



# MODERNISING NEW ZEALAND'S EXTRADITION AND MUTUAL ASSISTANCE LAWS





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# Summary

## WHAT IS WRONG WITH THE CURRENT LAW

- 1 This Report outlines our recommended approach to extradition and mutual assistance<sup>3</sup> as set out in our Issues Paper. The case for reform remains as we expressed it in the Issues Paper:<sup>4</sup>

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

## PRINCIPAL PROPOSALS FOR A NEW EXTRADITION ACT

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

### An integrated scheme for extradition

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

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

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

5 Extradition Bill, cls 12 and 14.

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

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

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

- 6 Our proposed Bill would resolve much of the complexity in the current Act as to how to give effect to the treaties New Zealand has either inherited or concluded.<sup>7</sup> As we explained in our Issues Paper, the current Act has made the technical requirements of those treaties the major focus of much of the extradition litigation that has occurred, causing considerable delay. Our proposed reforms aim to make it clearer how international obligations might supplement the extradition procedure in the new Act.
- 7 Our proposed Bill contains a simpler approach to categorising countries. Two distinct procedures would apply, depending on which country makes the extradition request. There is no evidential inquiry into requests from approved countries (Australia and other close extradition partners like the United Kingdom) and they may use the simplified procedure in the Bill.<sup>8</sup> All other countries must present a summary of the evidence against the person sought (the “Record of the Case”) on which the Court would determine liability for extradition. These countries must use the standard extradition procedure.<sup>9</sup>
- 8 Australia is in a unique position. Under the Bill some of the requirements in the simplified extradition procedure do not apply if the requesting country is Australia. There is a less onerous test for whether an offence is extraditable<sup>10</sup> and, unlike for other countries, Australia is not required to provide certain formal assurances.<sup>11</sup> These exemptions reflect the particularly close relationship New Zealand has with Australia.

### Reducing delay

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

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

8 Extradition Bill, pt 2, sub-pt 3.

9 Extradition Bill, pt 2, sub-pt 2.

10 Extradition Bill, cl 7(1)(a).

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

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

### The protection of rights

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

### PRINCIPAL PROPOSALS FOR MUTUAL ASSISTANCE

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

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<sup>12</sup> Issues Paper, above n 4, at [1.28]–[1.29].

<sup>13</sup> Extradition Bill, pt 2, sub-pt 1.

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

## Gateway role

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

## Gatekeeper role

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

## Mutual assistance and New Zealand's international obligations

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

## Clarifying the relationship with other forms of mutual assistance

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

### **Provision of information held by government departments**

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