

Chapter 10 – Examination orders

INTRODUCTION

- 10.1 The examination order regime in the Search and Surveillance Act 2012 (the Act) provides a power—available only to New Zealand Police—to obtain a court order requiring a person to submit to compulsory questioning. Since the Act’s enactment, the examination order regime has yet to be employed by Police.
- 10.2 Examination orders were one of the most contentious aspects of the Search and Surveillance Bill and were the subject of considerable debate in the House.¹ Concern was raised that they would remove an individual’s right to silence and the privilege against self-incrimination.²
- 10.3 The main issue arising in this review in relation to examination orders is whether—given they have not been used—there is a continuing need for the regime.

OVERVIEW OF THE EXAMINATION ORDER REGIME

What is an examination order?

- 10.4 Under the Act, Police may obtain an examination order from a judge³ to require a person to answer questions in relation to identified information, where he or she has previously refused to do so.⁴
- 10.5 An examination order may be made in either a “business” or “non-business” context. Those terms are defined in section 3.⁵ In short, examination orders in a business context are directed at persons who hold information in a professional capacity that they do not want to disclose voluntarily. In a non-business context, examination orders may be directed to any person who holds information that he or she does not wish to disclose.

¹ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8.

² At 8.

³ Section 3 of the Search and Surveillance Act 2012 defines “Judge” as a District Court judge or a judge of the High Court.

⁴ Search and Surveillance Act 2012, ss 33–43.

⁵ “Business context,” in relation to the acquisition of any information by a person, means the acquisition of the information in the person’s capacity as — (a) a provider of professional services or professional advice in relation to a person who is being investigated, or one or more of whose transactions are being investigated, in respect of an offence; or (b) a director, manager, officer, trustee, or employee of an entity that is being investigated, or one or more of whose transactions are being investigated, in respect of an offence. “Non-business context” means a context other than a business context.

10.6 There are a number of procedural and substantive hurdles that need to be overcome before Police can obtain an examination order.

Procedural requirements

10.7 An application for an examination order may only be made by a Police Inspector or more senior officer, and must be approved by the Police Deputy Commissioner, Assistant Commissioner, or District Commander.⁶

10.8 The Commissioner of Police or a delegate of the Commissioner must conduct the examination⁷ and provide a formal report to the issuing judge within one month.⁸

Substantive requirements

10.9 Examination orders are available only where there are reasonable grounds to suspect that an offence has been, is being, or will be committed.⁹ The orders may only be made in relation to sufficiently serious suspected offences. How serious the offence needs to be depends on whether the order is made in a business or non-business context:

- in a business context, an examination order may only be made if the offence in question is punishable by five years' imprisonment or more;¹⁰ and
- in a non-business context, the offence must be serious or complex fraud punishable by seven years' imprisonment or more, or an offence committed by an organised criminal group.¹¹

10.10 In both cases, there must also be reasonable grounds to believe that the person to be examined (the examinee) has information that constitutes evidential material in respect

⁶ Search and Surveillance Act 2012, ss 33(1) and 35(1).

⁷ Section 39(1).

⁸ Section 43. The report must address whether the examination resulted in obtaining evidential material; whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination; and any other information stated in the order as being required for inclusion in the examination order report (s 43(2)). The Police annual report must also include the number of examination orders that were granted or refused in that year (s 170(1)(c)).

⁹ Sections 34(a) and 36(a).

¹⁰ Section 34(a).

¹¹ Section 36(a). The definition of "organised criminal group" in s 98A(2) of the Crimes Act 1961 applies to this section.

of the offence, and the examinee must have declined to provide the information despite being given a reasonable opportunity to do so.¹²

10.11 The issuing judge must also be satisfied that it is reasonable to subject the examinee to compulsory examination, having regard to the nature and seriousness of the suspected offending, the nature of the information sought, the relationship between the examinee and the suspect, and any alternative ways of obtaining the information.¹³

The examination process

10.12 Once an examination order has been issued, the examinee must be given a reasonable opportunity to arrange for a lawyer to be present during the examination.¹⁴ The examinee may refuse to answer a question by invoking the privilege against self-incrimination,¹⁵ or any other privilege recognised under the Act.¹⁶ If the examinee refuses to answer a question on the grounds of privilege, the Commissioner may apply to a judge for an order determining whether the claim is valid.¹⁷

10.13 It is an offence to fail to comply with an examination order without reasonable excuse.¹⁸ The maximum penalty is one year's imprisonment (in the case of an individual) or a \$40,000 fine (in the case of a body corporate).

Genesis of the examination order regime

10.14 Examination orders were not included in the Law Commission's 2007 Report, *Search and Surveillance Powers*.¹⁹ They were beyond the Commission's terms of reference. The examination order regime was developed at a later point, when the Government was considering the implementation of the Commission's Report. In September 2007, the Labour Government announced its plans to set up an Organised Financial Crime Agency within Police and to disestablish the Serious Fraud Office (SFO). It was proposed that SFO's functions would be integrated into those of the new agency,

¹² Search and Surveillance Act 2012, ss 34(d) and 36(d).

¹³ Section 38(b).

¹⁴ Section 40.

¹⁵ Section 138(1).

¹⁶ Section 139(1).

¹⁷ Sections 138(3) and 139(2).

¹⁸ Section 173.

¹⁹ Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).

which would have the same investigative tools and powers that were available to SFO. One of those powers was SFO's ability to require persons to answer questions relevant to an investigation into serious or complex fraud.²⁰ (SFO's examination powers are discussed later in this chapter.²¹)

10.15 Accordingly, a Police-only examination order was included in the Search and Surveillance Powers Bill, introduced by the Labour Government in September 2008.²² That Bill was subsequently discharged.

10.16 In July 2009, the National Government decided not to integrate SFO into Police, but nonetheless retained the examination order regime in the Search and Surveillance Bill 2009 (which was ultimately enacted).

The rationale for examination orders

10.17 During the Bill's passage, the complex nature of fraud offending was suggested as a reason why special examination powers were needed.²³ It was suggested that investigations of offending involving complex financial transactions could benefit from a power requiring a person to answer questions about complicated documents and paper trails (already obtained by Police) relating to these transactions.²⁴ Access to pre-existing documents would not always give the investigator a clear picture of what had occurred; so it was thought that the investigation of fraud could be carried out more effectively if persons with relevant information could be compulsorily examined.

10.18 It was also suggested that examination orders could assist in situations where a person was reluctant to assist Police on the grounds of professional confidentiality.²⁵ In a business context, a person may acquire information in the course of providing professional services and not wish to disclose this information because of professional or fiduciary obligations owed to the client. For example, chartered accountants have an obligation to respect the confidentiality of information about their clients' affairs (set out in the New Zealand Institute of Chartered Accountants' code of ethics) and may

²⁰ Serious Fraud Office Act 1990, s 9(1)(d).

²¹ See paragraphs [10.26]–[10.29] below.

²² Search and Surveillance Powers Bill 2008 (300-1), cls 33 and 35.

²³ Ministry of Justice and Law Commission *Departmental Report for the Justice and Electoral Committee* (August 2010) at [164]; (1 March 2012) 677 NZPD 761; Search and Surveillance Bill 2010 (45-2) (select committee report) at 8.

²⁴ Ministry of Justice and Law Commission *Departmental Report*, above n 23, at [164].

²⁵ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8–9.

fear disciplinary action for breaching the Institute’s code if they voluntarily disclose this information to Police. Compulsory questioning would allow such persons to cooperate with Police without fear of adverse legal or ethical consequences (whether real or perceived).²⁶

10.19 In the case of persons who have obtained information about suspected offending in a non-business context, the information will generally have come into their knowledge through a personal relationship with the suspect. There are many reasons why a person may be reluctant to disclose that information to the Police voluntarily (for example, fear of jeopardising social relationships). Cooperating with Police could have serious and ongoing consequences, given the more enduring nature of personal relationships compared to business relationships.²⁷ The Select Committee was concerned that compulsory questioning would adversely affect personal relationships, but ultimately considered this was justified to help Police unravel complex transactions and arrangements when investigating serious financial crime and organised crime.²⁸

The right to silence

10.20 Because examination orders compel a person to submit to police questioning, concerns were raised during the Bill’s passage that they infringed the general right held by all citizens to remain silent and to decline to provide information.²⁹

10.21 The “right to silence” has been described as a network of loosely linked rules or principles of immunity, differing in scope and rationale.³⁰ Broadly speaking, these rules reflect the principle that “every citizen has in general a right to refuse to answer questions from anyone, including an official”.³¹ The right may be seen as an essential

²⁶ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8–9; Ministry of Justice and Law Commission *Departmental Report*, above n 23, at [170].

²⁷ Search and Surveillance Bill 2010 (45-2) (select committee report) at 9; Ministry of Justice and Law Commission *Departmental Report*, above n 23, at [171].

²⁸ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8.

²⁹ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8; and see the submissions referred to in Ministry of Justice and Law Commission *Departmental Report*, above n 23, at [159].

³⁰ *R v Hertfordshire County Council* [2000] 2 AC 412 (HL) at 419, referring to *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 (HL) at 30–31. The right to silence is discussed in Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 10–26.

³¹ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398 per Cooke P. See also *Rice v Connolly* [1966] 2 QB 414 at 419: “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”.

component of a citizen's "right to be let alone"³² and to be free from unwarranted State intrusion into his or her private life.³³

10.22 In New Zealand, the general right to silence is not subject to explicit legislative protection. However, specific instances of the right are given special protection. For example:

- section 23(4) of the New Zealand Bill of Rights Act 1990 (NZBORA) guarantees the right to silence when a person has been arrested or detained;
- section 25(d) of NZBORA guarantees the right not to be compelled to be a witness or confess guilt at trial; and
- section 60 of the Evidence Act 2006 preserves the common law immunity against being compelled to answer any questions that may incriminate oneself (known as the "privilege against self-incrimination").

10.23 The Select Committee acknowledged submitters' concern that examination orders would remove an individual's right to silence, but concluded there were strong policy reasons for the examination order regime to remain in the Bill.³⁴ The Committee also noted that the Bill expressly preserved the examinee's privilege against self-incrimination; and that the proposed use of examination orders would be subject to more rigorous scrutiny than under the Serious Fraud Office Act 1990 (as examination orders would require prior judicial authorisation).³⁵

10.24 The Committee did, however, recommend a number of amendments to ensure that examination orders would not become a routine tool for investigation. These amendments (which were carried through into the final Act) included raising the threshold for issuing examination orders,³⁶ creating an internal oversight process for making applications,³⁷ and strengthening reporting requirements.³⁸

³² *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10] per Elias CJ, referring to *Olmstead v United States* 277 US 438 (1928) at 478 per Brandeis J and *Katz v United States* 389 US 347 (1967) at 350 per Stewart J.

³³ See Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) at 23.

³⁴ Search and Surveillance Bill 2010 (45-2) (select committee report) at 8. This was the view of the majority of the Select Committee. The minority views of the Green Party and Labour Party, who were opposed to the provisions relating to examination orders, are recorded at 21–25 of the final Select Committee report.

³⁵ Search and Surveillance Bill 2010 (45-2) (select committee report) at 9.

³⁶ The Bill as introduced provided that examination orders were available for information obtained: in a business context, in relation to investigations of *any* imprisonable offence; and in a non-business context, in relation to investigations of *any* imprisonable offence that was serious or complex fraud or committed because of participation in a continuing association of

EXAMINATION POWERS IN OTHER ACTS

10.25 Examination orders under the Act were an entirely new power for Police in the investigation of suspected criminal offending. However, the concept and use of examination powers was not novel. There are similar powers in other statutes that permit government bodies to submit people to compulsory questioning. Some of those examination powers are briefly described below.

Serious Fraud Office Act 1990

10.26 As mentioned above, there is an examination power available to SFO to require persons to answer questions in the investigation of suspected serious or complex fraud.³⁹ The Director of SFO must have reasonable grounds to believe that an offence involving serious or complex fraud may have been committed before using this power.⁴⁰

10.27 The examination power may be exercised by the Director giving notice in writing to the examinee⁴¹ (rather than requiring a judicial order) and remains unaffected by the enactment of the Search and Surveillance Act. The examinee may be either the person whose affairs are being investigated by SFO or any other person whom the Director

three or more persons (having a continuing course of criminal conduct as one of its objects). The Select Committee recommended limiting examination orders in the business context to offences punishable by five years' imprisonment or more; and, in the non-business context, to serious or complex fraud offences punishable by seven years' imprisonment or more, or offences committed by an "organised criminal group" as defined in s 98A(2) of the Crimes Act 1961.

³⁷ The Select Committee recommended that only police officers holding the rank of Inspector or higher could make an examination order and applications would need to be approved by a Deputy Commissioner, Assistant Commissioner or District Commander.

³⁸ The Select Committee recommended imposing reporting requirements on police officers questioning people under examination orders and through the Police's annual report to Parliament.

³⁹ "Serious or complex fraud" is defined in s 2 of the Serious Fraud Office Act 1990 as including "a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud". When determining whether suspected offending involves serious or complex fraud, the Director may have regard to the nature and consequences of the fraud; the scale of the fraud; the legal, factual and evidential complexity of the matter; and any relevant public interest considerations (s 8(d)). The Serious Fraud Office (SFO) can assume responsibility from Police for investigating any case the Director believes on reasonable grounds to involve serious or complex fraud (s 11(1)(a)). If a complaint of fraud does not meet the criteria required for SFO investigation, SFO may direct complainants to another law enforcement agency, or refer the matter to that agency itself.

⁴⁰ Serious Fraud Office Act 1990, s 7.

⁴¹ Section 9(1).

has reason to believe may have information or documents relevant to an investigation.⁴² Failure to answer a question during examination is an offence.⁴³

10.28 In contrast to the Search and Surveillance Act, the Serious Fraud Office Act expressly removes the privilege against self-incrimination. Section 27 provides:

Privilege against self-incrimination no excuse

No person shall be excused from answering any question, supplying any information, producing any document, or providing any document, or providing any explanation pursuant to section 5 or section 9 of this Act on the ground that to do so would or might incriminate or tend to incriminate that person.

10.29 Although the privilege against self-incrimination is removed, section 28(1) of the Serious Fraud Office Act provides that a self-incriminating statement can only be used in evidence against that person in a prosecution for an offence if he or she gives evidence inconsistent with the statement.

Insolvency Act 2006

10.30 Under the Insolvency Act 2006, the Official Assignee has the power to summons certain persons for questioning on oath in relation to the property and transactions of a bankrupt.⁴⁴ Like the Serious Fraud Office Act, there is nothing to preclude questions that may elicit self-incriminating answers.⁴⁵ However, such statements cannot be used in criminal proceedings against that person unless he or she is charged with perjury in relation to the statement.⁴⁶

Criminal Proceeds (Recovery) Act 2009

10.31 The Criminal Proceeds (Recovery) Act 2009 establishes a regime for the forfeiture of the proceeds of crime in New Zealand.⁴⁷ Under that Act, the Commissioner of Police may apply to a High Court judge for an examination order.⁴⁸ Section 107 empowers a judge to make an order requiring a person to attend before the Commissioner and

⁴² Serious Fraud Office Act 1990, s 9(1)(a)–(b).

⁴³ Section 45(d)(ii). The maximum penalty in the case of an individual is one year's imprisonment or a \$15,000 fine; and, in the case of a corporation, a \$40,000 fine.

⁴⁴ Insolvency Act 2006, s 165(1).

⁴⁵ Section 184(2).

⁴⁶ Section 185(2)(a). Or, in the case of the bankrupt, if the bankrupt is charged with making a misleading statement: s 185(2)(b).

⁴⁷ It replaces the Proceeds of Crime Act 1991.

⁴⁸ Criminal Proceeds (Recovery) Act 2009, s 106.

answer questions in relation to any matter that the Commissioner has reason to believe may be relevant to the investigation or to any proceedings under the Act. The order may be made if the judge is satisfied that the Commissioner has reasonable grounds to apply for the examination order.⁴⁹ Failure to comply with an examination order is an offence.⁵⁰

10.32 Like the Serious Fraud Office Act, the Criminal Proceeds (Recovery) Act removes the privilege against self-incrimination,⁵¹ but there are restrictions on the ability to use self-incriminating statements obtained during the examination process in criminal proceedings.⁵²

CURRENT PRACTICE

10.33 Police have not yet applied for any examination orders under the Search and Surveillance Act.⁵³ In contrast, SFO used its examination powers on 32 occasions in 2014, 64 occasions in 2013, and 73 occasions in 2012.⁵⁴

10.34 Police told us that they have not used the examination order regime in the Search and Surveillance Act because they do not tend to investigate many serious or complex fraud cases.⁵⁵ Most serious or complex fraud investigations are conducted by SFO.

10.35 Police also told us that some of their investigations could have benefited from the use of examination orders, but this did not occur because of knowledge gaps within the police force about their availability.

ISSUES FOR CONSIDERATION

10.36 The main issue arising in this review in respect of examination orders is whether—because they have not yet been employed by Police—they should remain in the Act.

⁴⁹ Criminal Proceeds (Recovery) Act 2009, s 107(1).

⁵⁰ Section 152(1)(a). The maximum penalty in the case of an individual is one year's imprisonment or a \$15,000 fine; and, in the case of a body corporate, a \$40,000 fine.

⁵¹ Section 163.

⁵² Section 165, which provides that any self-incriminating statement may be used in evidence against that person only in a prosecution for perjury, or in relation to any evidence given by the person that is inconsistent with the statement.

⁵³ According to the Police annual reports, since 1 October 2012 no applications for examination orders have been made, granted or refused.

⁵⁴ See Serious Fraud Office "Annual Reports" <www.sfo.govt.nz/annual-reports>.

⁵⁵ The Auckland City Police District has a dedicated Financial Crime Unit that investigates fraud (some of these investigations involve serious or complex fraud), but other districts do not have dedicated fraud units.

Another issue we discuss in this chapter is whether the Act should be clearer about who can be an examinee (namely whether persons suspected of, arrested for, or charged with the offending in question should be subject to compulsory examination). Issues concerning the interaction of the examination order regime with claims of privilege were dealt with in Chapter 8.

Is there a problem with retaining the examination order regime in the Act?

10.37 We welcome comments on whether there are any problems with retaining the examination order regime in the Act.

10.38 On one hand, the regime arguably provides Police with a valuable investigative tool in relation to certain serious offences. Although examination orders have not yet been used, there may be future occasions where the investigation of complicated financial transactions can be carried out more effectively if people with relevant information can be required to answer questions.⁵⁶ Our understanding is that Police intend to provide further guidance and education to staff on the availability and use of examination orders.⁵⁷

10.39 Moreover, although examination orders are a coercive tool available to Police in the investigation of suspected criminal offending, the Act imposes a number of safeguards and limitations surrounding their use. In particular:

- Judicial approval of an examination order is required before Police can subject a person to compulsory examination. In contrast, SFO can exercise its examination powers simply by issuing a notice to the person to be examined.
- The privilege against self-incrimination is expressly preserved in the Act. This means that an examinee can refuse to answer questions if the answer is likely to incriminate him or her. In contrast, the privilege is removed under the Serious Fraud Office Act, Insolvency Act and Criminal Proceeds (Recovery) Act. Under these Acts, there is nothing to stop a question being asked during examination that

⁵⁶ For example, we understand that examination orders may be useful in the context of investigating money laundering, terrorist financing and other serious offences, which may be prompted by suspicious transaction reports made to the Commissioner of Police (under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which came into force on 30 June 2013).

⁵⁷ For example, Police's Financial Crime Group is in the process of establishing and trialling a financial investigation team to support criminal investigations and target facilitators of financial crime.

may elicit a self-incriminating statement (although there are limitations on using those statements in subsequent criminal proceedings).

10.40 Further, police practice since the Act came into force demonstrates that one of the principal concerns during the Bill’s passage—that examination orders would be used too readily by Police—has not come to pass. Examination orders have not been employed as a substitute for normal police investigative practice.

10.41 We also note that if the regime was removed, this might create an anomaly in the powers available to Police and SFO when investigating similar offending. SFO exercises discretion when determining whether to investigate a complaint of fraud.⁵⁸ Its current priorities lie with cases involving multiple victims, losses of more than \$2 million, and transactions with significant legal or financial complexity.⁵⁹ If SFO decides not to pursue an investigation, it may refer the case to another agency (for example, Police). It may be anomalous for an examination power to be available to SFO but not to Police when investigating serious or complex fraud falling just short of the criteria required for SFO investigation.

10.42 On the other hand, the lack of use of examination orders under the Act perhaps suggests there is no real practical need for the regime. We note that SFO appears to rely far more heavily on its powers to compel individuals to supply pre-existing documents than it does on its powers to require answers to questions.⁶⁰ This perhaps suggests that in practice, documents obtained during an investigation often provide a sufficiently clear picture of offending, without the need to compel persons to answer questions and explain complex documents.

Q47 Should the examination order regime remain in the Act?

⁵⁸ Serious Fraud Office Act 1990, s 8.

⁵⁹ See Serious Fraud Office “FAQs” <www.sfo.govt.nz/faqs>.

⁶⁰ According to SFO’s annual reports, it used its statutory power to require documents to be produced (under s 9(1)(f) of the Serious Fraud Office Act 1990) on 341 occasions in 2014, 361 occasions in 2013, and 620 occasions in 2012. In contrast, it required compulsory answers on 32 occasions in 2014, 64 occasions in 2013, and 73 occasions in 2012.

Who can be an examinee?

- 10.43 The Act is not clear as to whether an examination order in a non-business context can be made against a person suspected of, arrested for, or charged with the offending in question.⁶¹
- 10.44 Section 38 of the Act provides that one of the factors to be considered by the issuing judge when deciding whether to make an examination order is “the relationship between the person to be examined and the suspect”.⁶² While it may be inferred that a suspect cannot be an examinee, this is not explicit.
- 10.45 In contrast, the Serious Fraud Office Act expressly provides that the Director of SFO may examine “any person whose affairs are being investigated”.⁶³ There is also case law establishing that SFO’s examination power may be used against a person who has been charged.⁶⁴
- 10.46 There is no direct discussion in the legislative history of the Search and Surveillance Bill as to whether a suspect can be an examinee. The issue was briefly discussed in relation to production orders in the Law Commission’s 2007 Report. The Commission said:⁶⁵
- We have concluded that the issue of production orders where the person to whom the order is directed may be a suspect or the target of the investigation should not be expressly restricted. The person to whom an order is directed should be obliged to produce the items or documents specified. However, if producing the material referred to would be likely to incriminate that person in terms of section 60(1) of the Evidence Act 2006, his or her non-compliance with the order should be justified by the privilege against self-incrimination.
- 10.47 However, in the departmental report provided to the Select Committee, it appears to have been assumed that examination orders could only be obtained “in relation to a person who is not a suspect”.⁶⁶

⁶¹ It appears, however, that examination orders are not available in respect of such persons in a business context because the order must be directed to a person who acquired information in a professional capacity *from the person under investigation*: see the definition of “business context” in s 3 of the Search and Surveillance Act 2012.

⁶² Search and Surveillance Act 2012, s 38(1).

⁶³ Serious Fraud Office Act 1990, s 9(1)(a).

⁶⁴ *R v H (No 2)* [1995] DCR 772 (this is the case even if the charges are less serious than those that justified the use of the power under the Serious Fraud Office Act 1990).

⁶⁵ Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [10.32].

⁶⁶ Ministry of Justice and Law Commission *Departmental Report*, above n 23, at [201].

10.48 Section 23(4) of NZBORA guarantees the right to refrain from making a statement to any person who has been “arrested or detained” under any enactment for any offence or suspected offence. Compulsory examination of persons suspected of, arrested for, or charged with the offending in question may infringe this right, because:

- *Suspects and persons who have been charged:* a person required by statute to attend an examination is arguably detained for the purposes of NZBORA.⁶⁷ Persons who are suspected of or charged with the offending in question could be regarded as being detained “for ... [a] suspected offence”⁶⁸ and may be entitled to refrain from answering questions by virtue of section 23(4).⁶⁹
- *Persons arrested:* a person who is arrested for a suspected offence may refuse to answer questions by virtue of section 23(4).

10.49 Any intrusion on the section 23(4) right must be justified on policy grounds, and should be expressly provided in the Search and Surveillance Act. Our (very preliminary) view is that there is no policy justification for Police to subject a person suspected of, arrested for, or charged with the offending in question to compulsory examination. If that is the case, there may be merit in expressly stating in the Act that such persons cannot be subject to an examination order.

Q48 Should examination orders be available in respect of persons suspected of, arrested for, or charged with the offending?

⁶⁷ See *Official Assignee v Murphy* [1993] 3 NZLR 62 (HC) and *Police v Smith and Herewini* [1994] 2 NZLR 306 (CA).

⁶⁸ New Zealand Bill of Rights Act 1990, s 23(4).

⁶⁹ *Official Assignee v Murphy*, above n 67, at 72. See also *Police v Smith and Herewini*, above n 67, at 316 and *Commissioner of Police v Burgess* [2016] NZHC 267 at [46].