



– 1 –

## INTRODUCTION AND CONTEXT

- 1.1 The Commission of Inquiry into Police Conduct was convened to inquire into and report upon the conduct, procedure, and attitude of the New Zealand Police in relation to sexual assault allegations made against members of the police or associates of the police.

### EVENTS LEADING TO ESTABLISHMENT OF THE COMMISSION

- 1.2 On 31 January 2004 a Rotorua woman, Ms Louise Nicholas, made allegations in *The Dominion Post* about the handling of historic rape complaints against police officers. The allegations suggested that police officers might have deliberately undermined investigations into complaints of sexual assault against other officers. Both current and former police officers were the subject of these allegations.
- 1.3 After the publication of Ms Nicholas' allegations, a Kaitaia woman, Ms Judith Garrett, came forward also alleging that her rape complaint against a police officer had not been investigated properly at the time it was made.<sup>1</sup>
- 1.4 The publication of these allegations raised serious concerns in the public mind about how New Zealand Police investigates allegations of sexual assault by members of the police.
- 1.5 On 3 February 2004 the Prime Minister, Rt Hon Helen Clark, announced that the Government would establish a commission of inquiry to carry out a full, independent investigation into the way in which the police had dealt with these allegations. In her news release of 3 February 2004 the Prime Minister said, "The Inquiry will focus primarily on issues of process. It will have a comprehensive brief, including the ability to make recommendations to avoid such circumstances arising in the future."<sup>2</sup>
- 1.6 Also on 3 February 2004 the Commissioner of Police announced that he had initiated criminal investigations into the alleged offending by current and former police officers.<sup>3</sup> This announcement followed the establishment of a police investigative team in late January 2004. The investigation into these matters was known as Operation Austin.

### COMMISSION OF INQUIRY APPOINTED

- 1.7 On 16 February 2004 the Prime Minister and the Attorney-General, Hon Margaret Wilson, announced that the Hon James Bruce Robertson and I would be the two Commissioners

---

1 See further: *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA).

2 Rt Hon Helen Clark, Prime Minister, "Commission of Inquiry to investigate Police handling of allegations", news release, 3 February 2004.

3 New Zealand Police, "Criminal investigation reopened – Assistant Commissioner on stand down", news release, 3 February 2004.

to conduct the commission of inquiry into the allegations against members of the police with respect to sexual conduct.<sup>4</sup> Justice Robertson was at that time a senior and experienced High Court judge and was also President of the Law Commission. I brought to the task a long career in the public service.

- 1.8 The warrant for the Commission of Inquiry into Police Conduct, which sets out the appointment and terms of reference, was given by Order in Council on 18 February 2004. However, as a result of the difficulties arising from concurrent criminal investigations and prosecutions, the Commission of Inquiry into Police Conduct was the subject of a subsequent Order in Council on 2 May 2005 that modified the directions to the Commission, its membership, and reporting time.

### Initial Order in Council

- 1.9 On 20 February 2004 the Prime Minister announced the terms of reference for the Commission of Inquiry into Police Conduct.<sup>5</sup> On the same day the Order in Council of 18 February 2004 was published in the *New Zealand Gazette*.
- 1.10 The terms of reference are published in full as Appendix 1.1 (see Volume 2). In summary, the terms of reference directed the Commissioners to inquire into and report upon
- standards and procedures established by the police as a matter of internal police policy for the investigation of complaints alleging sexual assault by members of the police or by associates of the police or by both
  - the practice of police in the investigation of complaints alleging sexual assault by members of the police or by associates of the police or by both
  - the adequacy of any investigations that had been carried out by the police on behalf of the Police Complaints Authority and that had concerned complaints alleging sexual assault by members of the police or by associates of the police or by both
  - standards and codes of conduct in relation to personal behaviour for members of the police
  - any other matters considered relevant to the inquiry.
- 1.11 The Commission was not to determine the guilt or innocence of any particular individual in relation to any alleged sexual assault or other alleged criminal offence.

### Order in Council of 2 May 2005

- 1.12 On 21 April 2005 the Attorney-General, Hon Dr Michael Cullen, announced that the Government had altered the mandate of the Commission of Inquiry into Police Conduct so that it could complete its work without prejudicing any criminal prosecutions and ongoing investigations. He said that the Commission would focus on how the police responded in general to the sexual assault allegations and whether people making them were treated appropriately.<sup>6</sup>

---

4 Rt Hon Helen Clark, Prime Minister, “Commission of Inquiry appointed”, news release, 16 February 2004.

5 Rt Hon Helen Clark, Prime Minister, “Commission of Inquiry terms of reference announced”, news release, 20 February 2004.

6 Hon Dr Michael Cullen, Attorney-General, “Commission of Inquiry into Police Conduct”, media statement, 21 April 2005.

- 1.13 On 2 May 2005 the Governor-General, by Order in Council, issued new directions to the Commission and changed its membership and the reporting time.<sup>7</sup> The Commission was directed to conduct its preliminary investigations in private and limit its public hearings; to make findings of a more general nature than those that were envisaged at the time the Commission was appointed; not to investigate any complaints that were the subject of current or ongoing investigations by the police, or were the subject of criminal proceedings before the courts; and not to give names or particulars that were likely to lead to the identification of the person who made an allegation of sexual assault or of any person alleged to have committed the assault. This Order in Council is published in full as Appendix 1.2.
- 1.14 At the same time, I was appointed as sole Commissioner. The Hon Justice Robertson asked to be discharged because of demands resulting from his responsibilities as a judge and President of the Law Commission. Shortly thereafter he was appointed as a judge of the Court of Appeal.

## COURSE OF THE INQUIRY

- 1.15 As explained above, the initial course of the inquiry changed because of the new directions to the Commission issued in May 2005. These directions formalised the Commission's 2004 decision to put on hold its review of several complaints that had become the subject of police investigations into alleged criminal offending by current or former police officers. Accordingly, the Commission did not see any material related to Ms Nicholas's or Ms Garrett's allegations, or any other material related to such police investigations. The move from consideration of particular cases to developing findings of a more general nature represented a significant shift in the work of the Commission. However, it should also be stressed that from its inception the Commission was directed not to determine the guilt or innocence of any person involved in the complaints considered.

## Processes of the Commission

- 1.16 From February 2004 until August 2004 the gathering of information and consultation by the Commission included the following processes:
- formally recognising four parties to the inquiry
  - seeking and considering expressions of interest from people or organisations wishing to make submissions or give information
  - holding four public meetings
  - determining that, apart from Ms Nicholas and Ms Garrett, there were 10 submitters who came forward with complaints that were considered to fall within the terms of reference
  - notifying the subjects of these submitters' complaints that the police investigation of the allegations against them was of interest to the Commission.
- 1.17 The Commission was adjourned on 27 August 2004 to avoid prejudicing certain criminal investigations under way at that time and any subsequent prosecutions.

---

<sup>7</sup> *New Zealand Gazette*, 5 May 2005, pp. 1796–97.

## **Use of terms**

### **Alleged offenders, offending**

Police members or police associates who had complaints made against them alleging sexual assault or sexual misconduct are referred to in the report as “alleged offenders”. The conduct complained of is similarly referred to as “alleged offending”. (These terms are used in a broader context than their use in criminal proceedings.)

The Commission’s terms of reference prohibited it from determining whether the complaints against alleged offenders were true or not.

### **Associates of the police**

Associates of the police are defined in the terms of reference as “persons who are not members of the Police but who, whether in the capacity of friends or in any other capacity, associate with members of the Police”.

The Commission later ruled that this required an ongoing (rather than an occasional) association and that the reference to “any other capacity” was intended to cover any other personal relationship that might potentially compromise the handling of a complaint.

### **Complainants**

The term “complainant” is used in this report to refer to those making a complaint alleging sexual assault against police members or police associates, or sexual assault or sexual misconduct against police members. (This is a more general usage than the strict definition applying to people involved in certain legal proceedings.) In the vast majority of files examined relating to allegations of sexual misconduct, complainants were female. However, it should be noted that there were a few male complainants.

### **Evidence**

Throughout my report I refer to the information available to the Commission as “evidence”, on the basis of the broad definition of that term in section 4B of the Commissions of Inquiry Act 1908:

The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

### **Sexual assault, sexual misconduct**

The term “allegations of sexual assault” is the predominant phrase used in the terms of reference. In its strict meaning, “sexual assault” refers to those criminal offences of a sexual nature which involve some form of assault, including those listed in section 185A of the Summary Proceedings Act 1957. However, the terms of reference also refer to “unprofessional behaviour ... in the context of such allegations”. At the outset of its work the Commission noted that, when the terms of reference are read as a whole, its task related to “actual assaults and other sexual offending which has been complained about”, and rejected any suggestion that it should confine its work solely to allegations of unlawful sexual conduct. The Commission was unwilling at that point to define in any more exact or limiting way the areas in which it would be interested. (Refer to the Commission ruling of 16 April 2004, Appendix 3.1)

The complaints later considered by the Commission covered a wide range of types of improper or inappropriate sexual behaviour, including sexual harassment in the workplace, which is reprehensible in the employment context even though it may not involve criminal offending. Nevertheless, some of the types of behaviour considered by the Commission (for example, forms of sexual harassment such as the use of inappropriate language) do not by any definition involve sexual “assault”.

Taking account of all these matters, the Commission uses two broad terms, namely “sexual assault” and “sexual misconduct”, to describe the range of behaviour alleged by complainants. The term “sexual assault” is used in this report to refer to sexual behaviour that involves actual or threatened physical contact of an unwanted nature; and the term “sexual misconduct” is used to refer to any other improper or inappropriate behaviour of a sexual nature, including that which would fit the accepted definition of sexual harassment in the workplace.

- 1.18 After the May 2005 Order in Council no further public hearings were held. I undertook 10 individual hearings into the particular cases that had been identified as relevant during the initial stages of the inquiry. I also heard evidence from Police Commissioner Robert Robinson, a range of other New Zealand Police staff, and specialist witnesses. Overall I held a total of 38 private hearings between June 2005 and December 2006.
- 1.19 Commission staff and I reviewed the Operation Loft files provided by New Zealand Police (see paragraph 1.29 below). These police records translated into over 600 separate physical files and contained around 55,000 documents.
- 1.20 I have provided a detailed account of the processes of the Commission as Appendix 2.

### **Rulings and memoranda by the Commission**

- 1.21 The Commission of Inquiry into Police Conduct made its first ruling on 16 April 2004. The ruling outlined the approach to the inquiry, including its time frame, focus, and issues of legal representation. Other rulings (some confidential) followed:
- In May and August 2004, rulings were issued dealing with time frames for hearings and confidentiality for people giving evidence, and with ensuring that the Commission's programme and publicity surrounding the inquiry did not impede or influence current police investigations and possible criminal proceedings. The Commission also made two confidential rulings on whether the alleged offenders in particular complaints were indeed "associates of the police" as defined in the terms of reference; both these rulings determined that the alleged offender could not be defined as an associate of the police and consequently that the Commission could not consider these cases.
  - In August 2004 the Commission ruled that its activities would be adjourned until the Commissioner of Police confirmed that all matters of investigation and criminal responsibility were concluded.
  - In November 2005 a ruling was issued concerning a proposal to carry out a survey of people involved in supporting those who have complained of sexual assault.
- 1.22 I also issued five memoranda in December 2005, February 2006, July 2006, October 2006, and January 2007 on the basis of memoranda of legal advice received. These concerned the jurisdiction of the Commission in relation to the Police Complaints Authority; statutory interpretation of the Police Complaints Authority Act 1988; the use of the Commissioner's knowledge and experience when reporting the findings and recommendations of the inquiry; interaction between the parties and the Commission in dealing with "new" material in the draft report process; and matters raised by Counsel for New Zealand Police at a hearing in December 2006.
- 1.23 Appendix 3 lists the Commission's rulings and memoranda in chronological order. Those rulings and memoranda that can be made public are published in full as Appendices 3.1 to 3.9.

### **Parties to the inquiry**

- 1.24 The New Zealand Police, Police Complaints Authority, and Police Association were formally joined as parties to the inquiry on 22 March 2004. On 13 August 2004, on application to

the Commission, the Police Managers' Guild was also accorded party status. Appendix 2 provides more detail of these entities and their legal representation.

1.25 Appendix 4 provides relevant background information on New Zealand Police.

1.26 Chapter 4 describes the structure and work of the Police Complaints Authority.

### **Time span of the inquiry**

1.27 At its first public meeting on 22 March 2004, the Commission made clear the time frame for the complaints of sexual assault (and police investigations into those complaints) that would be the subject of its inquiry. Complaints must have been made during the 25-year period from 1 January 1979. This was the period of interest to the Commission.

1.28 Although the earliest date for complaints to come within the scope of its inquiry was firmly established, a Commission ruling in April 2004 (see Appendix 3.1) left open the option of considering complaints that were lodged after the initial Order in Council on 18 February 2004. In the event, 11 complaints made after February 2004 were considered by the Commission. None dated from 2006.

### **Police investigation files and other documents**

1.29 The Professional Standards section at the Office of the Commissioner was directed by the Commissioner of Police to locate and retrieve all police investigation files relating to sexual offending by police since 1 January 1979. The search of police records to identify cases that related to the Commission's terms of reference was named Operation Loft.<sup>8</sup>

1.30 The search categories used by police included sexual offending, disgraceful behaviour, harassment, sexual harassment, unlawful act, and internal discipline. As a result of their search, the police identified 185 separate records (or files) of investigations into allegations of sexual offending in which the alleged offenders were police officers and the allegations were made after 1 January 1979 and were within the Commission's terms of reference.<sup>9</sup>

1.31 Operation Loft also identified 43 investigations into allegations of sexual offending by police associates. Police files are not categorised according to an alleged offender's association with police. The search for these records therefore relied on local knowledge of the alleged offending or some form of public complaint.<sup>10</sup>

1.32 The police told me that the records I received (about 55,000 documents) covered all the cases from the 25-year period in which the Commission was interested and included all allegations of sexual misconduct that fell within the Commission's terms of reference, whether or not they were subsequently found to be proved.<sup>11</sup>

---

8 I am indebted to Detective Superintendent Malcolm Burgess and Detective Inspector Angela Gallagher for their diligent and painstaking work in sifting through many years of police files to complete this operation.

9 Detective Superintendent Malcolm Burgess, Brief of evidence, 29 November 2005, pp. 2 and 3.

10 Detective Superintendent Malcolm Burgess, Brief of evidence, 29 November 2005, p. 3.

11 Consistent with my terms of reference, investigations that were the subject of ongoing criminal investigation or prosecution were not provided to me.

### Police Complaints Authority documents

- 1.33 In addition, 19 Police Complaints Authority files related to Operation Loft cases were provided to the Commission where it proved possible to secure signed consents to disclosure under the 2004 amendment to the Police Complaints Authority Act from the complainants who had triggered the investigation.
- 1.34 I did not therefore always receive the corresponding Police Complaints Authority file for each police investigation that I reviewed. However, the police file usually contained copies of correspondence between the police and the Police Complaints Authority. This enabled me to make an assessment of the interface between these two organisations.

### Police policies and procedures

- 1.35 The police also provided extensive documentation covering the structure of the organisation, codes of conduct, sexual harassment and human resources policies, and other information relevant to the work of the Commission.

### Review of documents

- 1.36 After the May 2005 Order in Council the Commission was required to make findings of a more general nature than originally envisaged. Commission staff and I therefore read all of the police files provided to see what issues of a general nature emerged. Letters were sent to the parties identifying issues about which I was concerned and I also asked for further information on various matters.
- 1.37 It would have been possible to conduct the entire inquiry on the basis of a document review and consideration of written communications and submissions. However, during the initial phase of our inquiry under the first Order in Council, several people, and the family of one deceased woman police officer, had been led to expect that they would either be called to give evidence or that their cases would be receiving individual attention. To meet these expectations I held 10 individual hearings into these cases, focusing exclusively on the police handling of the particular submitter's complaint. (See Appendix 2 for further detail.)
- 1.38 All other cases were reviewed on the basis of the files alone. The complainants involved in these files had chosen not to come forward to the Commission. In many instances it was some years after the alleged incident, and I felt that any contact by the Commission could possibly stir up emotions or raise expectations when neither would be appropriate.
- 1.39 The police files were useful in assessing the way the police had carried out certain types of investigations. They enabled me to identify any weaknesses or failures in the processes used in those types of investigations during the period in question, and to illustrate particular types of behaviour or attitude apparent within the police at various times. Particular examples, where mentioned, are not presented as findings about any individual police officers.

### Legislative matters affecting the inquiry

- 1.40 Two bills, and their progress through Parliament, have affected the course of the inquiry: the Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill and the Police Amendment Bill (No 2).

### **Amendment of the Police Complaints Authority Act**

- 1.41 Investigation files reviewed by the Police Complaints Authority are subject to secrecy provisions in the Police Complaints Authority Act, which prevented the relevant files being made available to the Commission. In order to rectify this situation a bill was introduced into Parliament on 30 March 2004 to enact temporary provisions to enable the Commission to fulfil its terms of reference.
- 1.42 The Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Act, which came into force on 20 May 2004, allowed the Commission to consider files covered by the secrecy provisions, subject to appropriate protections over that information.

### **Police Amendment Bill (No 2)**

- 1.43 The Commission had carried out its work and gathered its evidence on the basis that the Police Amendment Bill (No 2) would in due course proceed. However, in March 2006 the Hon Annette King, Minister of Police, announced a comprehensive review of the Police Act 1958 and the Police Regulations 1992, which, she said, might take up to 18 months to complete. In the light of that review, the Minister noted, the Police Amendment Bill (No 2), which had sat in the order paper for several years, had been withdrawn.<sup>12</sup>
- 1.44 My report takes this development into account. In view of the fact that the bill has now been withdrawn, and new legislation, or replacement legislation, is not likely to be introduced until 2008, I have identified several key changes that I believe should be implemented as soon as practicable, in advance of this major legislative review. The proposed changes are discussed in later chapters in relation to improving police disciplinary processes and implementing a code of conduct for sworn police officers.

### **Responses to the establishment of the Commission**

- 1.45 Counsel for New Zealand Police told me that the establishment of the Commission of Inquiry into Police Conduct had operated as a significant catalyst for review and change within the police.<sup>13</sup> Since the establishment of the Commission in 2004, the police have launched a range of initiatives in anticipation of the Commission's report and likely recommendations. These are discussed in more detail in Chapter 8.

### **Reporting**

- 1.46 My reporting date under the 2 May 2005 Order in Council was 3 March 2006. However, as the complexity of my task became apparent, I sought extensions to my reporting date in order to allow me sufficient time to analyse the extensive volume of material and submissions provided by the parties during the inquiry process. I was also mindful that public release of the report of the Commission of Inquiry into Police Conduct should not jeopardise the right to a fair trial of those members of the police concurrently under investigation or subject to criminal proceedings relating to complaints alleging sexual assault. Any public

---

12 Hon Annette King, Minister of Police, news release, "Police Act to be reviewed", 7 March 2006.

13 New Zealand Police, Closing submissions, 16 December 2005, p. 2. (For comment on the provision of references to quotations, submissions, and other information provided by the parties, refer to "Notes for readers" in the Appendices.)

discussion of these issues had the potential to be seen as making a fair trial unlikely, and therefore charges might have been dismissed.

- 1.47 In April 2006 I provided a draft report to the parties for their comment. Substantial submissions from the parties were received in May and June 2006. Further submissions followed in July, August, September, and October, culminating in a hearing in December 2006. These covered both jurisdictional and content issues. The submissions I received from the New Zealand Police were particularly extensive and detailed, and required lengthy analysis to consider all the issues raised.
- 1.48 After full consideration of the parties' feedback I finalised my report for submission to the Governor-General in March 2007.
- 1.49 After the extension to my reporting date in September 2006, I determined that there were two issues on which I would like to report in advance of my final reporting date of 30 March 2007. These encompassed matters that were the subject of proposed legislation or ongoing policy work under review at the time, and therefore I believed that my deliberations and recommendations on these topics required urgent consideration by the Government. I subsequently prepared two interim reports; one of these related to the PCA, and the other to the police disciplinary system. However, counsel for the PCA and counsel for New Zealand Police respectively made submissions that it would not be appropriate to release interim reports on these two issues at that time. After considering their submissions I decided it was unnecessary, at that time, to release the interim reports.

## **PUBLIC EXPECTATIONS OF THE COMMISSION AND THE POLICE**

- 1.50 The Commission received a substantial amount of evidence of the good quality of policing in New Zealand, including the handling of complaints against police officers. Effective police accountability is a cornerstone of democracy and the rule of law, and how complaints against the police are handled is crucial to public perceptions of that accountability. This means that any perceived failure in the handling of complaints can severely undermine public confidence in the New Zealand Police.
- 1.51 The headlines that prompted this inquiry themselves demonstrate the level of public interest and concern that arises when the suggestion is made that the police might protect their own in the face of complaints of criminal offending.
- 1.52 The emphasis on public accountability across Government, particularly in the past 20 years, has meant that New Zealanders have a low tolerance for inefficiency, bias, or lack of transparency with respect to the handling of complaints regarding police officers' behaviour.
- 1.53 Moreover, the public expect high ethical standards from police officers, both on duty and off. This extends to sexual conduct. Although public views on sexual morality have changed significantly in the past 25 years, there exists a strong consensus in our society regarding
- the need for professionals to exercise extreme care in entering into sexual relationships with people they have met in the course of their professional duties

- the inappropriateness of any use of a position of power to pursue a sexual relationship
- the inappropriateness of any sexual exploitation of a vulnerable person.

1.54 The police themselves place great importance on maintaining their reputation. This is reflected in general instruction IA 101 (the opening statement in the instructions for handling complaints against the police):

(1) The most critical asset of the New Zealand Police is its reputation and it is the duty of every member of Police to promote and defend it.

(2) We promote and defend our reputation by setting high professional standards for ourselves and demonstrating to the public, through our willingness to be held accountable for breaches of those standards, that we deserve their trust and confidence.

(3) It is our reputation that encourages, for example, witnesses to come forward, jurors to believe prosecution witnesses, and communities to support our search and rescue operations. Our effectiveness as a policing service is only as strong as our public support.<sup>14</sup>

1.55 The Commission was also conscious of public expectations and the expectations of individual submitters concerning its inquiry. The May 2005 Order in Council, which directed the Commission to make its findings of a more general nature, dampened some of those expectations. However, readers may still be disappointed that the report's examples of police investigations into complaints made against members of the police or associates of the police are couched in general terms with identities protected (in accordance with the Government's direction). Nevertheless, in preparing its report, the Commission was acutely aware that the examples of police investigations that it reviewed involved real people, on whom the events in question have sometimes had a lasting impact. The examples provide valuable lessons from the past, which should not be forgotten, and insights and benchmarks for the future.

---

14 New Zealand Police, *Ten-One*, No 90b, 28 April 1995, General Instructions Supplement, Internal Affairs, p. 3.