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NEW ZEALAND

**REVIEW OF IMPLEMENTATION OF THE CONVENTION ON COMBATING
BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS
TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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NEW ZEALAND

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

New Zealand signed the Convention on December 17, 1997. The Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 implementing the Convention was passed by the New Zealand Parliament and received the Royal Assent on May 2, 2001. The Act was published in the Public Act 2001 n°28 and came into force on May 3, 2001. The instrument of ratification was deposited with the OECD Secretary-General on June 25, 2001.

New Zealand has one dependency: Tokelau. New Zealand's ratification of the Convention was not intended to extend to Tokelau. New Zealand "envisages drawing the Convention to the attention of the General Fono (legislative body)", which is responsible, by delegated authority, to administer Tokelau. The authorities of New Zealand state that, however, whether Tokelau implements the Convention is within the discretion of the Fono.

The Cook Islands and Niue are "self-governing in free association with New Zealand". New Zealand "envisages drawing the existence of the Convention to their attention" in the same way as it intends to do in relation to other countries in the South Pacific region as part of its global effort to encourage improved systems of governance and strengthened mechanisms to combat international criminal activity.

Convention as a Whole

In order to implement the Convention, New Zealand has enacted the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001, which amends the Crimes Act 1961 by adding sections 105 C, 105 D and 105 E. They respectively make the active bribery of a foreign public official in business transactions a territorial criminal offence and an extra-territorial criminal offence for New Zealand citizens and residents and bodies incorporated in New Zealand.

International treaties, including the Convention, do not per se have the force of law in New Zealand, but must be implemented through domestic legislation. New Zealand indicates that the courts may "nevertheless be willing to have regard to (the Convention)" in interpreting the implementing law. The courts may also use any document that provides an indication of Parliament's intention including the original Bill as first introduced and subsequent amended versions, as well as the Report of the Law and Justice Select Committee.

Decisions of a court are binding on it, but are subject to review by courts having a higher status and the power to over-rule decisions of the lower courts. The highest court in the New Zealand system is the Privy Council. The other main courts of relevance in descending order of precedence are the Court of Appeal, the High Court and the District Court.

1. ARTICLE 1. THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

The offence of bribing a foreign public official is set out in the Crimes Amendment Act 2001 as follows:

Section 105 C (“Bribery of foreign public official”)

(2) *Every one is liable to imprisonment for a term not exceeding seven years who corruptly gives or offers or agrees to give a bribe to a person with intent to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope of the official’s authority) in order to—*

(a) obtain or retain business; or

(b) obtain any improper advantage in the conduct of business.

(3) *This section does not apply if—*

(a) the act that is alleged to constitute the offence was committed for the sole or primary purpose of ensuring or expediting the performance by a foreign public official of a routine government action; and

(b) the value of the benefit is small.

(4) *This section is subject to section 105E.¹*

Section 105D (“Bribery outside New Zealand of foreign public official”)

(1) *Every one commits an offence who, being a person described in subsection (2), does, outside New Zealand, any act that would, if done in New Zealand, constitute an offence against section 105C.*

(2) *Subsection (1) applies to a person who is—*

(a) a New Zealand citizen; or

(b) ordinarily resident in New Zealand; or

(c) a body corporate incorporated in New Zealand; or

(d) a corporation sole incorporated in New Zealand.

1. ‘105E Exception for acts lawful in country of foreign public official reads:“(1) Sections 105C and 105D do not apply if the act that is alleged to constitute an offence under either of those sections—“(a) was done outside New Zealand; and“(b) was not, at the time of its commission, an offence under the laws of the foreign country in which the principal office of the person, organisation, or other body for whom the foreign public official is employed or other-wise provides services, is situated.”(2) If a person is charged with an offence under section 105C or section 105D, it is to be presumed, unless the person charged puts the matter at issue, that the act was an offence under the laws of the foreign country referred to in subsection (1)(b).’

(3) *Every one who commits an offence against this section is liable to the same penalty to which the person would have been liable if the person had been convicted of an offence against section 105C.*

(4) *This section is subject to section 105 E.*

1.1 The Elements of the Offence

1.1.1 any person

Section 105 C paragraph 2 of the Crimes Amendment Act 2001 Code applies to “every one”.

The same term “*every one*” is used for the offence of bribery of domestic public officials in the following sections: 101 paragraph (2) relative to judicial officers, 102 paragraph (2) relative to corruption and bribery of Minister of the Crown, 103 paragraph (2) relative to corruption and bribery of Member of Parliament, 104 paragraph (2) relative to corruption and bribery of law enforcement officer, 105 paragraph (2) relative to corruption and bribery of official and 105 B relative to use or disclosure of personal information disclosed in breach of section 105 A.

The term “every one” is not defined in the Crimes Act 1961, but would appear to correspond to the term “person”, which is defined therein as including “the Crown and any public body or local authority, and any board, society, or company, and any other body of persons, whether incorporated or not, and the inhabitants of the district or any local authority”.

The only persons who are excluded from the application of the Crimes Act are foreign sovereigns due to the immunity afforded them under section 20(1) Crimes Act. The Crown cannot be prosecuted for a criminal offence under the common law.

1.1.2 intentionally

Under section 105 C paragraph 2 an offence is committed where “every one” giving etc.. “corruptly” a bribe.... did so “with the intent to influence a foreign public official in order to “obtain or retain business”....

The terms “corruptly” and “with intent” are taken from the existing domestic offences of bribery of New Zealand officials.

New Zealand’s authorities explain that in the common law, in the context of bribery, “corruptly“ does not necessarily mean dishonestly, but deliberately knowing that the act is one which the law forbids and is not for a lawful purpose, with the intention that the person to whom the bribe is intended should be influenced to enter into a corrupt bargain {*Cooper v Slade* (1858) 6 HL Cas 746; *R v Smith* [1960] 2 QB 423 (CA); *R v McDonald* [1993] 3 NZLR 354}.

The term “corruptly” forms part of the mens rea required by the offence. It requires knowledge from the person offering or giving the bribe that the act is unlawful. New Zealand states that there is no requirement that the foreign public official is aware of the illegality of the act”.

The requirement of intent includes the notion of *dolus eventualis*. Recklessness will be a sufficient but minimum degree of fault for liability. In most cases “recklessness” will require actual "advertence" (or

conscious appreciation or foresight) of the relevant risk in question, together with an intention to continue the course of conduct regardless of the risk {*R v Harney* [1987] 2 NZLR 576}.

The term “with intent to influence” in section 105C and 105D of the Crimes Amendment Act 2001 (and s.105D) is consistent with the wording of the existing domestic offences of bribery of New Zealand officials. At common law, the term has been interpreted such that the briber need not specify at the time of the offer the “occasions and the manner in which the recipient officers are expected to depart from their duty” [*R v Allen* (1992) 62 A Crim R 251]. New Zealand’s authorities add that arguably the use of the term “intent to influence” may extend to trafficking in influence, in which case the standard under the Convention would be exceeded in this respect.

1.1.3 to offer, promise or give

Section 105 C paragraph 2 applies where “every one” “gives or offers or agrees to give a bribe”. This terminology corresponds to that used in the domestic offence.

The term “agrees to give” is intended to cover the notion of “promises” under Article 1 of the Convention. New Zealand states that it is the effect that the words or actions are intended to have on the mind of the possible recipient that is of importance. Thus the offence applies where the briber intends that the official should take the offer seriously, and there is no need for the official to intend to provide the quo [*R v Pierce* (1994) 90 A Crim R 134 (Vic SC)].

1.1.4 any undue pecuniary or other advantage

Section 105 C paragraph (2) the Crimes Amendment Act 2001 criminalises the conduct of a person “who corruptly gives, or offers or agrees to give a bribe”.

The term “bribe” is defined in section 99 of the Criminal Amendment Act 1961 as “any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect”. The same definition is used for the term “benefit” in section 105 C paragraph 1.

New Zealand’s authorities explain that if the offer of money is made by telephone or fax from New Zealand, or if the funds are transmitted from New Zealand to the foreign public official overseas, the action will be caught by the offence under section 105C(2), even if it is not an offence in the jurisdiction of the official’s principal office.

1.1.5 whether directly or through intermediaries

Although Section 105 C does not expressly mention that the bribes through intermediaries are covered, it is not limited to bribes to foreign public officials (i.e. it applies to bribes to “a person”). New Zealand confirms that this formulation is intended to capture bribes through intermediaries.

1.1.6 to a foreign public official

The definition of “foreign public official” and all the complementary definitions, such as “foreign country”, “foreign government”, “foreign public agency”, “foreign public enterprise” “foreign public official” as well as “public international organisation” are contained in the new section 105 C paragraph 1 of the Crimes Amendment Act 2001.

The following definitions are provided therein:

“foreign public official” includes any of the following:

- (a) a member or officer of the executive, judiciary, or legislature of a foreign country;*
- (b) a person who is employed by a foreign government, foreign public agency, foreign public enterprise, or public international organisation;*
- (c) a person, while acting in the service of or purporting to act in the service of a foreign government, foreign public agency, foreign public enterprise, or public international organisation.*

“public international organisation” means any of the following organisations, wherever situated:

- (a) an organisation of which 2 or more countries or 2 or more governments are members, or represented on the organisation;*
- (b) an organisation constituted by an organisation to which paragraph (a) applies or by persons representing 2 or more such organisations;*
- (c) an organisation constituted by persons representing 2 or more countries or 2 or more governments;*
- (d) an organisation that is part of an organisation referred to in any of paragraphs (a) to (c)*

The New Zealand definition covers as required by the Convention “a public agency” and “a public enterprise”:

“foreign public agency” means any person or body, wherever situated, that carries out a public function under the laws of a foreign country

The term “public function” which is referred to under this definition corresponds to the term “public interest” in Commentary 13 of the Convention.

“foreign public enterprise” means

- (a) a company, wherever incorporated, that:*
 - (i) a foreign government is able to control or dominate (whether by reason of its ownership of shares in the company, its voting powers in the company, or its ability to appoint one or more directors (however described), or by reason that the directors (however described) are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise);*
and “(ii) enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (b)(i) apply;
- or*
- (b) a person or body (other than a company), wherever situated, that*
 - (i) a foreign government is able to control or dominate (whether by reason of its ability to appoint the person or 1 or more members of the body, or by reason that the person or*

members of the body are accustomed or under an obligation to act in accordance with the directions of that government, or otherwise); and
(ii) enjoys subsidies or other privileges that are enjoyed only by companies, persons, or bodies to which subparagraph (i) or paragraph (a)(i) apply.

The definition of “foreign public enterprise” specifically refers to control or domination by a foreign government, including whether the directors are accustomed or are under an obligation to act in accordance with the directions of that government. New Zealand’s authorities state that this captures indirect control as required by Commentary 14 of the Convention.

“Foreign country” under the Convention includes in Article 1 paragraph 4 subparagraph b) “all levels and subdivisions of government, from national to local”. New Zealand’s legislation includes under section 105 C first paragraph the definition of a foreign government as well as a foreign country. The former includes “all levels and subdivisions of government, such as local, regional, and national government”. The latter comprises: “a territory for whose international relations the government of a foreign country is responsible (a) and an organised foreign area or entity including an autonomous territory or a separate customs territory (b)”.

1.1.7 for that official or for a third party

The offence of bribing a foreign public official under section 105 C of the Crimes Amendment Act 2001 applies to the case where a bribe is given or offered, etc., to a “person”. The text, like the legislation relative to bribery of domestic officials, does not expressly refer to bribes for third parties.

New Zealand’s authorities explain that bribes to third parties are definitely covered because section 105C(2) specifies that the bribe may be given or offered to “a person”.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Section 105 C of the Crimes Amendment Act 2001 applies where a “bribe” is provided with the “intent” “to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope)”.

The Convention requires that the act of the foreign public official relates to the performance of his/her “official duties”, whereas article 105 C states that the act or omission must be in his/her “official capacity”. These terms would appear to be analogous. In addition section 105 C states that “official capacity” means “whether or not the act or omission is within the scope of the official’s authority”. This would appear to satisfy the requirement under Article 1 paragraph 4 c) of the Convention that “act or refrain from acting in relation with the performance of official duties includes any use of the public official’s position, whether or not within the officials authorised competence”.

1.1.9 in order to obtain or retain business or other improper advantage

The foreign bribery offence applies when the “bribe” is given or offered “in order to”:

- “obtain or retain business”, pursuant to section 105 C paragraph 2 subparagraph a); or
- “obtain any improper advantage” pursuant to section 105 C paragraph 2 subparagraph b).

New Zealand confirms that, consistent with Commentary 5 of the Convention, “*any improper advantage*” in section 105C(2)(b) refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements. It also includes any other advantage “in the conduct of business” other than obtaining or retaining business [s.105C(2)(a)]. For instance, it covers bribes for the purpose of gaining priority in getting permits approved, or obtaining the delivery of supplies or obtaining false records.

In accordance with Commentary 4 of the Convention, the outcome of the act of bribery (whether or not the briber was successful) or whether the briber might have received the business in any case, is irrelevant. Both unsuccessful and successful bribers would be caught by s.105C(2), as long as they had an intent to influence a foreign public official in order to obtain or retain business or to obtain an improper advantage in the conduct of business.

According to New Zealand, section 105 C also covers the retaining of business that has already been acquired.

1.1.10 in the conduct of international business

The offence of bribing a foreign public official under Section 105 C paragraph 2 applies in relation to the obtaining or retaining of business or obtaining any improper advantage “in the conduct of business”.

1.1.11. Defences

Routine Government Action

Section 105 C subsection 3 paragraphs a) and b) of the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 provides a defence in relation to an act committed for the sole purpose of ensuring or expediting the performance by a foreign public official of a “routine government action” where the benefit is “small”.

“Routine government action” is defined by section 105 C subsection 1 of the Crimes Amendment Act 2001 as not including the following:

“(a) any decision about (i) whether to award new business or (ii) whether to continue existing business with any particular person or body; or (iii) the terms of new business or existing business; nor (b) any action that is outside the scope of the ordinary duties of that official”.

Thus, it would appear that any action that is not listed under Section 105 C 1), such as an unfair tax break or a favourable foreign exchange rate, could potentially be considered a routine government action because it does not constitute per se the awarding of business. Moreover, New Zealand has not qualified such payments in terms of their discretionary nature or the legality of the reciprocal act of the foreign public official.

New Zealand’s authorities explain that “routine government action” refers to the manner in which an official deals with all those with whom he or she is doing business. They state that they did not prescribe a list of actions that constitute this exception because they prefer to let the courts determine its exact meaning on a case by case basis.

New Zealand doubts that actions such as unfair tax breaks could be regarded as routine government action, since they would be “outside the scope of the duties” of the official.

In New Zealand's view, "small" benefits are benefits for a foreign public official that are insignificant and offer little real value to the official concerned in light of the context in which the act of bribery is made and the value of the money in the relevant jurisdiction (i.e. the country of the foreign public official's principal office). However, again there are no criteria under the law for determining whether a benefit to an official is "small" and it will be up to the courts to make the determination to avoid the risk of excluding payments that might offer substantial benefits to an official even though the value of the bribe might be small from the point of view of the briber.

The prosecution bears the onus of negating any claim that the function being performed by the official was a routine government action.

Other Defences

General defences under the Crimes Act 1961 also apply to the offence of bribery (i.e. sections 20 to 23, 53 and 64 relating to infancy, insanity and obedience to de facto law).

The defence of necessity or duress does not exist in the Criminal Code and the corresponding common law defence is not applicable to the bribery of a foreign public official because it only applies in circumstances that pose a threat of death or serious injury. New Zealand states that, therefore, consistent with Commentary 7, an offence is committed irrespective of the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

Although New Zealand does not specifically exempt custom as a defence, its authorities state that the case law, without referring to custom, makes it clear that it is sufficient for a public official to act "corruptly" if he/she acts without legal authority or lawful excuse.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

Section 66 paragraph 1 subparagraph b) to d) of the Crimes Act 1961 (parties to offences), which is a general provision that applies to all offences under the Criminal Code, provides for the criminal liability of a "party" to an offence. Everyone who actually commits the offence or helps or encourages its commission is a party to and guilty of an offence and is liable to the penalty prescribed for the offence.

Thus anyone who aids or abets the bribery of a foreign public official is liable to seven years imprisonment under sections 105C and 105D, as inserted by the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001. This includes persons who act as intermediaries and third party beneficiaries, where they have the requisite knowledge of the offer or agreement.

However, the liability for those who help or encourage persons who commit offences [s 66(1)(b) to (d)] presupposes the commission of an offence by someone who is directly liable as the principal party. According to case law, a person cannot be guilty under s 66(1)(b) to (d) as a secondary party unless it is proved that another person actually committed that offence in terms of s 66(1)(a) {*R v Bovern* (1915) 34 NZLR 696 (CA); *R v Harrison* [1941] NZLR 354 (CA); *R v Paterson* [1976] 2 NZLR 394 (CA)}.

If some form of authorisation is required for a bribe to be paid, such conduct falls within the terms of section 66 of the Crimes Act 1961. The offences under section 66(1) of the Crimes Act 1961 include

“counselling” or “procuring” any person to commit an offence. This would include, for example, authorisation by a manager or supervisor of the person committing the offence. An individual who “authorises” the payment of a bribe, but does not actually pay it is guilty of the offence as a party.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Attempts

Section 72 of the Crimes Act 1961 (Attempts) defines who may be guilty of an attempt to commit an offence without creating separate offences). It provides as follows:

- (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.*
- (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law*
- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.*

Section 311(1) (attempt to commit or procure commission of offence) is the general provision for the punishment of attempts in respect of which no punishment is otherwise provided. It makes every such attempt liable to criminal prosecution, providing for a penalty of not more than half the maximum punishment for the offence; thus the offence of bribery of a foreign public official will be punished with a penalty of three years and a half. It provides as follows:

- (1) Every one who attempts to commit any offence in respect of which no punishment for the attempt is expressly prescribed by this Act or by some other enactment is liable to imprisonment for a term not exceeding ten years if the maximum punishment for that offence is imprisonment for life, and in any other case is liable to not more than half the maximum punishment to which he would have been liable if he had committed that offence.*
- (2) Every one who incites, counsels, or attempts to procure any person to commit any offence, when that offence is not in fact committed, is liable to the same punishment as if he had attempted to commit that offence, unless in respect of any such case a punishment is otherwise expressly provided by this Act or by some other enactment.*

Under section 311 paragraph 2) (Attempt to commit or procure commission of an offence) a person or corporate body may still be held liable for an attempt offence even where the offence is not in fact committed.

If an offer is made that is not accepted, an attempt would have been committed since it goes beyond mere preparation. If an offer is made of which the official is unaware, there is an attempt if the person making the offer has taken “real and practical steps” towards communicating the offer [*Drewery v Police* (1988) 3 CRNZ 499]. An offer that has no prospect of being accepted would still amount to an attempt if the person making the offer intended it to influence the foreign public official.

Conspiracy

Section 310 of the Crimes Act 1961 (Conspiring to commit offence) provides for the liability of conspirators to the penalty prescribed for the offence. It provides as follows:

- (1) Subject to the provisions of subsection (2) of this section, every one who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.*
- (2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.*
- (3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted.*

Therefore, Section 310 applies to the offences of bribery of a foreign public official, providing for a penalty of seven years imprisonment under sections 105C and 105D, as inserted by Crimes (Bribery of Foreign Public Officials) Amendment Act 2001.

New Zealand’s authorities underline that the essence of the offence of conspiracy is in the agreement to commit a substantive offence and that “the agreement need not be carried to fruition, indeed no steps to implement it need be taken, but there must have been an intention that such steps would be taken” {*R v Gemmell* [1985] 2 NZLR 740 (CA)}.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

New Zealand provides for the criminal responsibility of legal persons.

2.1.1 Legal Entities

According to section 29 of the Interpretation Act 1999, “person” includes a corporation sole, a body corporate, and an unincorporated body. All criminal statutes are therefore presumed in New Zealand to apply to artificial bodies (such as companies, including state-owned or state-controlled companies) as well

as to natural persons. The definition of “person” under the Crimes Act 1961 is contained above (see 1.1.1 on “any person”).

A “body corporate” is a body that is given separate identity under law. The most common is a limited liability company (shareholders’ liability according to the capital committed to the company). Other corporate bodies may be set up under the umbrella of a statute to cater for the interests of owners in multiunit buildings, or under the Unincorporated Societies Act, under which associations of people, such as tennis clubs, complying with statutory requirements as to their association, are liable to the society but have no separate personal liability.

A “corporation sole” is rare, where one person is regarded as having corporate liability for purposes of dealing with property etc on behalf of a wide number of people, for example, an Archbishop in whose name all church property is registered, or the Public Trustee dealing with unclaimed estates.

An “unincorporated body” is merely an association of people who come together for any purpose, for example, a street residents’ association. They may make rules for themselves, but there are no statutory requirements. Liability, however, will be joint and several

Case law provided by New Zealand deals only with natural persons and imprisonment sanctions.

2.1.2 Standard of Liability

To establish the criminal responsibility of a legal person, all the elements of a criminal offence must be proved beyond a reasonable doubt. New Zealand does not require the conviction of an individual as a pre-condition to the prosecution of a company.

New Zealand’s authorities state that pursuant to the common law, the criminal responsibility of a company depends upon the assigning of responsibility to the company for a culpable act by a representative thereof. They cite a decision of the Court of Appeal of England for the principle that the representative of the company must be a person whose acts and state of mind satisfy the definition of the offence and whose conduct and state of mind can be attributed to the company for the purposes of the offence {*R v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118; [1972] 1 All ER 65 (CA)}. New Zealand explains that in *Andrews* the appellant was a construction company that had been convicted on a bribery and corruption charge under section 1 of the Public Bodies Corrupt Practices Act 1889. The company had paid a member of the local authority in return for his support in obtaining council building contracts. The issue on appeal was whether the limited liability company could be held responsible for the criminal intentions and actions of three of its senior employees. Two of the men involved were directors and one was a manager. The Crown contended that they had sufficient status and authority for their conduct to be attributed to the company, making it criminally liable on the corruption charge. The English Court of Appeal held that “It is not every “responsible agent” or “high executive” or “manager of the housing department” or “agent acting on behalf of a company” who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law make their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself.”

The accepted test currently applied in New Zealand is whether the individual responsible for the alleged conduct has actual authority within the company in relation to the area of the alleged conduct. Therefore it is no longer necessary to determine whether he/she can be regarded as the “brains or mind” (and possessed the necessary state of corporate mind for the offence) or is simply the “hands” of the company. Therefore, under New Zealand’s criminal law, the conduct of an employee cannot be attributed to the company unless the employee has some real control over the activities related to the offence.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or those monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The current penalty for the offence of bribing a domestic public official is a maximum of seven years imprisonment. Natural persons are also liable to a fine, in addition to imprisonment or in lieu thereof, at the general discretion of the court. A “body corporate” is liable to a fine at the general discretion of the court (cf. “judicial discretion as to fine”).

Similarly, the offence of bribing a foreign public official is punishable under the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001 by a maximum of seven years of imprisonment. In addition to imprisonment or in lieu thereof, a natural person is liable to a fine at the general discretion of the court. New Zealand’s authorities state that pursuant to Section 26 (1) of the Criminal Justice Act, a legal person is liable to a fine of the same amount as a natural person. High Courts which have jurisdiction for indictable offences including bribery of a foreign public official, can order a fine of any amount. There are, as yet, no reported cases involving the prosecution of a legal person in New Zealand for the bribery of a domestic public official.

New Zealand states that these sanctions are comparable to those prescribed for similar offences, including theft in most cases of a value over NZ \$300 (s.227), taking and dealing with certain documents with intent to defraud (s.229 A), criminal breach of trust (230), obtaining by false pretence (s.246), false accounting by an officer or member of a body corporate (s.252), false accounting by an employee (s.254).

Sentences of imprisonment of between 6 months and 2 years can be suspended (the suspension period can be for up to 2 years) and all offenders sentenced to finite terms of imprisonment for more than 1 year are eligible for parole. Release on parole is determined either by the Parole Board (sentences of 7 or more years including indeterminate sentences) or a District Prisons Board.

Judicial discretion as to fine

Sections 26 and 27 of the Criminal Justice Act 1985 enable the courts to impose a fine where any enactment provides only for a penalty of imprisonment and for the court to take into account the means and responsibilities of the offender in fixing the amount of the fine. These provisions apply to both natural and legal persons.²

2. Section 26. General discretion to impose fines—

(1) Subject to subsections (2) and (3) of this section, where under any enactment a court may sentence an offender to imprisonment, or to imprisonment or a fine, the court may sentence the offender to pay a

There are no statutory guidelines regarding fines, including criteria for determining the level of fine or for when a fine in lieu of imprisonment should be ordered. However, the general approach of the courts, which has been endorsed by the Court of Appeal, is to measure the fine in terms of the gravity of the offence, having regard to the financial means of the offender. The court has also held (in obiter dictum) in *Graham v. MOT* {[1990] 3 NZLR 249; (1990) 6 CRNZ 403} that the judge should not impose a higher fine than would otherwise be appropriate because of the offender's relatively good financial situation, even though a poor financial situation may justify a lower penalty. New Zealand's authorities indicate that a new sentencing Bill will provide more guidelines to assist the High Courts in determining the level of sanctions.

3.3 Penalties and Mutual Legal Assistance (MLA)

New Zealand's authorities explain that in general, neither requests by New Zealand nor requests to New Zealand are subject to limitations relating to the length of imprisonment for the offence in New Zealand. However, with respect to certain coercive measures, a certain length of imprisonment both in New Zealand and the requesting state (e.g. 2 years for search warrants for tainted property, 5 years for enforcement of confiscation orders, etc.; see below 9.1.1/9.2 "Criminal Matters/Dual criminality") is required for the provision of assistance.

3.4 Penalties and Extradition

Pursuant to the Extradition Act 1999, an extraditable offence is one for which the maximum term of imprisonment is not less than 12 months under the law of both the requesting state and New Zealand³. Pursuant to sections 4 and 60 of the Extradition Act 1999, it must have been an offence in New Zealand at the time when the conduct occurred or is alleged to have occurred.

fine in addition to or instead of sentencing the offender to imprisonment, unless there is express provision to the contrary in that enactment.

- (2) No offender shall be sentenced for an offence against any enactment to pay a fine exceeding in amount any maximum fine prescribed by the enactment.
- (3) Where no maximum fine is prescribed by the enactment, no person shall, except as provided by section 28F of the District Courts Act 1947, be sentenced by a District Court to pay a fine exceeding \$4,000 if the Court is presided over by a Judge, or \$400 if the Court is presided over by a Justice [or one or more Community Magistrates].
- (4) Where under any enactment an offender is liable to a fine of a specified amount, the offender may be sentenced to pay a fine of any less amount, unless a minimum fine is expressly provided for by that enactment.

Section 27. Means of offender and amount of reparation to be taken into consideration in fixing amount of fine—

- (1) In fixing the amount of any fine to be imposed on an offender, a court shall take into consideration, among other things, the means and responsibilities of the offender so far as they appear or are known to the court.
- (3) Where a court imposes a fine in addition to a sentence to make reparation, it shall, in fixing the amount of the fine, take into account the amount payable under that sentence.

3. See sections 4 and 60 of the Extradition Act 1999.

3.6 Seizure and Confiscation of the Bribe and the Proceeds of Bribery of a Foreign Public Official

The Proceeds of Crime Act 1991 provides for the following measures in relation to offences punishable by imprisonment for a term of 5 years or more (i.e. a “serious offence”), including the offence of bribing a foreign public official:

1. The search and seizure of “tainted property” (section 30).
2. A forfeiture order against “tainted property” (sections 8 and 15).
3. A pecuniary penalty in respect of “benefits” derived from the commission of an offence (sections 8 and 25).
4. Mutual Legal Assistance in respect of registered foreign forfeiture orders (section 23A), registered foreign pecuniary penalty orders (section 29A), etc. (See below under (9.1.1/9.2).

Section 2 of the Act provides the following definitions:

1. “Tainted property” means “property used to commit, or to facilitate the commission of a serious offence or proceeds of a serious offence” “and when used without reference to a particular offence means tainted property in relation to any serious offence.” This definition appears to cover the bribe and the proceeds of bribery of a foreign public official.
2. “Property” means “real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible and includes an interest in any such real or personal property”.
3. “Proceeds” means “any property that is derived or realised, directly or indirectly, by any person from the commission of the offence”.

“Benefits” are not defined in the Proceeds of Crime Act. However, New Zealand provides that it means any profit, advantage or gains provided to or derived by a person. They state further that the purpose of a “pecuniary penalty” under section 25 is to allow the Court to assess the value of the benefit or gain that the offender has derived in cases where forfeiture of the proceeds of the crime is unavailable because the offender has converted those proceeds to another form.

A warrant to search and seize “tainted property” may be applied for in writing made on oath to a District Court Judge, and the Judge may issue the warrant where satisfied on reasonable grounds that the property in question can be found “in or on any place”.

“Forfeiture” and “pecuniary penalty orders” are discretionary and are only available on conviction, upon application of the Solicitor General within six months of the date of conviction. In addition, the process for applying such an order can be completely separate from the sentencing process. According to the New Zealand authorities, the decision whether to institute confiscation proceedings is based on the assessment of the likelihood of a successful outcome. Mutual legal assistance in the form of confiscation can be ordered once a foreign forfeiture order is registered in New Zealand pursuant to section 56 of the Mutual Assistance in Criminal Matters Act 1992.

New Zealand’s authorities confirm that the bribe payment, any property that has been acquired with the proceeds as well as the proceeds themselves can be ordered forfeited by the court.

3.7 Sanctions, where legal system has no seizure and confiscation provisions

Not applicable.

3.8 Additional civil or administrative sanctions for bribery of foreign public official

New Zealand's legal system does not provide any additional non-criminal (administrative or civil) sanctions in connection with a criminal offence such as bribery of a foreign public official. New Zealand's authorities explain that it is not possible for such sanctions to be imposed under criminal law processes in New Zealand and that they have considered such sanctions in accordance with Article 3.4. of the Convention.

Moreover, New Zealand does not employ the use of exclusion or suspension from access to procurement as a sanction for bribery and corruption offences.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention clarifies that "an extensive physical connection to the bribery act" is not required.

The Crimes Act 1961, which contains the offence of bribery of a foreign public official, applies to "all acts done or omitted" in New Zealand (section 5.2). Pursuant to section 7, an offence is deemed to be committed in New Zealand where (1) an act or omission forming part of any offence, or (2) an event necessary to the completion of the offence, occurs in New Zealand.

According to case law, the defendant's act (or omission) which forms part of the *actus reus* of the offence would trigger territorial jurisdiction⁴. Moreover, an "act" may be considered to be carried out in New Zealand if the conduct in another country causes the occurrence of a relevant event in New Zealand⁵. In addition, one of the New Zealand courts⁶ has adopted the Canadian approach⁷ whereby territorial jurisdiction is established where there is a "real and substantial link" between the offence and the country. New Zealand confirms that a telephone call, fax or e-mail emanating from New Zealand is sufficient to trigger territorial jurisdiction .

On the other hand, an "event necessary to the completion of the offence" focuses not on the conduct of the defendant, but on the occurrence of an "event" in New Zealand necessary before the offence is complete⁸.

4. *Tipple v Pain* [1983] NZLR 257

5. *Saxton v Police* [1981] 2 NZLR 186 (CA) (a case of importing where the offender posted drugs in England to a New Zealand address)

6. *Solicitor-General v Reid* [1997] 3 NZLR 617

7. *Libman v R* (1985) 21 CCC (3d) 206 (SCC)

8. *Tipple v Pain* [1983] NZLR 257 (a case of a customs offence, found the arrival of goods in New Zealand as an event necessary before the commission of the offence)

However, New Zealand confirms that, with respect to bribery, which is not a “result offence”, this rule would not apply in order to establish its jurisdiction.

In addition, pursuant to section 8.1 paragraphs a-c and section 8.4, New Zealand establishes jurisdiction over any person who commits an offence on board a Commonwealth or Republic of Ireland ship, a New Zealand aircraft, or any ship/aircraft that arrives in New Zealand in the course of, or at the end of, the perpetrator’s journey.

However, where New Zealand establishes its jurisdiction pursuant to section 8 (e.g. offence committed on board a New Zealand aircraft), if the act/omission was not an offence under the law of the country of which the person charged was a national or citizen at the time of the commission, a defence under section 8.2 would apply. Thus, the case where a foreigner whose home country does not establish the foreign bribery offence, bribes a foreign public official on board a New Zealand aircraft or ship would not be covered.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Section 105D, which was added by the implementing legislation, establishes jurisdiction over a person who is: (a) a New Zealand citizen, (b) ordinarily resident in New Zealand⁹, (c) a body corporate incorporated in New Zealand, or (d) a “corporation sole” incorporated in New Zealand, who commits the offence of bribing a foreign public official wholly outside of New Zealand¹⁰. New Zealand’s authorities confirm that where the foreign bribery offence was committed wholly outside of New Zealand, it can establish nationality jurisdiction over a company, etc. incorporated in New Zealand regardless of the offender’s nationality. They further confirm that it is possible to apply nationality jurisdiction to a foreign branch office; however, not to a foreign subsidiary .

9. Pursuant to section 4 of the Crimes Act 1961, a person is deemed to be “ordinarily resident in New Zealand” if: (a) his/her home is in New Zealand, (b) he/ she is residing in New Zealand with the intention of residing therein indefinitely or (c) having resided in New Zealand with the intention of establishing his home therein, or with the intention of residing in New Zealand indefinitely, he is outside New Zealand but has an intention to return to establish his home therein or to reside in New Zealand indefinitely.

10. In addition, pursuant to sections 8.1.d, e, 8.3 and 8.4, New Zealand establishes its jurisdiction in respect of a British or an Irish (i.e. Republic of Ireland) subject, New Zealand citizen, etc. as follows: (1) with respect to a British or Irish subject, any act done or omitted on board a foreign ship on the high seas or within the territorial waters of a Commonwealth country (sections 8.1.d, 8.4); (2) with respect to a New Zealand citizen or a person ordinarily resident in New Zealand, any act done or omitted on board any aircraft (sections 8.1.e, 8.4); (3) with respect to a person who is neither a British nor an Irish subject, any act done or omitted on board a non-Commonwealth / Irish ship or aircraft used as armed forced ship, etc. (sections 8.1.e, 8.4); and (4) with respect to a person who belongs or within 3 months previously have belonged to any Commonwealth or Irish ship, any act done or omitted on shore or afloat at any place beyond New Zealand (sections 8.3, 8.4). These rules are not applicable where the act/ omission did not constitute an offence in the country of which the person charged was a national or citizen at the time of the commission (section 8.1).

Section 105E, also added by the implementing legislation, provides for an exception to section 105D. Pursuant to section 105E.1, where the act (a) was committed outside New Zealand and (b) was not, at the time of its commission, an offence under the laws of the foreign country in which the “principal office” of the person, organisation, or other body for whom the foreign public official is employed or otherwise provides services, is situated, sections 105C and 105D do not apply. New Zealand’s authorities confirm that this exception is only applicable where the offence is committed wholly outside of New Zealand.

Under New Zealand’s law, nationality jurisdiction is established only over a very few limited offences (e.g. sex offences against children). Also, New Zealand states that as regards sex offences against children, dual criminality is not required for establishing nationality jurisdiction. Thus, New Zealand has gone beyond its usual practice by establishing nationality jurisdiction over the foreign bribery offence.

In order to establish nationality jurisdiction over the foreign bribery offence, section 105E requires that the act constitute an offence in the country in which the foreign public official’s “principal office” is situated. This form of dual criminality differs from customary international law (i.e. the act is unlawful in the place of the commission¹¹), but in New Zealand’s view, it is more effective for achieving the objectives of the Convention since one could not avoid liability by committing the offence in a jurisdiction that has not established the foreign bribery offence. However, on the other hand, it would appear that this deviation from custom could result in a refusal of MLA or extradition where the requesting state bases dual criminality on the law in the country in which the offence takes place (this is discussed more in detail under relevant sections. See below 9.1.1/9.2 “Criminal Matters/Dual Criminality” and 10.5 “Dual Criminality”).

New Zealand’s authorities confirm that the condition of dual criminality based upon the foreign public official’s “principal office” is considered to be fulfilled if the act constitutes an offence under the law of the country where the “principal office” is situated, even if under a different criminal statute. However, the offence is not likely to cover certain cases¹².

In addition, New Zealand authorities confirm that procedural impediments (e.g. expiration of the statute of limitations, lack of jurisdiction) applicable under the country’s law where the “principal office” of the foreign public official is situated are not relevant for the condition of dual criminality. In any case, however, they state that nationality jurisdiction would not apply to a legal person if legal persons were not subject to criminal liability in the country where the “principal office” of the foreign public official is situated.

Furthermore, the term “principal office” is not defined in the law. New Zealand’s authorities state that it would be subject to definition by the courts. Thus, there appears to be a potential for the court to interpret the term broadly for the benefit of the defendant. However, in the view of New Zealand’s authorities, the court would interpret the term “principal office” according to the intent of the law as meaning the one from which instructions emanate, and thus, they believe that it is unlikely that this lack of a definition would cause a problem.

11. Also, see Commentary 26, which states that “the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different statute.”

12. For instance, according to New Zealand’s authorities, the following case would not be covered: a New Zealand national bribes abroad in country “C” a foreign public official from country “A” and whose “principal office” is situated in country “B” abroad and country “B” does not penalise bribery of a foreign public official (even if country “C” does).

Pursuant to section 105E.2, it is presumed that the act was an offence under the law of the foreign public official's country (i.e. the foreign country where the "principal office" of the public official is situated), unless the person charged raises the issue.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

New Zealand has no formal procedures for consultations in relation to the offence of bribery of a foreign public official. According to New Zealand's authorities, generally, consultation procedure would be carried out through diplomatic channels.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

New Zealand considers its jurisdiction sufficient and effective in relation to an offence of bribery of a foreign public official.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

New Zealand's authorities state that a clear distinction is drawn between the investigation and the prosecution of a criminal offence. The police are responsible for the investigation of all criminal offences, investigating an offence and gathering evidence on their own initiative or in response to a complaint. Also, the Serious Fraud Office is responsible for the investigation of cases of serious fraud. The National Prosecutions Service (NPS), which consists of police prosecutors (i.e. specially trained members of the police), is responsible for the prosecution of all summary offences. Crown counsels, who belong to the Crown Law Office or are lawyers of private law firms and appointed to hold Crown warrants to represent the Crown, have the responsibility of conducting prosecutions of indictable offences. The Solicitor-General, as the head of the Crown Law Office, is responsible for the supervision of all Crown counsels¹³. New Zealand's authorities state that the police refer serious cases to Crown counsels for further prosecution action after accused persons have been committed for trial. According to them, it is frequently the case that the police will consult a Crown counsel or the Solicitor-General for advice as to whether a

13. Such information is also available from Warren Young "New Zealand", *The World Factbook of Criminal Justice Systems* (U.S. Department of Justice; Bureau of Justice Statistics) This document was taken from: <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnew.txt>

prosecution would be well founded. To obtain a conviction, a charge must be proved beyond reasonable doubt.

New Zealand states that the offence of bribery of a foreign public official is a purely indictable offence .

According to New Zealand's authorities, all prosecutors (i.e. the police prosecutors and the Crown counsels) exercise discretion to initiate, suspend and terminate criminal proceedings. They state that such decisions should be made in accordance with the Solicitor-General's prosecution guidelines and are subject to judicial review by the High Court¹⁴.

The Police Manual of Best Practice (PMBP) prescribes police procedures and standards of conduct. It incorporates the Solicitor-General's prosecution guidelines as set out in a New Zealand Law Commission report¹⁵. New Zealand states that investigations of offences and suspensions of investigations are influenced by the prosecution guidelines. Pursuant thereto, the major considerations for prosecution are existence of evidential sufficiency and whether the "public interest" requires the prosecution to proceed. Pursuant to sections 3.2.1 of the PMBP, the factors to be considered in determining whether the "public interest" requires a prosecution vary from case to case, but generally the more serious the charge and the stronger the evidence to support it, the more likely it will be prosecuted. Section 3.2.2 of the PMBP provides a list of guidelines that may be considered in determining whether the "public interest" requires a prosecution, which includes:

1. all mitigating or aggravating circumstances;
2. the degree of culpability of the alleged offender;
3. the effect on public opinion of a decision not to prosecute;
4. whether the prosecution might be counter-productive; for example, by enabling an accused to be seen as a martyr;
5. the availability of any proper alternatives to prosecution;
6. the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;
7. the attitude of the victim of the alleged offence to a prosecution;
8. the likely length and expense of the trial.

New Zealand confirms that the factors mentioned in points 3, 4 and 8 above would not be interpreted as referring to matters of national economic interest within the meaning of Article 5 of the Convention.

New Zealand states that any person or organisation including victims (i.e. competitors) may institute a prosecution for the foreign bribery offence where the police decline to prosecute an offence. However, such prosecutions require the consent of the Attorney-General (see the discussion below). In addition, victims can seek reparation from the offender as a part of the sentencing process following conviction. In the absence of a conviction, a victim can sue for civil remedies.

14. However, according to New Zealand's authorities, judicial review is rarely used in practice. They state that private prosecution is the most frequently used measure for the victims, etc. where the prosecution is terminated or where the prosecutorial authorities refuse to initiate a prosecution.

15. Criminal Prosecution (Report 66, Oct 2000)

Section 106.1 of the amended Crimes Act 1961 requires the consent of the Attorney-General before a prosecution for the offence of bribery of a foreign public official as well as for offences respecting judicial corruption, bribery and corruption of law enforcement officers and “officials”¹⁶. New Zealand states that in practice, this consent is provided by the Solicitor-General. There is no case law to illustrate the exercise of this discretion in practice. Moreover, New Zealand’s authorities confirm that there are no specific statutory guidelines for the Attorney-General’s decision. However, they state that the Solicitor-General’s prosecution guidelines (incorporated in the PMBP) provide appropriate guidelines. Additionally, they state that the requirement of the Attorney-General’s consent is intended to prevent the “frivolous, vexatious or political” use of criminal provisions in prosecution. According to New Zealand, the decision of the Attorney-General could be the subject of an application for “judicial review” conducted by the High Court. New Zealand states that judicial review is available to anyone who has an interest in the case on the ground that the decision was made on the basis of irrelevant factors or a failure to take account of relevant factors.

5.2 Considerations such as National Economic Interest

New Zealand’s authorities confirm that in compliance with Article 5, there is no provision under New Zealand law that would allow for the investigation and/or the prosecution of the bribery of foreign public officials to be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal person involved. In addition, section 3.2.4 of the PMBP states that a decision whether or not to prosecute must not be influenced by factors including the ethnic or national origins of the accused, or the possible political advantage or disadvantage to the Government or any political organisation.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Under New Zealand law, there is no limitation period with respect to the prosecution of a natural person or a body corporate for the offence of bribing a foreign public official. However, New Zealand states that the courts have an inherent jurisdiction to stay proceedings where the effect of delay between an alleged offence and the bringing of a prosecution results in unfairness to the accused or amounts to an abuse of process. The issue for the court is whether, in the circumstances of the particular case, the accused can still receive a fair trial despite the delay involved.¹⁷

There are no express provisions in the law limiting the period for the investigation and prosecution of indictable offences.

16. In addition, New Zealand states that this restriction is its constitutional practice not just in cases of bribery, but also in cases of offences arising from international obligations that may affect international relations.

17. This is reinforced by section 25(b) of the New Zealand Bill of Rights Act 1990 which provides the right to be tried without undue delay.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Money Laundering Offence

Under section 257A of the Crimes Act 1961, “property that is the proceeds of a serious offence” is subject to the money laundering offences. Pursuant to subsection (1), “serious offence” is “an offence punishable by imprisonment for a term of 5 years or more including any act, wherever committed, which if committed in New Zealand would constitute an offence punishable by imprisonment for a term of 5 years or more”. Thus, both domestic and foreign bribery offences are qualified as predicate offences.

Pursuant to subsection (1), “proceeds” are defined as “any property that is derived or realised, directly or indirectly, by any person from the commission of the offence”. Thus, only the proceeds of a bribe are covered, but not the bribe in respect of foreign bribery (i.e. active bribery).

In addition, “property” covers any property of any description, real and personal, tangible and intangible, irrespective of whether it is situated in New Zealand. It also includes an interest in the property [i.e. (1) a legal or equitable estate or interest in the property; or (2) a right, power, or privilege in connection with the property].

Under section 257A, the following acts constitute money laundering offences, which are subject to imprisonment for a term not exceeding 7 years (subsection 2):

1. To deal with any property in any manner for the purpose of “concealing” that property or enabling another person to “conceal” that property, knowing or believing that all or part of the property is the “proceeds” of a serious offence. Such acts include disposing of the property, transferring its possession, bringing it into New Zealand, and removing it from New Zealand;
2. To assist directly or indirectly another person to do the act mentioned above in 1. for the same purpose, knowing or believing that all or part of the property is the “proceeds” of a serious offence.

“Conceal” means to conceal or disguise the property. It includes converting the property from one form to another, concealing or disguising its nature, source, location, disposition, and ownership.

In addition, anyone who obtains or has in his/her possession any property that is the proceeds of a serious offence committed by another person is liable for money laundering subject to imprisonment for a term not exceeding 5 years (subsection 3). This offence is committed where the person commits such an act with intent to engage in a “money laundering transaction” (i.e. dealing with any property or assisting another to deal with it for the purpose of concealing or enabling another to conceal the property), knowing or believing that all or part of the property is the “proceeds” of a serious offence.

Pursuant to section 257A.5, in order to apply the money laundering offences under subsection 2 or 3, it is not required that the offender know/believe that the property was derived, etc. from a specific serious offence. Moreover, New Zealand confirms that a conviction in respect of the predicate offence is not required to apply the money laundering offences.

As mentioned above, it does not matter where the bribery occurred, if the conduct in question would have constituted a “serious offence” in New Zealand had it occurred in New Zealand. However, pursuant to subsection 6A of section 257A, these money laundering offences do not apply where the predicate offence (i.e. bribery) was committed abroad if it did not constitute an offence in the place it was committed at the time of its commission (dual criminality). New Zealand’s authorities confirm that the requirement of dual criminality is deemed to be met where the act constitutes an offence in the place of the commission even if under a different statute. Pursuant to subsection 6B, it is presumed that this requirement of dual criminality is fulfilled unless the person charged raises the issue.

Reporting Requirements for Financial Institutions

In addition, the Financial Transactions Reporting Act 1996 imposes certain obligations on financial institutions in relation to the conduct of financial transactions, and provides a system for monitoring cash taken across New Zealand’s border. For instance, a financial institution shall report suspicious transactions which may be relevant to the investigation/prosecution of a money laundering offence to the Commissioner of Police¹⁸. A financial institution is liable to a fine for failing to check the identity of a facility holder in relation to specified transactions, or failing to report suspicious transactions. The range of the fine is up to \$20,000¹⁹ for a natural person, and up to \$100,000²⁰ for a body corporate.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1 Accounting and Auditing Requirements

There are no accounting prohibitions specifically relating to bribes paid to foreign public officials, or to off-the-record documentation. However, as discussed below, the framework of New Zealand’s laws and regulations regarding accounting, professional standards and disclosures provides for sanctions in a number of relevant circumstances. New Zealand’s authorities confirm that the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents are prohibited.

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18. Also, an auditor may report suspicious transactions which may be relevant to the investigation/ prosecution of a money laundering offence to any member of the police (section 16 of the Financial Transaction Reporting Act 1993).
 19. 1 New Zealand dollar was valued at 0.42 U.S dollars on 14 May 2001 (i.e. \$ 20,000 was valued at 8,400 U.S. dollars).
 20. Approximately, 42,000 U.S. dollars.

General Standards

Companies are self-regulating within statutory guidelines under the Companies Act 1993 and the Financial Reporting Act 1993, in relation to which they, or their officers, may face specified criminal charges or civil action in relation to specified obligations. For instance, there are obligations for directors under the Companies Act 1993, which require the directors to act in good faith and in the best interests of the company (section 131), exercise power for proper purposes (section 133), comply with the Act and the company's constitution (section 134), etc. A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him/her (section 169).

Accounting Standards

Section 194 of the Companies Act 1993 provides for requirements to keep "accounting records" that:

- correctly record and explain the transactions of the company,
- will at any time enable the financial position of the company to be determined with reasonable accuracy,
- will enable the financial statements of the company to be readily and properly audited.

Subsection 2 of section 194 states that accounting records must contain entries of money received and spent each day, a record of the assets and liabilities of the company, a record of goods bought and sold and the buyers and sellers, a record of services provided and invoices, etc. Under section 189, "company records", which include (1) all financial statements for the last 7 completed accounting periods and (2) "accounting records", must be kept at the company's registered office. In addition, New Zealand's authorities state that material contingent liabilities would be required to be disclosed under the aforementioned requirement of keeping records enabling the financial position to be determined with reasonable accuracy.

The Financial Reporting Act 1993 prescribes requirements for financial reporting by companies and other "reporting entities", and gives legal force to accounting standards approved by an Accounting Standards Review Board²¹. Pursuant to sections 10 and 13, directors of every reporting entity must ensure that financial statements (and group financial statements with respect to entities that have one or more subsidiaries) are completed within a prescribed period related to the balance date. Pursuant to section 8, financial statements include a statement of financial position for the entity as at the balance date, and notes/documents giving information relating to the statement or account. Pursuant to section 3, financial statements must comply with "generally accepted accounting practices", which include (a) applicable financial reporting standards, and (b) accounting policies that are appropriate to the circumstances of the reporting entity and have authoritative support within the accounting profession in New Zealand, in relation to matters on which there is no applicable rule under the law or financial reporting standards²².

21. The Accounting Standards Review Board has functions of review and approval of financial reporting standards and of issuing directions as to the accounting policies that have authoritative support within the accounting profession in New Zealand. It is required to consult with the Institute of Chartered Accountants of New Zealand and others who would be affected by a standard.

22. Financial reporting standards include, for instance, the definition of "cost of purchase" and a rule for determining when a collection of items of property, etc. is acquired – the cost must be allocated to individual items in proportion to their fair values at the time of acquisition.

The Companies Act 1993 and the Financial Reporting Act 1993 provide for criminal offences relating to such requirements (see section 8.3 “Penalties” below). The company and its directors also may face civil legal action for failure to meet statutory obligations.

Auditing Requirements

New Zealand prescribes requirements under the law for external audits under the Companies Act 1993 and the Financial Reporting Act 1993. Pursuant to section 196 of the Companies Act 1993, a company must appoint an external auditor to audit financial statements (and group financial statements) of the company at each annual meeting. Pursuant to section 16 of the Financial Reporting Act 1993, financial statements and group financial statements of a reporting entity are required to be audited. Section 205 of the Companies Act 1993 and section 16 of the Financial Reporting Act 1993 require that the auditor’s report on reporting entities must state matters which include (a) whether proper accounting records have been kept by the reporting entity (b) whether financial statements and group financial statements comply with generally accepted accounting practice, and if they do not, the respects in which they fail to comply, and (c) whether financial statements and group financial statements give a true and fair view of the matters to which they relate, and, if they do not, the respects in which they fail to give such a view. Where the auditor’s report indicates that the requirements of the Financial Reporting Act 1993 have not been complied with, the auditor must send a copy of the report and financial statements, etc. to the Registrar, whose competence includes investigations under the Financial Reporting Act 1993. The Registrar must send copies of the report and statements to the Accounting Standards Review Board, or to the Securities Commission if the reporting entity is an “issuer”.

In addition, under the Securities Act 1978, auditors are obliged to report to the issuers, statutory supervisors or unit trustees on any matters that the auditors consider relevant to the exercise of their duties. Moreover, under Auditing Standards, auditors must report all instances of non-compliance with laws and regulations discovered during the performance of the audit as appropriate in the circumstances.

Auditor’s reports in respect of entities required to be registered in accordance with sections 18 and 19 of the Financial Reporting Act 1993 are publicly available. Such entities include an issuer, an overseas company, and a subsidiary of a company incorporated abroad, etc.

In order to ensure the independence of external auditors, certain persons must not be appointed or act as an auditor of a company. Such persons include²³:

- a director or employee of the company,
- a person who is a partner of a director or employee of the company, or in the employment of such a person,
- a liquidator or a person who is a receiver in respect of the property of the company,
- a person who is a director or employee of a related company, or who is a partner of a director or employee of a related company, or in the employment of such a person.

23. See section 199.2 of the Companies Act 1993.

In addition, section 204 of the Companies Act 1993 provides that an auditor must ensure that his/her judgement is not impaired by reason of any relationship with or interest in the company or any of its subsidiaries.

8.2 Companies Subject to Requirements

New Zealand states that all companies are subject to the requirements under the Companies Act 1993 and the Financial Reporting Act 1993. In addition, it states that other “reporting entities” also are subject to the Financial Reporting Act 1993. Pursuant to section 2 of the Financial Reporting Act 1993, a “reporting entity” is an “issuer”, a company, other than an “exempt company”²⁴, or a person that is required by any other Act to comply with the Financial Reporting Act 1993. An “issuer” is defined in section 4 of the same Act, and includes a manager of a unit trust in which securities have been allotted, a person who is a party to a listing agreement with a stock exchange in New Zealand and who has issued securities which are quoted on such an exchange, and an insurer.

8.3 Penalties

Pursuant to sections 194.4 and 374.2 of the Companies Act 1993, every director of the company is liable to a fine not exceeding \$10,000 if the board of a company fails to comply with the requirements of keeping accounting records under section 194.

Pursuant to sections 377.1 and 373.4 of the Companies Act 1993, and section 41 of the Financial Reporting Act 1993, a person is liable to imprisonment for a term not exceeding 5 years or a fine not exceeding \$200,000, if, with respect to a document required by either of the Acts (or for the purpose of the Companies Act 1993), he/she (a) makes, or authorises the making of, a statement in it that is false or misleading “in a material particular” knowing it to be false or misleading, or (b) omits, or authorises the omission from it of, any matter knowing that the omission makes the document false or misleading “in a material particular”. Under sections 377.1 and 373.4 of the Companies Act 1993, a director or employee of a company is liable to the same penalties if he/she makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading “in a material particular”, to a director, employee, auditor, shareholder, liquidator, etc., knowing it to be false or misleading.

Pursuant to sections 379.1 and 373.4 of the Companies Act 1993, a director, employee, or shareholder of a company is liable to imprisonment for a term not exceeding 5 years or a fine not exceeding \$200,000, if he/she, with intent to defraud or deceive a person, (a) destroys, parts with, mutilates, alters, or falsifies, or is a party to the destruction, mutilation, alteration, or falsification of any register, accounting records, book, paper, or other document belonging or relating to the company, or (b) makes, or is a party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company. Pursuant to sections 379.2 and 373.4, a person who, in relation to a mechanical, electronic, or other device used in connection with the keeping or preparation of any register, accounting or

24. An “exempt company” is not subject to full requirements of generally accepted accounting practice; it is subject to some of the financial reporting and auditing requirements. An “exempt company” is a company (other than an overseas company/ issuer), which, fulfils all the following conditions in respect of the accounting period for which financial statements are required: (1) the value of its total assets did not exceed \$450,000 or the amount prescribed by Order in Council; (2) its turnover did not exceed \$1,000,000 or the amount prescribed by Order in Council; (3) it was not a subsidiary of another body corporate or association of persons; and (4) it did not have any subsidiaries.

other records, index, book, paper, or other document for the purposes of a company or the Act is liable to the same penalties if he/she (a) records or stores in the device, or makes available to a person from the device, matter that he or she knows to be false or misleading “in a material particular”, or (b) with intent to falsify or render misleading any such register, accounting or other records, index, book, paper, or other document, destroys, removes, or falsifies matter recorded or stored in the device, or fails or omits to record or store any matter in the device.

New Zealand’s authorities confirm that the penalties are applicable only to the directors; there are no penalties for the legal entities themselves.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. Pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1/9.2 Criminal Matters/Dual Criminality

New Zealand can provide mutual legal assistance pursuant to the Mutual Assistance in Criminal Matters Act 1992 and treaties²⁵ and arrangements made with other countries. Under the Act, New Zealand may provide mutual legal assistance to (1) the “prescribed countries”, that are prescribed by regulations²⁶ made under the Act, (2) the “convention countries” that are parties to certain conventions specified in Schedule 1, and (3) other countries in response to ad hoc requests where there is no formal treaty or arrangement.

“Prescribed countries” include some Parties to the Convention²⁷. Under part 7 of the amended Schedule 1 of Mutual Assistance in Criminal Matters Act 1992, Parties to the Convention qualify as “convention countries” in relation to the offence of bribing a foreign public official. Thus, New Zealand may provide mutual legal assistance in criminal matters²⁸ to Parties as “convention countries” as long as they have ratified the Convention²⁹. Moreover, New Zealand states that where a party has signed but not yet ratified the Convention and does not have a formal MLA treaty or arrangement with New Zealand, it can provide

25. New Zealand has concluded bilateral treaties on mutual legal assistance with Hong Kong and Korea.

26. New Zealand states that regulations may be preceded by negotiation of a treaty.

27. “Prescribed countries” which are Parties to the Convention are Australia, UK, U.S.A. and Korea.

28. Section 24A.7 states that if a “convention country” requests MLA in accordance with the Convention, the request must relate to criminal matters arising from the commission or suspected commission of an offence that, if committed within the jurisdiction of New Zealand, would correspond to an offence against section 105C or 105D of the Crimes Act 1961.

29. If a certain country is a prescribed country as well as a convention country, the request for MLA must, as far as practicable, be made and dealt with in the manner specified in the treaty unless to do so would be inconsistent with the convention (section 24B.2a).

mutual legal assistance in response to ad hoc requests. In such a case, the Attorney-General must consider factors under section 25A.2 in order to decide whether to deal with the request. Such factors include: (1) assurances given by the requesting state that it will entertain a similar request by New Zealand (reciprocity), (2) the seriousness of the offence to which the request relates, and (3) any other matters that the Attorney-General considers relevant.

Pursuant to section 25 of the Act, every request shall be made to the Attorney-General or to a person authorised by the Attorney-General. Section 27.1 provides for conditions under which the Attorney-General shall refuse to provide assistance. They include:

- the request relates to the prosecution or punishment of a person for an offence of a political character³⁰ (subsection 1.a);
- the request relates to the prosecution, etc. of a person in respect of an act/omission that if it had occurred in New Zealand, would have constituted an offence under the military law but not under the criminal law (subsection 1.e);
- the granting of the request would prejudice the sovereignty, security, or national interests of New Zealand (subsection 1.f).

Section 27.2 provides for conditions under which the Attorney-General may refuse to provide assistance. They include:

- The request relates to a prosecution, etc. of a person in respect of conduct that, if it had occurred in New Zealand, would not have constituted an offence under New Zealand law (dual criminality, subsection 2.a). New Zealand explains that a lack of dual criminality would invariably lead to a refusal of MLA unless there were special considerations. However, New Zealand’s authorities confirm that dual criminality is deemed to exist if the offence for which the assistance is sought is within the scope of the Convention;
- The request relates to the prosecution, etc. of a person in respect of conduct that occurred outside the requesting state where similar conduct occurring outside New Zealand in similar circumstances would not have constituted an offence under New Zealand law (subsection 2.b). With respect to the foreign bribery offence, application of this condition results in requiring dual criminality based upon the foreign public official’s “principal office” as described above under 4.2 (“Nationality Jurisdiction”). New Zealand’s authorities state that refusal upon this ground is unlikely to occur where the foreign public official is a foreign “state” official in which case, the act would usually be covered by the domestic bribery offence under the law of the country where the foreign public official’s “principal office” is situated. However, where a public international organisation official (or under some jurisdiction, a public enterprise/public agency official, etc.) whose “principal office” is not situated in the territory of Parties to the Convention is involved, and there is no domestic bribery offence in the requesting state, MLA may be refused.

Under the Act, assistance in locating or identifying persons, arranging for persons to give evidence in a foreign country, obtaining evidence in New Zealand, search and seizure, foreign forfeiture order, etc. are available. However, with respect to certain coercive measures, the Act and the Proceeds of Crime Act 1991 require that the offence to which the request relates be punishable by a certain term of imprisonment in the requesting state and in New Zealand. For instance, if the request is to obtain an article, etc. by search and seizure, the offence must be punishable by imprisonment for a term of 2 years or more. If the request is to assist with the enforcement of a foreign confiscation order or a foreign restraining order, etc., the offence must be punishable by imprisonment for a term of 5 years or more.

30. New Zealand confirms that the bribery of a foreign public official who holds a political office would not be construed as an offence of a “political” character

New Zealand's authorities confirm that mutual legal assistance may be given in relation to legal persons as well as natural persons.

9.1.2 Non-Criminal Matters

New Zealand states that it has limited legal authority for the provision of mutual legal assistance in relation to non-criminal proceedings brought by a Party against legal persons. For instance, the issuance of search warrants is not possible.

However, pursuant to the Evidence Act 1908 and the Evidence Amendment Act (No.2) 1980, the (1) examination of witnesses in relation to proceedings pending in an overseas court, (2) taking of evidence in relation to corresponding courts in prescribed foreign countries, and (3) production of any document or any evidence of the contents of any document, are possible. (1) and (2) are possible in response to the request of the corresponding courts. (3) is possible in response to the request of a foreign authority; however it is subject to the Attorney-General's discretion. New Zealand confirms that these forms of assistance are possible in relation to all criminal and non-criminal court proceedings including non-criminal proceedings against legal persons in respect of the foreign bribery offence.

9.3 Bank Secrecy

In New Zealand, the relationship between a banker and his/her customer is protected by a duty of confidentiality subject to limited statutory exceptions (e.g. being subject to a search warrant in relation to an offence). New Zealand's authorities confirm that there is no ability under the Mutual Assistance in Criminal Matters Act 1992 to refuse assistance simply on the basis of bank secrecy. However, a request must be for assistance that is within the scope of the Act and relate to criminal investigations or criminal proceedings. New Zealand's authorities state that the standard requirements for granting MLA apply in respect of a request for the search and seizure of bank information.

10. ARTICLE 10. EXTRADITION

10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

Under the Extradition Act 1999, New Zealand may provide extradition to countries which fall within one of the three categories discussed below pursuant to different procedures. In any case, the request must be for an offence for which the maximum penalty is imprisonment for not less than 12 months in both New Zealand³¹ and the requesting state ["extradition offence"] (dual criminality), in respect of a person who (i) is accused of having committed an "extradition offence" against the requesting state's law, or (ii) has been convicted of an "extradition offence" against the requesting state's law, and there is an intention to impose

31. However, it has to be punishable in New Zealand at the time of its commission. See discussion under section 10.5 "Dual Criminality" below.

a sentence on him/her, or the whole or a part of a sentence imposed on him/her remains to be served [“extraditable person”].

Where there is an extradition treaty in force between New Zealand and any Party to the Convention³², the foreign bribery offence is deemed to be included in the list of extraditable offences therein³³. Also, the provisions of the Extradition Act 1999 must be construed to give effect to the treaty. Moreover, a treaty cannot override certain provisions in the Act such as those on restrictions for granting extradition (e.g. section 7), on a particular function/power of the court or the Minister of Justice (e.g. section 48), etc.³⁴

The three categories to which New Zealand may provide extradition are as follows:

1. Australia and “designated countries”. “Designated countries” are those specified as such in an “Order in Council”³⁵ (part 4 of the Extradition Act 1999). [Australia is the only Party to the Convention which falls within this category];
2. Other Commonwealth countries and “Order in Council” countries which are not “designated countries” (part 3 of the Extradition Act 1999). [Canada, UK and U.S.A. are the Parties which falls within this category];
3. Non-Commonwealth countries where there is either no bilateral extradition treaty or no relevant offence under a bilateral extradition treaty, there is no applicable “Order in Council” and the countries are not “designated countries”. This category includes countries with which New Zealand is a party to a “multilateral treaty” (part 5 of the Extradition Act 1999). [All other Parties fall within this category].

The process involved is more burdensome for the second and third categories. The essential difference is that the District Court is authorised to grant or deny extradition without referring a request to the Minister of Justice for first category countries, unless there is a question of the possibility of the death penalty or torture, etc. (sections 45, 47-50). With respect to the second and third category countries, the Minister of Justice makes the final decision in all cases (sections 30, 31, 60). In addition, a request by a second category country must be made to the Minister of Foreign Affairs and Trade for transmission to the Minister of Justice³⁶ (section 18), and a request by a third category country must be made to the Minister of Justice who then decides whether to deal with the request (section 60). Only the person for whom extradition is sought or the Crown (i.e. New Zealand on behalf of the requesting state) can appeal a

32. New Zealand has concluded an extradition treaty with U.S.A. In addition, an extradition treaty with Korea was signed in May 2001.

33. See section 10 of the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001.

34. See section 11 of the Extradition Act 1999.

35. An “Order in Council” is an order by the Governor-General acting by and with the advice and consent of the Executive Council of New Zealand, which consists of the Prime Minister and the Ministers of Crown. The Governor-General may, on the recommendation of the Minister of Justice, declare by Order in Council that a certain country be a designated country. The criteria for the Minister of Justice to make such a recommendation are provided in section 40 of the Extradition Act 1999. They include: (i) New Zealand has an extradition treaty in force with the country, (ii) the circumstances in which a person may be arrested in relation to the offence against the country’s law in the country is similar in effect to such circumstances in New Zealand, and (iii) reciprocity is guaranteed.

36. New Zealand confirms that the Minister of Foreign Affairs and Trade would not make any comment, suggestion or decision when transferring the request to the Minister of Justice.

decision of the court. However, the Crown's right of appeal is limited to a question of law. The decision of the Minister of Justice (i.e. whether to deal with the request, whether to grant/refuse extradition) could be the subject of an application for "judicial review".

Pursuant to section 7 of the Extradition Act 1999, extradition must be refused, for instance, if:

- The offence for which the extradition is sought is an offence of a political character³⁷;
- The person may be prosecuted, punished or prejudiced at his/her trial, etc. by reason of his/her race, ethnic origin, religion, political opinions, etc.;
- The conduct for which the extradition is sought constitutes an offence under military law but not under the ordinary criminal law of the requesting state;
- The person has been acquitted or pardoned by a competent tribunal, etc., in the requesting state or New Zealand, or has undergone the punishment provided by the law thereof in respect of the same conduct.

In addition, extradition shall not be granted where there are substantial grounds for believing that the person may be subject to torture in the requesting state (sections 30.2, 49, 60.6).

Extradition may be refused if, for instance: (i) the accusation against the person was not made in good faith in the interests of justice. New Zealand's authorities state that this includes the situation where the accusation may not be sufficiently robust or where there may not be sufficient safeguards in the prosecution system of the requesting state to ensure the accusation is convincing, (ii) the person has been accused of another offence within the jurisdiction of New Zealand and the proceedings against him/her have not been disposed of (section 8), (iii) the person may be subject to the death penalty, or (iv) there is any other reason the Minister of Justice considers that the person should not be extradited (sections 30.3, 49, 60.6). New Zealand's authorities state that this includes the situation where the political situation or government of a country is considered unstable so as to render it undesirable to extradite the person.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Under the law of New Zealand, New Zealand's citizens can be extradited for the offence of bribery of a foreign public official. However, the Extradition Act 1999 provides discretion to refuse the extradition of its citizens. In addition, it allows prohibiting the extradition of its citizens under extradition treaties and arrangements. There are no provisions in the Extradition Act 1999 relating to the prosecution of a national of New Zealand where extradition has been refused on the ground of his/her nationality. However, New Zealand's authorities provide assurances that a prosecution would be undertaken in New Zealand in such a case as long as it has jurisdiction. They further state that under some extradition treaties, submission of the case to the prosecutorial authority is required.

37. New Zealand's authorities confirm that this refusal ground could not be a bar to extradition in respect of bribery of a foreign public official who holds a political office.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

As mentioned above, extradition is conditional upon dual criminality. Pursuant to section 5.2 of the Extradition Act 1999, in determining the condition of dual criminality, it does not matter if the act is categorised or named differently or the constituent elements of the offence differ from each other. New Zealand confirms that, therefore, this condition is deemed to be fulfilled if the offence for which extradition is sought is within the scope of the Convention.

However, pursuant to section 4 subsections 2 and 3, or section 60.1.f, the condition of dual criminality is considered to exist if the conduct is punishable under New Zealand law at the time when the conduct occurred or is alleged to have occurred. Since the laws of the majority of the Parties were in force before New Zealand's implementing legislation entered into force, it would appear that this requirement might be an obstacle for extradition in the case where the offence were committed before the entry into force of New Zealand's law. However, New Zealand's authorities state that for the purpose of providing extradition, the requirement of dual criminality is given such a broad interpretation under section 5.2 of the Extradition Act 1999 that it would be deemed to be met if the conduct were within the scope of the Convention because such conduct would have constituted a domestic bribery offence in New Zealand before the entry into force of the foreign bribery offence.

Contrary to the Mutual Assistance in Criminal Matters Act 1992, the Extradition Act 1999 does not expressly require the conditions for establishing nationality jurisdiction under New Zealand law where the extradition request is for an offence committed outside of the requesting state. However, in the case where the request is for the foreign bribery offence committed outside of the requesting state, a question might be raised whether the condition of dual criminality could be interpreted to require the act be an offence in the country where the foreign public official's "principal office" is situated. In the view of New Zealand's authorities, extradition shall be possible in such a case irrespective of whether the act constitutes an offence in the country where the foreign public official's "principal office" is situated, since the conduct would correlate in overall criminality to New Zealand offences. In such circumstances, the Extradition Act does not require consideration of what defences might have been available had New Zealand been able to exercise jurisdiction.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

New Zealand has notified the Secretary General of the OECD of the responsible authorities as provided for in Article 11 of the Convention. These are as follows:

- The Minister of foreign Affairs for making and receiving requests in relation to matters of consultation and for extradition;
- The Attorney-General for mutual legal assistance.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Income Tax Act 1994 applies to taxation of both natural and legal persons. Section BD2 of the Act 4³⁸ allows the deduction of a bribe paid to a foreign public official to the extent it is an expenditure: (1) incurred by the taxpayer in deriving the taxpayer's gross income, or (2) necessarily incurred by the taxpayer in the course of carrying on a business for the purpose of deriving the taxpayer's gross income. This does not implement the 1997 Revised Recommendation. However, in 2002, New Zealand intends to introduce a legislative amendment to this Act denying tax deductibility of a bribe.

Tax officials in New Zealand are bound by a duty of confidentiality in relation to all tax matters including bribery issues and are therefore unable to share tax information on bribes with investigative/prosecutorial authorities. New Zealand states that sharing tax information on bribes with investigative/prosecutorial authorities would undermine the New Zealand tax system, which is largely dependent upon voluntary compliance and requires that taxpayers be assured that the information they provide cannot be used for other purposes. However, this would appear to be an obstacle in the detection of bribery in New Zealand and the provision of MLA where tax information is requested regarding suspected bribe transactions.

38. Section BD2 (Allowable deductions) of the Income Tax Act 1994 states as follows:

Definition

(1) *An amount is an allowable deduction of a taxpayer*

- (a) *if it is an allowance for depreciation that the taxpayer is entitled to under Part E (Timing of Income and Deductions), or*
- (b) *to the extent that it is an expenditure or loss*
 - (i) *incurred by the taxpayer in deriving the taxpayer's gross income, or*
 - (ii) *necessarily incurred by the taxpayer in the course of carrying on a business for the purpose of deriving the taxpayer's gross income, or*
 - (iii) *allowed as a deduction to the taxpayer under Part C (Income Further Defined), D (Deductions Further Defined), E (Timing of Income and Deductions), F (Apportionment and Recharacterised Transactions), G (Avoidance and Non-Market Transactions), H (Treatment of Net Income of Certain Entities), I (Treatment of Net Losses), L (Credits) or M (Tax Payments).*

Exclusions

(2) *An amount of expenditure or loss is not an allowable deduction of a taxpayer to the extent that it is*

- (a) *of a private or domestic nature, or*
- (b) *incurred in deriving exempt income under Part C (Income Further Defined), D (Deductions Further Defined) or F (Apportionment and Recharacterised Transactions), or*
- (c) *incurred in deriving income from employment, or*
- (d) *incurred in deriving schedular gross income subject to final withholding, or*
- (e) *of a capital nature, unless allowed as a deduction under Part D (Deductions Further Defined) or E (Timing of Income and Deductions), or*
- (f) *disallowed as a deduction under Part D (Deductions Further Defined), E (Timing of Income and Deductions), F (Apportionment of Recharacterised Transactions), G (Avoidance and Non-Market Transactions), H (Treatment of Net Income of Certain Entities), I (Treatment of Net Losses), L (Credits) or M (Tax Payments).*

Defined: [[allowable deduction, amount, business, gross income, income from employment, schedular gross income subject to final withholding, taxpayer]]"

EVALUATION OF NEW ZEALAND

General Remarks

The Working Group compliments the New Zealand authorities for the thoroughness of their responses during all stages of the examination. The Group appreciates the excellent co-operation of the New Zealand authorities throughout the process.

In particular, the Group noted that New Zealand has made the active bribery of a foreign public official an extra-territorial criminal offence for its citizens and residents and bodies incorporated in New Zealand and commends the New Zealand government on this action.

The Working Group considered that New Zealand's legislation overall conforms to the requirements of the Convention. However, certain aspects of the implementing legislation, listed below, need to be followed up in Phase 2. Furthermore, two issues require horizontal review at a later stage. The Group notes, furthermore, that by not yet denying the tax deductibility of bribes, New Zealand has not fully implemented the 1997 Revised Recommendation.

I. Specific Issues

1. Elements of the offence: The term "corruptly"

Section 105 C (2) of the Crimes Amendment Act 2001 which uses the term "corruptly" in the definition of the offence might introduce an additional element to be proven by the prosecution. This element could imply, in the context of an offence committed abroad, that the standard of the community abroad would have to be taken into consideration and could vary.

New Zealand's authorities explain that the term "corruptly" is used in their domestic legislation. They state that in common law, the meaning of "corruptly" is uncertain but implies that the actor is aware that the act is improper. However, it is New Zealand's view that this standard is almost always met by the requisite intent and certainly would always be met if the act was unlawful. New Zealand believes that the term corruptly does not dilute the legislation in any material way.

The Working Group is of the opinion that this issue should be considered on a horizontal basis at a later stage and notes that New Zealand legislation does not expressly exclude custom as a defence.

2. The Routine Government Action Defence

Section 105 C (3) of the Crimes Amendment Act 2001 provides an exception to the offence where a function by the foreign public official is a routine government action and where the benefit is small. The provision defines routine government action by way of a negative list and does not set any thresholds for what is a small benefit.

New Zealand explained that they preferred the legislative technique of a negative list and chose not to set monetary amounts for "small" benefits in order to avoid an unduly narrow interpretation. New Zealand believes that it is better to allow the scope of the exception to be defined by judicial interpretation.

As the interpretation of these terms will be determined by case law, the Working Group recommends that this issue be followed up in Phase 2.

3. Sanctions for Legal Persons

New Zealand explains that the offence of foreign bribery is an indictable offence that falls within the jurisdiction of the High Court. There are no statutory limits on the maximum amount of fine that can be set by the High Court against natural or legal persons. On the other hand, fines are discretionary sanctions and there are no statutory sentencing guidelines. However, there are guidelines in case law in relation to the imposition of fines generally.

The Working Group recommends that this issue should be followed up in Phase 2 to determine whether sanctions are effective, proportionate, and dissuasive.

4. Seizure and Confiscation of the Bribe and the Proceeds of Bribery

“Forfeiture” and “pecuniary penalty orders” are not mandatory but only available upon the discretionary application by the Solicitor General within a period of 6 months after a conviction by the High Court.

New Zealand’s authorities state that there are no guidelines on the exercise of the discretionary power by the Solicitor General. They state that the decision whether to institute confiscation proceedings is based on the assessment of the likelihood of a successful outcome especially as compared to the financial cost of the proceedings. Although an offence may be serious, an application for a forfeiture order will not be made if there is no property to be confiscated.

The Group believes that the absence of guidelines to determine the pecuniary sanctions for legal persons together with the discretionary power of the Solicitor General to initiate confiscation proceedings should be monitored in Phase 2.

5. Nationality Jurisdiction

New Zealand established nationality jurisdiction over the foreign bribery offence by adding a new section to the Crimes Act 1961. The Working Group noted that New Zealand has extended its jurisdiction to cover foreign bribery cases committed abroad by its citizens and residents, and is doing so has gone beyond its usual practice.

In order for New Zealand to establish nationality jurisdiction, the act must constitute an offence under the law of the country where the foreign public official’s “principal office” is situated. This form of dual criminality differs from customary international law where the act is unlawful where it occurred. In New Zealand’s view, this form of dual criminality is a more effective way of achieving the objectives of the Convention.

The Working Group recommended that this issue be considered on a horizontal basis at a later stage.

6. Enforcement

Section 106.1 of the amended Crimes Act 1961 requires the consent of the Attorney-General (i.e. the Solicitor-General, in practice) in order to prosecute foreign bribery offences as well as domestic bribery

offences. The Solicitor-General's prosecution guidelines incorporated in the Police Manual Best Practice contains "public interest" considerations and there are no specific legislative guidelines for the exercise of this discretion. New Zealand's authorities confirm that this requirement is intended to prevent the "frivolous, vexatious or political" use of criminal provision in prosecution and that prosecution would not be refused on account of considerations prohibited under Article 5. They also point out that "judicial review" of a decision of the Attorney-General (i.e. the Solicitor-General, in practice) is available to anyone who has an interest in the case on the ground that the decision was made on the basis of irrelevant factors or a failure to take account of relevant factors.

7. Extradition

Extradition is conditional upon dual criminality. The condition of dual criminality is considered to exist if the conduct is punishable under New Zealand law at the time when the conduct occurred or is alleged to have occurred. Since New Zealand is the one of the last Parties to implement the Convention, there was a concern that this requirement might be an obstacle for extradition in the case where the offence was committed before entry into force of New Zealand's law. However, New Zealand's authorities clarify that for the purpose of providing extradition, the condition of dual criminality is interpreted so broadly under section 5.2 of the Extradition Act 1999 that it would be deemed to be met if the conduct is within the scope of the Convention since such a conduct would have constituted a domestic bribery offence in New Zealand.

The Working Group recommended that this issue be followed-up in Phase 2 in order to see how this condition is applied in practice.

II. Tax Deductibility

New Zealand tax law allows the deduction of a bribe to the extent it is an expenditure: (1) incurred by the taxpayer in deriving the taxpayer's gross income, or (2) necessarily incurred by the taxpayer in the course of carrying on a business for the purpose of deriving the taxpayer's gross income. The Working Group considered that this does not fully implement the 1997 Revised Recommendation. It welcomed the statement of the New Zealand authorities that the New Zealand government will propose an amendment to their legislation by the end of 2001 to prohibit the deduction of bribes. The Working Group urges the New Zealand government to speed up the adoption of adequate legislation.

Tax authorities in New Zealand are bound by a duty of confidentiality. New Zealand points out that sharing tax information on bribes with investigative/ prosecutorial authorities would undermine the New Zealand tax system which is largely dependent upon voluntary compliance and requires that taxpayers be assured that the information they provide cannot be used for other purposes.

The Working Group considers this to be a significant obstacle in the detection of bribery in New Zealand and the provision of MLA where tax information is requested regarding suspected bribe transactions. The Working Group therefore recommends that New Zealand consider taking appropriate steps to allow the exchange of information between the tax authorities and the prosecutorial authorities in cases of foreign bribery.