

In the matter of the Commissions of Inquiry
Act 1908

And

In the matter of a Commission of Inquiry into
Police Conduct

Submissions by APN New Zealand Limited

Dated 13 August 2004

Bell Gully *Barristers & Solicitors*

PO Box 4199 Tel +64 9 916 8800
DX CP20509 Fax +64 9 916 8801
Auckland NZ

Reference: Solicitor: A L Ringwood Counsel: B D Gray

SUBMISSIONS BY APN NEW ZEALAND LIMITED

May it please the Commission:

Introduction

- 1 APN New Zealand Limited ("APN") is the publisher of the New Zealand Herald and other newspapers throughout New Zealand.
- 2 These submissions address the extent to which proceedings of this Commission should be in private, or reporting of them should be suppressed.

Powers of the Commission

- 3 The Commissions of Inquiry Act 1908 provides at s 13 that where a Judge of the High Court is a member of a Commission for the purpose of holding an Inquiry, that Judge and the Commission of which he or she is a member shall, for the purposes of the Inquiry, have 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.
- 4 Section 16 of the Judicature Act 1908 confers on the High Court and its Judges all jurisdiction which may be necessary to administer the laws of New Zealand. This provision is regarded as confirming the Court's inherent jurisdiction.
- 5 The terms of reference for this Inquiry include the provisions:

"And, without limiting any of your other powers to hear proceedings in private and to exclude any person from any of your proceedings, you are empowered to exclude any person from any hearing, including a hearing at which evidence is being taken, if you think it proper to do so ..."
- 6 It seems:
 - 6.1 The Commission has the inherent power of the High Court, in its civil jurisdiction;
 - 6.2 The terms of reference permit the Court to exclude any person or persons from the hearing of any part of the proceedings before it;

- 6.3 The terms of reference do not otherwise limit or expand the powers available to the Commission in respect of its inherent jurisdiction.
- 7 Because the powers available to the Commission are those available to the High Court, in its civil jurisdiction, the specific powers conferred by the Criminal Justice Act 1985 are not available. Accordingly, the powers to suppress publication of a report of the proceedings so as to protect the identity of persons from whom or with whom certain offences of a sexual nature are alleged to have been committed found in s 139 of that Act, is not available. Similarly, the power of the Court to make orders forbidding the reporting of proceedings pursuant to s 138 of that Act and to make orders prohibiting the publication of names pursuant to s 140 of that Act, are not available.
- 8 However, APN will submit that s 139 of the Criminal Justice Act 1985 may provide assistance to the Commission in identifying public policy, especially in respect of disclosure of the identity of persons from whom or with whom certain offences of a sexual nature may be alleged to have been committed, and that this might help the Commission in the exercise of its inherent jurisdiction.
- 9 Most modern cases which deal with the limited circumstances in which it is appropriate for the High Court, in its civil jurisdiction, to sit in camera or prohibit publication of a report of its proceedings, start with the judgments of the House of Lords in *Scott v Scott* [1913] AC 417. Vicount Haldane LC said:
- "If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the Judge."* (page 435)
- 10 Exceptions to the broad principle that justice should be administered in public rest on a "yet more fundamental principle that the chief objective of courts of justice must be to secure that justice is done" (page 437) so that any interference with open hearings should be based on particular needs and particular cases rather than on the sensitivities of parties or witnesses, no matter how well founded they may be.

- 11 The Earl of Halsbury agreed that personal sensitivity was not a sufficient ground for private hearings and was reluctant to accept even a general proposition that "a Judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret" (page 442). His Lordship felt that these words may have too wide an application and that it was better to consider possible constraints on public hearing in the context of particular cases.
- 12 The extent to which these principles affect the exercise of the inherent jurisdiction of the High Court was considered in *Taylor v Attorney-General* [1975] 2 NZLR 675.
- 13 Richmond J noted:
 - 13.1 Section 16 of the Judicature Act 1908 provided the then Supreme Court with "all judicial jurisdiction which may be necessary to administer the laws of New Zealand" (page 682, line 12);
 - 13.2 This includes powers which are necessary to enable the court to act effectively to do its work (page 682, line 17);
 - 13.3 The juridical basis of the inherent jurisdiction is to protect and to fulfil the judicial function of the administration of justice according to law in a regular, orderly and effective manner (page 682, line 25);
 - 13.4 The power to sit in camera exists only in cases where nothing short of the exclusion of the public would permit justice to be done (page 682, line 30).
- 14 Woodhouse J noted that the inherent power of the High Court to exclude the public:

"Is one to be exercised not for the sake of individual litigants or witnesses but in the interests of the administration of justice itself." (Page 691, line 5)
- 15 From these judgments it is clear that the inherent jurisdiction of the High Court to do what is necessary to administer justice does permit the Court to sit in camera, but that, as a matter of practice, that power is to be exercised in that very small number of cases where justice cannot be done in an open hearing. In this, a distinction can be drawn between "interests of justice" which refers to substantive

laws, and "interests of administration of justice" which refers to the power to do what is necessary for Courts to do their work.

- 16 The decision of the Court of Appeal in *Broadcasting Corporation v Attorney-General* [1982] 120 confirms that courts should sit in public and that any departure from the principle of open administration of justice must depend not on judicial discretion but on the demands of justice itself (see page 123, line 24 per Woodhouse P, page 129, line 39 and page 130, line 50 per Cooke J).

Public policy

- (a) *Persons who may be victims of alleged crimes of a sexual nature*
- 17 The Commission may feel that s 139 of the Criminal Justice Act illustrates a public policy in favour of suppression of the identity of persons who may be victims of alleged crimes of a sexual nature and that this policy constitutes a sufficient exception to the general principle that court proceedings should be heard in public and are available to be reported. APN would not oppose the making of orders suppressing publication of the identity of such persons who seek that suppression. Some of the complainants have identified themselves and so it would not be appropriate to suppress publication of their identity now.
- (b) *Persons who may be accused of having committed crimes of a sexual nature*
- 18 APN understands that the terms of reference for this Commission of Inquiry do not permit it to consider whether alleged offences of a sexual nature may have occurred or whether any persons may be guilty or innocent of any such offences. This means that anyone identified as a possible perpetrator of an alleged offence of this nature may not have an opportunity to articulate their position in relation to any such allegations, or provide evidence to support their position.
- 19 By reason of Part II(3)(a) of the First Schedule to the Defamation Act 1992, a fair and accurate report of the proceedings of this Commission of Inquiry will attract a qualified privilege. The Commission may feel that this leaves persons said in the course of evidence or submission presented to the Inquiry to have committed offences of a sexual nature vulnerable to publication of the allegation without having an opportunity to respond.

- 20 However, this is not a concern which would provide grounds for the Commission sitting in camera or suppressing publication because it is a private concern and not one affecting the administration of justice.
- 21 As well, it is difficult to identify a public policy in favour of suppression of the identity of persons alleged to have committed offences of the kind found in respect of alleged victims in s 139 of the Criminal Justice Act.
- 22 It is appropriate that the law provides some control over what is said about persons alleged to have committed offences where there is no opportunity for answer or rebuttal. That control is found in the requirement in the law of defamation that in order to attract the defence of qualified privilege a report be fair and accurate. APN says it is incumbent on parties and persons appearing before the Commission to recognise that evidence might be given which suggests the Commission of an offence, but that there may be no opportunity for that evidence to be answered so that some restraint is required in the making of allegations, and fair reporting requires recognition of a lack of opportunity to answer or rebut such allegations.

(c) Persons who may face criminal charges

- 23 It may be argued that publication of evidence or submissions presented to the Commission of Inquiry may prejudice a possible fair trial of persons charged with criminal offences. This concern may be said to be a breach of a right to a fair trial affirmed in s 25(a) of the New Zealand Bill of Rights Act.
- 24 In *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 the Court considered that the passage of time might sufficiently diminish the impact on a jury of any possibly prejudicial pre-trial publicity. A period of eight months was mentioned.
- 25 More recently, the New Zealand Law Commission Preliminary Paper No. 37 reported the outcome of research on the ability of jurors to comply with a direction to make their decision solely on the evidence before the Court and to ignore pre-trial publicity (pages 59-62).
- 26 There can be exceptions in particular cases. One such exception is *R v Burns (Travis)* [2002] 1 NZLR 387 in which the Court considered that publication of materials suggesting that Mr Burns may have

committed a murder and then provided evidence of a confession to enable the conviction of another person for that murder was so "sensational" that a fair trial could not be assured (page 405, paragraphs 12, 13).

- 27 *R v Burns* demonstrates how difficult it is for courts to predict when trials might take place and so to predict whether any pre-trial publication might prejudice a jury. The first hearing before the Court of Appeal took place on 31 August and 1 September 2000. Following submission by counsel the Court of Appeal understood that Mr Burns appeal against conviction could be heard in late September or in October that year (page 403, para 3). This meant that any possible retrial following a successful appeal was thought to be possible within a reasonable period of the hearing then taking place. In fact, the hearing of the appeal by Burns against conviction did not take place until late in 2001. When, following a further hearing before the Court of Appeal this time of an application by Burns for further name suppression because of the possibility of charges being laid in respect of the first murder, the Court of Appeal derived considerable assistance from the research completed by Dr Young and published in the New Zealand Law Commission Preliminary Paper No. 37 (*R v Burns (Travis) (No. 2)*) (page 413, para 11).

(d) Public interest is served by publicity

- 28 The purpose for which this Commission of Inquiry has been established is to consider the adequacy of investigation of complaints by the New Zealand Police Department. At issue it is public confidence in the New Zealand Police Department. The private interests of complainants have been served by new investigations of their complaints.
- 29 In order for there to be public confidence both in the New Zealand Police Department and in this Inquiry, it is essential that the proceedings before the Commission of Inquiry be held in public.
- 30 In this sense a great deal of assistance can be found in the decision of the Court of Appeal in *Fay, Richwhite Limited v Davison* [1995] 1 NZLR 517. This case concerned the manner in which the "Winebox" Commission of Inquiry should receive evidence about the tax affairs of persons involved in transactions which had been referred to the Commission. Legislation and court decisions meant that taxpayers were entitled to expect that consideration of their tax affairs would be private, and confidential. However, the purpose for

which the Winebox Commission of Inquiry was established included a consideration of whether the Commissioner of Inland Revenue and his staff and the Director of the Serious Fraud Office and his staff had acted, in the course of their official duties, in a lawful, proper and competent manner in dealing with the relevant transactions.

- 31 The Winebox Commission had the same powers as this Commission to exclude any person from any of the proceedings (page 520, line 4).
- 32 All of the Judges noted that notwithstanding that tax affairs and litigation in respect of tax affairs are private and confidential, the objects of the Inquiry required that its proceedings be in public. See:
- 32.1 Judgment of Cooke P (page 524, line 5);
- 32.2 Judgment of Hardy Boyes J (page 529, line 6);
- 32.3 Judgment of MacKay J (page 534, line 50-page 535, line 5).
- 33 Where the concern which has given rise to this Commission of Inquiry is that complaints have not been investigated properly, a closed hearing of proceedings before the Inquiry will fail to satisfy those concerns and may create an opportunity for suspicion that this Inquiry is a further step taken beyond the bounds of public scrutiny.

Conclusion

- 34 APN is not opposed to making orders suppressing publication of the identity of persons who claim to have been victims of offences of a sexual nature.
- 35 Neither the interests of fair trial of possible charges either brought or yet to be brought nor concerns about reputation justify any suppression of publication of the identity of persons who may be said to have committed crimes of a sexual nature.
- 36 There is no principled basis upon which the proceedings before the Commission of Inquiry should be heard in private.

- 37 It is in the public interest that the proceedings before the Commission of Inquiry be in public.

Dated 13 August 2004

B D Gray