

COMMISSION OF INQUIRY INTO POLICE CONDUCT

**MEMORANDUM OF COUNSEL ASSISTING
RELATING TO REQUESTS BY THE POLICE AND POLICE
ASSOCIATION FOR FURTHER PARTICULARS ETC
For hearing: 8 April 2004**

May it please the Commission:

Issues raised for consideration on 8 April

1. The Commission is to consider several matters at its hearing on 8 April which relate to the scope of the Inquiry.
2. In particular matters were raised by Counsel for the Police, Ms McDonald QC, in her letter of 22 March, provided at the previous hearing on that date. Those points are supported by, and further questions have been raised by, Counsel for the Police Association, Ms Hughes, in her letter dated 25 March.
3. A further matter was raised on 22 March relating to the effect of the secrecy provisions in the Police Complaints Authority Act 1988 on the Commission's work. That potential difficulty is in the process of likely resolution by Parliament

in an amendment Bill presently before the Law and Order Select Committee. Counsel understand that any submissions on the Amendment Bill are to be made by 15 April, with the Committee due to report back to the House on 3 May. That issue need not trouble the Commission further at this stage.

4. The issues arising from the correspondence are addressed under the following general headings:
 - 4.1 Time frame for complaints to be the subject of Inquiry, and requirement for a complaint to the Police;
 - 4.2 Extent of inquiry into Police practices at various locations;
 - 4.3 Extent of the Commission's proposed inquiry into complaints of matters not amounting to allegations of criminal conduct; meaning of the phrases "sexual assault"; "sexual activity that gives cause for concern"; "the general propriety of the conduct of members of the Police in respect of sexual matters"; "personal behaviour, including sexual conduct";
 - 4.4 Representation for those of interest to the Inquiry.

Time frame for complaints to be the subject of Inquiry, and requirement for a complaint to the Police

5. Counsel for the Police asks what years the Commission's inquiries will cover [letter of 22 March 2004, para 3]. You have answered that question at the opening hearing of 22 March. You indicated that in the first instance you would concentrate on a period of 25 years, ie from the period from 1 January 1979 through to the present time.
6. At this stage the relevance of the time frame is to assist the police in responding to your request for evidence directed at the policies and procedures in place for dealing with allegations of sexual assault against police officers and/or their associates from that time through to the present. For clarity it could be indicated

that it is intended to review qualifying complaints made to the police (or Police Complaints Authority) within that period. It is not a reference to the time of the alleged offending which gave rise to the complaint. You have indicated that this period could be reviewed should the need arise.

7. Counsel for the Police Association asks whether the Commission accepts that it cannot hear complaints now if no complaint was made to the Police at any time prior to 20 February 2004 [letter of 25 March, para 2.2]. The focus of the terms of reference is on the propriety of the police response to complaints of sexual assault. The Commission is, therefore, only likely to be dealing with complaints after the Police have completed their investigations and where the complainant is dissatisfied with the process.
8. However we submit that there is no need for the Commission to take an unduly restrictive approach; this is not required by the Terms of Reference. There may conceivably be circumstances where recent complaints become relevant. It can nevertheless be reiterated for the sake of clarity that the focus of the inquiry is on the way the police handled complaints and not the behaviour that lead to them.

Extent of inquiry into Police practices at various locations

9. Counsel for the Police asks whether the Commission is mandated to report on practices in every centre where a relevant complaint of sexual assault has been received. Clarification of the phrase “other relevant localities” in paragraph 2(a) of the terms of reference is sought [letter of 22 March 2004, para 5].
10. This term of reference requires the Commission to consider the practice of Police in the investigation of complaints alleging sexual assault by members of the Police and/or their associates, including the practice in both Kaitaia and Rotorua at the material times. It also extends to any other relevant localities. We assume these will be identified, if any, once any relevant information that raises issues about such practices in other locations is received and assessed by Counsel Assisting. We assume the Police will be advised of the relevant locations and the

Commission will receive evidence in relation to the practices in those locations at the relevant time.

Extent of the Commission’s proposed inquiry into complaints of matters not amounting to allegations of criminal conduct; meaning of the phrases “sexual assault”; “sexual activity that gives cause for concern”; “the general propriety of the conduct of members of the Police in respect of sexual matters”; “personal behaviour, including sexual conduct”

11. Both the Police and the Police Association seek to clarify the extent to which the Commission might inquire into matters beyond the treatment of complaints or allegations of sexual assault.

“Sexual assault”

12. Both parties seek some definition of the type of conduct which might amount to “sexual assault”. We submit that it is not necessary for the Commission, particularly at this very early stage, to limit in this way the possible matters which it may see fit to consider in the course of its inquiry. Definitions can raise difficult line-drawing questions.

13. Nevertheless it is understandable that the Police wish to have some guidance as to the matters of interest to the Commission. We agree that section 185A of the Summary Proceedings Act 1957 provides a useful guide to matters that fall within the definition of “sexual assault”. That provision refers to offences against the person of a sexual nature, including those set out in relevant provisions of the Crimes Act 1961. These include being a party to, or conspiring with any person to commit, any such offence. It is important, in our view, that the Commission is not constrained by an unduly restrictive or legalistic approach to matters of fact that are not yet before it.

Sexual activity or conduct not amounting to “sexual assault”

14. There appears to be a level of confusion, and some concern, as to the scope of the terms of reference and the ability of the Commission to consider sexual conduct

by the Police that does not amount to an offence. Accordingly the following analysis of the terms of reference and proposed process is offered in an attempt to clarify the appropriate approach but without, again, unduly restricting the Commission's role.

15. The general order to the Commission appears under the heading *Appointment and order of reference*. The opening paragraph directs, in summary, that the Commission is to inquire into-

15.1 The conduct, procedure and attitude of Police in relation to allegations of sexual assault by members of the Police and/or their associates;

15.2 The extent to which unprofessional behaviour relating to/in the context of such allegations was or is tolerated; and

15.3 The manner in which such allegations were/are handled by the Police directly and/or on behalf of the Police Complaints Authority.

The order then sets out particular matters upon which the Commission is asked to report. They can be seen as particulars that give detail to the general statements referred to above.

16. The opening paragraph emphasises that the Commission's focus will primarily be on the response of the Police to complaints or allegations of sexual assault. This will include both direct complaints and investigations of complaints on behalf of the Police Complaints Authority. However the Commission will also consider the extent to which unprofessional behaviour relating to, or in the context of, such allegations was then, and is now, tolerated. This matter is taken up in the particular terms of reference, especially terms of reference 2 (e), (f) and (g), and term of reference 4.

17. In the first instance, it is submitted that it is for the Police to indicate what behaviours, if any, fall within the description "sexual activity that gives cause for concern" [term of reference 2(e)]. We suggest that at the appropriate time the

Police be asked to present evidence which answer questions along the following lines:

- 17.1 What forms of sexual activity or conduct falling short of criminal conduct (if any) have in the relevant past caused the Police concern and why?
- 17.2 What was done about that conduct (if anything) and why?
- 17.3 What forms of sexual activity or conduct falling short of criminal conduct (if any) now causes the Police concern and why?
- 17.4 What is done about that conduct (if anything) and why?

Ultimately of course, in the context of the Commission's obligation to report to the Governor-General, it will be the Commission's role to determine and report on the type of behaviour that both should have at the relevant time given, and/or now give, cause for concern.

18. The same analysis and evidence will be relevant to assessing the adequacy and effectiveness of the standards and codes of conduct in relation to "personal behaviour, including sexual conduct" [term of reference 4(a)]
19. For completeness, we submit that "the general propriety of the conduct of members of the Police in respect of sexual matters" is a matter to be considered in the course and context of the above, and other, particular terms of reference. However it is not a phrase that appears in the terms of reference. Rather it appears as para (d) in the Recitals. Once again it is emphasised that the focus of the Inquiry is on the adequacy of the police response to allegations of sexual assault by their members and/or associates. Each of the introductory paragraphs to the *Recitals* refers to the investigation of, and subsequent action in respect of, allegations or complaints of sexual assault. One can see by their opening words that each of paras (a), (b), (c) and (d) (to which we refer here) of the *Recitals* also relate expressly to questions raised by "these various allegations", being the various allegations of sexual assault by Louise Nicholas, Judith Garrett and

others. There is no mandate for a broad ranging inquiry into the general sexual conduct of members of the police. Such conduct is only relevant in the context of the handling of relevant complaints, both specifically and at a more general, institutional level. We envisage that this will be addressed at least in part in evidence from the Police along the lines signalled above.

20. It is submitted that this is as far as the Commission need go in responding to the questions raised by the Police and Police Association on this subject. At this early stage it would be inappropriate for the Commission to unnecessarily restrict the scope of its inquiry.

Representation for those of interest to the Inquiry

21. The Police Association makes further enquiries relating to legal representation for interested persons who might be adversely affected [letter of 25 March 2004, para 3].
22. In the course of the Preliminary hearing, the Commission indicated that it will likely be willing to accept individual representation of people at risk of an adverse finding. The Police Association infers from this that such representation will be funded, and asks about the process for making application.
23. It appears at this early stage that a significant number of individuals may have interests that they would seek to protect through separate counsel. Whether or not that facility is available, the role of Counsel Assisting is to assist the Commission in ensuring that all persons with a special interest in the subject matter of the inquiry are treated fairly and in accordance with the relevant principles of natural justice. At present one can only speculate on whether difficulties might arise for the protection of individual interests which might call for separate representation and what, if any, consequences arise if that is not available to the individual.
24. Nevertheless it should be made plain that the Commission has no funds for separate representation. Applications for funding would, we submit, appropriately be through the usual channels for civil legal aid. Otherwise the

matter is one that should be taken up, in the first instance we suggest, with the Attorney-General's office.

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Counsel Assisting the Commission of Inquiry

5 April 2004