

# Regulatory Impact Statement

## All of Government Response to Organised Crime

### Agency disclosure statement

This Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice. It provides an analysis of proposals arising from the organised crime strategy - *Strengthening New Zealand's Resistance to Organised Crime: An all-of-Government Response* published in August 2011.

The proposals in this paper focus on ensuring New Zealand maintains an effective regime for targeting organised crime, and enabling law enforcement agencies to respond quickly and effectively to new challenges as they emerge.

In addition, the proposals bring aspects of New Zealand's domestic law into conformity with a number of international agreements and standards.

The options considered are based on advice and comments received from the key enforcement agencies who deal with organised crime, such as Police, Customs, and Crown Law.

There is a lack of detailed data about the extent of organised crime in New Zealand, which limits the extent to which the impact of the proposals can be assessed. The range of options that could be considered was also limited by the need to comply with international conventions to which New Zealand is a signatory.

The options relating to the collection and monitoring of international funds transfers will impose additional costs on businesses who deal with these types of transactions.

The options considered will not impair private property rights, market competition, or incentives on businesses to innovate or invest; or override fundamental common law principles.

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## **Introduction**

1. In August 2011, Cabinet agreed to an All-of-Government Response to Organised Crime. This outlined a multi-agency work programme designed to build on existing legislation to target and further disrupt the activities of organised criminal groups.
2. The outcome of this work has found that while generally New Zealand has a strong legislative framework in place to obstruct organised crime, a number of amendments have been identified to address gaps in the law or to make existing processes more efficient, and to improve compliance with international conventions.
3. These amendments have been prioritised as having the greatest and widest impacts across illegal markets. They also complement existing initiatives such as the Methamphetamine Action Plan and the National Cyber Security Strategy.
4. The proposals considered in this paper will ensure New Zealand maintains an effective toolbox for targeting organised crime, and enable law enforcement agencies to be agile and able to quickly and effectively respond to new challenges as they emerge.

## **Status Quo and Problem Definition**

### *Status Quo*

5. New Zealand has robust domestic laws and law enforcement, strong partnerships internationally, and traditionally low levels of corruption, which mean we are not perceived to be an easy target for organised crime networks.
6. The most significant legislation includes the Criminal Proceeds (Recovery) Act 2009, the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 and the Search and Surveillance Act 2012.
7. New Zealand also has a well-established non-legislative foundation for combating organised crime with a dedicated law enforcement agency (Organised and Financial Crime Agency), a multi-agency Action Plan on Methamphetamine and a National Cyber Security Strategy.
8. In addition, New Zealand has developed strong partnerships with other governments and overseas agencies, which contribute to high levels of expertise and law enforcement activity against organised crime.

### *Problem Definition*

9. As an open economy and society, New Zealand is not immune to domestic and trans-nationally generated organised crime. Police's 2010 assessment of organised crime in New Zealand documents a wide array of organised criminal markets and activities, ranging from drug crime to fraud, to intellectual property theft, to cybercrime and environmental crime. These activities significantly impact our communities, international reputation and markets.

10. For example, New Zealand's methamphetamine market is estimated to be worth \$1.2 billion per year and contains organised criminal group involvement from production to consumption.
11. Organised criminal networks and operations are purposeful and can be highly adaptable, moving rapidly to exploit vulnerabilities in legal and market settings, technology, trade and financial systems. There is frequently a trans-national component to these criminal operations that will commonly touch on the responsibilities of more than one agency and across the jurisdictions of more than one country. It is becoming more common for New Zealand law enforcement agencies to be asked to contribute to overseas investigations into organised criminal activity.
12. The All-of-Government Response to Organised Crime focuses on disrupting activities used in the commission of calculated, profit motivated, serious offending. It aims to see people and groups involved in such offending more readily identified, incarcerated and, importantly, stripped of any financial gains.
13. The organised crime strategy has identified seven areas where legislative amendments can be made to improve New Zealand's response to organised crime or address a gap in the law.

### **Objectives**

14. The proposals in the paper are designed to address organised criminal offending. This offending can range in its type, nature and seriousness, and can often have an international component.
15. Options for legislative amendment to address this harm are assessed by the following criteria:
  - 15.1. Ensures New Zealand's legislative framework is effective and that organised criminal offending does not go unpunished
  - 15.2. Ensures law enforcement officers have the right tools to address new forms of crime
  - 15.3. Improves New Zealand's ability to cooperate with our international partners
  - 15.4. Is a proportionate response and takes into account civil liberties and privacy principles.
16. Options considered should be cost effective, practical for enforcement agencies, proportionate to the offending and contain appropriate safeguards.

### **Regulatory Impact Analysis**

17. The regulatory impact analysis below has been separated into six sections covering each proposed legislative amendment:
  - 17.1. Money laundering offences
  - 17.2. Identity crime offences
  - 17.3. Improving the efficiency of mutual legal assistance

- 17.4. Registration of foreign restraining orders on an ex parte basis
- 17.5. Trafficking in persons
- 17.6. Collection and monitoring of international funds transfers data
- 17.7. Implementing the agreement with the United States on preventing and combating crime
- 17.8. Sharing DNA databank information with overseas law enforcement agencies.

### ***Money laundering offences***

18. Money laundering is the process of disguising the true origin and ownership of the proceeds of criminal activity by converting it into apparently legitimate income or property. Laundering not only assists offenders to avoid detection, it also enables the proceeds of crime to be preserved and reinvested in further criminal activity. Most economic crime involves laundering of some description. Estimates of the amount of money laundered in New Zealand range from NZ \$1-1.5 billion per annum.
19. Work undertaken as part of the organised crime strategy has identified two areas where changes are needed to the offence of money laundering as defined in New Zealand law:
  - 19.1. The first proposed change will address New Zealand's technical non-compliance with international requirements.
  - 19.2. The second proposed change will improve the effectiveness of the money laundering offence.

### ***Compliance with international requirements***

#### ***Status quo and problem***

20. As a member of the Financial Action Task Force on Money Laundering (FATF) New Zealand is subject to regular evaluations to assess levels of implementation of the FATF recommendations. These evaluations also examine additional reporting requirements on the prosecution of money laundering offences and the effectiveness of our legislation. For example, in 2011 there were 172 charges for money laundering with 18 convictions, and in 2012 there were 106 with 13 convictions. The majority of these charges were withdrawn during the court process.
21. All of this contributes to and influences New Zealand's international reputation and has an impact on our ability to trade in international markets. For example, the European Union maintain a "white list" of countries which similarly criminalise money laundering, and those countries on the white list mean that European businesses can, among other things, accept customer identification and analysis that is performed in New Zealand. This makes it must easier for New Zealand companies to do business in Europe.

22. New Zealand was last evaluated in 2009. At that time issues were raised regarding the technical compliance of New Zealand's money laundering offence with the:
  - 22.1. FATF recommendations;
  - 22.2. United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances (Vienna Convention); and
  - 22.3. United Nations Convention against Transnational Organised Crime (UNTOC).
23. The Mutual Evaluation identified the following technical deficiencies in New Zealand's money laundering offence:
  - 23.1. The prosecution must prove an additional purposive/intent element of concealment/disguise in relation to:
    - 23.1.1. money laundering activities generally;
    - 23.1.2. a third-party money launderer's sole acquisition, possession or use of substitute or indirect proceeds.
  - 23.2. Use of proceeds by the predicate offender ('self-laundering') is not covered (*a predicate offender* is a person who committed the offence that produced the illegal proceeds that are subject to money laundering).

### **Options**

#### *Option 1: Status quo*

24. In this option, no amendment would be made to the offence provisions and New Zealand would remain technically non compliant with the FATF recommendations.
25. The risk of this option is that if New Zealand remains technically non-compliant it will be significantly more difficult to move back onto the European Union's white list (a list of countries considered to have the equivalent controls on money laundering to EU states). This list is often used by the private sector in deciding which countries to trade with; New Zealand's absence from the list is currently an issue for businesses.

#### *Option 2: Amend the money laundering offences (preferred option)*

26. This option proposes to amend New Zealand's money laundering offences to address the technical deficiency in the offence identified by the FATF.
27. The amendment will clarify that intent to conceal is not an element of the offence of money laundering. This small amendment will ensure that New Zealand is complaint with the FATF recommendations and assist in New Zealand returning to the EU white list.

## *Other changes to improve the efficiency of the money laundering offence*

### ***Status quo and problem***

28. Under New Zealand law, the money laundering offence identifies illegal money or property as the proceeds of a “serious offence.” The latter refers to an offence that has a maximum penalty of 5 years or more imprisonment. Enforcement agencies have found that it can be difficult to establish, either during an investigation or prosecution, that a “serious offence” has been committed to obtain the illegal money. This is particularly the case where the “serious offence” generating the proceeds has been or is being committed overseas.
29. The current law means that offending involving money laundering is often prosecuted under other offences, which obscures the true level of money laundering.

### ***Options***

#### *Option 1: Status quo*

30. This option retains the current money laundering offence. This option is not preferred because, as identified above, there is a significant amount of offending that is currently going unpunished.

#### *Option 2: replace the 5 year threshold (preferred option)*

31. This option would expand the requirement that the property be the proceeds of an offence punishable by 5 years’ or more imprisonment to include *any* offence.
32. The benefit of this amendment is that it will improve the effectiveness of the offence, while retaining the safeguard of the State having to establish beyond reasonable doubt that the property was the proceeds of an offence.
33. This does mean that less serious predicate offending could be included in a money laundering charge. Further, this amendment recognised that in some cases the scale and nature of the offending is significant rather than solely the particular offence.
34. In addition, this approach is comparable to the UK’s offence and the FATF’s Anti-Money Laundering Model Common Law money laundering provisions. This harmony with other jurisdictions is important for New Zealand’s international cooperation.

## ***Identity crime offences***

### ***Status quo and problem***

35. Identity information is becoming more important as the number and types of online interactions increase. However, the increased use of technology is also making identity information more vulnerable to criminals. Identity-related crime is an enabler of a range of crimes, including people smuggling and immigration fraud. Large international markets have emerged for identity documents and information.

36. It is difficult to obtain reliable and robust statistics on the nature and extent of identity-related crime in New Zealand. Some of the available information indicates:
- 36.1. Between 2.8% and 7% of the adult population may be victims of identity theft or fraud
  - 36.2. Identity crimes may cost between 0.1% and 0.75% of GDP each year
  - 36.3. Estimates of time spent by victims repairing or resolving damage range from between 21 hours and 165 hours
  - 36.4. Credit card fraud (including opening new accounts and lines of credit) still appears to be the single largest type of identity-related crime.
37. Once false identity information has been obtained, a significant amount of damage can be inflicted to the victim whose identity has been taken.
38. As part of the organised crime strategy, analysis was conducted on New Zealand's legislation. This revealed two areas where gaps were identified in the relevant offences.
39. The first gap identified is the transfer of unauthorised identity-related information to others. It is not generally a criminal offence to transfer, distribute or otherwise make available unlawfully obtained or manufactured identity-related information. There are, however, some related offences such as altering, concealing, destroying or reproducing documents with the intent to deceive or using altered or reproduced documents with the intent to deceive in the Crimes Act 1961. This issue is particularly important for organised crime, notably where there is a trans-border element.
40. The second gap identified is the design, manufacture and distribution of goods (eg, credit card skimming devices) intended to facilitate the commission of crime involving dishonesty. The current legislation does not deter the sending of identity information to others and neither does it deter the production of devices to obtain identity information. These activities are difficult to prosecute under the existing legislation; the closest existing offence is that of having paper or implements for forgery.

### **Options**

#### *Option 1: Status quo*

41. This option involves relying on the current offence provisions to address identity related offending.
42. This option is not preferred because, as noted above, a review of the legislation has identified potential gaps where individuals or organised criminal groups could take advantage of for profit.

#### *Option 2: New Crimes Act offences (preferred option)*

43. This option proposes creating new offences to fill the identified legislative gaps.
44. It is proposed to amend the Crimes Act to create an offence, punishable by up to three years' imprisonment, to sell, transfer, distribute, export or otherwise make

available the unlawfully obtained or manufactured identity documents or information.

45. In addition, a further offence is proposed to be added to the Crimes Act to make it an offence, also punishable by up to three years' imprisonment, to, without reasonable excuse:
  - 45.1. design, manufacture, or adapt goods with the intent to facilitate the commission of a crime involving dishonesty, or
  - 45.2. possess or sell, export or dispose of such goods.
46. This option is preferred because it ensures that New Zealand's laws are more able to address identity related offending. This is important because identity theft is a large part of international organised criminal offending.

### ***Improving the efficiency of mutual legal assistance***

47. Mutual legal assistance is the formal process by which one country assists another in the investigation or prosecution of a criminal matter. As part of the All of Government Response to Organised Crime, the Ministry of Justice has been directed to report to Cabinet with proposals for "more efficient processes and a broader scope for mutual legal assistance" [DES MIN (11) 2/3]. On average, New Zealand receives 31 requests for mutual legal assistance per year.
48. There are two areas of concern which relate to foreign restraining and forfeiture orders (i.e. orders that allow New Zealand authorities to restrain (freeze) or order the forfeiture (confiscate) proceeds of crime on behalf a foreign state). These need to be remedied by legislative amendment. The two areas of concerns are:
  - 48.1. the time frames for foreign restraining orders; and
  - 48.2. the inability to register a foreign forfeiture order on a without notice basis.

#### *Time frames for foreign restraining orders*

##### ***Status quo and problem definition***

49. In New Zealand, a foreign restraining order is registered for two years with the possibility of a one year extension. At the end of this time, a foreign forfeiture order needs to have been registered in New Zealand or the proceeds are returned to the individual. If the proceeds need to be returned to the individual because no forfeiture order has been registered, the Crown may become liable for costs or damages caused by the restraint period (e.g. loss of profit through lost opportunity).
50. This can cause problems where an individual is being extradited (a process that typically takes a number of years) or where there are criminal proceedings in a foreign country (which can be a lengthy process). As noted above, New Zealand receives on average 31 mutual legal assistance requests per year, of these only a small proportion relate to foreign restraining orders. This is a fiscal risk for New Zealand, and will become increasingly more so as economic crimes are investigated and prosecuted transnationally.

## **Options**

### *Option 1: Maintain the status quo*

51. As outlined above, this option allows for a foreign restraining order to be registered for two years with the possibility of a single one year extension.
52. This option is not preferred because it often means that New Zealand is unable to provide international asset recovery of criminal proceeds in certain cases. It may provide an incentive for individuals to fight and delay extradition proceedings. In addition, it also undermines New Zealand's compliance with international treaties requiring effective recovery of assets.

### *Option 2: the time frame begins once extradition proceedings are completed*

53. Under this option, when an order is made for property belonging to an individual in respect of whom an extradition request has been made, the time frame for the restraining order does not commence until the completion of the extradition process.
54. The benefit of this option is that it will significantly decrease the risk that New Zealand is unable to recover the assets of someone being extradited. Further, it reduces the risk that the Crown may become liable for costs or damages caused by the restraint period.
55. However, this option is not preferred as it may result in long periods (conceivably up to 10 years) of restraint, where assets may ultimately be released to the individual. In addition, it may also deter an individual from challenging a substandard extradition request.

### *Option 3: allow for additional extensions (preferred option)*

56. This option provides that where an order is made for property belonging to an individual in respect of whom an extradition request has been made, the Police will have the ability to apply to the Court for a two-year extension (rather than the current one-year extension) at the end of the initial restraint period. Subsequent extensions, if required, could also be applied for.
57. The benefit of this option is that it decreases the risk that New Zealand will be unable to recover assets and minimises risk to the Crown while retaining the safeguard of requiring approval from the Court. The onus would be on the Police to show that there is good justification for ongoing restraint of the assets. In addition, it provides a disincentive to delay extradition proceedings in order for the restraint period to expire.
58. Similar to option 2, this option creates the potential for assets to be restrained for a long period of time; however, this is mitigated by the involvement of the Court.

## **Registration of foreign restraining orders on an ex-parte basis**

### **Status quo and problem**

59. An application for a foreign restraining order is made by the Commissioner of Police, on the request of a foreign country, and with the authority of the Attorney-General. These requests are expected to be made more often as New Zealand trades more internationally, as well as an increasing focus on transnational crimes by other countries.
60. There are two types of foreign restraining order:
  - 60.1. An interim foreign restraining order made where a restraining order is yet to be issued in the foreign country, but the investigation indicates that criminal proceeds are located in New Zealand.
  - 60.2. A standard foreign restraining order made where a restraining order has been issued in the foreign country and requests the restraint of assets located in New Zealand.
61. An application for an interim order can be made without notice (i.e. without notifying the individual whose assets are being restrained), but a standard foreign restraining order cannot. For restraining orders made in relation to domestic criminal assets (i.e. from New Zealand investigations) the restraining order may be registered without notice only where there is a risk of assets being concealed or destroyed and the order only remains in effect for seven days.
62. Making such an order without notice ensures that the individual against whom the order is being pursued is not given an opportunity to destroy or conceal their assets to avoid restraint.
63. An issue has arisen since the implementation of the Act. It was expected that a foreign country would always make an initial mutual assistance request for an interim foreign restraining order before obtaining a formal restraining order and making a mutual assistance request for the registration of that order. However, in practice this has not been the case; a country's first approach to New Zealand will frequently be to request the registration of a standard foreign restraining order.
64. The inability to register a standard foreign restraining order on a without notice basis means New Zealand authorities must either risk alerting the individual against whom the order is pursued (potentially resulting in the concealment of assets), or apply for an interim order as an unnecessary preliminary step (resulting in an increase in Crown costs and court time associated with the request).

### **Options**

#### *Option 1: status quo*

65. This means that only interim foreign restraining orders would be permitted to be registered without notice.
66. This option is not preferred because it results in inefficient processes and increased costs, court time and delay associated with applying for unnecessary interim foreign restraining orders.

*Option 2: allow without notice applications for foreign restraining orders (preferred option)*

67. This option would provide for the registration of foreign restraining orders on a without notice basis in a manner consistent with restraining orders for domestic assets. This would mean that the restraining order may be registered without notice only where there is a risk of assets being concealed or destroyed and the order only remains in effect for seven days.
68. The benefits of this option are that it ensures that an on notice hearing is held promptly and does not allow assets to be restrained, without notice, for long periods of time, while still preventing the assets from being hidden. These are important safeguards.
69. Further, it ensures a clear distinction between the use of interim and standard orders when dealing with international requests.

## **Trafficking in persons**

### **Status quo and problem**

70. The United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children (the Anti-Trafficking Protocol), to which New Zealand is a signatory, requires States parties to:
  - 70.1. Ensure legislation clearly and precisely defines the constituent elements of the trafficking in persons offence in order to distinguish it from other offences and enable the identification of trafficking victims; and
  - 70.2. Ensure the trafficking in persons offence reflects the three constituent elements of action, means and exploitative purpose.
71. The Legislative Guides to the Anti-Trafficking Protocol, issued by the United Nations Office on Drugs and Crime, state that transnationality (e.g. the requirement to move people across borders) should not be an express element of the offence for the purposes of criminalising trafficking.
72. Section 98D of the Crimes Act is the primary provision in New Zealand legislation that criminalises trafficking in persons. This section contains an express transnational requirement – that is, the offence requires the “entry of a person into New Zealand.” In addition, the offence does not explicitly refer to an “exploitative purpose” as one of the elements of trafficking.
73. While this is not considered to be a considerable risk in New Zealand, in recent years New Zealand has come under criticism for perceived gaps in the trafficking in persons offence from the United Nations Human Rights Committee and from the United States in their *Trafficking in Persons Report*.

### **Options**

*Option 1: status quo*

74. This option would leave the current section 98D as it is currently drafted.

75. This option is not preferred because, as mentioned above, New Zealand has been criticised by the Human Rights Committee for gaps in our offence definition, despite our belief that the existing legislation complies with the convention.
76. There are reputational risks for New Zealand, in that we may receive a downgrade in the Trafficking in Persons report and increasing criticism which may cause international embarrassment. This may harm our reputation as a global leader in respect for human rights and as an active opponent of human exploitation and organised crime.
77. In addition, there is a risk that a downgrade would result in increased scrutiny of New Zealand's exports to the United States, with the prospect of trade access in certain sectors (such as fisheries) being jeopardised.

*Option 2: amend the trafficking in persons offence*

78. This option amends the trafficking in persons offence in Section 98D of the Crimes Act to remove the transnational element, in order to ensure that domestic trafficking in persons is properly criminalized. It also refines the offence to ensure that the use of an "exploitative purpose" is covered as a means of trafficking in persons.
79. This amendment will improve the effectiveness of the trafficking in persons offence and provide law enforcement with the appropriate tools to combat domestic people trafficking. The amendment will also better align the trafficking offence with the Anti-Trafficking Protocol and its Legislative Guides. Finally, the amendment will address the international criticism of New Zealand's trafficking in persons offence and improve our standing in the United Nations and with respect to the United States' Trafficking In Persons Report.

***Collection and monitoring of international funds transfers data***

***Status quo and problem***

80. The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act), which comes into force in June 2013, enhances the existing regime and establishes a new supervisory regime to better detect, deter and investigate funds related to organised and financial crimes.
81. In the six month period between 1 December 2009 and 31 May 2010, a total of 2,329 Suspicious Transaction Reports were received by the financial Intelligence Unit from various financial institutions. The majority of these were from registered banks.
82. Under the new AML/CFT Act, banks, other financial institutions and casinos (reporting entities) will be required to report *suspicious* transactions to the Police's Financial Intelligence Unit (FIU). However, the information that is reported can be limited due to the subjective and disparate nature of reports that are based on suspicion. This can be a problem because they are:
  - 82.1. *subjective* – they are based on judgements made by reporting entities so suspicious transactions have the potential to go unnoticed, and secondly, a single report excludes a large set of supporting information; and

- 82.2. *disparate* – they are based on a reporting entities' isolated experience (for example, a reporting entity may only see one transaction, which on its own is not suspicious, however, it may form part of a wider pattern of transactions made through multiple entities)
83. This means that the FIU may miss evidence of significant international offending, or miss opportunities to assist with global investigations. This information can provide a significant intelligence benefit for the FIU. The growth in easier access to international financial networks also allows more discrete crime proceeds to be laundered through less formal financial mechanisms. Increasingly, the intelligence need is to find a few small dots of data in a sea of information and make a picture out of them.
84. As part of the organised crime strategy agencies considered whether it would be valuable for reporting entities to routinely report transactions that are inherently suspicious – international wire transfers and large cash transactions.
85. Supplementing suspicious transaction reporting with routine reporting of certain inherently high risk transactions would provide the FIU greater opportunities to target money laundering and terrorist financing.

### **Options**

#### *Option 1: Status quo*

86. Under this option, reporting entities would only provide reports of suspicious transactions to the FIU.
87. This option is not preferred because, while suspicious transaction reports are valuable, on their own they are unlikely to fully address the high risk from wire transfers and cash deposits.

#### *Option 2: international wire transfers and large cash transactions be reported to the FIU (preferred option)*

88. Under this option there would be a legislative requirement for all reporting entities covered by the AML/CFT Act to report to the FIU:
- 88.1. all international wire transfers over the \$1,000 threshold; and
  - 88.2. all domestic physical cash transactions of \$10,000 NZD or more.
89. The *National Risk Assessment 2010: Anti-Money Laundering / Countering Financing of Terrorism*, published by the FIU, classifies wire transfers of this amount and cash deposits as high risk for money laundering and terrorist financing.
90. For each transaction, the reporting entities would routinely report:
- 90.1. the nature of the transaction
  - 90.2. the amount of the transaction and the currency in which it was denominated
  - 90.3. the date on which the transaction was conducted
  - 90.4. the parties to the transaction (this will include a party's name, date of birth and address)

- 90.5. if applicable, the facility through which the transaction was conducted, and any other facilities (whether or not provided by the reporting entity) directly involved in the transaction
  - 90.6. the name of the officer or employee or agent of the reporting entity who handled the transaction, if that officer, employee, or agent (i) has face-to-face dealings in respect of the transaction with any of the parties to the transaction; and (ii) has formed a suspicion about the transaction
  - 90.7. any other information prescribed by regulations.
91. There is a cost for reporting entities in providing this information. However, the benefits obtained from this information are significantly greater.

*Direct Benefits*

92. The transaction reporting proposals are expected to produce the following benefits:
- 92.1. significantly reduce the harm arising to society from economic crime
  - 92.2. provide greater value to the intelligence analysis than suspicious transaction reporting, (e.g., international experience has shown that international wire transfers are used in 60% of disclosures)
  - 92.3. reduce the relatively high impact of international wire transfers and cash deposits
  - 92.4. provide more intelligence that is expected to directly result in prosecution (or significantly contribute to investigations)
  - 92.5. identify more assets that could be restrained under the Criminal Proceeds (Recovery) Act 2009
  - 92.6. better facilitate law enforcement agencies' analysis to inform decisions on the allocation of limited investigative resources
  - 92.7. increase identification of victims of fraud
  - 92.8. be more cost-effective than other investigative techniques, such as surveillance.
93. The potential added value for improved law enforcement intelligence under the AML/CFT Act was estimated at between \$12 and \$88 Million per year. This is option is likely to further increase quality and quantity of intelligence and its value.

*Indirect Benefits*

94. Potential indirect benefits include:
- 94.1. increased prevention of crime through a positive impact on the deterrence and disruption to criminal activities
  - 94.2. improved use of existing government information technology resource
  - 94.3. positive effect on our diplomatic reputation countries such as the United States, Canada, the United Kingdom, and other European Union countries

- 94.4. maintaining New Zealand's good reputation as a country with strong financial institutions and effective financial regulations that contributes to protecting our sovereign credit rating and the cost of Crown borrowing.

*Benefits for reporting entities*

95. A consultation document was sent to representative reporting entities to request information on what the impact would be of the proposals on their businesses. From the responses received, banks and other financial institutions suggest that they may benefit from transaction reporting. Transaction reporting will complement other anti-money laundering controls which are currently being implemented. Increased reporting will help to deter criminals from misusing financial systems, in order to facilitate crime.
96. This supports a positive perception of the financial sector. In addition, the proposals align with international standards. Compliance with international standards can support and improve working relationships between international businesses.

*Costs*

97. Information received in response to the consultation document indicates that there will be costs to those who have to implement the proposal (ie, the five main banks and the Western Union). The costs will vary depending on whether they have current record keeping and reporting systems which enable electronic reporting to the FIU's new IT system (goAML).
98. For a bank or financial institution that does not have existing electronic transaction reporting capabilities, the estimated start up time varies between 3-12 months, and cost between \$850,000 and \$1.000 million.

***Implementing the agreement with the United States on preventing and combating crime***

99. On 20 March 2012 the New Zealand and the United States signed the Agreement between the Government of the United States of America and the Government of New Zealand on Enhancing Cooperation in Preventing and Combating Crime (the PCC Agreement). The PCC Agreement provides for New Zealand and the United States to exchange, on request, biometric and biographic data for the purpose of preventing, detecting and investigating offences that are punishable by a maximum term of more than one year's imprisonment.
100. Sharing information internationally enables law enforcement agencies to perform their functions regardless of the jurisdiction in which the crime was committed or where the criminal is currently located. New Zealand must be able to share law enforcement information with our international counterparts if we are to expect such information in return.
101. The objectives of this part of the reform are to:
- (a) implement the PCC Agreement with the United States

- (b) ensure Police has an explicit legal framework which allows them to continue to share personal information with their international counterparts to fulfil their functions under the Policing Act 2008
- (c) ensure that appropriate checks, balances and accountability mechanisms are in place, to ensure that information is only shared where necessary and that individual privacy is appropriately protected.

### ***Status quo and problem***

- 102. The Policing Act 2008 does not contain an express provision authorising Police to share information with its international counterparts. Police rely on a combination of domestic legislation and international agreements to provide authority for such sharing.
- 103. The PCC Agreement involves the sharing of personal information collected by Police that is not currently shared internationally. Without express legislative authority to share personal information under the PCC Agreement, there is a risk that the sharing of some information under the PCC Agreement will breach the Privacy Act 1993.

### ***Options***

#### *Option 1: Status quo*

- 104. Maintaining the status quo will not enable the Government to implement the PCC Agreement, as there is a risk that the sharing of some information will breach the Privacy Act 1993.
- 105. Not implementing the Agreement would negatively impact on Police's ability to share information with the United States, would risk damaging New Zealand's relationship with the United States and could put New Zealand's visa-free access to the United States at risk. This option would not meet any of the reform's objectives. We have not identified any benefits from maintaining the status quo.

#### *Option 2: Amend the Policing Act to specifically authorise sharing with the United States under the PCC Agreement*

- 106. This option would provide statutory authority for Police to share information with the United States under the PCC Agreement. It removes the risk that such sharing will breach the Privacy Act.
- 107. However, amending the Policing Act to specifically authorise the sharing of information under the PCC Agreement with the United States only, without authorising similar information sharing under other international agreements, makes little sense and would not meet the objectives set out above.

#### *Option 3: Amend the Policing Act to expressly provide Police with a power to share personal information with its international counterparts (preferred option)*

- 108. This option would insert a new provision into the Policing Act, expressly authorising Police to share personal information internationally. This option reflects current Police sharing practices. Sharing under the PCC Agreement would take place in accordance with this power.

109. The extent to which this option meets the reforms objectives depends on how it is designed. We have considered two different designs which are set out in the table below.

Design option	Does it meet objectives?	Impact (costs & benefits)
<p><b>A. Adopt model in Immigration Act 2009 and Customs &amp; Excise Act 1996</b></p> <p>This model:</p> <ul style="list-style-type: none"> <li>• Specifies what information can be shared</li> <li>• Describes the functions of the overseas agency with which information may be shared</li> <li>• Provides authority for Chief Executive to enter into information sharing agreements and for sharing information on an ad-hoc basis if certain statutory criteria are met</li> </ul>	<p><u>Does not meet first objective:</u></p> <ul style="list-style-type: none"> <li>• Much sharing takes place in the context of international taskforces and between networks of Police Liaison Officers posted in overseas countries.</li> <li>• This model requires formal steps to be taken at all stages of the information sharing process. Police would no longer be able to effectively share (and receive) information with (or from) international counterparts.</li> </ul> <p><u>Does not meet second objective:</u></p> <ul style="list-style-type: none"> <li>• Although it places constraints on Police sharing, these are not appropriate as they would undermine Police ability to share at all.</li> </ul> <p><u>Meets third objective:</u></p> <ul style="list-style-type: none"> <li>• Would ensure accountability.</li> </ul>	<p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>• Negative impact on NZ policing.</li> <li>• Reduces the information NZ Police has available to solve crime and respond to humanitarian and welfare issues in NZ.</li> <li>• Reduces NZ Police's ability to deal with humanitarian and welfare issues and transnational crime requiring flexible, fast and efficient responses (eg responding to potential online child exploitation etc).</li> <li>• Would ensure accountability for sharing.</li> <li>• May have positive social impact by increasing trust and confidence in how Police deal with personal information.</li> </ul> <p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>• May be indirect financial impact - risk of greater financial cost for victims of crime and NZ Government due to reduced ability to deal with trans-national crime.</li> <li>• Unable to quantify the financial impact, risk is speculative.</li> </ul>
<p><b>B(i). Bespoke sharing provision for Police</b></p> <ul style="list-style-type: none"> <li>• Requests for personal information must come from an agency or body performing one or more of functions in s9 Policing Act.</li> <li>• Information must be necessary for body to discharge its s9 equivalent functions.</li> <li>• If above criteria met, and sharing not contrary to another Act, information may be disclosed: <ul style="list-style-type: none"> <li>○ With consent of individual; or</li> </ul> </li> </ul>	<p><u>Meets first objective:</u></p> <ul style="list-style-type: none"> <li>• Removes risk that sharing under the PCC Agreement will breach Privacy Act.</li> <li>• Recognises that Police share information with variety of international counterparts and puts this on statutory footing.</li> </ul> <p><u>Meets second objective:</u></p> <ul style="list-style-type: none"> <li>• Places constraints on when and with whom Police can share information internationally.</li> <li>• Limits who is authorised to share information outside of specific</li> </ul>	<p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>• Express legislative framework could increase public confidence in police, because there will be a clear source of authority for the information sharing power.</li> <li>• Positive social impact from Police continuing to share information for: <ul style="list-style-type: none"> <li>○ dealing with and reducing trans-national crime; and</li> <li>○ humanitarian and welfare reasons through Interpol.</li> </ul> </li> <li>• A complaints based</li> </ul>

Design option	Does it meet objectives?	Impact (costs & benefits)
<ul style="list-style-type: none"> <li>○ Under Agreement entered into by Govt; or</li> <li>○ In response to Interpol request; or</li> <li>○ Under Agreement entered into by NZ Police; or</li> <li>○ By an individual in specified role or business unit, in accordance with approval given by Police Commissioner. Internal guidelines must be in place to ensure sharing complies with statute.</li> <li>● Accountability &amp; transparency: <ul style="list-style-type: none"> <li>○ Police must make international information sharing agreements publicly available, unless good reason to withhold under Official Information Act.</li> <li>○ Police must publish list of business units and individual roles authorised to share information internationally, unless good reason to withhold under Official Information Act.</li> <li>○ Breach of the provision could trigger internal Police disciplinary process or, where warranted, complaint to Independent Police Complaints Authority.</li> <li>○ Complaint about sharing outside the statutory provision could be considered by Privacy Commissioner under the Privacy Act 1991.</li> </ul> </li> </ul>	<p>agreements or Interpol.</p> <ul style="list-style-type: none"> <li>● These constraints are appropriate – they are directly linked to the statutory functions of Police.</li> </ul> <p><u>Meets third objective:</u></p> <ul style="list-style-type: none"> <li>● Ensures processes for sharing are transparent.</li> <li>● Police can be held accountable for complying with the information sharing provision through: <ul style="list-style-type: none"> <li>○ Internal disciplinary process and Independent Police Conduct Authority; and</li> <li>○ Complaints to Privacy Commissioner.</li> </ul> </li> </ul>	<p>accountability mechanism may not be considered strong enough in current context where considerable social concern about privacy breaches:</p> <p><i>Mitigation:</i></p> <ul style="list-style-type: none"> <li>○ Police Commissioner will continue current practice of consulting Privacy Commissioner before entering into new (or varying or reviewing) international information sharing agreements.</li> <li>○ Police Commissioner will consult the Privacy Commissioner when deciding to approve specific individual roles or business units to respond directly to international information requests.</li> <li>○ Police Commissioner will provide an annual report to the Privacy Commissioner on the operation of assurance processes to ensure that Police comply with statutory criteria for international information sharing.</li> </ul> <p><u>Financial impact:</u></p> <ul style="list-style-type: none"> <li>● No direct financial impact.</li> <li>● Positive indirect financial impact from being able to deal with trans-national crime.</li> </ul>
<p><b>B(ii): As per B(i), but with additional accountability and transparency requirements</b></p> <p>Statutory requirement for Police to:</p> <ul style="list-style-type: none"> <li>● Consult with the Privacy Commissioner: <ul style="list-style-type: none"> <li>○ Before entering into new (or varying or reviewing) international information sharing agreements.</li> <li>○ When deciding to approve specific individual roles or business units to respond directly to international</li> </ul> </li> </ul>	<p>Not relevant to <u>first objective</u> or <u>second objective</u>.</p> <p><u>Meets third objective:</u></p> <ul style="list-style-type: none"> <li>● Ensures Police are statutorily accountable for reporting to and consulting with the Privacy Commissioner.</li> </ul>	<p><u>Social impact:</u></p> <ul style="list-style-type: none"> <li>● Compelling the Police Commissioner to report to and consult with the Privacy Commissioner, in statute, may be seen as compromising the Police Commissioner's statutory independence, as set out in the Policing Act 2008.</li> </ul>

Design option	Does it meet objectives?	Impact (costs & benefits)
<p>information requests.</p> <ul style="list-style-type: none"> <li>• Provide an annual report to the Privacy Commissioner on the operation of assurance processes to ensure that Police comply with statutory criteria for international information sharing.</li> </ul>		

### ***Sharing DNA databank information with overseas law enforcement agencies***

110. Police periodically receive requests from overseas agencies for DNA profile information (primarily from one of the Australian police forces or through Interpol), and their inability to provide that information is a significant impediment to international co-operative arrangements.

#### ***Status quo and problem***

111. The current legislation governing the DNA databank (the Criminal Investigations (Bodily Samples) Act 1995) does not permit DNA profile information to be provided to an overseas agency for the purposes of the investigation and prosecution of offences in their jurisdictions. That is because the Act prohibits access to or disclosure of information stored in the profile databank that identifies any person, except:
- 111.1. for the purpose of forensic comparison in the course of a criminal investigation by the Police;
- 111.2. for the purpose of making the information available, in accordance with the Privacy Act 1993, to the person to whom the information relates;
- 111.3. for the purpose of administering the DNA profile data.
112. The consequence, for example, is that the Queensland Police investigating a homicide may take a DNA sample from the crime scene and may ask the New Zealand Police whether or not there is a matching sample in New Zealand's databank, but in the event of a match New Zealand Police are unable to disclose who the matching sample belongs to.
113. Nor can information about a sample be provided following a request under the Mutual Assistance in Criminal Matters 1992 (even if the release of that information has been approved by the Attorney General), because there is no express provision in Part 3 relating to a request for DNA databank information and section 27 of the Criminal Investigations (Bodily Samples) Act 1995 therefore prevails.
114. The fact that New Zealand cannot share personal information relating to DNA profiles also makes it out of step with many other like-minded jurisdictions:

114.1. Australia can provide DNA information stored on the National Criminal Investigation DNA Database (NCIDD) to foreign countries following an approved request under their Mutual Assistance in Criminal Matters Act 1987.

114.2. Since 2008, European Union member states have been required to make DNA databases available to each other on a hit/no hit basis. If this shows a match, personal information relating to the DNA profile is then to be exchanged under existing mutual assistance procedures within member states.

114.3. The United Kingdom's mutual assistance framework can be used to enable the information to be shared with a wider range of countries.

### ***Options***

115. There are four ways in which relevant information could be amended to allow New Zealand Police to share DNA databank personal information with overseas agencies.

#### *Option 1: Status quo*

116. This option involves maintaining the status quo as described above. This option is not preferred because it does not enable the Police to assist overseas enforcement agencies with their inquiries.

#### *Option 2: Share information under the Policing Act 2008*

117. This option proposes that DNA information could be shared by amending the Policing Act 2008 that will create a general international information sharing power for Police.

118. This option is not preferred. In the New Zealand's legislative context, DNA is treated differently from other types of personal information and is subject to a specific piece of legislation, the Criminal Investigations (Bodily Samples) Act 1995. This reflects the special nature of DNA and the sensitivities around using it for law enforcement purposes.

119. It is appropriate to maintain the distinction between personal information relating to DNA profiles and other types of personal information in the international context and to ensure that there are greater restrictions and safeguards around the sharing of it.

#### *Option 3: Amend the Criminal Investigations (Bodily Samples) Act 1995 to define "police" and "criminal investigation"*

120. This option proposes adding a definition of "police" and "criminal investigation" to the Criminal Investigations (Bodily Samples) Act 1995, which would include foreign police and their investigations.

121. This option is not preferred, because information could then be provided informally to overseas agencies without any real scrutiny of the nature of the investigation being conducted by them. This would allow requests to be met

efficiently and quickly, but it would not incorporate sufficient safeguards to ensure that personal information was not being misused.

*Option 4: Amend the Criminal Investigations (Bodily Samples) Act 1995 to allow police-to-police sharing in specific circumstances*

122. This option proposes a specific provision to be inserted into the Criminal Investigations (Bodily Samples) Act allowing the sharing of information on a police-to-police basis, but only if specified additional criteria (eg, that the offence being investigated has an equivalent in New Zealand that carries a maximum penalty of a specified term of imprisonment) were met.
123. This option is not preferred. This would allow requests to be met efficiently and quickly. However, it would leave control over the release of information solely in the hands of the police. Reciprocal arrangements between the police and overseas agencies may place pressure on the police to release the information without giving close attention to whether or not release could be justified. There would therefore not be the perception of sufficient independence in decision-making or sufficient public confidence that personal information of a sensitive type was being adequately protected.

*Option 5: (preferred option)*

124. This option proposes that the Criminal Investigations (Bodily Samples) Act be amended to make an exception for police to share DNA information where they are acting on the authorisation of the Attorney-General in response to a mutual assistance request under the Mutual Assistance in Criminal Matters Act 1992.
125. This is the preferred option. This would ensure that all requests received the independent scrutiny of the Attorney-General acting on the advice of Crown Law. In deciding whether or not to give approval, the Attorney-General would need to take into account the matters listed in the Mutual Assistance in Criminal Matters Act (such as the seriousness of the offence and any reciprocal arrangements with the requesting jurisdiction). He or she would also be required to refuse the request if it was made in one of the circumstances set out in section 27 of the Act (eg, if the information related to an offence of a political character).
126. This option fits with the established framework for dealing with overseas requests for information or things that may assist with a criminal investigation. It provides independent oversight and other safeguards that are missing from the first two options. It would have some potential to delay the progress of overseas criminal investigations, because there are often significant delays in the handling of mutual assistance requests. Further, once the requesting country makes a request that is accompanied by the required information, urgent requests can be expedited and dealt with relatively quickly.

## **Consultation**

127. The New Zealand Police, the Crown Law Office, Inland Revenue Department, Customs Service, Department of Internal Affairs, Department of Corrections, Ministry of Business, Innovation and Employment, Ministry of Foreign Affairs and Trade, Treasury, the Serious Fraud Office and the Office of the Privacy Commissioner have been consulted on the proposals contained in the paper.

128. A number of banks and financial institutions were consulted on the proposals relating to the collection and monitoring of international funds transfers data.

## **Conclusions**

### *Money laundering offences*

129. The preferred option is to clarify that intent to conceal is not an element of the money laundering offence and remove the requirement that the predicate offence must be punishable by 5 years' or more imprisonment. This option meets the objectives identified above as it ensures New Zealand's legislative framework is effective and will mean more money laundering offending is prosecuted.

### *Identity crime offences*

130. The preferred option is to create new offences to address gaps in New Zealand's identity crime offence framework. This option meets the objectives identified above as it ensures the law enforcement officers have the appropriate laws to address these new forms of crime.

### *Improving the efficiency of mutual legal assistance*

131. The preferred option is to extend the time frames for foreign restraining orders and provide the ability to register such orders without notice. This option meets the objectives identified above as it improves New Zealand's ability to cooperate with our international partners, as well as ensuring there are appropriate safeguards in place.

### *Trafficking in persons*

132. The preferred option is to amend the offence of trafficking in persons in the Crimes Act to refine the elements of the offence and remove the requirement to cross borders. This option meets the objectives identified above as it ensure that New Zealand's legislative frame work is consistent with international conventions and improves our ability to cooperate with our international partners.

### *Collection and monitoring of international funds transfers data*

133. The preferred option is to amend the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 to require reporting entities to report all international wire transfers over \$1,000 and all cash transactions over \$10,000. This option meets the objectives identified above as it ensures that New Zealand's legislative framework is effective and improves our ability to cooperate with our international partners.

### *Implementing the agreement with the United States on preventing and combating crime*

134. The preferred option is to allow Police to share personal information, with its international counterparts in order to implement the agreement with the United States on Preventing and Combating Crime. This option meets the objectives identified above as it improves New Zealand's ability to cooperate with our international partners.

### *Sharing DNA databank information with overseas law enforcement agencies*

135. The preferred option is to enable NZ Police to share DNA databank information with overseas agencies by amending the Criminal Investigations (Bodily Samples) Act to make an exception to allow police to share DNA information with the authorisation of the Attorney-General in response to a request under the Mutual Assistance in Criminal Matters Act 1992. This option meets the objectives identified above as it improves New Zealand's ability to cooperate with our international partners and is a proportionate response taking into account civil liberties and privacy principles.

### **Implementation**

136. The changes discussed in this Regulatory Impact Statement are to be included in an Omnibus Bill that amends a number of Acts. It is intended that this Bill be introduced into the House in 2013.
137. As the Ministry of Justice is responsible for the pieces of legislation being amended, it is intended that the Ministry of Justice administer the legislation.

### **Monitoring, evaluation and review**

138. The changes discussed above will be monitored as part of the ongoing work of the organised crime strategy.