

## **COMMISSION OF INQUIRY INTO POLICE CONDUCT**

### **MEMORANDUM OF COUNSEL ASSISTING ON THE POWERS OF THE COMMISSION**

**For Hearing 13 August 2004**

#### **MAY IT PLEASE THE COMMISSION:**

1. This memorandum sets out the powers of the Commission of Inquiry which may be relevant to dealing with the issues to be considered by the Commission at its hearing on 13 August 2004. In particular, the Commission is to consider whether the Commission should conduct its hearings in public or in private and, if in public, what the Commission's approach should be to matters such as name suppression? The issues become particularly acute where criminal charges have been laid or may be laid in relation to historic complaints, the investigation of which fall within the Commission's Terms of Reference.
2. It is not considered to be appropriate for Counsel Assisting to express any view as to how these powers might be exercised in the particular circumstances that may arise for this Commission, given the breadth of views which the Commission will receive from interested persons. However to the extent that there may be unrepresented positions or interests affected by the issues, Counsel propose to offer separate submissions.
3. This memorandum address the following subjects:
  - 3.1 The sources of the Commission's powers;
  - 3.2 Power to suppress names and/or evidence;
  - 3.3 Power to conduct hearings in private;
  - 3.4 Powers to cite for contempt
  - 3.5 Power to inquire into matters touching on matters which are the subject of criminal prosecutions.

## **The sources of the Commission's powers**

4. The powers of the Commission derive from two sources:

4.1 The Terms of Reference themselves (powers derived from the Prerogative);

4.2 The Commissions of Inquiry Act 1908.

### **(i) Terms of Reference**

5. Powers expressly provided in the Terms of Reference include the power to adjourn from time to time and the power to exclude any person from any hearing.

6. The power to exclude any person was expressed in the same terms in the Terms of Reference for the "Winebox" Inquiry, discussed in *Fay, Richwhite & Co Ltd v. Davison* [1995] 1 NZLR 517 (CA), 520. The Court of Appeal at 529 accepted this provision conferred a specific discretionary power on the Commission to sit in private or exclude particular persons from the hearing.

### **(ii) Commissions of Inquiry Act 1908**

7. The Commissions of Inquiry Act contains some specific powers in relation to investigation (s.4C), summoning of witnesses (ss.4D and 5), power to award costs (ss.11 and 12) and powers to cite witnesses and other persons for contempt (ss.13A and 13B).

8. This Commission, being chaired by a Judge of the High Court, has the same powers, privileges and immunities as are possessed by a Judge of the High Court in the exercise of his or her civil jurisdiction under the Judicature Act 1908 (s.13(1)).

9. Section 13(1) thus imports the specific powers set out in the Judicature Act. This includes s.16, which gives statutory recognition to the inherent jurisdiction of the Court:

"The court shall continue to have all the jurisdiction which it had on becoming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

10. The inherent jurisdiction was discussed in the context of the court's civil jurisdiction in *Taylor v. Attorney General* [1975] 2 NZLR 675 (CA), the case dealing with contempt for publication of the name of a witness, suppressed in the course of evidence at the Sutch trial, after completion of the trial. Richmond J cited the seminal lecture by Master Jacob (*The Inherent Jurisdiction of the Court* (1970) CLP 23) at pages 27-28 as "aptly and succinctly" describing the essential nature of this jurisdiction:

"The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

11. The learned Master is also referred to in the following commentary on s. 16 in McGechan on Procedure: para J16.02:

"The inherent jurisdiction is a power allowing the Courts to summarily deal with matters that arise before it to ensure the machinery of justice is able to turn smoothly. It is possessed by superior Courts of Record and exists as only one part of the Court's general jurisdiction.

A Court has the ability to exercise its inherent jurisdiction when it is faced with a difficulty that cannot be dealt with in a satisfactory manner using only the powers conferred by statute or the rules of Court. When such a difficulty arises, the Court will invoke the inherent jurisdiction in order to further the administration of justice. The inherent jurisdiction has been described as a reserve or fund of powers, a residual source, which the Court may draw on when necessary, whenever it is just and equitable to do so. See Jacob, *The Inherent Jurisdiction of the Court* (1970) CLP 23, 51."

12. Express statutory powers and inherent jurisdiction frequently overlap: e.g. *Quality Pizzas Ltd v. Canterbury Hotel Employees' Industrial Union* [1983] NZLR 612 (CA), where the Court held it was within both the statutory and the inherent jurisdiction of the High Court to issue a writ of sequestration to punish a contempt of the Arbitration Court. However the Court's inherent jurisdiction can be constrained by express statutory powers or limits and does not extend to contravening any statutory provision: *Taylor v. Attorney General*, at 680.
13. The Court of Appeal has stated that it is both unwise and unnecessary to seek to define the scope of the Court's inherent jurisdiction: *R v. Moke and Lawrence* [1996] 1 NZLR 263 (CA) at 267.
14. It is submitted that the Commissions of Inquiry Act (as amended in 1995) recognises that where matters are of sufficient significance to warrant the

appointment of a Commission of Inquiry headed by a sitting or retired High Court Judge, then it is appropriate that that Commission has sufficient powers to enable it to fulfil its function in a manner which best accords with the proper administration of justice. In the context of an Inquiry, this will usually relate to the requirement for the Commission to follow fair and proper processes, and the importance of the lawful exercise of compulsory powers, in the context of a matter of significant public interest and where individual or wider interests may conflict.

### **Power to suppress names and/or evidence**

15. This power is part of the inherent jurisdiction of the High Court in the exercise of its civil jurisdiction: *Taylor v Attorney General*. It must be exercised in light of any relevant principles. For example, in *Vasan v. Medical Council of New Zealand* [1992] 1 NZLR 310 (CA) at 311-312 the President observed that the freedom of the press to report Court proceedings fairly and accurately should not be unnecessarily shackled. Applied by the High Court, for example, in *Gibson v. Auditor-General* (1999) 13 PRNZ 12 at pp.15-16.
16. In *Surrey v. Speedy* (1999) 13 PRNZ 397 (HC), an order was sought preventing any publication in the media of any aspects of defamation proceedings or, alternatively, suppression of the parties' names. The application was declined on its merits.
17. In *Angus v. H* (17 June 1999, Wild J, High Court, Wellington, CP129/99) the Court granted an interim suppression order pending judgment in a claim of negligence against a medical practitioner. That was held to be consonant with the proper administration of justice.
18. In *A v. B* (1999) 14 PRNZ 497, a name suppression order was granted in a claim against a pathologist for misreading cervical smears. This was later discharged on application by the media.
19. In the context of Commissions of Inquiry, a discussion of the balancing of prejudice to witnesses of attendant publicity against the purposes of a particular inquiry appears in a discussion of procedures at inquiries by Sir Richard Scott VC, written following completion of his inquiry into the Arms for Iraq matter: The Law Quarterly Review, Vol 111 October 1995 p.596 at pp.614-616.

### Power to conduct hearings in private

20. The “default” or usual position is that the hearings of the Commission will be conducted in public. Nevertheless, the Terms of Reference expressly empower the Commission to sit in private. Refer *Fay, Richwhite & Co Ltd v. Davison* [1995] 1 NZLR 517, 529 (CA):

“Section 4 [of the 1908 Act] suggests that an inquiry will normally be conducted in the same way as Court proceedings: in public. So do the terms of reference. They appear to be drawn on the premise that in the ordinary course the proceedings will be in public. This is to be expected where it can fairly be said that the Commission was established ‘not as a matter of private information for the executive government, but for public information and confidence’: *Bretherton v. Kaye* [1971] VR 111 at 125 per Gillard J. Nonetheless the terms of reference confer specific power to sit in private or to exclude particular persons from the hearing. The power so conferred is plainly a discretionary one.”

21. In that case the exercise of the Commissioner’s discretion to hear evidence (including confidential taxpayer evidence) in public was the subject of judicial review. The Court of Appeal found that the Commissioner (retired Chief Justice Sir Ronald Davison) had not erred in law in exercising his discretion to hear evidence in public since he was entitled to conclude that public and personal interests outweighed the interests of taxpayer confidentiality.
22. The position was also discussed in *Thomson v. Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98 (HC). In that case the terms of reference did not expressly confer the power to sit in private.

“There is nothing in the legislation contrary to the Commission’s sitting in private; what has been understood for many year is the right and indeed the necessity at times for a Commission dealing with sensitive matters, both private or public, must be acknowledged; i.e. the right to sit in camera. Whether this right comes from the prerogative power or as a necessary corollary to the Commission’s power to investigate does not, to my mind, matter very much.”(page 106/6-11)

23. The discretion is to be exercised reasonably. The Court of Appeal has made it plain in *Fay, Richwhite* that a court will not interfere where the decision is one the Commission could reasonably come to:

“Further submissions were directed to the issues of whether the Commission’s ruling was one that was reasonably open to it. It was said that there was no reason why the evidence could not be given in camera. At one stage of the argument I was attracted to the possibility that this could be done. In the end I am not persuaded that it would be a practical alternative. In any event, it is not enough to show that the Commission might reasonably have come to a different decision. It was for the Commission to decide. Only if its decision was one

which no reasonable body could have come to can it be set aside by the Court... It cannot be said that the decision made by the Commission in the present case was other than one properly available to it” (per McKay J p 537/13-22)

24. In *Taylor v. Attorney General* the Court of Appeal referred to the House of Lords decision in *Scott v. Scott* [1913] AC 417, noting the strict test that the Law Lords had imposed on the exercise of the discretion by the courts to sit in camera (the case concerned matrimonial proceedings). That case emphasised the basic principle of the common law “that every Court of justice is open to every subject of the King”. It should be considered in light of the nature of the Commission, the express powers in the Terms of Reference to sit in private, and the recognition of the scope of the discretion in *Fay, Richwhite*.
25. Note that the Terms of Reference oblige the Commission to keep confidential any evidence or information obtained except that received in the course of public sittings, except when reporting to the Governor-General.
26. Note also that the High Court retains the discretion to order discovery of evidence heard in private in subsequent proceedings where the balance of public interest warrants it: *Attorney-General v. Birss* [1990] 1 NZPC 388 (CA).

### **Powers to cite for contempt**

27. The powers to cite for contempt referred to in ss.13A and 13B of the Commissions of Inquiry Act expressly import the powers conferred on the High Court by ss.56A(1) and 56B and 56C of the Judicature Act 1908. Categories of contempt referred to in the authorities include:
  - 27.1 Mid-trial television coverage of a sensational and emotive nature, prejudicing a fair trial: *Solicitor-General v. TV3 Network Services Ltd* 8/4/97, Eichelbaum CJ and Hansen J, HC, Christchurch, M520/96 (Solicitor-General’s application dismissed);
  - 27.2 Obstructing a party to proceedings: *Raymond v. Honey* [1983] AC 1 (HL);
  - 27.3 Threatening a witness: *Morris v. Wellington City Corp* [1969] NZLR 1038;
  - 27.4 Breach of an order suppressing the identity of a witness: *Taylor v. Attorney-General* [1975] 2 NZLR 675 (CA).

**Power to inquire into matters touching on matters which are the subject of criminal prosecutions**

28. The only bar upon a Commission of Inquiry inquiring into matters which touch on criminal prosecutions, assuming those matters are within its Terms of Reference, is if to do so would put it in contempt of Court: *Fitzgerald v. Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368 (HC). The issue before that Court, on an interim order application, was whether the continuation of the Commission's proceedings in the manner indicated would amount to an interference with the course of justice. The High Court found that the propriety of the Commission's proposed actions, and the right of the Court to interfere in them, were to be judged according to whether those actions would amount to contempt: p.736/45-50. The Court summarised the relevant law as to contempt as follows:

“In general terms, words spoken or otherwise published, or acts done, outside Court which are intended or likely to interfere with or obstruct the fair administration of justice are punishable as criminal contempts of Court.” (Halsbury's Laws of England (4th ed), Vol 9, para.7.) (pp376/54 – 377/2).

“Apart from direct interference, it is publication which constitutes contempt, for the essential nature of contempt is the tendency ‘to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard’ (Lord Hardwicke CJ in *St James's Evening Post case* (1742) 2 AtK 469; 26 ER 683).” (p.377/14-18)

29. Otherwise the Court found it is a matter for the discretion of the Commission. However, this can be compared with *Thompson v. Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98 (HC). The case concerned the Commission of Inquiry to inquire into allegations of impropriety concerning the manner in which the District Court at Wellington was being administered. Certain parties were charged on indictment with conspiring to defeat the course of justice by interfering with proper Court procedures in relation to minor offence notices issued by the Ministry of Transport in respect of parking offences committed by each other and other persons. The Commission declined their request that it defer its investigations until after their trial, noting that the Commission had the power to sit in private and that it would be alive to the exercise of this power if evidence were to be called which might prejudice the applicants and their trial. It noted that it would have prior knowledge of what might be said because of having expressed a request for written briefs for the evidence which was subject to cross-examination: p.101/25-30. The Court in that case carried out the balancing of the competing public interests itself and found

that the Commission should proceed on a limited basis whilst the applicants' criminal trial was pending. It made the following directions:

- 29.1 The applicants should not be called to give evidence before the Commission;
- 29.2 They should not be required to reveal their defence to the criminal charges in any way, especially by cross-examination of witnesses before the Commission who were also witnesses in the criminal trial; and
- 29.3 The Commission should sit in private if any matter arose in the course of the hearing which could, in the view of the Chairman of the Commission, prejudice the applicants' right to a fair trial.

The case demonstrates the way the Commission's powers might be exercised to prevent any interference in the criminal process. However this will, it is submitted on the authority of *Fay, Richwhite*, be a matter for the discretion of the Commission, not the Court, as long as the processes to be followed by the Commission do not risk prejudice to the criminal processes.

- 30. In exercising its discretion the Commission will obviously want to be able to ensure that there is no risk of interference with the course of justice such as prejudicing the minds of the public against persons concerned in the criminal prosecution. The Commission must have regard to the constitutional right to a fair trial recognised in s.25 of the New Zealand Bill of Rights Act 1990.
- 31. In a different context, in *TV3 Network Services Ltd v. Broadcasting Standards Authority* [1992] 2 NZLR 724, the High Court was prepared to stay proceedings before the Broadcasting Standards Authority pending determination of civil proceedings for damages based on injurious falsehood, disparagement of goods and defamation. The Court was persuaded by the risk of the prejudice of publicity from the ultimate publication of the Authority's decision itself. It found that to follow the course proposed by the Authority would, in the real world of subsequent jury litigation, be unworkable and would carry an unacceptable risk of interference with justice (p.737/46). The Court observed:

“With luck, injustice might not occur. TV3 should not be asked to rely upon luck.”

32. A discussion of the importance of hearings in public appears in the Report of the Royal Commission on Tribunals of Inquiry (1966, London), (the Salmon Commission) at pp.38-40.

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