EXAMINATION ORDERS IN THE SEARCH AND SURVEILLANCE BILL: IS THEIR BARK WORSE THAN THEIR BITE?

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CHAPTER ONE: INTRODUCTORY MATTERS

1.1 Media Coverage and Public Concern

Examination Orders are a controversial proposed power that would be awarded to the police by the enactment of the Search and Surveillance Bill 2009.[1] Currently awaiting a Second Reading, the Bill grants police the authority to compel a person to answer questions if the person is believed to have knowledge regarding an offence. The orders have been criticised for both intruding on the right to silence and interfering with the relationship between the state and the individual.

When the Bill was introduced, the media attacked it with a multitude of claims, each of which varied in its degree of truth. Some asserted the Bill was another "component of the government's grasp for more power over our lives".[2] Others went further than this: "once again this government is showing its authoritarian streak … their first resort is: more power to us and authority – that'll fix the problem. The people cannot be trusted".[3] Although it might be expected that media take an extremist position, the extent to which the Bill was portrayed as a travesty is surprising. No mention of the purpose of, or need for the Bill was made, and impartial journalism was scarce.

The public response to this media barrage was passionate, with a variety of actions taken. [4] Protesters declared Saturday, 24 April a national day of action against the Search and Surveillance Bill.[5] Demonstrations took place all around New Zealand, with thousands voicing their disapproval.[6] "The Search and Surveillance Bill is an assault on every New Zealander's fundamental rights and freedoms. There is simply no justification for this massive increase in state power," said Lee Warren from the official 'Campaign to Stop the

[1] Search and Surveillance Bill 2009 (45-2). See Appendix 1 for the relevant provisions of the Bill governing the use of Examination Orders.
[2] "Search and Surveillance Bill before Parliament" (2010) Aotearoa Independent Media Centre <www.indymedia.org.nz>.
[3] Bunju "Govt Attacks Right to Silence" (2010) The Standard < www.thestandard.org.nz>.
[4] In his Cabinet Paper, Simon Power noted that "there has been significant criticism of the Bill from the public and the media": Craig Sisterton "Public concerns lead Cabinet to amend Search and Surveillance Bill" (2010) NZ Lawyer Magazine <www.nzlawyermagazine.co.nz>.
[5] Cameron Walker "Aucklanders Oppose Search And Surveillance Bill" (2010) Scoop Independent News <www.scoop.co.nz>.
[6] These were held at Cathedral Square in Christchurch, Cuba St in Wellington and the Auckland Town Hall: "Nationwide protests against surveillance bill" (2010) nzherald.co.nz <www.nzherald.co.nz>.

Bill".[7] Fellow campaigner and founder of the 'Stop the Search and Surveillance Bill Now' Facebook Group, Cameron Walker agreed: "The Search and Surveillance Bill overturns many important liberties that have long been considered an essential part of a free and democratic society".[8] Perhaps the most extravagant, and arguably the most disproportionate appeal was the comparison of the Bill to the ANZAC battle in Gallipoli. Auckland Civil Liberties president Barry Wilson told One News: "Tomorrow is Anzac Day and there'll be a tremendous outpouring of sentiment remembering the people who died for basic freedoms in two world wars. What this bill does goes a long way to undermining those basic freedoms".[9]

Numerous public submissions were received by the Justice and Electoral Committee, with the vast majority opposing the Bill.[10] It was obvious that many of the inconsistencies and false claims published by the media were accepted at face value by the public. Some focused on the power of the state and the citizen's relationship with the state: "The balance of power between an individual and the state is not equal and at no stage should more power be given to the state".[11] Others took this further, expressing concern that our country was headed in the direction of dictator states. Manufacturing New Zealand wrote, "Should it pass, it will discredit democracy in New Zealand to an embarrassing degree, making us little better in terms of our civil liberties and ability to speak freely than a country by a dictatorship such as Burma."[12] Reservation was expressed at the new powers proposed for police: "Given the track record of the New Zealand police … it would simply be naive to trust that enforcement officers will 'act in good faith'".[13] It should be noted that although these quotes illustrate relatively extreme positions, these general attitudes and opinions were reflected in a substantial number of submissions.

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[7] Liz Willoughby-Martin "Search and Surveillance Bill skulks back in through side-door" (2010) The Salient <www.salient.org.nz>.

[8] Walker, above n 5.

[9] Ibid.

[10] 438 submissions were submitted by the Public. Controversial legislation such as the Prostitution Reform Act 2003 received less than half of this number (222). The Criminal Procedure and Modernisation Bill 2010 (243-3A) received only 80. What is now the Marine and Coastal Area (Takutai Moana) Act 2011 received over 4000 submissions during its entry into Parliament, making it one of the most controversial and debated acts in Parliament's history. This author read all 438, and approximately 300 submissions expressed some sort of concern regarding the Examination Orders.

[11] Annemarie Thorby "Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009" at [5].

[12] Manufacturing New Zealand "Submission to Parliament on the Search and Surveillance Bill 2009".

[13] Abi Pollitt- Jones "Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009".

Examination Orders were frequently mentioned in the submissions and apparently frequently misunderstood. The recurring media claim that after the Bill's introduction, the right would "effectively no longer exist", was taken literally by many.[14] Many submissions rejected any change to the right at all. There was also recognition of the slippery slope when fundamental rights are tampered with: "People should always have the right to remain silent. Whats [sic] next? Abolishing the right to a lawyer?"[15] Internet group 'Tech Liberty' co-founder Thomas Beagle is apprehensive: "Obviously there are times when it's necessary to do so [restrict the right of silence] for the maintenance of law. But they haven't asked: 'what do the police actually need to do their job while still protecting people's privacy and freedom?'"[16] The restriction of the Orders to business and limited non-business contexts was misconstrued, with one report claiming the Orders "could be used to get information from an accountant working for a criminal gang".[17]

The previous excerpts have not been highlighted to suggest that lay people are merely being led astray. Their concerns are, to an extent, legitimate. David Small from the University of Canterbury has said that the removal of the right to silence that is proposed in the Search and Surveillance Bill is "radical and unwarranted". [18] Speaking in his submission to the Justice and Electoral Committee, Small claimed the creation of any situations where New Zealanders lose their right to silence "muddies the waters" and people will be left wondering in what circumstances they are allowed to remain silent.[19] Dr Small said that civil rights were "only as strong as they were exercisable" and that the Bill not only undermines important rights, but also renders remaining rights more difficult to exercise and defend.[20] Further, Auckland Council for Civil Liberties chairman Barry Wilson says people will need a lawyer's knowledge of their rights and may be less likely to co-operate with authorities without legal advice.[21] He predicts a goldmine for lawyers as regulators' actions are challenged.[22] "Having these powers encapsulated in one statute rather than being spread over a range of statutes will

[14] "Search and Surveillance Bill before Parliament", above n 2.
[15] Ben Connolly "Submission to the Justice and Electoral Committee on the Search and Surveillance Bill 2009".
[16] Geoff Cumming "You can't hide from prying eyes" (4 December 2010) nzherald.co.nz <www.nzherald.co.nz>.
[17] "Vocal protests against surveillance bill" (2010) One News <www.tvnz.co.nz>.
[18] "Removal of right to silence 'radical and unwarranted'" (2010) Scoop Independent News <www.scoop.co.nz>.
[19] Ibid.
[20] Ibid.
[21] Cumming, above n 16.
[22] Ibid.

focus attention on the extent of powers and their incredible complexity," says Wilson.[23] He says that people will have no idea whether powers are being exercised legally and are likely to be more resistant; "Experience suggests powers are likely to be exercised in a rough and ready fashion and if they are pushed hard, Ruatoki-style,[24] there will be a groundswell of public opposition".[25]

These are but a small selection of the criticisms of the Bill from respected legal entities. Support for the Bill, however, is also evident. Law Commission Deputy President Warren Young says that the Bill imposes as many restrictions as there are extensions of enforcement agencies' powers.[26] In theory, the Bill edges us closer to a police state as the powers available to police are increased. However, it is true that much is dependent on how these powers are interpreted by officers and how judges balance the use of these coercive powers against individual rights.

In this dissertation, I will examine the claims from the media and concerns from the public regarding the proposed Examination Orders and analyse what justification there is for these. Chapter One will set the background to the Bill's introduction, before briefly considering Examination Orders in particular. Similar legislation adopted by the state of Victoria will also be introduced. Chapter Two will explore the objectives of the Examination Orders in order to begin the process of determining whether the Orders' limit to the right to silence can be justified. Chapter Three continues this process. Part A will provide a summary of the various arguments proposed by academics regarding the right to silence. In Part B, a Bill of Rights analysis will be performed to determine whether the Orders are a justified limit on the right to silence. Chapter Four will focus on what I perceive to be the more pressing issues regarding the Orders, all of which have received no or very little media attention. Recommendations regarding these issues will be advanced, with the Victorian legislation providing helpful guidance. Lastly, Chapter Five will summarise my recommendations for the provisions governing the Orders, before giving a broad overview of the legitimacy of the Orders. It is contended that the Orders are not dangerous in the way media have led us to

[23] Cumming, above n 16.
[24] Ruatoki was one of the main sites involved in the 2007 New Zealand anti-terror raids, conducted under the Terrorism Suppression Act 2002.
[25] Cumming , above n 16.
[26] Ibid.

believe; rather it is the specifics of the legislation that require further scrutiny and amendment by Parliament.

1.2 The Bill

Before embarking on an analysis of the Examination Orders, it is prudent to consider how and why the Search and Surveillance Bill was introduced.

The law relating to search and seizure was (and technically still is) out-dated,[27] with core police powers contained in statutes between forty and fifty years old.[28] The law has developed in a piecemeal fashion, with significant variation in the tests laid down for the exercise of search powers.[29] If enacted, the Bill would clarify existing statutory powers, codify case law and introduce several new powers to reflect technological developments and reforms carried out in other jurisdictions.[30] It aims to make the process of investigation more effective and efficient. The Law Commission has said that "[r]eform is urgently needed to provide a greater measure of coherence, consistency and certainty".[31]

In 2007 the Law Commission released a report on the state of New Zealand's search and surveillance laws. This 500 page document was over five years in the making and the result of widespread consultation.[32] It made over 300 recommendations for reform in the area and was largely followed by Parliament in the first draft of the Bill. The Law Commission's terms of reference were to "review the scope and adequacy of current powers to search persons and places and associated powers to seize in order to determine an appropriate balance between law enforcement agencies and the protection of individual rights".[33] Thus, the Examination Orders included in the first draft of the Bill were not discussed or mentioned in the report.

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[27] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 14.
[28] Ibid. Other specific statutory provisions supplement these powers and are spread across dozens of statutes.
[29] In some areas of the law, non-police agencies (for example the Serious Fraud Office) have wider powers than police to investigate offences. Legislation is often unclear as to the scope of law enforcement officer's powers and the manner in which they are to be exercised. This leads to persons using their individual discretion and judgement, thus an inconsistent approach.
[30] Law Commission *Search and Surveillance Powers*, above n 27, at 15.
[31] Ibid, at 14, [4].
[32] Amy Mansfield "Law Commission report damning of outdated search and surveillance laws" (2007) New Zealand Lawyer Online <www.nzlawyermagazine.co.nz>.
[33] Law Commission *Search and Surveillance Powers*, above n 27, at 19.

The Bill was introduced into Parliament on 2 July 2009 and had its first reading on 4 August that year. At its first reading, Minister Simon Power acknowledged the Law Commission's report revealed reform was well overdue, with other MPs quick to agree.[34] However, there were several concerns regarding the intrusive nature of the Bill, in particular the Examination Orders.[35] Despite apprehensions, the Bill passed its first reading easily.[36] It was then sent to the Justice and Electoral Committee.

The Committee released its report on 4 November 2010 and suggested a significantly redrafted Bill.[37] Amendments to the Orders were recommended, including strengthening safeguards intended to protect human rights and limiting the circumstances in which they could be used. The release of the redrafted Bill allowed a second period of public consultation. Although the public expressed satisfaction that some of their concerns had been listened to and had been addressed by the inclusion of additional safeguards being in the Bill, in general there was disappointment about the preservation of the Examination Orders.[38] The majority of submissions on the redrafted Bill continued to oppose the fundamental purpose of and power contained in the Orders, and it is therefore somewhat surprising that the Orders are still included in the Bill.

[34] (4 August 2009) 656 NZPD 5399. During the first reading Power emphasised that effective search and surveillance powers could not come at the expense of human rights, and applauded the Bill for ensuring that these rights were adequately protected. Although admitting the powers were intrusive, he highlighted the essential checks and balances which were to be implemented.

[35] Keithe Locke of the Green Party chastised the orders, saying the Bill "went too far towards intruding on privacy". David Garrett of ACT shared these concerns. He recalled the Arthur Allan Thomas case and said after reading the 1981 Royal Commission report on the case, never believed again that the "police were always right, that they always acted with integrity, and that they always told the truth". (In the 'Arthur Allan Thomas' case a farming couple was found shot dead. Arthur Allan Thomas was arrested and an incriminating piece of evidence, a cartridge which had been used in the murder weapon, was found at his house. This was later found to have been planted at the scene by two top police inspectors. Arthur was given a royal pardon and compensated). Rahui Katent of The Maori party raised the issue of compliance with both the Human Rights Act and Bill of Rights Act 1990. She also said that there was no mention of human rights in the Bill and no consultation with the Human Rights Commission: Ibid.

[36] The Bill passed with 112 Ayes (New Zealand National 58; New Zealand Labour 43; ACT New Zealand 5; Maori party 4; Progressive 1; United Future 1) to 9 Noes (Green Party).

[37] "Search and Surveillance Bill 2009 (2010 45-2)" (Justice and Electoral Committee, 4 November 2010). An interim report was also released on 6 August 2010 ("Search and Surveillance Bill 2009 (45-1)" (Interim report of the Justice and Electoral Committee, 6 August 2010).

[38] The Justice and Electoral Committee received and considered 48 submissions from interested groups and individuals. After releasing the Interim Report, further comments were sought and the Committee received and considered a further 379 submissions.

1.3 What are Examination Orders?

Examination Orders are the most contentious part of the Bill and are included in subpart 11. The subpart allows the Commissioner to apply to a Judge for an Order if there are reasonable grounds to suspect that an offence has been or is going to be committed, and there are reasonable grounds to believe that the person has information regarding the offence.[39] Applications for the Orders must be detailed and comprehensively outline both the reasons to believe an offence has or will be committed and that the person has important information related to the offence, amongst other things.[40] There are limited situations where the granting of an Examination Order is to be allowed, in either a business context or non-business context. In all cases, examinees must be given a reasonable chance to respond to questioning before being served with an Order.[41] If an Order is granted, the Judge must set out several conditions, including the period of time that the Order will remain in force.[42] Failure to comply with an Examination Order can result in imprisonment not exceeding one year,[43] or in the case of a body corporate, a fine not exceeding $40,000.[44]

The Examination Orders are similar to a power currently available to the Serious Fraud Office. [45] Under s9 of the Serious Fraud Office Act, the Director has the power to compel testimony or the production of documents. The merit of this invasive s9 power will be further considered in Chapter Two.

Similar powers have been adopted in other common law jurisdictions, including England and Wales,[46] Northern Ireland,[47] and Ireland.[48] In the State of Victoria, the Major Crime

[39] Search and Surveillance Bill 2009, cl 32 and 34.
[40] Ibid, cl 31(2) and 33(2).
[41] Ibid, cl 31(2)(d) and 33(2)(g).
[42] Ibid, cl 37(2). The maximum duration an Order can be in force for is 30 days: Ibid, cl 39.
[43] Ibid, cl 165 (2)(a).
[44] Ibid, cl 165 (2)(b).
[45] Serious Fraud Office Act 1990.
[46] England and Wales are governed by the Serious Organised Crime and Police Act 2005. Section 60 empowers the Director of Public Prosecutions (DPP), to issue a disclosure notice in connection with an investigation. Section 62(3)(a) authorises the DPP or authorised prosecutor to require the person to whom the notice is given to answer questions with respect to any matter relevant to the investigation. The offences to which this section applies is not as limited as the Bill, including such crimes as terrorism and theft: "Director's Investigatory Powers" The Crown Prosecution Service <www.cps.gov.uk>.
[47] The Criminal Evidence (Northern Ireland) Order 1988 provides for adverse inferences to be drawn for failure to mention something prior to being charged to an offence. The Criminal Procedure (Amendment) Rules 2009 which came into effect on 5 October 2009 provides for post-charge questioning. This can be applied for failure to mention facts after a suspect has been charged with an offence. The scope of Emergency Legislation in

(Investigative Powers) Act 2004 (MCIPA) was introduced in the hopes of removing the veil of silence that typically shrouds and impedes organised crime investigations.[49] As Australia is a comparable common law jurisdiction to New Zealand, this Act will be used as a comparison to the New Zealand legislation, throughout this dissertation. Even though the scope of the Act is different to that of the Bill, it is the extension of coercive powers to police and the use of such powers to investigate offences outside traditional corporate crimes, which concern the New Zealand public. Thus the MCIPA provides a valuable measure.

The powers granted by the MCIPA are similar to the Bill's Examination Orders, as they allow the compulsion of answers from organised crime suspects and witnesses. In a process similar to that in the Bill, a police officer can apply to the Supreme Court for a *coercive powers order* if the officer suspects "an organised crime offence has been, is being or is likely to be committed".[50] This order must be approved by either the Commissioner[51] or a delegate of the Commissioner,[52] and allows for the summoning of witnesses to secret hearings to answer any question posed, with criminal sanctions for non-attendance.[53] As with the Search and Surveillance Bill, witnesses are entitled to have legal representation present whilst answering questions and giving evidence.[54]

Northern Ireland includes limitations on the right to silence, extended police detention powers and limitations on a suspect's right to legal counsel at time of arrest which can all impact upon a suspects right to a fair trial.

[48] A number of statutory measures in Ireland have re-interpreted the right to silence, such as the Criminal Justice Act 1984, the Criminal Justice (Drug Trafficking) Act 1996 and the Offences Against the State (Amendment) Act 1998. The general effect of these measures is to provide for adverse inferences to be drawn against a suspect who declines to answer questions while being questioned in police custody. The Criminal Justice Act 2006 also affects the right to silence, in that it permits inferences to be drawn from silence where no solicitor is present. Section 52 of the Offences against the State Act 1939 obliges you, if detained under Section 30 of the Act, to answer certain questions concerning your movements and actions and your knowledge concerning the commission of any offence under the Act. Before requesting this information, the Garda must inform you that the request is being made under section 52 of the Act. You must then be informed of the consequences of a failure or refusal to comply with the request, that is, you are committing an offence. The Garda must explain this in clear, ordinary and understandable language.

[49] Rona Koifman "Major Crime Investigative Powers Act" <www.ehow.com>.

[50] Major Crime (Investigative Powers) Act 2004, s 5(1).

[51] Currently the Chief Commissioner is Ken Lay.

[52] This led some, for example Liberty Victoria president Greg Connellan, to claim that the law makes the Commissioner Australia's most powerful police officer: John Silvester "US-style powers to hit crime" (2004) theage.com.au <www.theage.com.au>.

[53] Major Crime (Investigative Powers) Act 2004, s 37.

[54] Ibid, s 34. Although the New Zealand Bill does not expressly provide that the witness must be told of this right, the Victorian law states this must occur before questioning 'where applicable'. The Major Crime (Investigative Powers) Act 2004, s 31(1)(f) states : "[before questioning] where applicable, inform the witness of his or her right to legal representation, to an interpreter or to have his or her parent or guardian or an independent person present with whom he or she may communicate before giving any evidence".

The Victorian MCIPA has an application process and reporting requirements similar to that for Examination Orders. There are several differences however; including requirements for the confidentiality of the hearings and the independence of the questioner, a public interest requirement, stricter penalties for non-compliance, and a role of Special Investigations Monitor (SIM). In some respects, the Victorian legislation may be more appropriate than the current New Zealand Bill in accomplishing the objectives of Examination Orders. These objectives will be considered in the following Chapter.

CHAPTER TWO: OBJECTIVES OF THE EXAMINATION ORDERS

With such an intent focus on the Examination Orders' intrusion on the right to silence, the media and others have failed to consider what the Orders are seeking to achieve. The reasons for proposing such an invasive power should have been the first question addressed. Orders in the business context are considered essential to override professional obligations which bar cooperation with the police. In terms of the non-business context, the Orders seek to assist in the detection, investigation, punishment and deterrence of specific crimes. It is crucial to discuss why serious or complex fraud and organised crime may justify such an expansive power.

2.1 Orders in the Business Context

The first scenario in which an Order can be sought is where knowledge is acquired in a business context. 'Business context' is defined in the interpretation section of the Bill as a situation where a person acquires information in their capacity as a provider of professional services or professional advice to a person or transaction being investigated, or a director, manager, officer, trustee or employee of a person being investigated.[55] This definition encompasses situations in which a person is relied upon for their professional expertise. Classic examples include occupations such as lawyers, accountants, engineers and architects.[56]

Orders in the business context are intended to cover situations in which a professional person may feel the highest obligation to their client or employer and thus is not comfortable cooperating with police. Rhys Henderson of the Serious Fraud Office says that the majority of the Orders issued under the Serious Fraud Office Act are in regards to people who want to help the office but cannot.[57] Henderson says the power contained in s9, referred to in Chapter One, is invaluable when it comes to investigating cases of serious or complex fraud.[58]

[55] Under s24 of the Serious Fraud Office Act 1990, the common law definition of solicitor/client privilege is narrowed. Any information in regards to financial records is not privileged. Thus officers of the Serious Fraud Office can compel a lawyer to answer questions about money flows and other financial particulars.
[56] "Indicators of regulatory conditions in the professional services" OECD: Economics Department <www.oecd.org>.
[57] Interview with Rhys Henderson, General Manager of the Serious Fraud Office in New Zealand (Zoe Roborgh, 1 September 2011).
[58] Ibid.

An accountant, for example, owes a bevy of rights to clients and it can be confusing where loyalties lie.[59] Under the Code of Ethics for Accounting, confidentially is emphasised as extremely important, and Rule 12 means that details regarding clients cannot be disclosed unless there is a legal obligation to do so. [60] The law places no legal obligation on an accountant to cooperate with police during an investigation, although individuals in these types of roles often hold information which may be vital to an investigation. Currently then, accountants are aware of both a professional and fiduciary obligation to protect their clients' information; but also of concern to them would be the effect of disclosure on their future business prospects. Serious risks include firings, lawsuits or loss of clients,[61] which collectively act as a disincentive to cooperation with police.[62] This example of the accountant applies to all those roles falling under the business context 'umbrella'.

Where there is a legal obligation to disclose information, the path is clear. It is less so, however, where there is no legal duty to cooperate, but a moral obligation to do so.[63] Using an Examination Order would mean that accountants, and those in similar roles, would be able to avoid this present dilemma.

2.2 Orders in the Non-Business Context

The second scenario where an Examination Order can be sought is when information is acquired in a non-business context.[64] As earlier referred to, the Justice and Electoral Committee amended the legislation to cover:

- serious or complex fraud that is punishable by imprisonment for a term of 7 years or more; or
- an offence by an 'Organised Criminal Group' as defined in Section 98A of the Crimes Act 1961 (this offence will be referred to throughout this dissertation as 'organised crime').[65]

[59] Charles A. Werner "Accountant confidentiality: the duty to remain silent vs. the duty to speak" (June 2009) 79(6) The CPA Journal 62.
[60] "New Zealand Institute of Chartered Accountants Code of Ethics" <www.nzica.com>.
[61] John Gruner "Confidentiality: striking the right balance" Accounting Today (United States, August 1998).
[62] *Paper 8: Examination Powers* (Ministry of Justice, 17 March 2008) <www.justice.govt.nz>.
[63] John Gruner, above n 61.
[64] Search and Surveillance Bill 2009 (45-2), cl 33. The definition of "non-business context" in the Bill is "a context other than a business context": Search and Surveillance Bill 2009 (45-2), cl 3.
[65] See Appendix 2 for s98A of the Crimes Act 1961.

Of note is the requirement that Examination Orders in regards to organised crime specify a "description of the offence" that the police suspect "has been committed, is being committed, or will be committed".[66] The Victorian legislation has a similar requirement for coercive powers orders.[67] This specification has proved problematic for investigators in Victoria, as often the precise type of offending is not apparent until after the powers have been used.[68] It is the use of the power to compel which assists in uncovering the true extent of an organised crime enterprise, and this can encompass offending not contemplated by the investigators when applying for a summons (or potentially an Examination Order).[69] Victoria has faced cases where the validity of an order has been challenged on the basis that it did not precisely specify a particular offence.[70] Thus it should be ensured that Examination Orders only require specification of the *general nature* of the offence, rather than any specific type of offending.

a) Serious or complex fraud

The effects of financial crime are often underestimated. The fear and anxiety caused by traditional street crimes such as burglary, robbery and rape is very high in comparison to crimes which inflict what is seen as 'merely' financial trauma.[71] However, serious fraud has

[66] Search and Surveillance Bill 2009 (45-2), cl 31(2) (b) for orders in the business context, and cl 33(2)(b) for orders in the non-business context.

[67] Major Crime (Investigative Powers) Act 2004, s 9(2) sets out that a coercive powers order must specify: the organised crime offence in respect of which the order is made; and the name of each alleged offender or, if the name is unknown, state that the offender is unknown; and the name and rank of the applicant; and the name and rank of the person who approved the application; and the date on which the order is made; and the period for which the order remains in force, being a period not exceeding 12 months; and any conditions on the use of coercive powers under the order.

[68] David Jones *Report by the Special Investigations Monitor Pursuant to s62 of the Major Crimes (Investigative Powers) Act 2004* (2008) Accessed at <www.justice.vic.gov.au>.

[69] Ibid.

[70] *Chief Commissioner of Police and Others* (2008) VSC 51.

[71] Arie Freiberg "Sentencing White Collar Criminals" (paper presented at the Fraud Prevention and Control Conference convened by the Australian Institute of Criminology on August 24-25, 2000). While it is true that many white-collar crimes are non-violent, violence is not necessarily the only requirement for the direct infliction of harm. The amount and severity of indirect harm caused by violations of legislation governing factories and workplaces, coal mines, consumer products, automobile safety, food preparation, environmental pollution and the like can be as great as the harms caused by immediate personal violence: J Braithwaite "Challenging Just Desert: Punishing White Collar Criminals" (1982) 73 JCRLC 723. The proposed introduction in Victoria of an offence of 'industrial manslaughter' reflects the view that harm in the workplace is as great as harm in the streets. Furthermore there is mounting empirical evidence that makes it clear that the general public is growing intolerant of certain types of white-collar crime, in particular corporate crime. See M Levi and S Jones "Public and Police Perceptions of Crime Seriousness in England and Wales" (1985) 25 BJ Crim 234 and J Miller, P Rossi and J Simpson "Felony Punishments: A Factorial Survey of Perceived Justice in Criminal Sentencing" (1991) 82 JCRLC Criminology 396.

the capacity to undermine faith in our social institutions, [72] which has led several academics to claim that corporate crime[73] is more serious than conventional crime.[74] The financial implications are also significant and two-fold. There are both direct impacts, in terms of the monetary losses suffered by its victims, and indirect impacts in terms of economic harm caused by damage to investor confidence and the public costs of prevention, detection and prosecution.[75] Serious or complex fraud is an immediate and significant drag on the economy, and acts as a suppressant to future investment in our financial markets.

In recent years, academics have undertaken research into the drivers and cost of financial crime in overseas jurisdictions.[76] The resultant data has illustrated how pervasive fraud is and how damaging it is to an economy. In New Zealand, where such research has been lacking, it can only be assumed that the emerging types and scale of fraud being experienced internationally will be affecting our economy in a broadly similar manner.[77] In January 2011, the UK National Fraud Authority published its Annual Fraud Indicator, which determined the annual cost of fraud in the United Kingdom to be over NZ$80 billion. Dr Bernard Herdan, Chief Executive of the Authority, made the observation that "[i]n this time of austerity, it is money we can ill afford to lose."[78] Although it is debateable whether New Zealand faces a problem of the same scale, it would nevertheless be complacent to assume that we do not face a significant problem with fraud.[79] The following table shows the number of victims and the money amounts involved in the cases investigated by the Serious Fraud Office in the two years ending in June 2010.[80]

[72] Vicky Comino"Civil or Criminal Penalties for Corporate Misconduct- Which Way Ahead?" [2006] UQLRS 1; (2006) 34(6) ABLR 428.
[73] The term 'corporate crime' is used simply to refer to serious corporate misconduct, wrongdoing or white-collar crime. Serious or complex fraud falls within these terms.
[74] Vicky Comino, above n 72. See Professor Seumus Miller, who said that the "problem of a corrupt or incompetent corporate leader is of an entirely different order of magnitude from that of a crooked or inept corner store grocer": "The Current Simplification Process and Questions of Corporate Ethics" (speech at the National Corporate Law Teachers Conference, Melbourne, 6-7 February 1995).
[75] *Serious Fraud Office Statement of Intent 2011-2014* (Serious Fraud Office, 2011).
[76] Ibid.
[77] Ibid.
[78] *Annual Fraud Indicator* (National Fraud Authority, January 2011).
[79] *Serious Fraud Office Statement of Intent 2011-2014,* above n 75.
[80] *Report of the Serious Fraud Office Ended June 2010* (Serious Fraud Office, 30 June 2010) at 6.

	Investigations	Estimated losses	$/case	Approx. number of victims	Victims/case
30-Jun-10	39	$690 million	$17,711,000	35,000	900
30-Jun-09	16	$629 million	39,363,000	25,000	1,600

These crimes involve a significant amount of money and the situation is all the more daunting when we consider that much fraud goes undetected. What is certain is that like the United Kingdom, these are losses that New Zealand can ill afford.

Fraudsters are clever, with fraud cases showing "the inventive brain at its most ingenious".[81] Serious fraud is truly complex, and can involve hundreds of transactions, bank accounts and people. Investigations are intricate and complicated, even more so with the increasingly sophisticated technology available to criminals. [82] Police have been developing their capability to investigate and prosecute serious or complex fraud, and although they do not currently have an examination power available, they enjoy a level of success by utilising existing methods.[83] Any additional powers are not to be considered a cure-all or first stop, but rather will complement the range of tools currently available.[84] Examination powers held by the Serious Fraud Office are "crucial" to the work they do,[85] so it is arguable that police investigations of serious or complex fraud would greatly benefit from the operation of Examination Orders.

b) Organised crime

The Bill uses the definition of 'organised criminal group' as found in s 98A of the Crimes Act 1961. The basic premise of the section is that three or more people must share in

[81] Justice (Society) *Fraud trials: a report/ By Justice; chairman, Beryl Cooper* (London: Justice, 1984).
[82] Ibid.
[83] *Paper 2: Establishment of an Organised Crime Agency and Disestablishment of the Serious Fraud Office* (Cabinet Business Committee, 12 March 2008) <www.justice.govt.nz>.
[84] Ibid. Police currently 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. They have the capability to issue search warrants and surveillance capabilities and also employ document examiners, computer forensic staff, legal advisors and forensic accountants. The Serious Fraud Office currently holds similar powers to those laid out in the Examination orders, and it is conceivable that the Police should hold similar powers when investigating comparable offences.
[85] Interview with Rhys Henderson, above n 57.

common objectives and contribute to the occurrence of a certain criminal activity.[86] The maximum penalty for a conviction of an offence under this section has recently been increased from five to ten years,[87] and participation in an organised crime is now an aggravating factor to be used at sentencing.[88] These recent legislative changes indicate the Government's serious and strict approach to this type of crime. Furthermore, New Zealand is a signatory to the United Nations Convention against Transnational Organised Crime,[89] requiring the introduction of measures to combat trans-national criminal activity. The adoption of Examination Orders in the Bill is an active step New Zealand can take to better meet its obligations under the Convention.

Richard Stott, Strategy & Liaison Manager and Operations Manager of the Organised and Financial Crime Agency of New Zealand (OFCANZ), believes that New Zealand's biggest organised crime concern is "that we have organised crime at all".[90] He elaborates: "It is secretive and has the potential to corrupt public officials and elements of society in a way that opportunistic criminality does not".[91] According to the Police Association, which has drawn on overseas studies,[92] organised crime does not begin but evolves. It is not merely the activity of gangs; rather, it involves criminal enterprises which are networked, profit motivated, opportunistic and adaptable. It seeks to hide and legitimise wealth obtained through crime and to corrupt. These networks are resilient and traditional policing is not enough.[93]

[86] Crimes Act 1961, s 98A (2) sets out what these objectives must be.
[87] Ibid, s 98A (1).
[88] Sentencing Act 2002, s9 (1) (hb). *R v Taueki* [2005] 3 NZLR 372 (CA) stated "Where serious violence is perpetrated by members of a criminal gang or organised crime cartel that would be an aggravating factor". The Court referred to *R v Hereora* [1986] 2 NZLR 164 (CA) and *R* v *Mako* [2000] 2 NZLR 170 (CA) which both said gang warfare was an aggravating factor.
[89] This treaty came into force on 29 September 2003. It currently has 147 signatories and 163 parties. New Zealand signed this treaty on the 14 December 2000 and ratified it on 19 July 2002. This convention requires countries to introduce measures to combat trans-national money laundering and trans-national corruption, criminalise membership of organised criminal groups and enable the proceeds of crime to be confiscated.
[90] Interview with Richard Stott, Strategy & Liaison Manager and Operations Manager of the Organised and Financial Crime Agency of New Zealand (Zoe Roborgh, 1 September 2011).
[91] Ibid.
[92] Both the Victoria Police and the Australian National University have carried out studies.
[93] "Understanding Organised Crime" NZPA Police News (2010) <www.policeassn.org.nz/newsroom/publications/featured-articles/understanding-organised-crime>.

The networks, gangs and groups involved in organised crime vary greatly in size, geography, criminal sophistication, modus operandi and their impact on communities.[94] The networks are entrepreneurial and often use legitimate businesses to facilitate their illicit activities.[95] Despite the challenge in defining and identifying organised criminal groups, they are linked by two common characteristics: they all pose serious risks to society and they are all largely motivated by financial gain.[96]

Organised crime in New Zealand involves large-scale financial transactions in relation to drug trafficking, money laundering and other offences.[97] In 2010, the methamphetamine (commonly referred to as 'P') market in New Zealand was estimated to be more than $1.2 billion at street value, and is the most significant driver of profit for organised crime in New Zealand.[98] As described by the Crown in *R v Fatu:* [99]

> The various ways in which the drug threatens a community are well known. Methamphetamine is a particularly destructive drug for users. It is highly addictive with profound mental and physical side effects. It induces aggressive and irrational behaviour and is regularly responsible for the other offending involving extreme violence, a phenomenon not commonly associated with other drugs. It has created a thriving industry in which organised crime is heavily involved at all levels. The manufacturing process is particularly dangerous. It is submitted with respect that if it is appropriate to draw any distinction between class A drugs, methamphetamine can fairly lay claim to a place in the most serious category.

Thus it is clear that the impact of organised crime in New Zealand is pervasive and its effects felt widely amongst communities.

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[94] *Paper 1: The Programme of Action for Organised Crime and the Organised Crime Strategy* (Cabinet Business Committee, 12 March 2008) <www.justice.govt.nz>.

[95] "Organised Crime in New Zealand" (2010) OFCANZ <www.ofcanz.govt.nz>. Worth noting is the clear relationship between organised crime interests and the commercial world. The more serious criminal enterprises use commercial and financial expertise not just as devices to launder the proceeds of crime, but also to induce markets, financial processes and decision makers within the system in order for criminal financial gain: *Paper 2: Establishment of an Organised Crime Agency and Disestablishment of the Serious Fraud Office*, above n 83.

[96] "Organised Crime in New Zealand", above n 95.

[97] Offences are illicit drugs, burglary, theft, violence, kidnapping, illegal trade of firearms, illegal possession of fire arms, illegal use of firearms, illegal migration, identity crime, financial crime, electronic crime, environmental crime, intellectual property crime, bribery and corruption: *Paper 1: The Programme of Action for Organised Crime and the Organised Crime Strategy*, above n 94.

[98] "Organised Crime in New Zealand", above n 95. Oceania has the highest user per capita statistics of methamphetamine in the civilised world: Ibid.

[99] *R v Fatu* (2005) 22 CRNZ 410 at 414.

The very nature of sophisticated criminal organisations makes the operations of ordinary law enforcement agencies very difficult. Douglas Meagher QC provides the following reasons why organised crime is different:[100]

- The victims of the crime rarely complain, mainly due to fear of violent consequences or because they played some role in the commission of the crime.
- Threats are commonly made to those who cooperate with police or are seen as disloyal.
- The immediate perpetrator of the crime rarely has any personal involvement other than a pecuniary rewards, thus a motive is frequently absent. The high echelon criminals are concealed behind false identities, complex corporate structures and geographical separation from the actual act.
- The perpetrator is provided with an extensive support network should the crime backfire.
- If law enforcement agencies become involved, the crime network will have well developed means of corruption available, to distract or suppress any investigation.

The net result of this is that organised crime is frequently undetected; and if it is, it is almost impossible to investigate. Perpetrators are well skilled in exercising their right to remain silent and even if they are caught in the act they will usually refuse to reveal the ringleaders of the organisation. Arguably then, special techniques should be allowed in order to increase the success of investigations into organised crime. Article 20 of the United Nations Convention against Transnational Organised Crime directly acknowledges this, recognising certain crimes require the use of techniques to extend above and beyond those normally available to investigators.[101]

The Victorian legislation requires the Court to be satisfied, before granting a coercive powers order, that there are reasonable grounds for the suspicion founding the application[102] and that

[100] Douglas Meagher "The Case for a Crime Commission" Meldrum and Hyland List <www.barristersclerk.com.au>.

[101] Article 20(1) provides: "If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combatting organized crime".

[102] Major Crime (Investigative Powers) Act 2004, s 8(a).

it is in the public interest to make the order. [103] In considering the public interest, the court must have regard to the nature and gravity of the organised crime offence and the impact of the Order on the rights of members of the community.[104] In the New Zealand Bill, before an Examination Order is granted, a Judge must determine 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".[105]

Consideration of the impact of the order on the rights of members of the community, in the MCIPA, is the only true difference between the Victorian test and the proposed New Zealand test. However, it amounts to a strong and necessary safeguard. Requiring judges to directly consider the rights of the members of the community before granting an Order gives well-deserved recognition to the intrusion of the Orders on individual rights. It is a plausible proposition that this element be introduced to the New Zealand test so that a similar consideration is explicitly required.[106] This would encourage not only careful consideration of whether the power is appropriate in that situation, but would also highlight how rarely the Orders should be used. As Stu Harvey of the New Zealand Police said, "the first avenue would always be talk to the person, if they don't want to then we would take the next step…it is very unlikely the power would be overused. We wouldn't want it to be overused".[107]

2.3 Conclusion

The objectives of the Examination Orders are to detect and hopefully reduce, punish and deter the commission of crimes that are of great concern to New Zealand. Orders granted in a business context allow professionals who hold valuable knowledge regarding the commission of a crime, to cooperate with police. Non-business context Orders target offenders of serious or complex fraud and organised crime. Critics of the Orders argue that the protection of the

[103] Major Crime (Investigative Powers) Act 2004, s 8(b).
[104] Ibid, s8 (b) (i) and (ii).
[105] Search and Surveillance Bill 2009 (45-2), cl 36(b).
[106] These sorts of tests are already in use in New Zealand. For example when the Director of the Serious Fraud Office is deciding if a suspected offence involves serious or complex fraud, he/she can have regard to several factors, one being "any relevant public interest considerations": Serious Fraud Office Act 1990, s8(d). Furthermore, information provided to the SFO is assessed objectively against set criteria to determine whether that information justifies the launch of a new investigation. This criteria includes 'the preventative impact of a successful prosecution on the wider fraud landscape in New Zealand': "The Serious Fraud Office: What we Do" The Serious Fraud Office <www.sfo.govt.nz>.
[107] Interview with Stu Harvey, Detective Sergeant, Fraud Office Branch of New Zealand Police (Zoe Roborgh, 8 September 2011).

individual right to silence should take precedence over the attempt to eliminate these crimes. The following chapter will consider if and when breaches of the right to silence can be justified.

CHAPTER THREE: THE RIGHT TO SILENCE

Part A: The Role of the Right to Silence

The right to silence debate has been brewing for decades, and thus is a topic that has received extensive academic attention. Given that, this paper will not discuss the right to silence in detail. Rather, a summary of arguments will be provided to highlight both the importance of the right and the extent of the varying views on its legitimacy. This analysis will lead us to the next consideration in Part B, of whether limitations of the right that would be imposed by Examination Orders can be justified.

3.1 The Right to Silence at Common Law

The term 'right to silence' has been seen as shorthand for much broader concepts that exist within the context of the adversarial criminal trial[108] and certain rights reflected in the New Zealand Bill of Rights Act 1990 (NZBORA).[109] It conceals a network of ideas and practices which, broadly speaking; reflect the principle that "in the absence of some contrary rule of common law or legislation, all citizens are free to remain silent and to decline to provide the authorities with information".[110] Or put otherwise, although citizens may feel a moral or a social duty to assist the police, there is no legal duty to that effect.[111]

[108] D Harvey "The Right to Silence and the Presumption of Innocence" (1995) NZLJ 181 at 1.
[109] *R v Haig* (2006) 22 CRNZ 814 at [120] per Hammond J.
[110] Law Commission *Criminal Evidence: Police Questioning - A Discussion Paper* (NZLC PP21, 1992) [*Criminal Evidence*] at 9.
[111] "The whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority": *Rice v Connolly* [1966] 2 QB 414 at 419. As observed by Lord Hoffman in the decision of the House of Lords in *R v Hertfordshire County Council* [2000] 2 AC 412 at 419: "As Lord Mustill said in *Reg. v Director of Serious Fraud Office, Ex parte Smith* [1993] A.C. 1 at 30-31, the expression 'privilege against self-incrimination' or 'right to silence' is used to refer to several loosely linked rules or principles of immunity, differing in scope and rationale. Perhaps the best known example is the rule that a person on trial should not be compelled to undergo inquisition by the prosecution or the court. … There are also associated principles which confer a right to silence or privilege against self-incrimination during the pre-trial investigation, such as the exclusion of involuntary confessions and the prohibition on the questioning of suspects without caution or after charge. … There is also a general privilege not to be compelled to answer questions from people in authority; based, as Lord Mustill put it in *Reg. v Director of Serious Fraud Office, Ex parte Smith* … upon 'the common view that one person should so far as possible be entitled to tell another person to mind his own business.' "

At a philosophical level, the right may be seen as an essential component of a citizen's "right to be let alone" and be free from unwarranted state intrusion into their private life.[112] Privacy is a key right compromised by search and surveillance powers and has been claimed to be a concomitant to the right to silence.[113] Our individual 'zone' of privacy is imperative to our personal integrity; however, over time, this zone has succumbed to the demands of society in the quest for crime control. [114] Proponents for the right argue that questioning a

[112] Law Commission *Criminal Evidence,* above n 110, at 21. Preservationists of the right contend that the right to silence is a fundamental articulation of the relationship between the individual and the state, defining what each can do in relation to one another: Ian Freckelton "The Right to Silence: Abolish or Retain" (1998) 10(2) Legaldate 6 at 10. It also represents the individual's right to privacy and dignity. Professor Griswald of Harvard is a credible advocate of the right's importance to the citizen's relationship with the state; "we want none of that [torture] today…we have, through the course of history, developed a considerable feeling of the dignity and intrinsic importance of the individual man…believe that is a good standard and that is an expression of one of the fundamental decencies in the relationship we have developed between government and man": Quoted by David Baragwanath QC in "The Right to Silence in Fraud Cases" (Address to Auckland Medico-Legal Society, September 1990) at 15. Our relationship with the state is, from a practical point of view, determined by powers that the state and its agents have to question us. Police officers must have reasonable grounds to suspect an offence before they interfere. Once they have this good reason it is a stretch to suggest that it is an essential part of our relationship with the state that we may remain silent and not have inferences drawn from the fact. Additionally, as the suspect is already a source of valuable evidence through fingerprints, identity parade and alibi, contention that the citizens relationship with the state is effected by compulsion of questions, is not an argument for the right to silence but for ending interrogation of suspect's altogether: Bernard Robertson "The Right to Silence Ill-Considered" (1991) 21 VUWLR 139 ["Right to Silence"] at 145.

[113] DJ Galligan "The Right to Silence Reconsidered" [1988] CLP 69. It is important to note however that the correlation between the right to privacy and to silence is not represented in international conventions. The right to privacy is contained in article 8 of the European convention, signed by many countries who do not exercise the right to silence: Robertson "Right to Silence", above n 112. Galligan argues that the right to silence defends a right to a fair trial by guarding against confessions. However Robertson rebuts this as Article 6 of the European Convention on Human Rights (which protects the right to a fair trial) does not include reference to the right to silence. Furthermore, the Police and Criminal Evidence Act1984, s 76(1) protects prisoners from forced confessions without resort to any right to fair trial. Robertson proposes that it is equally arguable that it is the inadmissibility of inferences drawn from silence which creates the perceived need to force confessions: Robertson "Right to Silence", above n 112 at 143.

[114] EW Thomas "The So-Called Right to Silence" (1991) 14 NZULR 299 at 315. Privacy is infringed when evidence such as fingerprints is taken. Thus, it has been suggested that it is only privacy with respect to an individual's consciousness that is sufficient to attract the right to silence, or privilege against self-incrimination: Galligan, above n 113. This however, ignores the intimate nature of accepted aspects of an investigation, such as bodily samples: Thomas, above n 114, at 315. The argument about privacy, argues Thomas, really means a "right to hold ones tongue": Ibid. If the protection of privacy was such a core consideration, it is arguable that police questioning could not take place at all, that the right to silence would need to be broader. The police will never know when a question will impinge on the suspect's personal domain and be an invasion of his/her privacy: Michael A. Menlowe "Bentham, Self-incrimination and the Law of Evidence" (1988) 104 L.Q.R. 286 at 300. From a practical perspective, if the real concern is that the interrogation will intrude on a suspect's core 'zone' of privacy, questions such as "who did you sell the drugs to?" or "who's bank account is this"' hardly represent such an intrusion.

person is compelling them to reveal his or her conscience[115] and any such intrusion is contrary to our accusatorial system.[116] Support is also derived from the claim that, at another level, the right is based on the twin principles "a citizen should not be required to incriminate him or herself" and "the burden of proving guilt should rest upon the prosecution".[117]

The right to silence operates in at least two distinct contexts, silence *before* trial as well as silence *at* trial. As Examination Orders occur during the investigatory stage, when police are questioning a person, it is the right to silence *before* a trial which will be considered here.

3.2 The Legitimacy of Limiting the Right to Silence

a) The limited support of the right

The real value of a right can be determined by its actual scope, as opposed to any symbolic significance. On close examination, the scope of the right to silence is more limited than one would expect, with it even being referred to as a "diminished right".[118]

Contrary to popular belief, the right to silence is a relatively new phenomenon.[119] It was created not to fill a pressing gap in the legal system, but arose from the adversarial criminal

[115] Thomas, above n114, at 316. However on closer inspection, any absence of a right to silence will not mean that a suspect *must* talk, rather that they may face an adverse inference if they choose not to. It is a plausible assertion that freedom of choice must come with the burden of responsibility for the consequences of ones decisions: Robertson "Right to Silence", above n 112 at 145. Thus it is logical that if a suspect is free to remain silent, they must bear the costs of that silence in the form of an appropriate adverse inference: Ibid. Nevertheless, most criminal offences do not raise the issue of conscience anyway: Thomas above n 114, at 316. In clear cases where indeed it did, i.e. political crimes, a suspect may welcome the chance to express their cause: Ibid, at 317. The Examination Orders are only available in business contexts or investigations of serious fraud or organised crime. It is doubtful that conscience forms a strong part in the committal of these. There is difficulty in seeing how the right to silence genuinely protects the freedom of conscience, as a person is still free to have any conscience they wish.

[116] The accusatorial system developed out of a deep respect for the uniqueness of the individual, for individual sanctity and for the protection of the individual from interference from the state: Harvey, above n 108, at 183.

[117] Roger Leng 'The right to silence debate' in D Morgan and GM Stephenson (ed) *Suspicion and Silence: The Right to Silence in Criminal Investigation* (Blackstone Press Ltd 1994) at 18. In the words of the English Royal Commission on Criminal Procedure "To require it [the defence] to rebut unspecific and unsubstantiated allegations, to respond to a mere accusation, would reverse the onus of proof at trial, and would require the defendant to prove the negative, that he is not guilty. Accordingly, "it is the duty of the prosecution to prove the prisoner's guilt", which is, in Lord Sankey's words, the "golden thread" running through English criminal justice": Royal Commission on Criminal Procedure *Report* (Cmnd 8092 HMSO 1981) at [4.35] quoting *Woolmington v DPP* [1935] AC 462 at 481.

[118] Thomas, above n 114, at 304.

[119] John H Langbein "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" (1994) 92(5) Mich Law Rev 1047 at 1062. The pre-trial system in the sixteenth, seventeenth and eighteenth century was largely inquisitorial, with the "Marion pre-trial system" intended to make people talk: Ibid at 1061.

procedure at the end of the eighteenth century.[120] There are already multiple exceptions to the right imposed by regulatory regimes and [121]requirements to provide identification particulars.[122] The Serious Fraud Office currently holds powers very similar to those encapsulated in Examination Orders. These powers will be considered in closer detail in Chapter Four.

Under current law, police must caution[123] a suspect as to their right to silence before questioning can commence.[124] This is intended to protect the right, but can have the opposite

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Witnesses were expected to answer questions, and failure to do so was noted at trial: Ibid. People were not advised they did not have to talk (EM Morgan "The Privilege Against Self Incrimination" (1949) 34(1) Minn Law Rev 14), and a privilege against self-incrimination 'scarcely existed': Leonard W Levy *Origins of the Fifth Amendment: The Right Against Self Incrimination* (Oxford University Press, New York, 1968) cited in Langbein, above n 119, at 1062. The St John Jervis Act of 1848 made statutory provision for cautioning those being questioned in criminal investigations, however did not provide' absolute' protection: SA Farrar "Myths and Legends: An Examination of the Historical Role of the Accused in Traditional Legal Scholarship; a Look at the 19th Century" (2001) 21(2) OJLS 331 at 339-340. Despite this, judges would still admit statements made without cautions, even if the suspect was facing the death penalty. Police questioning was not limited by the provision, rather enabled. There was no specific wording for the cautions. Furthermore, there was no specific power to exclude if the caution was not given, a statement could be admitted as long as the police did not threaten or induce the suspect. The object of the legislation seemed to be to protect law officials, rather than suspects. Parliamentary Debates on the legislation supports this view. It was not until the early part of the twentieth century that pre-trial standards settled. In 1912, the judges of the Queen's Bench Division created the Judges Rules, in the hopes that confusion surrounding the pre-trial questioning of suspects would be lessened: Ibid. These rules were adopted by New Zealand courts some time later in *R v Convery* [1968] NZLR 426 (CA): TE St Johnston "The Judges' Rules and Police Interrogation in England Today" (1966) 57(1) The Journal of Criminal Law, Criminology and Police Science 85 at 85.

[120] Thus even if it were true that ancient status or historical significance should protect legal principles, the right to silence cannot benefit from this approach: Isabella Margaret Gladstone Clarke "A Kahui Exception: Examining the Right to Silence in Criminal Investigations" (LLB (Hons) Dissertation, University of Otago, 2007) at 30.

[121] These regimes often have a statutory requirement to provide information to officers exercising regulatory powers. These powers only apply in limited settings and are justified by the fact that engaging in a regulated activity is a matter of personal choice. If a breach constitutes a criminal offence, it is only in rare circumstances that it will give rise to a penalty of imprisonment: *Paper 8: Examination Powers*, above n 62.

[122] Identification particulars are sought in classes of minor offending. This can be a duty to provide personal particulars (Sale of Liquor Act 1989) or about another person (for example in the Land Transport Act 1998, s114 outlines a duty to disclose identification particulars of yourself and the driver of a vehicle, if required to by an officer). Other officials such as rangers can require those they find offending to disclose their name and address (e.g. under the Wildlife Act 1953 and the Reserves Act 1997).

[123] The caution to be given is as follows: that the person has the right to refrain from making any statement and to remain silent, that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme, that anything said by the person will be recorded and may be given in evidence.

[124] Thomas suggests the caution be rephrased to be clearer, perhaps "you cannot be questioned without consent, do you give consent?" This would be more effective in conveying the right to silence thus, he argues, is why it is not used: Thomas, above n 114, at 305.

effect if given in an intimidatory fashion.[125] Police must tread a fine line, with a duty to both uphold the right and undermine it, by attempting to convince suspects to talk.[126] Current law dictates that a juror cannot draw an adverse inference from a suspect's silence during questioning;[127] however, doing so is contrary to common sense.[128] Furthermore, there is no way to ensure that jury members do not draw inferences in their minds.[129]

It has been argued that compliant, weak and impulsive suspects admit their guilt and that sophisticated, experienced or well-informed criminals use the rule to their advantage and thereby avoid conviction.[130] These claims have been thoroughly investigated.[131] Thomas J

[125] Suspects are then put in a dilemma about whether to cooperate or whether refusal to talk will count against them: Ibid. Additionally, Steven Greer has argued "the criminal justice system is committed to the right of silence yet under present conditions its exercise is illusory, since it is virtually impossible for most suspects to make an informed and voluntary decision whether or not to waive it": quoted by Ira deCordova Rowe "How Valid is the Right to Silence in Criminal Law?" (Conference Papers, 9th Commonwealth Law Conference, CCH 1990) 267 at 274.

[126] The right is further diminished by the fact that police can continue questioning a person even after the person has claimed the right to silence: *R v Wallace* [2007] NZCA 265.

[127] Evidence Act 2006, s 32.

[128] Professor Williams cited in Thomas, above n 114, at 306. If the right was taken seriously, arguably a direction by the judge in every case would be required: Robertson "Right to Silence", above n 112, at 146. This might however have the counter-productive effect of reinforcing the jury's perception that the accused has not spoken. It would be equivalent to telling the jury 'not to think about white elephants'': Ibid, at 146. In short, what is left is a 'damned if you do, damned if you don't' scenario.

[129] Thomas, above n 114, at 306.

[130] Ibid, at 304. Bentham famously criticised the right: "If criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes a privilege of silence": J Bentham, VII *Rationale of Judicial Evidence* (ed JS Mill, 1827) at 588 cited in Thomas, above n 112, at 308.

[131] The right to silence debate has been underway in the United Kingdom since the early 1970s; thus, several empirical studies have been carried out regarding the rights use and its consequences. Nothing on this scale has been undertaken in New Zealand, and therefore overseas research must be referred to for guidance. A study carried out by the Association of Chief Police Officers (ACPO) in 1993 confirms Bentham's proposition. Based on eight forces in the South East of England, with data returned on 3, 633 suspects, it concluded that 47% of suspects with five or more convictions exercise the right to silence, as against 15% with no criminal record. The conclusion of the study was that the right to silence is, in reality, 'a protection for hardened criminals'. It should be noted that because this study has not been compared with others, its reliability is difficult to assess. Furthermore those with criminal records are far more likely to be arrested than other citizens and are the most likely to be arrested in circumstances where there is no objective evidence to link them to the offence. It is perhaps no surprise that the group of suspects who are most susceptible to repeated unjustified arrests are those most likely to exercise their right to silence: Leng, above n 117, at 27. The study also tied together the themes of criminal professionalism and crime seriousness, by relating the rate of silence both to the number of previous convictions and the type of offence. As explained by David Brown of the Home Office: "It was found that those with previous convictions were more likely to exercise their right of silence in serious offences. For example, those with five or more convictions remained silent in over 47 per cent of serious offences compared with 35 per cent of other offences": D Brown, *PACE Ten Years On: A Review of the Research* (Home Office Research and Statistics Directorate, 1997).

states that those who do refuse to answer "appear to be among the more sophisticated of the courts' customers, and their previous criminal records tend to indicate a predilection for confidence trickery, fraud or drug trafficking".[132] These are the very crimes which Examination Orders are intended to combat; thus, the restriction of the right to silence for these sorts of witnesses can perhaps be justified.

While the police station and interview room may be a comfortable environment for police and lawyers, they are profoundly intimidating for many members of the community.[133] Individuals may perform poorly for reasons unconnected to their guilt or innocence, giving the wrong impression.[134] As explained previously, however, people who are not confident or anxious usually do not exercise the right and will respond to questioning.

Some claim the right is necessary to control police behaviour. Studies show that the police interrogation process can force false confessions[135] through the use of specially honed techniques which put pressure on the suspect to answer questions.[136] Others, however, argue that an absence of the right to silence does not necessarily lead to a de facto right of interrogation.[137]

b) A safeguard for fundamental legal concepts

[132] Thomas, above n 114, at 301.

[133] Freckelton, above n 112, at 10.

[134] The Australian Law Reform Commission reported that those who are accused of crime tend, for the most part, to be 'inarticulate, poorly educated, suspicious, frightened and suggestible, arguably not able to face up to and deal with police questioning': J Vincent "The Right to Silence Revisited Again" (Conference Papers, 9th Commonwealth Law Conference, CCH 1990) at 264.

[135] In 1932 over 200 people confessed to the kidnapping and murder of Charles Lindbergh's baby. Then in the late 1940s, more than 30 people falsely confessed to the murder and mutilation of Elizabeth Short, an aspiring Hollywood actress whose severed remains were found in a vacant Los Angles lot. The Short case is still unresolved. Still another instance of a false confession is the story of SS leader Heinrich Himmler, who lost his pipe while visiting a concentration camp. A search followed, but upon returning to his car the pipe was discovered on his seat. The camp commandant protested that six prisoners have already confessed to stealing it. Thus false confessions do occur and they are not a new phenomenon: Richard P Conti "The Psychology of False Confessions" (1999) 2(1) JCAAWP 14.

[136] There are a number of factors which bring about pressure on the suspect to answer questions from the police: A moral compulsion to account for ones actions, the desire to provide an explanation which will satisfy the questioner, a desire to stop the investigation and techniques and psychological pressures: Ibid, at 18.

[137] Vincent, above n 134, at 263. The right to silence itself is uninvolved with the kind of questioning techniques which are deemed appropriate, and control of police questioning requires direct action. Clear protocols and rules about questioning, the presence of lawyers, and videotaping interviews are effective means of controlling police misbehaviour, but the right to silence is not: Gladstone Clarke, above n 120. There are standards for inadmissibility of evidence and these exist regardless of the right to silence: Thomas, above n 114, at 312.

Presumption of innocence

Within the adversarial criminal trial, the accused has three rights: to be presumed innocent, for the burden of proof to rest on the prosecution and for proof to be established with admissible evidence.[138] The first is a guiding principle of our criminal system[139] and is practically upheld by the requirement that the prosecution must prove that the accused is guilty of a specific offence beyond reasonable doubt.[140] It is the existence of external evidence that, if sufficient, erodes the presumption of innocence.[141] Attaching significance to a defendant's silence means that the prosecution may theoretically establish something less than proof beyond reasonable doubt and yet still obtain a conviction.[142] Commentators have argued that this approach is a common misconception.[143] To establish guilt, proof beyond reasonable doubt must be met and the prosecution always bears the burden of discharging the presumption.[144] Attaching significance to silence; however, would mean that although the formal burden would remain on the prosecution, interrogation of the accused would likely be the first port of call and the collection of independent evidence would be neglected. [145]

[138] Harvey, above n 108, at 1.

[139] In *Woolmington v* DPP, above n 117, at 481, Lord Sankey described the presumption of innocence as the "golden thread" running through English criminal justice.

[140] Harvey, above n 108, at 1.

[141] Ibid, at 184. If the system were such that a mere accusation was enough in order to call upon the accused to respond, then this would require proof by the accused that he or she was not guilty. The burden would not then be fully on the Crown: Ibid. A conviction should be based purely on the evidence presented, and not on the silence of the accused. It should be noted that any alterations to the right to silence will have their greatest impact where the prosecution's case is at its weakest. That is, in the absence of this external evidence; good forensic evidence, reliable confessions or testimony from other witnesses: Gareth Griffith "The Right to Silence" (NSW Parliamentary Library Research Service, Briefing Paper 11/27).

[142] Law Commission *Criminal Evidence*, above n 110, at 16. Or alternatively put, the prosecution could prove guilt on a lower standard and then the accused's silence could be used to tip the scale. For those who accept this proposition, the presumption of innocence and the right of silence stand and fall together: Ibid.

[143] Thomas, above n 114 and Glanville Williams "The Tactic of Silence" (1987) 137 NLJ 1107.

[144] As explained by Professor Williams: "The rule as to burden of proof has nothing to say on what evidence shall be taken into account. It is illogical to argue that reasonable changes to the law of evidence to help the prosecution to discharge their burden of proof shift the burden of proof": Williams, above n 143, at 1108.

[145] Harvey, above 108, at 184. Altering the pre-trial right to silence would be to "lend a new significance to police interviews, since they would be a potential source of evidence, whether or not the suspect answered or was silent": Leng, above n 117, at 22. The police station would become the ultimate forum for deciding guilt or innocence. Compulsion would be imposed, not necessarily by the interrogators, but by the system itself: Harvey, above n 108, at 184.

Privilege against self-incrimination

The privilege against self-incrimination and the right to silence are sometimes considered one and the same, but they are actually two separate and distinct rights.[146] Parliament, although showing clear intent to override the right to silence, has expressly retained the privilege in the Search and Surveillance Bill through cl 132.[147]

The essence of the privilege against self-incrimination is that the State cannot require us to provide information which may expose us to criminal liability.[148] Thus, it remains entirely up the Crown to prove the guilt of an accused person, and the State cannot compel the accused to assist it in any stage of proceedings.[149] In addition to being a long held tradition, the privilege is said to protect multiple interests.[150] Interestingly, although suspects cannot

[146] The right of silence allows a suspect in a criminal investigation to refuse to answer questions, incriminating or not, put to him or her by a law enforcement officer. Thus it is somewhat broader than the privilege, because it can be invoked in response to any question, self-incriminating or not. In another sense however, it is narrower as it applies only in the context of criminal investigations and proceedings. The privilege can be claimed in a variety of situations, including civil discovery, disciplinary proceedings, before commissions of inquiry, and under examination on oath by a judicial officer. The privilege must be claimed, it does not automatically apply as the right to silence does. There is no duty at common law for the person requesting information, or for a judge in the course of proceedings, to warn the person being questioned of his or her right to invoke it: *R v Goodyear-Smith*, HC Auckland 26 July 1993, T 332/92. The privilege can be claimed by a person when there is a risk of criminal charges being laid against him or her likely to result from any information the person gives. The term "criminal charge" is given a very wide meaning in this context. The privilege can apply to regulatory offences, not traditionally thought of as criminal (see *Taylor v New Zealand Poultry Boards* [1984] 1 NZLR 394 (CA) where the Court of Appeal considered offences under the Poultry Board Regulations 1980). Thus anyone being questioned under an Examination Order, who, in answering a question posed by police is likely to incriminate him/herself, can claim the privilege.

[147] This section preserves the operation of s 60 of the Evidence Act 2006, which allows a person to refuse to give information if it is likely to incriminate them. Clause 132 of the Bill allows, if the privilege is invoked, for the Commissioner or other enforcement officer to apply to a District Court Judge for an order, determining whether or not the claim of privilege is valid. If such an application is made, the potentially incriminating evidence must be put before the judge, resulting in somewhat of a contradiction.

[148] Law Commission *The Privilege Against Self Incrimination* (NZLC PP25, 1996) [*The Privilege*] at 1. This right originated from the idea citizens should be protected from the coercive and overbearing powers of the state: David Morgan & Geoffrey Stephenson (eds) *Suspicion and Silence*, (Blackstone Press Ltd, London, 1994) at 7.

[149] Freckelton, above n 112. As expounded by McNaughton, "The Anglo-New Zealand legal system does not require that individuals respond to criminal allegations made by the state; criminal guilt must be proved beyond reasonable doubt through the evidence of others. As Wigmore puts it, 'the individual is sovereign and … proper rules of battle between government and the individual require that the individual … not be conscripted by his opponent to defeat himself": McNaughton *Wigmore on Evidence* (Little, Brown, Boston, 1961) vol 8 at 318.

[150] These have famously been summarised by Justice Goldberg in *Murphy v Waterfront Commission* 378 US 52 (1964) at 55: "The privilege against self-incrimination 'registers an important advance in the development of our liberty – one of the great landmarks in man's struggle to make himself civilized.' It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an

traditionally be made to answer questions, they are already required to provide evidence in many other ways.[151] This evidence takes the form of books, documents and bodily samples, and often no choice is given as to their provision.[152]

3.3 Conclusion

The right to silence is regarded as a cornerstone of our legal system, and thus has attracted vigorous academic analysis. Although it is often taken for granted, its "hallowed" existence justified by its pedigree, there are arguments for its limitation.[153] There is consensus that the right plays a necessary role in our system of law; however views differ regarding the extent to which it is appropriate to limit the right. Much is dependent on what the particular limit seeks to achieve, and therefore what is appropriate must be determined on a case-by-case basis. Such an analysis will follow in Part B of this Chapter.

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inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty', is often "a protection to the innocent."

[151] Examination Orders can be issued to people who are merely witnesses or hold information, however this argument is limited to those who are suspects.

[152] The distinction between real and testimonial evidence is then, rather subtle. What distinguishes concrete forms of evidence, from the compulsion to answer questions, is that the right to silence protects our conscious thoughts. Our mind is our own and the state should not have the power compel us to reveal this.

[153] Thomas, above n 114, at 307.

Part B: Are the Orders a Justified Limit to the Right to Silence?

Part A of this Chapter reiterated the important role the right to silence plays in our system of law. What must now be determined, is whether the Examination Orders would amount to a justified limit on the right to silence. Such a determination requires careful weighing up of the objectives of the Orders against the rights of those who would be forced to comply. This enquiry will take place against the background of New Zealand's obligations under the New Zealand Bill of Rights Act 1990.

3.4 Can the Common Law Right to Silence Trump the Breach of the Right in Examination Orders?

The relationship between common law and statute has always been that Parliament is sovereign; thus, any Act of Parliament will prevail over the common law.[154] On first inspection then, the common law privilege guaranteeing the right to silence has no impact once the Orders are enacted. However, courts are reluctant to uphold legislation which takes away the rights of citizens or breaches 'cornerstones' of law.[155] It will only do so if the statute has taken away the right by "necessary implication".[156] According to the Privy Council, a 'necessary implication' is an implication which the express language of the statute clearly shows must have been included.[157] As explained by Lord Hobhouse in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax:*[158]

> A necessary implication is not the same as a reasonable implication ... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows

[154] As espoused by Professor Philip Joseph: "Parliament's illimitable powers of legislation can be neither judicially controlled nor circumscribed by earlier enactment": Philip A Joseph "Beyond Parliamentary Sovereignty" (1989) 18 Anglo-Am LR 91 at 91.
[155] In the case of *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390, the judges of the Court of Appeal observed, "We have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary courts of law for the determination of their rights".
[156] *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 (PC).
[157] Ibid, at 349.
[158] *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] WLR 1299 at [45].

that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.

In the context of Examination Orders, one must conclude that the ultimate implication of the sections is to exclude the right to silence. Thus, the common law must give way. The wording of the clauses in the Bill is clear and unambiguous.[159] It is impossible to interpret them as running concurrently with the common law right to silence. Thus, courts would have no choice but to apply the Orders and read them as intention from Parliament to override this right. This is a momentous step for Parliament and flies in the face of deeply entrenched principles.[160]

3.5 The New Zealand Bill of Rights Act 1990

In 1990 New Zealand enacted a "watered down" New Zealand Bill of Rights Act (NZBORA), which was intended to operate as a statutory mechanism to protect citizens against the State.[161] The Act was enacted to "affirm, protect and promote" human rights and fundamental freedoms in New Zealand.[162] Its passage also confirmed New Zealand's commitment to the International Covenant on Civil and Political Rights[163] (ICCPR); on which the rights and freedoms it contains, are based.[164] No new rights were created by the NZBORA; rather, existing common law rights were restated.[165] It is appropriate to consider

[159] The Search and Surveillance Bill 2009 (45-2), cl 37 states: Form and content of examination order (1) An examination order made under section 36 must be in the prescribed form and 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.

[160] In *Taylor v New Zealand Poultry Boards*, above n 146, at 398, Lord Cooke said famously that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them". Although this seems to be a strong approach, New Zealand Courts have never flat out refused to apply a statutory provision due to its inconsistency with common law rights.

[161] M Taggart "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] Public Law 266 at 267.

[162] "New Zealand Bill of Rights 1990" Ministry of Justice < http://www.justice.govt.nz>.

[163] International Covenant on Civil and Political Rights (opened for signature on 16 December 1966, entered into force 23 March 1976).

[164] The ICCPR is a multilateral treaty adopted by the United Nations General Assembly. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. The treaty is monitored by the Human Rights Committee, which reviews regular reports of States parties on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). As of September 2011, the Covenant had 72 signatories and 167 parties. New Zealand signed the treaty on 12 November 1968 and ratified it on the 28 December in that year.

[165] International Covenant on Civil and Political Rights, art 14(2) provides that there is a presumption of innocence, until proven guilty according to law. It is the only provision where the ICCPR deals, expressly or

Examination Orders against the rights of the citizen as outlined in the NZBORA, in order to assess whether there are any practical implications.

3.6 Application of the NZBORA to Examination Orders

Taking the approach adopted by Rishworth and others in "The New Zealand Bill of Rights", there are several steps when applying the NZBORA to another enactment. [166] One must ask:

a) Does the enactment establish a limit on a right?
b) Is the advocated meaning 'inconsistent' with the right? (This then requires an analysis of whether the inconsistency can be justified, through a s5 test).
c) Is an alternative meaning possible? If so, it must be taken.

This approach has been used below, in determining whether the use of the Examination Orders is a justified limit under the NZBORA.

a) Do the Examination Orders establish a limit on a right?

There is no specific section in the NZBORA which refers to a 'right to silence' in those terms. However, there are four provisions of possible relevance to this application, the first in s 23 and the others in s 25.[167] These four rights articulate rules or principles of immunity

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impliedly, with rights relevant to the privilege against self-incrimination or the right to silence. However, the section only applies to persons "charged with a criminal offence". Therefore, any person who is not charged with any offence does not have the protection of Article 14(2). Nevertheless even where a person is charged with an offence, and they are asked for information under an Examination Order, it is highly doubtful that Article 14(2) would lend any protection. It would be doubtful to suggest that the presumption of innocence, in isolation, implies direct protection of the privilege against self-incrimination or right to silence. Certainly, the jurisprudence of the Human Rights Committee has not sought to infer such a privilege in its application or consideration of Article 14(2): Alex Conte, Scott Davidson and Richard Burchill *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Aldershot, England: Ashgate 2004) at 125-126. Furthermore, as New Zealand has not incorporated the ICCPR into domestic law, domestic law supersedes any allegiance to the covenant: Christopher Harland "The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents" (2000) 22 (1) Hum Rights Quart 187-260.

[166] Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, USA, 2003) at 135-157.

[167] The New Zealand Bill of Rights Act 1990, s 23(4) provides: "Everyone who is— (a) Arrested; or (b) Detained under any enactment— for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right." The New Zealand Bill of Rights Act 1990, s 25(a), (b) and (c) provide: "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court: … (c)The right to be presumed innocent until proved guilty according to law: (d)The right not to be compelled to be a witness or to confess guilt: "

of differing scope and rationale designed, amongst other things, to protect defendants facing trial from forced disclosure of material that could be used to assist the Crown in the prosecution.[168] Read together, these sections can be seen as recognising a qualified right to silence. Thus, it is relevant and appropriate to further examine the right and its possible treatment by courts in relation to the NZBORA.

Before embarking on this examination, it is worth noting that s 25 applies only to those that are "charged with an offence" and s 23(4) is limited to situations where a person is "arrested" or "detained under any enactment". Only in these circumstances are any rights to silence triggered. Because of these requirements, it must be remembered that the NZBORA may not even be applicable in many cases of questioning being undertaken by an Examination Order.

The wording of the Orders is clear: those summoned are compelled to answer any question posed to them by police. It can be accepted that only in limited to situations of charge, arrest or detainment (referred to in the preceding discussion), can the Examination Orders operate to limit the right of silence.

b) Is the advocated meaning inconsistent with the right?

Section 25 sets out "minimum rights" for those charged with an offence. The onus of proof (s25(c)) and right to a fair trial (s 25(a)) are established. Those issued with Orders will be expected to answer a wide range of questions posed by the Commissioner. Answers to these questions could possibly assist the Crown in proving that the person being questioned is guilty of an offence. Therefore, compelling answers to questions defies the "golden thread" of the common law that it is the duty of the prosecution to prove guilt.[169]

Section 25(d) provides that a person charged has a minimum right "not to be compelled to be a witness or to confess guilt". This is not limited to confessions in court: it is a stand-alone right. As those who are issued with Examination Orders commit an offence and face imprisonment if they refuse to answer questions, there is a significant limitation placed on the rights in s 25(d).

Section 23(4) provides the right to refrain from making a statement and to be informed of that right, in relation to an offence for which that person is specifically arrested or detained. Those

[168] *Commissioner of Police v Burgess* [2011] 2 NZLR 703.
[169] *Woolmington v Director of Public Prosecutions*, above n 117, at 481.

issued with Examination Orders must answer questions or face imprisonment. It is arguable that in being questioned at the police station, an examinee (who is a suspect) is being detained by that process.[170]

For the sake of the following examination, it will be assumed that one of these subsections would likely be infringed upon, in a NZBORA case concerning Examination Orders. Thus, this step of the examination would be satisfied. The next question within Rishworth's second step is to determine whether this limitation is 'consistent' with the NZBORA, by application of the s5 test.

Application of section 5 of the NZBORA

If the legitimacy of Examination Orders is challenged, the onus is on the Crown to establish that they are a justified limitation to the right of silence.[171] Under s 5 of the NZBORA, as long as the Orders pursue what is a proportionally significant objective, the limitation is considered justified.[172]

The Supreme Court considered the correct approach to the s 5 exercise in *R v Hansen.*[173] This approach has been followed below.

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[170] In *Police v Smith & Herewini* [1994] 2 NZLR 306 (CA) at 316, it had to be determined whether the taking of blood from a suspected drunk driver, meant the suspect was 'detained' for the purposes of the NZBORA.

[171] This was held to be so by the Supreme Court of Canada in *Re Southam (No 1)* [1983] 41 OR (2d) 113 at 124. The New Zealand Court of Appeal has taken the same view, stating that it is for the party seeking reliance on s 5 to advance the argument that limits on rights are reasonable, in *MOT v Noort; Police v Curran* [1992] 3 NZLR 260 (CA) at 271 and 283. See also *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).

[172] The NZBORA, s5 provides: "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". There is considerable jurisprudence on this substantive test, particularly in Canada through the application of section 1 of the Canadian Charter of Rights and Freedoms 1982 (on which s5 of the NZBORA was based).

[173] [2007] NZSC 7, [2007] 3 NZLR 1. In *Hansen* the majority of the Judges approached the s 5 exercise by applying the decision of the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103[Green] and the cases that followed it. See [120]—[124] per Tipping J, [203]—[205] per McGrath J and [272] per Anderson J following *R v Chaulk* [1990] 3 SCR 1303 which essentially summarised the *Oakes* approach. The New Zealand formulation of the test had also been expressed by the High Court in the case of *Solicitor-General v Radio New Zealand Ltd*, above n 171, at 58 (emphasis added): "To establish that the limit is both reasonable and demonstrably justified in a free and a democratic society the law creating the limit on the right of freedom must have an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom…The means chosen by the law to achieve the objective must be proportional and appropriate to be objective…To meet the requirement of the proportionality test there are three components. First, the limiting measures or the law must be designed to *achieve the objective* not being arbitrary, unfair or based on irrational considerations. This is described as being *rationally connected to the objective*. Second, the measures or the law should *impair as little as possible* the right or freedom. Third, there must be *proportionality* between the effects of the measures or the law

I. Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

Application of the s 5 test is difficult as the Examination Orders have no specific, single objective other than to broadly assist the police in investigating offences. The Orders are completely new to search and surveillance law and are only restricted by their application to cases in the business context where penalties are greater than seven years, or to the non-business context in cases of serious or complex fraud, or organised crime. One must ask whether the objective of aiding the investigation of crimes relates to concerns which are pressing and substantial in a free and democratic society. Detection and punishment of crimes of this nature is an important societal concern; thus, we can proceed on the assumption that the court would take this claim to be satisfied.

II. Does the limiting measure pass the proportionality test? This is a three step process.

i. Is the limiting measure rationally connected with its purpose?

The Examination Orders must be rationally connected to achieving successful investigations of crimes in the business context, serious or complex fraud, or organised crime. This requirement is traditionally accepted in the affirmative, unless the connection is not clearly obvious.[174] The Orders compel a person to answer any question posed by police in the course of their investigation. Thus, it can be accepted that this furthers the objective of investigating crimes.

ii. Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

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responsible for limiting the right or freedom and the objective. The law which restricts the right must not be so severe or so broad in application as to outweigh the objective."

[174] In *Lavigne v Ontario Public Service Employees Union* [1991] SCR 211 at 219, Wilson J stated that "[t]he *Oakes* inquiry into 'rational connection' between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means the government has chosen to adopt". Although this is a Canadian case, New Zealand courts have tended to follow the approach of Canadian courts. It can be assumed that the New Zealand position is to also treat the limiting measure as rationally connected to the purpose, unless it is clearly not the case.

The initial draft of the Bill limited the Orders to crimes which carried penalties of imprisonment. This is an extremely broad application and thus would be unlikely to satisfy the justified limitations test. The Justice and Electoral Committee's suggested limitation of the Orders (to crimes in the business context with a penalty of five years imprisonment, serious fraud with a punishment of seven years or to organised crime offences) places a reasonable limit on the use of the Orders.

iii. Is the limit in due proportion to the importance of the objective?

In applying the final part of the proportionality test, achieving a balance between the importance of the objective and the effect of the limiting provision will depend on the specific limitation in question and how it impacts on rights and freedoms.[175] As the Attorney-General's advice notes, "the greater the degree of intrusiveness, the greater the justification that is required and, further, the greater the attendant safeguards to ensure that justification is present".[176] Careful consideration is required of the effects of the limitation, the importance of the objective, and the importance of the right being affected.

- What are the effects of the limiting provision (Examination Orders) on the rights invoked?

The Orders negate the right to silence (where it operates under the NZBORA, following an arrest or detainment) by requiring that person answer the questions of the police. There is no choice but to comply or face the penalty of imprisonment.

- What is the importance of the right to silence?

As discussed earlier in this Chapter, the right to silence has a long history in New Zealand's common law and plays an important role in our accusatorial criminal system.

- What is the level of importance of the objective of the provision?

[175] The only truly 'guiding' principles are those set out by the Court in *R v Oakes*, above n 173, at 138-139 and *R v Lucas* [1998] 1 SCR 439 at [118]. The Court in *Oakes* spoke of the need to ensure that the law which restricts the right is not so severe or so broad in application as to outweigh the objective, adding in *Lucas* that this requires consideration of the importance and degree of protection offered by the human right being limited: Alex Conte "Crime and Terror: New Zealand's Criminal Law Reform Since 9/11" (2005) 21 NZULR 635.
[176] Minister of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Search and Surveillance Bill* (45-1) at [8].

The objectives of Examination Orders have been described earlier, in Chapter Two. Orders granted in the business context would allow professionals to cooperate with investigators, without fear of breaching professional obligations. Non-business context Examination Orders cover serious or complex fraud and organised crime, both of which have widespread effects and are uniquely complex in nature. It is not disputed that these crimes are devastating and must be combatted; however, it is an arguable point whether Examination Orders will minimise them and if such intrusion is really appropriate. This leads us to the final question.

- Are the effects of limiting the right proportionate to the objectives of the Examination orders?

The 'slippery slope argument' must be addressed.[177] It is accepted that there are many other dangerous crimes (such as murder and rape) that would benefit from allowing police to compel a suspect to provide answers during questioning. Critics of the Orders argue it is only a matter of time before Examination Orders are extended further and further, until the right to silence no longer exists. This is a valid concern; however, it can be reasonably expected that Parliament will take any limit on 'fundamental' rights very seriously. In the case of the Examination Orders, the media and public were quick to express dissatisfaction with the proposed breach of the right to silence. This led the Justice and Electoral Committee to introduce limits and safeguards surrounding the use of the Orders. The introduction of legislation is a transparent process, which means that the public can stay informed and hold Parliament accountable where necessary. The reaction to the Examination Orders highlights how passionate citizens are about fundamental rights, so it is unlikely that any breach of these will go unnoticed.

In addition, the Orders have several safeguards such as monitoring and reporting requirements, which seek to limit their use to appropriate situations. These safeguards will be considered further in Chapter Four. Like any encroachment on a right, if it is restricted and there are appropriate safeguards in place, its limitation can be justified. Here, I would submit that the effects of limiting the right are proportionate to the fight against serious or complex

[177] The slippery slope argument is based on the idea that A leads to B, B leads to C, C leads to D and so on, until one finally claims that A leads to Z. While this is formally valid when the premises are taken as a given, each of those contingencies needs to be factually established before the relevant conclusion can be drawn. There is no reason to believe that one event must inevitably follow from another without an accepted argument for each claim.

fraud and organised crime. The Orders are a demonstrably justified limit, thus the s 5 test is satisfied.

c) Availability of alternative meaning

The third step is to determine whether an alternative interpretation of the Examination Orders is possible, and whether this interpretation is consistent with the right invoked. If it is, then s 6 of the NZBORA will demand that the courts apply the alternative interpretation. In this case, such an alternative interpretation of the Orders is not open. The wording of the Orders is clear and unambiguous, with no mention of existing human rights obligations. As such, it is concluded that the Examination Orders will be in an 'irreconcilable conflict' with the NZBORA. Section 4 of the NZBORA therefore supports the Orders overriding the right to silence.

3.7 The Approach by the Australian State of Victoria

In 2006, Victoria enacted the Charter of Human Rights and Responsibilities Act, which is similar in form and content to the NZBORA. The Victorian Charter requires Parliament to scrutinise incoming Bills to ensure consistency where possible and also requires courts to interpret statutes in way that is consistent with the Charter. Like the NZBORA, the Charter is an ordinary statute and cannot trump any other Act. It is helpful to assess the response of the Victorian courts to the MCIPA's inconsistencies with the Charter.

Section 39 of the MCIPA[178] removes the right to the privilege against self-incrimination for those being questioned.[179] Under the MCIPA, although direct evidence (answers to questions) cannot be used against a witness in a criminal hearing, it was unclear what the scope for derivative evidence (evidence discovered as a result of questioning) was. In *Re an application under the Major Crime (Investigative Powers) Act*,[180] an application for a coercive powers order was granted by the Supreme Court, subject to a stipulation that the

[178] The Major Crime (Investigative Powers) Act 2004, s 39(1) states "A person is not excused from answering a question or giving information at an examination, or from producing a document or other thing at an examination or in accordance with a witness summons, on the ground that the answer to the question, the information, or the production of the document or other thing, might tend to incriminate the person or make the person liable to a penalty." Subsection (3) limits the use that can be made of any self-incriminating answers, ensuring the answer or document or other thing is not admissible in court for an offence under another Act, amongst other things.

[179] As already referred to, the Search and Surveillance Bill 2009 (45-2), cl 132 preserves the privilege against self-incrimination under s60 of the Evidence Act 2006.

[180] 2004 [2009] VSC 381.

power not be exercised until the apparent inconsistency with s 25(2)(k) of the Charter was resolved. This section of the Charter protects the privilege against self-incrimination and mirrors the same right set out in s 25(d) of the NZBORA.[181] Her Honour Justice Warren determined that s 39 of the MCIPA limited a fundamental human right. Applying the s 7 Charter check (similar to that in s 5 of the NZBORA), the Chief Justice developed a new test similar to the 'fruit of the poisonous tree test' commonly used in the United States.

Thus interestingly, Victorian courts have sought to interpret and apply the MCIPA in a manner consistent with the Charter. While this is only one example; it would seem that judges are not willing to accept any blatant breach of fundamental rights by Parliament. Whether New Zealand courts will take a similar 'rights based' interpretation to the limitations imposed by Examination Orders is unknown.

3.8 Conclusion

As the NZBORA has the status of an ordinary statute, it is unlikely that its guarantees will affect the operation of the Examination Orders. While the courts are obliged to interpret the Orders in a manner consistent with the NZBORA if possible, here, the two are irreconcilable. What is further concluded, however, is that the limit placed on the right to silence by the Orders, can be demonstrably justified as a reasonable limit on the right of silence in a free and democratic society. Thus, because the s 5 test is satisfied, the courts must apply the Orders. As will be seen in Chapter Four, there are significant problems with the Examination Orders as they are currently drafted that go beyond any potential violations of the right to silence.

[181] The Charter sets out three broad rules. The rights mandate is that human rights can only be limited by laws that pursue an important and legitimate purpose in a rational, proportionate and parsimonious way. The interpretation mandate is that Victorian statutory provisions must be read in a way that makes them comply with the rights mandate, but only if such readings are consistent with their purpose and words. Lastly the conduct mandate is that public authorities must comply with the rights mandate unless doing so would contradict or frustrate any other law. However, the implementation of these mandates is (deliberately) weak. The Charter is a statute that can be repealed or superseded by later statutes; moreover, each of the mandates is expressly limited by all other laws, past or present, and whatever their source. The mandates don't bind parliament; legislators are instead only required to state and scrutinise whether or not, and how, new bills comply with the rights mandate. The conduct mandate doesn't bind courts (except when they act in an administrative function): Jeremy Gans "About the Charter" Charterblog: Analysis of Victoria's Charter of Human Rights <http://charterblog.wordpress.com>.

CHAPTER FOUR: THE CRUCIAL ISSUES

The media intently focused its attention on rights issues, apprehensions which are only valid to a point. As the previous chapter has established, a restricted limitation on the right to silence can be justified. What are more concerning are the lesser known legal and practical specifics which were not publicised and received little attention. There are crucial issues that require further scrutiny; the threshold before an Examination Order can be applied for, the practical implications of the penalties, concerns with police powers and multiple investigatory agencies. In its current form, the Bill's approach is arguably off point. I have offered recommendations, where possible, with the experience of Victoria providing valuable guidance.

4.1 Multiple Investigatory Agencies

In New Zealand, seven agencies are responsible for enforcing the law against serious fraud[182] and two for organised crime.[183] Such a multi-faceted approach can be confusing and overlaps in jurisdictions will inevitably occur. This confusion will intensify with the introduction of expanded powers for the New Zealand Police. The relevant investigatory bodies most affected by the introduction of the Examination Orders are the New Zealand Police, the Organised and Financial Crimes Agency of New Zealand (OFCANZ) and the Serious Fraud Office (SFO). It is useful to first look briefly at each agency and the relationship between the three. From there it can be concluded whether the introduction of new powers will significantly increase the success of investigations of organised crime and serious or complex fraud.

a) The relevant bodies

New Zealand Police

The Police have highly developed intelligence capabilities at a district and decentralised level to investigate organised crime. In regards to serious fraud investigations, police are responsible for those investigations not handled by the SFO. Thus, the force needs access to adequate tools to ensure they can carry out this investigative function sufficiently. The public

[182] The Serious Fraud Office, the IRD, the Police, the National Enforcement Unit of the Ministry of Economic Development, the Official Assignee's office, the Securities Commission and finally the newly formed Financial Markets Authority.
[183] The Organised and Financial Crime Authority of New Zealand (OFCANZ) and the New Zealand Police.

has been sceptical of both the necessity for and appropriateness of powers proposed for police through the Bill. When the Bill was drafted, however, these powers were not introduced without thought and several safeguards were employed. The relatively low level of corruption in the force further alleviates this concern.[184]

It is recognised that this apprehension regarding the police is valid, and recommendations are given at 4.1 (c) to address these concerns.[185]

OFCANZ

OFCANZ is a discreet service agency hosted by the Police. Its purpose is to promote increased co-operation among government agencies that target organised crime.[186] With only 40 staff split across two offices, it is a small body, coordinating the investigation of specific targets by way of a taskforce approach.[187] Richard Stott, Strategy & Liaison Manager and Operations Manager, says that the agency is slightly removed from mainstream police only to the point where it can be "selective about the work taken on and the targets worked against".[188] This means that staff are completely focused and not distracted by other tasks.[189] Stott says the agency manages a good on-going working relationship with the wider police intelligence units and specialist services. OFCANZ is often required to work in tandem with other government agencies.[190] The SFO is a useful partner; the corporate knowledge of the SFO's officers helps with the investigation of money laundering in organised crime.

[184] Transparency International defines corruption as the abuse of entrusted power for private gain. This definition encompasses corrupt practices in both the public and private sectors. The Corruption Perceptions Index ranks countries according to perception of corruption in the public sector. New Zealand is ranked first equal with Denmark and Singapore, as one of the least corrupt countries in the world, with a score of 9.3/10: "CPI 2010 table" Transparency International (2010) <http://www.transparency.org>

[185] The recommendations are to limit the power for organised crime to OFCANZ and reduce the Bill's sunset clause to two years.

[186] "About OFCANZ; Background" OFCANZ Organised Financial Crime Agency of New Zealand (2008) <www.ofcanz.govt.nz>.

[187] "Tasking Framework (Organised Crime)" OFCANZ Organised Financial Crime Agency of New Zealand (2008) <www.ofcanz.govt.nz>.

[188] Interview with Richard Stott, above n 90.

[189] Ibid.

[190] For example, Operation Acacia required OFCANZ tap into specialist capabilities of the police force, and both custom services and the services of Immigration NZ were called upon. Operation Acacia involved a year-long investigation, which uncovered an Asian crime group involved in multi-million dollar criminal activity. This major money-laundering operation, with links to China, Taiwan and South Korea, was busted by police and fraud investigators in South Auckland in 2010. More than $400,000 cash, $5.5 million worth of methamphetamine, $750,000 worth of ContacNT (the cold medicine that can be used to make P) and 21 illegally acquired firearms were seized: "Money laundering operation busted" (22 July 2010) TVNZ <http://tvnz.co.nz>.

SFO

The SFO was created in 1990 in response to the 1987 share market crash and widespread public concern about corporate misconduct.[191] The principal purpose of the SFO is the detection, investigation and prosecution of cases of serious or complex fraud.[192] The SFO has broad regulatory investigative tools to conduct criminal investigations.[193] If there is reason to suspect that fraud has been committed, the Director has the power[194] to compel the attendance of witnesses or suspects and for them to answer questions about the whereabouts or existence of documents relevant to the investigation.[195] Once there is reason to believe that an offence may have been committed, the SFO has the power to require a person to attend before it[196] and compel them to provide answers to questions.[197] These powers of compulsion are an essential investigative tool and allow the Office to effectively detect and prosecute fraud.[198] Rhys Henderson, General Manager of the SFO, says the powers are extremely important: "we wouldn't be able to do our job without them".[199]

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[191] The New Zealand SFO was modelled on the UK's SFO, with the intention that this small, specialist, multi-disciplinary agency would fill a gap between existing law enforcement and regulatory agencies: *Paper 2: Establishment of an Organised Crime Agency and Disestablishment of the Serious Fraud Office*, above n 83.

[192] Serious Fraud Office Act 1990, Long title.

[193] At the time, Ministers agreed that the criminal investigation of serious or complex fraud would require comprehensive powers to compel the production of documents, and examinations similar to other financial market and corporate regulatory agencies that were in existence at the time. The SFO was modelled on the UK SFO, with the intention that this small, specialist, multi-disciplinary agency would fill a gap between existing law enforcement and regulatory agencies: *Paper 2: Establishment of an Organised Crime Agency and Disestablishment of the Serious Fraud Office*, above n 83.

[194] The Director may delegate their power: Serious Fraud Office Act 1990, s33.

[195] Serious Fraud Office Act 1990, s 5(1)(b). As the first table in Appendix 3 shows, although relied upon in the past, this power to compel answers to questions is seldom used in the early stages of an investigation. It was used only 39 times during the last five years. The Director also has the power to compel documents and information: Ibid, s5(1)(a).

[196] Ibid, s 9(1)(c).

[197] Ibid, s 9(1)(d). The second table in Appendix 3 shows the reliance the SFO place on the power conferred by s9 (1)(d), a power similar to that which Examination Orders would give police. Although the power to produce documents was used a lot more than other powers available in section 9 (over four times more than any other power available in section 9), this was still only 39 times in 2010. In that year the Office dealt with over 200 inquiries and over 100 cases which underwent substantive assessment, investigation or prosecution: *Report of the Serious Fraud Office Ended June 2010*, above n 80. When a person is brought before the Director to answer questions, they are not given any time to prepare: *D v Sturt* (1990) 5 PRNZ 17. Furthermore, the subject of the questioning need only be specified in a very general way. Section 9(5) requires that before complying with any requirements imposed by section 9, the person be given a reasonable opportunity to be accompanied by a lawyer. *D v Sturt* also established that merely because a person's lawyer of choice is unavailable, does not mean that there has been no reasonable opportunity. The Director can also make a person supply any information relevant to the investigation (Serious Fraud Office Act 1990, s 9(1)(e)) and produce for inspection any documents relevant to the investigation(s 9(1)(f)).

[198] *Report of the Serious Fraud Office Ended June 2010*, above n 80.

There are currently several agencies responsible for the investigation of organised crime and serious fraud. These bodies have recognised systems in place, and therefore the introduction of such an invasive and overreaching power to the police force needs careful consideration to avoid duplicity and confusion. This is especially so given the lack of guidance from Parliament regarding the practical implementation of the power.

b) Is such an extension appropriate?

Proponents of Examination Orders cite the impressive conviction rate of the SFO as reason for their introduction. However, the SFO's conviction rate—which is in the high 90th percentile—is put into perspective when one simultaneously considers the comparably small number of new prosecutions.[200] Therefore, although the SFO are clearly successful in the investigations they carry out, there are not *enough* of these investigations being undertaken. This is perhaps a justification for extending such powers to police, however this has not been stated by Parliament and no clarification has been made of how cases would then be split between the SFO and police.

Furthermore, the SFO is small, with only four police officers and 26 full-time staff. Of these, only four have the power to apply for powers under s 9 of the Act. Thus, monitoring the number and circumstances surrounding the notices being applied for and granted, is very simple.[201] By contrast, there are 8,950 sworn police officers currently working in New Zealand.[202] It is arguable whether the level of monitoring at the SFO, could occur to the same degree in an agency this size. This issue concerns those who are apprehensive of potential police abuses of power.

It is not just any police officer who will be permitted to apply for an Order, however. The Justice and Electoral Committee amended clauses 31(1) and 33(1) of the Bill so that only those officers holding the rank of Inspector or higher could make an application for an Order. Furthermore, all applications must be approved by a Deputy Commissioner, Assistant Commissioner, or District Commander before being submitted to a judge. These measures

[199] Interview with Rhys Henderson, above n 57.
[200] Rebecca Hirsch and Susan Watson "The Link Between Corporate Governance and Corruption in New Zealand" (2010) 24 NZULR 42.
[201] These people are the General Counsel, Adam Fairley (the Director) and the two General Managers: Interview with Rhys Henderson, above n 57.
[202] Email from Public Affairs Team, New Zealand Police to Zoe Roborgh regarding the number of staff currently employed by the New Zealand police (21 September, 2011). The total number of staff for NZ Police is around 11,950: Ibid.

were introduced to encourage the development of rigorous internal policies and to ensure that Examination Orders do not come to be used routinely by police.

In addition, according to Stott, the police have considerable oversight mechanisms at various levels. He is confident that stringent monitoring can, and would, occur and that internal systems would cope with any addition requirements: "if introduced, they [the Orders] would operate correctly and for the intended purpose".[203] Stott said internally imposed requirements, by way of operational policy, would likely be introduced to ensure Orders were used by the right person at the right time. He further stressed that the Commissioner would ensure any delegation was carried out correctly. Stu Harvey, Detective Sergeant in the Fraud Branch of the police holds similar views, predicting that any applications will go through a Sergeant or Senior Sergeant level to be checked, or would be issued by those in the criminal investigation branch.[204] He said that there would be strict reviews on what is applied for, and that there would be "a number of hoops to jump through" to ensure the powers were not overused.[205] Stott and Harvey seem confident that appropriate procedural systems would be implemented, however with no legal requirement, the introduction of such formal measures cannot be assumed.

In comparison to the Bill, the Victorian legislation provides little extension of power to the police, in terms of questioning witnesses. Questioning of witnesses can only be done by a 'Chief Examiner'.[206] Appointed by the Governor-General in Council, [207] this person has exclusive control of the examination process and is independent from the Victoria Police. Thus, the police are placed at 'arm's length' from the examination hearing process.[208] This is a more stringent procedure than that found in the Bill, which contains no restrictions on who can carry out questioning under an Order. It is police officers who will do this; meaning there is not the level of independence from investigations that the MCIPA provides for. Although the issue of independence is not specifically addressed by the New Zealand Bill, it

[203] Interview with Richard Stott, above n 90.
[204] Interview with Stu Harvey, above n 107.
[205] Ibid.
[206] The Chief Examiner also has authority to issue a witness summons requiring the attendance before him of a witness for coercive questioning or production where a coercive powers order is in force. In addition to this Chief Examiner, as many additional Examiners as necessary can be appointed: Jones, above n 68.
[207] The Examiner must be an Australian lawyer with at least five years' experience: Major Crime (Investigative Powers) Act 2004, s 21(2) (a). They cannot be a Member of Parliament in either Victoria or wider Australia: Ibid, s 21(20(b).
[208] A member of the police force can initiate the coercive powers process: Ibid, s 5(1). No member of the police force can be present during examinations : Ibid, s 35.

is hoped that the police would use internal measures to control the use of the Orders.[209] These measures would be in addition to the stringent reporting requirements introduced to the Bill by the Justice and Electoral Committee, which will be explained shortly.

A further safeguard in the Victorian legislation—and arguably one that is the most substantial—is the role of the Special Investigations Monitor (SIM). [210] This person, appointed by the Governor-In-Council, monitors the Director, the police and the Chief Examiner, to ensure they comply with the MCIPA.[211] Thus the SIM plays an important role in overseeing these coercive and potentially intrusive powers. They assess the questions that have been asked of people who have been compelled to answer questions;[212] and also have the power to investigate certain complaints.[213] Furthermore, the Act gives SIM the responsibility to write reports and formulate recommendations.[214] Two years after the MCIPA was enacted, the SIM released a report reviewing the necessity of the Act and the adequacy with which those given powers under the Act, had used them.[215] The encouraging findings of this report are outlined in Chapter Five.

The Bill has a similar sunset clause which requires both a review five years after enactment, and publication of yearly reports. In these annual reports to Parliament, [216] the Commissioner must include: statistics of the number of Examination Orders granted or refused[217] and the number of individuals charged in a criminal proceeding, where an examination conducted under an Order significantly assisted in the collection of evidence.[218] External reporting requirements are thus similar under the two jurisdictions, with oversight mechanisms ensuring accountability to Parliament.

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[209] Richard Stott of OFCANZ said "there would be tight controls around the use of these": Interview with Richard Stott, above n 90.

[210] The role is powerful and thus is taken very seriously. The first SIM, appointed in 2004 for a period of three years, was David Anthony Talbot Jones. At that time, he was an Australian lawyer of 42 years standing. From 1986 to 2002 he was a Judge of the County Court of Victoria and until 13 December 2004, a Reserve Judge of that Court. This serves to illustrate the high calibre of those assigned to this role: Jones, above n 68.

[211] Major Crime (Investigative Powers) Act 2004, s 51(a).

[212] Ibid, s 51(b).

[213] Ibid, s 51(d).

[214] Ibid, s 51(e).

[215] Ibid, s 62.

[216] The Commissioner has an obligation under s39 of the Public Finance Act 1989 to present information about his/her department annually, immediately after delivering their budget for that year.

[217] Search and Surveillance Bill 2009 (45-2), cl 162A(1)(c).

[218] Ibid, cl 162A(1)(e).

In regards to internal reporting in the MCIPA, when the Chief Examiner issues a witness summons or an order, they must inform the SIM.[219] After the examination has occurred, a more extensive report, including a video of the examination, must be given to the SIM.[220] The Bill similarly requires the police officer who carried out the examination to report back to both the judge who issued the application (within one month)[221] and the Commissioner (as soon as practicable).[222] The report to the judge must set out whether the use of the Order resulted in obtaining evidential material and ultimately a conviction. Thus, the reporting requirements help make it clear the extent to which the Orders are having a practical effect. It has been suggested that the reporting requirement has a further benefit by providing a disincentive for the use of the Orders, encouraging police to use other means available before resorting to their use. Stu Harvey of the New Zealand Police said that the reporting requirement is an unlikely deterrent, however, as police already face large amounts of paperwork: "although it is a good control that there is quite a process involved, using them [the Orders] would be more of a circumstantial thing".[223]

The role of the SIM in the MCIPA provides a stronger safeguard than the application and reporting requirements of the New Zealand Bill. However, as the Victorian legislation is arguably more intrusive than the Bill,[224] it is a necessary safeguard. It may be appropriate in the future to introduce such a role to the New Zealand legislation; however, until the powers are used in a practical sense, it is uncertain whether such a control is needed. Police should be afforded an opportunity to first familiarise themselves with the new powers granted under the proposed legislation, and exercise them, without the added control of the SIM. As 4.1(c) will outline, the Bill contains a clause which requires a review of the legislation. Thus, if there are any problems with the exercise of the powers, this review can determine whether a control similar to the SIM is required.

The internal and external reporting requirements under the Victorian Act and the New Zealand Bill, although carried out by different roles, are similar. These requirements provide

[219] The Chief Examiner must include the name of the person and why the summons or order was required: Major Crime (Investigative Powers) Act 2004, s 52.
[220] The report must be given as soon as reasonably practicable and if available, a written transcript must be included: Major Crime (Investigative Powers) Act 2004, cl 53.
[221] Search and Surveillance Bill 2009 (45-2), cl 40A.
[222] Ibid, cl 162(1AA).
[223] Interview with Stu Harvey, above n 107.
[224] The MCIPA has a significantly higher penalty for non-compliance with a coercive powers order, than the Bill's penalty for non-compliance with an Examination Order.

a safeguard in terms of monitoring and compliance and ensure information regarding the exercise of the powers is transparent. Given these stipulations, concerns regarding the use of the powers by police are unproven. It still must be determined whether the Orders will have any practical effect on the success of investigations.

c) Are the powers necessary?

Serious or Complex Fraud

Recently, the SFO amended the criteria for 'serious fraud', requiring a financial threshold of at least $2 million before an investigation is launched.[225] Anything lower must be very complex or have a strong influence on the market before the SFO becomes involved.[226] Thus, as the SFO are currently responsible for both serious fraud *and* complex fraud, this makes the provision of powers to police for investigations of either these, arguably redundant. What must be remembered, however, is that many instances of fraud will be just shy of the $2 million threshold, or will be not quite complex enough to warrant investigation by the SFO.

Police are then, in theory, responsible for the investigation of relatively significant fraud. According to Henderson, however, although police may have the mandate to investigate everything that the SFO does not, it does not necessarily follow that the Police will or will want to. Financial crime for the police is usually smaller scale, with the SFO tackling high end fraud.[227]

Ron McQuilter is the managing director of Paragon New Zealand, the country's largest private investigation company. He says a lack of both specialist fraud expertise and resources within the police mean that his clients, often defrauded commercial entities, are prepared to pay a significant amount for his team to do the leg-work and put together a

[225] This was because the SFO was taking an increasing percentage of cases with a relatively low dollar value. In some instances, the losses involved were less than $500,000: *Report of the Serious Fraud Office Ended June 2010*, above n 80. The criteria is as follows: Fraud losses of over $2 million and/or multiple victims, particular priority are those involving fraud losses over $10 million and/or 100+ victims, financial fraud of a complexity or scale that is likely to be beyond the forensic accounting or investigative resources of other law enforcement agencies; or bribery and/or corruption involving public officials or otherwise undermine confidence in the administration of justice: "The Serious Fraud Office: What we Do", above n 106.

[226] While monetary value does not always indicate the calibre of offending, it is questionable whether offences at this lower end of the range necessarily involved the sophisticated criminals alluded to by the proponents of the wide powers for the Office: Law Commission *The Privilege*, above n 148.

[227] Ibid.

prosecution.[228] When he offers information to the police, "they tell me they'd love to help and they might eventually get on to it, but their priorities are elsewhere".[229] McQuilter says he advises clients to let his staff investigate and get the evidence, then do a deal with the offender: "don't expect the police to prosecute or take it through the courts."[230] Henderson concedes that because fraud is a number four priority on a list of five, it does not receive a lot of attention.[231]

If Examination Orders make a meaningful difference to the number of convictions secured, following investigations of fraud cases passed over by the SFO, then the extension of powers to the police may be necessary.[232] In reality though, it is due to lack of resources and under prioritising, rather than the absence of investigative powers, that these lesser frauds go uninvestigated.[233] Thus, for the introduction of the Orders to be worthwhile, police need to reprioritise and allocate more resources towards the investigation of serious or complex fraud. If the police force maintains its current approach, the powers in the Examination Orders for this offence are unnecessary.

As mentioned above, the Bill has a sunset clause which requires the Law Commission and Ministry of Justice to report to the Minister of Justice on the operation of the Act and to make any amendments recommended, after five years.[234] This safeguard allows Parliament an opportunity to review the success and necessity of the Examination Orders. Given the degree of novelty surrounding many of the powers encapsulated in the Bill and the fact that such a power for the police may be unnecessary, the time frame of five years is too long. I suggest this be reduced to two years. Obvious incongruities within the Bill will have made themselves clear by this time. This provision will also be useful when reviewing the recommendation outlined below, and the use of Examination Orders in general.

Organised Crime

OFCANZ is responsible for the investigation of New Zealand's sophisticated organised crime, which is complex enough to require the expansive power in Examination Orders.

[228] Jenni McManus 'To catch a white collar thief' (13 July 2007) Sunday Star Times <www.stuff.co.nz>.
[229] Ibid.
[230] Ibid.
[231] Interview with Rhys Henderson, above n 57.
[232] Ibid.
[233] Ibid.
[234] Search and Surveillance Bill 2009 (45-2), cl 316.

Outside of OFCANZ, the police do not target this high-end level of offending, and thus should not have such drastic powers available to them. I suggest that OFCANZ be the sole unit within the police force that holds the power to apply for and carry out Examination Orders.

This recommendation comes with several logistical hurdles. One of the main duties of OFCANZ is to coordinate the police in its investigation of organised crime. This means it is effectively the police who determine *what* exactly OFCANZ investigates.[235] Thus, even if the Orders were limited to OFCANZ, any officer can be conscripted for an investigation; making the use of Orders through the wider police, potentially very broad. The scope of OFCANZ's investigations should be subject an external control, independent from the police force, perhaps the Minister of Police. This would ensure that the police do not simply widen the agency, in order to get an increased reach for the application of the Orders.

In rare occasions it may be necessary for a member of the wider Police to use an Order. In these cases, an application to this independent control could occur. Admittedly, this introduces added administration for the police; however, it also serves to emphasise how rarely the Orders are to be used during investigations, especially by the wider force.

d) Conclusion

With several investigatory bodies and relationships at play, a clear structure needs to be established to ensure that there is no overlap of cases and resources are not wasted. Recommendations have been made in order to address concerns of the public regarding proposed powers for police.

The operation of Examination Orders by the police is superfluous in regards to serious or complex fraud. The SFO tackles any fraud case serious or complex enough to warrant such a power. As this crime is not of high priority for police, those fraud cases passed over by the SFO are often not investigated. Thus, reprioritisation and increased resources for these investigations must occur, before the Orders are required.

A core justification for the powers in regards to organised crime is the high level of complexity of the investigations. However, it is not the wider police force which targets this high level of offending, but OFCANZ. Thus, it is only OFCANZ which should be privy to

[235] Interview with Richard Stott, above n 90.

such a power. An external review must be introduced to control the mandate of OFCANZ and ensure that the scope of the agency is not broadened to take advantage of this new power.

4.2 The Penalty Regime

The penalty for failure to comply with an Examination Order is a maximum of one year in prison.[236] There is discord as to whether such a penalty will effectively act as a disincentive to those issued with Orders.

a) Is the use of a penalty appropriate?

Advocates of the right to silence argue that penalties may encourage people to lie, adversely affecting the reliability of statements. [237] However, as previously referred to, courts and several statutory bodies already hold coercive powers and coerced statements made to these bodies are generally accepted as reliable.[238] If a person's rights are protected and penalties are similar, there is little reason why statements made to police before a trial[239] should be considered less reliable than those presented in Court.[240]

Regardless, a witness statement merely provides a starting platform for the investigation, and police must always determine its level of reliability. It is more helpful to have a statement from which elements of truth can be determined, than to have no statement at all. Of course, there is nothing to stop a person from lying when being questioned or claiming that they have no knowledge regarding the offence. Those caught, however, face being charged as an accessory after the fact.[241] Such a situation is less-than-ideal, as those people intent on lying will not necessarily be dissuaded by the possibility of prosecution and any such charge would be reliant on the person being caught.

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[236] Search and Surveillance Bill 2009 (45-2), cl 165.

[237] "The primary risk for a suspect who is induced to speak is that the transcript which is the evidential product of the interview will not be the account that he would have given unprompted and may seriously misrepresent his position": Leng, above n 117, at 32.

[238] Any individual who refuses to comply with a power under s9 faces imprisonment for a term not exceeding 12 months or to a fine not exceeding $15,000: Serious Fraud Office Act, s45. Rhys Henderson has worked at the Serious Fraud Office for 14 years and says that he has seen this penalty awarded under ten times. Perhaps then, this is an issue which does not require too much attention. However, he further said the majority of those issued with Orders under s9 are those individuals who cannot divulge information due to professional privileges and obligations owed: Interview with Rhys Henderson, above n 57. The Office does not deal with reluctant witnesses, rather professionals that *want* to talk to the office. It is imaginable that those issued with Examination Orders in the non-business context may hold different attitudes and be uncooperative.

[239] Gladstone Clark, above n 120, at 50.

[240] Or to a body such as the Commerce Commission.

[241] Crimes Act 1961, s 71(1).

In reality, there is no foolproof way of ensuring that people tell the truth all the time. A scheme that provides punishments for both actively (lying) and passively (staying silent) disrupting police investigations is the most desirable option to encourage honesty.

b) Is the current penalty appropriate?

Examination Orders operate in regards to offences with penalties ranging from five to ten years, however, the penalty for failure to comply with an Order is one year. At the heart of both organised crime and serious or complex fraud is a profit motive; the degree of motivation for undertaking these criminal activities always depends on the risks and rewards associated with the behaviour. Similarly, pros and cons will be weighed up when deciding whether to comply with police orders to provide information. Richard Stott of OFCANZ thinks the possible one year penalty may be a factor for witnesses who have knowledge of a crime and are not directly linked to it, or who do not have criminal backgrounds.[242] People with this level of involvement may view the penalty as an incentive to cooperate. Alternatively, career criminals who have more to lose may balance the consequences and find it in their better interests to refuse to assist.[243]

Organised crime gangs are renowned for taking revenge against those who are 'disloyal' or who wrong them in any way.[244] Often those with knowledge of organised crime offending would rather risk prison than the repercussions of cooperating with police. Stott has brushed this off: "this is an issue that has been around for decades and the police are well equipped to deal with the issue of those reluctant to talk for fear of retribution".[245] Under the Victorian legislation, a major emphasis is placed on the secrecy of hearings, with strict penalties for those who breach confidentiality.[246] This confidentiality is intended to protect those who are involved from the potential repercussions of their cooperation with police.

[242] Interview with Richard Stott, above n 90.
[243] Ibid.
[244] See Stuart Dye and Beck Vass "Terrified city braces for gang revenge" (7 May 2007) nzherald.co.nz <www.nzherald.co.nz> and Kim Workman "Looking Back- Looking Beyond- Gang Strategies in the Wider Context" (Local Government Forum on Gangs, Brentwood Hotel, Kilbirnie, 19 November 2008).
[245] Interview with Richard Stott, above n 90.
[246] Anyone who discloses anything about a hearing, even the presence of one, can face up to 12 months in prison or 120 penalty units: Major Crime (Investigative Powers) Act 2004, s 20. Penalty units are a scheme used in Victoria to define the amount payable under offences. The rate for penalty units is indexed annually, so that it is raised in line with inflation. Any change to the value of a penalty unit will happen on 1 July each year.

Under the Victorian law, organised crime suspects who refuse to take the oath,[247] answer questions or miss hearing appointments can be jailed for up to five years.[248] This is clearly significantly harsher than the one year penalty for failing to answer questions under an Examination Order.[249] Furthermore, if an arrest warrant is issued for a witness, a Victorian court can "order the continued detention of the person in police custody for the purpose of ensuring his or her appearance as such a witness until the person has concluded giving evidence".[250] "In effect, they can be held until they provide answers," the then-Police Minister Andre Haermeyer said.[251]

c) Recommendation

Such an approach goes beyond what is regarded as a 'reasonable limit' under the NZBORA and is thus, too harsh. There is a strong argument in favour of a higher penalty for the New Zealand Bill; however it is crucial that any penalty is not disproportionate to the offence. The penalty for active disruption of a police investigation is a maximum of seven years' imprisonment.[252] Non-compliance with an Examination Order indirectly hinders police investigations and is thus, passive disruption. Because Orders issued in respect of a non-business context tackle serious and dangerous crimes, individuals should arguably face a similar penalty for both types of behaviour. On the other hand, the greater seriousness of active disruption must be recognised. To achieve a balance between these considerations, a maximum penalty of three years' imprisonment is recommended for those who refuse to comply with an Order. This is two years higher than the penalty currently included in the Bill. It may seem contradictory to recommend *increasing* the penalty, when this dissertation has emphasised the importance of safeguards. A higher penalty is necessary, however, for the Orders to make a practical difference to the results of investigations. The Examination Orders are a significant limit to the right to silence, and therefore their introduction must not only be justifiable in terms of human rights, but also must make the practical difference to investigations it sets out to.

[247] Major Crime (Investigative Powers) Act 2004, s 36(4).
[248] Ibid, s 37(3).
[249] Search and Surveillance Bill 2009 (45-2), cl 165.
[250] Major Crime (Investigative Powers) Act 2004, s 46(5)(b).
[251] Silvester, above n 52.
[252] Crimes Act 1961, s116, s117 and s71(1).

4.3 Threshold: 'reasonable grounds to suspect' vs. 'believe'

The legislation governing the use of search powers commonly use either one of two tests:[253] 'reasonable grounds to believe'[254] or 'reasonable grounds (or good cause) to suspect'.[255] As the Bill currently stands, the Police must have reasonable grounds *to suspect* that an offence has taken place and then reasonable grounds to *believe* that the person has information regarding the offence.[256] Both thresholds require assessment from an objective standard, by reference to a reasonable person with the experience and training of a police officer, rather than that of an uninformed bystander.[257] Neither requires that the grounds for application be based upon what the police officer directly knows.[258] Hearsay evidence can be relied upon;[259] however, the person issuing the warrant must consider it to be sufficiently reliable.[260]

a) Legal considerations

The Law Commission has recommended that 'reasonable grounds to believe' be used in relation to Examination Orders.[261] Although a 'higher standard, it is still considered

[253] *Paper 8: Examination Powers*, above n 62. There are some variations to this e.g. the Insolvency Act 2006, s250 (reason to believe); Antarctic Marine Living Resources Act 1981, s9 and Marine Mammals Protection Act 1978, s13 (reason to believe or suspect): Law Commission *Search and Surveillance Powers*, above n 27, at 56.
[254] This standard is used in the following Acts: Agricultural Compounds and Veterinary Medicines Act 1997, s69; Animal Welfare Act 1999, s131; Biosecurity Act 1993, s111; Commerce Act 1986, s98A; Extradition Act 1999, s83; Films, Videos and Publications Classifications Act 1993, s109; Fair Trading Act 1986, s47; Financial Transactions Reporting Act 1996, s44; Fisheries Act 1996, s199; Gambling Act 2003, s340; Motor Vehicle Sales Act 2003, s130; Resource management Act 1991, s334; Sale of Liquor Act 1989, s177; Summary Proceedings Act 1957, s198(1); Trade in Endangered Species Act 1989, ss37, 38: Law Commission *Search and Surveillance Powers*, above n 27, at 56.
[255] This standard is used in the following Acts: Arms Act 1983, s60; Corrections Act 2004, s99(3); Criminal Investigations (Bodily Samples) Act 1995, s16; Customs and Excise Act 1996, s149B: *Paper 8: Examination Powers*, above n 62.
[256] Search and Surveillance Bill 2009 (45-2), cl 32 and cl 34.
[257] *R v Ritchie* HC WHA CrI-2004-029-63, 26 November 2004 per Harrison J.
[258] Law Commission *Search and Surveillance Powers*, above n 27, at 57.
[259] Janet November *Burdens and Standards of proof in criminal cases* (Wellington Butterworths 2001).
[260] The test from *R.* v. *Debot* (1986) 30 C.C.C. (3d) 207 at 218-19 is "[it is h]ighly relevant…whether the informers 'tip' contained sufficient detail to ensure that it is based on more than mere rumour or gossip, whether the informer discloses his source or means of knowledge, and whether there are any indicia of his confirmation of his part of his story by police surveillance". Although this is a Canadian case, as already established, New Zealand Courts have often followed the approach of Canadian courts. This is especially so in cases regarding human rights (as the NZBORA is very similar to the Canadian Charter).
[261] This standard was also recommended by the Law Reform Commission of Canada *Search and Seizure* (R24, Ottawa, 1984) 16; and the Victorian Parliament Law Reform Committee *Warrant Powers and Procedures: Final Report* (No 170 of Session 2003-2005, Melbourne, 2005) 113. The 'reasonable grounds to suspect'

relatively low.[262] The historical approach to 'reasonable grounds to suspect' is concerning, with Judges referring to it in the past as "mere suspicion or surmise".[263] Additionally, there is no evidence that the reasonable belief standard would be too high.

Although the difference between the two standards has been judicially discussed, there has been a reluctance to define any boundaries with explicit terms.[264] The clearest distinction is from Fisher J in *R v Sanders*:[265]

> Even suspicion probably goes beyond mere recognition that something is possible to the point that, while final judgement must be suspended pending proof, the proposition in question is regarded as inherently likely.

This is compatible with the Law Commission's recommendation that the distinction is better expressed in terms of likelihood.[266] Belief requires a high or substantial likelihood and suspicion requires a low or moderate likelihood. The distinction cannot be expressed in mathematical terms and there is no particular percentage threshold; however, using a standard of 'likelihood' provides a guideline and seems logical. In *Sanders*, Fisher further stated that 'belief' required that there must be the view that the state of affairs in question actually exist".[267] The Law Commission has argued that this distinction is too rigid and places the threshold for belief at too high a level.[268] A similarly bold comparison was made by McGregor J in *Seven Seas Publishing v Sullivan*: [269]

> To 'suspect' is to imagine something evil or undesirable, or on slight or no evidence to imagine or fancy something wrong … or to be possible or likely … to 'believe' is to have

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threshold has been favoured by the Royal Commission on Criminal Procedure *Report* (Cmnd 8092 HMSO 1982) at [5.4]; the Gibbs Committee: Australian Attorney-General's Department *Review of Commonwealth Criminal Law* (Fourth Interim Report, AGPS, Canberra, 1990) at [38.50]; and the Queensland Criminal Justice Commission *Report on a Review of Police Powers in Queensland- Volume II: Entry, Search and Seizure* (Brisbane, 1993) at [8.2]: Law Commission *Search and Surveillance Powers*, above n 27, at 58.

[262] See Kevin Dawkins and Margaret Briggs "Criminal Law" (2005) 3 NZLR 393 at 423.

[263] *P F Sugrue Ltd v Attorney General* [2004] 1 NZLR 207 (HC) at 227, *Frost v Police* [1996] 2 NZLR 716 (HC) at 721 and *R v Laugalis* (1993) 10 CRNZ 350 (CA) at 355.

[264] Law Commission *Search and Surveillance Powers*, above n 27, at 57.

[265] [1994] 3 NZLR 450 at 461. Fisher J confirmed the position taken by the Court in *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663.

[266] Law Commission *Search and Surveillance Powers*, above n 27, at 57.

[267] *R v Sanders* [1994] 3 NZLR 450 at 461.

[268] Law Commission *Search and Surveillance Powers*, above n 27, at 57.

[269] *Seven Seas Publishing v Sullivan*, above n 265. These definitions were taken from the Shorter Oxford English Dictionary.

> evidence or faith and consequently to rely upon, to give credence to, to believe in its existing or occurrence.

Courts in the past, however, have focused on the term 'reasonable' rather than 'suspect' or believe'.[270] McGregor J's approach seems to ignore this. Examination Orders require that suspicion be on 'reasonable grounds'; thus, the *Seven Seas* definition of "no evidence to imagine" is inappropriate.

Although the distinction between the two thresholds may be blurred, it is generally agreed that 'reasonable grounds to suspect' is the lower test. As Lord Devlin in the Privy Council observed:[271]

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting-point of an investigation, of which the obtaining of prima facie proof is the end.

When proof has been obtained, the police case is complete, and it is ready for trial and passes on to its next stage.[272] Examination Orders are issued during the initial stage of the investigation: thus the threshold 'reason to suspect' seems more appropriate. Although when an Order is applied for there may be indicators pointing to a person's guilt, there will hardly be enough to say that the "police case [is] finished".

The danger of this lower suspicion test has been noted. In *Securities Commission v Jones*,[273] after exploring several past approaches,[274] McGechan J cautioned that discretion from the courts was appropriate and that action should be taken "cautiously and sensibly".[275]

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[270] Law Commission *Search and Surveillance Powers*, above n 27, at 57.
[271] *Hussein v Chong Fook Kam* [1970] AC 942 at 948.
[272] *Shaaban Bin Hussien v Chong Fook Kam* (1970) AC 942 at 948.
[273] (1993) 6 NZCLC 68.547 (HC).
[274] Some decisions held that 'reasonable grounds to suspect' should be treated as the normal balance of probabilities: *Securities Commission v Honor Friend* (1991) 5 NZCLC 67,512 (HC); 67,517-67,518. This approach gains support from the natural disinclination to make a decision on the basis of mere suspicion; even suspicion on reasonable grounds: McGechan J in *Securities Commission v Jones*, above n 273. As McGechan J pointed out however, this approach lacks reason. It is illogical to require a higher standard of proof for minor peripheral issues, but allow establishment of the essential elements of an offence at the lower standard of suspicion.
[275] *Securities Commission v Jones*, above n 273, at 5.

b) Practical significance

It is easy to become engrossed in legal arguments, but of more importance is the effect a threshold would have on the everyday work of those using the Orders. The practical significance of the threshold became evident after discussions with Rhys Henderson of the SFO[276] and Richard Stott of OFCANZ.[277] Stott said that the OFCANZ unit are acutely aware of legal thresholds and the case law establishing what is required for each one.[278] Each threshold is extremely specific and knowing what is required to meet each standard is "something that we [OFCANZ] deal with all the time".[279] Similarly, says Henderson:[280]

> On Monday morning there is a meeting with the general counsel, the general managers and the director, Adam Fairley. The five of us discuss the merits of the complaint and discuss if the legislative thresholds have been met. An investigation will be commenced if the threshold is met. So, yes, the threshold in the legislation is something that is extremely important and of practical significance.

He was quick to emphasise that the difference between 'reasonable grounds to suspect' versus 'reasonable grounds to believe' was substantial. Taking a firmer stance is Stu Harvey, a detective sergeant in the Fraud Branch of the New Zealand Police. He regards 'reasonable grounds to suspect' as a fairly low threshold and "a lot lower" than 'reasonable grounds to believe'.[281] Harvey is not sure that the lower threshold is justified: "from a fraud perspective, we have most of the details on paper so would normally have reasonable grounds to believe before questioning anyway".[282] Although the suspicion threshold for organised crime "would be extremely helpful" to investigations, he is not sure that it is appropriate.[283]

c) Conclusion

On first inspection, an issue such as threshold might seem trivial. Those working with the threshold on a daily basis, however, make it clear that the importance of the choice should not be underestimated. Using the threshold of 'reasonable grounds to suspect' makes it easier for

[276] As established by previous Chapters, he is the General Manager of the Serious Fraud Office.
[277] As established by previous Chapters, he is the Strategy & Liaison Manager and A/Operations Manager of OFCANZ.
[278] Interview with Richard Stott, above n 90.
[279] Ibid.
[280] Interview with Rhys Henderson, above n 57.
[281] Interview with Stu Harvey, above n 107.
[282] Ibid.
[283] Ibid.

investigators to target individuals who are otherwise difficult to link to specific crimes.[284] However, as a threshold is the *starting* point for any investigation, Parliament should err on the side of caution, especially when such integral rights are at issue. Thus, the threshold before an Order can be applied for should be if any officer has 'reasonable grounds to believe', rather than 'suspect'. The 'likelihood' approach of the Law Commission, described earlier, is rational. Requiring a high or substantial likelihood of an offence occurring should be the minimum standard when operating such invasive powers. As earlier concluded, the right to silence can justifiably be limited. This justification comes with the caveat, however, that appropriate safeguards are utilised wherever possible.

4.4 Overall Conclusion

Although the issues in this Chapter did not receive the same extensive media coverage as the right to silence, they have a significant impact on the everyday operation of the Orders. The provisions governing the use of the Examination Orders require minor changes to ensure safeguards are appropriate and that the Orders make a practical difference to investigations.

As Chapter Five will demonstrate, Victoria's approach to a similar power in the MCIPA has led to increased success in the investigation of organised crime. This Chapter will also provide a brief summary of the issues arising from Examination Orders.

[284] See Dawkins and Briggs, above n 262, at 424.

CHAPTER FIVE: A BROAD ASSESSMENT

Examination Orders are not as concerning as the media would lead us to believe. Slight adjustments to the present legislation would more closely align New Zealand to legislation in Victoria, where similar powers have been enacted. The state has operated under these powers for seven years; thus it is constructive to review the Victorian experience.

5.1 Victoria's Journey

The enactment of the Major Crime (Investigative Powers) Act 2004 (MCIPA) gave authority to several state actors within Victoria. This was viewed as a necessity for the effective detection and investigation of organised crime. Due to the invasive nature of these investigative powers, it was crucial that a practical and significant difference resulted from their use. Two years after the Act came into force, the Victoria Police reported on their experience using the powers: [285]

> Valuable information and evidence has been gained from coercive powers hearings. While information obtained by means of coercive questioning from a witness cannot be used directly against the witness in criminal proceedings, it can be used [by] other persons who are involved in major crime. In addition, information obtained by means of coercive powers from witnesses who are not charged with offences has contributed to the strength of evidence against offenders who have already been, or will be, charged. In addition, evidence obtained by means of coercive questioning will be used in future prosecutions. Further, the coercive powers process has been used to enhance the effectiveness of other investigative methods. Coercive powers also assist the tactical direction of investigations.

Evidently, the police welcomed the MCIPA and the supplementary powers they were granted as a result of the Act. In that same 2006 report, the Special Investigations Monitor reported he was "impressed by the thorough, comprehensive and responsible approach" taken by those acting under new powers.[286]

The basic premise of the Victorian Act and the proposed Bill is the same. Unlike New Zealand, however, which has devoted several sections to these invasive powers, the MCIPA

[285] Jones, above n 68.
[286] Ibid.

provides a comprehensive and carefully considered scheme.[287] This approach shows an appreciation for the seriousness with which these powers should be treated.[288] Like New Zealand, Victoria faced similar criticism of the Act with Australian civil rights groups claiming it set a dangerous precedent.[289] Despite these hurdles, Victoria has enjoyed success with the operation of the MCIPA and the manner in which it has been used should be commended.

5.2 Summary of Examination Orders in the Proposed New Zealand Bill

a) The Orders

The Orders can be issued in two situations. The first is when a party becomes privy to knowledge through a business context, and cannot answer questions of the police due to professional obligations. A legal obligation ensures these individuals no longer make a private judgement about whether to cooperate. The second situation which justifies the issuing of an Order is a serious or complex fraud, or organised crime offence, in a non-business context. Both offences have widespread, toxic effects on New Zealand society. The complexity of these offences is unique, meaning they require a unique approach to combat them. Examination Orders aid the investigation of these crimes, an extremely worthwhile objective. The public had a strong reaction to the introduction of these Orders; however, it is likely that increased awareness of the important objectives would help to alter this negative attitude.

[287] The Search and Surveillance Bill devotes 12 sections to the introduction and regulation of Examination Orders, whereas the MCIPA has 70 sections outlining a comprehensive regime. These sections also cover production of documents but regardless, Victoria has produced a carefully thought out piece of legislation.

[288] As Examination Orders are a new police power they should, as done by Victoria, be set out in a new Act. This may seem contradictory, as one of the main purposes of the Search and Surveillance Bill was to streamline the laws surrounding investigations. However as mentioned, they are a new power and thus not part of our current law that requires "streamlining".

[289] Koifman, above n 49. Liberty Victoria and the Criminal Bar Association both expressed alarm and disappointment at this legislation: Jason Dowling "Police set to override right to silence" (19 September 2004) theage.com.au <http://www.theage.com.au>. The then President of the Law Institute of Victoria (LIV) stated in a press release that, "He was alarmed by the lack of consultation for reform that would remove a person's fundamental rights". He was further quoted as saying that, "The idea that such a major revolution in police powers could be legislated without public consultation is undemocratic": Jones, above n 68.

b) The right to silence

Over time there has been considerable academic discussion regarding the right to silence. Even a cursory examination reveals hundreds of perspectives regarding the scope of, reason for and legitimacy of the right. The arguably excessive attachment to the right to silence cannot be defended on the basis of history, as it is a relatively modern concept. Moreover, there are already limits to the right in regulatory regimes, in the requirement to provide particulars in many situations and in the Serious Fraud Office's powers. It is claimed, however, that the right provides important protection for a citizen's conscience, privacy, privilege against self-incrimination and presumption of innocence. Legal academics hold strong feelings towards the right, whether supportive or critical. Thus it is accepted that the right plays a fundamental role in our legal system.

c) The right as a justified limit

What deserves a more extensive enquiry is the question of whether, given the seriousness of these crimes and the difficulty in investigating them, an Examination Order's infringement of the right to silence can be justified. This enquiry requires consideration of New Zealand's commitment to the New Zealand Bill of Rights Act. After completion of the "s 5 balancing test", it can be concluded that although the Orders are irreconcilable with the NZBORA, they are a demonstrably justified limit to the right. Victorian Courts have taken a rights-based perspective to situations where the Charter is breached, and it will be interesting to see if New Zealand courts take a similar approach.

The lesser publicised, legal specifics of the legislation are of greater concern than limiting the right to silence. Amendments are recommended to ensure that the Orders operate under suitable safeguards.

5.3 Recommendations

1. When considering whether to grant an Order, a judge should consider the impact of the Order on the members of the community.

This provides consideration of the wider effects of the Order, and serves to emphasise the exceptional circumstances required before the powers in an Order should be called upon.

2. The application threshold for an Order should be changed, from 'reasonable grounds to suspect' to 'reasonable grounds to believe'.

The current threshold is too low. 'Reason to believe' is a threshold which is considered higher and more appropriate, by both those in the legal sphere and those who would be using the Orders. An increased threshold provides a further safeguard to control the use of the Orders.

3. The penalty for refusal to comply with an Order should be increased to a maximum of three years imprisonment.

Given the complex nature of the crimes, those involved in offending are often relatively sophisticated. The relatively small penalty, in comparison to the penalty for a conviction of serious or complex fraud, or organised crime, may mean that witnesses will refuse to cooperate. Under the Victorian legislation, those who breach a coercive powers order face imprisonment until they cooperate—a much higher penalty.

4. It remains unclear whether the powers granted under the Examination Orders are necessary for police investigations of serious fraud. The sunset clause should thus be amended to require a review after two years rather than five.

Concerns were raised regarding the potential of police to abuse their position of power, and the Orders being used too frequently. The adoption of recommendations three and four help to alleviate these concerns. The combination of these proposed recommendations, reporting requirements and the low levels of corruption in the force, act as substantial checks on the police, and would help ensure that the Orders were utilised appropriately. In addition, according to those in the field, internal monitoring requirements would likely be introduced after the Bill's enactment. These safeguards should give the public confidence that the Bill appropriately limits police powers.

With their experience and intelligence capability, police are a valuable resource in the investigation of serious or complex fraud cases which are rejected for consideration by the SFO. As this crime is not currently of a high priority, however, it is unclear whether these powers will make a practical difference and result in more successful investigations. It may be that the increased powers will help prompt a refocused approach. Regardless, the mandatory review of the Bill's effectiveness should occur after two, rather than five, years.

Many of the powers in the Bill are novel and if the police are not utilising Examination Orders for the investigation of this crime, then such a power should not be available.

5. In regards to organised crime, Orders should be limited to the specialised unit of OFCANZ.

A core justification for this power is the complex nature of investigations into organised crime. OFCANZ targets this high level offending; therefore, it is redundant for the wider police force to have access to such a power. An external body or position, such as the Minister of Police, should be introduced to monitor and control the scope of OFCANZ.

5.4 Conclusion

While the emotive coverage of the Search and Surveillance Bill is enough to alarm even the most seasoned legal mind, the interests of the wider community are best served by the ability of the police to successfully investigate and prosecute those who commit serious or complex fraud and organised crime. Thus, although the Orders breach the right to silence, this breach is justified by the end result of increased success in the investigation of serious or complex fraud and organised crime. An assessment of similar legislation and its success in Victoria makes it clear the Examination Orders represent a step towards more successful police investigations. Refocusing of police attention is required and the Orders still have several issues that require fine-tuning. If the above suggested changes are made, however, the Orders will be a useful and appropriate tool against crime.

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APPENDIX 1

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Subpart 11—Examination orders

Examination orders in business contexts

31 ~~Commissioner~~ Inspector or more senior officer may apply for examination order in business context

- ~~(1) The Commissioner may apply to a Judge for an examination order against a person in a business context if the Commissioner is satisfied that the conditions specified in **section 32** are met in respect of the person.~~

  (1) A constable who is of or above the level of position of inspector may apply to a Judge for an examination order against a person in a business context if—

  - (a) the constable is satisfied that the conditions specified in **section 32** are met in respect of the person; and
  - (b) the making of the application is approved by—
    - (i) a Deputy Commissioner; or
    - (ii) an Assistant Commissioner; or
    - (iii) the District Commander (other than an acting District Commander) of the Police district in which the constable is stationed.

(2) An application made under this section must be made in writing, and must set out the following particulars:

- (a) the name of the applicant:
- (b) a description of the offence that it is suspected has been committed, is being committed, or will be committed:
- (c) the facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed:
- (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 acquired the information in respect of which the order is sought in a business context:
- (g) the facts that indicate that the person against whom the order is sought has been given a reasonable opportunity by a constable to provide the information but has not done so.

32 Conditions for making examination order in business context

- The conditions for making an examination order in a business context against a person are that—
  - (a) there are reasonable grounds to suspect that an offence punishable by imprisonment for a term of 5 years or more has been committed, or is being committed, or will be committed; and
  - (b) there are reasonable grounds to believe that the person sought to be examined has information that constitutes evidential material in respect of the offence; and
  - (c) there are reasonable grounds to believe that the person sought to be examined acquired the information in respect of which the order is sought in a business context; and
  - (d) the person has been given a reasonable opportunity by a constable to provide that information and has not done so.

Examination orders in contexts other than those of business

33 ~~Commissioner~~ Inspector or more senior officer may apply for examination order in non-business context

- ~~(1) The Commissioner may apply to a Judge for an examination order against a person in a non-business context if the Commissioner is satisfied that the conditions specified in **section 34** are met in respect of the person.~~
  (1) A constable who is of or above the level of position of inspector may apply to a Judge for an examination order against a person in a non-business context if—
  - (a) the constable is satisfied that the conditions specified in **section 34** are met in respect of the person; and
  - (b) the making of the application is approved by—
    - (i) a Deputy Commissioner; or

- (ii) an Assistant Commissioner; or
- (iii) the District Commander (other than an acting District Commander) of the Police district in which the constable is stationed.

(2) An application made under this section must be made in writing, and must set out the following particulars:

- (a) the name of the applicant:
- (b) a description of the offence that it is suspected has been committed, is being committed, or will be committed:
- (c) the facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed:
- (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 acquired the information in respect of which the order is sought in a non-business context:
- (g) the facts that indicate that the person against whom the order is sought has been given a reasonable opportunity by a constable to provide the information but has not done so.

34 Conditions for making examination order in non-business context

- The conditions for making an examination order in a non-business context against a person are that—
  - (a) there are reasonable grounds to suspect that an offence punishable by imprisonment has been committed, or is being committed, or will be committed, and the offence—
    - ~~(i) is serious or complex fraud; or~~
    - ~~(ii) has been committed, or is being committed, or will be committed wholly or partly because of participation in a continuing association of 3 or more persons having as its object, or as 1 of its objects, a continuing course of criminal conduct; and~~
    - (i) involves serious or complex fraud that is punishable by imprisonment for a term of 7 years or more; or

        - (ii) has been committed, or is being committed, or will be committed wholly or partly by an organised criminal group as defined in section 98A(2) of the Crimes Act 1961; and
    - (b) there are reasonable grounds to believe that the person sought to be examined has information that constitutes evidential material in respect of the offence; and
    - (c) there are reasonable grounds to believe that the person sought to be examined acquired the information in respect of which the order is sought in a non-business context; and
    - (d) the person has been given a reasonable opportunity by a constable to provide that information and has not done so.

Other provisions that apply to examination order applications

35 Other provisions that apply to examination order applications

- (1) The provisions in **subsection (2)** apply to any application for an examination order as if—
    - (a) any reference in those provisions to a search warrant were a reference to an examination order; and
    - (b) any reference in those provisions to an issuing officer were a reference to a Judge; and
    - (c) any reference in those provisions to a District Court were a reference to a District Court or a High Court, as the case may be.

(2) The provisions are—

- (a) **section 96(2)** (relating to requirements for further information); and
- (b) **section 97** (relating to verification of application); and
- (c) **section 98(1), (2), and (4)** (relating to mode of application); and
- (d) **section 99** (relating to retention of documents).

Making examination orders and contents of examination orders

36 Judge may make examination order

- A Judge may, on an application made under **section 31 or 33**, make an examination order against a person if the Judge is satisfied that—

- (a) the conditions specified in **section 32 or 34**, as the case may be, are met in respect of the person; and
- (b) 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.

37 Form and content of examination order

- (1) An examination order made under **section 36** must be in the prescribed form and 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.

  (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:
  - (d) if the examination is to be conducted by a delegate of the Commissioner, the name of the delegate:
  - (da) a condition that, in accordance with **section 40A**, an examination order report must be provided within 1 month after the completion of the examination conducted under the order to the Judge who made the order or, if that Judge is unable to act, to a Judge of the same court as the Judge who made the order:
  - (db) any requirement that the Judge making the order considers reasonable for inclusion of specified information in the examination order report provided under **section 40A**:
  - (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.

Other provisions relating to examination orders

38 Presence of lawyer

- A person against whom an examination order is made must, before being required to appear before the Commissioner or the Commissioner's delegate, be given a reasonable opportunity to arrange for a lawyer to accompany him or her.

39 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).

40 Other provisions that apply to examination orders

- **Section 103** (relating to the transmission of search warrants) and **section 105** (relating to when a search warrant is invalid) apply to examination orders as if—
    - (a) any reference in those provisions to a warrant or search warrant were a reference to an examination order; and
    - (b) any reference in those provisions to an issuing officer were a reference to the Judge issuing an examination order.

Examination order reports

40A Examination order reports

- (1) The Commissioner or the delegate of the Commissioner, as the case may be, who conducts an examination authorised by an examination order must provide an examination order report within 1 month after the completion of the examination conducted under the order, as specified in the order, to the Judge who made the order, or, if that Judge is unable to act, to a Judge of the same court as the Judge who made the order.

  (2) The examination order report must contain the following information:
    - (a) whether the examination resulted in obtaining evidential material:
    - (b) whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination:
    - (c) any other information stated in the order as being required for inclusion in the examination order report.

Subpart 12—Other matters

41 Common law defence of necessity for people other than constables not affected by this Part

- Nothing in this Part affects the common law defence of necessity as it applies to persons who are not constables.

APPENDIX 2

Crimes Act 1961, s 98A.

S98A Participation in organised criminal group

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
    - (a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
    - (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and
    - (c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.

  (2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—
    - (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
    - (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
    - (c) the commission of serious violent offences (within the meaning of section 312A(1)); or
    - (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)).

  (3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—
    - (a) some of them are subordinates or employees of others; or

- (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
- (c) its membership changes from time to time

APPENDIX 3

Report of the Serious Fraud Office Ended June 2010 (Serious Fraud Office, 30 June 2010) at 18.

The Office has met all its requirements of the Serious Fraud Act 1990. An analysis of the 'Use of Statutory Powers' as notices issued under the Act is summarised in the tables below.

Table One:

Section	**Part 1 of the Act**	**2009/10**	**2008/9**	**2007/8**	**2006/7**	**2005/6**	**2004/5**
s 5(1)(a)	Requiring documents	50	209	56	91	44	118
s 5(10(b)	Requiring answers to questions	Nil	1	5	4	16	13
s 6	Search warrant obtained	Nil	Nil	Nil	Nil	1	Nil
TOTAL		50	210	61	95	61	131

Table Two:

Section	**Part II of the Act**	**2009/10**	**2008/9**	**2007/8**	**2006/7**	**2005/6**	**2004/5**
s 9(1)(d)	Requiring answers to questions	39	36	84	258	123	101
s 9(1(e)	Requiring information	82	103	82	113	129	69
s 9(1)(f)	Requiring documents	419	412	409	669	547	560
s 10	Search warrant obtained	3	Nil	Nil	7	4	5
TOTAL		543	551	575	1,047	803	735