Law Commission review of Extradition Act and Mutual Assistance in Criminal Matters Act

Thank you for inviting the submission of the Office of the Privacy Commissioner on the review of extradition and mutual assistance. We commend the Law Commission for the clear and thorough analysis of the important issues and questions raised in the Issues Paper.

OPC agrees with the expressed principles underlying the Law Commission's approach to the review:

- facilitating and supporting New Zealand's role as a good international citizen in the prosecution and prevention of crime;
- promoting procedural fairness and the protection of individual rights; and
- enhancing substantive opportunities to provide assistance while substantively protecting the rights of those affected.

The disclosure of information about individuals to overseas countries can raise significant privacy issues. Once the information is disclosed, it effectively leaves New Zealand's well-established privacy and human rights framework and becomes subject to the laws of another state, including trial processes and the handling of evidence. Those laws may be substantially similar to New Zealand's or quite different in the level of protection and process they provide to accused individuals. Any proposal to liberalise the MACMA disclosure framework therefore needs careful scrutiny to ensure that appropriate procedures, safeguards and protections are in place to address the potential impacts on privacy and human rights.

The benefits of providing mutual assistance to further New Zealand's operational relationships with foreign states should not come at an undue cost to our legal framework and the process rights of individuals who may be impacted. The overall theme of the comments offered in this submission is to recommend that any expansion of mutual assistance mechanisms must ensure that privacy protections are not diluted or omitted without reasonable justification, and any risk of disproportionate adverse impacts on individuals is minimised. We are confident that the right balance can be achieved.

We have focussed specifically on those aspects of the Issues Paper that raise privacy considerations, particularly in Part 2 of the paper dealing with mutual assistance:

- Chapter 15 grounds for refusing mutual assistance requests and granting requests on conditions
- Chapter 17 search and surveillance requests
- Chapter 18 requests for information without a coercive order
- Chapter 19 inter-agency mutual assistance regimes.

Transparency

The review of the two Acts is an opportunity to enhance transparency mechanisms and the public reporting of extradition and mutual assistance requests made and received by New Zealand. For example, the Annual Report 2013-14 of the Australian Attorney-General's department (Appendix 7) includes data on numbers of requests made/received and granted, citizenship of people surrendered, major categories of offences, and comparative figures over the previous decade. There is also reporting on any breaches of undertakings.

While the reporting provisions of the Search and Surveillance Act (Part 4(8)) apply to extradition and mutual assistance by New Zealand, this reporting is not necessarily comprehensive. It would be desirable, from the perspective of accountability and oversight, to embed appropriate transparency measures into both the extradition and mutual assistance regimes, particularly in light of proposals in chapter 17 to expand the availability of coercive law enforcement powers to fulfil foreign requests. We are happy to provide further input into this area of the review if this would be helpful.

Chapter 15 Grounds for refusing assistance

Q57 Should MACMA include a ground that assistance may be refused if, in the opinion of the Attorney-General, there is no assurance that the material to be provided to the requesting country will be solely used for the requested purpose?

OPC supports the inclusion of mechanisms, such as those included in the UN Model Law, to ensure the use of evidentiary material provided to a requesting State is for the purpose for which it was requested and provided. This is consistent with a core principle of privacy and data protection that personal information should generally be used for the purpose for which it was collected.

As noted, New Zealand agencies are subject to purpose controls under section 23 of MACMA. Express controls would therefore support both the principle of reciprocity and the principle of domestic equivalency.

Express controls on secondary use can also help to support agency decision making about disclosing information in response to mutual assistance requests (discussed in chapter 18) as it can provide assurance to information holder agencies about limits on the downstream uses of the information.

Q58 Should MACMA include a general discretion to refuse to provide assistance if it is appropriate in all the circumstances that the assistance should not be granted?

A catch-all refusal ground could provide useful additional flexibility. The Australian provision is a useful precedent. We expect it would rarely be exercised (thereby demonstrating New Zealand's commitment to providing mutual assistance), but could provide a safety valve in any particular case where the provision of mutual assistance may not be in the public interest. One example might be where the requesting country's arrangements for handling

personal information do not offer privacy protections substantially similar to those applying in New Zealand.

We comment further on this issue below in the context of setting conditions on the granting of requests (Q60).

Q59 Should all grounds for refusal in MACMA relate to the investigation stage of a criminal matter in addition to the prosecution and punishment stages?

OPC agrees this is a gap that should be clarified, as has been done in Australia. We note there is currently a risk that the refusal ground safeguards could be avoided by the timing of the request and indirectly incentivise requests for evidentiary material prior to the initiation of proceedings. This potentially undermines process protections afforded at the proceedings stage.

Q60 Should New Zealand have a statutory obligation in MACMA to consult with a requesting country to consider whether a request may be granted subject to terms and conditions before deciding to refuse a request?

We do not comment specifically on the option of requiring consultation prior to refusal. However, we note that it would be useful if MACMA highlighted the need to consider imposing conditions on granting a request in the situation where the requesting country's arrangements for handling personal information (whether legislative, contractual or otherwise) do not offer comparable privacy protections to New Zealand's. Some statutory mutual assistance regimes specifically provide for the setting of conditions on the handling of information provided under them, for example, the Commerce Act 1986 (s 99J) and the Financial Markets Authority Act 2011 (s 30(2), s 32(1)(b), s 33(3)).

This is an area that is currently under review in the context of Privacy Act, following the Law Commission's 2011 recommendation for enhanced accountability for disclosures of personal information overseas. Disclosing agencies will be required to take such steps as may reasonably be necessary to ensure that the information disclosed will be subject to acceptable privacy standards.[1]

Because of the cross border nature of the MACMA disclosures, it would be desirable for MACMA (or a subordinate instrument) to facilitate appropriate mitigation of any particular privacy risks associated with disclosing information to a specific jurisdiction, for example through the terms of a mutual assistance agreement, the provision of undertakings by the receiving country and/or the New Zealand agency imposing conditions on fulfilling a request for information. It may be useful for MACMA to authorise the Central Authority to consult with the Privacy Commissioner on cross border privacy issues, either generally or in any specific case.

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[1] Review of the Privacy Act 1993 (NZLC R123, 2011) R110.

Chapter 17 Search and surveillance requests

Q64 Do you think New Zealand should be able to obtain and execute a general examination order on behalf of a foreign country for criminal investigations and prosecutions?

The following comments are made in response to the proposed use of examination orders, but some apply equally to the use of other proposed coercive orders in a MACMA context.

We assume that if examination and other coercive powers are included in MACMA, they would require authorisation both by the Central Authority (in its discretion) and by the courts, and would be made available to foreign partners on a reciprocal basis.

Threshold for use of coercive powers

The use of coercive powers on behalf of a foreign state should be subject to a seriousness threshold, reflecting the potential intrusion and impact of such powers, as well as the domestic resourcing required to supervise their execution. As noted, the threshold for domestic use of an examination order is a suspected offence punishable by a minimum of 5 years imprisonment in a business context, or 7 years imprisonment in a non-business context, while the threshold for use of surveillance devices is a suspected offence punishable by a minimum of 7 years imprisonment. The threshold for use of these powers for the purpose of a foreign investigation or proceeding should be no less than these domestic thresholds.

The threshold for a MACMA search warrant is that the request relates to a criminal matter in the foreign country that is punishable by at least two years imprisonment (section 43(1)). It may not be sufficient to look solely at the imprisonment penalty set by the foreign jurisdiction. An additional step is whether New Zealand treats the offence as seriously as the foreign jurisdiction before the offence would be eligible for the use of coercive powers as a form of mutual assistance (as per the dual criminality approach to qualifying offences for extradition discussed in chapter 5).

Procedural protections

OPC supports the proposed procedural requirements in paragraph 17.23 of the Issues Paper, should the Law Commission recommend the availability of examination orders under MACMA.

As the Law Commission identifies, the concern about how to provide adequate human rights protections where a transcript is sent overseas needs to be addressed. We suggest that the results of the examination order should be subject to independent review, prior to delivery of the material to the overseas jurisdiction, on particular conditions if necessary.

OPC supports the requirement for an agreement on procedural matters including any use and retention of the transcript. We submit that there should be independent oversight of these agreements and it may be appropriate for the Privacy Commissioner to be consulted on their formulation. This would be consistent with the Privacy Commissioner's oversight role

in relation to international information sharing agreements (discussed in chapter 19), and would ensure that adequate provision is made for controls on secondary use and disclosure. It would also allow for additional safeguards to be included as necessary, depending on the adequacy of privacy laws in the foreign jurisdiction.

Transparency

Transparency about the use of examination orders and other coercive powers would be desirable with agencies being required to publicly report on the frequency with which the power is used, the type of offence involved, and the foreign jurisdiction involved. Timely reporting to the Privacy Commissioner should also be required.

Q65 Under what conditions should New Zealand be able to obtain and execute a surveillance device warrant on behalf of a foreign country for criminal investigations and prosecutions?

Limits and controls

Extending the availability of surveillance powers under MACMA would expand the scope for the surveillance of New Zealanders by foreign states. The potential impacts include a chilling effect on freedom of expression, from perceived intrusions into the private communications of New Zealanders. While the use of such powers is unlikely to affect a large number of New Zealanders, any lack of transparency about their use can give rise to unease and distrust amongst the wider community.

The use of such powers should therefore be proportionate and clearly justified. We consider there should be a high threshold and strict conditions on their use where the interception or surveillance is at the behest of another country. Information derived from interception or surveillance should be carefully and independently screened for relevance, the protection of third parties, and for interests protected by privilege, before being disclosed to a foreign country. Transparency and accountability measures will be vital to demonstrate that the use of any expanded powers is proportionately targeted to criminal offending.

Scope

Should the Law Commission decide to recommend the availability of surveillance powers under MACMA, consideration will need to be given to the scope of the power. The domestic regime makes clear that certain activities do not require a surveillance warrant (such as covert recordings of voluntary oral communications, and recordings made by an enforcement officer while lawfully on private premises).

However, it does not necessarily follow that information lawfully gathered by a law enforcement surveillance device without a warrant should flow to a foreign state without judicial authorisation. In our view, this may exceed New Zealanders' reasonable expectations of privacy. This suggests that the intersection of the controls on gathering and using surveillance material and the sharing of law enforcement information, both under MACMA and under inter-agency mutual assistance regimes (discussed in chapter 19), needs to be addressed.

Emergency powers

We note the Law Commission's reservation about extending emergency warrantless surveillance powers. We agree that this is a highly invasive extraordinary power. However, there is an issue raised later in the chapter and in chapter 21 about enabling action to be taken in order to preserve potential evidential material in urgent circumstances. There may be a case to consider whether there is justification for a suitably targeted warrantless surveillance power with a high threshold to cover truly exigent circumstances (such as where there is a significant risk of danger to life or health), provided that judicial oversight is provided before the fruits of the surveillance are sent offshore.

Although the surveillance power would be warrantless at the point of execution, safeguards could be developed to ensure that no use may be made of the material until a warrant is subsequently obtained. Where a warrant is refused, provision could be made for mandatory destruction of the material. Such an approach would limit the risk of missing a material opportunity to collect significant evidence of serious offending, while maintaining protection of individual rights through judicial oversight.

GCSB assistance

Another issue to clarify is whether assistance from the GCSB could be requested to assist with the execution of a surveillance warrant obtained by the Police on behalf of a foreign state. The GCSB Act was amended to clarify its assistance to domestic agencies at the discretion of the Director (section 8, 8C). Should the proposed regime allows the potential for GCSB assistance, OPC would need to carefully consider the implications, policy justification and additional safeguards that may be required, given the additional layer of complexity and accountabilities that this would involve.

Q66 Should New Zealand be able to obtain and execute a production order on behalf of a foreign country for criminal investigations and prosecutions?

OPC agrees with the Law Commission's analysis that production orders are generally less intrusive than search warrants, with the exception of the power to require production of a person's call associated data for a period of up to 30 days. This aspect of the production order power could be regarded as similar in nature to a surveillance power, although we acknowledge that the surveillance is retrospective rather than "real-time" surveillance. Nevertheless, we consider that the call data power requires a suitably robust threshold before being used on behalf of a foreign country, and other appropriate procedures to limit the disclosure of irrelevant information, such as independent review.

Q67 How should powers to intercept data in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?

Care needs to be taken in considering the expansion of surveillance powers to accommodate mutual assistance requests for real time interceptions of traffic and content data. As noted above, any expansion of surveillance powers or production order powers to obtain call associated data should be subject to an appropriate threshold to ensure that the surveillance is a justified and proportionate response. Strict conditions should apply,

appropriate undertakings required and thorough procedures established governing the use of surveillance powers in a MACMA context.

Q68 How should covert electronic surveillance powers in New Zealand be used in respect of criminal investigations and prosecutions in a foreign country?

See response to Q65 above.

Q69 How should the issue of the involvement of foreign law enforcement officers in executing search warrants (and potentially examination orders and surveillance device warrants) be dealt with under MACMA?

For reasons of sovereignty, accountability, legal compliance, and public trust and confidence in law enforcement, law enforcement powers executed in New Zealand should generally be executed by New Zealand law enforcement officers.

This approach also mitigates any risks to New Zealand's human rights framework from the execution of coercive orders by foreign officers. Coercive powers are entrusted to New Zealand's law enforcement agencies and are subject to the checks and balances in New Zealand's legal system. Such powers should not be delegated to foreign law enforcement officers without making due provision for scrutiny and accountability. A major consideration is whether there are meaningful avenues to address adverse impacts on citizens from the unreasonable use of such powers, once the foreign officer has returned with the fruits of the coercive order to the home jurisdiction (as per Q72).

Any role for foreign officers should therefore largely be limited to an ancillary assistance role, under the oversight and supervision of the New Zealand agency with primary responsibility for executing the warrant power remaining with the New Zealand officer. OPC suggests the involvement of foreign law enforcement officers in executing law enforcement powers should be subject both to the consent of the Central Authority (who should have a general discretion to refuse foreign assistance) and to judicial authorisation on issue of the relevant warrant. This would allow for an appraisal of the circumstances of the warrant application, and for appropriate conditions to be established.

Q70 How should MACMA deal with the issue of sending seized (or created) material overseas in response to a request that contains both relevant and irrelevant information?

Law enforcement searches of digital devices raises significant potential for privacy intrusion, given the sizeable quantity of data routinely held on individual devices. Consistent with our view that search powers should generally be executed by New Zealand law enforcement officers, we suggest the default presumption should be that searches of digital devices are the primary responsibility of the New Zealand law enforcement agency. To allow searches to be conducted offshore may risk diluting the rights of individuals to be protected from an unreasonable search under the Bill of Rights Act.

The default procedure should allow for relevant material to be identified, extracted and provided to the requester country to assist with an investigation, while preserving the integrity of the digital evidence in the original exhibit which would be held in New Zealand

until required by the requester country as evidence in proceedings. This allows for New Zealand to provide substantive assistance to a criminal investigation, while maintaining a degree of substantive control over the evidence gathered.

Provision could be made for a search to be conducted by a requester country in special circumstances where justified and proportionate in the circumstances. However, adequate assurances on issues such as record-keeping and search methodology would be needed, to verify the reasonableness of the search undertaken.

Q71 How should MACMA deal with the issue of sending potentially privileged or confidential seized (produced or created) material overseas in response to a request?

To ensure access to justice rights are maintained, MACMA should minimise the potential for privileged material to be sent overseas and privilege claims should generally be dealt with by the New Zealand courts.

On the exercise of overt law enforcement powers, affected individuals should be notified of the search or production of information so that they have a meaningful opportunity to raise a privilege claim (including the opportunity to assess the material for privilege through access to it) before the information is disclosed overseas.

On the exercise of covert law enforcement powers, the material gathered should be independently reviewed before it is disclosed overseas, to reduce the risk that potentially privileged material is included. We suggest that the court authorising the use of the covert power could appoint counsel from the independent bar to fulfil this function. There should also be measures to recall or freeze the use of specific material, should a privilege claim be raised following an overseas disclosure.

Searches on behalf of foreign countries of material likely to be privileged such as searches of confidential client material held by lawyers, or sensitive locations such as churches or religious communities, should attract the additional safeguard of independent supervision. The Law Commission has previously suggested that independent supervision of a search may be warranted in particular cases as an additional safeguard.[2]

Q72 How should MACMA deal with a New Zealand Bill of Rights Act challenge to an investigative action taken under the Search and Surveillance Act in response to a request?

We agree with the Law Commission's view that individuals who are subjected to such powers should have the right to challenge them under the Bill of Rights Act. This is consistent with the approach that New Zealand law enforcement agencies should be primarily responsible and accountable for the exercise of coercive powers, and that individuals should not effectively lose their process rights where the fruits of coercive orders are disclosed overseas.

The provision of material derived from the exercise of coercive powers might be made conditional on any ruling of the New Zealand courts as to admissibility, under the Law Commission's second option.

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[2] Search and Surveillance Powers (NZLC R97, 2007) at [12.88].

Q73 How should MACMA protect against the collateral use of any seized (produced or created) material that is sent overseas in response to a request?

OPC supports the inclusion of safeguards to protect against the collateral use of the fruits of coercive orders disclosed overseas. As the Law Commission notes, this is consistent with the principle of speciality in the context of extradition.

Further measures that might be considered include:

- verifying whether the foreign state's legislation contains a reciprocal provision to section 23 of MACMA;
- making any use of seized material disclosed conditional on the consent of the New Zealand agency providing it;
- including provision in MACMA for the Central Authority to obtain formal undertakings from the foreign state in relation to information obtained through a search or surveillance warrant or other coercive process. (MACMA currently provides for undertakings in relation to other forms of assistance - sections 39 and 52).

Q74 How should MACMA deal with issues of access, retention, and disposal of seized (produced or created) material that is sent overseas in response to a request?

It is critical that MACMA establish parameters around the access, retention and disposal of material obtained through the use of coercive powers, particularly if search and surveillance powers available through MACMA are expanded. Processes are needed both in relation to the obligations of the domestic agency gathering the information, and the obligations of the foreign country receiving the information in response to a request.

As noted, these parameters are set in a domestic context by the Search and Surveillance Act – Part 4(6). While much of Part 4 applies to MACMA searches, the Part 4(6) rules are expressly excluded (section 44(3)). This gap should be addressed in the review of MACMA.

The Part 4(6) rules create a set of procedures about the custody, return and disposal of materials obtained through a search or production power and entitles people to apply to the court for the return of seized items or access to them. Material may be held for up to 6 months, with provision for a court application should this period need to be extended.

The lack of express rules in the context of MACMA searches makes the basis for domestic agencies to hold, return and dispose of material obtained on behalf of foreign countries somewhat unclear. A set of rules and presumptions based on Part 4(6) should be created and applied to domestic agencies where coercive powers are used to assist foreign countries.

The second question is how to establish rules in this area and verify compliance by the foreign countries receiving mutual assistance. This may require a combination of disclosure conditions and undertakings from the receiving country.

There should also be compliance oversight, by requiring foreign requesters to report on the handling of the material provided. Where a domestic agency finds there are any issues with compliance, this should be reported to the Central Authority and may be relevant to the

handling of future requests from the jurisdiction concerned. Breaches of undertakings should also be publicly reported (as per the Australian Attorney-General's annual report).

We note that similar issues arise in relation to searches incidental to arrest under the Extradition Act. While Part 4 of the Search and Surveillance Act applies to these searches, this does not include subpart 6. (See section 83(4) of the Extradition Act). It would be desirable to take a consistent approach to addressing these issues in both Acts.

Q75 Should MACMA be amended to make the provision of search and surveillance assistance conditional on New Zealand and the foreign country reaching prior agreement on a list of specified matters?

OPC supports the proposed clarification of matters to be addressed between New Zealand with its mutual assistance partners, prior to providing assistance through use of compulsory law enforcement powers. In particular, it is crucial to reach agreement on the handling of information gathered through use of these powers, before it is sent offshore.

Chapter 18 Requests for information

Q76 Do you think MACMA needs a specific provision that gives the Central Authority a statutory mechanism for requesting information from domestic agencies?

OPC agrees with the Law Commission's conclusion that the Official Information Act should not be used as the basis to relay mutual assistance requests to domestic government agencies. While the OIA has the administrative advantage of providing a time limited process for responding to requests, it is not intended or designed to enable the disclosure of personal information about citizens between government agencies.

OPC agrees that a feasible option is to create an information request mechanism in MACMA that imposes a timeframe for agency responses. To avoid confusion, MACMA could clarify that the OIA does not apply. We can provide input into the design of a MACMA request mechanism as the review progresses, if this would be useful.

Q77 How can the relationship between the Privacy Act and MACMA be clarified in the law?

Decision-making accountability

The Law Commission presents three options for making substantive release decisions. OPC's firm preference is the first option, as we consider this provides for an appropriate balance of New Zealand's domestic and foreign interests.

The decision about whether to release personal information in response to mutual assistance requests should remain squarely with the information holder agency (consistent with the Privacy Act). It is the holder agency that is best positioned to assess any adverse impact of the disclosure on any competing domestic public interests such as public service delivery by the agency. Holder agencies should retain the discretion to decline a request

where public service provision relies on high levels of ongoing trust and confidence. Where a request is not fulfilled on a non-compelled basis, the case and justification for a coercive order can be assessed.

We anticipate that the Central Authority process underlying the request will demonstrate a clear public interest in favour of the provision of information that will prevail in the large majority of requests. However, the option of refusal needs to be retained to cater for rare cases where the public interest is not so clear-cut. The provision of health information, for example, can be difficult to balance in favour of disclosure to meet a request, given its sensitivity.

This is consistent with the domestic position where law enforcement agencies may request (but not compel) the disclosure of personal information from government agencies about citizens in the course of their enquiries, without a warrant or other compulsory order.

Clarification of disclosure grounds

OPC agrees that a legislative amendment would clarify the basis on which MACMA disclosures may be made, to overcome the current limitation of the maintenance of the law exception that restricts disclosures to maintenance of New Zealand law.

The option in paragraph 18.23 of the Issues Paper to expand “maintenance of the law” to include “maintenance of foreign law” is broader than is necessary for MACMA purposes, and could undermine the protections created by the MACMA scheme. The exceptions to privacy principle 11 apply to disclosures by a broad range of public and private sector agencies, and any expansion of the exception needs to be carefully assessed and targeted to the particular policy problem identified to avoid unintended consequences. We are happy to provide advice on a more specific legislative amendment to the Privacy Act or a legislative override in MACMA.

Q78 Do you think MACMA needs a statutory framework for collecting voluntary evidence?

The current position is unsatisfactory and we agree that it should be clarified in MACMA. Individuals should be clearly informed about whether they are compelled to answer questions or whether the interview is voluntary.

For comparative purposes, in a Privacy Act context, privacy principle 3 expects that the collection of personal information from an individual requires adequate transparency about the purpose of collection, the intended recipient, whether the collection is authorised or required under law, and the consequences of not providing the requested information. This baseline transparency standard may offer an appropriate benchmark in the context of voluntary interviews.

There is also a question about whether covert recordings of voluntary interviews should be made available to overseas countries. Under section 47 of the Search and Surveillance Act, such recordings do not require a warrant for domestic purposes. However, this should not automatically permit the recording to be shared with overseas jurisdictions, without appropriate oversight.

Q79 Are there any other forms of assistance that MACMA ought to specifically provide for?

We do not have specific comments but would welcome the opportunity to discuss the privacy aspects of any proposal by the Law Commission to include other forms of assistance in MACMA.

Q80 How should MACMA deal with a request received by a foreign country for material that has already been lawfully obtained under a warrant or order? Should any involvement from the court be required?

OPC supports consideration being given to requiring secondary disclosures of compulsorily acquired material to be authorised by the courts, given the potential for secondary disclosures to magnify the impact of a coercive power. This would address any risk of undermining the original authorisation, for example, where material seized is secondarily disclosed on suspicion of a different offence. In our view, the courts should have the opportunity to impose any appropriate conditions on the use and disclosure of material gathered by using coercive powers, whether primary or secondary (or beyond).

Chapter 19 – Managing the overlap with inter-agency mutual assistance regimes

Q81 What fundamental safeguards do you think should be included in all inter-agency mutual assistance regimes?

Need for privacy safeguards

International information sharing through inter-agency mutual assistance regimes can pose risks to New Zealanders' privacy as it takes place outside New Zealand's privacy framework. Privacy safeguards should be among the fundamental safeguards included in information sharing agreements enabled through inter-agency mutual assistance regimes. The privacy safeguards required include the following:[3]

1. The purpose for sharing the information should be made clear.
2. Information sharing should be positively enabled though primary legislation.
3. The public benefit afforded by information sharing under the agreement should be likely to outweigh the privacy risks of doing so.
4. The type and quantity of information to be shared should be no more than is necessary to facilitate the purpose of the agreement.
5. The agreement should contain adequate safeguards to protect New Zealanders' privacy.
6. Sharing should be transparent and reviewable for compliance with the enabling legislation, the terms of the sharing agreement, and its overall effectiveness.

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[3] These safeguards have their domestic equivalents in Part 9A of the Privacy Act.

We are happy to provide further discussion of the necessary privacy safeguards in more detail.

Forms of oversight

It is important that the public are informed and assured about the fact and adequacy of international information sharing and the Privacy Commissioner's assessment of these matters are of genuine public interest.

There are different models of Privacy Commissioner oversight that can be incorporated in an inter-agency mutual assistance regime.

Consultation, review and reporting

Consultation with the Privacy Commissioner is a means of ensuring that privacy issues are adequately addressed in the inter-agency agreement. A number of inter-agency mutual assistance regimes require the New Zealand agency to consult with the Privacy Commissioner before entering into information sharing agreements, and enable the Commissioner to require that the agreement be reviewed and reported on.[4]

We suggest that this should be the default Privacy Commissioner oversight mechanism for information sharing agreements that are a component of inter-agency mutual assistance regimes.

Information matching controls

Two international information sharing provisions are structured as information matching arrangements under Part 10 of the Privacy Act which receive close scrutiny from the Privacy Commissioner.[5] This form of oversight is appropriate in the context of automated transfers and the comparison of data relating to multiple individuals for a particular legislated purpose.

Privacy Act complaints jurisdiction

An alternative mechanism is to provide that any disclosure that does not comply with legislative requirements is deemed to be a breach of a privacy principle, thereby invoking the Privacy Commissioner complaints jurisdiction under Part 8 of the Privacy Act. See for example the Organised Crime and Anti-Corruption Legislation Bill, clause 61, adding section 95B to the Policing Act 2008.

This is a weaker oversight mechanism as it depends on individuals making complaints to the Privacy Commissioner that they have suffered a detriment due to the compliance failure, rather than providing for systematic review of information sharing arrangements.

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[4] Immigration Act 2009, ss 305, 306; Immigration Advisers Licensing Act 2007, s 92; Customs and Excise Act 1994, s 281; Passports Act 1992, ss 36, 37; Births, Deaths, Marriages and Relationships Registration Act 1995, ss 78D-F; Commerce Act 1986, s 99E; Food Act 2014.

[5] Social Welfare (Transitional Provisions) Act 1990, ss 19-19D; Tax Administration Act 1994, s 85B.

Q82 What is the correct relationship between inter-agency mutual assistance regimes and MACMA?

MACMA can provide a useful role in ensuring that inter-agency regimes observe the fundamental human rights, privacy, criminal process, oversight and other safeguards. As highlighted in chapter 17, particular safeguards are required in relation to the manner in which coercive powers are executed on behalf of a foreign state.

One option to consider is whether MACMA might include default provisions that apply to inter-agency mutual assistance regimes unless expressly overridden in a particular statutory regime.

MACMA safeguards

OPC supports the Law Commission's preliminary view that MACMA should continue to be the primary tool for foreign countries accessing the Police's coercive powers, but that mutual assistance by regulatory agencies might provide direct assistance (including the use of coercive powers) under inter-agency mutual assistance regimes.

We suggest the presumption should be that any exercise of a coercive law enforcement power in response to a foreign request relating to the investigation or prosecution of an individual for a criminal offence (as so classified by New Zealand), should be subject to the MACMA safeguards, including:

- the Central Authority's process for accepting requests, and
- the process safeguards in relation to the use of coercive orders.

However an option to streamline requests from countries whose legal system and human rights framework is substantially similar to New Zealand's, might be to establish an approval process so that New Zealand law enforcement agencies could respond to these requests from eligible countries without the direct oversight of the Central Authority. MACMA safeguards for the acceptance of requests and the use of coercive orders could be directly mirrored in the approved mutual assistance regime. This has parallels with the designation approach taken in Part 4 of the Extradition Act.

Oversight

Oversight is the other area where default provisions could be included in MACMA by requiring the New Zealand agency to:

- report annually on the inter-agency mutual assistance regime;
- publish annual statistics on the use of the inter-agency mutual assistance regime;
- consult the Privacy Commissioner (and possibly the Central Authority where the mutual assistance potentially relates to criminal offending) prior to entering into information sharing agreements to provide mutual assistance;
- report annually on the operational information sharing arrangements to the Privacy Commissioner, or on the request of the Privacy Commissioner;

- co-operate in a review of the information sharing component of the regime by the Privacy Commissioner

Q82 Given the types of assistance that can be undertaken under inter-agency mutual assistance agreements, how do we best ensure that there is sufficient oversight when foreign countries request material that has been obtained via coercive means?

Oversight of requests

It is critical that there are various layers of oversight of requests for information that has been compulsorily acquired by New Zealand agencies for the investigation or prosecution of criminal offences against an individual:

- First, such requests should be subject to the safeguards in MACMA, unless there is a justifiable case for departing from that process in any particular context;
- Second, judicial authorisation of the warrant or order authorising the gathering of the information and its disclosure to the foreign counterpart agency;
- Third, public reporting and reporting to the Privacy Commissioner of the use of mutual assistance regimes would enable a degree of public oversight.

General oversight of inter-agency mutual assistance regimes

OPC supports the development of mechanisms for the general oversight of the inter-agency regimes. As the Law Commission identifies, there is potential for greater oversight, both initial oversight of the legislative scheme as it is established and ongoing monitoring of its operation.

Initial oversight could include assessing and advising on the proposed legislative scope and consistency with other comparable regimes. Ongoing monitoring could involve regular assessment of request handling and the provision of assistance and information to foreign agencies, verification of compliance with the legislative safeguards by the New Zealand agency, and compliance by foreign agencies with their obligations under the regime.

Options to implement initial oversight mechanisms might include a legislative role for an oversight body, combined with non-legislative mechanisms that apply to the development and scrutiny of new legislation. Establishing best practice legislative benchmarks might involve default provisions being set out in MACMA and/or the Legislation Advisory Committee's (LAC) Guidelines on Process and Content of Legislation.

Options to implement ongoing oversight of inter-agency regimes might require a legislative oversight role and legislative requirements as to reporting and review.

Who should provide oversight?

The Privacy Commissioner has an accepted role in providing oversight of the privacy issues arising from the development and operation of information sharing agreements associated with these regimes. More generic oversight of mutual assistance regimes may raise issues that go beyond the Commissioner's legislative mandate to monitor privacy impacts. It may

be desirable to develop a broader oversight model that involves additional agencies such as the Central Authority, while maintaining and strengthening the Privacy Commissioner's current oversight of privacy safeguards.

Conclusion

We hope that these comments are of assistance to the review. We would be happy to discuss any of these issues with the Law Commission, or provide any further views and information, as the review progresses.