Te Tari Ture
o te Karauna
Crown Law

31 August 2022

Attorney-General

Criminal Proceeds (Recovery) Amendment Bill [PCO 22596/11.0] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/369

1. We advise on whether the amendments to the Criminal Proceeds (Recovery) Act 2009 (**CPRA**) introduced by the Criminal Proceeds (Recovery) Amendment Bill (**Bill**)[1] appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act 1990 (**Bill of Rights Act**).

2. The Bill amends the CPRA and other statutes, most significantly by creating new types of orders to better enable forfeiture of criminal assets. New type 2 asset forfeiture orders make forfeiture conditional on proof of association between the respondent and a participant in an organised criminal group. New disclosure of source orders require respondents who are overseas to provide information in relation to their property.

3. Unusually, the Bill contains a number of options for the financial value of the threshold amount for the making of new 2 asset forfeiture orders. We have been asked to advise on whether the adoption of any one of those threshold amounts would be inconsistent with the Bill of Rights Act. In our view certain options may be inconsistent with freedom of association.

4. The Bill is otherwise consistent with the rights and freedoms affirmed by Bill of Rights Act.

Summary of advice

5. The Bill introduces new restraining and forfeiture orders, (ss 24A restraining and type 2 asset forfeiture orders) that require the High Court (**Court**) to presume assets to be tainted property (derived from significant criminal activity) if the Commissioner of Police (**Commissioner**) proves that the respondent has associated with a member or participant of an organised criminal group and could not have obtained the assets through the respondent's readily available legitimate

[1] Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0.

income.[2] Existing asset forfeiture orders under s 50 of the CPRA are renamed by the Bill as type 1 asset forfeiture orders.[3]

6. In considering whether these powers limit any of the rights affirmed by the Bill of Rights Act, we have focussed on ss 17 (freedom of association), 21 (reasonable search and seizure) and 27(1) (natural justice) as the rights most likely to be engaged.[4] Although there is some risk that the new restraining and forfeiture orders may limit freedom of association, any such limitation is likely to be justified under s 5 of the Bill of Rights Act as a proportionate measure to respond to serious and organised crime. The introduction of the new restraining and forfeiture orders would not limit the right to be free from unreasonable search or the right to natural justice.

7. We regard the threshold amount options of $50,000 and $30,000 for making of the new restraining and forfeiture orders as consistent with freedom of association. However, the options of $10,000 or no threshold amount risk inconsistency with freedom of association since the exercise of the powers of restraint and forfeiture for comparatively small value does not, on the information that we have been provided, appear to significantly contribute to responding to serious and organised crime.

8. The Bill introduces new disclosure of source orders which require respondents who are overseas to provide information about assets that are subject to restraint.[5] If a respondent fails to provide the information or provides misleading information, the Court may presume that the property subject to restraint has been derived from significant criminal activity, unless the respondent satisfies the Court that it was not.[6] In considering whether these powers limit any of the rights affirmed by the Bill of Rights Act we have focused on ss 19 (freedom from discrimination), 21 (reasonable search and seizure), 27(1) (natural justice) and s 25(c) (the right to be presumed innocent in criminal proceedings) as the rights most likely to be engaged. It is unclear whether the power would give rise to differential treatment on the basis of nationality that would engage freedom from discrimination. However, if it did so, such treatment is likely to be justified under s 5 of the Bill of Rights Act and therefore would not be inconsistent with the freedom from discrimination. The introduction of the new disclosure of source orders would not limit the right to be free from unreasonable search, the right to natural justice or the right to be presumed innocent in criminal proceedings.

9. The Bill introduces a number of other amendments to the CPRA and other legislation. In our view, they do not give rise to inconsistency with the Bill of Rights

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2 Clauses 15 and 21 at new ss 24A and 50C.

3 Clauses 18 – 20.

4 Crown Law's advice to the then Attorney-General on the consistency of the Criminal Proceeds (Recovery) Bill 2006 (**2006 Bill**) with the Bill of Rights Act, dated 18 August 2006, addressed the rights affirmed by ss 9, 14, 21, 23, 25 and 27 of the Bill of Rights Act and found that the 2006 Bill was consistent with those rights. We have not repeated that analysis. This advice only addresses Bill of Rights Act rights that may be specifically and newly engaged by the amendments to the CPRA that the Bill introduces.

5 Clause 33 at new s 109A.

6 Clause 20 at new ss 50(2A) and 50(2B).

Act. However, we have briefly set out reasons for this conclusion in relation to the three most substantive amendments.

New s 24A restraining orders and new s 50C type 2 asset forfeiture orders

10. The primary purpose of the CPRA is to establish a civil regime for the restraint and forfeiture of property derived directly or indirectly from significant criminal activity or that represents the value of the person's benefit from that criminal activity.[7] To achieve that purpose, the CPRA establishes an asset forfeiture regime that proposes to:[8]

> (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.

11. The CPRA pursues these aims through establishing restraint and asset forfeiture orders that can be made following proof, to the requisite standard, that specific assets are tainted (meaning that they represent the proceeds of significant criminal activity). However, organised criminal groups can structure their affairs to render it difficult to do so.[9] In particular, the leaders and facilities of organised crime may transfer assets to their associates.

12. The aim of the Bill is "to amend the Criminal Proceeds (Recovery) Act 2009 to provide new powers to better respond to significant transnational and organised criminal offending". It seeks to address the difficulties created by the transfer of assets to associates through the introduction of new restraining and asset forfeiture orders.

13. New s 24A, inserted by cl 15 of the Bill, provides that the Court may make a restraining order in relation to specific property if is satisfied that it has reasonable grounds to believe that:[10]

    13.1 when the respondent acquired the specific property, the respondent was an associate of 1 or more members of or participants in an organised criminal group;

    13.2 all or any of those members or participants have, as members of or participants in the group, been involved in, or, unlawfully benefited from, significant criminal activity at any time;

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7 Criminal Proceeds (Recovery) Act 2009, s 3(1).

8 Section 3(2).

9 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 at 2 per the explanatory note.

10 Clause 15 at new s 24A(1).

13.3 at the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily able to be used by them to acquire the specific property would have been insufficient to enable them to acquire the specific property at or near reasonable market value;[11] and

13.4 when the application was made, the reasonable market value of the specific property, excluding the proportion potentially attributable to legitimate property, is at least $50,000 (option 1), $30,000 (option 2) or $10,000 (option 3). However, if option 4 is selected, there will not be a required threshold amount for the making of a s 24A restraining order.

14. New ss 50A – 50D, inserted by cl 21 of the Bill, provide for the making of a type 2 asset forfeiture order.[12] New s 50C requires the Court to make a type 2 assets forfeiture order if satisfied that the Commissioner has proven same four criteria set out in paragraphs [13.1] – [13.4] are met, this time on the balance of probabilities.[13]

15. However, the Court must not make a type 2 assets forfeiture order in respect of specific property if –[14]

15.1 the respondent satisfies the Court, on the balance of probabilities, that the specific property is not tainted property; or

15.2 the Court is satisfied that it would not be in the interests of justice to make the order.

16. New s 50C(3) also provides for exclusion of a respondent's property from assets forfeiture orders because of undue hardship,[15] and relief from a civil forfeiture orders for persons other than a respondent.[16]

Bill of Rights Act analysis

Freedom of association – s 17

17. Central to proceedings under new ss 24A and 50C is evidence of the respondent being an associate of another who is a member or participant in an organised criminal group. Associate is defined in new s 5A and:[17]

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11 Clause 15 at new s 24A(5): in identifying the property that the Commissioner alleges was the respondent's legitimate property and readily able to be used, the Commissioner must exercise all due diligence on the basis of information readily available.

12 Clause 21 at new s 50A provides for the matters that the Commissioner must specify in an application for a type 2 assets forfeiture order. New s 50D relates to the interests specified in the order. To the extent that the respondent satisfies the Court, on the balance of probabilities, that a proportion of the value is not attributable to significant criminal activity, that proportion is to be treated as the exempt proportion when determining the extent of the interest that is to vest in the Crown.

13 Clause 21 at new s 50C(1).

14 Clause 21 at new s 50C(2).

15 Criminal Proceeds (Recovery) Act 2009, s 51.

16 Sections 61 – 69.

17 Clause 5 at new s 5A(1).

(a) means a person who—

(i) is associated with the member or participant; and

(ii) is not a mere acquaintance of the member or participant; and

(b) includes another member of or participant in the organised criminal group (whether or not a mere acquaintance of the member or participant).

18. An organised criminal group is defined as a group of three of more people who have as their object, or one of their objects, benefiting from significant criminal activity.[18]

19. Section 17 of the Bill of Rights Act affirms the right to freedom of association, which concerns the right to form or participate in an organisation with common aims and objectives and not simply to associate more loosely with individuals and groups.[19]

20. The powers of restraint and forfeiture in new ss 24A and 50C do not directly prohibit respondents from entering into association. Nor do they seek to impose penalties on doing so. Instead, association is one factor among others which provides the evidential basis for the making of an order of restraint or forfeiture. However, human rights legislation should not be given a narrowly technical construction.[20] It is necessary to take into account the practical consequences of an enactment in order to assess whether it limits the right in question.[21] By making evidence of association a condition which enables the making of an order that is intended to deter criminal conduct and deprive criminals of their assets, it imposes risks on types of association that may have the effect of limiting the exercise of the right of association.

21. A right is not necessarily limited simply because costs are imposed on its exercise. However, the bringing of proceedings under these new provisions, even if forfeiture is not ultimately ordered, is likely to impose significant burdens on a respondent. Those burdens include attendance at Court, the costs of legal representation, the risk of cost orders, inquiries into their finances and being the subject of search and examination orders. This may give rise to a chilling effect among those who associate with members of an organised criminal group and as a result of that association, are subject to investigations and proceedings under new ss 24A and 50C orders. That chilling effect may also extend to others who fear

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18 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 5 at new s 5(3).

19 *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142. The approach of the Court of Appeal was consistent with that articulated by the Supreme Court of the United Kingdom in *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] AC 719 and the Supreme Court of Canada in *Lavigne v Ontario Public Services Employee Union* [1991] 2 SCR 221.

20 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 238.

21 Bill of Rights interpretation should be purposive, focused on the particular right infringed and the object which the particular provision is designed to serve: *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260 (CA) at 278 per Richardson J; and *R v Te Kira* [1993] 3 NZLR 257 (CA) at 271 per Richardson J. This requires consideration of *effective* enjoyment of protected rights: *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [113].

that association with members of an organised criminal group may place them at risk of being subject to such investigations and proceedings.

22. The types of association which may be limited are, first, a respondent's own participation in an organised criminal group. Such association will attract little if any protection. Its limitation, for the purpose of effectively responding to organised crime, will readily be found to be a justified limitation under s 5 of the Bill of Rights Act. However, the power is broadly framed to apply to respondents who are not involved in an organised criminal group but who associate with another who is a member of such a group, absent any proof that the respondent was involved in criminality.[22]

23. The breadth of the relationships that may be covered by the term "associated" makes it difficult to predict how the powers will be used in practice. Not every association that may be captured by the provisions will attract the protection of s 17 of the Bill of Rights Act, given that the right concerns participation in collective associations rather than relationships among individuals. However, given the extent of the prominence of gangs within particular communities there is a more than fanciful risk that community, work, iwi or whānau-based associations in which gang members also participate, may be used to establish an association with a member of an organised criminal group for the purposes of investigations and proceedings under new ss 24A and 50C.[23]

24. We take into account the particular risk that may arise for Māori exercising their rights of association. Whanaungatanga obligations mean that Māori may be particularly likely to engage in association with whānau who have gang affiliations.[24] This may place them at greater risk of being subject ss 24A and 50C orders, therefore imposing significant burdens upon that exercise of the right of association.

25. For these reasons, there is some risk that freedom of association may be limited by orders made under new ss 24A and 50C. However, we consider that it would be a justified limitation under s 5 of the Bill of Rights Act in that the introduction of these orders advances a legitimate aim of depriving criminals of the proceeds of serious criminal activity and in so deterring serious criminal activity, in a way that limits the exercise of freedom of association no more than reasonably necessary.[25]

26. To this end, new ss 24A and 50C provide that although proof of association with a member or participant of a criminal organisation is a necessary step in reversing

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22 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 5 at new s 5A.

23 Office of the Minister of Justice and Cabinet Social Wellbeing Committee "Criminal Proceeds (Recovery) Act 2009: Proposed Reforms to Better Target Illicit Assets" (19 April 2021) (**Cabinet Paper**), at [55] – [60]: Māori make up a disproportionate share of gang membership and Te Puni Kōkiri has estimated that there are approximately 50,000 people who are whānau of gang members, which equate to 5% of Māori in New Zealand.

24 Whanaungatanga is a fundamental concept within Te Ao Māori. Whanaungatanga is defined as the source of the rights and obligations of kinship. It refers to the state or circumstances of being a relative; that is, the rights, responsibilities and expected modes of behaviour that accompany kinship. See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 12 Waikato Law Review 1.

25 *R v Oakes* [1986] 1 SCR 103, applied by the NZSC in *Hansen v R* [2007] NZSC 7 at [109] per Tipping J.

the burden of proof, it is not itself sufficient. The Commissioner must also prove that the respondent would not have been able to obtain assets equal to or exceeding the threshold amount through their own readily available legitimate income.[26] The combination of association and the absence of available legitimate income may be sufficient to justify an inference that the property is tainted and for the burden to shift to the respondent, who is likely to be in a better position than the Commissioner to prove the source of his or her own assets, to prove that it is not tainted.[27]

27. The Bill contains two safeguards against the disproportionate use of these powers. First, the Court has a discretion, which must be exercised in accordance with the Bill of Rights Act, not to order forfeiture.[28] Second, restraining and forfeiture orders may only be made in relation to property that reaches a threshold amount.[29] This assists in ensuring that the limitation on the right only takes place as a result of investigations and procedure that seek the forfeiture of the proceeds of significant criminal offending in accordance with aims of the CPRA. Unlike the existing restraining and asset forfeiture orders under the CPRA (s 24 restraining orders and what will become type 1 asset forfeiture orders under s 50), the Commissioner is not required to prove that the assets are tainted, giving rise to a risk that they may be more widely deployed against those who have not been involved in criminal activity. Therefore, a threshold amount may be important in ensuring that these powers are used in a focussed and proportionate way. The asset forfeiture legislation of Australia and the United Kingdom set significant threshold amounts ($100,000 and £50,000, respectively) for their equivalent forfeiture orders.[30]

Freedom of association and threshold amount options

28. The Bill currently contains the following options for the threshold amount: $50,000, $30,000, $10,000 or no threshold amount.[31] We have been asked to advise on whether the selection of any one of these options would give rise to inconsistency with the Bill of Rights Act.

29. Although there may be an element of arbitrariness in the selection of any particular amount, the lower the threshold the greater the likelihood that the powers of the CPRA will be deployed in relation to assets that do not represent the proceeds of seriousness criminality, the loss of which is likely to be of so little significance to the leaders and facilitators of significant crime that forfeiture will not have the deterrent effect that these proposals are intended to provide. Further, lower thresholds risk the powers being deployed in respect of assets for which respondents have no or limited documentation and respondents may find

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26 As defined in new s 5B of the Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 5.

27 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cls 20 and 21 at new ss 24A(4) and 50B.

28 Clauses 20 and 21 at new ss 50(2C) and 50C(2).

29 Clauses 15 and 21 at new ss 24A(1)(d) and 50C(1)(d).

30 Cabinet Paper, above n 23, at [31], [77] and [78].

31 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cls 4(2), 15 and 21 at s 5 and new ss 24A(1)(d) and 50C(1)(d).

it difficult to rebut the presumption notwithstanding that the asset in question may not be tainted.

30. Section 6 of the CPRA currently defines significant criminal activity as activity from which proceeds or benefits of at least $30,000 have been derived, or, activity that consists of or includes the commission of an offence which carries a minimum of 5 years imprisonment. The threshold of $30,000 was set when the CPRA was passed, on the basis of its relationship to the median income.[32] However, in introducing the CPRA, the Associate Minister indicated that it may not be appropriate and that there was a potential for it to be revised upwards.[33]

31. It is proposed that if a different amount is selected for the threshold amount for the making of new ss 24A and 50C orders, the threshold amount for significant criminal activity would nevertheless remain $30,000, meaning that $30,000 (or proof that the activity consists of or includes an offence which carries a minimum of 5 years imprisonment) would remain the threshold for making restraining and asset forfeiture orders under the existing ss 24 and 50 of the CPRA, but the threshold amounts for making restraining and forfeiture orders against an associate of another who is a participant of an organised criminal group would be significantly less, if $10,000 or no threshold were selected.

32. In determining the appropriate threshold amount for orders directed at the associates of members of organised criminal groups, account must be taken of the fact that leaders and facilitators of organised crime may disguise their proceeds by dividing them into smaller amounts and distributing them to associates.[34] However, there will be practical limits to the division of the proceeds of serious crime. We have not been provided with any information to suggest there is a practice of leaders and facilitators of organised crime of dividing the proceeds into amounts of under $30,000 and distributing them to associates. Nor that the loss of comparatively small amounts through forfeiture proceedings would provide a significant deterrent to leaders and facilitators. Indeed, the examples provided by Police of the proceeds of crime at which these orders might be directed involve proceeds running into millions.

33. We have been provided with no evidence to suggest that $30,000 is no longer a reasonable threshold figure for significant criminal activity nor that it has given rise to any difficulties in the operation of the CPRA. The absence of any caselaw in which the existing powers of restraint and forfeiture were held to have been used disproportionately suggests that the existing threshold is effective in ensuring that

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32 Cabinet paper, above n 23, at [30] – [31]: the Cabinet Paper describes the threshold amount as tied to the median annual earnings of adults in the workforce, which is now approximately $55,000 before tax and expenses (2020).

33 (17 February 2009) 652 NZPD 1382 at 1382: "I suppose there could be an argument raised by cynics as to whether that threshold of $30,000 is appropriate. Why was $30,000 chosen and not some higher number? I hope that, when this bill is enacted, an opportunity may be taken at a later date to make a judgment as to whether that threshold figure of $30,000 is appropriate. We could argue that a higher threshold number could more readily have been chosen, but in the context of getting the legislation through we have decided not to change that number. We will run with $30,000 and, perhaps, at a later stage, look at it again."

34 Cabinet Paper, above n 23, at [75] and Appendix 1: Police consider that the $30,000 threshold will exclude many assets commonly seized by Police, such as motorcycles and cars.

those powers are directed at the forfeiture of the proceeds of significant criminality.

34. For these reasons, we think that having no threshold amount or a threshold amount of $10,000 would be inconsistent with freedom of association, in that these options risk limiting freedom of association without significantly advancing the purposes of the CPRA. Such a threshold amount would sit uneasily with the CPRA definition of significant criminal activity as that which gives rise to proceeds of more than $30,000.[35]

35. In the event that a threshold amount of $30,000 or $50,000 is adopted, it is our view that the limitations on freedom of association to which new ss 24A and 50C may give rise, would be justified limitations on the right and would, therefore, not be inconsistent with the right.

Unreasonable search and seizure – s 21

36. Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The provision is concerned with the protection of privacy interests primarily, although not necessarily exclusively, in the context of criminal investigations.[36] In our view asset forfeiture does not involve "seizure" within the meaning of s 21, as the HC held in *McGlone v Ministry of Fisheries*, and in *Wilson v New Zealand Customs Service*.[37] In the latter case the Court held that s 21 of the Bill of Rights Act was engaged by the search and seizure of a car because it gave rise to privacy, as opposed simply to property interests.

37. However, because there is some authority for the contrary view,[38] we have gone on to consider whether the powers in ss 24A and 50C provides for reasonable seizure. These sections allow for seizure that is lawful in that would be authorised by clear legislative provisions and subject to judicial control. For the reasons set out at paragraphs [26] and [27] in relation to freedom of association, the evidential requirements for the making of type two 2 forfeiture orders establish a reasonable regime for the forfeiture of the proceeds of significant criminal activity with protections against disproportionate or improper deployment of the powers in question. Therefore, to the extent to which the provisions do establish powers of search and seizure, those powers are capable of being exercised reasonably and the provisions are not inconsistent with s 21 of the Bill of Rights Act.

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35 We take into account that one of the other preconditions for the making of an order under new s 50C would be that the respondent is associated with an organised criminal group and that at least one member of that group had "at any time" been involved in or benefited from significant criminal activity. However, this link between the assets subject to restraint and forfeiture and significant criminal activity may be satisfied by the most tenuous connection. For example, it is easy to establish that a member of a motorcycle gang of reasonable size has a member who, at some point, obtained or was involved in obtaining at least $30,000 from criminal activity.

36 In *Hamed & Ors v R* [2011] NZSC 101 the Supreme Court held that s 21 of the Bill of Rights Act required the adoption of a broad approach to the meaning of search and seizure in order to protect privacy interests.

37 *McGlone v Ministry of Fisheries* HC Wellington CP 62-98, 16 December 1998; and *Wilson v New Zealand Customs Service* 1999 5 HRNZ 134 (HC).

38 *Alwen Industries Ltd v Comptroller of Customs* (1993) 1 HRNZ 574

Natural Justice – s 27(1)

38. We have considered whether the reversal of the burden of proof under new s 50C gives rise to unfairness that is contrary to natural justice. Whilst the reversal of the burden of proof in civil proceedings is not clearly established in the common law as an element of natural justice, the touchstone is always fairness and the prospect of a reversal of the burden in civil cases gives rise to fundamental unfairness is capable of engaging s 27(1) of the Bill of Rights Act. Courts of overseas jurisdictions have found that reverse burden of proof in civil cases engaged the right to a fair trial.[39]

39. Whether it is fair to reverse a burden of proof may depend on whether it is reasonable for a particular party to prove the matter in issue. Under these provisions the Commissioner would have to prove that the respondent was an associate of a member or participant in an organised criminal group and that he could not have readily acquired the proceeds through his legitimate income, before the burden shifted. It will not necessarily be unreasonable for a respondent, who is likely to have better knowledge of his own financial affairs than the Commissioner, to then be required to prove that his assets are not tainted. Further, the Court would have the discretion not to make the order sought, if it would not be in the interests of justice, so ensuring the fairness of the proceedings.[40]

40. For these reasons, the test for forfeiture contained in new s 50C is not inconsistent with the right to natural justice.

New disclosure of source orders

41. It can be difficult for the Police to obtain evidence from foreign jurisdictions to support an application for a type 1 assets forfeiture order (forfeiture following proof that the assets are tainted). This difficulty can result in the CPRA being thwarted.[41] To address this problem, the Bill inserts new s 109A into the CPRA which provides the Court the power to make an order in relation to a respondent who is outside the jurisdiction, requiring them to provide information about those assets.[42]

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39 In *G v France* (1988) No. 11941/86 57 DR 100 and *Metalco BT v Hungary* (2011) No. 34976/05 the European Court of Human Rights considered that reverse burdens of proof in civil cases were capable of breaching the right to a fair trial but only they lead to a fundamental imbalance between the parties. Similar in *Frederick Transport Ltd. (Re), 73 di 33* the Canada Industrial Relations Board found that, understood in context, the reversal of the burden of proof in the Labour Relations Act was not contrary to natural justice. It well established in both domestic and international law that reverse burdens of proof in criminal proceedings may be contrary to the right to a fair trial and the presumption of innocence.

40 Under new s 24A the Court has a discretion as to whether to make a restraining order. Under new s 50C, the Court must make the order if the matters set out in the section are proved and the respondent has failed to prove that the property is not tainted, unless the Court finds that it would not be in the interests of justice to make the order.

41 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 at 3 per the explanatory note.

42 The source information includes the matters listed in ss 109A(3)(a) – (d) including any other information or documents of a kind specified in the disclosure of source order. The source information must be provided within the period specified in the order. The period must not exceed 2 months after the order is made unless the court is satisfied that special circumstances exist that make a longer period appropriate. The order must inform the respondent of the effect of new ss 50(2A) and 50(2B).

42. The incentive for compliance (in addition to prosecution for non-compliance)[43] is that a failure to respond, or a misleading response, may lead the Court to presume that the property is tainted.[44]

43. Property will be presumed to be tainted if the Commissioner shows, on the balance of probabilities, that the respondent was served with a disclosure of source order,[45] and failed to provide the information or provided false or misleading information in a material particular. The presumption is rebutted if, on the balance of probabilities, the respondent shows either that:[46]

    43.1 the respondent had a reasonable excuse for failing to comply with the order or for making the false or misleading statement (as the case may be); or

    43.2 the property is not tainted property.

44. However, the presumption does not apply if the Court is satisfied that it would not be in the interests of justice.[47]

Bill of Rights Act analysis

Reasonable search and seizure – s 21

45. Similar considerations that have led the courts to find that assets forfeiture does not amount to a seizure within the meaning of s 21 of the Bill of Rights Act, may lead to the conclusion that an order requiring the respondent to provide financial information in asset forfeiture proceedings does not constitute a search. However, *in R v McKinlay Transport* the Supreme Court of Canada found that orders requiring the disclosure of financial information in a regulatory context can constitute the Canadian equivalent provision to s 21 of the Bill of Rights Act.[48] Given the potential scope of the information that may be sought through a disclosure of source order and therefore, the prospect of such orders engaging a respondent's reasonable expectation of privacy, we have considered whether, if the provision does concern searches within the meaning of s 21 of the Bill of Rights Act, the provision provides for reasonable powers of search.

46. In our view, these powers of search are capable of being used to conduct reasonable searches. Given the public interest in the forfeiture of the proceeds of significant criminality and the difficulties faced by Police in making inquiries into respondents, at times complex and deliberately opaque financial arrangements, significant powers of inquiry are justified. Mutual Legal Assistance procedures may be available but can prove slow and ineffective in certain jurisdictions.[49] Had the

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43 Criminal Proceeds (Recovery) Act 2009, s 152.

44 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 20(3) at new s 50(2A).

45 Clause 33 at new s 109A(1).

46 Clause 20(3) at new s 50(2B).

47 Clause 20(3) at new s 50(2C).

48 *R v McKinlay Transport* [1990] 1 SCR 627.

49 Information provided by Police suggests that they face substantial difficulties in obtaining information from some overseas jurisdictions using mutual legal assistance procedures. Those difficulties can include corruption within that jurisdiction, legal of

respondent been in New Zealand they might be subject to effective powers of search and examination under the CPRA. Whether to make a disclosure of source order and the scope of any such order will be determined by the Court. However, an order may only be made after a restraining order has been made under s 24(1) of the CPRA, which would require the Court to be satisfied that it has "reasonable grounds to believe that any property is tainted property".[50]

Natural justice – s 27(1)

47. For similar reasons set out in relation to type 2 forfeiture orders, the presumption that property is tainted is not inconsistent with the right to natural justice affirmed by s 27(1) of the Bill of Rights Act.

48. The presumption only applies once a restraining order has been made, the respondent is then served with a disclosure of source order and has failed to respond or, in responding has provided misleading information.[51] At this point it will not necessarily be unfair for the Court to presume the property tainted and requires the respondent to rebut the presumption by showing, on the balance of probabilities, either that the property is not tainted or that they had reasonable excuse for a non-response or for a misleading response. To ensure the fairness of proceedings, the Court retains a discretion not to apply the presumption, if satisfied that it would not be in the interests of justice to do so.[52]

Discrimination on the grounds of nationality – s 19

49. The provisions involve no direct discrimination on the grounds of nationality, in that the condition for making an order is simply the absence of the respondent in the jurisdiction, rather than the respondent's immigration status. There may a prospect that the orders will be used more frequently against respondents who are non-citizens, since they are more likely to be absent from the jurisdiction, than respondents who are citizens. Although given that non-citizens who are in New Zealand with a right of residence may also be the subject of investigations under the CPRA, that is far from clear. However, even if non-citizens were more likely to be the subject of the orders than citizens, any such differential treatment would be justified by the public interest in enabling police to better understand the source of potentially tainted assets held by respondents who are overseas. Therefore, the provision is not inconsistent with freedom from discrimination.[53]

The presumption of innocence – s 25(c)

50. The proposals do not risk infringing the presumption of innocence that is affirmed by s 25(c) of the Bill of Rights Act, since the Bill introduces new s 165A that provides

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compatibility between the mutual legal assistance provisions of both countries, lack of resources and expertise within that jurisdiction for inquiries to be effectively pursued.

50 Criminal Proceeds (Recovery) Act 2009.

51 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 20(3) at new s 50(2A).

52 Clause 20(3) at new s 50(2C).

53 Further, such differential treatment may be captured by s 132(3) of the Human Rights Act 1993, which provides that the Human Rights Act 1993, itself (which establishes the grounds of discrimination from which s 19 of the Bill of Rights Act, affirms the right to freedom), does not apply to any enactment or rule of law, or any policy or administrative practice, that distinguishes between New Zealand citizens and others.

that information provided in response to a disclosure of source order is not admissible against the respondent in criminal or civil proceedings, save for in forfeiture proceedings themselves or prosecution for non-compliance with the order.[54] Therefore, a respondent who is subject to both criminal proceedings and asset forfeiture proceedings can provide information in response to a disclosure of source request with the risk of its being used against them in criminal proceedings.

Other amendments brought about by the Bill

51. The Bill introduces a number of other amendments to the CPRA and other statutes. None of them give rise to inconsistency with the Bill of Rights Act. However, we briefly address the three most significant amendments that the Bill would introduce.

Closing the gap in Official Assignee's authority to hold seized property under the CPRA

52. New ss 112 and 113 amend current ss 112 and 113 of the CPRA which govern the Official Assignee's power to retain property that is subject to restraint or has been seized pursuant to a search and seizure warrant under the CPRA. Most significantly, they amend the period for which the Official Assignee may hold property seized under a warrant but not subject to a restraining order.

53. The CPRA currently allows the retention of property seized in a search carried out under the CPRA for 28 days only, unless during that time a restraining order is made in respect of that property. The new provisions allow for retention of the property after 28 days if either an application for a restraining order or a forfeiture order is made within the 28 day period, even if it has not been determined within the 28 day period. This enables the Official Assignee to retain property during the period between an application for restraint or forfeiture being made, and it being determined by the Court. The extension of the power to retain involves no new power of search and seizure and therefore does not engage s 21 of the Bill of Rights Act.

Providing that funds in KiwiSaver may be subject to orders under the CPRA

54. The Bill inserts new s 84A into the CPRA,[55] and together with the amendments made by Part 2 of the Bill to the KiwiSaver Act 2006, ensures that if property that is in a KiwiSaver scheme is specified in an assets forfeiture order or profit forfeiture order, an amount up to the member's accumulation must be released from the scheme into the custody and control of the Official Assignee as soon as practicable after the time by which all property specified in the order must be disposed of.[56]

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54 However, any statement or disclosure the person makes in response to the order may be used in or for civil proceedings about an application for type 1 assets forfeiture order. In respect of refusal or failure to provide information that the order requires, the refusal or failure may be used in evidence against a person in any prosecution for an offence under s 152 of the CPRA arising from refusal or failure to provide information that the order requires them to provide. In respect of any statement or disclosure that the person makes in response to the order that is false or misleading in a material particular, that statement or disclosure may be used in evidence against them in any prosecution for an offence under s 152 arising from that act.

55 Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cl 32.

56 Cabinet Paper, above n 23, at [61] – [63]: KiwiSaver funds are not currently subject to forfeiture under the CPRA due to s 127 of the KiwiSaver Act 2006. This was upheld by the Court of Appeal in *CIP v Harrison* [2021] NZCA 540, 18 October 2021.

The effect of these amendments are to ensure that tainted assets can be traced into and forfeited from the KiwiSaver scheme, as they already can for other saving and investment schemes.

55. For the reasons already set out above at paragraphs [35], [36] and [44], we do not regard the powers of forfeiture under the CPRA as involving seizure within the meaning of s 21 of the Bill of Rights Act. However, if we are wrong and asset forfeiture under the CPRA does amount to seizure, then this new power of seizure is reasonable in that it advances the purposes of the Bill in depriving criminals of the proceeds of significant criminal offending through a mechanism that is subject to the control of the courts.

Amendments to Mutual Assistance in Criminal Matters Act 1992

56. The Bill amends ss 2A and 2B of Mutual Assistance in Criminal Matters Act 1992 (**MACMA**)[57] by deeming investigations or proceedings relating to the restraint or forfeiture of property that is the subject of an application for a new ss 24A or 50C order as criminal proceedings when New Zealand makes a request for mutual legal assistance to another jurisdiction under part 2 of MACMA.

57. MACMA already deems investigations and proceedings in respect of existing civil forfeiture orders made under the CPRA as criminal for the purposes of request made under Part 2. The deeming of proceedings as criminal enables requests for mutual assistance in relation to asset forfeiture proceedings to be progressed under the international treaties governing mutual legal assistance in criminal matter. However, as ss 2A and 2B of MACMA makes clear, the proceedings remain civil proceedings for the purpose of our domestic law. Further, powers under Part 2 of MACMA must be exercised in accordance with the Bill of Rights Act.[58] It is therefore our view that these amendments to MACMA are not inconsistent with the rights and freedoms affirmed by the Bill of Rights Act.

Review of this advice

58. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.

Daniel Jones
Crown Counsel

Encl.

Noted / Approved / Not Approved

Hon David Parker
Attorney-General
31 / 8 /2022

[57] Criminal Proceeds Acts Amendment Bill 2022 PCO 22596/11.0 cls 49 and 50.

[58] *R v Bechmann-Hansen* [1997] 1 NZLR 598 at 609 – 610.