

Departmental Disclosure Statement

Criminal Proceeds (Recovery) Amendment Bill

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.

5 September 2022.

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Part One: General Policy Statement

Overview of Criminal Proceeds (Recovery) Act 2009

The Criminal Proceeds (Recovery) Act 2009 (the **principal Act**) establishes a civil regime for forfeiture to the Crown of a person's property that has been derived from significant criminal activity or that represents the value of the person's benefit from that criminal activity. The aims of the regime include eliminating the chance for persons to profit from significant criminal activity and deterring that criminal activity.

The regime enables restraining orders and civil forfeiture orders to be made in relation to property. Restraining orders are interim orders that preserve the property concerned and place it under the control and custody of the Official Assignee of New Zealand (the **Official Assignee**). Civil forfeiture orders are final orders. They vest property in the Crown absolutely (subject to orders for relief from civil forfeiture, and the resolution of any appeals).

There are a number of different circumstances in which different types of restraining orders may be made. Applications for a restraining order under section 24 of the principal Act (a **section 24 restraining order**) are made by the Commissioner of Police (the **Commissioner**) to the High Court. The court may make a section 24 restraining order only if satisfied that there are reasonable grounds to believe that the property concerned is tainted property. **Tainted property** is property that has, wholly or in part, been acquired as a result of, or derived from, significant criminal activity.

A section 24 restraining order enables the New Zealand Police (the **Police**) to further investigate the source of the property to determine whether there is sufficient evidence to apply for an assets forfeiture order (a type of civil forfeiture order). To make an assets forfeiture order, the High Court must be satisfied on the balance of probabilities (meaning that it must be satisfied that it is more likely than not) that the property is tainted property.

Responding to organised criminal offending

Currently, organised criminal groups can attempt to structure their affairs to avoid restraint and forfeiture of tainted property under section 24 restraining orders and asset forfeiture orders (renamed by the Bill as type 1 assets forfeiture orders).

As an alternative to those orders, the Bill allows specific property to be restrained or forfeited to the Crown if the High Court is satisfied that it has reasonable grounds to believe (in the case of a restraining order), or is satisfied on the balance of probabilities (in the case of a forfeiture order called a type 2 assets forfeiture order), that —

- the respondent is associated with a member of or participant in an organised criminal group who has been involved in, or unlawfully benefited from, significant criminal activity; and
- 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 it at or near reasonable market value; and
- the reasonable market value of the specific property (excluding the proportion potentially attributable to that legitimate property (the **convertible legitimate property**)) is at least \$30,000.

The court must not make a type 2 assets forfeiture order in respect of specific property if—

- the respondent can show, on the balance of probabilities, that the specific property is not tainted property; or
- the court is satisfied that it would not be in the interests of justice to make the order.

If a type 2 assets forfeiture order is made, the share of the specific property that could not have been acquired at reasonable market value using the convertible legitimate property is generally forfeited to the Crown. However, that share is decreased to the extent that the respondent can show, on the balance of probabilities, that the specific property was not derived from significant criminal activity.

New disclosure of source order applying to person who is overseas

As noted in the overview above, a section 24 restraining order may be made if the High Court is satisfied that there are reasonable grounds to believe that the property concerned is tainted property. The significant criminal activity to which tainted property relates involves certain conduct in or outside New Zealand that, if proceeded against as a criminal offence, would be an offence in New Zealand.

It can be difficult to obtain the necessary evidence from foreign jurisdictions to support an application for a type 1 assets forfeiture order if the owner of the property to which a section 24 restraining order applies is overseas (whether the offending occurred in New Zealand or overseas). This difficulty can result in the principal Act being thwarted.

In response to that difficulty, the Bill enables the High Court to make a disclosure of source order, on application of the Commissioner, in relation to property to which a section 24 restraining order applies if the respondent is overseas. A disclosure of source order will require the respondent to provide certain information to the Police, mainly relating to the source of the property.

The respondent will have an incentive to provide the information within the time required by the order (generally, within 2 months after the order is made) because of the risk that the property will be forfeited to the Crown under a type 1 assets forfeiture order—without the Commissioner having to satisfy the court that the property is tainted property. If the Commissioner applies for a type 1 assets forfeiture order and shows that the respondent has failed to comply with the disclosure of source order, the property is presumed to be tainted property. The respondent may rebut the presumption by showing that the respondent had a reasonable excuse for failing to comply with the order or that the property is not tainted property. The presumption does not apply if the court is satisfied that it would not be in the interests of justice for the presumption to apply.

A disclosure of source order would put overseas respondents in a similar position to domestic respondents, who can be made subject to production and examination orders served within New Zealand. Production and examination orders require the persons on whom they are served to supply the Police with documents, information, or answers to questions that are relevant to investigations or proceedings under the Act, and failure to comply is an offence. However, those orders are not able to be effectively enforced when those persons are overseas.

Providing that funds in KiwiSaver scheme may be subject to orders under principal Act

The Bill amends the principal Act and the KiwiSaver Act 2006 to overcome a legal loophole to the effect that funds in a KiwiSaver scheme are not subject to forfeiture or

debt recovery under the principal Act until they are withdrawn under the KiwiSaver Rules.

The loophole has been revealed by case law, including *Commissioner of Police v Harrison* [2021] NZCA 540. It arises largely because the KiwiSaver Act 2006 generally prohibits a member's interest and future benefits under a KiwiSaver scheme from being passed to another person (for example, the Official Assignee), except in accordance with that Act.

The amendments are intended to prevent criminals from exploiting the loophole and also create consistency with other retirement savings vehicles and bank accounts.

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

The Bill allows the Official Assignee to hold property that is seized under a search warrant (including property seized by the Police and transferred to the Official Assignee) until an application for a restraining order relating to the property is determined, but only if the application is made as soon as practicable and before the expiry of the period of 28 days (the **28-day period**) after the date on which the property comes into the Official Assignee's custody or control.

Currently, the Official Assignee can hold property that is seized under a search warrant for the 28-day period, or until a restraining order relating to the property expires (if the order is obtained before the expiry of that period), or until an application for a forfeiture order relating to the property is determined. This leaves a gap in cases where the Police apply for a restraining order in relation to the property before the expiry of the 28-day period but the courts do not determine the application until after that period expires. By contrast, if the Police have applied for a forfeiture order, the Official Assignee can hold the property until the court has made a determination (for as long as that takes). The Bill will remove the gap and ensure consistency in the rules about when the property must be returned.

Other amendments

The Bill makes amendments of a minor or technical nature, including consequential amendments.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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?	YES
<p>Colin Atkinson, Simon Mackenzie, and Niall Hamilton-Smith, (2017) <i>A Systematic Review of the Effectiveness of Asset-Focussed Interventions against Organised Crime</i>. Economic and Social Research Council. What Works: Crime Reduction Systematic Review Series, 9. Scottish Centre for Crime and Justice Research. https://dspace.stir.ac.uk/handle/1893/26091</p> <p>Arie Freiberg, Richard Fox, (2000) <i>Evaluating the Effectiveness of Australia's Confiscation Laws</i>. Australian & New Zealand Journal of Criminology, Volume: 33 issue: 3, page(s): 239-265. https://journals.sagepub.com/doi/abs/10.1177/000486580003300301</p> <p>Maira Martini, <i>Unexplained Wealth Order As An Anti-Corruption Tool</i>. Transparency International, 27 November 2015. https://knowledgehub.transparency.org/helpdesk/unexplained-wealth-order-as-an-anti-corruption-tool</p> <p>Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, <i>Fighting organised crime by facilitating the confiscation of illegal assets</i>. Report Doc. 14516 26 March 2018, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24507&lang=en</p> <p>New Zealand Police, <i>Organised Crime & Our Operational Response Strategy: Five Year Strategy</i>. February 2021. https://www.police.govt.nz/sites/default/files/publications/organised_crime_and_our_operational_response.pdf</p> <p>New Zealand Police, <i>Transnational Organised Crime in New Zealand: Our Strategy 2020 – 2025</i>. September 2020. https://www.police.govt.nz/about-us/publication/transnational-organised-crime-new-zealand-our-strategy-2020-2025</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
<p>The Criminal Proceeds (Recovery) Act 2009 (CPRA) amendments are consistent with the:</p> <ul style="list-style-type: none"> • United Nations Convention against Transnational Organized Crime 2000, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html <ul style="list-style-type: none"> ○ Article 12. Confiscation and seizure, Paragraph 7: “States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.” • United Nations Convention Against Corruption 2005, https://www.unodc.org/unodc/en/treaties/CAC/ <ul style="list-style-type: none"> ○ Article 31. Freezing, seizure, and confiscation, Paragraph 8: “States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.” 	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<ul style="list-style-type: none"> • <i>Impact Summary: Reforms to the Criminal Proceeds (Recovery) Act 2009 to better target illicit assets</i>, Ministry of Justice, 9 December 2020, accompanying the Cabinet Paper considered by Cabinet in 2021 [CBC-21-MIN-0040; CAB-21-MIN-0138]. • A second policy paper making refinements to the proposals was considered by Cabinet in 2022 [CBC-20-MIN-0092; CAB-22-MIN-0146]. It received an exemption from the requirement to provide a Regulatory Impact Statement, as the relevant issues had already been adequately addressed by the existing impact analysis, and the revised approach was analysed in the paper itself. <p>The impact analysis is available on the Ministry of Justice website: https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/</p>	

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?	NO
<p>The regulatory impact summary identified above did not meet the threshold for receiving an independent opinion from the Regulatory Impact Analysis Team based in the Treasury. The Ministry of Justice provided an internal quality assurance panel.</p>	

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?	YES
<p>As noted in part 2.3, a second policy paper was considered by Cabinet, and a subsequent policy decision was made by the Cabinet Legislation Committee. These included:</p> <ul style="list-style-type: none"> • Refinements to the new restraint and forfeiture orders (responding to organised crime), which address potential limitations on rights under the New Zealand Bill of Rights Act 1990 (NZBORA). These changes: <ul style="list-style-type: none"> ○ clarified the meaning of “association” (to mean more than a mere acquaintance); ○ added a minimum threshold of \$30,000, for the value of a person’s property that Police must show is not explained by known legitimate property; ○ required proportionality, by ensuring only the value of the property not explained by legitimate property is to be forfeited (and not any amount that does have a legitimate source); and ○ created a limited judicial discretion to decline to make a forfeiture order, if it would not be in the interests of justice to do so. • A new amendment to expressly provide that funds in KiwiSaver may be subject to CPRA, creating consistency with other retirement savings vehicles, such as bank accounts and managed funds, which can already be subject to CPRA. The proposal relating to forfeiture of KiwiSaver funds was exempt from an impact analysis on the basis of it having minor impacts on businesses, individuals, and not-for-profit entities. 	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
Analysis of the expected benefits and costs for the policy is available in the regulatory impact summary.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
Organised criminal groups, in particular, will always seek ways to avoid detection from, or subvert the efforts of, law enforcement. However, the level of resources dedicated to responding to illicit assets can impact the amount of assets seized. As noted in the regulatory impact summary, the budget for Police's Asset Recovery Unit reflects an increase in baseline funding that will enable more CPRA investigations and civil proceedings to be progressed.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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?

As noted in part 2.2, the amendments are consistent with two UN Conventions regarding proceeds of crime to which New Zealand is a party.

There are also the technical and effective compliance standards for asset recovery, maintained by the Financial Action Task Force (FATF), the intergovernmental organisation that monitors policies to combat money laundering and terrorism financing:

- New Zealand was rated as having a high level of effectiveness for confiscation of proceeds of crime in 2021: *Anti-money laundering and counter-terrorist financing measures – New Zealand, Fourth Round Mutual Evaluation Report*, FATF, Paris, Pg 80. <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-new-zealand-2021.html>
- This makes New Zealand one of only five countries rated as having a high level of effectiveness (alongside France, Honduras, Israel, and the United States, as of 1 August 2022): *Consolidated table of assessment ratings, Effectiveness "IO8"* (Immediate Outcome 8, Confiscation), FATF, Paris, <https://www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html>

Consistency with the government's Treaty of Waitangi obligations

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?

Although there was no consultation with Māori on the proposals in the Bill, officials consulted with relevant government agencies and analysed the proposals in this Bill against the principles of the Treaty of Waitangi and the Crown's Treaty obligations.

Officials identified that there is a risk that Māori may be disproportionately impacted by the new restraining and forfeiture order created by the Bill, which is designed to respond to organised criminal offending. This is based on the fact that:

- While there are no reliable estimates of people associated with organised criminal groups, and gangs and organised crime are not synonymous (gang membership does not inherently entail offending, nor does an organised criminal group – such as drug trafficking network – need to be a gang);
- There is an overlap between some members of gangs and members of organised criminal groups. And Māori make up a disproportionate share of gang membership, *Using Evidence to Build a Better Justice System*, Chief Science Advisor, Pg 21, <https://dpmc.govt.nz/sites/default/files/2021-10/pmcsa-Using-evidence-to-build-a-better-justice-system.pdf>.
- Te Puni Kōkiri estimates that approximately 37,000 Māori are whānau of gang members, based on data from Police's Gang Intelligence Centre. This equates to around 5% of the Māori population, including extended family, such as spouses, children, parents, siblings, and in-laws.

This impact is mitigated by the design of the proposal, intended to safeguard people's rights under NZBORA, as noted in part 4.1. This includes the focus on organised criminal groups that have been involved in significant criminal activity; the standards of proof required to access the powers; and the judicial discretion as to making of orders where it is not in the interests of justice to do so. On balance, officials consider that the proposals are consistent with the principles of the Treaty.

Consistency with the New Zealand Bill of Rights Act 1990

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?	YES
Advice provided to the Attorney-General, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, 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

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
<p>The Bill amends section 152 of CPRA, the offence for <i>Failing to comply with orders and search warrants</i>, by adding the new disclosure of source order.</p> <p>The new disclosure of source order is intended to be available where a person is overseas. It creates an incentive to comply with the provision of information, as otherwise their property may be presumed to be derived from significant criminal activity, and liable to forfeiture.</p> <p>This order puts overseas respondents in a similar position to domestic respondents, as existing production and examination orders are not enforceable where a person is overseas. However, if a respondent (re)enters New Zealand, after such a disclosure of source order has been granted, this offence may apply (as it would for domestic respondents).</p>	
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO

3.4.1. Was the Ministry of Justice consulted about these provisions?	NO
The Ministry of Justice led the policy development of the Bill.	

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>The Bill creates a new section 109A in CPRA, providing the court with a new power to make a disclosure of source order. These require the provision of information on restrained assets.</p> <p>This new order is a reasonable and proportionate power addressing the specific circumstances where existing information gathering powers are not enforceable.</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO
The new powers are consistent with existing provisions under CPRA.	

External consultation

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?	NO
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Other testing of proposals

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?	YES
Officials have worked closely with relevant agencies to ensure that the provisions in the Bill are workable.	

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?	YES
<p>Three of the four amendments to CPRA enable forfeiture of property:</p> <ul style="list-style-type: none">• the new restraining and forfeiture order (new sections 24A and 50C) for where a person is associated with an organised criminal group and their legitimate property is insufficient to have acquired the specific property subject to the order;• the new disclosure of source order requiring respondents outside of New Zealand to provide information on the source of restrained property within 2 months, or else the court may presume the property was tainted (new sections 50(2A) and 109A); and• the exception to the KiwiSaver Act 2006 to allow funds in KiwiSaver schemes to be subject to CPRA orders (new section 84A, and the Part 2 amendments to the KiwiSaver Act 2006). <p>These provisions are necessary to enable the confiscation of property derived from significant criminal activity or organised criminal activity, thereby depriving the opportunity to profit from, and to deter, criminal activity.</p> <p>Any potential adverse outcomes are mitigated by:</p> <ul style="list-style-type: none">• the burden of proof on the Commissioner of Police to satisfy the court the criteria are met, to the relevant standards, for the granting of any of the relevant orders;• the ability of respondents to present evidence at restraint and/or forfeiture hearings;• where a presumption that reverses the burden of proof against a respondent may be engaged, the court has the ability to decline to make an order if it would not be in the interests of justice;• the existing provisions in CPRA that will apply. These allow the courts to:<ul style="list-style-type: none">○ sever a person's interest in property from restraint or forfeiture, if the person did not unlawfully benefit from significant criminal activity; or○ grant relief from restraint or forfeiture if it would cause undue hardship. <p>These provisions intend to protect peoples' rights (in particular, to natural justice including a fair hearing, and to freedom from unreasonable seizure including unjust forfeiture).</p>	

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
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
<p>The new provisions that enable forfeiture, identified in part 4.1, will apply to property that is in the possession of respondents when the amendments come into force.</p>	

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?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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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
As noted in part 4.1, the Bill allows the Commissioner of Police to apply for the new orders being created, which the High Court will determine consistent with existing procedures under CPRA, if satisfied of the criteria set out for the new orders. Existing rights to appeal any civil forfeiture orders made will also be available to respondents under the new orders created.	

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?	YES
The Bill amends section 173 to allow the threshold amount for the new orders to be prescribed by regulation, by Order in Council. This enables adjustments (such as for inflation), above the initial minimum value.	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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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
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