

# Impact Summary: Reforms to the Criminal Proceeds (Recovery) Act 2009 to better target illicit assets

## Section 1: General information

**Purpose**

The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Assessment (RIA), except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be made by Cabinet.

**Key Limitations or Constraints on Analysis**

This analysis has been constrained by:

- **Lack of broader public consultation:** The timeframes in which the policy proposals have been prepared did not allow for consultation beyond government agencies affected by these operational issues (see section 5 on stakeholders consulted). As the proposed changes require legislative amendment, the Select Committee process will provide an opportunity for broader public scrutiny and input.
- **Lack of opportunity for further analysis:** With more opportunity for further analysis of the operation of existing profit forfeiture orders, Justice may have been able to develop alternative options for the organised crime proposal.
- **Narrow scope:** The proposed changes are focused on addressing the barriers to the existing asset recovery mechanisms in the Criminal Proceeds (Recovery) Act 2009. A review of the efficacy of the regime as a whole was beyond scope. As such, there has not been the opportunity to evaluate further issues, nor potentially develop additional amendments.
- **Data limitations:** Due to the covert nature of much criminal activity quantitative data can be difficult to obtain; for example there is limited data on the exact scale of the problem, and there is not an easy objective way to measure the ultimate impact of the amendments on rates of significant criminal activity.

**Responsible Manager (signature and date):**

Alida Mercuri  
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Policy Group  
Ministry of Justice  
9 December 2020

To be completed by quality assurers:

#### Quality Assurance Reviewing Agency:

Ministry of Justice Internal Quality Assurance Panel (QA Panel).

#### Quality Assurance Assessment:

The Ministry of Justice QA Panel has reviewed *Impact Summary: Reforms to the Criminal Proceeds (Recovery) Act 2009 to better target illicit assets*, prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA partially meets the quality assurance criteria.

#### Reviewer Comments and Recommendations:

The RIA acknowledges that officials did not have an opportunity to consult outside government on the proposals. This consultation may have informed the development of options, assessment of the likely effectiveness of options, and the costs and benefits of each.

The RIA also notes other constraints on the analysis, such as data limitations on the potential effectiveness of the proposed changes, and the limited opportunity to assess how particular aspects of the current regime are inadequate against organised criminal groups. Further time to analyse the underlying issues and develop the organised crime proposal may have resulted in more proportionate options that do not infringe on the rights protected in the New Zealand Bill of Rights Act to the same extent as identified with the current proposal.

These constraints do, to some extent, undermine the confidence that Ministers can place on the analysis in the RIA. Notwithstanding that these constraints are clearly identified and the analysis is otherwise complete, clear, and convincing, the QA Panel assesses the RIA as partially meeting the quality assurance criteria (complete, convincing, clear and concise, and consulted).

## Section 2: Problem definition and objectives

### 2.1 What is the policy problem or opportunity?

#### Context

The Criminal Proceeds (Recovery) Act 2009 (the Act) is part of the government's toolkit to respond to transnational and organised crime. The Act enables Police to recover the proceeds derived from criminal activity. This contributes to the objectives of the broader Transnational Organised Crime Strategy, and Organised Crime work programme – working to prevent, detect, and respond to organised crime, and address the harms and drivers of organised crime.

The purpose of the Act includes deterring significant criminal activity by reducing the chance that a person can profit from undertaking or being associated with significant criminal activity. Significant criminal activity is defined as offences with a penalty of imprisonment of 5 years or more, or when the criminal activity has derived a benefit of \$30,000 or more.

The Act gives courts the power to make **restraining orders** (the seizure and preservation of property) and **forfeiture orders** (transfer of ownership to the Crown). Restraint allows time for Police investigations of property derived from significant criminal activity, where it is necessary to gather more evidence to prove the standard for forfeiture.

A criminal conviction is not required to restrain or forfeit property. The purpose and standards of proof required of the two regimes are different. Criminal convictions punish offenders – and require proof beyond reasonable doubt as a person's liberty may be at stake. By contrast, the Act creates a civil regime targeting the proceeds of crime. The forfeiture of property is intended to reduce the incentive of profit-driven offending, and prevent the re-investment of profits into offending.

In order to grant a **restraining order**, the court must be satisfied that there are *reasonable grounds to believe* that either:

- (i) property is tainted (meaning property that is derived from significant criminal activity); or
- (ii) the person whose property has been restrained (the respondent) has unlawfully benefited from significant criminal activity (meaning the person knowingly, directly or indirectly, derived a benefit from significant criminal activity).

Restrained property is held by the Official Assignee for a year (a restraining order can be renewed, more than once, for further periods). Alternatively, Police may return property, if an investigation identifies a legitimate source.

In order to grant a **forfeiture order**, the court must be satisfied of either (i) or (ii) *on the balance of probabilities*. This is a higher evidential criterion than satisfying *reasonable grounds to believe*. It requires evidence to establish that the facts are more probable than not.

Money recovered from forfeited property is transferred to the Proceeds of Crime Fund, which is used to target criminal activities and address crime-related harm.

## **Problem definition**

At present, the complexities of transnational and organised crime can undermine the effectiveness of the Act:

- in transnational cases, it is difficult to obtain evidence from foreign jurisdictions; and
- organised criminal groups can structure their affairs to insulate members (especially leaders) from direct involvement in or knowledge of particular criminal activities.

There is also a gap in Police's authority to hold property seized under a search warrant. These three problems are discussed further below:

### ***Evidentiary hurdles in transnational cases impede investigations***

Police has identified potential cases of significant assets derived from criminal offending overseas being invested in New Zealand's financial and property markets. Unlike domestic investigations under the Act, transnational cases are impeded by:

- the inability to use domestic Police powers (e.g. examination orders and production orders, to produce documents or answer questions) in foreign jurisdictions;
- the time often required to utilise transnational mutual legal assistance processes;
- non-cooperative foreign jurisdictions, or jurisdictions that do not or cannot prioritise requests for assistance; and
- the lack of skill and resources in some jurisdictions to investigate and present evidence of the foreign predicate offending to the standard demanded by the New Zealand High Court.

These factors exacerbate the cost and time necessary to restrain and forfeit transnational criminal proceeds, and can prevent Police from gathering the evidence needed for successful forfeiture of property derived from significant criminal activity.

### ***Organised criminal groups disguise criminal origins to impede forfeiture***

The Commissioner of Police has indicated that in determining whether to pursue forfeiture, they need to point to particular criminal activity from which property or benefits are derived. It would have been preferable to have further opportunity to analyse the way in which the standard for forfeiture operates under the current law. This could have allowed other options to be developed.

Forfeiture of assets may be thwarted where Police are required to identify the particular criminal activity from which assets are derived. It is not always possible to identify this in the organised crime context, even where Police is aware that the respondent's known legitimate income is insufficient to account for the restrained assets. This is because members (especially leaders) of organised crime groups can insulate themselves from involvement in or knowledge of particular criminal activity, despite benefiting from the structure in which this criminal activity takes place.

Early successes of the current forfeiture regime have driven organised criminal groups to hide or disguise ownership of property in the names of nominees or trusted third parties who are not directly involved in crime. For example, drug-related organised crime is structured so as to create distance between leaders (who receive a portion of the profits)

and the criminal activity. For this reason, the current forfeiture regime is no longer fit for purpose in the above circumstances.

### ***A gap in Police's authority to retain seized property until a court determination***

The Commissioner of Police is required to return property seized under a search warrant:

- After 28 days; or
- If a restraining order is obtained within the 28 days, at the date of expiry of the restraining order; or
- If a forfeiture order application is applied for within 28 days, at the determination of that application.

In other words, Police can only hold seized property for 28 days, even when it has applied for a restraining order and is awaiting the court's determination. By contrast, for forfeiture orders, Police can hold the property until the court has made a determination.

Currently, courts can take longer than 28 days to issue a determination, creating a gap between the 28-day limit for holding seized property and the court's determination on restraint. This gap does not exist with forfeiture. Police must return the suspected tainted property, which can provide an opportunity for respondents to relocate or dispose of the property before Police is given further authority to hold it under a restraining order.

### **Evidence base**

In both transnational and organised crime cases, where tainted property is unable to be successfully forfeited, the underlying significant criminal activity remains profitable. Addressing the problems that prevent (or exacerbate the costs of) forfeiture would allow more Police investigations to be pursued and tainted property forfeited.

The more tainted property that can be forfeited (from more efficient and more successful forfeiture cases), the greater the deterrence to the underlying significant criminal activity. This would reduce harm by producing fewer victims and/or mitigating the severity of offending. Criminological evidence suggests that forfeiting assets can have a greater deterrent effect than criminal proceedings (that may result in incarceration) against these types of groups whose offending is driven by profit.<sup>1</sup>

On average, the Commissioner of Police commences 50 cases under the Act per year, with transnational proceedings consuming the most court and Police time. The average value of assets restrained per case is \$1.8 million. Police advises that transnational and organised crime cases in particular are very resource intensive; in one case Police expended 30,000 hours (5 people over three years) to achieve a significant \$43 million seizure.

Police's experience with criminal proceeds investigations identifies that use of intermediaries, third party relatives or friends, and legal persons such as companies and trusts are a feature of the majority of cases now investigated.<sup>2</sup> These types of layering by

<sup>1</sup> If punishment is more certain, it does not need to be severe to be effective. Pratt, Cullen, Blevins, Daigle, and Madensen, "The empirical status of deterrence theory," 2006, in Cullen, Wright and Blevins (eds), "Taking Stock: The Status of Criminological Theory" New Brunswick, NJ: Transaction Books.

<sup>2</sup> See for example the Financial Intelligence Unit's 2019 National Risk Assessment, pages 10-12, <https://www.police.govt.nz/sites/default/files/publications/fiu-nra-2019.pdf>

organised criminal groups can complicate or prevent a connection between an asset and a particular criminal activity from being established.

Due to limitations on time and resources, combined with the problems described above, the Commissioner of Police will decide not to proceed with certain cases. Under the status quo, Police reports a significant number of investigations that are not yet feasible (between 40 and 80 total potential cases, based on persons in New Zealand identified by foreign jurisdictions as having committed financial crime, and/or persons in foreign jurisdictions who have placed funds in New Zealand that exhibit risk factors of being proceeds of crime). These involve millions of dollars in suspected illicit assets, including the proceeds derived from illicit drug activities, corruption, foreign fraud and tax crime, and international money laundering.

Addressing these problems carries a risk of undermining due process protections. This could infringe the ability of respondents to protect their assets from restraint and forfeiture when they come from a legitimate source. The policy proposals are intended to mitigate the problems that produce negative criminal justice outcomes; their design also attempts to ensure the solutions are proportionate to the problems, and maintain procedural safeguards for respondents' rights.

## 2.2 Who is affected and how?

The following groups are affected:

- Transnational and organised criminal offenders: depriving offenders of the benefit of their criminal conduct removes the incentives for them to commit the unlawful behaviour in the first instance.
- Associates of organised criminal organisations: enabling the restraint and forfeiture of assets held by associates of organised crime, where their known legitimate income is likely to be insufficient to acquire the asset, may have a chilling effect on the willingness of associates to co-operate to hide tainted assets (making it more difficult to layer illicit funds).
- Persons unconnected to significant criminal offending: any person who is believed to have property derived from transnational or organised offending may have their assets restrained by Police, until they identify a legitimate source of that property to Police investigators or to the courts.
- Wider society: any significant criminal offending that is deterred will avoid the associated harm on persons that would otherwise be victims of crime.
- Police (Assets Recovery Unit and Official Assignee): making the restraint and forfeiture process more efficient will reduce costs per case, allowing more cases to be pursued from within the same baseline.
- Courts: an increase in case volume will increase the costs borne by courts; however, cases will be more efficient from simplifying and expediting transnational and organised crime proceedings to forfeiture or withdrawal by prosecutors.
- Proceeds of Crime Fund: additional revenue from an increase in forfeited assets will be used to first recover the costs of holding assets and prosecuting cases, and secondarily be used on programmes to address the harms and drivers of crime.

These costs and benefits are covered in more detail in section 4.

## 2.3 What are the objectives sought in relation to the identified problem?

The objective is to improve the ability of the State to respond to significant criminal activity through civil forfeiture processes, and to do so in a way that is proportionate and maintains procedural safeguards.

Increasing the volume of tainted assets forfeited reduces the ability to profit from illegal activities, thereby deterring offending. Improving the likelihood of asset restraint and forfeiture risks State overreach that unintentionally infringes the rights of people with a legitimate source for their assets. Changes must be carefully designed to avoid this.

We have used the following criteria to assess the extent to which the options achieve the objective:

- Consistency with the purpose of the Act;
- Effectiveness at restraining and forfeiting tainted assets;
- Cost-effectiveness; and
- Maintaining due process (in particular, to avoid restraining and forfeiting legitimate assets).

## Section 3: Options identification

### 3.1 What options have been considered?

Tainted property derived from transnational offending: Description of options			
Problem	Status Quo	Option 1 (preferred option)	Option 2
In cases of <b>transnational crime</b> it is difficult to obtain evidence from foreign jurisdictions	<p>In order to grant a <b>restraining order</b>, courts must be satisfied that there are <i>reasonable grounds to believe</i> that either:</p> <p>(i) property is tainted (meaning property that is derived from significant criminal activity); and / or</p> <p>(ii) the respondent has unlawfully benefited from significant criminal activity (meaning the person knowingly, directly or indirectly, derived a benefit from significant criminal activity).</p>	<p>The process for obtaining a <b>restraining order</b> for property would be the same as the status quo. However, if the respondent is not in New Zealand, there would be a new information-gathering power.</p> <p>The Commissioner of Police may apply to the Court for an order requiring the respondent to file a “<b>notice of source</b>” within 2 months of being served with the order. Failure to do so affects forfeiture (discussed below).</p> <p>The purpose of the notice of source is to provide information showing a legitimate source for the assets. The notice must specify:</p> <ul style="list-style-type: none"> <li>• the jurisdiction(s) the restrained property originated from;</li> <li>• the jurisdiction(s) through which the restrained property transited prior to its arrival in New Zealand;</li> <li>• the circumstances surrounding the acquisition of the property, including details of how it was acquired, derived, and funded; and</li> <li>• all persons, natural or legal, who may have an interest in the property, including the nature of any interest.</li> </ul>	<p>In contrast to option 1, the notice of source is (1) required automatically on restraint of (2) foreign generated proceeds; (3) the threshold for restraint is lower; and (4) there is an adverse inference at forfeiture.</p> <p>In order to grant a <b>restraining order</b>, courts must be satisfied that there are <i>reasonable grounds to suspect</i> (as opposed to believe) that the property is “foreign generated proceeds” – meaning property acquired as a result of criminal activity in another jurisdiction that: if committed in New Zealand, would be punishable by 5 or more years imprisonment; or from which is derived property worth \$30,000 or more.</p> <p>Reasonable grounds to suspect is a lower standard, only requiring the belief that the state of affairs exists; as opposed to an objective and credible basis for thinking that the situation exists.</p> <p>The <b>notice of source</b> is triggered on restraint (same process as with option 1, but without a separate application for a court order).</p>
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(Continued) Tainted property derived from transnational offending: Description of options

Problem	Status Quo	Option 1 (preferred option)	Option 2
<p>In cases of <b>transnational crime</b> it is difficult for Police to obtain evidence from foreign jurisdictions</p>	<p>In order to grant a <b>forfeiture order</b>, courts must be satisfied of either (i) or (ii) <i>on the balance of probabilities</i>.</p> <p>This requires evidence to establish that the facts are more probable than not.</p>	<p>At the <b>forfeiture</b> stage, if the respondent has filed a notice of source, the process will proceed as it does under the status quo (the onus on Police).</p> <p>If the respondent fails to file a notice of source, or Police prove (on the balance of probabilities) the respondent has filed a materially false or misleading one, the court must <i>presume</i> that the property is tainted property. Respondents will be able to rebut this presumption. In cases where the respondent fails to file a notice of source within 2 months, or files a materially false or misleading notice, the court must <u>presume</u> that the property in question is foreign generated proceeds.</p> <p>The presumption shifts the onus onto the respondent to prove, on the balance of probabilities, that the property is not tainted property (i.e. derived from significant transnational offending).</p>	<p>For <b>forfeiture</b>, the Commissioner of Police will need to prove <i>on the balance of probabilities</i> that:</p> <ul style="list-style-type: none"> <li>• The property is foreign generated proceeds;</li> <li>• That the restraining order was made earlier in relation to the same property;</li> <li>• That the restraining order has been in place for a period of at least 6 months;<sup>3</sup></li> <li>• That a notice of source has not been filed with the High Court and served on the Commissioner of Police;</li> <li>• That the Commissioner has contacted or made all reasonable efforts to contact any person the Commissioner believes may have an interest in the property.</li> </ul> <p>The courts may draw an <u>inference</u> against the respondent (as opposed to a presumption) if the respondent has:</p> <ol style="list-style-type: none"> <li>(i) failed to file a notice within 20 days of being served with the restraining order; or</li> <li>(ii) filed a notice that the Commissioner of Police proves on the balance of probabilities is false in a material way, or that the respondent has misled the court in a material way.</li> </ol> <p>If the respondent files a notice of source, Police would have to satisfy the same standard as the status quo for forfeiture.</p>

<sup>3</sup> This aligns with the time allowed for third parties with an interest in the property to apply for relief from a forfeiture order, CPRA ss 62, 148.

**Tainted property derived from transnational offending: Analysis of options**

Criteria	Status Quo	Option 1 (preferred option)	Option 2
<b>Consistency</b> with the purpose of the Act	<b>0</b> Status quo.	<b>+</b> The notice of source order is intended to have the same effect as CPRA’s existing production and examination orders. Domestic respondents must provide documents or answer questions, or risk a fine or imprisonment. The existing orders are not effectively enforceable overseas. Instead, the presumption for failure to file a notice of source incentivises compliance, which will enable Police to investigate effectively and efficiently to determine if forfeiture should be pursued.	<b>+</b> Similar to preferred option, except that it would be easier to restrain foreign generated proceeds (reasonable grounds to suspect rather to believe); but harder to forfeit foreign generated proceeds (engaging an inference against the respondent for failure to file a notice, rather than presumption). “Foreign generated proceeds” also adds unnecessary complexity.
<b>Effectiveness</b> at restraining and forfeiting tainted assets	<b>-</b> Currently, the hurdles to gathering evidence of transnational offending make it difficult to satisfy that property is tainted, on the balance of probabilities (required for forfeiture), as criminals adapt to the regime by using layering of to disguise an illegitimate origin of their assets.	<b>++</b> The proposed option improves the ability of Police to gather evidence to investigate restrained property, when information (that the respondent is privy to) is required from overseas. The information required by a notice of source will be readily accessible to respondents. They will have incentive to provide this to Police within 2 months, in order to regain control of their assets, and avoid the presumption at forfeiture (an onus on them to rebut on the balance of probabilities, in cases where they do not file a notice, or one that is materially false or misleading). This information will therefore facilitate forfeiture or withdrawal of cases.	<b>0</b> An inference (rather than a presumption) against the respondent does not provide sufficient incentive for the respondent to file a notice of source. The notice of source provides additional information that Police can investigate to determine a legitimate source, or a materially false and misleading notice. With only an inference, organised criminal groups may still be incentivised not to cooperate. This would deprive Police of the ability to investigate a fabricated origin of source that the respondent has had time to manufacture before a forfeiture hearing.
<b>Cost-effectiveness</b>	<b>0</b> To satisfy the existing standard requires a significant investment of Police resource.	<b>++</b> The notice of source will allow Police to focus its investigative resources (on confirming a legitimate origin, or disproving a materially false or misleading explanation). In addition, the presumption may allow cases to proceed that are otherwise not currently viable due to the evidentiary hurdles. Both increase the number of successful cases within the same budget baselines.	<b>+</b> While the notice of source may not prove effective at facilitating forfeiture of tainted property (due to insufficient incentive for criminals to comply); it may enable Police to more quickly hear from innocent respondents and ascertain a legitimate origin. The latter may have a small positive impact.

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*(Continued)* Tainted property derived from transnational offending: Analysis of options

Criteria	Status Quo	Option 1 (preferred option)	Option 2
<p>Maintaining due process (in particular, to avoid restraining and forfeiting legitimate assets)</p>	<p><b>0</b> Courts, as an independent arbiter to Police investigators and prosecutors, must be satisfied that there is proof to the standard of <i>reasonable grounds to believe</i> required for <b>restraint</b>; <i>on the balance of probabilities</i> for <b>forfeiture</b>.</p>	<p>– Police must submit evidence to the same standards at the restraint stage. At forfeiture, there is a presumption against the respondent only if they have failed to file a notice after 2 months (providing time for respondents to engage translation and/or legal services to navigate the New Zealand legal system before the forfeiture hearing), or filed one that is materially false and misleading.</p> <p>The shift in onus may be a limitation on the rights of respondents (set out in Section 4.2). Any limitation imposed by this reverse burden is justified given:</p> <ul style="list-style-type: none"> <li>• the evidence on which a restraining order was obtained;</li> <li>• the ability for the court to reject a notice of source order application, if it could affect a concurrent criminal prosecution (thus protecting fair trial rights);</li> <li>• the fact that the respondent has been given 2 months to explain where the property has come from and has not taken it (which would have avoided the presumption) or filed a materially false or misleading notice of source; and</li> <li>• the respondent still has an opportunity to rebut the presumption (by submitting evidence showing a legitimate source).</li> </ul> <p>Furthermore, this creates a more even playing field with respondents in New Zealand. It is a criminal offence for domestic respondents not to comply with production and examination orders, which ensures Police does not face the same difficulties getting evidence that it currently does in transnational cases.</p> <p>Due process is maintained by the independent role of courts, which must act consistently with the New Zealand Bill of Rights 1990 (NZBORA), in:</p> <ul style="list-style-type: none"> <li>• granting restraining orders, and the new notice of source orders,</li> <li>• hearing evidence submitted in the notice of source (to avoid a presumption at forfeiture); and</li> <li>• hearing evidence to rebut the presumption (if engaged) at the forfeiture hearing.</li> </ul>	<p>– Similar to the preferred option except a notice of source is automatically triggered upon the granting of a restraint order. This creates a risk to fair trial rights: if a respondent is involved in a criminal prosecution, a notice of source could compel them to reveal their legal defence. While it is unlikely an overseas respondent will be involved in a concurrent criminal prosecution in New Zealand; an automatic notice-on-restraint removes the ability of the court to both grant restraint and reject a notice in such circumstances.</p> <p>However, the adverse inference (and lack of a presumption) places a lower burden on respondents who do not file a notice: they need not submit evidence that satisfies the balance of probabilities. Respondents need only submit evidence to challenge the prosecutor’s case that the property is tainted, with the burden on prosecutors to disprove.</p>

## Tainted property derived from organised crime: Description of options

Problem	Status Quo	Option 1	Option 2
<p>In cases of <b>organised crime</b> organised criminal groups can structure their affairs to insulate members (especially leaders) from direct involvement in or knowledge of particular criminal activities.</p>	<p>(Same as for transnational crime):</p> <p>In order to grant a <b>restraining order</b>, courts must be satisfied that there are <i>reasonable grounds to believe</i> that either:</p> <ul style="list-style-type: none"> <li>(i) property is tainted (meaning property that is derived from significant criminal activity); and / or</li> <li>(ii) the respondent has unlawfully benefited from significant criminal activity (meaning the person knowingly, directly or indirectly, derived a benefit from significant criminal activity).</li> </ul> <p>In order to grant a <b>forfeiture order</b>, courts must be satisfied of either (i) or (ii) <i>on the balance of probabilities</i>. This is a higher evidential criterion than satisfying <i>reasonable grounds to believe</i>. It requires evidence to establish that the facts are more probable than not.</p>	<p>In order to grant a <b>restraining order</b>, courts must be satisfied that there are <i>reasonable grounds to believe</i> that:</p> <ul style="list-style-type: none"> <li>• the respondent has interests in the restrained property; and</li> <li>• the respondent is <u>associated</u>, directly or indirectly, with an “organised criminal group” (meaning a group of 3 or more people who have as their objective, or one of their objectives, obtaining material benefit from significant criminal activity or conduct outside New Zealand that, if it occurred in New Zealand, would constitute significant criminal activity); and</li> <li>• members of, or participants in, the organised criminal group have been involved in, or unlawfully benefited from, significant criminal activity; and</li> <li>• the respondent’s known <u>legitimate income and capital</u> are likely to have been insufficient to acquire the interests in the restrained property.</li> </ul> <p>There would be no requirement to prove that property was derived from particular significant criminal activity. The proposed criteria create a presumption that this is the case.</p> <p>At the <b>forfeiture</b> stage, there would be a presumption that the property is tainted if the Commissioner can prove the above criteria <i>on the balance of probabilities</i>. This presumption can be rebutted if the respondent can prove on the balance of probabilities that the property is not in fact connected with significant criminal activity, or was derived from a legitimate source.</p>	<p>Same as option 1 <u>except</u>:</p> <p>The criteria the Police must prove, in order to grant a <b>restraining order</b> or <b>forfeiture order</b>, would be more narrowly defined.</p> <p>In particular, the definition of ‘<u>association</u>’ could be limited. For example, by requiring Police prove that the respondent has an element of knowledge (about the organised criminal group), for the property to be restrained or forfeited. And/or ‘<u>legitimate income</u>’ could be clarified to more clearly include/exclude the sources of income that are legitimate.</p>

### Tainted property derived from organised crime: Analysis of options

Criteria	Status Quo	Option 1	Option 2
<b>Consistency</b> with the purpose of the Act	<b>0</b> Status quo.	<b>+</b> The proposed power allows for courts to grant the restraint or forfeiture of tainted property on the basis of the respondent's connection to an organised criminal group, the group's participation in significant criminal activity, and the lack of ability to account for the assets by way of legitimate income. As this enables a greater volume of restraint and forfeiture of property, this better fulfils the purpose of deterring criminal activity by depriving offenders of the proceeds derived from offending.	<b>+</b> Same as option 1, except that Police would have to supply evidence to establish that the respondent is <u>associated</u> with an organised criminal group, knowing or being reckless as to their criminal purpose. While this would make it more difficult to forfeit illegitimate assets, it would give more protection to the assets of people who may have interacted with members of organised criminal group without knowledge of and/or intent to contribute to their criminal enterprise.
<b>Effectiveness</b> at restraining and forfeiting tainted assets	<b>-</b> Currently, to prove property is tainted or that a respondent has unlawfully benefitted from significant criminal activity, Police prosecutors must identify a particular instance of criminal activity from which the property is derived.	<b>++</b> The proposed option provides an alternative to Police proving an asset is derived from a particular instance of criminal activity. If Police can prove the association and income criteria at the restraint and forfeiture hearings; there would be a presumption that the property is derived from significant criminal activity. This is intended to allow forfeiture in cases where it may not currently be successful. This will better disincentivise people who lead and facilitate organised criminal groups, but who are not directly involved in significant criminal activity.	<b>++</b> Same as option 1. However, prosecutors would be required to submit stronger evidence to satisfy the court that a respondent is associated with an organised criminal group in a more culpable manner for the court to grant forfeiture. This may marginally increase the time required for Police to investigate (to gather sufficient evidence to satisfy the courts), but may not necessarily inhibit the ultimate success of forfeiture.
<b>Cost-effectiveness</b>	<b>0</b> To satisfy the existing standard requires a significant investment of Police resource.	<b>++</b> This option may allow Police to efficiently proceed with some cases that are not feasible under the current standards. This means the same level of investigative resources may allow a greater number of cases and, ultimately, forfeited assets.	<b>+</b> Similar to option 1. However, the additional time to investigate (to satisfy the additional requirements to prove association) may marginally increase Police costs, and potentially time of court hearings.

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(Continued) Tainted property derived from organised crime: Analysis of options

Criteria	Status Quo	Option 1	Option 2
<p>Maintaining <b>due process</b> (in particular, to avoid restraining and forfeiting legitimate assets)</p>	<p><b>0</b> Courts, as an independent arbiter to Police investigators and prosecutors, must be satisfied that there is proof to the standard of <i>reasonable grounds to believe</i> required for <b>restraint</b>; <i>on the balance of probabilities</i> for <b>forfeiture</b>.</p>	<p>-- A presumption is engaged at forfeiture (if Police have proved the criteria on the balance of probabilities). Protections for due process are that Police must prove known legitimate income is insufficient, and the respondent has the ability to show a legitimate source at either the restraint (thereby avoiding the presumption) or forfeiture hearings (rebutting the presumption on the balance of probabilities). The courts retain their independent role in determining restraint and forfeiture applications – including interpreting and applying the powers in the manner most consistent with NZBORA.</p> <p>However, the scope of those captured by association is potentially broad (including friends, family, and businesses), and primarily limited by the requirement for Police to show that a person’s known legitimate income is insufficient. The broad initial scope of capture (by association) may affect whether the power constitutes a reasonable seizure under NZBORA.</p>	<p>-- Similar to option 1. However, the scope of those captured by association would be narrowed. This would reduce the risk that innocent respondents are subject to restraint, and either spend time and effort proving they have a legitimate source, or loss of legitimate assets.</p> <p>This would mitigate the risk that NZBORA rights are engaged more than is reasonably necessary in order to achieve the policy objective.</p> <p>This option would still be a lower threshold than the status quo in the ability for Police to engage a presumption, if they can prove association and lack of insufficient income on the balance of probabilities (rather than direct proof of the assets were derived from significant criminal activity).</p>

### Authority to hold property seized under a search warrant: Description of options

Problem	Status Quo	Preferred option
In certain cases, Police is required to return property seized under a search warrant while waiting for courts to issue a restraint order.	<p>Under section 112 of the Act property that is seized under a search warrant must be returned:</p> <ul style="list-style-type: none"> <li>• After 28 days; or</li> <li>• <b>If a restraining order is obtained within the 28 days, at the date of expiry of the restraining order;</b> or</li> <li>• If a forfeiture order application is applied for within 28 days, at the determination of that application.</li> </ul>	<p>Allow Police to retain seized property pending the determination of a restraining order application. In other words, amend the Act to provide that certain property seized under a search warrant must be returned:</p> <ul style="list-style-type: none"> <li>• After 28 days; or</li> <li>• If a restraining order is <b>applied for as soon as practicable</b> within the 28 days, at the <b>determination of that application;</b> or</li> <li>• If a restraining order is obtained, at the date of expiry of the restraining order; or</li> <li>• If a forfeiture order application is applied for within 28 days, at the determination of that application.</li> </ul>

### Authority to hold property seized under a search warrant: Analysis of options

Criteria	Status Quo	Preferred option
<b>Consistency</b> with the purpose of the Act	<b>0</b> Status quo.	<b>+</b> Prevents property that Police believe is tainted from being returned due to potential delays in a court determination.
<b>Effectiveness</b> at restraining and forfeiting tainted assets	<b>0</b> Currently, seized property must be returned within 28 days, even if Police has applied for a restraint order.	<b>++</b> The proposed option ensures that property is not returned before the courts issue a determination. This denies offenders the opportunity to relocate property, if said property is tainted.
<b>Cost-effectiveness</b>	<b>0</b> If courts take longer than 28 days to grant a restraint application, Police must re-seize returned property.	<b>++</b> By authorising Police to hold property until determination by the court, Police avoid the costs of returning, locating (again), and re-seizing property (in cases where restraint is granted).
Maintaining <b>due process</b> (in particular, to avoid restraining and forfeiting legitimate assets)	<b>0</b> Respondents may submit evidence at a restraint hearing to contest an application.	<b>0</b> Although property seized under a search warrant may be held longer, where courts take more than 28 days to issue a determination; respondents retain their rights and opportunities to challenge a restraining order application.

### 3.2 Which of these options is the proposed approach?

The Minister's proposed package of amendments is:

#### ***Tainted property derived from transnational offending***

Option 1: Following restraint of property, where the respondent is not in New Zealand, the Commissioner of Police can apply to the court for an order requiring the respondent to file a notice of source (which would show that property was legitimately obtained). If the respondent does not comply with a court order to file a notice of source, or files a notice that is materially false or misleading, it would engage a rebuttable presumption that the property is tainted.

#### ***Tainted property derived from organised crime***

Option 1: The power to order the restraint and forfeiture of property in which someone associated with an organised criminal group has an interest, where a person's known legitimate income is likely to have been insufficient to acquire the property. This provides an alternative to proving the property was derived from a particular criminal activity. Such property would be forfeited unless the respondent provides evidence that the property was legitimately obtained.

#### ***Authority to hold property seized under a search warrant***

Preferred option: A minor amendment to allow Police to retain seized property until the determination of any restraining order application made as soon as practicable within the current 28-day period. This would require Police to apply for a restraining order within 28 days or return the seized property.

## Section 4: Impact Analysis (Proposed approach)

### 4.1 Summary table of costs and benefits

Affected parties	Comment: nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>
Additional costs of proposed approach, compared to taking no action		
Transnational and organised criminal offenders	<b>Forfeited assets:</b> Respondents subject to the new restraint and forfeiture powers may lose significant tainted assets.	<b>High (desired)</b> On average there are 50 civil cases per year, with an average value of restrained assets of \$1.8 million. Police estimate an increase of 20-30% in cases proceeding to forfeiture, with an estimated total of \$25 million more assets forfeited per year.
Innocent respondents	<b>Court time and legal fees:</b> those with legitimate assets that get restrained will have to present evidence to the court to avoid forfeiture.	<b>Low</b> This is expected to be rare. However, under the organised crime power, the potential for association to be interpreted broadly may inappropriately shift costs from the state to citizens in some cases.
Police and Official Assignee	<b>Investigation and prosecution:</b> More Police investigations will become viable, such as the 40-80 current potential cases involving millions in suspected illicit assets from proceeds of illegal drug activity, corruption, foreign fraud and tax crime, and international money laundering.	<b>Low</b> These costs will be met from baselines. Police budget already reflects a 50% increase in Asset Recovery Unit (ARU) staffing (from 100 to 154 by 2022/23).  The costs to Police prosecution and the Official Assignee (responsible for managing restrained assets) are recovered from assets forfeited. Prosecution fees are forecast at \$3.5 million (19/20), with an estimated increase of \$750,000 per year. This will be met from the estimated \$25 million increase in assets forfeited per year.
Courts	<b>Court workload:</b> There will be flow-on costs to the courts of cases proceeding from investigators to Crown prosecutors seeking restraint and forfeiture orders.  However, transnational proceedings consume the most Police time; the reforms are expected to simplify and expedite proceedings to either forfeiture or withdrawal of the case by prosecutors.	<b>Low</b> The flow-on costs to courts have been included in forecasts (from the above increase in ARU), and will therefore be absorbed within baselines.
<b>Total Monetised Cost</b>		<b>Low, overall and ongoing</b>
<b>Non-monetised costs</b>		<b>Low, overall and ongoing</b>

Expected benefits of proposed approach, compared to taking no action		
Transnational and organised criminal offenders	<b>Deterred offending:</b> The increased likelihood that tainted assets will be forfeited (by the new powers) will reduce the frequency and margins of profit from significant criminal activity, disincentivising offending.	Medium
Police and courts	<b>Improved efficiency per case:</b> The proposed approach will lower the costs and time per case required for investigators and prosecutors. Transnational cases in particular consume the most time for investigators and the court. The new powers will simplify and expedite such cases to either forfeiture or withdrawal by Police. However, this efficiency may allow more cases to proceed.	Low
Proceeds of Crime Fund (Social Wellbeing budget)	<b>Increase in revenue from additional forfeited illicit assets:</b> By forfeiting additional tainted property, there will be an increase in the revenue of the Proceeds of Crime Fund. Agencies may make a bid for the additional revenue in the Proceeds of Crime Fund, which is used to address the harms and drivers of crime.	Medium The estimated total of \$25 million more assets forfeited per year.
<b>Total Monetised Benefit</b>		Medium, overall and ongoing
<b>Non-monetised benefits</b>		Medium, overall and ongoing

## 4.2 What other impacts is this approach likely to have?

The increase in civil forfeiture from the amendments to the Act is expected to have an indirect impact on victims of crime and the criminal justice system:

- increased deterrence of significant criminal offending will result in a diffuse benefit of reduced harm (with fewer victims of crime);
- the additional expenditure from the increased Proceeds of Crime Fund will benefit programmes reducing the harm and drivers of crime;
- any reduction in offending (from the above effects) will reduce enforcement demands on Police and the criminal courts;
- New Zealand's reputation will be enhanced, by being viewed as a less attractive jurisdiction for illicit assets.

The proposals will place limitations on peoples' rights under NZBORA.

Under the transnational proposal, the Ministry of Justice considers that any limitations imposed on these rights are reasonable and justified, on the basis that:

- it assists with the prevention and deterrence of transnational crime. This is a sufficiently important public objective, to which the proposal is rationally connected.
- the rights are limited no more than is reasonably necessary, being restricted to overseas respondents around which the problem exclusively arises.
- the limits are in due proportion to the problem. The transnational proposal creates powers that cannot be exercised unless the respective evidentiary hurdles are met, and the presumption (that shifts the onus onto respondents) is proportionate in recognising the significant evidential difficulties surrounding property that is obtained from transnational offending and/or linked to organised crime. Further, the notice of source orders can only be made by the courts, who must act consistently with the NZBORA; and there are procedural safeguards for respondents to avoid or rebut any adverse presumptions.

Under the organised crime proposal, the Ministry of Justice considers:

- also has a sufficiently important objective of deterring organised crime, and the proposal is rationally connected to this problem.
- may risk limiting the rights more than is reasonably necessary to achieve this objective, due to the broad scope of "association" (and potentially the interpretation of legitimate income). The requirement to show that legitimate income is insufficient provides one safeguard. However, it could be possible to further protect the rights engaged by narrowing the scope of the association, in a way that would still achieve the policy objective.
- the limits on the rights are otherwise similar in nature to those under the transnational proposal. More time to analyse the deficiencies with existing profit forfeiture orders under CPRA may have revealed an alternative option for addressing the problems. This would strengthen the basis for the proposed intervention as a proportionate limitation in respect of the problem.

# Section 5: Stakeholder views

## 5.1 What do stakeholders think about the problem and the proposed solution?

The Ministry of Justice consulted New Zealand Police, Crown Law, Treasury, Customs, and the Ministry of Foreign Affairs and Trade. These agencies agree with the analysis and proposed approach on the transnational proposal, and amendment on seized property. Police also support the organised crime proposal, while Crown Law has raised concerns about the likely inconsistency with NZBORA. The Department of the Prime Minister and Cabinet has been informed.

In particular, New Zealand Police considers the amendments will facilitate investigation and prosecution of civil forfeiture cases, allowing more cases to proceed, making them more efficient, and resulting in a higher volume of successfully forfeited tainted assets.

Crown Law considers that several rights under the NZBORA may be engaged: the rights to freedom of association (s 17), freedom from unreasonable search and seizure (s 21), and natural justice (s 27(1)). Crown Law considers the organised crime proposal as currently designed risks being inconsistent with NZBORA, due to the broad scope of capture potential under “association.” That broad scope could also affect the reasonableness of seizure of property.

Compliance with the NZBORA will be assessed by Crown Law when the relevant Bill is drafted. Crown Law and Justice officials will attempt to refine the organised crime proposal in drafting, to achieve consistency with NZBORA. However, officials consider that NZBORA compliance is unlikely under the current design of the organised crime proposal, and the issues may not be resolved through drafting alone.

Wider consultation has not been undertaken. As legislation is required to implement agreed policy changes, the public will have the opportunity to provide input via the Parliamentary Select Committee process.

# Section 6: Implementation and operation

## 6.1 How will the new arrangements be given effect?

The proposed approach will be given effect by an amendment to the Criminal Proceeds (Recovery) Act 2009. Police will continue to be responsible for enforcement under the Act.

The new arrangements will come into effect if and when the amendment bill comes into force, expected to be late 2021.

# Section 7: Monitoring, evaluation, and review

## 7.1 How will the impact of the new arrangements be monitored?

Currently Police investigate and prosecute cases under the Criminal Proceeds (Recovery) Act 2009. Its experience in dealing with the restraint and forfeiture of property has highlighted the difficulties in successfully obtaining orders in the aforementioned circumstances.

Police will continue to be responsible for monitoring the effectiveness of the Act and the impact of these amendments through the performance of its Asset Recovery Units: the number of cases progressed, and the value of assets forfeited. This will be reported to the Ministry of Justice as the agency responsible for administering the Act.

We would expect to see the Commissioner of Police progress a greater volume of cases through to the forfeiture stage that were not previously feasible. We expect the projected increase in revenue to the Proceeds of Crime Fund (as described above).

## 7.2 When and how will the new arrangements be reviewed?

The ultimate objective of reducing significant criminal activity is able to be measured via crime rates. However, it will not be possible to determine whether differences in rates of significant criminal activity are directly attributable to these amendments as many different factors that drive criminal activity can change at the same time. This prevents accurate attribution of cause and effect.

The Ministry of Justice will be able to evaluate the impact of the amendments based on Police’s report back from the operations of the Asset Recovery Unit.