

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

Government Bill

## **Explanatory note**

### **General policy statement**

#### **Changed environment for serious fraud investigations**

The Serious Fraud Office (SFO) was created in 1990 following the 1987 share market crash and widespread public concern about corporate misconduct. It was modelled on the United Kingdom SFO, with the intention that this small, specialist multi-disciplinary agency would fill a gap between existing law enforcement and regulatory agencies.

Since 1990, the nature and scale of fraud offending has changed. Fraud is now made more complex by the impact of globalisation, computers, Internet access, and identity fraud, which provide for levels of anonymity and speed well beyond those of the 1990s. While there does still exist a category of such fraud that is strictly the criminal abuse of commercial practice and is not covered by the taint of organised crime in the sense that it is generally perceived, there is a clear track of convergence between organised crime interests and the commercial world. The more serious organised criminal enterprises are using commercial and financial expertise not just as devices to launder the proceeds of crime or to accrue assets, but also to utilise financial processes and decision makers within the system for criminal financial gain.

There are now 5 agencies that can address aspects of corporate fraud or white collar crime: the Inland Revenue Department, police, SFO, Securities Commission, and National Enforcement Unit (NEU) of the Ministry of Economic Development. In addition, reforms continue within the Ministry of Economic Development, Ministry of Justice, Reserve Bank of New Zealand and Treasury regarding financial products, providers, and anti-money laundering regulation.

Against that background, police have also further developed their capability to investigate and prosecute serious or complex fraud. The police now deal with fraud with a significant dedicated resource, including forensic accountants and detectives working in dedicated fraud squads such as the Company Fraud and General Fraud squads in the Auckland City District. The police employ document examiners, computer forensic staff, legal advisors, and forensic accountants.

#### **Integration of SFO into new Organised and Financial Crime Agency of New Zealand**

The development of a new Organised and Financial Crime Agency of New Zealand (OFCANZ) 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 current SFO so that its existing functions and powers can be reformed into a permanent Serious Fraud Taskforce within OFCANZ. This decision provides an effective response to the changed environment and establishes a more streamlined response to both fraud and organised crime. Combining the skills, abilities, tools, and resources of the 2 organisations to undertake the financial investigations required to more effectively combat organised crime and serious or complex fraud is a significant step forward.

This integration also allows the greatest degree of flexibility and co-ordination 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 com-

but serious or complex fraud will be substantially enhanced by the integration of the SFO.

### **Transitional serious or complex fraud investigatory powers**

The nature of crime is trending towards complex Internet transactions and document-based crime. This change indicates that document production and limited compulsory examination powers should be added to the toolbox of police investigatory powers for the investigation of a range of crime types, including serious and corporate fraud and organised crime.

As part of the Government's wider reform of all law enforcement search and surveillance powers, the Government's Search and Surveillance Bill will therefore propose that document production and limited compulsory examination orders be established as part of the investigatory toolbox available to all criminal investigations. These 2 powers have proven particularly useful when unravelling complex financial transactions and business structures that have been used for criminal purposes.

Accordingly, in order to ensure that OFCANZ retains the powers necessary to investigate serious and complex fraud in the period leading up to the final enactment of the wider search and surveillance regime, transitional document production and limited examination powers are provided for in this Bill. These powers retain the current commercial fraud investigative capability, while also providing additional safeguards such as prior judicial approval and a better definition of those who may be subject to a compulsory examination. As these transitional powers reflect the wider reforms contained in the Government's Search and Surveillance Bill, there will be some temporary inconsistencies with the current law as it applies to other older search and surveillance powers. However, these inconsistencies will not hamper the ability of OFCANZ to perform its functions and it is intended that these proposed transitional powers will expire upon Order in Council once the Government's Search and Surveillance Bill is enacted and comes into force.

### **Clause by clause analysis**

*Clause 1* relates to the Title of the Bill.

*Clause 2* provides that the sections on interpretation, designation and delegations come into force on the day after Royal assent. The remainder of the Bill comes into force 21 days after this date. This allows the designations and delegations required for the effective operation of the Act to be put into place prior to the Act coming into force.

## Part 1

### Preliminary provisions

*Clause 3* provides that the Act binds the Crown.

*Clause 4* sets out the purposes of the Bill. These are to—

- repeal the Serious Fraud Office Act 1990 (the **SFO Act**); and
- vest control of the Serious Fraud Office (**SFO**) documents in the police; and
- provide for the issuing of production and examination orders by the courts for a transitional period to allow for the search and surveillance reforms based on the Law Commission's report *Search and Surveillance Powers* (NZLC R97, 30 June 2007) to be implemented; and
- enable the police, during the transitional period, to conduct effective investigations into offending involving serious or complex fraud.

*Clause 5* defines terms used in the Bill. Some of the key terms are business context, Commissioner, entity, and evidentiary material.

## Part 2

### Repeal of Serious Fraud Office Act 1990 and transitional matters

#### Subpart 1—Repeal of Serious Fraud Office Act 1990

*Clause 6* repeals the Serious Fraud Office Act 1990.

*Clause 7* sets out what happens to the documents of the SFO. The documents vest in the Commissioner of Police. The protections relating to the secrecy of information that applied to information under the SFO Act will continue to apply.

*Clause 8* allows the Commissioner to designate people who are eligible to be involved in the administration of the Act.

*Clause 9* restricts employees of the SFO from being entitled to redundancy if they are offered equivalent employment within the police, or they are offered and accept other employment within the police. Equivalent employment is defined.

*Clause 10* provides that certain of the appointment processes in the Police Act 1958 do not apply to the transfer of SFO staff to the police.

*Clause 11* provides that any references to the SFO that exist or are in force at the commencement of this legislation must be read as references to the police. Prosecutions underway at the commencement of the Act will be continued by the police.

*Clause 12* allows the Governor-General to deal with savings or transitional matters connected to the abolition of the SFO by Order in Council.

*Clause 13* sets out, for the avoidance of doubt, some matters that the abolition of the SFO does not affect. These are property, rights, or obligations of the Crown and the commencement or continuation of proceedings by or against the Crown.

*Clause 14* makes consequential amendments to other Acts as set out in the *Schedule*.

*Clause 15* provides for the continuation of the SFO Act in respect of specified matters. Any production and examination notices given before the commencement of the Act can be continued under the SFO Act. Any search warrants applied for can be granted and executed, and any search warrants obtained can be executed under the SFO Act. The indemnity of SFO members continues.

### Subpart 2—Orders assisting certain investigations during transitional period

*Clause 16* sets an expiry for the subpart of 31 July 2011, or earlier as set out by Order in Council. These provisions will cease to apply once the search and surveillance reforms are implemented. Any matters pending at the expiry date will be determined as if the subpart had not expired.

*Clause 17* sets out the matters to be considered in determining whether something is serious or complex fraud under the subpart.

These are the suspected nature and consequences of the fraud, the suspected scale of the fraud, and the legal, factual, and evidential complexity of the matter.

*Clause 18* sets out the conditions for making a production order. These are that there are reasonable grounds to suspect that—

- an offence punishable by imprisonment has been committed; and
- the offence arises in the context of serious or complex fraud.

In addition, there have to be reasonable grounds to believe that the documents sought—

- constitute evidentiary material in respect of the offence; and
- are in the possession or control of the person against whom the order is sought.

*Clause 19* provides that the application for a production order must be made by the Commissioner or a delegate of the Commissioner on oath to a District Court Judge or a High Court Judge. The Commissioner or a delegate must approve the application. The clause also sets out the matters that need to be included in the application.

*Clause 20* authorises a Judge to make a production order if the conditions set out in *clause 18* are met.

*Clause 21* sets out the contents of a production order. The production order requires a person to provide specified documents. The order must specify the name of the person required to comply with the order, the grounds on which the order is made, the documents to be provided, and the time frame within which a person must comply with the order.

*Clause 22* sets out that a production order is in force for the time specified in the order, which must not exceed 30 days.

*Clause 23* sets out what happens to documents produced under a production order. They must be returned, but may be copied prior to return.

*Clause 24* sets out the conditions for making an examination order. These are that there are reasonable grounds to suspect that—

- an offence punishable by imprisonment has been committed; and
- the offence arises in the context of serious or complex fraud.

In addition, there have to be reasonable grounds to believe that the person being examined—

- has evidentiary material in respect of the offence; and
- has been given an opportunity to provide the information voluntarily but has not done so.

*Clause 25* provides that the application for an examination order must be made on oath to a District Court Judge or a High Court Judge. If there is a business relationship between the person or entity being investigated and the person to be examined, the Commissioner or a delegate must approve the application for the order. If there is no business relationship, the Commissioner as well as the Secretary for Justice must approve the application for the order. The approval of the Commissioner and the Secretary for Justice for that application must be given personally.

*Clause 26* allows a District Court Judge or a High Court Judge to make an examination order if the conditions set out in *clause 24* are met. In addition, the Judge must be satisfied that it is reasonable to issue an examination order having regard to certain matters. These are the nature and seriousness of the offending, the nature of the information sought, the relationship between the person to be examined and the suspect, and any alternative ways to obtain the information.

*Clause 27* sets out the contents of the examination order. The examination order requires a person to attend a meeting and answer questions. The order must specify the name of the person required to comply with the order, the grounds on which the order is made, the nature of the questions to be asked, who will conduct the examination (if it is to be conducted by a delegate of the Commissioner), and where and when the examination will take place (or how the time will be determined).

*Clause 28* allows a person attending an examination to be accompanied by a lawyer.

*Clause 29* sets out that an examination order is in force for the time specified, which must not exceed 30 days.

*Clause 30* sets out that the privilege against self-incrimination as provided in section 60 of the Evidence Act 2006 applies to production and examination orders. A District Court Judge is able to determine whether a particular claim of the privilege is valid. Section 63 of the Evidence Act 2006 (which requires disclosure in certain circum-

stances in civil proceedings) does not apply to production and examination orders.

*Clause 31* sets out the legal professional privilege, medical privilege, and religious privilege in the Evidence Act 2006 that will apply if the person could assert the privilege in a criminal proceeding. A District Court Judge is able to determine whether a particular claim of privilege is valid and disallow the privilege if it would be disallowed in a proceeding under section 67(1) of the Evidence Act 2006. The clause also clarifies that legal professional privilege cannot be asserted in respect of accounting records for trust accounts or nominee companies. This is in line with the existing law on search warrants.

*Clause 32* clarifies that persons do not incur any civil liability by complying with a production order or an examination order.

*Clause 33* provides that any proceedings to review the exercise of powers or discharge of duty under the Act will not prevent the exercise or discharge of the power or duty.

*Clause 34* provides that it is an offence to fail to comply with a production or examination order or to provide false or misleading information. The penalties are imprisonment not exceeding 12 months or a fine not exceeding \$15,000, or both, for an individual; and a fine not exceeding \$40,000 for a body corporate.

*Clause 35* provides that all designated persons must observe the strictest secrecy in respect of information received from the exercise of a production or examination order, any search warrants obtained by a designated person, and any information derived from that information. Specified reasons for disclosure are set out and include the situation where the person who disclosed the information consents and where the information is used for the purpose of a prosecution. It is an offence punishable by a fine not exceeding \$5,000 to knowingly contravene this clause.

*Clause 36* provides that all designated persons must observe the strictest secrecy in respect of revenue information, being information subject to secrecy under the Tax Administration Act 1994 and information disclosed by the Commissioner of Inland Revenue. Specified reasons for disclosure are set out. It is an offence punishable by imprisonment not exceeding 6 months or a fine not exceeding \$15,000 to knowingly contravene this clause.

*Clause 37* authorises the disclosure of information protected under legislation (not being the Tax Administration Act 1994 or the Statistics Act 1975) to a designated person for the purpose of investigating or prosecuting serious or complex fraud.

*Clause 38* provides that all designated persons must observe the strictest secrecy in relation to any information that is protected under any legislation (except the Tax Administration Act 1994). Specified reasons for disclosure are set out. It is an offence punishable by a fine not exceeding \$5,000 to knowingly contravene this clause.

*Clause 39* provides that anyone who discloses information under *clause 35, 36, or 38* must inform the recipient that the recipient is under an obligation to observe the strictest secrecy in respect of that information.

*Clause 40* provides that a person to whom information protected under *clause 35, 36, or 38* is disclosed under the Act must not disclose that information to anyone else except as specified.

*Clause 41* sets out requirements for written authorisations to disclose information.

*Clause 42* sets out when the secrecy provisions no longer apply. This is when the information is released in court; or where the information has been disclosed on a specified ground and the Commissioner informs the person to whom the information was disclosed that the information is no longer protected. Such notice must only be given in specified cases.

*Clause 43* provides that obligations as to secrecy continue after a person has ceased to be designated.

*Clause 44* sets out ways in which orders and notices can be served.

### Subpart 3—Miscellaneous provisions

*Clause 45* provides that the Commissioner can delegate powers, functions, or duties under the Act.

*Clause 46* authorises forms to be prescribed by regulations.

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*Hon Annette King*

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Government 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**

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- (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**

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**Preliminary provisions**

**3 Act binds the Crown**

This Act binds the Crown.

**4 Purposes**

The purposes of this Act are—

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- (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
- (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.

## **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
- (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
- (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**

**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**

**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—
  - (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
- (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—

- (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. 5

## Part 2

### Repeal of Serious Fraud Office Act 1990 and transitional matters 10

#### 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** 15

(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)**. 20

(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. 25

(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: 30

(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.

**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. 5

**9 Restriction of compensation for technical redundancy arising from abolition of Serious Fraud Office** 10

(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— 15

- (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. 20

(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 25
- (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.

(3) This section overrides Part 6A of the Employment Relations Act 2004. 35

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** 10

(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—

(a) are in force or existing at the commencement of this section; and 15

(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. 20

(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. 25

(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) 30

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

The Governor-General may, by Order in Council, provide for savings and transitional matters connected with the abolition of the Serious Fraud Office. 35

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—
- (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 5
  - (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). 10
- (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. 15
- (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. 20

**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)**. 25
- (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. 30
  - (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. 35

- (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. 5
- (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—
- (a) for “Director” there were substituted “Commissioner or a delegate of the Commissioner”: 10
- (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. 15

### 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. 20
- (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. 25
- (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. 30

#### *Serious or complex fraud*

#### **17 Factors relevant to existence of serious or complex fraud**

Whenever any question arises, under this subpart, whether an offence arises in the context of serious or complex fraud or 35

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:
- (c) the legal, factual, and evidential complexity of the matter. 5

*Orders*

**18 Conditions for making production order**

The conditions for making a production order are that—

- (a) there are reasonable grounds to suspect that— 10
  - (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 15
- (b) there are reasonable grounds to believe that the documents sought by the proposed order—
  - (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. 20

**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. 25
- (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. 30
- (3) In no case may a delegate of the Commissioner who applies under **subsection (1)** approve, under **subsection (2)**, his or her own application. 35

- (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: 5
  - (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. 10
- 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. 15
- (2) The order must be promptly served on the person against whom it is made.
- 21 Contents of production order** 20
- (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.
- (2) The production order must set out the following:
- (a) the name of the person required to comply with the order: 25
  - (b) the grounds on which the order is made:
  - (c) the documents required to be given:
  - (d) the time by which, and the way in which, the documents must be produced. 30
- (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 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 35

body) who is to comply with the order as the body's representative.

**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). 5

**23 Documents produced under production order**

(1) 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: 10

(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: 15

(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. 20

(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. 25

**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— 30

(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 35

- (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
- (c) the person has been given a reasonable opportunity to provide that information but has declined or neglected to do so. 5

**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 20
  - (b) the Commissioner.
- (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. 25
- (5) In no case may a delegate of the Commissioner who applies under **subsection (1)** approve, under **subsection (4)**, his or her own application.
- (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: 35
  - (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:
  - (d) a description of the information sought to be obtained by the examination order: 5
  - (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. 10
- (8) The powers conferred on the Secretary for Justice by **subsection (2) and (3)(a)** must be exercised personally by— 15
- (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. 20

**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— 25
- (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. 30
- (2) The order must be promptly served on the person against whom it is made. 35

**27 Contents of examination order**

- (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 5
  - (b) to answer any questions that are relevant to the information in respect of which the order was made.
- (2) The examination order must set out the following:
- (a) the name of the person required to comply with the order: 10
  - (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:
  - (d) if the examination is to be conducted by a delegate of the Commissioner, the name of the delegate: 15
  - (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. 20

**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. 25

**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

**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.
- (2) Any assertion of a privilege against self-incrimination must be based on section 60 of the Evidence Act 2006. 35

- (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. 5 10
- (4) Section 63 of the Evidence Act 2006 does not apply to a production order or to an examination order.

**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. 15
- (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 application, the District Court Judge may require the information or document to be produced to him or her. 20 25
- (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. 30
- (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 35
  - (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. 5
- (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— 10
- (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 15
  - (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.
- 32 Exclusion of civil liability** 20
- (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.
- (2) **Subsection (1)** does not apply to a person who purports to comply with the order concerned in bad faith. 25
- 33 Effect of proceedings**
- (1) This section applies when any proceeding has been commenced in any court in respect of— 30
- (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. 35

- (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 5
  - (b) the applicant would suffer harm from the exercise or discharge of the power or duty; and
  - (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. 10
- (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): 15
  - (b) any damages that the applicant may be able to claim in concurrent or subsequent proceedings:
  - (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. 20
- (5) This section applies despite any other provision of any Act or rule of law or equity.
- 34 Failing to comply with orders** 25
- (1) Every person commits an offence who, being a person against whom a production order or an examination order is made,—
- (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. 30
- (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 be- 35

cause of that duty, excused from complying with a production order or an examination order.

- (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; 5
  - (b) in the case of a body corporate, to a fine not exceeding \$40,000.

*Secrecy*

10

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

- (1) This section applies to information—
- (a) obtained as a result of or in connection with the exercise, or possible exercise, of any power conferred by this subpart: 15
  - (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: 20
  - (c) derived from or based upon any information described in **paragraph (a) or (b)**. 20
- (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. 25
- (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,— 30
- (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 35
  - (c) for the purposes of this Act or in connection with the exercise of powers under this Act; or

- (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**. 5
- (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** 10
- (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— 15
- (a) that is subject to an obligation of secrecy under the Tax Administration Act 1994; and
  - (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,— 20
- (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,—
    - (i) with the consent of the Commissioner of Inland Revenue, to any person; or 30
    - (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. 5  
Compare: 1990 No 51 s 37
- 37 Disclosure to designated person of information protected under other Acts**
- (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. 10
- (2) No person is liable to prosecution for an offence by reason of disclosing information under this section. 15
- (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. 20  
Compare: 1990 No 51 s 38
- 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,— 25
- (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 30
- (b) the Commissioner or a delegate of the Commissioner may disclose any such information, or authorise any designated person to disclose any such information,—
- (i) with the consent of the person who disclosed the information to a designated person, to any other person: 35

- (ii) to any Judge for the purpose of obtaining a production order or an examination order or a search warrant:
  - (iii) to any person commencing or conducting any proceedings relating to any suspected offence involving serious or complex fraud: 5
  - (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. 10
- 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— 15
- (a) that the recipient is, in accordance with **section 40**, under an obligation to observe the strictest secrecy in relation to the information; and
  - (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)**. 20
- (2) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$1,000, who knowingly contravenes this section. 25
- 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,— 30
- (a) in the case of information to which **section 35** applies,—
    - (i) authorised by the Commissioner or a delegate of the Commissioner; or 35

- (ii) necessary or desirable for the purposes of commencing or conducting any proceedings relating to any suspected offence involving serious or complex fraud:
- (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:
- (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
  - (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)**.
- (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**

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
- (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
- (e) expires at the time when the person to whom it is given ceases to be a designated person. 5

Compare: 1990 No 51 s 42

#### **42 Information may cease to be secret**

- (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. 10
- (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. 15

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
  - (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. 25

Compare: 1990 No 51 s 44

### *Service*

#### **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— 35

- (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
  - (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. 5
- (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. 10
- (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. 15
- (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. 20
- Compare: 1990 No 51 s 52

### 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. 25
- (2) A delegation under **subsection (1)**—
- (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: 30
  - (b) may be made generally or in any particular case:
  - (c) is revocable at will:
  - (d) does not prevent the Commissioner from exercising any power, or carrying out any function or duty: 35
  - (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. 20

#### 46 Regulations

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.

**Lawyers and Conveyancers Act 2006 (2006 No 1)**

Sections 150(g) and 188(2)(e), clauses 4(g) and 6(e) of Schedule 2, 5  
and clause 10(2)(c) of Schedule 3: omit “or the Serious Fraud Of-  
fice”.

**Ombudsmen Act 1975 (1975 No 9)**

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

**Privacy Act 1993 (1993 No 28)**

Schedule 5: omit “Serious Fraud Office” in each place where it ap-  
pears.

Third column of the item relating to details of hearings in Schedule 5: 15  
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.

**Protected Disclosures Act 2000 (2000 No 7)**

Paragraph (a)(iii) of the definition of **appropriate authority** in sec- 20  
tion 3: repeal.

**State Sector Act 1988 (1988 No 20)**

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

**Summary Proceedings Act 1957 (1957 No 87)**

Item relating to the Serious Fraud Office Act 1990 in Part 2 of Sched- 25  
ule 1: omit.

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

Section 81(4)(c): 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”.