

# COMMISSION OF INQUIRY INTO POLICE CONDUCT

## HEARING

13 AUGUST 2004, 9.30AM

Ms M Scholtens QC and Ms B Hunt, Counsel Assisting the Commission  
Ms K McDonald QC and Mr D Boldt, Counsel for the New Zealand Police  
Ms S Hughes, Counsel for the Police Association  
Mr E Cooper, Police Managers Guild  
Ms N Crutchley, Deputy Solicitor-General  
Mr B Gray, Counsel for APN New Zealand Limited  
Mr P McKnight and Mr R Stewart, Counsel for Dominion Post and Fairfax Group Publications  
Ms J Ablett-Kerr QC and Mr M Phelps, Counsel for Ms Garrett  
Mr W Akel, Counsel for TVNZ and TV3 (Canwest TV Works Limited)

## RULING OF THE COMMISSION

**DATED 27<sup>TH</sup> AUGUST 2004**

### Introduction

- 1 This hearing was scheduled to hear submissions on whether the Commission, in receiving evidence, should do so in public or in private, if in public whether generic suppression orders could be made; and what other arrangements might be necessary to meet competing interests which were arising with regard to our practice and procedure.
- 2 Counsel Assisting the Commission was requested to advise the various persons who had registered an interest in the Inquiry and who were potentially affected by the issues that the hearing was to take place. Written submissions were invited. Commission staff also canvassed the views of various persons who had made complaints to it. Major media outlets were informed and invited to make

submissions. The Solicitor-General was invited to appear. The hearing was advertised in some newspapers.

- 3 In addition to those persons now identified as appearing, written submissions were received from the Police Complaints Authority, and there was a joint submission from the Wellington Sexual Help Foundation, Wellington Independent Rape Crisis, Hutt Rape Counselling Network and Whare Mahana. A letter was received from counsel for one of the people who has already been charged with criminal offences and there was a submission on behalf of a person who was the subject of the Commission's current attention.
- 4 There is no argument that the Commission has the ability to sit in private under its terms of reference. However those terms must be interpreted having regard to the prevailing environment in the law and the practice and policy applying in the general Courts.
- 5 We accept that, whatever general approaches we adopt, there may be situations where unique orders are needed to deal with particular circumstances. However, as has already become very apparent to us and our staff the manner in which evidence is provided, the number of witnesses who may wish to be heard, and the subject matters on which they will wish to testify, will to a marked extent be affected by the general environment of our operation.
- 6 This issue of public or private hearings arises because of a risk that the proceedings of this Commission might prejudice the prosecution of criminal proceedings in the High Court as a result of reinvestigations by the Police. The primary but not only concern, surrounds the impact of the publicity our proceedings would attract, and the impact that might have on the administration of justice in the criminal courts.

#### **Our Terms of Reference and Criminal Processes**

- 7 On 8 April we held a public hearing to consider issues raised by Counsel for the Police and Counsel for the Police Association with regard to the scope and nature of our operation. In the course of a Ruling issued thereafter we said:

In our view the starting point for this part of the Inquiry will be evidence from both the Police and the Police Association as to the circumstances in which action has been initiated against members of the Police during the last 25 years in relation to conduct which is not unlawful. In hearing that historical narrative, we would anticipate evidence being provided as to why action has been taken in the way that it has when it relates to non-criminal activity.

We anticipate that there will have been changing patterns. We are obviously interested to know of the present situation and to hear views as to what needs to occur in the future. All of this must involve a nexus between the behaviour which is being considered and the status of the individual as a Police officer at the time that it occurred.

We are unwilling to define in any more exact or limiting way the areas in which we will be interested. In part our areas of inquiry will be influenced by the nature of the complaints which are made to us. If, as a result of the generality of our approach, it is necessary for further or additional evidence to be called as the Inquiry progresses, then we accept that that is the consequence of our task.

...

We acknowledge the need for everybody to understand the general parameters within which the Commission will work, so that proper preparation can be progressed. However, it is inappropriate for the Commission to curtail potential areas of inquiry which could require attention.

In a nutshell, our approach is that the Inquiry is based on concerns of people who allege that having been inappropriately treated by the Police/their close associates in a sexual manner, and having complained about it, they remain dissatisfied about the acts or omissions of Police officers in response.

Initially we will cover a 25 year period. We will have regard to the general position within the Police in New Zealand but will look specifically at localities where we find examples of this having occurred on the evidence which is called.

Obviously we will be concerned about behaviour which could be unlawful. We will be anxious to know whether there is other sexual conduct that impinges upon, or has a nexus with, an alleged wrongdoer's position as a member of the New Zealand Police. We are not undertaking a general inquiry into the moral behaviour of Police officers in their private capacity which properly has no consequence for their work as a Police officer.

We acknowledge that there are serious and legitimate concerns in the community about the difficulty which people have in raising concerns and complaints about those who abuse them sexually. Investigating that would be a far reaching inquiry in itself and is not our brief, except to the extent that the phenomena is more difficult or different where the alleged wrongdoer has been a member or close associate of the Police.

## **The Last Few Months**

- 8 The necessary preparatory processes had not long been in place when we were advised that the New Zealand Police were apprehensive as to the effect of our

operation on their ongoing investigations although they were then, and always have been, anxious to see our work continue.

9 After a specific request was transmitted to us, we decided to hear evidence from the Commissioner of Police in a private hearing so he could outline the difficulties which were perceived to exist.

10 A hearing was held on 10 May 2004 following which we ruled as follows:

1 On Wednesday 5 May 2004, I received a telephone call from Ms Scholtens advising of a conference she had had with Ms McDonald and concerns which the Police had as to the interface between the work of this Commission and the ongoing criminal investigations by the Police.

2 Dame Margaret was out of New Zealand on vacation at the time, but endeavours were made to contact her. Eventually I was informed that the only time that would suit everybody for an urgent hearing was 3pm on Sunday 9 May, an arrangement with which I concurred. We were, however, defeated by the weather and it was not possible for everyone to get to Wellington. The matter was rescheduled to 8am on Monday 10 May 2004 and duly proceeded at that time.

3 I was persuaded, on the basis of the representations made by Ms Scholtens, that it was both necessary and appropriate for the Commission to conduct this hearing (which related purely to questions of process and procedure) without giving public notification. I indicated that there was no guarantee that evidence given or submissions made would necessarily be suppressed at all, or for all time.

4 The only evidence at the hearing came from the Commissioner of Police who outlined the state of the Police investigation arising from the complaints of Ms Nicholas and Ms Garrett, the two individuals specifically referred to in the Commission's terms of reference. Without naming any individuals nor detailing any evidence, the Commissioner was able to provide for us a sketch of the state of the Police inquiries with regard to these including that some inter-relationships existed, and generally about the ongoing work in the area. He also informed us that other incidents had come to light and were also the subject of investigation.

5 Not surprisingly, the Police are anxious that their inquiries should not be contaminated or placed in jeopardy by anything else that is going on. We are satisfied that, as with any trial relating to historical sexual allegations, there are particular problems that can arise. The potential for allegations of people being rehearsed or encouraged are well known. The possibilities of allegations of collaboration or coaching cannot be discounted.

6 The appointment of this Commission signalled a clear community need for an investigation into the circumstances surrounding the responses to the initial complaints of alleged sexual misconduct by Police officers, and the fact that they did not result in action against officers. This is a matter of prime importance. But there can be no doubt that the issue of possible criminal behaviour must be given priority if and when the two investigations come into conflict or our one has a real and substantial potential to influence or affect the criminal inquiries.

7 We are satisfied that, on the basis of the evidence we heard, the extensive Police inquiry, in respect of which there are a number of connecting strands, will continue for a substantial period yet. On balance, it is necessary for this Commission, and those acting under its direction and control, to be constantly vigilant to ensure that our activities could not have any adverse effect on trials that will occur if criminal charges are laid against any of the people whose acts and omissions we are required to evaluate.

8 This Commission has been conscious since its appointment of the potential for problems to arise. We accordingly have begun our processes on the basis that the Commission would initially employ oral history recorders to speak with people who had a complaint or grievance. Our counsel would then assess and analyse that material to see what potential evidence there was in it. That process is being carried out totally isolated from the Commissioners themselves. This is the mechanism we have chosen to enable the issues of confidentiality and privacy that are of substantial importance to many complainants to be preserved so they have an ability to control, in the initial stages, their involvement in the formal Commission activities.

9 Although we have adopted this arrangement, the evidence of the Police Commissioner satisfies us that there are still real and substantial dangers in us even doing this work in respect of the incidents from which criminal charges might arise. It would be serious and regrettable if activities of this Commission (undertaken in good faith and in terms of our commission) subsequently had the unintended effect of providing a basis for people to avoid the proper consequences of their acts or omissions because of allegations of contamination in the trial process.

10 This raises the question as to what the Commission can properly do in the meantime. It is important that we do not act in a precipitate way that would have an influence on the Police investigations, or on the activities of those who are subject to the Police investigations ... This Commission must be totally neutral and not have any effect on the criminal investigations one way or another.

11 Accordingly we adjourned the hearing until Monday 17 May 2004 when we will decide what activities can properly be advanced until such time as it is clear whether any charges are to be laid. If no charges are laid then we will need to continue apace with our analysis and investigation of the entire chronology of events.

12 However, if charges are laid, our ability to investigate the circumstances of previous inaction will probably have to be postponed until all trial processes are concluded.

13 If that stage is reached, we will need to consider whether we need to advise Her Excellency that, because of the inevitable time delays which will realistically be not less than a year, we should be discharged from our task and consideration be given at the end of the trial process to what sort of Commission is required to deal with any matters which then require attention.

14 We have consistently been of the view that we should not, at any stage, hear evidence from only one side of an incident. There is not a possibility of proceeding to hear evidence immediately from complainants when serving or former Police officers who may potentially be at risk of prosecution involved in such incidents

will consider they are precluded from telling their side of the story at this stage as would probably want to exercise their right to silence.

15 The last thing we want is delay, but in light of the fact that at the heart of this task is public confidence in first the Police and secondly the processes of the law, we are persuaded that the approach to our work will have to be fashioned to ensure that there is no chance of any impediment, contamination or influence through what we are doing on the police inquiry processes or subsequent prosecutions.

16 In the meantime, we are satisfied that this Ruling, and the evidence upon which it is based, needs to remain confidential. We will continue the review of the situation on 17 May 2004. Then we will consider what public advice needs to be given as to what we are doing, how we are doing it and why we are doing it if there is to be any marked deviation from the programme previously announced.

11 There was a further hearing on 17 May 2004 which resulted in a Ruling of 19 May 2004 which said:

1 As anticipated in the Ruling of 13 May 2004 (following the Hearing of 10 May) we again convened without public notification, to discuss the issues that were raised the week previously.

2 All counsel remained of the view that it was essential for the Commission to avoid any work that could impinge upon or impede in any way the criminal investigations being undertaken by the Police.

3 The Commissioners are persuaded that there is validity in this concern and that we should respond to it.

4 We are, however, equally concerned that in February, as a result of very substantial public disquiet and concern, Her Excellency the Governor-General was advised to set up this Commission and to report within what was seen at the time as being a very short time span. Whether the full consequences of the interface between the work of this Commission and the Police investigative activities were fully appreciated, we are anxious that we should, to the greatest extent possible, adhere to the demands of our terms of reference.

5 The opportunity for Police investigative processes has already existed for three months. We do not minimise the extent or scope of the work which needs to be undertaken, but bearing in mind our obligation and the competing interests which it represents, we are firmly of the view that we should agree that the Commission will take no steps in areas in which there are ongoing Police investigations, but only for a further three months. In our view the effort must be made, and the resources provided, to ensure that issues as to whether charges are to be laid and against whom in respect of matters which could come within the terms of this Commission, must occur and be known publicly by 17 August 2004.

6 The expectation of the general community, and the public confidence in our work, will be irrevocably damaged if we delay for longer than that ongoing work across the entire spectrum of our terms of reference.

7 If people are charged, then difficult issues will arise about our ability to progress our terms of reference without the potential for unintended deleterious

consequences. Those are matters that we will consider at the time and in light of the reality that then exists.

8 We are, however, persuaded that in the meantime there is work that can be and should be done by this Commission. Public hearings have been set down for 24 May. They will proceed for the reception of base documentary evidence as to the rules, regulations and protocols that have governed the Police handling of allegations of sexual impropriety by Police Officers during the last 25 years.

9 We are advised by counsel assisting us that there are not less than eight cases which they are of the view can be pursued without any potential for them having an adverse effect on the ongoing criminal investigations.

10 Ms Scholtens and Ms McDonald need to confer, as a matter of urgency, as to what these are. If they are unable to agree as to that categorisation then their difficulties should be referred to the Commission.

11 It appears unlikely that we will be able to hear any evidence, even on these matters, within the timeframes that we established for public hearing. We accept that there has been some delay because of the amendment to the Police Complaints Authority's Act. There are still issues to be sorted through as to the meaning and effect of the amendments passed by Parliament.

12 The Commissioners, however, are of the view that real urgency must attend the investigation and preparation of evidence with regard to these incidents that are unrelated to the criminal investigation. We are certainly not at this stage persuaded that, by the end of June, it will not be possible for evidence to be led from all perspectives with regard to these incidents.

13 We will have a procedural chambers hearing on Tuesday 25 May at 10am with counsel for all parties to discuss timetabling and other outstanding process issues. It will take overwhelming material to persuade us that, with the appropriate resources being employed, progress cannot be made throughout July and the first fortnight in August, in other words until the time to which we have indicated we will postpone other activity in anticipation of the possibility of criminal charges being laid.

14 No-one should be in any doubt that if criminal charges have not been laid at that stage we must nonetheless pursue our commission and fulfil the obligations that have been placed upon us.

15 It necessarily follows that this Ruling, like the one last week, must remain confidential in the meantime. After the Chambers hearing which is scheduled for Tuesday 25<sup>th</sup> May 2004 with all counsel for parties, we will decide what public indications need to be made as to our hearings during the next three months.

12 In accordance with that decision, our work was concentrated thereafter on a group of eight particular submitters where there was no likelihood of direct conflict between the ongoing Police investigation and work by the Commission. However, we remained acutely aware of the potential for contamination (if there was any public airing of issues of Police behaviour and response in matters

relating to inappropriate sexual activity) on those matters which might come under the Police investigative focus. We have specifically avoided any public activities.

- 13 In July 2004 we were advised that 4 people had been arrested and charged with a variety of offences including sexual violation and indecent assault. Some had been Police Officers. Suppression orders with regard to their identities were immediately made and it appears, by consent, agreed to continue through until a date in September.
- 14 In August 2004, we were advised that charges were to be laid against another former Police Officer. Again an order for suppression of his name was made which continues until early October. The existence of the orders has meant the public cannot understand the challenges that we have had to confront to ensure the maintenance of the purity of the criminal process, although we note there has been some media speculation.
- 15 Over many weeks we have been indicating to counsel for the Police that it was essential for us to have accurate information as to the position with regard to criminal charges which had been laid, or where there were ongoing investigations.
- 16 Even up to the hearing on 13 August 2004, there remained uncertainty about the extent of the activities of the police in investigating matters and the Crown in prosecuting. Since then we have had a Memorandum filed on behalf of the Commissioner of Police and an affidavit from Detective Inspector Nicholas Perry which provides some information. It leaves us with no doubt that the problems identified in May continue to exist and require our utmost vigilance to ensure that unintended consequences do not flow from any of our work.

### **Public or Private Hearings**

- 17 On the issue of public or private hearings there was a consistency of approach from all counsel who appeared before us. No party suggested that hearings should not be in public to the greatest extent possible, consonant with people's individual rights and without compromising the proper administration of justice in any criminal proceedings. Stating the ideal is easy but giving it life and reality is much more challenging.

- 18 The starting point is the very significant public interest in the principle of open justice. This principle is well recognised in civil as well as criminal proceedings. The House of Lords held in *Scott v Scott* [1913] AC 417 that unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear a civil proceeding in camera. Lord Atkinson held at p463 that:

The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

- 19 The content of the open justice principle was summarised by Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [1979] 1 All ER 745 at 760:

The application of this principle of open justice has two aspects: as respects proceedings in the Court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

- 20 In New Zealand, the “default” or usual position is that the hearings of the Commission will be conducted in public. Our terms of reference expressly empower the Commission to sit in private as was the case with the Winebox Inquiry. In *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517, where there was a challenge to the Commissioners’ exercise of discretion in this area, the Court of Appeal held at 529:

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 It 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 the relevant public interests outweighed the very significant interests of taxpayer confidentiality recognised in legislation.

22 This Commission has very similar powers to those which applied in the *Fay Richwhite* case and it is abundantly clear that it was set up “for public information and confidence”. The importance of conducting its hearings in public cannot be overstated. The point was well summarised by Ms Ablett-Kerr, counsel for Mrs Garrett, in her submissions when she contended that hearings in public were essential so that

- (a) sufficient transparency could be accorded the process, and
- (b) the integrity of the proceeding is demonstrated, and
- (c) public confidence in both the process and the New Zealand Police can be enhanced.

23 The advantages of public hearings in inquiries such as this were considered by Mason J in *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* [1982] HCA 31 at p97 when he said:

“[A Commission of Inquiry] is a valuable method of comprehensive and authoritative fact finding on which to base wide-ranging proposals for legislative and administrative reform. It is a means of ascertaining whether abuses exist and eliminate them. By virtue of the publicity which usually attends the proceedings and ultimately the report when it is made public, the commission of inquiry serves the beneficial purpose of enlightening the public just as it enlightens government.

...

It was no doubt a recognition of this aspect of the public interest that persuaded the Federal Court to impose, not an absolute restraint on the proceedings, but a restraint on proceedings in public. However, this restraint, limited though it is, seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. Especially is this so when the inquiry has power to compel attendance and testimony.

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.”

24 In our view the carrying out of our task in public, to the greatest extent possible, is critical as our warrant arises from public concern about the adequacy and impartiality of the New Zealand police force in investigating complaints against

their own, the police attitude towards and tolerance of alleged sexual offending by their own, and the general propriety of police conduct in respect of sexual matters. Allegations have been made that raise questions about the integrity of those who hold very high positions in the Police. These matters go to the heart of public confidence in the New Zealand Police, who are entrusted with significant powers for the protection of the public.

- 25 When the issues were first raised in the media, they evoked a reaction of such proportions that the Government was moved to recommend the establishment of this Commission of Inquiry. The purpose of the inquiry plainly and properly is to enable an open and public consideration of the allegations now in the public arena. In particular we are to inquire into whether there was substance in the suggestion that matters were not properly investigated, to consider the broader context of the way the police respond to allegations of sexual offending by the police and their associates so as to assess the scale of any problem, and to assess how things have changed over the past 25 years. These are matters of public interest which could not be properly addressed if the Commission were to meet in private, even if its evidence and report are eventually made public at the end of any criminal proceedings.
- 26 The confidence of the public in, and integrity of, the Commission's processes is also advanced by public hearings. Although hearings in private might lead to recommendations that could be welcomed by some groups, they are less likely to receive universal acceptance if the evidence which supports them has not been the subject of the usual disciplines of the winds of publicity. Our recommendations may accordingly lack credibility.
- 27 Linked to this is a concern that, if we hear evidence in private or suppress essential evidence, our conclusions may be seen as either a whitewash or a kangaroo court assessment emerging from a star chamber arrangement. We are expected and instructed to call the police to account. Those who are called upon by us to justify or explain their conduct are entitled to the protections of natural justice and fair process. A transparent public process is essential to give confidence to all that we have made full, proper and fair inquiries. Public access to our hearings is also a primary way in which we are accountable for the carrying

out of our task. The justifications behind the principle of open justice include judicial accountability and with it the prevention of arbitrary decision making and abuse of process. The development of public hearings is attributed to a backlash against the practices of the English star chamber and its notorious equivalents, see Morag McDowell, *The Principle of Open Justice in a Civil Context* [1995] NZ Law Review 214, 216.

- 28 We are persuaded that the public interest in public hearings with the attendant ability for the press to report is essential to our task. The nature of the underlying issue, the manner in which it arose, the public expectations which have been created, the cynicism and scepticism about hidden processes, all lead inexorably to an essential requirement that all but procedural hearings must be transparent and available for complete evaluation and scrutiny.
- 29 While we remain open to considering particular matters on a case-by-case basis, it is our considered view that doing anything of substance in private will undermine the essential integrity of our task and unacceptably diminish the value and efficacy of our conclusions.
- 30 The public versus private tension which can arise is vividly demonstrated by three recent English decisions:

*R (Wagstaff) v Secretary of State for Health and Anor* [2001] 1WLR 292 – the inquiry following the conviction of Dr Harold Shipman for multiple counts of murder.

*Persey & Ors v Secretary of State for Environment, Food and Rural Affairs & Ors* [2002] EWHC 371 – the inquiry into the lessons to be learned after the 2001 foot and mouth disease outbreak.

*Howard and Anr v Secretary of State for Health* [2002] EWHC 396 – the inquiry into the sexual misconduct of Dr Clifford Ayling.

- 31 The different views reached in these cases demonstrate that one must look with care at the reasons for, and the nature of, the inquiry. We have no doubt that our task has much synergy with the public concern and clamour with regard to the activities of Dr Harold Shipman where the Court was of the view that it would have been “irrational” for such an inquiry to have been conducted in private.

## Name Suppression

- 32 As in all of life (and nonetheless in the law) there are competing interests. The first which arises within this context is the rights of confidentiality and privacy which each individual citizen enjoys within our community, versus the principle of open justice referred to earlier and the right to receive and impart information as recognised in section 14 of the New Zealand Bill of Rights Act 1990.
- 33 Apart from perhaps the more extreme positions espoused by one counsel for the media, there was a general acceptance that there may be strong and exceptional circumstances where individual factors may require assessment and orders suppressing names and identifying factors may become necessary.
- 34 Mr Gray questioned the juridical basis for suppression. Although acknowledging that sitting in private was specifically permitted under our terms of reference, he argued that, if we concluded we should not sit in private, then we could not take the lesser step of curtailing publication of some of what was done. There is a fascinating theoretical stream in that argument, but we are of the view that if, in striking the balance between competing interests, we decide that public hearings are essential, our ability to sit in private would provide sufficient warrant for us to influence the degree of publication of those proceedings where unique circumstances so demand. In saying this we note that our jurisdiction derives from the civil jurisdiction of the High Court and its inherent jurisdiction to make suppression orders. We also note the recent judgment of the Privy Council in *Independent Publishing Company Ltd v Attorney General of Trinidad and Tobago & Anor* (Trinidad and Tobago) [2004] UKPC 26 to the effect that such powers do not in fact exist at common law and must be conferred by legislation (paras 65 and 67). The New Zealand position to the contrary derives from *Taylor v Attorney General* [1975] 2 NZLR 675(CA), which was expressly doubted (paras 40, 41, 52 and 64).
- 35 Both the New Zealand Police and the Police Association submitted that, wherever so requested, persons who made the initial complaints of sexual misconduct by Police Officers or those associated with them, together with the Police Officers about whom those complaints were made, should presumptively be granted

suppression. The principal reason was that this Commission is not inquiring into whether those complaints had validity or whether any wrongdoing had occurred. We are explicitly prevented in our terms of reference from making any assessment or finding as to guilt or innocence. It was therefore argued that the identity of persons in those two categories was not a relevant or critical factor to anything going on before the Commission of Inquiry. However the nature of the evidence identifying them is likely to be of significant interest to some sections of the media. It was argued that there is a real likelihood their privacy would be compromised in circumstances where no particular public interest would be served. Further, if the names of those who were the subject of original complaints were published, then the rules of natural justice might require they be given the opportunity to respond to defend their reputations and honour. The Commission would be in the difficult position of being asked to hear evidence on matters outside its terms of reference. It is likely to be duty bound to exclude such evidence as having no relevance to anything it has to consider.

36 We had initial sympathy with the position that presumptively orders should be made protecting the identity of both of these groups of people. As Ms Hughes submitted:

- (a) The names of the subject persons are not relevant to this consideration of the Commission
- (b) The Commission will make no finding as to guilt or innocence of a subject person
- (c) The subject persons identified to date have not been requested to give evidence by the Commission and if they requested an opportunity to give evidence they could well find that the Commission declined to hear them on the basis that their evidence was not relevant.

She continued:

“By contrast, the subject persons, many of whom deny any wrongdoing, could be subjected to salacious, inappropriate and intrusive inquiry by the media. Such can have no justification in law.”

- 37 All Counsel were of the view that, although our powers are those of the High Court in its civil jurisdiction, it was reasonable when considering where the balance of public and private interests lay to consider analogous circumstances within the criminal justice system as our Commission is concerned primarily with complaints arising from behaviour alleged to be criminal.
- 38 As far as persons who have made complaints are concerned, it was noted that under ss138-140 of the Criminal Justice Act 1985 a clear policy position is espoused with regard to complainants in sexual cases – namely an automatic suppression of name. There are obvious reasons for that, and the policy should apply to those who have come forward to this Commission, and those whose names will become available to us as a result of receipt of information from the Police under the express exception to secrecy in the Police Complaints Authority Act 1988. We agree that it is appropriate to keep confidential the names of those people who complained to the Police. Some may not want anonymity but that is a matter of personal choice and will be accommodated where appropriate.
- 39 While acknowledging immediately that persons who were the subject of complaints are not in the same category, we note that the position under the criminal law with regard to persons accused of criminal offending which is now beyond debate. A useful starting point for our current jurisprudence is the decision of the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 where the principle of openness post-conviction was made plain and explicit. It was extended to cases where a person had been charged but not convicted by the decision of the Court of Appeal in *Proctor v R* [1997] NZLR 295 and reinforced in *Lewis v Wilson and Horton Limited* [2000] 3 NZLR 546. These cases emphasise that the starting point when considering the exercise of powers to suppress names or other evidence is the importance in a democracy of the freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as “surrogates for the public”. Suppression should only occur where and to the extent that it is necessary to ensure that justice may be done in a particular case. The possibilities for a more restricted view have recently been articulated by the Law Commission in *Delivering Justice for All* (NZLC R85, chapter 8) but a law reform proposal cannot be given priority as

against the clear, consistent and developing policy approach taken by the ultimate Courts of this country and in no way deflected from by the Parliament.

40 The approach to openness with respect to witnesses in criminal cases is demonstrated by the decision of the Court of Appeal in *Re Victim X* [2003] 3 NZLR 230. There the privacy interests of a kidnap victim did not outweigh the principles of open justice and free speech.

41 Earlier this week the High Court in Auckland declined to continue confidentiality orders restricting publication of the names of parties involved in a significant dispute with the Commissioner of Inland Revenue (*C and Multiple Parties v Commissioner of Inland Revenue* M725-728-IM02, High Court Auckland, 23 August 2004, Venning J). The Court noted the primary principle as one of open justice applying to criminal, civil and tax cases. The Judge said, at para 12:

The starting point is ... the importance of open judicial proceedings and the right of the media to report: *Lewis v Wilson and Horton* [2000] 3 NZLR 546.

42 The Court recognised that tax cases carried additional features that do not apply to other cases, because of the confidentiality of proceedings when they are heard by the Taxation Review Authority, and that tax cases can involve evidence relating to the taxpayers' personal financial details which would generally not be disclosed in civil or even criminal cases. Nevertheless, the Court held that suppression orders in the circumstances were not considered necessary. At para 37 the Judge held:

While the evidence led by [the parties] sets out their expectations and belief that their personal position will be affected the evidence is not such as to counterbalance the principle of open justice. Some degree of distress, embarrassment and adverse personal and financial circumstances might be expected to follow publication of names. Against that there is a legitimate public interest in an arrangement that has the potential effect of the magnitude that this arrangement could have on the tax base, both in relation to the details of the arrangement, its creators and those who chose to continue to support their investment in it.

43 In light of the clear and unequivocal policy position which informs the civil and criminal courts, we do not consider that there should be presumptive suppression of names for classes of people who will give evidence or be mentioned in evidence before us. Nevertheless we agree that they should be given the

opportunity to make individual applications, and their position should not be prejudiced in the interim.

- 44 In order that past or present Police Officers who are alleged to have been involved in sexual misconduct are not denied due process they will need to be individually advised by our staff if they are to figure in our hearings and have an opportunity to make an application on a personal basis for an order suppressing their names and details, in accordance with the general approach taken before the Courts. In the meantime their identities are to remain confidential.

### **The Fundamental Nature of Fair Trial Process**

- 45 Any accused person enjoys the presumption of innocence and any allegations made against them in the criminal Courts must be proved beyond reasonable doubt by proper evidence in a fair, independent and impartial process. The right to a fair trial is one value in our system of justice which must prevail over the principles of free speech and open justice.
- 46 The Court of Appeal considered the principles in *R v Burns (Travis)* [2002] 1 NZLR 402, and noted at paragraph 8 and following:

[8] The relationship of the public's right to receive information with the right for an accused to receive a fair trial has at times been referred to as a "balancing exercise." To take an example, this Court in *Gisborne Herald Co Ltd v Solicitor-General* [1953] 3 NZLR 563 considered whether the publisher of the *Gisborne Herald* should be found guilty of contempt of Court for printing details, including the criminal record, of the main suspect in a highly publicised attack on a police constable. The Court stated at p 571:

"The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial Court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of these Courts invokes both these values ... Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act 1990."

[9] Nonetheless, the Court in that case emphasised the crucial importance of a fair trial, stating at p 569 that: "Fair trial is not a purely private benefit for an accused. The public's confidence in the integrity of the justice system is crucial." Where there is a conflict between fair trial values and freedom of expression, it added at p 575, the latter may be suspended or delayed until a trial is completed.

[10] In the sphere of the criminal justice system the right to a fair trial has been jealously guarded by the Courts. No right is more inviolate than the right to a fair trial. Not only is it the fundamental right of the individual but it permeates the very fabric of a free and democratic society. The notion that a person should be required to face a trial and ensure the punishment which a conviction would bring, when the fairness of that trial cannot be assured, is repugnant. Indeed it has been judicially observed that the right to a fair trial is as near an absolute right as any which can be envisaged. See *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779 at p 787. It is for this good reason that the Courts at times insist that the right to a fair trial must prevail over the principles of free speech and open justice. As Cooke P in *R v Liddell* stated at p 547, in considering suppression orders “Departures from the principles [those of free speech and open justice] are necessary at times to avoid prejudice in pending trials.”

[11] The comments in *R v Liddell* and the *Gisborne Herald* case clarify the nature of the balancing exercise to be undertaken when considering whether to grant or revoke a suppression order. The public’s right to receive information, the principle of open justice, the type of information in question, its public importance and interest, its likely circulation, methods of diluting its effect on the minds of potential jurors, the presumption of innocence, and other issues are all to be balanced against its prejudicial effect. But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing. The principles of freedom of expression and open justice must then be departed from; not balanced against. There is no room in a civilised society to conclude that, “on balance”, an accused should be compelled to face an unfair trial.

### **Our Current Dilemma**

47 As against that legal backdrop, we find ourselves in the position where we can have no current assuredness as to where matters are in respect of the Police investigations or charges arising from them. As noted above, there was always a potential for this problem but it has now reached the position where it would be foolhardy for us to plough ahead in the dark and perhaps inadvertently interfere with the fundamental right to a fair trial.

48 Counsel before us have taken a variety of positions on how we should manage this situation. At the one extreme Mr Akel was of the view that nothing done by this Commission would have any direct bearing or relevance on jury determinations in criminal trials. At the other end of the spectrum the Deputy Solicitor-General acknowledged the potential for problems. Counsel for the Police and the Police Association, (with their priority being that we should continue with our task), considered that the interface could be managed and that a juggling exercise could be undertaken. Their submissions appeared to assume we would not inquire into any complaints which were the subject of charges while those matters were before

the Courts, but would continue, in private where necessary, to consider those complaints where no further action was being taken. This would include a review of police files covering complaints made over the past 25 years.

- 49 In our view there can be no question that our Commission must refrain from any form of inquiry, assessment or hearing in respect of the incidents which are covered by criminal charges. We agree with the submission made by the Deputy Solicitor-General:

23. Given what the Commission can inquire into, it must be that witnesses, particularly complainants, and putative accused may give evidence to the Commission on matters, which are collateral to or associated with, rather than directly about allegations of criminal conduct. That material would not be admissible at trial.

24. If such evidence provided to the Commission for the purposes of the Commission's area of inquiry, but which trenched on the evidence that witnesses and accused may give at a criminal trial, then publication of evidence given to the Commission may well have an improper influence on future jury members.

25. A current or former Police officer may give evidence about their conduct in investigating sexual allegations against Police officers, or their sexual conduct relevant to consideration of adequacy of investigation. This evidence could well be inadmissible at a criminal jury trial. If published from the Commission's hearing it could well affect the jury pool's assessment of the particular current or former Police officer, either when they come to give evidence as a witness at a criminal trial or when they come to their trial as an accused on criminal charges.

26. Witnesses at the Commission may well have to canvas matters at the heart of the allegations of sexual offending. That may provide a rehearsal for such witnesses which may have the following implications:

26.1 It could force witnesses to commit themselves on oath to a version of events in advance of the criminal proceedings.

26.2 Publication of the evidence of witnesses might provide difficulties where a witness to the Commission has told a version of events which is contrary to their statement to the Police about the criminal matter. The witness may then feel compelled to repeat the evidence given to the Commission for fear of being prosecuted from giving false evidence to the Commission.

26.3 It could deprive of the opportunity for surprise contained in cross-examination at trial.

26.4 It may necessarily cover collateral matters and evidence which could be inadmissible at trial.

27. This latter matter could influence the course of evidence given at trial if such inconsistencies obtained in evidence for the Commission's inquiry were used to undermine witnesses' credibility at criminal trials.

28. In the criminal process cross-examination designed to test the credibility of witnesses occurs through exploration of inconsistencies with the witness in evidence, as between written statement, evidence given at depositions and at trial.

29. While depositions is an inquiry into whether there is a case to answer and trial is an inquiry into guilt or innocence, such cross-examination is always focussed on the substantive and relevant evidence related to proof of charges and is always done in the strict context of procedures surrounding the criminal jury trial.

30. However, here the purpose and specific nature of this inquiry is quite different to either inquiry described above in the criminal process. Thus, evidence given publicly for one purpose in a forum not contained by rules applicable to the criminal process, but which evidence is available to the criminal trial, could allow an undermining of the credibility of witnesses and accused in a way that would affect the proper administration of justice through interfering with the more limited inquiry and stricter rules that apply to a jury trial.

50 While we have said we do not consider hearings in private to be feasible given the nature of this inquiry and the concerns that have given rise to it, we note that even private hearings would not avoid some of these risks. It would be fundamentally wrong for this Commission simultaneously to do any work which considers the adequacy of the police response to and investigations of complaints made when there are now criminal charges arising out of those complaints pending and being processed. We emphasise our concern is that there is a very real risk that our inquiries, whether in public or private, would result in contamination of the criminal process, with the consequence that the Courts would have no option but to intervene and dismiss the criminal charges or stay proceedings without regard to culpability, because the system could not ensure a fair trial.

51 As part of the submissions on managing matters it was submitted by Counsel for the Police that the Commission should, at least initially, deal only with matters which were unrelated to pending criminal trials. That is an interesting theoretical possibility, but in reality we consider it is illusory. We cannot see how this Commission can do its task with regard to any of the complaints that have been brought to the attention of the Commission without permitting Counsel before it to thoroughly investigate the attitudes, approaches and activities of Police Officers in a generic sense. It is readily foreseeable that many of the issues raised will echo issues in the criminal trials, and the evidence will raise systemic and other matters which may seem very relevant to those trials. We consider there is a real risk that continuing our inquiry at all could have an effect on the conduct of

criminal trials which were going on at the same time. However we cannot finally form a view about this until the full extent of any relevant charges is known.

52 We are very conscious that this will be disappointing to some. We acknowledge the important public interest in seeing very serious concerns that have been raised in relation to policing in New Zealand responded to in a public forum, and the associated public interest in the police having a proper forum in which to respond to allegations which undermine both public confidence and police morale. There are also the interests of the individual submitters who are preparing to bring their concerns to the Commission. We do not undervalue the personal effort and cost that has been borne by these individuals, and the expectations they have that their concerns will be fully investigated. We acknowledge too that others have had to deal with the disruption to their lives of the prospect that matters they thought were long behind them are to be revisited. However we must give primary consideration to the risk of prejudice to the criminal proceedings now in train. This raises concerns for both the individuals who are entitled to a fair trial, and for the public interest in ensuring that the actions of this Commission do not have the unintended effect of providing a basis for people to avoid the proper consequences of their acts or omissions. We consider that once the criminal trials are completed, the issues that then appear to remain can and should be the subject of a full and public inquiry.

53 What this Commission is asked to do is to inquire into a set of circumstances which have existed over 25 years, to assess and audit processes and procedures to evaluate the environment and culture which has operated within the Police, and to make recommendations for the future. Those are all matters of immense public concern. They are issues which have been addressed to some extent by the police and we hope improved over the years. They are still under active consideration. Whether the reforms that have taken place are sufficient we do not yet know. To make that assessment there must be a totally uninhibited and thorough scrutiny of everything which has occurred. From the perspective of the Police, there is undoubtedly urgency in having this task undertaken sooner rather than later. From the perspective of people who feel that they were improperly responded to, the issues at hand have been festering sores in some cases for decades. Important as those perspectives are, they cannot be given priority over the need to maintain

an environment in this small country in which there can be guaranteed criminal processes which have integrity and which are free from contamination by any simultaneous activity no matter how worthy its aims may be.

### **Interim Conclusion**

- 54 We concluded earlier that the need for our hearings to occur in public is fundamental to the object and integrity of this inquiry so that doing some ‘closed door’ sessions in the meantime until all information is available is not a viable alternative.
- 55 From the first public exposure of the issues which became the subject matter of our Commission, there has been an enormous media interest in the allegations and in our activities. Because of the high level of public interest, if not fascination, in the issues which we will consider, and because of the nature of our inquiries, we consider that, if we are to continue to investigate, hear evidence and eventually assess, evaluate and report publicly, there would be a serious and genuine risk that our work could have a direct bearing on the trials, or the processes attendant upon them, which are now in actual contemplation.
- 56 One can readily see that any scrutiny of current or former Police officers about whom there is dissatisfaction in respect of their acts or omissions will be perceived in concert with all Police. They involve the same environment.
- 57 Although our terms of reference are directed towards assessing issues of process and the culture and environment in which things did or did not happen, it is abundantly clear that there is an enormous media appetite for details about the actual complaints which were made. Even though we are precluded from making assessments about their strength or validity, to do our task we will have to evaluate the complaints and their underlying circumstances to some extent to determine whether the responses were appropriate or sufficient. This will inevitably be heavily publicised. Such publicity could undoubtedly have an effect on the possible trials of other serving or former Police officers.

- 58 When the totality of the criminal process is known, some very difficult questions will have to be addressed as to what we can do thereafter and when it can properly be done.
- 59 No-one should assume that we are in any way suggesting there will not be a major task still requiring attention of the sort which is contemplated by our present terms of reference. The events of the last six months have confirmed fully the need for a thorough, rigorous and comprehensive assessment of a variety of issues. The real issue is one of timing.
- 60 As we are not yet in a position to assess the full implications for our Inquiry of any criminal proceedings, we propose to adjourn the Commission until 22 October 2004, or sooner if the Commissioner of Police confirms that all work of reinvestigation and criminal responsibility has been concluded and issues are then totally in the hands of the prosecuting authorities. After that date we will, if necessary, provide further opportunity for submission. If there are criminal charges pending (and suppression orders do not impede full information about them) we will have to assess how they impact on the Commission carrying out its terms of reference.
- 61 We are persuaded that the activities of the Commission must now stand in abeyance until that information about criminal charges is available.
- 62 We will direct our staff to notify all those affected by this ruling and explain the concerns which have led to this interim decision. It is not a case of our task being abandoned, but an issue of when it can fairly and properly be undertaken.

Dated at Wellington this 27th day of August 2004.

Hon Justice J Bruce Robertson

Dame Margaret Bazley DNZM