**

New Zealand cannot transfer sentenced persons and has not concluded any agreements or arrangements in this regard.

New Zealand may wish to consider entering into agreements on the transfer of sentenced persons.

## **Article 46. Mutual legal assistance**

### **Paragraph 1 of article 46**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In New Zealand, mutual legal assistance (MLA) is governed by the Mutual Assistance in Criminal Matters Act 1992 ("MACMA") and several bi- and multilateral treaties (see information provided below under article 46, paragraph 30 of the Convention).

New Zealand referred to the following provisions:

### **Mutual Assistance in Criminal Matters Act 1992**

#### **4 Object of Act**

The object of this Act is to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters, including-

- (a) the identification and location of persons:
- (b) the obtaining of evidence, documents, or other articles:
- (c) the production of documents and other articles:
- (d) the making of arrangements for persons to give evidence or assist investigations:
- (e) the service of documents:
- (f) the execution of requests for search and seizure:
- (g) the forfeiture of-
  - (i) tainted property; and
  - (ii) property of persons who have unlawfully benefited from significant criminal activity or significant foreign criminal activity; and
  - (iii) instruments of crime; and
  - (iv) property that will satisfy all or part of a foreign pecuniary penalty order:
- (h) the location of property that may be forfeited:
- (i) the recovery of property to satisfy foreign pecuniary penalty orders:
- (j) the restraining of dealings with property, or the freezing of assets, that may be forfeited.

## **8 Requests to be made by Attorney-General**

Requests by New Zealand for assistance under this Part shall be made by the Attorney-General.

## **25 Requests to be made to Attorney-General**

(1) Every request by a foreign country for assistance in a criminal matter pursuant to this Part shall be made—

- (a) to the Attorney-General; or
- (b) to a person authorised by the Attorney-General, in writing, to receive requests by foreign countries under this Part.

(2) Where a request by a foreign country is made to a person authorised under subsection (1)(b), the request shall be taken, for the purposes of this Act, to have been made to the Attorney-General.

### **Incoming requests:**

Incoming requests are received by the Attorney-General (sect. 25 MACMA) as central authority. The Attorney-General usually delegates her authority to the Crown Law Office and forwards the incoming requests to the Crown Law Office for evaluation. The Crown Law Office acknowledges receipt of the request and recommends to the Deputy Solicitor-General whether the requested assistance can be

granted, and the Deputy Solicitor-General takes a decision in this regard, of which the requesting State is informed. If the request is granted, the Crown Law Office liaises with relevant officials in New Zealand to arrange for the execution of the request and with the requesting State to ensure that the assistance provided meets the needs of the requesting State.

In the latter situation, Crown Law Office usually acts on delegation of Attorney-General in dealing with incoming mutual assistance requests in a standard process as follows:

- If necessary, contact the requesting country seeking further information to ensure we fully understand the request and can confirm the requirements of MACMA are met;
- Counsel assigned to the file draft a detailed memorandum to the Deputy Solicitor-General (Criminal) setting out the nature of the request and the extent to which the requirements of MACMA are met. Counsel make a recommendation to the Deputy Solicitor-General as to whether he should consent to the request;
- The Deputy Solicitor-General considers the request and makes a decision as to whether New Zealand will provide the requested assistance;
- The Deputy Solicitor-General's decision is communicated to the requesting country, and
- If the Deputy Solicitor-General has consented to the request, counsel responsible for the file liaise with relevant officials in New Zealand (often Police/Interpol) to arrange the assistance. Counsel also stay in touch with the requesting country to ensure the assistance provided meets their needs (for example any evidential requirements).

The number of mutual assistance requests New Zealand has received between 1 January and 31 December in each year from 2003 to 2015 is as follows:

2003 - 64
2004 - 35
2005 - 49
2006 - 43
2007 - 57
2008 - 61
2009 - 64
2010 - 59
2011 - 67
2012 - 58
2013 - 51
2014 - 90
2015 - 82

The New Zealand Police office of INTERPOL can obtain information from other countries through INTERPOL channels or New Zealand Police Liaison Officers (PLOs) for criminal investigation purposes. INTERPOL Wellington manages all incoming and outgoing MLA requests for New Zealand

Police, which processes and assures quality of all MLA requests. INTERPOL Wellington also assists district staff and liaises with Crown Law Office on behalf of New Zealand Police.

In general, New Zealand requires a MLA request from another country in order to exercise coercive power (such as search warrants) or obtain any information in an evidential format (such as court affidavits). In this sense, MACMA allows New Zealand to implement its international obligations through facilitating competent authorities in executing foreign MLA requests in criminal investigations and prosecutions.

Similarly, in order to acquire overseas assistance in gaining telephone or ISP information, bank records, or exercising search or seizure powers and obtaining formal affidavits and documents, New Zealand Police will usually seek for cooperation through MLA channels.

### **Outgoing requests:**

Within the Criminal Team at Crown Law, specially trained counsels prepare outgoing requests in consultation with the prosecuting agency and assess incoming requests. Requests are then referred to the Deputy Solicitor-General (Criminal Team) who, pursuant to delegations from the Attorney-General, makes the final determination whether the request is actioned or sent.

### **(b) Observations on the implementation of the article**

Mutual legal assistance (MLA) is regulated by the Mutual Assistance in Criminal Matters Act 1992 (MACMA) and several bilateral and multilateral treaties.

The MACMA allows for the provision of a wide range of assistance. The Attorney-General is the central authority for mutual legal assistance, but these powers have been delegated to the Crown Law Office, which acts as the delegate of Attorney-General with regard to MLA requests.

### **(c) Successes and good practices**

If asked to do so by the requesting State, New Zealand reviews draft MLA requests and consults with the requesting State to ensure their compliance with the requirements established by New Zealand.

### **Paragraph 2 of article 46**

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

## **Interpretation Act 1999**

### **Part 5 Meaning of terms and expressions in legislation**

#### **29 Definitions**

In an enactment,-

...

person includes a corporation sole, a body corporate, and an unincorporated body.

The authorities confirmed that New Zealand had received and responded to MLA requests in relation to legal persons, and quoted an example in which New Zealand agreed to provide mutual assistance to a European country in relation to the prosecution of a company (Company A) for fraud and insolvency related offences. The requested assistance related to information about New Zealand based companies alleged to be part of the wider corporate structure of Company A.

#### **(b) Observations on the implementation of the article**

The term “person” is defined in Section 29, Part 5 of the Interpretation Act 1999, to include a corporation sole, a body corporate, and an unincorporated body. This definition applies to MACMA. As such, New Zealand is able to provide mutual legal assistance with regard to offences for which a legal person may be considered responsible.

#### **Subparagraphs 3 (a) to 3 (i) of article 46**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

(a) **Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

**Mutual Assistance in Criminal Matters Act 1992**

**30 Assistance in locating or identifying persons**

- (1) A foreign country may request the Attorney-General to assist in locating, or identifying and locating, a person who is believed to be in New Zealand.
- (2) Where, on receipt of a request made under subsection (1) by a foreign country, the Attorney-General is satisfied—
  - (a) that the request relates to a criminal matter in the foreign country; and
  - (b) that there are reasonable grounds for believing that the person to whom the request relates—
    - (i) is or might be concerned in, or could give or provide evidence or assistance relevant to, the criminal matter; and
    - (ii) is in New Zealand,— the Attorney-General may authorise, in writing, assistance in accordance with this section.
- (3) Where, in relation to a request made under subsection (1), the Attorney-General authorises assistance in accordance with this section, the Attorney-General shall forward the request to the appropriate agency in New Zealand, and that agency shall use its best endeavours to locate or, as the case may be, identify and locate the person to whom the request relates, and shall advise the Attorney-General of the outcome of those endeavours.
- (4) On receipt of such advice, the Attorney-General shall inform the requesting country of the result of the inquiries made pursuant to the request.

**31 Assistance in obtaining evidence in New Zealand**

- (1) A foreign country may request the Attorney-General to assist in arranging—
  - (a) the taking of evidence in New Zealand; or
  - (b) the production of documents or other articles in New Zealand; or
  - (c) the undertaking of a forensic comparison under the Criminal Investigations (Bodily Samples) Act 1995 and the production of a document specifying the result of that comparison.
- (2) The Attorney-General may, in writing, authorise the requested assistance if,—
  - (a) in the case of receipt of a request made under subsection (1)(a) or (b) by a foreign country, the Attorney-General is satisfied that—
    - (i) the request relates to criminal proceedings in the foreign country; and

- (ii) there are reasonable grounds for believing that the evidence can be taken or the documents or other articles can be produced in New Zealand:
- (b) in the case of receipt of a request made under subsection (1)(c) by a foreign country, the Attorney-General is satisfied that—
  - (i) the request relates to a criminal matter in the foreign country; and
  - (ii) the request is in respect of an offence that corresponds to an offence in New Zealand that is punishable by a term of imprisonment of more than 1 year.
- (3) If, under subsection (2), the Attorney-General authorises—
  - (a) the taking of evidence, a Judge may, subject to sections 32 and 33 and to any regulations made under this Act, take the evidence on oath of each witness appearing before the Judge and must, in this case,—
    - (i) cause the evidence to be put in writing and certify, in the prescribed form, that the evidence was taken by the Judge; and (ii) cause the writing to be sent to the Attorney-General:
  - (b) the production of documents or other articles, a Judge may, subject to sections 32 and 33 and to any regulations made under this Act, require the production of the documents or other articles, and, unless the Judge otherwise orders, must cause the documents, or copies of the documents certified by the Judge to be true copies, or the other articles, to be sent to the Attorney-General.

### **32 Further provisions relating to obtaining evidence**

- (1) Subject to section 33, the laws of New Zealand with respect to the compelling of persons to attend before a Judge, and to give evidence, answer questions, and produce documents or other articles, upon the hearing of a charge against a person for an offence against the law of New Zealand shall apply, so far as they are capable of application and with all necessary modifications, with respect to the compelling of persons to attend before a Judge, and to give evidence, answer questions, and produce documents or other articles, for the purposes of section 31.
- (2) Where, pursuant to section 31, a foreign country requests the production of documents that are judicial records or official records, and that are not publicly available in New Zealand, those records may be produced or examined only to the extent that they could be produced or examined if the criminal proceedings to which the request relates were pending in a New Zealand court.

### **33 Protection of witnesses**

- (1) For the purposes of section 31, the person to whom the criminal proceedings in the foreign country relates is competent but not compellable to give evidence.
- (2) No person who is required, pursuant to section 31, to give evidence, or to produce documents or other articles, for the purposes of any proceedings in a foreign country shall be required to give any evidence, or to produce any document or article, that the

person could not be compelled to give or produce in the proceedings in the foreign country.

- (3) A duly authenticated foreign law immunity certificate is admissible, for the purposes of subsection (2), as prima facie evidence of the matters stated in the certificate.
- (4) Every person who is required, pursuant to section 31, to give evidence, or produce documents or other articles, for the purposes of any proceedings in a foreign country shall have the same privileges in relation to the answering of questions and the production of documents and things as if the proceedings were pending in a New Zealand court.

**37 Assistance in arranging attendance of person to give or provide evidence or assistance in relation to criminal matter in foreign country**

- (1) A foreign country may request the Attorney-General to assist in arranging the attendance, in that country, of a person in New Zealand (not being a person to whom section 38 applies) for the purposes of giving or providing evidence or assistance in relation to a criminal matter in the foreign country.
- (2) Where, on receipt of a request made under subsection (1) by a foreign country, the Attorney-General is satisfied—
  - (a) that the request relates to a criminal matter in the foreign country; and
  - (b) that there are reasonable grounds for believing that the person concerned could give or provide evidence or assistance relevant to that criminal matter; and
  - (c) that the person concerned has freely consented to attend as requested; and
  - (d) that the foreign country has given adequate undertakings in respect of the matters specified in paragraphs (a), (b), (c), and (e) of section 39,—

the Attorney-General may authorise, in writing, assistance in accordance with this section, and may assist in the making of arrangements to facilitate that attendance.

**38 Assistance in arranging attendance of prisoner in foreign country for specified purposes**

- (1) A foreign country may request the Attorney-General to assist in arranging the attendance, in that country, for either or both of the purposes specified in subsection (1A), of a person in New Zealand who is—
  - (a) a prisoner; or
  - (b) on parole, home detention, or compassionate release, or is subject to release conditions, under Part 1 of the Parole Act 2002; or
    - (ba) subject to a sentence of home detention imposed under section 80A of the Sentencing Act 2002; or
  - (c) [Repealed]
  - (d) at large pursuant to section 62 of the Corrections Act 2004; or

- (e) subject to a community-based sentence (within the meaning of section 4(1) of the Sentencing Act 2002).
- (1A) The purposes referred to in subsection (1) are—
- (a) for giving evidence in relation to any criminal proceedings in the foreign country;
  - (b) for assistance in relation to a criminal matter in respect of a foreign serious offence.
- (2) The Attorney-General may authorise, in writing, assistance in accordance with this section if, on receipt of a request under subsection (1) by a foreign country, the Attorney-General is satisfied—
- (a) that the request relates to the attendance of the person concerned in connection with a criminal matter in the foreign country; and
  - (b) that there are reasonable grounds for believing that the person concerned could give or provide evidence or assistance relevant to that criminal matter; and
  - (c) that the person concerned has freely consented to attend as requested; and
  - (d) that the foreign country has given adequate undertakings in respect of the matters specified in section 39.
- (3) Where assistance is authorised in accordance with subsection (2), the Attorney General may,—
- (a) in the case of a person who is a prisoner, direct that the prisoner be released from the prison in which that person is detained for the purpose of travelling to the foreign country to give evidence at the hearing, and may make arrangements for the prisoner to travel to the foreign country in the custody of a constable or a prison officer;
  - (b) in the case of any other person, approve and arrange the travel of the person to the foreign country to give evidence at the hearing, and may obtain such approvals, authorities, and permissions as are required for the purpose, including the variation, discharge, or suspension of the conditions of the person's release, or the variation, cancellation, or suspension of the person's sentence, or of the conditions of the person's sentence.
- (4) A direction given, pursuant to subsection (3)(a), by the Attorney-General in respect of a prisoner shall be sufficient authority for the release of the prisoner from the prison in which he or she is detained for the purposes of the direction.
- (5) Every person released under a direction given pursuant to subsection (3)(a) shall, while that person is in New Zealand during the period of that release, be deemed, for the purposes of section 120 of the Crimes Act 1961 (which relates to escaping from lawful custody) and for that purpose only, to continue to be in the legal custody of the person in whose custody he or she was when in the prison from which he or she is so released.

#### **43 Assistance in obtaining article or thing by search and seizure**

- (1) A foreign country may request the Attorney-General to assist in obtaining an article or thing by search and seizure.
- (2) Where, on receipt of a request made under subsection (1) by a foreign country, the Attorney-General is satisfied—
  - (a) that the request relates to a criminal matter in that foreign country in respect of an offence punishable by imprisonment for a term of 2 years or more; and
  - (b) that there are reasonable grounds for believing that an article or thing relevant to the proceedings is located in New Zealand,—

the Attorney-General may authorise a constable, to apply to an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) for a search warrant in accordance with section 44 of this Act.

#### **44 Search warrants**

- (1) An issuing officer who, on an application made in the manner provided in subpart 3 of Part 4 of the Search and Surveillance Act 2012, is satisfied that there are reasonable grounds for believing that there is in or on any place or thing—
  - (a) any thing upon or in respect of which any offence under the law of a foreign country punishable by imprisonment for a term of 2 years or more has been, or is suspected of having been, committed; or
  - (b) any thing which there are reasonable grounds for believing will be evidence as to the commission of any such offence; or
  - (c) any thing which there are reasonable grounds for believing is intended to be used for the purpose of committing any such offence—may issue a search warrant in respect of that thing.
- (2) An application for a warrant under subsection (1) may be made only by a constable authorised under section 43(2).
- (3) The provisions of Part 4 of the Search and Surveillance Act 2012 (except subpart 6) apply.

#### **51 Assistance in arranging service**

- (1) A foreign country may request the Attorney-General to assist in effecting the service of process on a person in New Zealand.
- (2) Where, on receipt of a request made under subsection (1) by a foreign country, the Attorney-General is satisfied—
  - (a) that the request relates to a criminal matter in the foreign country; and
  - (b) that there are reasonable grounds for believing that the person to be served is in New Zealand; and

- (c) where the request relates to the service of a summons to appear as a witness in the foreign country, that the foreign country has given an adequate undertaking in respect of the matters specified in section 52,—

the Attorney-General may authorise assistance in accordance with this section.

- (3) Where service is authorised under subsection (2), the Attorney-General shall direct the appropriate authority to arrange service, and in such a case the authority shall—
  - (a) use its best endeavours to have the process served—
    - (i) in accordance with procedures proposed in the request; or
    - (ii) if those procedures would be unlawful or inappropriate in New Zealand, or if no procedures are so proposed, in accordance with the law of New Zealand; and
  - (b) if the document—
    - (i) is served, transmit to the Attorney-General for transmission to the foreign country making the request a certificate as to service; or
    - (ii) is not served, transmit to the Attorney-General for transmission to the foreign country a statement of the reasons which prevented the service.

#### **54 Request to enforce foreign restraining order**

- (1) A foreign country may request the Attorney-General to assist in enforcing a foreign restraining order that relates to property that is believed to be located in New Zealand.
- (2) The Attorney-General may authorise the Commissioner to apply to the High Court to register a foreign restraining order in New Zealand if satisfied—
  - (a) that the request from the foreign country relates to—
    - (i) tainted property (as defined in relation to Part 3); or
    - (ii) property of a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) an instrument of crime (as defined in relation to Part 3); or
    - (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and
  - (b) that there are reasonable grounds to believe some or all of the property that is able to be restrained under the foreign restraining order is located in New Zealand.
- (3) An authority issued under subsection (2) must be in writing.

#### **55 Request to enforce foreign forfeiture order**

- (1) A foreign country may request the Attorney-General to assist in enforcing a foreign forfeiture order that relates to property that is reasonably believed to be located in New Zealand.
- (2) The Attorney-General may authorise the Commissioner to apply to the High Court to register the foreign forfeiture order in New Zealand if satisfied—

- (a) that the request from the foreign country relates to property that may be forfeited under the foreign forfeiture order and is specific property that—
    - (i) is tainted property (as defined in relation to Part 3); or
    - (ii) belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) is an instrument of crime (as defined in relation to Part 3); or
    - (iv) will satisfy some or all of a foreign pecuniary penalty order; and
  - (b) that there are reasonable grounds to believe that some or all of the property to which the order relates is located in New Zealand.
- (3) An authority issued under subsection (2) must be in writing.

### **5 Act not to limit other provision of assistance**

Nothing in this Act—

(a) derogates from existing forms of co-operation (whether formal or informal) in respect of criminal matters between New Zealand and any other country; or

(b) prevents the development of other forms of such co-operation.

Compare: Mutual Assistance in Criminal Matters Act 1987 s 6 (Aust)

With regard to subparagraph 3(i), section 5 of MACMA provides that the Act does not derogate from existing, or prevent the development of other forms of cooperation in criminal matters between New Zealand and other countries.

### **(b) Observations on the implementation of the article**

The reviewing experts observed that New Zealand can provide all forms of legal assistance listed in article 46(3)(a) to (h) of the Convention. However, the taking of statements from or giving of evidence by suspects in New Zealand in response to an MLA request is only possible with the person's consent (sect. 33 (1) MACMA). Nevertheless, witnesses can be compelled to give evidence (sect. 32(1) MACMA).

In this vein, and while ensuring the respect of the suspect's right to not incriminate him/herself and remain silent, it was recommended that New Zealand facilitate the taking of statements from suspects even when they do not consent.

### **Subparagraphs 3 (j) and 3 (k) of article 46**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

...

- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Mutual Assistance in Criminal Matters Act 1992**

Please refer to Sections 54 and 55 of the MACMA cited above.

**59 Request for search warrant in New Zealand**

- (1) A foreign country may request the Attorney-General to obtain the issue of a search warrant in New Zealand in respect of a criminal investigation or criminal proceedings relating to—
  - (a) tainted property (as defined in relation to Part 3); or
  - (b) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
  - (c) an instrument of crime (as defined in relation to Part 3); or
  - (d) property that will satisfy some or all of a foreign pecuniary penalty order.
- (2) After a request is made, the Attorney-General may, if satisfied of the matters in subsection (3), do any of the following:
  - (a) authorise a constable to apply under section 124 of the Criminal Proceeds (Recovery) Act 2009 for a search warrant under section 101 of that Act in relation to that property;
  - (b) authorise the Commissioner to apply under section 125 of the Criminal Proceeds (Recovery) Act 2009 for a search warrant under section 102 of that Act in relation to that property;
  - (c) authorise the Official Assignee to apply under section 126 of the Criminal Proceeds (Recovery) Act 2009 for a search warrant under section 110 of that Act in relation to that property.
- (3) The matters referred to in subsection (2) are—
  - (a) that the request relates to a criminal investigation or criminal proceedings relating to—
    - (i) tainted property (as defined in relation to Part 3); or
    - (ii) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) an instrument of crime (as defined in relation to Part 3); or
    - (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and

- (b) that there are reasonable grounds for believing the property is located in New Zealand.

#### **60 Interim foreign restraining order**

- (1) A foreign country may request the Attorney-General to obtain the issue of an interim foreign restraining order in respect of property that is believed to be located in New Zealand.
- (2) After a request is made, the Attorney-General may authorise the Commissioner to make an application under section 128 of the Criminal Proceeds (Recovery) Act 2009 for an interim foreign restraining order if the Attorney-General is satisfied that—
  - (a) there is a criminal investigation in relation to—
    - (i) tainted property (as defined in relation to Part 3); or
    - (ii) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) an instrument of crime (as defined in relation to Part 3); or
    - (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and
  - (b) there are reasonable grounds to believe all or part of the property to which the criminal investigation relates is located in New Zealand.

#### **61 Request for production order in New Zealand**

- (1) A foreign country may request the Attorney-General to make an application for a production order in New Zealand.
- (2) After a request is made, the Attorney-General may authorise the Commissioner to make an application to a Judge under section 104 of the Criminal Proceeds (Recovery) Act 2009 if the Attorney-General is satisfied that—
  - (a) the request relates to a criminal investigation that relates to—
    - (i) tainted property (as defined in relation to Part 3); or
    - (ii) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) an instrument of crime (as defined in relation to Part 3); or
    - (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and
  - (b) there are reasonable grounds to believe that all or part of the property to which the criminal investigation relates is located in New Zealand.

#### **62 Request for examination order in New Zealand**

- (1) A foreign country may request the Attorney-General to make an application for the issue of an examination order in New Zealand.

- (2) After a request is made, the Attorney-General may authorise the Commissioner to make an application under section 106 of the Criminal Proceeds (Recovery) Act 2009 if the Attorney-General is satisfied—
- (a) that the request relates to a criminal investigation that relates to—
    - (i) tainted property (as defined in relation to Part 3); or
    - (ii) property that belongs to a person who has unlawfully benefited from significant foreign criminal activity; or
    - (iii) an instrument of crime (as defined in relation to Part 3); or
    - (iv) property that will satisfy some or all of a foreign pecuniary penalty order; and
  - (b) that there are reasonable grounds to believe that all or part of the property to which the criminal investigation relates is located in New Zealand.

## 2 Interpretation

...

- (2) A reference in this Act to criminal proceedings or a criminal investigation includes proceedings or investigations into the following matters:
- (a) revenue (including taxation and customs and excise duties):
  - (b) foreign exchange control:
  - (c) the forfeiture of property as a result of the commission of an offence:
  - (d) the restraint of dealings with property or the freezing of assets that may be forfeited as a result of the commission of an offence:
  - (e) imposing or recovering pecuniary penalties under, and restraining dealing with property needed to satisfy, a foreign pecuniary penalty order imposed as a result of the commission of an offence.

The authorities noted that assistance was possible only if the request from the foreign country related to a “criminal proceeding or investigation” concerning proceeds or instruments of crime. In this regard, the authorities highlighted that section 2(2) of MACMA extended the definition of “criminal investigation or proceeding” to allow such assistance if the foreign country is using, or intends to use, a non-conviction-based confiscation regime.

### (b) Observations on the implementation of the article

New Zealand is able to provide mutual legal assistance in accordance with the requirements of subparagraphs 3(j) and 3(k) of article 46 of the UNCAC.

### Paragraphs 4 and 5 of article 46

4. *Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in*

*another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party to this Convention.*

5. *The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restriction on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

**Mutual Assistance in Criminal Matters Act 1992**

**5 Act not to limit other provision of assistance**

Nothing in this Act-

- (a) derogates from existing forms of co-operation (whether formal or informal) in respect of criminal matters between New Zealand and any other country; or
- (b) prevents the development of other forms of such co-operation.

**Serious Fraud Office Act 1990**

**51 Agreements with overseas agencies**

(1) The Director may enter into any agreement or agreements with any person in any other country whose functions are or include the detection and investigation of cases of fraud or the prosecution of any proceedings which relate to fraud, if—

- (a) the agreement relates to a particular case or cases of fraud; and
- (b) in the case of an agreement providing for the supply of information by the Serious Fraud Office,—
  - (i) the Director is satisfied that compliance with the agreement will not substantially prejudice the performance of the Serious Fraud Office’s functions in relation to any other investigations; and

(ii) the Director has recommended to the Attorney-General that the agreement be entered into and the Attorney-General has accepted the recommendation.

(2) Any such agreement—

(a) may be made orally or in writing:

(b) may provide for the supply or the receipt of information by the Serious Fraud Office:

(c) shall contain a condition that no person who receives information pursuant to the agreement shall disclose the information except for any purpose specified in the agreement or with the consent of all of the parties to the agreement.

(3) Nothing in this section shall limit the general powers of the Director to enter into agreements.

(4) This section is subject to the provisions of sections 37 and 39.

Section 5 of MACMA affirms that the Act does not limit other formal or informal methods of cooperation, including proactive transmission of information, provided that sharing the information is consistent with domestic law.

For example, in 2010 the SFO was made aware of an investigation being conducted by the Independent Commission Against Corruption (ICAC) of the Hong Kong SAR (China), into the affairs of Mae Wang. The investigation became known as the “Crafar Farms Inquiry”. The director of the SFO opened an investigation and stipulated that an agreement under section 51 of the Serious Fraud Office Act 1990 should be entered into with ICAC. This provided a mechanism for the official sharing of information between the two agencies.

During the country visit, the authorities clarified that New Zealand could share information with relevant foreign authorities on spontaneous basis, and would seek to reach agreements according to section 51 of the Serious Fraud Office Act 1990 if further communication or joint investigations were foreseeable. In the same vein, the authorities confirmed that in practice, New Zealand endeavoured to comply with requests to keep such information confidential.

#### **(b) Observations on the implementation of the article**

New Zealand can spontaneously share information with other countries (sect. 5 MACMA) and endeavours to keep information so received confidential even in the absence of a provision requiring such confidentiality.

#### **Paragraph 8 of article 46**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the absence of a general bank secrecy provision in its legislation. In addition, the grounds for refusal of MLA requests (sect. 27 MACMA) do not include bank secrecy as grounds for refusal of MLA.

**(b) Observations on the implementation of the article**

The reviewing experts observed that New Zealand does not decline to render MLA on the ground of bank secrecy.

**Paragraph 9 of article 46**

*9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

*(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;*

*(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provision:

**Mutual Assistance in Criminal Matters Act 1992**

**2B Certain civil proceedings deemed to be criminal proceedings**

...

- (3) A proceeding certified by the Central Authority of the requesting country to have been instituted in respect of the forfeiture or restraint of property that is, or is suspected on reasonable grounds to be or to be likely to be, any of the things referred to in subsection (4) must be treated as a criminal proceeding despite being civil in nature.

**5 Act not to limit other provision of assistance** (cited above under subparagraphs 3 (a) to 3 (i) of article 46)

**27 Refusal of assistance**

[...]

(2) Subject to subsections (3) and (4), a request by a foreign country for assistance under this Part may be refused if, in the opinion of the Attorney-General,-

a. the request relates to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or

(ab) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that, if it had occurred in New Zealand, would not have constituted significant criminal activity in New Zealand; or

b. the request relates to the prosecution or punishment of a person in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law; or

(ba) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted significant criminal activity; or

(bb) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that, if it had occurred in New Zealand at the same time, could not have been the subject of proceedings of that kind because of lapse of time or for any other reason; or

c. the request relates to the prosecution or punishment of a person in respect of conduct where, if it had occurred in New Zealand at the same time and had constituted an offence against New Zealand law, the person responsible could no longer be prosecuted by reason of lapse of time or for any other reason; or

[...]

The authorities noted that coercive measures would include orders such as search or restraint of proceeds of crimes. For such measures, it is necessary for the Central Authority to seek either a warrant or an order from a court in the same way as a domestic law enforcement agency.

As above, section 5 of MACMA affirms that the Act does not limit other formal or informal methods of cooperation, including proactive transmission of information, provided that sharing information is consistent with domestic law.

#### **(b) Observations on the implementation of the article**

The absence of dual criminality is a discretionary ground for refusal of a request under section 27(2)

of MACMA. During the country visit, the authorities noted that, in practice, the purposes of the Convention, in particular the prevention of corruption and promotion of proper management of public affairs, are highly relevant factors for the Attorney-General in deciding whether to exercise the discretion to refuse MLA requests.

There is no rule on the provision of non-coercive MLA in the absence of dual criminality. In practice, New Zealand police routinely shares information through INTERPOL with authorities from other countries where there are no evidentiary requirements.

New Zealand is encouraged not to refuse providing MLA in the absence of dual criminality. It was also recommended to at least render assistance not involving coercive measures in these cases.

### **Paragraphs 10 to 12 of article 46**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

- (a) The person freely gives his or her informed consent;*
- (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

*11. For the purposes of paragraph 10 of this article:*

- (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*
- (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*
- (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*
- (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

### **Mutual Assistance in Criminal Matters Act 1992**

#### **38 Assistance in arranging attendance of prisoner in foreign country for specified purposes**

- (1) A foreign country may request the Attorney-General to assist in arranging the attendance, in that country, for either or both of the purposes specified in subsection (1A), of a person in New Zealand who is—
  - (a) a prisoner; or
  - (b) on parole, home detention, or compassionate release, or is subject to release conditions, under Part 1 of the Parole Act 2002; or
    - (ba) subject to a sentence of home detention imposed under section 80A of the Sentencing Act 2002; or
  - (c) [Repealed]
  - (d) at large pursuant to section 62 of the Corrections Act 2004; or
  - (e) subject to a community-based sentence (within the meaning of section 4(1) of the Sentencing Act 2002).
- (1A) The purposes referred to in subsection (1) are—
  - (c) for giving evidence in relation to any criminal proceedings in the foreign country;
  - (d) for assistance in relation to a criminal matter in respect of a foreign serious offence.
- (2) The Attorney-General may authorise, in writing, assistance in accordance with this section if, on receipt of a request under subsection (1) by a foreign country, the Attorney-General is satisfied—
  - (a) that the request relates to the attendance of the person concerned in connection with a criminal matter in the foreign country; and
  - (b) that there are reasonable grounds for believing that the person concerned could give or provide evidence or assistance relevant to that criminal matter; and
  - (c) that the person concerned has freely consented to attend as requested; and
  - (d) that the foreign country has given adequate undertakings in respect of the matters specified in section 39.
- (3) Where assistance is authorised in accordance with subsection (2), the Attorney General may,—
  - (a) in the case of a person who is a prisoner, direct that the prisoner be released from the prison in which that person is detained for the purpose of travelling to the foreign country to give evidence at the hearing, and may make arrangements for

the prisoner to travel to the foreign country in the custody of a constable or a prison officer:

- (b) in the case of any other person, approve and arrange the travel of the person to the foreign country to give evidence at the hearing, and may obtain such approvals, authorities, and permissions as are required for the purpose, including the variation, discharge, or suspension of the conditions of the person's release, or the variation, cancellation, or suspension of the person's sentence, or of the conditions of the person's sentence.
- (4) A direction given, pursuant to subsection (3)(a), by the Attorney-General in respect of a prisoner shall be sufficient authority for the release of the prisoner from the prison in which he or she is detained for the purposes of the direction.
- (5) Every person released under a direction given pursuant to subsection (3)(a) shall, while that person is in New Zealand during the period of that release, be deemed, for the purposes of section 120 of the Crimes Act 1961 (which relates to escaping from lawful custody) and for that purpose only, to continue to be in the legal custody of the person in whose custody he or she was when in the prison from which he or she is so released.

### **39 Undertakings required from foreign country**

Where, pursuant to section 37 or section 38, a foreign country requests the assistance of the Attorney-General in arranging the attendance, in that country, of a person to whom either of those sections applies, the Attorney-General shall, before authorising assistance in accordance with either of those sections in that case, obtain undertakings from the foreign country in relation to the following matters:

- (a) that the person to whom the request relates shall not-
  - i. be detained, prosecuted, or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before the person's departure from New Zealand, other than an offence in respect of which the Attorney-General consents to the person's being so detained, prosecuted, or punished; or
  - ii. be subjected to any civil proceedings in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person's departure from New Zealand, being civil proceedings to which that person could not be subjected if the person were not in the foreign country; or
  - iii. be required to give or provide evidence or assistance in respect of any criminal matter in the foreign country other than the matter to which the request relates-
    - unless the person has left the foreign country, or has had the opportunity of leaving the foreign country and has remained in that country otherwise than for the purpose of giving or providing evidence or assistance in respect of the matter to which the request relates:

- (b) that any evidence given by the person in the criminal proceedings to which the request relates shall be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence:
- (c) that the person will be returned to New Zealand in accordance with arrangements agreed by the Attorney-General as soon as practicable after giving the evidence:
- (d) in a case where the request relates to a person who is a prisoner in New Zealand and the Attorney-General requests the foreign country to make arrangements for the keeping of the person in custody while the person is in the foreign country,-
  - i. that appropriate arrangements will be made for that purpose; and
  - ii. that the person will not be released from custody in the foreign country without the prior approval of the Attorney-General; and
  - iii. if the person is released in the foreign country, at the request of the Attorney-General, before the completion of the proceedings to which the request relates, that the person's accommodation and expenses will be met by the foreign country:
- (e) such other matters (if any) as the Attorney-General thinks appropriate.

#### **40 Penalty not to be imposed for refusal to consent**

Where, pursuant to section 37 or section 38, a foreign country requests the assistance of the Attorney-General in arranging the attendance, in that country, of any person, the person to whom the request relates shall not be subject to any penalty or liability or otherwise prejudiced in law by reason only of that person's refusal or failure to consent to attend as requested.

#### **41 Effect of removal to foreign country on prisoner's term of imprisonment**

Where a prisoner who is serving a term of imprisonment for an offence against the law of New Zealand is released from a New Zealand prison pursuant to a request by a foreign country under section 38, the prisoner shall, while in custody in connection with the request (including custody outside New Zealand), be deemed to be continuing to serve that term of imprisonment.

#### **41A Effect of transfer to foreign country pursuant to request under section 38 on remand prisoner's sentence**

- (1) If a prisoner who is charged with or convicted of an offence against the law of New Zealand (the New Zealand offence) is transferred to a foreign country pursuant to a request by that country under section 38, section 41B of this Act and section 90 of the Parole Act 2002 apply to any period that the person spends in custody outside New Zealand in connection with the request before sentence is imposed for the New Zealand offence.

(2) Nothing in this section affects section 41.

**(b) Observations on the implementation of the article**

Sections 38 to 41A MACMA address the temporary transfer of persons detained or serving a sentence to another State for the purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings, and establish the requirements and conditions for such a transfer.

**Paragraph 13 of article 46**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to section 25 of the Mutual Assistance in Criminal Matters Act 1992 as cited above under paragraph 1 of article 46 in implementing the provision under review, where the Act designates the Attorney-General as the Central Authority for mutual legal assistance in New Zealand.

The Attorney-General in New Zealand is an elected Member of Parliament and a Cabinet Minister. The Attorney-General's powers under MACMA are largely delegated to the Solicitor-General, who is an appointed Law Officer. Lawyers at Crown Law Office, the Office of the Solicitor-General, therefore undertake the legal work required to make or execute mutual legal assistance requests.

In practice, formal requests for mutual assistance are received and prepared by the Crown Law Office on behalf of the Attorney-General, and the Secretary-General of the United Nations has been notified that the CLO acts as central authority. If requests are received by other New Zealand agencies or a court in New Zealand, they should be sent to the New Zealand Central Authority for Mutual Assistance

in Criminal Matters, the Crown Law Office.

During the country visit, New Zealand clarified that it mainly accepts MLA requests sent through INTERPOL. Transmission of requests through diplomatic channels is not required.

#### **(b) Observations on the implementation of the article**

The Attorney-General is the central authority for MLA (sect. 25 MACMA). This authority has been delegated to the Solicitor-General, and is normally delegated in turn to a Deputy Solicitor-General. In practice, the Crown Law Office (CLO) acts as central authority, of which the Secretary-General of the United Nations has been notified.

CLO evaluates incoming MLA requests, advises the Deputy Solicitor-General whether the assistance requested can be granted, and informs the requesting State of this decision.

New Zealand mainly receives MLA requests through INTERPOL and does not require the transmission of requests through diplomatic channels.

#### **Paragraph 14 of article 46**

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provisions:

#### **Mutual Assistance in Criminal Matters Act 1992**

#### **26 Form of request**

Every request by a foreign country for assistance under this Part shall-

- (a) specify the purpose of the request and the nature of the assistance being sought; and
- (b) identify the person, agency, or authority that initiated the request; and
- (ba) specify whether the foreign country is requesting assistance in its capacity as-

- i. a prescribed foreign country; or
- ii. a convention country; or
- iii. a foreign country (other than a prescribed foreign country or a convention country);  
and

(bb) if the foreign country is a convention country and requests assistance in accordance with a convention specified in column 1 of the table in the Schedule, state the convention under which the request is made; and

(c) be accompanied by-

- i. a certificate from the Central Authority of the foreign country that the request is made in respect of a criminal investigation or criminal proceedings within the meaning of this Act; and
- ii. a description of the nature of the criminal investigation or criminal proceedings and a statement setting out a summary of the relevant facts and law; and
- iii. details of the procedure that the foreign country wishes to be followed by New Zealand in giving effect to the request, including details of the manner and form in which any information, document, or thing is to be supplied to the foreign country pursuant to the request; and
- iv. a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes; and
- v. details of the period within which the foreign country wishes the request to be complied with; and
- vi. if the request involves a person travelling from New Zealand to the foreign country, details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the foreign country pursuant to the request; and
- vii. any other information required to be included with the request under a treaty or other arrangement between New Zealand and the foreign country; and
- viii. any other information that may assist in giving effect to the request.

New Zealand has notified the Secretary-General that MLA requests shall be accepted in English.

During the country visit, New Zealand clarified that all requests have to be submitted in writing. In practice, New Zealand could receive oral information or information sent by email to prepare relevant documents in advance, provided that a request in writing will be submitted subsequently. MLA requests can be transmitted by email.

#### **(b) Observations on the implementation of the article**

The reviewing experts observed that MLA requests are accepted in English and that New Zealand has notified the Secretary-General of the United Nations accordingly. Requests can be received by the

CLO in hard copy and by e-mail. The authorities confirmed that New Zealand accepts oral MLA requests insofar as they are subsequently confirmed in writing.

## **Paragraphs 15 and 16 of article 46**

*15. A request for mutual legal assistance shall contain:*

- (a) The identity of the authority making the request;*
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*
- (e) Where possible, the identity, location and nationality of any person concerned; and*
- (f) The purpose for which the evidence, information or action is sought.*

*16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to sections 26 (quoted above under article 46, paragraph 14 of the Convention) and 27 MACMA:

#### **27 Refusal of assistance**

[...]

(2) Subject to subsections (3) and (4), a request by a foreign country for assistance under this Part may be refused if, in the opinion of the Attorney-General,—

[...]

(h) the request does not comply with the requirements of section 26.

(3) No request shall be refused solely on the grounds contained in subsection (2)(g) unless—

(a) the Attorney-General has first consulted with the Central Authority of the requesting country about the terms and conditions on which the request may be complied with; and

(b) the Attorney-General has been unable to reach agreement with the Authority in that regard.

(4) No request shall be refused solely on the grounds contained in subsection (2)(h) unless the Attorney-General has first requested further information from the requesting country and that country has failed or refused to provide that information.

(5) Subject to subsection (1), the Attorney-General may grant a request even though the request does not comply with the requirements of section 26.

**(b) Observations on the implementation of the article**

Section 26 MACMA sets forth the requirements for the contents of requests for MLA, while section 27, subsection 4, establishes that no request shall be refused solely because it does not comply with the requirements of section 26, unless the Attorney-General has first requested further information from the requesting State and the requesting State has failed or refused to provide that information.

**(c) Successes and good practices**

If necessary, New Zealand requests additional information required for the execution of the request already during the consultations that can be held prior to the submission of the request, thereby reducing the turnaround time required for its execution and facilitating cooperation.

**Paragraph 17 of article 46**

*17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

**Mutual Assistance in Criminal Matters Act 1992**

**26 Form of request**

Every request by a foreign country for assistance under this Part shall-

...

(c) be accompanied by-

...

iii. details of the procedure that the foreign country wishes to be followed by New Zealand in giving effect to the request, including details of the manner and form in which any information, document, or thing is to be supplied to the foreign country pursuant to the request; and

...

**(b) Observations on the implementation of the article**

Section 26 (c) (iii) MACMA stipulates that every MLA request made by a foreign country shall be

accompanied by details of the procedure that the foreign country wishes to be followed by New Zealand in giving effect to the request. The authorities confirmed that, in practice, New Zealand complies with the procedures requested by the requesting State as long as they do not contradict domestic legislation.

#### **Paragraph 18 of article 46**

*18. Whenever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that the MACMA did not contain specific provisions in this regard.

With regard to outgoing requests, the authorities noted that any evidence that is sought to be admitted in criminal proceedings in New Zealand was subject to the general rules of admissibility. There are many grounds on which defence counsel can challenge evidence in general and especially evidence which is obtained from overseas. The authorities specified that, for this reason, New Zealand's requests for obtaining evidence usually involved detailed and lengthy procedures for a foreign country to follow, and highlighted that Counsels from the Crown Law Office were willing to discuss any problem the foreign country has in following New Zealand's requests.

The authorities further indicated that the adversarial system in New Zealand was underpinned by a strong preference for witnesses in criminal proceedings to appear in person so that they could be cross-examined, which was one reason why the video-link evidence was recommended. It was also why having already interviewed a witness in a foreign country, or taken their statement, New Zealand would still need to make a further request for that witness to (a) attend in person, (b) give evidence by video-link, or (c) provide an affidavit (statement on oath requiring compliance with additional legal formalities).

With regard to incoming requests, the authorities confirmed that a person in New Zealand can voluntarily give evidence in a foreign proceeding by video link. This could be arranged by the foreign country directly with a private audio-visual services provider in New Zealand or pursuant to a formal mutual legal assistance request (especially if Police assistance was required).

#### **(b) Observations on the implementation of the article**

During the country visit, New Zealand indicated that, while not all courts were equipped with video link facilities, the major courts have these facilities.

In line with the possibility of hearing witnesses through video link in domestic proceedings, such hearings can also be conducted by New Zealand via videoconference in relation to incoming MLA requests.

### **Paragraph 19 of article 46**

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the following provision:

#### **Mutual Assistance in Criminal Matters Act 1992**

##### **23 Restriction on use of evidence**

Any evidence, information, document, or article that is obtained, provided, or produced pursuant to a request made under this Part shall be used by a New Zealand authority only for the purposes of, or in connection with, the criminal matter to which the request relates, unless—

- (a) the foreign country to which the request was made; and
- (b) in the case of any evidence, information, document, or article obtained from, or provided or produced by, a person while he or she is in New Zealand pursuant to a request made under section 12, that person—  
consents to the use of the evidence, information, document, or article for any other purpose.

#### **(b) Observations on the implementation of the article**

New Zealand has established the principle of speciality for information received as a result of MLA (sect. 23 MACMA).

### **Paragraph 20 of article 46**

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to section 26 MACMA:

**Mutual Assistance in Criminal Matters Act 1992**

**26 Form of request**

Every request by a foreign country for assistance under this Part shall-

(c) be accompanied by-

...

iv. a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes; and

...

The authorities confirmed that New Zealand in practice respects the requesting States' wishes concerning the confidentiality of the request (section 26(c)(iv) of MACMA) and that New Zealand would inform the requesting State in advance if it cannot comply with the confidentiality requirement.

**(b) Observations on the implementation of the article**

The reviewing experts noted New Zealand foresees that requests be made including information on the desired confidentiality, and that in practice, New Zealand can comply with requests to keep information confidential, and consults with the requesting State if it would be required to disclose information when executing an MLA request.

**Paragraph 21 of article 46**

*21. Mutual legal assistance may be refused:*

*(a) If the request is not made in conformity with the provisions of this article;*

*(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*

*(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*

*(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal*

*assistance for the request to be granted.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that Section 27 of MACMA established the grounds on which the Attorney-General could decline a request for assistance from a foreign country. The grounds for refusal are divided into mandatory and discretionary grounds.

New Zealand referred to the following provisions:

**Mutual Assistance in Criminal Matters Act 1992**

**27 Refusal of assistance**

(1) A request by a foreign country for assistance under this Part shall be refused if, in the opinion of the Attorney-General,-

(a) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character; or

(ab) the request relates to the bringing of proceedings of the kind described in section 2B(3) that relate to an activity of a political character; or

(b) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character; or

(ba) there are substantial grounds for believing that the request has been made with a view to bringing proceedings of the kind described in section 2B(3) that are of a political character; or

(c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing, or otherwise causing prejudice to a person on account of the person's colour, race, ethnic origin, sex, religion, nationality, or political opinions; or

(ca) there are substantial grounds for believing that the request has been made for the purpose of bringing proceedings of the kind described in section 2B(3) on account of a person's colour, race, ethnic origin, sex, religion, nationality, or political opinions; or

(d) the request relates to the prosecution of a person for an offence in a case where the person-

(i) has been acquitted, convicted, or pardoned by a competent tribunal or authority; or

(ii) has undergone the punishment provided by law,-

whether in the foreign country, in New Zealand, or elsewhere, in respect of that offence or of another offence constituted by the same act or omission as that offence; or

(e) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in New Zealand, would have constituted an offence under the military law of New Zealand but not also under the ordinary criminal law of New Zealand; or

(f) the granting of the request would prejudice the sovereignty, security, or national interests of New Zealand; or

(g) in the case of a request made pursuant to section 37 or section 38 for the attendance of any person in that foreign country, the person to whom the request relates is not prepared to give his or her consent to the transfer; or

(h) the request is for assistance of a kind that cannot be given under this Act, or would require steps to be taken for its implementation that could not be lawfully taken.

(i) [Repealed]

(2) Subject to subsections (3) and (4), a request by a foreign country for assistance under this Part may be refused if, in the opinion of the Attorney-General,-

(a) the request relates to the prosecution or punishment of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence against New Zealand law; or

(ab) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that, if it had occurred in New Zealand, would not have constituted significant criminal activity in New Zealand; or

(b) the request relates to the prosecution or punishment of a person in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence against New Zealand law; or

(ba) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that occurred, or is alleged to have occurred, outside the foreign country and similar conduct occurring outside New Zealand in similar circumstances would not have constituted significant criminal activity; or

(bb) the request relates to proceedings of the kind described in section 2B(3) in respect of conduct that, if it had occurred in New Zealand at the same time, could not have been the subject of proceedings of that kind because of lapse of time or for any other reason; or

(c) the request relates to the prosecution or punishment of a person in respect of conduct where, if it had occurred in New Zealand at the same time and had constituted an offence against New

Zealand law, the person responsible could no longer be prosecuted by reason of lapse of time or for any other reason; or

(ca) the request relates to the prosecution or punishment of a person for an offence in respect of which the person may be or has been sentenced to death by the appropriate authority in that requesting country, and that requesting country is unable to sufficiently assure the Attorney-General that-

- (i) the person will not be sentenced to death; or
- (ii) if that sentence is or has been imposed, it will not be carried out; or

(d) in the case of a request made pursuant to section 38 in respect of a person who is a prisoner in New Zealand, the granting of the request-

- (i) would not be in the public interest; or
- (ii) would not be in the interests of the person to whom the request relates; or

(e) the provision of 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

(f) the provision of 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

(g) the provision of assistance-

- (i) would impose an excessive burden on the resources of New Zealand; or
- (ii) relates to a matter that is trivial in nature; or

(h) the request does not comply with the requirements of section 26.

(3) No request shall be refused solely on the grounds contained in subsection (2)(g) unless-

- (a) the Attorney-General has first consulted with the Central Authority of the requesting country about the terms and conditions on which the request may be complied with; and
- (b) the Attorney-General has been unable to reach agreement with the Authority in that regard.

(4) No request shall be refused solely on the grounds contained in subsection (2)(h) unless the Attorney-General has first requested further information from the requesting country and that country has failed or refused to provide that information.

(5) Subject to subsection (1), the Attorney-General may grant a request even though the request does not comply with the requirements of section 26.

**(b) Observations on the implementation of the article**

Section 27 of the MACMA sets forth mandatory and discretionary grounds for refusal of MLA in line with paragraph 21 of article 46 of the Convention.

#### **Paragraph 22 of article 46**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand noted that the MACMA does not provide for refusal of assistance solely on the ground that the offence is also considered to involve fiscal matters.

##### **(b) Observations on the implementation of the article**

The grounds for refusal stipulated in section 27 of MACMA do not include as ground for refusal that an offence is also considered to involve fiscal matters.

#### **Paragraph 23 of article 46**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

##### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

#### **Mutual Assistance in Criminal Matters Act 1992**

##### **28 Notification of refusal**

If a request by a foreign country for assistance under this Part is refused in whole or in part, notice of the refusal shall be given by the Attorney-General to the Central Authority of the requesting country together with the reasons for the refusal.

##### **(b) Observations on the implementation of the article**

In accordance with section 28 MACMA, New Zealand informs requesting States' of the reasons for refusal of MLA requests.

#### **Paragraph 24 of article 46**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand provided the following information:

**Mutual Assistance in Criminal Matters Act 1992**

**26 Form of request**

Every request by a foreign country for assistance under this Part shall-

...

(c) be accompanied by-

...

v. details of the period within which the foreign country wishes the request to be complied with; and

...

The authorities confirmed that, although section 26 MACMA does not establish an obligation of national authority to obey such timeline, New Zealand would treat an urgent request sent by foreign countries as a priority and make best endeavours to meet the deadline. As a matter of practice, they indicated that New Zealand also endeavoured to keep requesting countries updated as to progress with execution of requests.

**(b) Observations on the implementation of the article**

During the country visit, New Zealand clarified that the execution of simple requests usually takes approximately one month from the date of receipt, and can be expedited in urgent cases. In addition, the authorities highlighted that the time required for the execution of requests depended on assistance provided by relevant institutions, such as the police, the Ministry of Justice, customs etc.

New Zealand endeavours to meet the deadlines for the execution of MLA requests established by the requesting States and keeps requesting States informed on progress in the execution of the requests.

## Paragraph 25 of article 46

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand indicated that MACMA did not establish an explicit ability to postpone mutual legal assistance on the ground that it interfered with an ongoing investigation, prosecution or judicial proceeding. However, they highlighted that the potential for prejudice to a criminal investigation in New Zealand was a discretionary ground for refusal of a request, a case in which consultation with the requesting country beforehand was always necessary. As a result of the consultation process, the execution of a request may be postponed by agreement.

### (b) Observations on the implementation of the article

While MACMA does not provide explicitly for postponing the execution of an MLA request, in practice, New Zealand can defer the execution of a request following consultations with the requesting State.

## Paragraph 26 of article 46

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand provided the following information:

#### **Mutual Assistance in Criminal Matters Act 1992**

[...]

(2) Subject to subsections (3) and (4), a request by a foreign country for assistance under this Part may be refused if, in the opinion of the Attorney-General,—

[...]

(g) the provision of assistance-

(i) would impose an excessive burden on the resources of New Zealand; or

- (ii) relates to a matter that is trivial in nature; or
  - (h) the request does not comply with the requirements of section 26.
- (3) No request shall be refused solely on the grounds contained in subsection (2)(g) unless-
- (a) the Attorney-General has first consulted with the Central Authority of the requesting country about the terms and conditions on which the request may be complied with; and
  - (b) the Attorney-General has been unable to reach agreement with the Authority in that regard.

## **29 Assistance may be provided subject to conditions**

Assistance under this Part may be provided to a requesting country subject to such conditions as the Attorney-General determines in any particular case or class of cases.

New Zealand noted that, while section 29 of MACMA allows assistance to be given subject to conditions, the Act does not provide for an obligation to consult and attempt to negotiate conditions before refusing a request. The Law Commission noted that it was not clear whether such an obligation would encourage and allow New Zealand to provide mutual legal assistance more often or whether this step would add time to the consideration of a request without having major benefits.

### **(b) Observations on the implementation of the article**

In accordance with section 26 MACMA, New Zealand consults with the requesting State to ensure that all information required to make a decision on the execution of a request is available. However, New Zealand does not necessarily consult the requesting State prior to refusing assistance. New Zealand can also make provision of MLA subject to conditions (sect. 29 MACMA).

It was recommended that New Zealand ensure consultations with the requesting State prior to refusing or postponing the execution of an MLA request.

### **Paragraph 27 of article 46**

*27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or,*

*having left it, has returned of his or her own free will.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to section 39 MACMA:

**39 Undertakings required from foreign country**

Where, pursuant to section 37 or section 38, a foreign country requests the assistance of the Attorney-General in arranging the attendance, in that country, of a person to whom either of those sections applies, the Attorney-General shall, before authorising assistance in accordance with either of those sections in that case, obtain undertakings from the foreign country in relation to the following matters:

- (a) that the person to whom the request relates shall not-
  - i. be detained, prosecuted, or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before the person's departure from New Zealand, other than an offence in respect of which the Attorney-General consents to the person's being so detained, prosecuted, or punished; or
  - ii. be subjected to any civil proceedings in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person's departure from New Zealand, being civil proceedings to which that person could not be subjected if the person were not in the foreign country; or
  - iii. be required to give or provide evidence or assistance in respect of any criminal matter in the foreign country other than the matter to which the request relates-  
unless the person has left the foreign country, or has had the opportunity of leaving the foreign country and has remained in that country otherwise than for the purpose of giving or providing evidence or assistance in respect of the matter to which the request relates:
- (b) that any evidence given by the person in the criminal proceedings to which the request relates shall be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence:
- (c) that the person will be returned to New Zealand in accordance with arrangements agreed by the Attorney-General as soon as practicable after giving the evidence:
- (d) in a case where the request relates to a person who is a prisoner in New Zealand and the Attorney-General requests the foreign country to make arrangements for the keeping of the person in custody while the person is in the foreign country,-

- i. that appropriate arrangements will be made for that purpose; and
- ii. that the person will not be released from custody in the foreign country without the prior approval of the Attorney-General; and
- iii. if the person is released in the foreign country, at the request of the Attorney-General, before the completion of the proceedings to which the request relates, that the person's accommodation and expenses will be met by the foreign country:

(e) such other matters (if any) as the Attorney-General thinks appropriate.

#### **(b) Observations on the implementation of the article**

Section 39 MACMA requires an undertaking from the requesting State to guarantee the safe conduct of persons transferred to give evidence or otherwise assist in criminal proceedings.

#### **Paragraph 28 of article 46**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The authorities indicated that MACMA does not specifically provide for cost issues of mutual legal assistance and noted that, in practice, New Zealand rarely sought contribution to the costs of executing a request, and only has such requirement when relevant expenses are exceptionally high. According to New Zealand authorities, this has occurred once in the past five years.

#### **(b) Observations on the implementation of the article**

The reviewing experts noticed that New Zealand bears the ordinary costs of executing MLA requests despite an absence of domestic legal provisions in this regard.

#### **Subparagraph 29 (a) of article 46**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that there was no restriction in MACMA regarding the sharing of government records, documents or information available to the general public.

**(b) Observations on the implementation of the article**

The reviewing experts noted that New Zealand can provide copies of government records, documents or information in its possession that are available to the general public under its domestic law.

**Subparagraph 29 (b) of article 46**

*29. The requested State Party:*

...

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that there was no provision in MACMA regarding the sharing of documents that were not publicly available. In practice, the authorities confirmed that New Zealand could exercise discretion to provide such government records to other countries in accordance with a domestic information sharing provision. The capacity to share the information when appropriate domestic circumstances arise is therefore “subject to such conditions as deemed appropriate”.

During the country visit, New Zealand further clarified that it would try to provide records through informal assistance even in cases of formal MLA requests.

**(b) Observations on the implementation of the article**

The reviewing experts noticed that New Zealand may in practice, at its discretion, share documents that are not publicly available subject to any conditions it may deem appropriate.

**Paragraph 30 of article 46**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand has entered into treaties with several countries or regions on mutual assistance in criminal

matters:

- Agreement with the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters (entered into in 1998)
- Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters (entered into in 1999)
- Treaty with the People's Republic of China on Mutual Legal Assistance in Criminal Matters (entered into in 2006), and
- Agreement with the Government of the Fiji Islands relating to Mutual Assistance in Criminal Matters (1999). In New Zealand this arrangement is implemented via the Mutual Assistance in Criminal Matters (Prescribed Foreign Country) (Fiji) Regulations 1999

**(b) Observations on the implementation of the article**

New Zealand has concluded several agreements with other States or regions for the purposes of MLA.

## **Article 47. Transfer of criminal proceedings**

### **Article 47**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand indicated that its legislation does not provide for the transfer of criminal proceedings. The authorities also noted that it was not party to any agreements equivalent to the European Convention on the Transfer of Proceedings in Criminal Matters.

Where the threshold for a prosecution is met according to the Solicitor-General's Prosecution Guidelines and relevant charges are brought, the case can proceed in New Zealand's criminal jurisdiction. Where a prosecution is not carried out in New Zealand, another country may make a request under the Extradition Act.

**(b) Observations on the implementation of the article**

Since New Zealand cannot transfer criminal proceedings, the reviewing experts recommended that New Zealand consider the possibility of transferring criminal proceedings.

## **Article 48. Law enforcement cooperation**

### **Subparagraph 1 (a) of article 48**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

*(ii) The movement of proceeds of crime or property derived from the commission of such offences;*

*(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand reported that the Serious Fraud Office (SFO) continued to take proactive steps to detect and investigate reports of corruption.

The authorities indicated that, since 2013, New Zealand had opened 12 foreign bribery investigations, two of which were ongoing and one of these cases had been opened in the last year.

Since 1 January 2017, SFO had received 40 complaints of corruption. Where allegations were identified or received, they were recognized as a priority area for SFO and investigated as far as is

possible on the information available, including information sought both informally and formally from foreign law enforcement agencies.

With regard to the steps taken by the SFO to detect and investigate foreign bribery and establish communication channels between authorities to facilitate exchange of information, the authorities reported the following:

- The review of domestic and foreign press reports specifically relating to allegations of foreign bribery.
- Regular liaison with foreign law enforcement agencies, in particular those in the Asia Pacific region, including at meetings of the APEC Anti-Corruption Working Group, Economic Crime Agency Network and other international conferences.
- Regular informal discussions and meetings with foreign law enforcement agencies (for example, the Australian Federal Police, and Taiwan(China)'s Agency Against Corruption) with a view to identifying potential instances of foreign bribery.
- Presentations at international conferences attended by representatives from the public and private sectors, including the Hong Kong SAR ICAC Corruption Symposium, the UK Cambridge Economic Crime Symposium, the biennial Australian Public Sector Anti-Corruption Conference, and the Annual Australian Public Sector Fraud and Corruption Congress.
- Providing training to the Pacific Prosecutors Association Annual conference in Tonga and further training to the Prosecutors' office in Samoa.
- Providing training to the Police FIU in the Cook Islands on forensic accounting investigations of fraud and corruption, including foreign bribery.

SFO has initiated the Economic Crime Agency Network (ECAN) which brings together international financial crime investigation agencies such as the UK SFO, FBI Financial Crime Unit, Singapore Corrupt Practices Bureau, Australian Federal police and Royal Canadian Mounted Police among others. New Zealand SFO hosted the inaugural meeting in 2013 which has convened every year since, most recently assembling in Brussels in March 2016. SFO also participated in the APEC Anti-Corruption and Transparency Working Group and ACT-NET law enforcement network through attendance at SOM 3 events in Beijing (2014), Cebu (2015) and Lima (2016).

New Zealand is a member of the Financial Action Task Force (the FATF), and a founding member and current co-chair of the Asia/Pacific Group on Money Laundering. The authorities noted that, as an active FATF member, New Zealand was committed to implementing the FATF Recommendations to combat money-laundering (terrorist financing and proliferation financing). New Zealand had been asked by the FATF President to present at the February 2016 FATF plenary on National and Sector Risk Assessments for money laundering and terrorist financing. The authorities indicated that New Zealand had a noted expertise in this area and the presentations had aimed at helping other FATF members understand best practice in the implementation of their own risk assessments.

New Zealand is a founding member of the Asia Pacific Group (the APG). It has also played a leading role at the APG and is recognised as a positive and strong contributor. New Zealand's contribution to

the APG is consistent with New Zealand's foreign policy approach to the Pacific region and has enhanced relationships with its major trading partners in the Asia/ Pacific region.

New Zealand's current involvement in the APG is:

- the rotating Co-Chair of the APG (July 2014-2016) and member of the APG Steering Group as co-chair
- co-chair of the Implementation Issues Working Group (IIWG) (with Hong Kong, China)
- providing technical assistance and training to other members in the region as a member of the APG Donors and Providers Group

New Zealand is also a full member of the Egmont Group and the information sharing arrangements of that group. New Zealand also receives and provides information via Interpol and various agency bilateral arrangements, as well as through formal mutual legal assistance arrangements.

The authorities reported that, between 1 July 2014 and 10 June 2015, the Financial Intelligence Unit received 55 Egmont Group requests and 36 requests from overseas jurisdictions outside of formal Egmont requests. These included a number of Australian agencies, INTERPOL, New Zealand overseas Police Liaison Officers and the Strategic Alliance Group of Countries. During the same time period, the authorities reported that the FIU made 39 spontaneous disseminations to Egmont group members.

New Zealand has nominated a representative to the International Anti-Corruption Coordination Centre (IACCC). The aim of the IACCC is to help investigators of corruption work together across multiple jurisdictions. The IACCC will focus on cases of high level corruption with an international element where cooperation across jurisdictions can add real value.

The authorities also confirmed that the Asset Recovery Units have liaised and assisted with overseas law enforcement agencies on a number of occasions. There have been eleven Mutual Legal Assistance cases since the Criminal Proceeds Recovery Act 2009 came into effect in December 2009. The Asset Recovery Units have, to date, collaborated with the United States, the United Kingdom, Hong Kong SAR (China), Australia, France, and Switzerland. As a result of these collaborations, New Zealand currently holds restraining orders over assets worth an estimated \$44 million, pending further investigations and court action.

The Criminal Investigations (Bodily Samples) Amendment Act 2015 allows for the sharing of DNA information for the purpose of criminal investigations or proceedings, subject to Attorney-General's consent.

### **Criminal Investigations (Bodily Samples) Act 1995**

## **27 Access to and disclosure of information on DNA profile databank**

- (1) Subject to subsections (2) to (4), no person may have access to any information stored on a DNA profile databank, and no person shall disclose any such information, except for 1 or more of the following purposes:
  - a. for the purpose of forensic comparison in the course of a criminal investigation by the Police;
  - b. for the purpose of making the information available, in accordance with the Privacy Act 1993, to the person to whom the information relates;
  - c. for the purpose of administering the DNA profile databank;
  - d. for the purpose of responding to a request under the Mutual Assistance in Criminal Matters Act 1992 if-
    - i. access to the information requested is authorised by the Attorney-General; and
    - ii. the request relates to an offence that corresponds to an offence in New Zealand that is punishable by a term of imprisonment of more than 1 year.
- (2) Nothing in this section applies in relation to information that does not identify any person.
- (3) Nothing in this section limits the jurisdiction of the Privacy Commissioner under the Privacy Act 1993 to investigate any complaint made under Part 8 of that Act.
- (4) Nothing in this section prohibits access to, or the disclosure of, any information for the purposes of-
  - a. any application for a compulsion order; or
  - (ab) the issuing of a databank compulsion notice or the making of a Part 3 order; or
  - b. the prosecution of an offence against section 77(2).

Senior staff are based in New Zealand's overseas missions in Bangkok, Sydney, Canberra, Washington, London, Jakarta, Apia and Beijing. They cooperate with international agencies in the collection and sharing of intelligence concerning drugs, terrorism and other criminal matters.

### **(b) Observations on the implementation of the article**

During the country visit, New Zealand further clarified that it requires no specific legal basis for law enforcement cooperation. The SFO and police have liaison officers working in several other jurisdictions such as Australia, China, Fiji, Indonesia, Samoa, Thailand, the United Kingdom and the United States. Exchange of personnel, such as rotations and secondments, with other countries is possible. On some occasions, New Zealand may also offer investigative support and assist through offering trainings to other States, especially Pacific islands countries, in terms of anti-corruption cooperation.

New Zealand law enforcement authorities cooperate through a variety of organizations and networks such as INTERPOL, the Egmont Group, the APEC Anti-Corruption Working Group, the Economic Crime Agency Network, the International Anti-Corruption Coordination Centre, and the Pacific Islands Police Chiefs.

**(c) Successes and good practices**

New Zealand's important role as an active provider of technical assistance to law enforcement agencies in the region was highlighted as a good practice in the implementation of article 48 of the Convention.

**Paragraph 2 of article 48**

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand has entered into a number of agreements and arrangements with other countries or regions. For instance:

- Agreement between New Zealand and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
- Agreement Risk Assessment between New Zealand and the Government of Turkey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
- Memorandum of Cooperation between the United States Department of Homeland Security, US Customs and Border Protection and the NZ Customs Service regarding the Automated Targeting System-Global (ATS-G) Pilot for Passenger
- Smartgate Integration Arrangement between the New Zealand Customs Service and the Australian Customs and Border Protection Service

- Joint Statement between the New Zealand Department of Labour and the US Department of Homeland Security on Combating Trafficking in Persons in the Pacific Island Region
- Joint Statement between New Zealand and the United States to Strengthen Border Security, Combat Transnational Crime and Facilitate Legitimate Trade and Travel
- Agreements pursuant to S51 of the SFO Act 1990 in order to assist partner economies such as the Cook Islands Police Service and the UK Serious Fraud Office in corruption investigations
- Arrangement between the New Zealand Police and the Hong Kong Police Force on Cooperation in Combating Crime
- Memorandum of Understanding between Indonesian National Police and New Zealand Police on Police Co-operation and Training to Combat International Terrorism and Transnational Crime
- Arrangement between the government of New Zealand and the Government of the Republic of the Philippines on Law Enforcement Cooperation to Combat Transnational Crime
- Arrangement between the New Zealand Police and Royal Thai Police on Combating Transnational Crime and Developing Police Cooperation
- Arrangement on the Co-operation in the Fight against Serious Crime, organised Crime, Illicit Trafficking and in like Matters of Mutual Interest signed between New Zealand Customs Service and Her Majesty's Revenue and Customs of the United Kingdom of Great Britain and Northern Ireland and Serious Organised Crime Agency
- Memorandum of Arrangement on Cooperation in the Fight against Serious Crime, Organised Crime, Illicit Drug Trafficking and in Like Matters of Mutual Interest
- Arrangement between the New Zealand Police and the Ministry of Public Security of the Socialist Republic of Vietnam on Cooperation within the Framework of the Countering of Transnational Crimes
- Memorandum of Understanding for cooperation and information sharing between New Zealand Police and The Australian Crime Commission
- The New Zealand Police Financial Intelligence Unit has Arrangements concerning Cooperation in the Exchange of Financial Information related to Money Laundering

and Terrorist Financing with the Indonesian Financial Transaction Reports and Analysis Centre, Niue Financial Intelligence Unit, Cook Islands Financial Intelligence Unit, Korea Financial Intelligence Unit, Rbank Negara Malaysia, Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), and China Anti-Money Laundering Monitoring and Analysis Centre.

**(b) Observations on the implementation of the article**

The SFO and New Zealand Police use a number of platforms and mechanisms for law enforcement cooperation. During the country visit, the authorities indicated that New Zealand would usually rely on bilateral memoranda of understanding to conduct law enforcement cooperation, but that in cases of cooperation with Egmont partner FIUs, bilateral MOUs were not necessary.

New Zealand further clarified that it could use the Convention as a legal basis for law enforcement cooperation.

**Paragraph 3 of article 48**

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand's Police has an Electronic Crime Laboratory which plays a role in the evidential preservation of data from electronic devices including computers, removable media, digital cameras, cell phones, digital diaries, and internet based activities. This laboratory is available to investigators dealing with corruption offences.

The SFO also has an Electronic Crime Laboratory that allows for the processing of electronic devices. Electronic communication and electronic storage of documents is a feature seen in most SFO investigations. In the 2017-2018 financial year the SFO laboratory processed 284 electronic devices.

**(b) Observations on the implementation of the article**

During the country visit, New Zealand highlighted that it was common for New Zealand to share information electronically with law enforcement authorities of other countries such as Australia.

The SFO and the Police dispose of Electronic Crime Laboratories to assist with the evidential preservation of information from electronic devices, which can be used when cooperating with other law enforcement agencies. New Zealand also cooperates through the International Association of Computer Investigative Specialists.

## Article 49. Joint investigations

### Article 49

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

#### (a) Summary of information relevant to reviewing the implementation of the article

New Zealand indicated that its Police Service had strong bilateral operational relationships for criminal policing operations throughout the world by virtue of its National Central Bureau (Wellington) under the charter of the International Criminal Police Organisation (INTERPOL).

In addition, New Zealand referred to the following provision:

#### **Serious Fraud Office Act 1990**

##### **51 Agreements with overseas agencies**

(1) The Director may enter into any agreement or agreements with any person in any other country whose functions are or include the detection and investigation of cases of fraud or the prosecution of any proceedings which relate to fraud, if—

- (a) the agreement relates to a particular case or cases of fraud; and
- (b) in the case of an agreement providing for the supply of information by the Serious Fraud Office,—

- (i) the Director is satisfied that compliance with the agreement will not substantially prejudice the performance of the Serious Fraud Office's functions in relation to any other investigations; and
- (ii) the Director has recommended to the Attorney-General that the agreement be entered into and the Attorney-General has accepted the recommendation.

(2) Any such agreement—

- (a) may be made orally or in writing;
- (b) may provide for the supply or the receipt of information by the Serious Fraud Office;
- (c) shall contain a condition that no person who receives information pursuant to the agreement shall disclose the information except for any purpose specified in the agreement or with the consent of all of the parties to the agreement.

(3) Nothing in this section shall limit the general powers of the Director to enter into agreements.

(4) This section is subject to the provisions of sections 37 and 39.

**(b) Observations on the implementation of the article**

In accordance with section 51 of the SFO Act, SFO can make agreements with its counterparts if necessary for information sharing in fraud investigation process. During the country visit, the authorities also indicated that New Zealand had no provisions prohibiting joint investigations in its domestic law.

The SFO has also initiated the ECAN which brings together international financial crime investigation agencies such as the UK SFO, FBI Financial Crime Unit, Singapore Corrupt Practices Bureau, Australian Federal police and Royal Canadian Mounted Police among others, for law enforcement cooperation (see above under article 48 of the Convention).

The reviewing experts noted that New Zealand could carry out joint operations on the basis of information sharing agreements formed with overseas agencies (sect. 51 SFO Act), in line with the provisions of article 49 of the Convention.

**(c) Successes and good practices**

New Zealand can supply to and receive information from any person in any other country whose functions are or include the detection, investigation or prosecution of fraud (sect. 51 SFO Act).

## **Article 50. Special investigative techniques**

### **Paragraph 1 of article 50**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

**(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the Search and Surveillance Act 2012 with regard to the implementation of the provision under review.

The Search and Surveillance Act 2012 (SSA) allows law enforcement authorities to avail themselves of special investigative techniques such as (i) visual surveillance involving entry onto private property (sect. 46(1)(d) SSA); (ii) audio surveillance and interception devices (sect. 46(1)(c) SSA); (iii) visual surveillance not involving trespass (sect. 46(1)(c) SSA); and (iv) use of tracking devices (sect. 46(1)(b) SSA).

Controlled delivery is not regulated by the Act and can be used for all offences established in accordance with the Convention. The powers under both the SSA and the Serious Fraud Office Act allow for access to information stored on computers, including banking and financial information. While the SFO cannot invoke the powers under the SSA on its own, it can indirectly obtain such information when conducting an investigation jointly with New Zealand Police or the Organised and Financial Crime Agency New Zealand. Training on the provisions of the SSA has been provided to investigators, prosecutors and judges.

New Zealand also cited the following legislation:

### **Search and Surveillance Act 2012**

#### **148 Admission of evidence**

(1) If a Judge of the appropriate court upholds a claim to privilege under section 138, 139, 140, 145, 146, or 147 in respect of any communication or information, the communication or information to which the privilege applies is not admissible in any proceedings arising from, or related to, the execution of the search warrant or exercise of the other search power or surveillance power or the carrying out of the examination order or production order, as the case requires.

(2) Subject to subsection (1), this subpart does not limit or affect the admissibility of any evidence, or the discretion of any court to admit or refuse to admit any evidence, in any proceedings.

### **Evidence Act 2006**

#### **7 Fundamental principle that relevant evidence admissible**

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
  - (a) inadmissible under this Act or any other Act; or
  - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

#### **8 General exclusion**

- (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—
  - (a) have an unfairly prejudicial effect on the proceeding; or
  - (b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

### **13 Establishment of relevance of document**

If a question arises concerning the relevance of a document, the Judge may examine it and draw any reasonable inference from it, including an inference as to its authenticity and identity.

### **30 Improperly obtained evidence**

(1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—

- (a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
- (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.

(2) The Judge must—

- (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
- (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

- (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it;
  - (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith;
  - (c) the nature and quality of the improperly obtained evidence;
  - (d) the seriousness of the offence with which the defendant is charged;
  - (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used;
  - (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant;
  - (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others;
  - (h) whether there was any urgency in obtaining the improperly obtained evidence.
- (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies;

or

(b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

## **Mutual Assistance in Criminal Matters Act**

### **63 Authentication of documents**

(1) Subject to section 23 and to the rules of law relating to the admission of evidence, any document that is obtained, provided, or produced pursuant to a request made under this Act and that is duly authenticated is admissible in evidence in any criminal proceedings.

(2) A document is duly authenticated for the purposes of subsection (1) if—

(a) it purports to be signed or certified by a Judge, Magistrate, or official in or of a foreign country; and

(b) either—

(i) it is verified by the oath of a witness, or of an official of the Government of a foreign country; or

(ii) it purports to be sealed with an official or public seal of the foreign country or of a Minister of State, or of a department or official of the Government, of a foreign country.

(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 of New Zealand.

New Zealand provided a case example in which a former police officer pleaded guilty to a total of 14 charges, including nine involving corruption and dishonesty as a police officer. Nine private citizens were charged along with him. The investigation began in 2012 and included interception of communications and the Police internal control systems detected unlawful access to areas within the Police computer system.

New Zealand indicated that it regularly used the following investigation techniques in relation to corruption offences:

- executing search warrants pursuant to either the SSA or the Serious Fraud Office Act 1990
  - compelling the production of documents (including electronic equipment) or information (including answers to written questions) under statutory notices served on legal or natural persons;
- compelling the provision of information relevant to its investigations;

- compelling attendance of individuals at interviews with the SFO;
- compelling interviewees to answer questions put to them in an interview (subject to safeguards whereby the interview cannot be used against the interviewee in criminal proceedings unless they put forward an inconsistent statement); and
- requiring the provision of computers and other electronic media so that they can be cloned and interrogated.

New Zealand also highlighted that the SFO has worked alongside specialists from other law enforcement agencies who have carried out electronic intercepts of telephone calls to advance joint investigations in domestic fraud and corruption cases.

#### **(b) Observations on the implementation of the article**

On the basis of the Search and Surveillance Act, New Zealand can use special investigative techniques for the investigation of Convention offences. The evidence obtained through special investigative techniques is admissible in court (sects. 7, 8 EA 2006).

#### **Paragraphs 2 and 3 of article 50**

*2. For the purpose of investigating the offences covered by this Convention, States parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the agreements and arrangements included above under paragraph 2 of article 48 of this Convention and highlighted that additional agreements for specific cases of fraud, including on the use of special investigative techniques, could be concluded in accordance with section 51 SFO Act. During the country visit, the authorities confirmed that New Zealand could apply special investigative techniques at the international level on a case-by-case basis in the absence of agreements.

#### **(b) Observations on the implementation of the article**

During the country visit, New Zealand clarified that, while the relevant law enforcement agreements concluded with other States did not contain specific provisions on the use of special investigative techniques at the international level, they constituted a general basis for enabling such use, and that additional agreements on the matter could be concluded. In the absence of an enabling agreement, the authorities confirmed that special investigative techniques could be applied at the international level on a case-by-case basis.

#### **Paragraph 4 of article 50**

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

New Zealand referred to the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013, which provide for controlled delivery in the context of their scope of application:

##### **Misuse of Drugs Act 1975**

###### **12D International controlled delivery and liability for offences**

(1) In this section, an international controlled delivery means allowing a controlled drug or precursor substance (or substance substituted in the place of a controlled drug or precursor substance) to pass through or into the territory of 1 or more countries—

(a) with the agreement of the relevant law enforcement agencies of the countries which it is to pass through or into; and

(b) with a view to identifying persons involved in the commission of an offence—

(i) under section 6(1)(a) or section 12AB of the principal Act; or

(ii) that would, if done or committed in New Zealand, be an offence under either of those sections.

(2) Nothing in subsection (3) affects the liability of any person charged with an offence under section 6(1)(a) or section 12AB or section 12AC of the principal Act.

(3) Any constable, Customs officer, or officer of a relevant law enforcement agency with which there is an agreement under subsection (1)(a) who is involved in an international controlled delivery—

(a) does not commit an offence under section 6(1)(a), 12AB, or 12AC of the principal Act by reason of taking part in that international controlled delivery; and

(b) unless he or she is acting in bad faith, is not subject to any criminal or civil liability as a result of taking part in that international controlled delivery.

##### **Psychoactive Substances Act 2013**

#### **84 International controlled delivery of psychoactive substances**

(1) An enforcement officer, a constable, a Customs officer, or an officer of a relevant law enforcement agency with which there is an agreement of the kind referred to in subsection (3)(a) who is involved in an international controlled delivery—

(a) does not commit an offence under this Act by reason of taking part in the international controlled delivery; and

(b) unless he or she is acting in bad faith, is not subject to any criminal or civil liability as a result of taking part in the international controlled delivery.

(2) Subsection (1) does not affect the liability of any person charged with an offence under this Act.

(3) In this section, international controlled delivery means allowing a psychoactive substance to pass through or into the territory of 1 or more countries—

(a) with the agreement of the relevant law enforcement agencies of the countries that the substance is to pass through or into; and

(b) with a view to identifying persons involved in—

(i) the commission of an offence under this Act; or

(ii) an act that would, if done or committed in New Zealand, be an offence under this Act.

New Zealand also shared information on the Customs and Excise Act Review: The authorities indicated that, in the framework of this review, the Cabinet had agreed on 18 November 2015, as part of the Customs and Excise Act Review, to permit the controlled delivery of a broader range of specified goods or classes of goods. The authorities also confirmed that this broader range of specified goods would include goods designed, manufactured or adapted to facilitate crimes of dishonesty (further information available online <http://www.customs.govt.nz>).

#### **(b) Observations on the implementation of the article**

The reviewing experts observed that the Customs and Excise Bill, which aims at *inter alia* extending the use of controlled delivery at the international level to most corruption offences, had been presented to Parliament at the time of the country visit.

In this regard, New Zealand is encouraged to further the adoption of the Customs and Excise Bill, ensuring that, for the use of controlled delivery at the international level, it allows methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part for all Convention offences.