

# Departmental Disclosure Statement

---

Organised Crime and Anti-Corruption Legislation Bill
--

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

21 May 2014

**Contents**

Contents..... 2

Part One: General Policy Statement ..... 3

Part Two: Background Material and Policy Information ..... 5

Part Three: Testing of Legislative Content..... 8

Part Four: Significant Legislative Features ..... 11

Appendix One: Further Information Relating to Part Two ..... 13

Appendix Two: Further Information Relating to Part Three..... 14

## Part One: General Policy Statement

### *Overview*

This is an omnibus Bill aimed at strengthening aspects of laws to combat organised crime and corruption. The Bill implements proposals contained in Strengthening New Zealand's Resistance to Organised Crime: An all-of-Government Response (August 2011). These proposals aim to improve New Zealand's ability to collaborate with international efforts to disrupt organised crime and ensure law enforcement agencies are able to quickly and effectively respond to new challenges.

The Bill allows New Zealand to ratify the United Nations Convention against Corruption and enables implementation of 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. It also enhances New Zealand's compliance with a number of other international conventions including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the United Nations Convention against Transnational Organized Crime, and the United Nations Anti-Trafficking Protocol.

### *Organised crime amendments*

The Bill contains amendments that build on existing legislation to target and further disrupt the activities of organised criminal groups.

The human trafficking offence in the Crimes Act 1961 is amended to be made more effective and brought into line with international best practice. The transnational element of the offence is removed to ensure trafficking can be prosecuted regardless of whether the crime crosses a border. In addition, the Bill ensures that the use of an "exploitative purpose" is covered as a means of trafficking in persons.

The Crimes Act 1961 and the Customs and Excise Act 1996 are amended to address gaps in New Zealand's identity-offence framework. Existing offences are expanded to ensure that selling, transferring, distributing, importing, exporting, or otherwise making available unlawfully obtained or manufactured identity-related information are criminal offences. Similarly, making, possessing, selling, exporting, or disposing of goods intended to facilitate the commission of identity-related crime are criminalised.

The money laundering offences in the Crimes Act 1961 and the Misuse of Drugs Act 1975 are amended to ensure they are effective and compliant with New Zealand's international obligations. The Bill clarifies that intent to conceal is not a necessary element of the offence and removes the requirement that the property laundered must be the proceeds of an offence punishable by at least 5 years' imprisonment. These changes require consequential amendments to the Financial Transactions Reporting Act 1996.

The ability to detect and investigate money laundering is improved through amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. Financial institutions are required to routinely report inherently high-risk transactions to the Financial Intelligence Unit of the New Zealand Police.

New Zealand's ability to co-operate internationally is improved. The Criminal Investigations (Bodily Samples) Act 1995 and the Mutual Assistance in Criminal Matters Act 1992 are amended to allow the sharing of DNA information for the purpose of criminal investigations or proceedings, subject to standard safeguards.

New Zealand will be better equipped to assist other countries to recover illicit gains. Amendments to the Criminal Proceeds (Recovery) Act 2009 ensure that the time frame for restraining assets on behalf of another country is sufficient and that the restraint can occur without tipping off the individual concerned.

The Bill amends the Policing Act 2008 to expressly provide the Police with a power to share personal information with its international counterparts. Safeguards are included to ensure any information-sharing is appropriate. This enables New Zealand to implement the agreement with the United States on Preventing and Combating Crime.

### *Anti-corruption amendments*

The Bill also contains amendments to enhance New Zealand's anticorruption legislative frameworks and bring New Zealand into line with international best practice.

The Bill updates the definition of crime involving dishonesty in the Crimes Act 1961 to ensure those convicted of corruption offences cannot hold positions of trust in the community. The definitions of business and routine government action are also updated to ensure the foreign bribery offence applies to bribery in relation to the provision of international aid and the facilitation payments exception is not open to abuse.

The foreign bribery offence in the Crimes Act 1961 is amended to remove the dual criminality requirement. This ensures that New Zealand can effectively prosecute foreign bribery regardless of whether it was an offence in the country in which the conduct occurred.

New offences are created to address gaps in New Zealand's anti-corruption framework. The Crimes Act 1961 is amended to criminalise the acceptance of a bribe by a foreign public official and the acceptance of a bribe in return for using one's influence over an official. The foreign bribery offence is amended to clarify the circumstances in which a legal person is liable for foreign bribery.

The obligations of companies are clarified. The Companies Act 1993 is amended to ensure companies record small facilitation payments (small payments to speed up an action to which the payer is already entitled) in a consistent manner. The Income Tax Act 2007 is amended to ensure that no bribes are tax deductible.

The Bill ensures that New Zealand can provide international assistance in corruption investigations and prosecutions by amending the Mutual Assistance in Criminal Matters Act 1992.

The penalties for bribery and corruption in the private sector are increased. The Secret Commissions Act 1910 is amended to bring penalties into line with public sector bribery and general fraud offences.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p>The Bill implements proposals contained in <i>Strengthening New Zealand's Resistance to Organised Crime: An all-of-Government Response</i> (August 2011):</p> <ul style="list-style-type: none"> <li>• <a href="http://www.justice.govt.nz/publications/global-publications/s/strengthening-new-zealands-resistance-to-organised-crime">http://www.justice.govt.nz/publications/global-publications/s/strengthening-new-zealands-resistance-to-organised-crime</a></li> </ul> <p>Several of the anti-corruption amendments in the Bill respond to concerns raised by the OECD in evaluations of New Zealand's anti-bribery frameworks:</p> <ul style="list-style-type: none"> <li>• NZ Phase 1 Report (2002) <a href="http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2088257.pdf">http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2088257.pdf</a></li> <li>• NZ Phase 2 Report (2006) <a href="http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37658136.pdf">http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37658136.pdf</a></li> <li>• NZ Phase 3 Report (2013) <a href="http://www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf">http://www.oecd.org/daf/anti-bribery/NewZealandPhase3ReportEN.pdf</a></li> </ul> <p>Amendments to the money-laundering offence respond to concerns raised by the Financial Action Taskforce in the last evaluation of New Zealand's anti-money laundering framework (2009):</p> <ul style="list-style-type: none"> <li>• <a href="http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20New%20Zealand%20ful.pdf">http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20New%20Zealand%20ful.pdf</a></li> </ul> <p>Amendments to the human trafficking offence respond to criticisms of New Zealand's anti-trafficking framework in the United States' Trafficking in Persons Report:</p> <ul style="list-style-type: none"> <li>• <a href="http://www.state.gov/documents/organization/210741.pdf">http://www.state.gov/documents/organization/210741.pdf</a></li> </ul>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>YES</b>
<p>The Bill will allow New Zealand to ratify the United Nations Convention against Corruption and to implement 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).</p> <p>In addition, the amendments in the Bill increase New Zealand's compliance with the recommendations of the Financial Action Taskforce, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organised Crime, and the United Nations Anti-Trafficking Protocol.</p>	
<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>YES</b>

The national interest analysis on the United Nations Convention against Corruption can be found <http://www.parliament.nz/resource/0001709169>.

The national interest analysis on the PCC Agreement can be found at [http://justice.govt.nz/policy/criminal-justice/copy\\_of\\_organised-crime/national-interest-analysis](http://justice.govt.nz/policy/criminal-justice/copy_of_organised-crime/national-interest-analysis).

## Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
A Regulatory Impact Statement was completed by the Ministry of Justice and is available on the Ministry of Justice website.	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
The RIA Team did not provide an independent opinion because the RIS did not meet the threshold for RIA Team assessment.	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>YES</b>
There is an additional amendment be included in the Bill to ensure legal persons can be held liable for foreign bribery. Further detail on this proposal is available in Appendix 1.	

## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
---	-----------

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
Detail on the potential costs and benefits of the Bill can be found in: The Regulatory Impact Statement (available on the Ministry of Justice website). The Cabinet Social Policy Committee paper – <a href="http://justedit.justice.govt.nz/publications/global-publications/o/organised-crime-all-of-government-response/publication">http://justedit.justice.govt.nz/publications/global-publications/o/organised-crime-all-of-government-response/publication</a> New Zealand's Organised Crime Strategy – <a href="http://www.justice.govt.nz/publications/global-publications/s/strengthening-new-zealands-resistance-to-organised-crime">http://www.justice.govt.nz/publications/global-publications/s/strengthening-new-zealands-resistance-to-organised-crime</a>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>

- (a) The Bill provides for financial institutions to report inherently high-risk transactions to the Financial Intelligence Unit of the Police. Compliance with this requirement will be required for the Financial Intelligence Unit having high-quality information. There is a supervisory regime under the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 in place already to monitor compliance.
- (b) The Bill creates a number of new offences and amends others. Successful investigation and enforcement is needed for them to be an effective deterrent.

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
--

The policy and the Bill have been widely consulted, including with the Ministry of Foreign Affairs and Trade.

The amendments in the Bill will increase New Zealand's compliance with the Recommendations of the Financial Action Taskforce, the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, the United Nations Convention against Transnational Organised Crime, the United Nations Anti-Trafficking Protocol and the OECD Anti-Bribery Convention.

The amendments in this Bill will enable New Zealand to implement the PCC Agreement and ratify the United Nations Convention against Corruption.

### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
---

The Ministry of Justice considered principles of the Treaty of Waitangi during the policy development and drafting of the Bill and consider the Bill consistent with these principles.

### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
---	------------

The Crown Law Office will complete a Bill of Rights vet on the Bill. Advice provided to the Attorney-General by Crown Law (or a Bill of Rights Act 1990 section 7 report of the Attorney-General) is expected to be available on the Ministry of Justice's website upon a Bill's introduction. The advice (or report) will be accessible on the Ministry's website at:

<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
This Bill amends a large number of offence and penalty provisions. Details of the offence and penalty amendments are provided in Appendix 2.	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
---	------------

Policy development has been led by the Ministry of Justice with internal consultation occurring throughout the policy-development and drafting processes.



## Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Three parts of the Bill relate to the collection, storage, access to, correction of, use or disclosure of personal information:</p> <ul style="list-style-type: none"> <li>• Amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 to require the reporting of inherently high risk transactions to the Police. Existing provisions in the AML Act allow Police to share data with other agencies for law enforcement purposes.</li> <li>• Amendments to the money laundering offences in the Crimes Act 1961 and the Misuse of Drugs Act 1975 to expand the range of predicate offences will permit information sharing for law enforcement purposes about a broader range of offences.</li> <li>• Amendments to the Criminal Investigations (Bodily Samples) Act 1995 to allow Police to share DNA information with overseas enforcement agencies in certain circumstances.</li> <li>• Amendments to the Policing Act 2008 to expressly provide Police with a power to share personal information with its international counterparts. An individual may complain to the Privacy Commissioner about a breach of the new provisions governing how Police share personal information with international counterparts.</li> </ul>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on specific proposals at the policy development stage and on the Bill in its entirety several times throughout the drafting process.</p> <p>The amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 were seen as justifiable in light of the broader law enforcement goals.</p> <p>No concerns were raised regarding the amendments to the Criminal Investigations (Bodily Samples) Act 1995.</p> <p>Concerns were raised regarding Amendments to the Policing Act 2008. The Privacy Commissioner expressed concern that the proposed amendments grant broad powers to Police but do not contain sufficient statutory mechanisms to ensure accountability.</p> <p>A mix of statutory and non-statutory measures were developed in response to these concerns.</p> <p>The amendments to the Policing Act will require Police to make information sharing agreements publicly available (unless there is a reason to withhold them under the Official Information Act). An individual may complain to the Privacy Commissioner about a breach of provisions governing how the Police share personal information with international counterparts.</p> <p>Cabinet has noted that the Police Commissioner will:</p> <ul style="list-style-type: none"> <li>• consult the Privacy Commissioner when entering into agreements to share information or approving individuals or business units to share information</li> <li>• take reasonable steps to enter into a Memorandum of Understanding with the Privacy Commissioner regarding the nature and scope of consultation with the Privacy Commissioner</li> <li>• provide an annual report to the Privacy Commissioner on the operation of assurance processes.</li> </ul>	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>Business NZ and New Zealand Trade and Enterprise were consulted on the new proposals regarding corporate liability for bribery; both were comfortable with the new proposals.</p> <p>As above, the Office of the Privacy Commissioner has been consulted on specific policy proposals with privacy implications and on the Bill in its entirety.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p>A number of the proposals contained in the Bill are related to recommendations from international bodies, and informed by international experience.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
---	----

### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
---	----

### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
--	----

### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES
<p>(a) The Bill amends section 95 of the Anti-Money Laundering and Countering the Financing of Terrorism Act 2009 to add prescribed transactions to the offence of failing to keep or retain adequate records relating to suspicious transactions. This offence is currently a strict liability offence, and the amendment adds an additional class of transactions that records must be obtained for.</p> <p>(b) The Bill amends section 105C of the Crimes Act 1961 to clarify the circumstances in which a corporate is liable for the foreign bribery offence. The Bill provides that it is not an offence where the corporate takes reasonable steps to prevent the offence. The Bill creates an evidential burden on the defendant to raise the issue of reasonable steps taken.</p>	

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
--	----

### Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
---	-----

The Bill amends the Criminal Proceeds (Recovery) Act 2009 to allow the Police to apply to the Court to successively extend the time for which a foreign restraining order is registered in New Zealand where the assets restrained belong to the subject of an extradition request.

The Court's decision is subject to the standard appeal and review process. In addition, the Court must not extend the order unless there are reasonable grounds upon which to do so. Each extension must be for no more than 2 years. If a further extension is required, a further application must be made to the Court and the Court will reconsider the grounds for an extension.

### **Powers to make delegated legislation**

**4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?**

**NO**

**4.8. Does this Bill create or amend any other powers to make delegated legislation?**

**NO**

### **Any other unusual provisions or features**

**4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?**

**NO**

## Appendix One: Further Information Relating to Part Two

### Question 2.3.2: Aspects not included in the Regulatory Impact Statement

1. The Bill includes a minor amendment to the Crimes Act 1961 to clarify the circumstances in which legal persons (ie, a company or body corporate) can be held liable for foreign bribery. This proposal was not included in the initial Cabinet paper or Regulatory Impact Statement on the policy contained in the Bill.
2. The issue has arisen recently in the course of New Zealand's evaluation for compliance with the OECD Anti-Bribery Convention, which was completed in October 2013. The OECD criticised New Zealand for its approach to corporate liability for foreign bribery.
3. This criticism has some merit. While legal persons can be held liable for foreign bribery, it is unclear from the case law which individual must commit the offence (ie, pay a bribe to a foreign official) for the offence to be attributed to the legal person.
4. To respond to this criticism and prevent future criticism, the Bill includes a statutory amendment specifying that a legal person is liable for foreign bribery where:
  - an employee, agent or officer of the legal person commits the offence of foreign bribery, and
  - the offence is committed, at least in part, with the intent to benefit the legal person, and
  - the employee, agent, or officer is acting within the scope of their authority when they commit the offence.
5. The legal person will be liable unless they take reasonable steps to prevent the offence. This requirement ensures legal persons are not held liable where an employee acts contrary to company protocols, codes of conduct, employee agreements etc.
6. The proposed approach to legal persons' criminal liability is unique for a New Zealand Crimes Act offence, but is similar to the approach taken in Australia, Canada, the UK and the United States.
7. The amendment is not expected to result in a significant increase in the number of cases before the court. To date, New Zealand has not had any prosecutions for foreign bribery against either individuals or companies.
8. Nor is the proposed amendment expected to be contentious. The proposal will provide clarity to companies about when they will be liable for foreign bribery, and will ensure they cannot be liable where they have adequate anti-bribery mechanisms in place (this limitation on liability does not currently exist). In addition, the proposal will only affect businesses operating offshore. The Ministry of Justice has discussed this proposal with BusinessNZ (a private sector advocacy group for New Zealand businesses) which raised no concerns.
9. Nonetheless, to assist companies to comply with the law and allay any concerns, the Ministry of Justice will (in consultation with relevant agencies) develop a resource pack for businesses. This will be made available well before the enactment of the legislation.

## Appendix Two: Further Information Relating to Part Three

### Question 3.4: Offences, penalties and court jurisdictions

The Crimes Act 1961		
Clause	Title	Amend/New/Repeal
5	Trafficking in persons	Amend
6	Bribery of foreign public official	Amend
7	Corruption of foreign public official; and Trading in influence	New
9	Dishonestly taking or using document	Amend
10	Goods involved in dishonesty offences	New
11	Obtaining by deception or causing loss by deception	Amend
12	Money laundering	Amend
13	Charges for money laundering	Amend
14	Defence of enforcement of enactment	Amend
16	Forgery	Amend
17	Altering, concealing destroying or reproducing documents with intent to deceive	Amend
Anti-Money Laundering and Countering the Financing of Terrorism Act 2009		
Clause	Title	Amend/New/Repeal
25	Failing to report a suspicious transaction report	Amend
26	Providing false or misleading information connected with a suspicious transaction report	Amend
27	Unlawful disclosure of a suspicious transaction report	Amend
28	Failure to keep or retain adequate records relating to suspicious transaction report	Amend
29	Obstruction of investigation relating to a suspicious transaction report	Amend
30	Contravention of s47(1)	Amend
Customs and Excise Act 1996		

Clause	Title	Amend/New/Repeal
44	Prohibited imports	Amend
45	Prohibited exports	Amend
46	Offences in relation to importation or exportation of prohibited goods	Amend
<b>Misuse of Drugs Act 1975</b>		
Clause	Title	Amend/New/Repeal
54	Laundering proceeds of drug offences	Repeal
55	Charges for money laundering	Repeal
<b>Secret Commissions Act 1910</b>		
Clause	Title	Amend/New/Repeal
63	Penalty on conviction	Amend