

IN THE MATTER OF THE COMMISSION OF  
INQUIRY INTO POLICE  
CONDUCT

AND

IN THE MATTER OF AN INTERLOCUTORY  
APPLICATION AS TO  
PRIVACY ISSUES

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SUBMISSION ON BEHALF OF SUBJECT PERSON

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**MAY IT PLEASE THE COMMISSION:**

**Introduction:**

1. I seek leave to place a submission before the Commission on behalf of the subject person , for the purposes of the name suppression, and related issues, to be heard on 13 August 2004.
2. I submit that such a person is an "*interested party*" for the purposes of s.4A(1) of the Commissions of Inquiry Act 1908.

**Name Suppression:**

3. I am aware of the "*generic application*" filed on behalf of the Police Association, which raises the possibility of a presumptive order being made, protecting name and all identifying particulars of both complainants, and subject persons/persons complained about.
4. I have seen Ms Hughes' submissions, and wish to support them in their entirety.
5. The Commission must balance the principles of open justice on the one hand, and any particular privacy interests on the other (the principles of open justice are conveniently summarised in "The Principle of Open Justice in a Civil Context" [1995] NZ Law Review 214; and see also the helpful summaries in *Director of Proceedings v Nursing Council* [1999] 3 NZLR 360, and *Director of Proceedings v I and the Medical Practitioners Disciplinary Tribunal*, Frater J, 20 February 2004, CIV 2003-485-210: this last decision is at present the subject of an application for special leave to appeal to the Court of Appeal, in the Court of Appeal).

6. I address the issue particularly from the standpoint of a subject person/person complained about. The Terms of Reference specifically exclude from the Commission's considerations, a determination of "*the guilt or innocence of any particular individual in relation to any alleged sexual assault or other alleged criminal offence*". The focus is on the "*conduct, procedure and attitude of the Police in relation to allegations of sexual assault...*".
7. The emphasis is on process, not substantive merits.
8. Accordingly, any attempt – whether by a complainant or a subject person – to traverse issues of guilt or innocence, cannot be permitted by the Commission.
9. However, the Commission has to receive some contextual evidence, at least of the complaint laid, in order to meet its Terms of Reference.
10. The inevitable consequence of the tension between receiving evidence as to process, but not being able to deal with the substantive merits, is that subject persons will inevitably be placed in a situation where they simply cannot "*defend*" the complaint. Yet such a person runs a significant risk of damage to reputation. In *Erebus (No. 2)* [1981] 1 NZLR 618, that damage was recognised as potentially "*devastating*". All the more so, because there is no right of appeal. Here, there is not even a proper opportunity for the affected person to put his own case.
11. In those circumstances the only appropriate step is to suppress names and other identifying particulars.

**Private Hearing:**

12. Submissions are also sought on the wider issue of whether the proceedings before the Commission should be conducted in public or in private.

13. It is submitted the Commission will be assisted by Fay, Richwhite Limited v Davison [1995] 1 NZLR 517 (CA) – particularly :
- Cooke P, pages 523-4;
  - Hardie Boys J, pages 529-30.
14. The Commission's Terms of Reference ("*General Provisions*") permit the hearing of its proceedings in private, and exclusion of any person from those proceedings. In the end, the judgment call is for the Commission.
15. In the Fay, Richwhite case, the Court of Appeal found persuasive, in that particular instance, the following passage from the relevant ruling of the Commissioner:
- "6. This Inquiry must be conducted in such a way that (whatever the result may be) the public will have confidence in the manner in which it is carried out. What confidence will the public have in an Inquiry, where all the evidence which goes to the heart of the Inquiry in relation to the Inland Revenue Department's investigations, is given behind closed doors?*
- 7. To learn of a large part of the proceedings only in my eventual report is a poor substitute for following these proceedings as they take place."*
16. No doubt, in the present instance, transparency is an aspect of the public interest which has to be balanced against any particular requirements, which might dictate the need for a private hearing. It is submitted the main mechanism for achieving the right balance will be suppression orders; at this stage, then, the direction should be that the anticipated hearings be in public, but it should be recognised that such an indication will have to be the subject of any particular applications which may be made hereafter, and which may require a reconsideration of position.

Dated: <sup>12</sup> August 2004

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Counsel for Subject Person :