

Serious Fraud Office (Abolition and Transitional Provisions) Bill

Government Bill

As reported from the Law and Order Committee

Commentary

Recommendation

The Law and Order Committee has examined the Serious Fraud Office (Abolition and Transitional Provisions) Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This bill repeals the Serious Fraud Office Act 1990 and disestablishes the Serious Fraud Office (SFO). The functions of the Serious Fraud Office will be taken over by the Organised and Financial Crime Agency of New Zealand (OFCANZ), which will be hosted within the New Zealand Police.

This commentary covers the key amendments that we recommend to the bill. It does not cover minor or technical amendments.

The development of the new Organised and Financial Crime Agency of New Zealand represents a significant opportunity for those presently engaged in the investigation of serious and complex fraud. It also offers a new mechanism to increase the attention given to serious and complex fraud, while significantly challenging those engaged in organised crime, whether of an international or domestic nature.

Accordingly, this bill disestablishes the SFO so that its existing functions and powers can be reformed into a permanent Serious Fraud Taskforce within OFCANZ. This decision would provide an effective response to the changed environment and establish a more streamlined response to both fraud and organised crime. Combining the skills, abilities, tools, and resources of the two organisations to undertake the financial investigations required to more effectively combat organised crime and serious or complex fraud is a significant step forward.

The inclusion of current SFO staff and expertise as part of the Financial Crime Group within OFCANZ will add to the critical mass needed to develop appropriate training and career opportunities to build the Police's financial crime investigation capability generally. It is anticipated that this will lead to an improved ability to investigate commercial fraud wherever it occurs, and regardless of whether it meets the standard of "serious or complex".

This integration would also allow the greatest degree of flexibility and coordination in the investigation of serious or complex fraud, while ensuring that the investigation of serious or complex fraud is identified as an ongoing priority within the Police. OFCANZ's ability to combat serious or complex fraud would be substantially enhanced by the integration of the SFO.

Oversight

We note that additional judicial oversight would be introduced regarding the powers to demand the production of documents, attendance at investigations, and answers to questions. We think this is appropriate, since failing to provide for such oversight would amount to the conferral of unusual powers on the Police. Judicial oversight would be consistent with the Police's exercise of statutory powers in other criminal investigations.

Production orders

We recommend amending clause 21 to clarify that there would be a requirement for a person to state to the best of his or her knowledge the location of a document, if he or she did not have the document. In the bill as introduced it is not clear that the penalty for failing to comply with a production order would extend to this requirement.

Delay of proceedings

We recommend amending clause 33 to prevent a judicial review resulting in an interim order that would delay the progress of the investigation. This amendment would align the bill more closely with section 21 of the Serious Fraud Office Act and clause 95 of the Criminal Proceeds (Recovery) Bill. It would still be possible to apply for a judicial review, but interim orders would not prevent a person from being required to comply with a production or examination order.

Schedule

We recommend amending the Schedule so that the references in the Tax Administration Act 1994 to commissioners are clear. In the bill as introduced, the amendment to the Act refers to two commissioners and the drafting may cause confusion about whether the Inland Revenue Commissioner or the Police Commissioner is intended in each instance, since either would be possible in context.

Review

We were concerned that there was no mechanism in this legislation to review the changes to the Serious Fraud Office's investigation powers that would result from the passage of the bill. We understand that this bill includes transitional provisions, however, and were advised that the Search and Surveillance Bill, which is still to be introduced, is likely to include a review process to be undertaken five years after the enactment of the Search and Surveillance Bill. This review would examine the investigation powers under the new regime.

New Zealand National Party minority view

The National Party does not agree that it is desirable to host the Serious Fraud Office within the Police at the present time and will oppose the bill. This is for four reasons; timing; degradation of powers; current Police practice and capability; and process.

Timing

There are currently ongoing investigations by the SFO in respect of collapsed finance companies. It is estimated that 175,000 people have invested in these companies. National members believe it is the wrong time to be removing the independent capability of our most engaged serious fraud investigating agency.

Degradation of powers

The Director of the SFO has enjoyed powers to demand provision of documents, attendance at investigations, and answers to questions, since the inception of the office in 1990. This Bill removes these powers from the Director and requires the applications to be made before the court. The Police, the Law Commission, and those in support of the bill have stated that the removal of these powers is a relatively minor point. However National members believe their argument is insufficient to warrant change to the status quo.

Current Police practice and capability

Fraud investigation has not been seen as a priority in the Police for ten years. There are currently only three offices within the Police dealing with serious fraud. Police acknowledged that they have concentrated on crimes against the person as a priority due to the need to ration resources. National believes that hosting the SFO within the Police at a time when capability is low and the preference is for investigating other categories of crime is not the best option for the office. The Police have expressed a desire to have the capability of the SFO support the Organised and Financial Crime Agency (OFCANZ). However the expertise of the SFO can be seconded from a stand-alone agency just as other agencies currently support the Police by secondment.

Process

The committee heard that the decision was made to host the SFO within OFCANZ in September 2007. The announcement of this decision was made by press release. The SFO told the committee that they had been consulted two weeks prior to the public

announcement. At the time of the announcement, the committee had been in the process of considering which agency should be the recovery body under the Criminal Proceeds (Recovery) Bill. National Party members of the committee believe that by making this announcement without requisite consultation, the Executive undermined the select committee process.

Appendix

Committee process

The Serious Fraud Office (Abolition and Transitional Provisions) Bill was referred to the committee on 20 May 2008. The closing date for submissions was 20 June 2008. We received and considered seven submissions from interested groups and individuals. We heard four submissions.

We received advice from the Ministry of Justice, the New Zealand Police, and the New Zealand Law Commission.

Committee membership

Ron Mark (Chairperson)

Hon David Benson-Pope (Deputy Chairperson)

Chester Borrows

Martin Gallagher

Hon Darren Hughes

Simon Power

Kate Wilkinson

**Serious Fraud Office (Abolition and Transitional
Provisions) Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Annette King

Serious Fraud Office (Abolition and Transitional Provisions) Bill

Government Bill

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**Serious Fraud Office (Abolition and Transitional
Provisions) Bill**

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Serious Fraud Office (Abolition and Transitional Provisions) Act **2008**.

2 Commencement 5

(1) **Sections 5, 8, and 45** come into force on the day after the date on which this Act receives the Royal assent.

(2) The rest of this Act comes into force 21 days after the date on which this Act receives the Royal assent.

Part 1 10

Preliminary provisions

3 Act binds the Crown
This Act binds the Crown.

4 Purposes 15
The purposes of this Act are—

(a) to repeal the Serious Fraud Office Act 1990 and to provide for matters consequential on the abolition of the Serious Fraud Office; and

(b) to vest control of the documents of the Serious Fraud Office in the police, while continuing the protection given to those documents under that repealed Act; and 20

(c) to empower courts, during a transitional period, to order persons to produce documents and supply information that constitutes evidentiary material of offending in the context of serious or complex fraud; and

(d) to enable the police, during that period, to conduct effective investigations into offending in the context of serious or complex fraud. 25

5 Interpretation
In this Act, unless the context otherwise requires,—

business context, in relation to the acquisition of any information by a person, means the acquisition of the information in the person's capacity as—

- (a) a provider of professional services or professional advice in relation to a person who is being investigated, or 1 or more of whose transactions are being investigated, in respect of an offence; or 5
- (b) a director, manager, officer, trustee, or employee of an entity that is being investigated, or 1 or more of whose transactions are being investigated, in respect of an offence

Commissioner means—

- (a) the person from time to time holding office under section 3 of the Police Act 1958; and 10
- (b) if there is a vacancy in the office of Commissioner or if the Commissioner is absent from duty, means the Deputy Commissioner referred to in section 4(5) of that Act

delegate of the Commissioner, in relation to any power conferred by a provision of this Act, means a person to whom that power has been delegated under **section 45** 15

designated person means a person designated by the Commissioner under **section 8**

Director of the Serious Fraud Office has the same meaning as **Director** in section 2 of the Serious Fraud Office Act 1990 immediately before its repeal by **section 6** 20

document means—

- (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes— 25
 - (i) a label, marking, or other writing that identifies or describes a thing of which it forms part, or to which it is attached:
 - (ii) a book, map, plan, graph, or drawing:
 - (iii) a photograph, film, or negative; and 30
- (b) information electronically recorded or stored, and information derived from that information

entity means a body corporate, trust, partnership, association of persons, or sole trader

evidentiary material, in relation to the commission or suspected commission of any offence, means any document, thing, information, or matter (whether tangible or intangible) that is relevant to the investigation of the offence, including any such document, thing, information, or matter that— 35

- (a) is evidence of the commission of the offence; or

(b) indicates that the alleged offence has not been committed or that a person has not been involved in the commission of the offence

examination order means an order made under **section 26**

lawyer has the same meaning as in section 6 of the Lawyers and Conveyancers Act 2006

police has the same meaning as in section 2 of the Police Act 1958

production order means an order made under **section 20**

protected information has the same meaning as in section 2 of the Serious Fraud Office Act 1990 immediately before its repeal by **section 6** and includes—

(a) any information obtained by the Commissioner or a delegate of the Commissioner by reason of **section 15**; and

(b) any information derived from the information described in **paragraph (a)**

Serious Fraud Office means the department of State in existence immediately before the commencement of **section 6**

serious or complex fraud includes a series of connected incidents of fraud that, if taken together, amount to serious or complex fraud.

Part 2

Repeal of Serious Fraud Office Act 1990 and transitional matters

Subpart 1—Repeal of Serious Fraud Office Act 1990

6 Repeal of Serious Fraud Office Act 1990

The Serious Fraud Office Act 1990 (1990 No 51) is repealed.

7 Documents of Serious Fraud Office

(1) On the commencement of this section, the possession and control of all documents held by the Serious Fraud Office, immediately before that commencement, vests in the Commissioner.

(2) Any information that immediately before the vesting by **subsection (1)** was subject to sections 36 to 44 of the Serious Fraud Office Act 1990 continues to be subject to those sections with the modifications specified in **subsection (4)**.

(3) Any information that the Commissioner or a delegate of the Commissioner obtains by reason of **section 15** is deemed to be information to which **subsection (2)** applies.

- (4) For the purposes of **subsection (2)**, the definition of **protected information** in section 2 and sections 36 to 44 of the Serious Fraud Office Act 1990 must be read as if—
- (a) the references to a member of the Serious Fraud Office were references to a designated person: 5
 - (b) the references to the Director were references to the Commissioner or a delegate of the Commissioner:
 - (c) in any case where any information is disclosed by reason of **section 15**, the references to the Serious Fraud Office were references to the Commissioner, or a delegate of the Commissioner, or a designated person. 10
- 8 Designation of persons by Commissioner**
- The Commissioner may designate, by name or by reference to any position held or to be held, any person as a person who is eligible to be involved in the implementation of this Act in accordance with any delegations made under **section 45** or any directions given by the Commissioner or a delegate of the Commissioner. 15
- 9 Restriction of compensation for technical redundancy arising from abolition of Serious Fraud Office**
- (1) An employee or former employee of the Serious Fraud Office is not entitled to receive any payment or other benefit on the ground that his or her position in the Serious Fraud Office has ceased to exist, as a result of the abolition of the Serious Fraud Office and the transfer of its functions to the police, if— 20
- (a) the employee is offered equivalent employment in the police (whether or not the employee accepts the offer); or
 - (b) the employee is offered, and accepts, other employment in the police. 25
- (2) **Equivalent employment** to the employee's employment in the Serious Fraud Office is employment in the police—
- (a) in substantially the same position; and
 - (b) in the same general locality; and
 - (c) on terms and conditions of employment that are no less favourable than those that apply to the employee immediately before the offer of equivalent employment (including any service-related redundancy and superannuation conditions); and 30
 - (d) on terms that treat the period of service with the Serious Fraud Office (and any other period of service recognised by the Serious Fraud Office as continuous service) as if it were continuous service with the police. 35
- (3) This section overrides Part 6A of the Employment Relations Act 2004.
Compare: 1988 No 20 s 30E

10 Appointment of employees of Serious Fraud Office to police

Sections 8 to 11 of the Police Act 1958 do not apply to the appointment of an employee or former employee of the Serious Fraud Office to a position in the police if the employee’s position in the Serious Fraud Office ceases to exist as a result of the abolition of the Serious Fraud Office and the transfers of its functions to the police. 5

Compare: 1988 No 20 s 30F

11 References to Serious Fraud Office

(1) **Subsection (2)** applies to an enactment (other than this Act) or other things including (without limitation) deeds, agreements, proceedings, instruments, documents, and notices that— 10

- (a) are in force or existing at the commencement of this section; and
- (b) contain a reference to the Serious Fraud Office or to the Director or chief executive of the Serious Fraud Office.

(2) The reference to the Serious Fraud Office must be read as a reference to the police and the reference to the Director of the Serious Fraud Office must be read as a reference to the Commissioner. 15

(3) The Commissioner or a delegate of the Commissioner may continue the prosecution of every criminal proceeding taken by the Director of the Serious Fraud Office that is pending at the commencement of this section. 20

(4) Nothing in this section or any other provision of this Act transfers the chief executive or any employee of the Serious Fraud Office to the police.

Compare: 1988 No 20 ss 30B, 30H(2), 30J(1)

12 Other savings and transitional matters arising from abolition of Serious Fraud Office 25

The Governor-General may, by Order in Council, provide for savings and transitional matters connected with the abolition of the Serious Fraud Office.

Compare: 1988 No 20 s 30K

13 Effect of repeal of Serious Fraud Office Act 1990

(1) The repeal of the Serious Fraud Office Act 1990 does not affect— 30

- (a) property, rights, or obligations of the Crown (whether or not in the name of the Crown or of the Serious Fraud Office, the chief executive of the Serious Fraud Office, or other person in the Serious Fraud Office); or
- (b) the commencement or continuation of proceedings by or against the Crown (whether or not in the name of the Crown or of the Serious Fraud Office, chief executive, or other person in the Serious Fraud Office). 35

(2) In this section, **property** means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal; and includes rights, interests, and claims of every kind in relation to property, however they arise.

- (3) This section does not limit **section 11**.
- (4) This section applies for the avoidance of doubt.
Compare: 1988 No 20 s 30L
- 14 Consequential amendments to other Acts**
The Acts specified in the **Schedule** are amended in the manner indicated in that schedule. 5
- 15 Continuing application of Serious Fraud Office Act 1990 to certain matters**
- (1) The Serious Fraud Office Act 1990 (the **repealed Act**), as in force immediately before the commencement of this Act, continues to apply in respect of the instruments specified in **subsection (2)**. 10
- (2) The instruments are as follows:
- (a) any notice under section 5 or 9 of the repealed Act, being a notice given to a person before the commencement of this Act and in force immediately before that commencement: 15
- (b) any application for a warrant made under section 6(1) or 10(1) of the repealed Act, being an application pending before a court immediately before the commencement of this Act:
- (c) any warrant issued under section 6(2) or 10(2) of the repealed Act, being a warrant issued either before the commencement of this Act and in force immediately before that commencement or issued after that commencement and in reliance on this section. 20
- (3) For the purposes of **subsection (1)**, the repealed Act must, in respect of any thing done, or required to be done, after the commencement of this section, be read as if— 25
- (a) for “Director” there were substituted “Commissioner or a delegate of the Commissioner”:
- (b) for “member of the Serious Fraud Office” there were substituted “delegate of the Commissioner”.
- (4) The indemnity conferred by section 35 of the repealed Act continues in effect and enures for the benefit of every person who has been a member of the Serious Fraud Office. 30

Subpart 2—Orders assisting certain investigations during transitional period

Expiry

16 Expiry and repeal of subpart

- (1) This subpart expires on the close of 31 July 2011 or on the close of an earlier date appointed by the Governor-General by Order in Council. 5
- (2) This subpart, if not earlier repealed, is repealed at the time at which it expires.
- (3) Any application under this subpart pending before a court immediately before the repeal of this subpart may be heard and determined as if this subpart had not been repealed. 10
- (4) Any order under this subpart that is in effect immediately before the repeal of this subpart, or that is made after that repeal in reliance on **subsection (3)**, has effect according to its tenor and as if this subpart had not been repealed.

Serious or complex fraud

17 Factors relevant to existence of serious or complex fraud 15

Whenever any question arises, under this subpart, whether an offence arises in the context of serious or complex fraud or involves such fraud, regard must be had to the following matters:

- (a) the suspected nature and consequences of the fraud:
- (b) the suspected scale of the fraud: 20
- (c) the legal, factual, and evidential complexity of the matter.

Orders

18 Conditions for making production order

The conditions for making a production order are that—

- (a) there are reasonable grounds to suspect that— 25
- (i) an offence punishable by imprisonment has been committed, or is being committed, or is about to be committed; and
- (ii) the offence arises in the context of serious or complex fraud; and
- (b) there are reasonable grounds to believe that the documents sought by the proposed order— 30
- (i) constitute evidentiary material in respect of the offence; and
- (ii) are in the possession or under the control of the person against whom the order is sought.

19 Commissioner or Commissioner’s delegate may apply for production order

- (1) The Commissioner or a delegate of the Commissioner may, without notice, apply to a High Court Judge or to a District Court Judge for a production order against a person if the Commissioner or the delegate is satisfied that the conditions specified in **section 18** for making the order against the person are met. 5
- (2) A delegate of the Commissioner may apply under **subsection (1)** only with the prior approval of the Commissioner or another delegate of the Commissioner.
- (3) In no case may a delegate of the Commissioner who applies under **subsection (1)** approve, under **subsection (2)**, his or her own application. 10
- (4) An application under this section must be in writing, and on oath, and must set out the following particulars:
 - (a) the name of the applicant;
 - (b) a description of the offence suspected of having been committed: 15
 - (c) the facts relied on to show reasonable grounds to suspect the commission of the offence;
 - (d) a description of the documents for which production is sought;
 - (e) the facts relied on to show reasonable grounds to believe the documents sought are in the possession or under the control of the person against whom the order is sought. 20

20 Judge may make production order

- (1) A High Court Judge or a District Court Judge may make a production order against a person if satisfied, on an application made under **section 19**, that the conditions specified in **section 18** for making the order are met. 25
- (2) The order must be promptly served on the person against whom it is made.

21 Contents of production order

- ~~(1) A production order must require the person against whom it is made to give the Commissioner, or a person identified in the order, any documents described in the order. 30~~
- (1) A production order must require the person against whom it is made (person A)—
 - (a) to give the Commissioner, or a person identified in the order, any documents described in the order that are in the possession or under the control of person A; and 35
 - (b) if any of those documents are not, or are no longer, in the possession or under the control of person A, to disclose, to the best of person A’s knowledge or belief, the location of those documents to the Commissioner or to the person identified in the order.

- (2) The production order must set out the following:
- ~~(a) the name of the person required to comply with the order:~~
 - (a) the name of person A:
 - (b) the grounds on which the order is made:
 - (c) the documents required to be given: 5
 - (d) the time by which, and the way in which, the documents must be produced.
- (3) The production order may describe the documents required to be given by reference to a class or category of document.
- (4) If ~~the production order is made against~~ person A is a body corporate or an unincorporated body, the order may specify an individual (whether by name or by reference to a position held in the body) who is to comply with the order as the body's representative. 10

22 Duration of production order

A production order is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made). 15

23 Documents produced under production order

When any document is produced in compliance with a production order, the Commissioner or a delegate of the Commissioner may do 1 or more of the following things: 20

- (a) retain the original document produced if it is relevant to the investigation, provided that a copy of the document is taken and returned as soon as practicable after the document is produced:
 - (b) take copies of the document, or of extracts from the document:
 - (c) if necessary, require the person producing the document to reproduce, or to assist any person nominated by the Commissioner or a delegate of the Commissioner to reproduce, in usable form, any information recorded or stored in the document. 25
- ~~(2) If any person is required to produce any document under a production order and fails to do so, the Commissioner or a delegate of the Commissioner may require that person to state to the best of his or her knowledge or belief where the document is.~~ 30

24 Conditions for making examination order

The conditions for making an examination order against a person are that—

- (a) there are reasonable grounds to suspect— 35
 - (i) that an offence punishable by imprisonment has been committed, or is being committed, or is about to be committed; and

- (ii) that the offence arises in the context of serious or complex fraud;
and
 - (b) there are reasonable grounds to believe that the person sought to be examined has information that constitutes evidentiary material in respect of the offence; and 5
 - (c) the person has been given a reasonable opportunity to provide that information but has declined or neglected to do so.
- 25 Commissioner or Commissioner’s delegate may apply for examination order**
- (1) The Commissioner or a delegate of the Commissioner may, without notice, apply to a High Court Judge or to a District Court Judge for an examination order against a person if the Commissioner or the delegate is satisfied that the conditions specified in **section 24** are met in respect of the person. 10
 - (2) If the Commissioner applies under **subsection (1)**, the Commissioner must have (subject to **subsection (6)**) the prior approval of the Secretary for Justice. 15
 - (3) If a delegate of the Commissioner applies under **subsection (1)**, the delegate must have the prior approval of—
 - (a) the Secretary for Justice (subject to **subsection (6)**); and
 - (b) the Commissioner. 20
 - (4) A delegate of the Commissioner may approve, under **subsection (3)(b)**, an application for an examination order against a person if the applicant for the order believes on reasonable grounds that the person acquired the information in respect of which the order is sought in a business context.
 - (5) In no case may a delegate of the Commissioner who applies under **subsection (1)** approve, under **subsection (4)**, his or her own application. 25
 - (6) The prior approval of the Secretary for Justice under **subsection (2)** or **(3)(a)** is not required if the applicant for an examination order against a person believes on reasonable grounds that the person acquired the information in respect of which the order is sought in a business context. 30
 - (7) An application made under this section must be made in writing, and on oath, and must set out the following particulars:
 - (a) the name of the applicant;
 - (b) a description of the offence that is suspected of having been committed;
 - (c) the facts relied on to show reasonable grounds to suspect the commission of the offence: 35
 - (d) a description of the information sought to be obtained by the examination order:

- (e) the facts relied on to show reasonable grounds to believe that the person against whom the order is sought has the information:
 - (f) the facts that indicate that the person against whom the order is sought has been given a reasonable opportunity to provide the information but has declined or neglected to do so. 5
- (8) The powers conferred on the Secretary for Justice by **subsection (2) and (3)(a)** must be exercised personally by—
- (a) the person holding that position; or
 - (b) if that person is absent from duty or there is a vacancy in that position, by the person who, under section 40 or 41 of the State Sector Act 1988, may exercise and perform the powers, functions, and duties of the chief executive of the Ministry of Justice. 10

26 Judge may make examination order

- (1) A High Court Judge or a District Court Judge may, on an application made under **section 25**, make an examination order against a person if the Judge is satisfied— 15
- (a) that the conditions specified in **section 24** are met in respect of the person; and
 - (b) that it is reasonable to subject the person to compulsory examination, having regard to the nature and seriousness of the suspected offending, the nature of the information sought, the relationship between the person to be examined and the suspect, and any alternative ways of obtaining the information. 20
- (2) The order must be promptly served on the person against whom it is made.

27 Contents of examination order 25

- (1) An examination order must require the person against whom it is made—
- (a) to attend before the Commissioner or a delegate of the Commissioner; and
 - (b) to answer any questions that are relevant to the information in respect of which the order was made. 30
- (2) The examination order must set out the following:
- (a) the name of the person required to comply with the order:
 - (b) the grounds on which the order is made:
 - (c) the nature of the questions that the person is to be asked, being questions that are relevant to the information in respect of which the order was made: 35
 - (d) if the examination is to be conducted by a delegate of the Commissioner, the name of the delegate:

- (e) where the examination is to take place:
 - (f) when the examination is to take place or how a time for the examination is to be fixed:
 - (g) that the person required to comply with the order may be accompanied by a lawyer. 5
- 28 Presence of lawyer**
- A person against whom an examination order is made must, before being required to appear before the Commissioner or a delegate of the Commissioner, be given a reasonable opportunity to arrange for a lawyer to accompany him or her. 10
- 29 Duration of examination order**
- An examination order is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made).
- 30 Privilege against self-incrimination**
- (1) A production order or an examination order does not affect the privilege against self-incrimination that an individual may have under section 60 of the Evidence Act 2006. 15
 - (2) Any assertion of a privilege against self-incrimination must be based on section 60 of the Evidence Act 2006.
 - (3) If any individual refuses to produce any information or document or to answer any question on the ground that it is a privileged communication under section 60 of the Evidence Act 2006, the Commissioner or a delegate of the Commissioner may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid; and, for the purposes of determining any such application, the individual must offer sufficient evidence to enable the District Court Judge to assess whether self-incrimination is reasonably likely if the individual produced the information or the document or answered the question. 20
25
 - (4) Section 63 of the Evidence Act 2006 does not apply to a production order or to an examination order. 30
- 31 Other privileges**
- (1) If a person against whom a production order or an examination order is made could, in a criminal proceeding, assert a privilege under any of sections 54 to 59 of the Evidence Act 2006, the person is taken to have the same privilege in respect of either order. 35
 - (2) If any person refuses to disclose any information on the ground that it is privileged under this section, the Commissioner or a delegate of the Commissioner may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid; and, for the purpose of determining any such appli-

- cation, the District Court Judge may require the information or document to be produced to him or her.
- (3) A District Court Judge may, on the application of the Commissioner or a delegate of the Commissioner, disallow a privilege claimed under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding. 5
- (4) **Subsection (5)** applies to documents that are books of account or accounting records kept—
- (a) by a solicitor in relation to any trust account money that is subject to section 112 of the Lawyers and Conveyancers Act 2006; or 10
- (b) by a nominee company that—
- (i) is subject to practice rules made by the Council of the New Zealand Law Society pursuant to section 96 of the Lawyers and Conveyancers Act 2006; and
- (ii) is operated by a barrister and solicitor or an incorporated law firm as a nominee in respect of securities and documents of title held for clients. 15
- (5) The application by **subsection (1)** of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect— 20
- (a) the making of a production order in respect of a document to which this subsection applies; or
- (b) the obligation to comply with that production order in respect of a document to which this subsection applies; or
- (c) the admissibility, in a criminal proceeding for an offence described in the production order, of any evidence that relates to the contents of a document obtained under the production order. 25
- 32 Exclusion of civil liability**
- (1) No person is under any civil liability in respect of anything that the person states, whether orally or in writing, or does (for example, producing a document) in compliance or intended compliance with a production order or an examination order. 30
- (2) **Subsection (1)** does not apply to a person who purports to comply with the order concerned in bad faith.
- 33 Effect of proceedings** 35
- ~~(1) This section applies when any proceeding has been commenced in any court in respect of—~~
- ~~(a) the exercise of any power conferred by this Act; or~~
- ~~(b) the discharge of any duty imposed by this Act.~~

- ~~(2) Until a final decision in relation to the proceeding is given, the power or duty to which the proceeding relates may be, or may continue to be, exercised or discharged as if the proceeding had not been commenced, and no person is excused from fulfilling any obligation under this Act by reason of that proceeding.~~ 5
- ~~(3) **Subsection (2)** has effect despite any interim order made in the proceeding unless the High Court is satisfied that—~~
- ~~(a) it is highly likely from the evidence before the court that the exercise or discharge of the power or duty would be found to be unlawful; and~~
 - ~~(b) the applicant would suffer harm from the exercise or discharge of the power or duty; and~~ 10
 - ~~(c) if the power or duty is exercised or discharged before a final decision is made in the proceeding, none of the remedies specified in **subsection (4)**, or any combination of those remedies, could subsequently provide an adequate remedy for that harm.~~ 15
- ~~(4) The remedies are as follows:~~
- ~~(a) any remedy that the court may grant in making a final decision in relation to the proceeding (for example, a declaration);~~
 - ~~(b) any damages that the applicant may be able to claim in concurrent or subsequent proceedings;~~ 20
 - ~~(c) any opportunity that the applicant may have, as defendant in a criminal proceeding, to challenge the admissibility of any evidence obtained as a result of the exercise or discharge of the power or duty.~~
- ~~(5) This section applies despite any other provision of any Act or rule of law or equity.~~ 25

33 Effect of proceedings challenging powers and duties under this subpart

- (1) This section applies if any person makes any challenge in any proceeding in any court in respect of—
- (a) the exercise of any power conferred by this subpart;
 - (b) the discharge of any duty imposed by this subpart. 30
- (2) If this section applies, until a final decision (as described in **subsection (4)**) in relation to those proceedings is given, the power or duty may be, or may continue to be, exercised or discharged as if no such proceedings of that kind had been commenced, and no person is excused from fulfilling any obligation under this subpart by reason of those proceedings. 35
- (3) This section applies despite any other provision of any enactment or rule of law or equity.

- (4) A final decision does not include a decision in proceedings for an interim order under section 8 of the Judicature Amendment Act 1972.

Compare: 1990 No 51 s 21

34 Failing to comply with orders

- (1) Every person commits an offence who, being a person against whom a production order or an examination order is made,— 5
- (a) fails, without reasonable excuse, to comply with that order; or
- (b) in purported compliance with the order, produces or makes available to the Commissioner or a delegate of the Commissioner a document or makes a statement that the person knows is false or misleading in a material particular. 10
- (2) To avoid doubt, a person who owes a duty of confidentiality to his or her client or customer (including, without limitation, a person carrying on the business of banking) is not, merely because of that duty, excused from complying with a production order or an examination order. 15
- (3) Every person who commits an offence against **subsection (1)** is liable on indictment,—
- (a) in the case of an individual, to imprisonment for a term not exceeding 1 year or a fine not exceeding \$15,000 or both;
- (b) in the case of a body corporate, to a fine not exceeding \$40,000. 20

Secrecy

35 Secrecy of certain information relating to investigations carried out under this subpart

- (1) This section applies to information— 25
- (a) obtained as a result of or in connection with the exercise, or possible exercise, of any power conferred by this subpart:
- (b) obtained as a result of or in connection with the execution of a search warrant issued on an application made by, or at the direction or request of, a designated person acting for the purposes of this Act:
- (c) derived from or based upon any information described in **paragraph (a) or (b)**. 30
- (2) Every designated person who holds any information to which this section applies must observe the strictest secrecy in relation to that information and, except as provided in **subsection (3)**, must not disclose that information in any way whatever to any person who is not a designated person. 35
- (3) Despite **subsection (2)**, the Commissioner or a delegate of the Commissioner may disclose any information to which this section applies, or authorise any designated person to disclose such information,—

- (a) if the person from whom that information was obtained consents to that disclosure; or
- (b) to the extent that the information is available to the public under any Act; or
- (c) for the purposes of this Act or in connection with the exercise of powers under this Act; or 5
- (d) for the purposes of any prosecution anywhere; or
- (e) to any person who the Commissioner or a delegate of the Commissioner is satisfied has a proper interest in receiving the information.
- (4) This section is subject to **sections 36 and 38**. 10
- (5) Every designated person commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000, who knowingly contravenes this section.
Compare: 1990 No 51 s 36
- 36** **Secrecy of information protected under ~~Inland Revenue Department Act 1974~~ Tax Administration Act 1994** 15
- (1) Every designated person must observe the strictest secrecy in relation to revenue information.
- (2) For the purposes of this section, **revenue information** means any information—
- (a) that is subject to an obligation of secrecy under the Tax Administration Act 1994; and 20
- (b) that has been disclosed by the Commissioner of Inland Revenue to a designated person.
- (3) Despite **subsection (1)** or anything in the Tax Administration Act 1994,—
- (a) any designated person may disclose any revenue information to any other designated person for the purpose of investigating or prosecuting any inland revenue offence; and 25
- (b) the Commissioner or a delegate of the Commissioner may disclose any revenue information, or authorise any designated person to disclose any revenue information,— 30
- (i) with the consent of the Commissioner of Inland Revenue, to any person; or
- (ii) to any Judge in order to obtain, for the purpose of investigating or prosecuting any inland revenue offence, a production order, an examination order, or a search warrant; or 35
- (iii) to any person commencing or conducting any proceedings relating to any suspected inland revenue offence; or
- (iv) to any court hearing any proceedings relating to any suspected inland revenue offence.

- (4) Every designated person commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$15,000, who knowingly contravenes this section.
Compare: 1990 No 51 s 37
- 37 Disclosure to designated person of information protected under other Acts** 5
- (1) Any information that is protected under any Act other than the Tax Administration Act 1994 or the Statistics Act 1975 may, despite any provision of that Act, be disclosed to a designated person for the purpose of investigating or prosecuting any offence involving serious or complex fraud.
- (2) No person is liable to prosecution for an offence by reason of disclosing information under this section. 10
- (3) Every person who discloses any such information to a designated person must, at the time of making the disclosure, inform the person that the information is so protected.
Compare: 1990 No 51 s 38 15
- 38 Secrecy of information protected under other Acts**
- (1) Every designated person must observe the strictest secrecy in relation to any information that is protected under any Act other than the Tax Administration Act 1994.
- (2) Despite **subsection (1)** or anything in the Act that protects the information,— 20
- (a) any designated person may disclose any such information to any other designated person for the purpose of investigating or prosecuting any offence involving serious or complex fraud; and
- (b) the Commissioner or a delegate of the Commissioner may disclose any such information, or authorise any designated person to disclose any such information,— 25
- (i) with the consent of the person who disclosed the information to a designated person, to any other person:
- (ii) to any Judge for the purpose of obtaining a production order or an examination order or a search warrant: 30
- (iii) to any person commencing or conducting any proceedings relating to any suspected offence involving serious or complex fraud:
- (iv) to any court hearing any proceedings relating to any suspected offence involving serious or complex fraud.
- (3) Every designated person commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000, who knowingly contravenes this section. 35
Compare: 1990 No 51 s 39

39 Obligation to inform that disclosed information is secret

- (1) Every person who discloses any information under any of **sections 35(3), 36(3), and 38(2)** must inform the recipient—
- (a) that the recipient is, in accordance with **section 40**, under an obligation to observe the strictest secrecy in relation to the information; and 5
 - (b) that, if the recipient discloses the information under **section 40**, the recipient will be bound by the obligation that is imposed by **paragraph (a)**.
- (2) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$1,000, who knowingly contravenes this section. 10
- Compare: 1990 No 51 s 40

40 Secrecy to be observed by other recipients of disclosed information

- (1) No person to whom any information to which any of **sections 35 to 38** applies is disclosed under this Act must disclose that information in any way whatever to any other person unless the disclosure is,— 15
- (a) in the case of information to which **section 35** applies,—
 - (i) authorised by the Commissioner or a delegate of the Commissioner; or
 - (ii) necessary or desirable for the purposes of commencing or conducting any proceedings relating to any suspected offence involving serious or complex fraud: 20
 - (b) in the case of any revenue information protected under the Tax Administration Act 1994,—
 - (i) authorised by the Commissioner of Inland Revenue; or
 - (ii) necessary for the purposes of commencing or conducting any proceedings relating to any suspected inland revenue offence: 25
 - (c) in the case of any information protected under any Act other than the Tax Administration Act 1994,—
 - (i) authorised by the person who disclosed the information to the designated person concerned; or 30
 - (ii) necessary for the purposes of commencing or conducting any proceedings relating to any suspected offence involving serious or complex fraud.
- (2) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000, who knowingly contravenes **subsection (1)(a)** or **(1)(c)**. 35

- (3) Every person commits an offence, and is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding \$15,000, who knowingly contravenes **subsection (1)(b)**.
Compare: 1990 No 51 s 41
- 41 Authorisations to disclose information** 5
- Every authorisation given pursuant to **section 35(3), 36(3)(b), or 38(2)(b)**—
- (a) must be in writing; and
 - (b) may be given subject to any conditions the Commissioner or a delegate of the Commissioner thinks fit; and 10
 - (c) may authorise the disclosure of information to any person or class of persons, or, subject to **paragraph (d)**, may authorise the general disclosure of information; and
 - (d) in the case of an authorisation given under **section 36(3)(b) or 38(2)(b)**, must only authorise the disclosure of specified information; and 15
 - (e) expires at the time when the person to whom it is given ceases to be a designated person.
- Compare: 1990 No 51 s 42
- 42 Information may cease to be secret** 20
- (1) **Sections 35 to 41** cease to apply to any information that—
- (a) is lawfully released in any court proceedings; or
 - (b) is lawfully released under **section 35 or 36(3)(b)(i) or 38(2)(b)(i)** in circumstances where the Commissioner or a delegate of the Commissioner informs the person to whom the information is disclosed, by notice in writing, that the information is no longer protected under the relevant section. 25
- (2) The Commissioner or a delegate of the Commissioner must not serve a notice under **subsection (1)(b)** in respect of information that is released under **section 36(3)(b)(i) or 38(2)(b)(i)** unless the person who disclosed the information to a designated person consents. 30
- Compare: 1990 No 51 s 43
- 43 Persons ceasing to be designated under continuing obligation of secrecy**
- Every person who ceases to be a designated person—
- (a) must continue to observe the strictest secrecy in relation to any information that was disclosed to him or her in his or her capacity as a designated person; and 35

- (b) may be charged and convicted of any offence against **section 35(5), 36(4), 38(3), or 39(2)** in all respects as if he or she had not ceased to be a designated person.

Compare: 1990 No 51 s 44

Service

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44 Service of orders and notices

- (1) Where an order or notice is to be given to a person for the purposes of this subpart, it may be given—
- (a) by delivering it personally to the person; or
- (b) by delivering it at the usual or last known place of residence or business of the person, including by fax; or 10
- (c) by sending it by pre-paid post addressed to the person at the usual or last known place of residence or business of the person.
- (2) Where an order or notice is to be served on a corporation for the purposes of this subpart, service on an officer of the corporation, or on the registered office of the corporation, in accordance with **subsection (1)** is deemed to be service on the corporation. 15
- (3) Where an order or notice is to be served on a partnership for the purposes of this subpart, service on any one of the partners in accordance with **subsections (1) and (2)** is deemed to be service on the partnership. 20
- (4) Where an order or notice is sent by post to a person in accordance with **subsection (1)(c)**, the order or notice is deemed, in the absence of proof to the contrary, to have been given on the third day after the day on which it was posted.

Compare: 1990 No 51 s 52

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Subpart 3—Miscellaneous provisions

45 Delegation of powers, functions, or duties of Commissioner

- (1) The Commissioner may, in writing, as he or she thinks fit, delegate to any designated person any of his or her powers, functions, or duties under this Act.
- (2) A delegation under **subsection (1)**— 30
- (a) may be made subject to any conditions or restrictions that the Commissioner thinks appropriate, including any factors that must be taken into account when the delegation is exercised:
- (b) may be made generally or in any particular case:
- (c) is revocable at will: 35
- (d) does not prevent the Commissioner from exercising any power, or carrying out any function or duty:

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- (e) does not affect the responsibility of the Commissioner for the actions of any person acting under delegation.
- (3) A designated person who is delegated any powers, functions, or duties under **subsection (1)** may,—
- (a) with the prior written approval of the Commissioner, delegate those powers, functions, or duties to any other designated person: 5
- (b) subject to any conditions or restrictions, exercise those powers and carry out those functions or duties in the same manner and with the same effect as if they had been conferred on that person directly by this Act and not by delegation. 10
- (4) Every person purporting to act under any delegation under **subsection (1)** is, in the absence of proof to the contrary, presumed to be acting in accordance with the terms of the delegation.
- (5) A delegation under **subsection (1)** that is made before the commencement fixed by **section 2(2)**— 15
- (a) must specify the date on which it takes effect, which must not be before that commencement; and
- (b) is, on and after that commencement, deemed to have been made on that commencement.
- 46 Regulations** 20
- The Governor-General may, by Order in Council, make regulations for any of the following purposes:
- (a) prescribing forms for the purposes of this Act:
- (b) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect. 25

**Schedule
Consequential amendments**

s 14

Animal Welfare Act 1999 (1999 No 142)

Sections 89(1)(c)(viii) and 96(2)(b)(viii): repeal. 5

Lawyers and Conveyancers Act 2006 (2006 No 1)

Sections 150(g) and 188(2)(e), clauses 4(g) and 6(e) of Schedule 2, and clause 10(2)(c) of Schedule 3: omit “or the Serious Fraud Office”.

Ombudsmen Act 1975 (1975 No 9)

Item relating to the Serious Fraud Office in Part 1 of Schedule 1: omit. 10

Privacy Act 1993 (1993 No 28)

Schedule 5: omit “Serious Fraud Office” in each place where it appears.

Third column of the item relating to details of hearings in Schedule 5: omit “(access is limited so as to exclude details relating to young persons, being persons over 14 years but under 17 years, where the offence did not carry a liability to imprisonment)” in the second place where it appears. 15

Protected Disclosures Act 2000 (2000 No 7)

Paragraph (a)(iii) of the definition of **appropriate authority** in section 3: repeal.

State Sector Act 1988 (1988 No 20)

Item relating to the Serious Fraud Office in Schedule 1: omit. 20

Summary Proceedings Act 1957 (1957 No 87)

~~Item relating to the Serious Fraud Office Act 1990 in Part 2 of Schedule 1: omit.~~

Part 2 of Schedule 1: omit the item relating to the Serious Fraud Office Act 1990 and substitute the following item:

<u>Serious Fraud Office (Abolition and Transitional Provisions) Act 2008</u>	<u>34</u>	<u>Failing to comply with orders</u>
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Tax Administration Act 1994 (1994 No 166)

~~Section 81(4)(e): omit “the Director of the Serious Fraud Office” and substitute: “the Commissioner of Police or any member of the police authorised by that Commissioner for the purpose”.~~

Section 81(4)(c): omit “Divulging or communicating any matter or thing to the Director of the Serious Fraud Office, or producing in any Court any book or document, that the Commissioner considers desirable for the purposes of any investigation or prosecution in relation to any suspected inland revenue offence,” and substitute “divulging or communicating any matter or thing to the Commissioner of Police, or pro-

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Tax Administration Act 1994 (1994 No 166)—*continued*

ducing in any Court any book or document, that the Commissioner of Inland Revenue considers desirable for the purposes of any investigation or prosecution in relation to any suspected inland revenue offence.”

Legislative history

24 April 2008
20 May 2008

Introduction (Bill 206–1)
First reading and referral to Law and Order Committee