

COMMISSION OF INQUIRY INTO POLICE CONDUCT

IN THE MATTER of an Application for name suppression of subject persons

AND NEW ZEALAND POLICE ASSOCIATION
Applicant

SUBMISSIONS

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Introduction

2. ALL subject persons have been subjected to inquiry at the time, that the various complaints were first made.

3. SOME have as a result of those inquiries faced disciplinary action but none have faced any criminal charges.

4. SOME have admitted the subject of the complaints but many more have vigorously and vociferously denied any wrong doing.

5. ALL complaints notified are of a historic nature.

6. ALL subject persons seek suppression of their names and details which might identify them.

Terms of Reference

7. THE terms of reference in this matter clearly direct the Commission to enquire into the processes adopted by the Police post complaint. It has been repeatedly said, that this Commission will not make findings of guilt or innocence and in no case, has the Commission sought to hear from any of the subject persons.

8. GIVEN the focus of the Commission of Inquiry the decision not to require the subject persons to give evidence is not surprising.

Law

9. IN the first instance, the actions of this Commission are governed by the Commissions of Inquiry Act 1908 and the attention of the Commissioners is drawn in particular to Section 13:

"Powers of Judges and former Judges when Commissioners

- (1) *In every case where, under this Act, or any other Act or the Letters Patent constituting the office of the Governor General, the Governor General or the Governor General in Council appoints one or more Judges of the High Court or former Judges of the High Court, to be members of a Commission for the purpose of holding an inquiry, every such Judge will retire Judge, and the Commission of which he or she is a member, shall, for the purposes of such inquiry, have the same powers, privileges, and immunities as are possessed by a Judge of the High Court in the exercised of his or her civil jurisdiction under the Judicature Act...*
- (5) *Where any member of a Commission is a Judge of the High Court or a former Judge of the High Court, - ...*
- (b) *Section 4(1) of this Act shall, in relation to that Commission, be read as if, for the words "the District Court" there were substituted the words "the High Court"; ..."*

10. SECTION 4 provides:

"Commissioners Powers –

- (1) *For the purposes of the Inquiry, every such Commission shall have the powers of a High Court, in the exercise of its civil jurisdiction, in respect of citing parties... and conducting and maintaining order at the inquiry..."*

11. AS is recorded in Section 13 of the Commissions of Inquiry Act, High Court Judges who are Commissioners have identical powers to those provided under the Judicature Act. Section 16 thereof provides:

"General jurisdiction

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

12. THIS section is commonly accepted as providing the High Court with inherent jurisdiction to order its affairs to achieve the ends of justice.

13. SUCH power is described in McGechan at paragraph J 16.02 as:

"The inherent jurisdiction is a power allowing the Court to summarily deal with matters that arise before it to ensure the machinery of justice is able to turn smoothly... 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 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 of or fund of powers, a residual source, which the Court may draw on where necessary, whenever it is just and equitable to do so..."

14. IT is acknowledged, that those who appear as witnesses before a Court may have their names suppressed. What distinguishes that usual run of the mill from that which confronts the Commission of Inquiry, is that the subject persons are not intended in the strict sense to be witnesses, in that they are not being required to either an affidavit or present viva voce evidence.

15. THEREFORE, that which confronts the Commission is novel.

16. IT is submitted, that assistance can be derived from instances wherein the Courts have been prepared to order suppression of name particularly in cases involving issues of discipline. It is submitted, that such are analogue to the situation which currently confronts the Commission and therefore provide a principled background against which this application can be considered.

17. THE seminal decision discussing the application of Section 16 is the Court of Appeal's judgment in Taylor v Attorney-General [1975] 2 NZLR 675. This case was concerned with Mr Taylor's identification in radio broadcasts and newspaper stories the identity of Dr William Sutch. Dr Sutch had had his name suppressed through trial and after the publicity which Mr Taylor gave to the matter, Mr Taylor faced contempt of Court proceedings. He was duly fined for such contempt and appealed to the Court of Appeal arguing that the

then Supreme Court had no power to order name suppression. The judgment of the majority was given by Wild CJ who referred with approval to the judgment of the Divisional Court in R v Socialist Workers Printers & Publishers Limited, Ex p Attorney-General [1975] 1 All ER 142 when Lord Widgery CJ when discussing the differences between private sittings and those where details identifying witnesses are suppressed described it thus at page 150 (supra):

"When one has an order for trial in camera all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone. When one has a hearing which is open, but where the names of the witnesses are withheld, virtually all the desirable features of having the public present are to be seen. The only thing which is kept from their knowledge is the name of the witness. Very often they have no concern with the name of the witness except a somewhat morbid curiosity. The actual conduct of the trial, the success or otherwise of the defendant, does not turn on this kind of thing."

18. THE Court of Appeal further referred with approval in the dicta of R v Connelly [1964] 2 All ER 401 where Lord Morris of Borth-y-Gest said at page 409:

"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such a jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practise and suppress any abuses of its process and to defeat any attempted thwarting of its process."

19. AS regards the application which confronts the Commission, it is submitted:

- 19.1 The names of the subject persons are not relevant to this consideration of the Commission.
- 19.2 The Commission will make no finding as to guilt or innocence of the subject persons.

19.3 The subject persons have not been requested to give evidence, and if did so request, could well find that you declined to hear them on the basis that their evidence is not relevant.

20. BY contrast, the subject persons, many of whom deny any wrong doing could be subjected to salacious, inappropriate and intrusive enquiry by the media. Such can have no justification in law.

Disciplinary Cases

21. MANY of those cases involving issues of discipline involve medical practitioners. In this regard, I am grateful to my learned friend for bringing such to my attention.

22. THE first such decision concerns the extent of the inherent jurisdiction of the Court. In Guy v Preliminary Proceedings Committee of the Medical Council of New Zealand (1994) 8 PRNZ 109. In this case, Tipping J was asked to consider an appeal from the Preliminary Proceedings Committee which had granted interim orders suppressing the name of the appellant. Subsequently at hearing, the jurisdiction to make such an order was challenged and the appeal arose. His Honour found that pursuant to Rule 718 of the High Court Rules, the Court was stood possessed of all the powers of the Tribunal appealed from. His Honour found that the Medical Council had no power to order name suppression. Further, that whilst the Court had inherent jurisdiction, such powers were to be exercised in addition to any statutory jurisdiction but could not conflict with the statutory matrix which existed. His Honour put it thus at page 111 (supra)

"The inherent jurisdiction may be resorted to, in a matter supplementary to any other jurisdiction, statutory or otherwise, which the High Court may possess. There is no inherent jurisdiction to do anything where it is clear that Parliament has legislated to cover the point and must be taken to have decided that this Court shall not have jurisdiction to do something. In other words, this Court may exercise an inherent jurisdiction, in addition to any statutory jurisdiction which it may possess, but not in a manner which conflicts with the ambit of that jurisdiction."

23. THE Commission of Inquiry is not so fettered because the powers are as described above.

24. THE most recent consideration of this issue is the unreported decision of The Director of Proceedings v I and The Medical Practitioners Disciplinary Tribunal, being a judgment of Frater J given on 20 February 2004. Her Honour was asked to consider a series of questions posed in a Case Stated. She concluded, that the threshold in favour of suppression is lower in the arena of a Tribunal than a Court, that each case must be considered on its merits, and that in this instance, it was appropriate to have suppressed the doctor's name.

25. HER Honour confirmed the decision of the District Court to provide the subject doctor with interim name suppression pending the hearing of the disciplinary matters.

26. IT is a significant and constant thread which traverses all consideration of name suppression applications in both the disciplinary and criminal process, that the subject person be considered innocent until proven to the contrary. The Commission is reminded, that it will not be able to discharge the burden of resolving the guilt or innocence of the officers whose actions and alleged actions are the subject of this Commission of Inquiry.

27. IN Justice Frater's decision, she considered that the reputation of the subject doctor, the stress placed upon her and her family, the presumption of innocence and the corresponding concern for potential irreparable damage to reputation outweighed the general public interest considerations.

28. IT is indisputable, that the situation in which the subject persons are being placed is worse than that which confronts those who face criminal trials. In effect publication of their names could subject them to trial by media, without a right of response and the irreparable destruction of their reputations. The Commission is again reminded that many of those who find themselves the subject persons strenuously deny any wrong doing. All have been subject to previous inquiries and whilst some have faced disciplinary charges none have faced criminal charges. All allegations are of an historical nature.

29. IT is submitted, that there is no principled basis upon which name suppression could or should be denied the subject persons. Accordingly an application is made to suppress the names of the subject persons until and unless an application is made by an interested party or at the Commission's behest to lift name suppression. By that I mean, that on a case by case basis, there may be a foundation to revisit this application, and to that end, a final order suppressing the names of the subject persons is not sought at this time. For the sake of absolute clarity, what is sought is an order suppressing their name pending further order of this Commission.

Application to be in public

30. THE Commission has invited the Police Association to address it as to whether or not the proceedings of the Commission of Inquiry should proceed in private or in public.

31. THE Police Association supports and indeed seeks the public hearing of the allegations giving rise to the Commission of Inquiry. This desire is subject to a single caveat, which is that the rights and interests of the subject persons should not be sacrificed for the purposes of conducting a public inquiry. It is submitted, that there is no proper basis for requiring the publication of their names and that the business of this Commission of Inquiry can proceed unimpeded if the names and details identifying the subject persons are suppressed.

32. THE Police Association accordingly submits that the hearings of this Commission of Inquiry should be conducted in public save for the orders sought in these submissions.

DATED at New Plymouth this day of 2004

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SW Hughes

Counsel for the Police Association

TO: Counsel assisting the Commission

AND TO: Counsel for the Commissioner for Police

AND TO: Counsel for the Police Complaints Authority

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