

COMMISSION OF INQUIRY INTO POLICE CONDUCT
PUBLIC HEARING HELD ON 13 AUGUST 2004
Commenced at 9.30 a.m.

PRESENT

Commissioners
Justice Robertson and Dame Margaret Bazley

Counsel for the Commission
Ms M Scholtens QC and Ms B Hunt

Counsel for the NZ Police
Ms K McDonald QC and Mr D Boldt

Counsel for the Police Association
Ms S Hughes

Police Managers Guild
Mr E Cooper

Counsel for Crown Law
Ms N Crutchley

Counsel for APN New Zealand Limited
Mr B Gray

Counsel for Dominion Post and
Fairfax Group Publications
Mr P McKnight and Mr R Stewart

Counsel for X
Ms J Ablett-Kerr QC
Mr M Phelps

Counsel for TVNZ and TV3 (Canwest
TV Works Limited)
Mr W Akel

Commission Staff
Ms R Boyack - Executive Officer
Ms E Jeffs - Advisory Officer
Ms J Harris - Information Officer

HON JUSTICE ROBERTSON: Please be seated.

REGISTRAR: This hearing of the Commission of Inquiry into
Police Conduct is now in session.

HON JUSTICE ROBERTSON: The Commission has received an application from the Police Managers Guild for full party status. It is minded to grant that application. Are any of the existing parties wishing to be heard on that matter?

MS McDONALD: No, Sir.

HON JUSTICE ROBERTSON: Well, in that case, full party status is accorded to the Police Managers Guild, together with the existing parties, New Zealand Police, Police Complaints Authority, Police Association. As we have indicated in the past, arrangements will be made from time to time in respect of particular aspects of our work for people who have an interest in that.

The second issue which we wish to consider today relates to the controversial issue as to the conduct of this inquiry and the competing interests which arise with regard to it. Dame Margaret and I determined that it would be appropriate to hear those who had a view and an interest, in open session, to determine on at least a starting point with regard to how we would operate, realising always that our overwhelming obligation is to be fair and to maintain integrity in what we do. Although we will endeavour to lay down uniform practices and approaches, necessarily there may be occasions where we will have to revisit issues in particular circumstances because of unique factors which have arisen.

What I am proposing to do is to invite Ms Scholtens to first address the Commission on the underlying issues and then to hear from any of the parties who wish to be heard.

We have sent notification of today to people who have expressed interest to us. Some people think that because we tell them that we are doing something, we are of the view that they have some particular contribution to make. The system isn't working like that. If people tell us that they have an interest, then we are advising them of what we are doing so that they can initiate action. That opportunity has been provided and will continue to exist. I am conscious that a number of representatives of the media are present and may wish to be heard.

I perhaps should identify them, I will get it wrong if I go from left to right or right to left, but you are in my

Immediate sight Mr Akel.

MR AKEL: I appear for Television New Zealand Limited and also Canwest TV Works Limited, which of course is TV3, formerly TV3 Network Services, so I appear for both the TV channels, Sir.

HON JUSTICE ROBERTSON: Thank you, Mr Akel. Mr McKnight?

MR McKNIGHT: I appear with Mr Stewart for the Dominion Post newspaper and the Fairfax Group Publications.

MR GRAY: I appear for APN New Zealand Limited, the publisher of the New Zealand Herald and other newspapers throughout New Zealand.

HON JUSTICE ROBERTSON: Thank you. Ms Ablett-Kerr, you appear for?

MS ABLETT-KERR: I appear for X, together with Mr Phelps.

HON JUSTICE ROBERTSON: What I propose to do is invite Ms Scholtens to address and then, Ms McDonald, do you intend to speak to the submission?

MS McDONALD: Yes, I do, Sir.

HON JUSTICE ROBERTSON: Ms Hughes, Mr Upton is not going to be present, is he, but he's been in touch with you?

MS HUGHES: Yes, Sir.

HON JUSTICE ROBERTSON: Mr Cooper, I will hear you if you wish to speak. I think it would then be appropriate to hear Ms Ablett-Kerr, and then I will hear the media at the end of that and then Ms Scholtens. I am grateful to those of you who did respond to the invitation to provide us with some material in advance, which both Dame Margaret and I have read. There will be no need to read any of that material. I have no objection to it being made available to the press bench.

I do want to remind people, however, that some of the issues which will be canvassed are subject to orders which exist in another place. Although it may be necessary for us, at least by implication, to avert to those matters, nothing said or done in this place can have any effect or impact on orders which have been made in another place. I can't hold your hands, the media

will have to ensure that they do not, in reporting anything which occurs here, place themselves in jeopardy of action in another place.

Does anyone have any questions or comments of a general sort before I invite Ms Scholtens to address? Thank you, Ms Scholtens.

SUBMISSIONS BY MS SCHOLTENS QC

MS SCHOLTENS: Thank you, Sir. The two key issues that are before the Commission today is first, should we be sitting in public or private? That's a general proposition and also a proposition that becomes live, particularly where there are pending criminal prosecutions which may bear on this Commission's work.

Secondly, if we are sitting in public, what approach to witness identification should be taken?

A memorandum that I prepared setting out what I see is the relevant legal principles has been circulated to all those persons who indicated that they were appearing today. So, that's available for anybody to comment or make submissions in relation to. It doesn't go into, obviously, the merits and how the Commission should exercise its various powers and discretions but attempts to set out the legal parameters of them.

Invitations were sent to all those who had registered a formal interest in this matter, inviting them to send in written submissions if they were not proposing - if they were not in a position where they could appear. We have some written submissions from persons who aren't here today. They have been made available to the Commission and also there are copies available for anyone else who is interested. There are four of them.

The first is from the Police Complaints Authority, which is a party to the inquiry. Mr Upton effectively submits that hearings should be in public as far as possible. He refers to the rights that are to be balanced and he supports the suppression of names of complainants and those complained about, essentially on the basis that they are background matters only and not matters which require focus, or ought to have any focus.

Then we have a submission from the Wellington Sexual Abuse Help Foundation and a number of other related organisations. They emphasise the importance, as they see it, that the individual complainants should be given an option as to how they give their evidence, and they support whatever measures are appropriate to make these people feel comfortable telling their story.

The third submission is on behalf of a person who is the subject of a complaint.

Mr B has made that submission in writing. He supports the generic application for a presumptive order of name suppression and identity suppression, that I understand Ms Hughes will be making from the Police Association.

He refers to the limits on the Terms of Reference and, in relation to private hearings, he submits that the primary mechanism for achieving the right balance is the use of suppression orders and so shouldn't get into a situation where private hearings are necessary, at least at this stage.

And then finally, there is a submission from Mr Y for one of the persons who has also been identified as relevant to a complaint.

He submits that the interests of a fair trial require the Commission to do nothing until the matter is disposed of, and that is a submission that he has made earlier.

He makes particular submissions relating to suppression if the Commission does proceed, but he raises a particular concern that any specific evidence relating to specific events, whether the parties are named or not, still has the real potential, he says, to prejudice a subsequent trial.

He also seeks the non-publication of any submissions, and I assume, Sir, that would apply to the submission that he has put before the Commission today.

So, those are the four submissions received from persons who aren't here today to support what they have said.

I have also, together with Commission staff, tried to ascertain the views of those persons who have made complaints that we have been focusing on in terms of getting ready to hear evidence about. These people have come forward on the basis that this is a public inquiry and in general they support the inquiry being heard in public; they want the facts in the public arena. They want the Police to be accountable publicly.

As far as name suppression goes it really is a case-by-case situation. Generally they are concerned, if not to protect their own names and identities, but to protect the identities of their family, their children and grandchildren where they are involved or implicated.

And so, overall, there's a view that name suppression may be appropriate, but there will be particular cases where I think those complainants will want their identity made public.

Their views, of course, unsurprisingly, about the subjects of their complaint, is that they are not in favour of suppression.

That's essentially all I think I need to raise with the Commission at this stage.

HON JUSTICE ROBERTSON: Ms Scholtens, I had understood it was apprehended that the Solicitor-General would be represented this morning?

MS SCHOLTENS: That was my understanding too, Sir. I understood Ms Crutchley was going to appear.

HON JUSTICE ROBERTSON: It may be that because we've sat at a non-conventional time for those who practice in the High Court she might have been caught short.

MS SCHOLTENS: Perhaps one of the Commission staff would mind giving her a call.

HON JUSTICE ROBERTSON: Just check with Crown Law whether there is to be an appearance.

All right, thank you. I will invite you to address further at the end, Ms Scholtens.

Ms Hunt, do you wish to be heard?

MS HUNT: I have nothing to add, thank you, Sir.

HON JUSTICE ROBERTSON: Yes, Ms McDonald?

SUBMISSIONS BY MS McDONALD QC
ON BEHALF OF THE NEW ZEALAND POLICE

MS McDONALD: Thank you, Sir. I have two submissions, I have separated them, Sir, one dealing with the specific issue of name suppression in respect of the complainants and subjects of the initial complaint, and a separate submission in relation to the public/private matter.

I wonder if I could just distribute those.

(Written submissions distributed
to Commissioners and counsel)

Perhaps while they're being distributed, I could deal first with the name suppression in relation to complainants and subjects of the initial complaints because my submission in that regard is fairly brief, although committed to writing, I probably don't need to go through it in its entirety, I will just speak to it.

The Commissioner supports the presumption in favour of suppression of the names of complainants where it is sought, along with the names of the Police members or associates who are the subjects of the initial complaints.

That submission is really made and arises out of the fact that suppression is required or appropriate for natural justice reasons, the Terms of Reference require the Commission to consider the process the Police followed in investigating these complaints and not the substance of the complaints themselves.

As I understand the intended process to be followed, for the most part, the subjects of the initial complaints are unlikely to be required to be giving evidence and the Commission's focus will be on the process of the investigation, rather than the allegation and specifically the Terms of Reference exclude from, as I understand it, your consideration, any final decision or judgment about the substance of the allegations, and for those reasons it would seem appropriate for name suppression to be granted on a generic basis for the subject of the initial complaints, and I certainly have no objection on behalf of the Commissioner to the complainants having suppression to the extent they wish that to happen.

Turning to the other issue, to the question of

public or private hearing, that's dealt with in the second of my submissions.

As I understand it, and as has been conveyed to me through counsel assisting, the Commission seeks submissions on this issue, in particular on the effect on its proceedings of possible criminal charges. The matter has been put to me on the basis that you have asked for submissions as to whether it would be - whether it should continue as a public inquiry, or whether in the event the charges remain outstanding the Commission should proceed in private.

In my submission, Sir, no issue really arises in the event that no criminal charges remain outstanding at the time we embark upon the substantive part of the inquiry, but even if charges do remain before the Courts, the Commissioner of Police supports the continuation of the inquiry and he considers that its proceedings should take place openly and in public, subject only to any suppression orders that may prove necessary as the inquiry proceeds.

The Commission was set up to address issues that have given rise to considerable public disquiet and the public interests that gave rise to the Commission has plainly not diminished. It's important that the Police have the opportunity to answer the allegations of investigative failure in the manner in which they have handled complaints of sexual misconduct against colleagues and associates, and it will also be important that any shortcomings in the way that the Police have handled these complaints are identified and are the subject of appropriate recommendations.

The Commissioner's position is that that process will be a vital part of restoring public confidence in the integrity of the Police and that in itself is a matter of some significant public importance.

The matters that are presently before the Commission, none of them relate to the matters that are or may come before the Courts. I am talking there about the first group of cases that you are seized of, and there are at least a dozen, maybe more.

Once the Commission has heard evidence as to the

complaints presently before it, it's the Police's intention, subject to your position on it, Commissioners, that they will want to present to you approximately 200 additional files covering the period 1979-2004 for consideration initially on the papers but analysis of those files, that will be a time consuming process but it will provide you into an insight of the performance of the Police in this area over the last 25 years.

That process may and is probably likely to identify further cases where oral evidence should be heard. Disclosure of these files, in my submission, will not risk the integrity of any other proceedings and will put those cases about which the Commission hear, say, oral evidence in their proper perspective.

It's my submission that the cases that are presently before you, together with the 200 odd files, will provide the Commission with the best basis on which to assess police conduct in these areas and in terms of the Terms of Reference, over the 25 year period.

It also means that the recommendations, or any recommendations that you may make, will be based on a comprehensive analysis of Police performance in this area over that period of time.

HON JUSTICE ROBERTSON: Do I understand you, Ms McDonald, to be saying that, assuming that there are criminal charges anywhere, we should investigate those simultaneously with criminal processes going on?

MS McDONALD: I am not sure that it needs to be simultaneous. My position, Sir, is that, with the more than dozen cases that you are seized of already, plus consideration of the other 200, that that process will take some time and by the time that process is reached, there will be a greater clarity about what the position is.

Although I am not formally instructed in relation to the criminal investigation, those matters are ongoing.

HON JUSTICE ROBERTSON: I just do have a little difficulty with the notion of this Commission and a criminal process

occurring simultaneously. My instincts suggest to me that that is a recipe for disaster.

MS McDONALD: I understand your concern, Sir, but I suppose one needs to step back and look at the basis upon which this inquiry was set up. At the time that the government announced this inquiry, the decision had been made by the Commissioner of the Police to reinvestigate matters. The Terms of Reference were set against that knowledge and both you and Dame Margaret were appointed as senior and experienced Commissioners to manage the very difficult juggling act that we now find ourselves in.

The submission that I am making on behalf of the Police is that that is a juggling act which can be managed. If one starts from the proposition that the media will act responsibly in the way they report matters, and, with respect, I don't think we can assume that the media will not act responsibly in the way they report any of these matters, and the inquiry that you and Dame Margaret embark upon is done cautiously and, where necessary, suppression orders could be used if there are sensitive aspects of the evidence that require to be dealt with in public, and we are not going to know that really until we're further on, then the matter and the inquiry, in my submission, can be managed.

HON JUSTICE ROBERTSON: Thank you, I hear your submission.

MS McDONALD: Paragraphs 5, 6 and 7 deal with the issue of media coverage and I perhaps don't need to read those in their entirety. I've really made the point that the media are obliged to report matters in a responsible fashion, and one must start from the proposition that they will do so and that they will not report matters in a way that leads to prejudice of any forthcoming criminal matters that may eventuate.

In the end, Sir, the Commissioner's position is that he supports the continuation of this inquiry. He supports its continuation in a public setting and he would only support a move to private sessions if that was a last resort, but does support the use of proper mechanisms as the inquiry proceeds to manage any particularly sensitive issues which you and Dame Margaret feel in your judgment may lead to difficulties with any future criminal proceedings, and the mechanisms there that I am particularly thinking of, and we have already discussed, the possible use of summaries of fact to deal with some of the more sensitive aspects of the first few

cases that will be talked about, and suppression orders in relation to aspects of the hearing.

Of course, the use of suppression orders would not mean that the media would not be present, or the public, rather, would not be present. It would just affect, obviously enough, the reporting of matters.

HON JUSTICE ROBERTSON: But in respect of a matter which involves a pending trial, the presence of the media would be somewhat hollow. I have difficulty in seeing how there could be any publicity permitted about matters which were the subject of a pending trial.

Does it have total integrity about it to say to the press, "We're delighted to have you here. We hope you will send large teams but there won't be a single word that you can publish in any shape or form for a year or two"?

MS McDONALD: I suppose where I'm coming from, to start with, is there's plenty of work, and important work and work that falls squarely within the Terms of Reference, in relation to the group of other cases arising from the women that have made complaints and put them before this Commission.

And it may be, and I am only speculating at this point, but it may be that after you have heard what will involve quite a lengthy process, detailed evidence from the Police and from the complainants in respect of the other matters, you and Dame Margaret may well feel you could report on an interim basis in relation to some of the Terms of Reference. I don't know, that would obviously be a matter for you and Dame Margaret.

HON JUSTICE ROBERTSON: Well, it's an issue I think we need to talk about. Is it being suggested that we could provide a report that would have any value on culture, ambience approach, which did not cover the matters which led to the formation of the Commission?

I have some difficulty, at least at first blush, in seeing any utility in a report which says, "This is how the Police operate, except in one, two, three, four,

five, whatever number of cases, which are off our territory."

I mean, it seems to me if the Commission is to report, it has to report on the whole picture; the goods, the bads, if there are things on both sides.

MS McDONALD: Well, with respect, Sir, I don't agree with you. There is, in the Commissioner's view and his clear instructions to me, a very strong public interest in this inquiry, but in having an open and public inquiry that may go some way to identifying, addressing, the sorts of issues that are raised, and that that is necessary in order that there can be some restoration, hopefully, of confidence in the New Zealand Police.

The Police need - those matters need to be inquired into and the Police need to address them. This is the only forum in which that can be properly done.

The other comment I would make in relation to your most recent observation, Sir, is that rather, with respect, diminishes the significance of that first group of cases and the other 200 files, these other files are equally important and they will give you and Dame Margaret a very good overview of where there has been, if there has been, any failure in Police investigation in matters of this type.

HON JUSTICE ROBERTSON: There is no question about that. The issue, I suppose, which will have to exercise the Commission, is the question which is posed most starkly in Mr Y's submission, as to why, if there are two competing interests and two competing priorities, why the Commission has to either be given precedence or simultaneous activity with the criminal process.

You will have seen Mr Y's submission, that we should defer until an uncontaminated criminal process has been given an opportunity to run, and then we should investigate, in public, all matters and not just some. On that submission of his, if you wish to make a

response, I would be glad to hear you from.

MS McDONALD: I haven't seen that submission. It wasn't copied to me. I simply heard Ms Scholtens's comments about it a moment ago.

But I would like to make a response to it in this form, the Commissioner supports the continuation of this inquiry at this stage and believes there is sufficient for you and Dame Margaret to consider of some importance at this point and that it would be in his view, I know, a very unfortunate situation if this inquiry was discontinued at all, and he, for the reasons I have already said, believes that it is important in the public interests that these matters are addressed fully and now because there is a very strong public wish that that happen, and that it is also in the Police interest that they are addressed now so that matters can move on from here and that the Commissioner can take steps to start restoring public confidence in the New Zealand Police, and that is a matter of significant importance.

HON JUSTICE ROBERTSON: Well, is the submission, Ms McDonald, that we could complete the inquiry before criminal processes had been concluded?

MS McDONALD: Sir, I cannot predict how long the criminal process may or may not take.

HON JUSTICE ROBERTSON: Yes, all right, thank you.

MS McDONALD: Thank you, Sir.

HON JUSTICE ROBERTSON: Ms Hughes?

SUBMISSIONS BY MS HUGHES
ON BEHALF OF THE POLICE ASSOCIATION

MS HUGHES: Your Honour, my submissions are primarily about the question of name suppression. Did you wish to hear me on that subject now, or did you wish to hear me just briefly on the question of public/private hearing?

HON JUSTICE ROBERTSON: Both.

MS HUGHES: Both.

(Written submissions distributed
to Commissioners and counsel)

HON JUSTICE ROBERTSON: I am just trying to get my head round the order, Ms Crutchley, I think probably it is more sensible if I invite you to address after all other counsel and before Ms Scholtens replies.

MS CRUTCHLEY: Thank you, Sir.

MS HUGHES: With the exception of the matter where Mr A and Mr B are acting, all other subject persons are represented by the Police Association.

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

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

Some have admitted the subject of the complaints but many more have vigorously and vociferously denied any wrongdoing.

All complaints notified are of a historic nature.

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

The Terms of Reference in this matter clearly direct the Commission to inquire 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.

Given the focus of the Commissions of Inquiry, the decision not to require the subject persons to give evidence is not surprising.

In the first instance, the actions of this Commission are governed by the Commissions of Inquiry Act and the attention of the Commissioners is drawn to sections 13 and 4.

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.

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

Such power is described in McGechan J 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 ..."

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 this 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 swear an affidavit or present viva voce evidence.

Therefore, that which confronts you is in that respect novel.

It is submitted that assistance can be derived from instances where the Courts have been prepared to order suppression of name particularly in cases involving matters of discipline. It is submitted that such are

analogous to the situation that currently confront the Commission and therefore provide a principled background against which this application can be considered.

The seminal decision discussing the application of inherent jurisdiction is that of *Taylor v Attorney-General*. 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 Court was given by the Chief Justice who referred to the British decision of *Socialist Workers Printers & Publishers, Ex p Attorney-General*. When discussing the differences between private sittings and those where details identifying witnesses are suppressed described it thus:

"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."

The Court of Appeal referred with approval to the decision of *R v Connelly*, another English decision, where it was said:

"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 practice and suppress any abuses of its process and to defeat any attempted thwarting of its process."

As regards the application which confronts the Commission, it is submitted:

The names of the subject persons are not relevant to the consideration of the Commission.

The Commission will make no finding as to guilt or innocence of the subject persons.

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

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.

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

The first such decision concerns the extent of the inherent jurisdiction of the Court. In *Guy v Preliminary Proceedings Committee of the Medical Council*, 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 the Court 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:

"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."

The Commission of Inquiry is not so fettered because

the powers are as described above.

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 in that case, it was appropriate to suppress the doctor's name.

Her Honour confirmed the decision of the District Court to provide the subject doctor with interim name suppression pending the hearing of disciplinary matters. It is a significant and constant thread which traverses all consideration of name suppression applications in both the criminal and disciplinary 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 inactions are the subject of this Commission of Inquiry.

In Frater J'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.

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 wrongdoing. All have been subject to previous inquiries and whilst some may have faced disciplinary charges, none have faced criminal charges. All allegations are of a historical nature.

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, 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.

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.

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.

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

HON JUSTICE ROBERTSON: Do you wish to comment at all on the issue of whether there is a different situation which would arise if there were criminal charges pending at the same time?

MS HUGHES: I adopt the submissions of Ms McDonald in that regard, Sir, that it is very important this Commission of Inquiry get underway. There is a considerable volume of matters that need to be attended to. They are obviously of concern to the complainants but, I can assure you, they are of equal concern to the subject persons and the Police Association generally.

HON JUSTICE ROBERTSON: And that the Commission could complete its task while there were still matters outstanding in the criminal Courts?

MS HUGHES: Yes, Sir, because, of course, this Commission is tasked with considering the culture of the New Zealand

Police, and if you take the Garrett and Nicholas matters, they themselves would not demonstrate a culture. A culture needs to be considered against an examination of a far greater matrix of matters and complaints and concerns and policies, etc..

Furthermore, if you don't proceed on that basis, then you deny all of those people their opportunity to be heard and to have the matter resolved now.

It must follow that it is possible to protect the rights and interests of those who may face criminal charges through various orders of this Commission and the Courts.

HON JUSTICE ROBERTSON: I wonder if you could help me with what you see as the mechanism.

You're saying that we could complete a report, including any matters which are the subject of a criminal trial, even though the criminal trials were on foot at the same stage?

MS HUGHES: The criminal trials will of course be concerned with a finding of guilt or innocence of anyone prosecuted. This Commission is concerned with processes conducted by the Police post-complaint.

There is, if you like, a demarcation line which naturally exists.

HON JUSTICE ROBERTSON: It appears a very sandy soil that it exists in, Ms Hughes. I'd be assisted if you tell me how one draws this bright line without the one contaminating the other?

MS HUGHES: It is, as we've discussed already, Sir, that in a number of the cases which are already before the Commission, there are assertions made by complainants that certain wrong things happened to them at some time in the past. There is an equal and opposite denial of that.

That is not of concern to you. What is of concern to you is, having received a complaint, what did the Police do?

So, how can that be any different to a matter before a criminal Court when I would assume that any wrongdoing is denied? And then the focus for that Court is focused

on a finding of whether that denial is accepted by a jury or not, and you have a difficult focus. Your focus is an assumption that a complaint was made on "X" date, what happened to it post that complaint.

HON JUSTICE ROBERTSON: Thank you.

MS HUGHES: Thank you, Sir.

HON JUSTICE ROBERTSON: Mr Cooper, do you wish to be heard?

MS HUGHES: I understand the Managers Guild simply adopts the submissions made already.

HON JUSTICE ROBERTSON: Ms Ablett-Kerr?

SUBMISSIONS BY MS ABLETT-KERR QC

MS ABLETT-KERR: I am obliged to you, Sir. I appear to present views on behalf of my client on the issues that we were invited to express some views on.

Firstly, the issue of whether the hearings should be in public or in private. This is a matter of discretion, I accept the outline of the legal principles as espoused by Ms Scholtens in her submissions. I've had sight of them and I accept those are the appropriate principles.

My client is very clear in her instructions that she believes that the Commission should be sitting in public. It is a Commission of Inquiry into Police Conduct and the very nature of the inquiry that you are about suggests that any hearing really does have to be in public, otherwise it may well defeat the purpose of the inquiry in the first place.

It's only by a public hearing that sufficient transparency can be accorded to the process, that the integrity of the proceedings its demonstrated to the whole of New Zealand, and that public confidence in both this process and the New Zealand Police Force can be enhanced.

It seems to me that the submissions that you have already heard really endorse this prospect, this desire to have the matter heard in public.

There is a need of the public to have confidence in its Police Force and a public hearing of an inquiry into its conduct is obviously the best way, in my submission, for this matter to proceed.

So, I have - in the submissions that I have put in front of the Commission, you will see that I have referred to the lecture that Sir Ivor Richardson gave, the F W Guest Lecture, where he draws distinctions

between certain types of inquiry. This inquiry is clearly an investigative inquiry and there is a legitimate public interest. My client has both a public interest and she has a personal interest in what takes place.

I have also referred you to Fay, Richwhite v Davison where Hardie Boys J indicated that section 4 suggests that an inquiry will normally be conducted in the same way as Court proceedings in public. I don't really seek to develop any more of my submissions because it does seem to me that the case for a public hearing, as opposed to a private hearing, which of course you have the right to hold if you think that that is appropriate, is in fact overwhelming and so I don't seek to develop that.

I move, if I may, to the question of whether there should be name suppression or not.

HON JUSTICE ROBERTSON: Well, the only comment that you may wish to make on this point that's being made, is whether that would be acceptable if it was seen as a necessary mechanism to preserve the integrity of simultaneous criminal process.

MS ABLETT-KERR: Yes, in terms of name suppression, you're talking about?

HON JUSTICE ROBERTSON: No, I'm talking about public/private hearing. If the concern were contamination of criminal process, whether in that circumstance, even although public hearing may be the desired alternative, private hearing would be acceptable so that there was no danger of contamination.

MS ABLETT-KERR: She wants matters to proceed as quickly as possible and as thoroughly as possible, but she recognises, and has accepted the advice that I have tendered, that there cannot be contamination of the criminal process. She does not want contamination of the criminal processes.

So that if this Commission did determine that there were some aspects that needed to be not publicised, then of course she would accept that because the criminal process is a vital process, as far as she is concerned.

Now, whether the concerns to protect that process can be met by suppression, as opposed to a private

hearing, is ultimately a matter for you, Sir, to determine because you will know where you're at at a particular point in time and the type of material that you're dealing with.

I think it's very difficult to set a hard and fast rule about these things because you don't yet know, as I understand it, the precise issue you're going to deal with at any given point in time.

So that, you have the right to - whilst you might say in a general sense the hearings will be public, but you reserve the right at any given point in time, providing the Commission feels that it is justified, to not have a particular part of the hearing certainly publicised. Well, you'd have the right to have it heard in private but you'd have to exercise that discretion very sparingly because having the media present, even if they can't publish it, is actually quite a good thing, in my submission.

I heard you indicate earlier that we can't really invite droves of them to come down to hear something that they can't do anything with, not for a while, but I don't - whilst it sounded unattractive to have these people sit here at considerable expense, there is something actually very valuable in having the media here even if they are held back from publishing for a considerable period of time because the public then know that at some stage the information that has been heard can in fact be put out there; it isn't hidden, it isn't behind closed doors, it isn't a star chamber, the whole process would become accountable and it will become transparent, even if it can't be transparent in its entirety at a particular point in time. So that, I probably draw back from the position that I understood you to be articulating to me -

HON JUSTICE ROBERTSON: Testing.

MS ABLETT-KERR: Testing, yes. Well, I draw back from it. I support the view that the media should have access to the whole of the hearing and that control, if the Commission believes that there should be control, because it does have other processes to consider, can be done by suppression orders, which no doubt the Commission would articulate with great clarity and great firmness to the media, and sufficient control could be gained, I think, in that way, and that would be my submission on the matter.

HON JUSTICE ROBERTSON: Thank you.

MS ABLETT-KERR: In relation to name suppression, I've already indicated that her name is in public. She doesn't resile from it and she will live with the consequences of the publicity that has been and will be, but she also strongly supports the view that the public interest demands that the names should not be suppressed.

I would seek to invite you to reverse Ms Hughes' position on this. Ms Hughes says you should suppress the names of all subject persons and then if there is an individual application to lift by a party, you can deal with it on a case-by-case basis.

In my submission, you should not suppress. Your basic rule should be no suppression. Transparency and accountability is vital to the integrity of this process and the idea that you're going to suppress names, and I include both complainants and subject persons, as a starting point immediately puts this cloak of secrecy about the matter. Nobody is really going to know what's going on.

If you start from the point where you say, "All matters are capable of being reported upon, seen, but we will identify those matters as we go along," and I rather suspect that you're going to have an army of counsel here who will tell you when you should be suppressing matters, "we will suppress those matters as and when they become demonstrably necessary."

So, for example, if we look at complainant persons, the argument for their names to be suppressed can clearly be dealt with by counsel assisting. There is obviously good communication between complainant persons and the counsel that have been made available by the Commission to take care of their interests. If suppression of their names becomes necessary, desirable, then the Commission could listen to the argument and make a decision accordingly.

As to subject persons, then the same can be done for them, but there is a shift in the burden. The shift places the burden upon the individual who seeks suppression to persuade the Commission that it should exercise its discretion in favour of suppression.

HON JUSTICE ROBERTSON: What is the relevance of the identity of the person complained about to this Commission?

MS ABLETT-KERR: Well, I think there is something that is inherently concerning, I don't want to put it higher than that, but concerning, about allegations being made by people who will not identify themselves, who don't seek to identify themselves. Now, there may be very good reasons, of course, why such people don't want to identify themselves. And where there are good reasons, no doubt the Commission would consider them very favourably. After all, our criminal law actually protects complainants -

HON JUSTICE ROBERTSON: No, you're getting off the question I asked, Ms Ablett-Kerr, with respect.

MS ABLETT-KERR: I'm sorry, Sir, would you like to focus me?

HON JUSTICE ROBERTSON: What is the relevance of the name of the person against whom an allegation was made by a member of the public of sexual misconduct to the Terms of Reference of this Commission?

MS ABLETT-KERR: Yes, I'm sorry, I got you the wrong way round.

Well, the relevance is that you may get further evidence becoming available. It is the same relevance that applies to a criminal Court. Why do we have publication of people's names? Because you may get further evidence coming forward. It's very important that the Commission does get as much information as it possibly can.

HON JUSTICE ROBERTSON: Why would we want information about a matter which we have been specifically excluded from looking at?

You see, the task of the Commission begins, as I read the Terms of Reference, on the day that a person fronted up to a Police Station and made a complaint of wrongdoing against them, and we are, in quite explicit words, excluded from considering the guilt or innocence, the validity or otherwise, of the allegation then made.

It seems to me that there is strength in Ms Hughes' submission, simply in the principles of natural justice, because if we are going to identify people, then we are going to have to give them an opportunity to be heard on that point.

Now, everyone has pussy footed around this morning about how long this Commission might sit for. It will be decades if we are going to let people get into the issue of whether the allegation was true or not true.

MS ABLETT-KERR: That isn't what I'm talking about. We all who have appeared in front of you, and will appear in front of you this morning, entirely accept that what this Commission is to investigate is the process.

HON JUSTICE ROBERTSON: The process "post-complaint".

MS ABLETT-KERR: Post-complaint. And it is not guilt or innocence. Therefore, what is the problem with identifying those individuals who are part of the process?

HON JUSTICE ROBERTSON: When you make an allegation against someone, the principles of natural justice are orthodoxly interpreted as meaning people have an opportunity to defend themselves and to challenge the allegation against them.

MS ABLETT-KERR: Well, there are many ways of being heard, of course; having counsel represent you and presenting your position is a way of being heard. My client is being heard this morning through my appearance here and in front of you, and the same will apply, presumably, to subject persons. Presumably, the other individuals who are here this morning will be representing the parties that have nominated them to come forward. So, there is a question of being heard. This Commission really is surely going to be interested in systemic, whether there has been - whether there is a systemic failure.

Now, if you conceal identities, then the opportunity for the Commission to identify evidence that might support systemic failure, or a systemic attitude to investigating complaints, say, of a sexual nature, are inhibited. We all know that the winds of publicity help bring things to the surface, help bring things out.

If it wasn't for publicity, then these cases would not have got to the point where it is. This Commission probably wouldn't be sitting.

Now, if - I appreciate the argument and of course I've argued on many occasions for the need -

HON JUSTICE ROBERTSON: I was just making a note of your new stance, Ms Ablett-Kerr. I will look forward to waiting for it if I ever get back on the bench.

MS ABLETT-KERR: I was quite sure you would, Sir.

But the protection - I accept that the protection of the individual and the individual's rights should be a matter of concern to the Commission but there are ways in which you can do it, and you can do it. I am quite sure Ms Hughes would get up if there was a subject person against whom an allegation is made and she felt that there should be protection of that person because the potential for unfairness and prejudice far outweighed the public interest in knowing, that would be a matter for the Commission and the Commission would suppress.

What I am putting to you is that you shouldn't start from the position that she articulates, namely suppress it all and let somebody like Mr Akel come along and ask for the publicity, for the suppression to be lifted, but rather adopt as a matter of principle your starting point, that is that there must be transparency.

HON JUSTICE ROBERTSON: Transparency about our Terms of Reference?

MS ABLETT-KERR: Absolutely.

HON JUSTICE ROBERTSON: But you're not yet coming to grips with that, in my judgment, Ms Ablett-Kerr.

MS ABLETT-KERR: Sir, that's a matter of -

HON JUSTICE ROBERTSON: The question of whether one can look at systemic problems, at response and reaction to allegation, why will that be better and more effective if it has a name attached to it than it will be if it is without a name?

Because it comes back to this competing interest that if a person is named in the public arena with an allegation of sexual misconduct against them, how can the Commission deny them the opportunity to defend themselves or call evidence about that point?

MS ABLETT-KERR: Well, with respect, I think that we might be discussing something that is very unlikely to occur because if somebody is the subject of a criminal inquiry, the likelihood of them wanting to come along and give

evidence to a Commission of Inquiry, I would have thought, was extremely, extremely remote.

HON JUSTICE ROBERTSON: But, as Ms McDonald has said, we need to remember that there is a wider focus than just some people who may be subject or are already subject to criminal inquiries. It is a much wider issue than that.

It may be that the issue doesn't arise because a name is in the public arena in another event. But we are looking, and it is clear from our preliminary work, that we are looking at least in some cases which relate to allegations made 20 years ago, where as best as we are told at the moment, no contemplation of criminal matters arising.

MS ABLETT-KERR: Let's look at that situation then. We've got an historic situation, scenario, an historic scenario where you've got allegations perhaps of sexual misconduct, assault, and an allegation that complaints were not followed up as a consequence.

Now -

HON JUSTICE ROBERTSON: Allegations made and denied at the time.

MS ABLETT-KERR: And then not properly inquired into, followed up.

HON JUSTICE ROBERTSON: I don't know whether they were properly inquired into or not. There was a complaint -

MS ABLETT-KERR: We're talking about the allegation. That is something that this Commission of Inquiry is looking at. Are these complaints properly followed up?

HON JUSTICE ROBERTSON: No, that's precisely what we're not looking at, Ms Ablett-Kerr. What we are looking at is whether the process of investigation was adequate and, to the extent, that there are problems with that, whether they indicate systemic problems or cultural problems or the like.

But it is clear, and with respect to your robust media not always so far well understood, that we will never be looking at issues as to whether an allegation made a person guilty or innocent.

MS ABLETT-KERR: No, I'm not saying that you are, and if I

haven't clearly expressed myself to you then I am very sorry and I will attempt to do it. I am quite prepared to adopt the description of what the Commission is going to do from you, Sir, because I totally accept that. But why is the public not entitled to know the identity of the people who are involved in the process?

HON JUSTICE ROBERTSON: Well, they are entitled to know the identity of the people who were involved in the process of investigating. The issue is whether it is necessary for them to know the name of the person against whom the allegation was made, in respect of which we are not going to give that person the opportunity to defend themselves against the initiating allegation.

MS ABLETT-KERR: Well, if we follow it through -

HON JUSTICE ROBERTSON: I have trouble drawing lines in the sand with Ms Hughes but I don't have any trouble in drawing this line between the day that a person arrives and makes a complaint and you look forward, which is what I understand, and no lawyer has ever suggested to me to the contrary, is what the Commission was about.

MS ABLETT-KERR: I think we all accept that and I think that we need to move on from that particular point.

So that, if I have understood the position that you're suggesting to me, that the identity of the person against whom the complaint was originally made might be suppressed, even though there is no risk of criminal charges being laid because I think that that possibly is a different scenario, but then that the identity of those who are involved in the processes thereafter, the processes of investigation, wouldn't necessarily be suppressed. Have I understood the scenario?

HON JUSTICE ROBERTSON: There is an investigation about that process. Obviously it would be subject to the caveat that for in an individual circumstance a unique application could be made. But what happens - how the investigation was handled is the very core of our activity and business.

MS ABLETT-KERR: Yes, I accept that.

HON JUSTICE ROBERTSON: So that, I didn't understand Ms Hughes to be suggesting that there could be some blanket Suppression Order applied there.

What we are talking about is the name of the person against whom the complaint was made on the basis that we are not going to inquire into the validity of that complaint and the guilt or innocence of the person against whom it was made and, therefore, it would be a breach of the principles of natural justice to identify a person who could not and would not be given the opportunity to defend themselves.

MS ABLETT-KERR: But the names of those who might have participated in a potential inadequacy of investigation, who might be described - and this is all potential, I mean, we're not talking about what necessarily has been - a cover up, a neglected duty, their names - Ms Hughes doesn't seek to have their names suppressed.

HON JUSTICE ROBERTSON: I'm sure if she could find a way to do it, she may want to do it, but it is much more difficult to see that arising out of the Terms of Reference, Ms Ablett-Kerr.

MS ABLETT-KERR: Well, it's entirely a matter for you, Sir, but I would have thought that the public interest in having the whole process to be a transparent one is really very strong.

HON JUSTICE ROBERTSON: I understand that.

MS ABLETT-KERR: Very strong, and the way in which you can protect this individual who has had a complaint made against them who is not going to be called to give evidence in front of you, is for you to deal with that on a case-by-case basis, when Ms Hughes or whoever can get up and say, "You shouldn't allow John Smith's name," God forbid that there is a John Smith who is part of it, "John Smith's name to be published because this is 20 years ago. He's not here in front of you, he's got 26 grandchildren who are going to be upset by the whole thing if you do."

Isn't the better way for the Commission to deal with that on a case-by-case basis when you can hear the competing arguments? But to start from a blanket proposal that you should suppress and that there should be - and shift the burden on lifting, or making an application to lift, on the media is wrong, and I don't really want to do the whole of the media's case here, but that's my position on it.

HON JUSTICE ROBERTSON: Well, I have a question of you on that

position. How does the Commission then react to that person, either with or without grandchildren, or sickness, or 20 years ago, who says, "You've identified me as someone who is alleged to have misappropriately behaved sexually," while he was a Police Officer, "I want to give evidence about what actually happened"? How, as a matter of law and equity, could this Commission refuse to hear him?

MS ABLETT-KERR: Well, you couldn't because it's not within the terms of your reference.

HON JUSTICE ROBERTSON: I see. So, he gets named. He can't defend himself because that's outside of the Terms of Reference?

MS ABLETT-KERR: This is not an unknown situation for Courts. In Courts quite frequently we get into situations where people are prevented from giving evidence, saying, "But I didn't do that." I mean, I'm thinking of similar fact evidence, evidence of being in a certain place at a certain time, we deal with, and judges tell juries, "You must put that from your mind, that is not what you're dealing with today." Why can the Commission not do that? Why can the Commission not deal with this situation on a case-by-case basis and make its determination then? but start from the point that there will be transparency.

HON JUSTICE ROBERTSON: Can I just draw your attention to paragraph 13 of your submissions. Who are we talking about when you talk about those who have done no wrong?

MS ABLETT-KERR: Well, it's very hard for me to determine who they might be at this time.

HON JUSTICE ROBERTSON: But are we talking about people against whom complaint was made or people who are under scrutiny because of their acts or omissions in investigation?

MS ABLETT-KERR: Probably the latter was what I had in mind when I wrote that.

It seems to me, if we're talking about - I think there's a distinction between the type of scenario that you will deal with where there is no criminal allegation, or unlikely to be a criminal allegation, that is going to travel the criminal processes, and ones where there are, but even in situations where there are criminal charges actually pending at this point in time, the appropriate

arena for protection of that person's name really has to be the criminal Court, doesn't it?

A Suppression Order in the criminal Courts will apply everywhere, and this Commission does not need to be troubled by the question of suppression of the individual's name. It's entirely a matter for the criminal Court who will apply the standards that it has where name suppression, of course, is not an easy thing to come by.

HON JUSTICE ROBERTSON: Yes, all right. Well, thank you for that, Ms Ablett-Kerr. Is there anything else you want to say in your submission?

MS ABLETT-KERR: No, I don't, Sir, apart from to say as a parting shot, if I may, I invite the Commission to treat the question of suppression in a manner that is consistent with the way that Courts deal with the question of suppression.

The Commission, whilst you are -

HON JUSTICE ROBERTSON: Higher Courts or first instance Courts?

MS ABLETT-KERR: The highest Court. Well, Your Honour, the way that the High Court would deal with the question of suppression is - it's a pretty good rule of thumb to look at. By and large they tend to go along with the Court of Appeal.

In my submission, there should be a consistency of approach from this Commission. It would be unfortunate, indeed, if a different standard were seen to apply to a Commission of Inquiry, particularly one of this nature, which really is of such importance to the New Zealand public and to the New Zealand Police Force itself, I would have thought.

I don't really have anything further.

HON JUSTICE ROBERTSON: Yes, all right. Thank you, Ms Ablett-Kerr. I think we'll take an adjournment before we hear from the media.

Hearing adjourned from 10.55 a.m. until 11.10 a.m.

HON JUSTICE ROBERTSON: Mr Akel?

SUBMISSIONS BY MR AKEL
ON BEHALF OF TVNZ & TV3 (CANWEST TV WORKS LIMITED)

MR AKEL: May it please the Commissioners, I have handed up some written submissions and a few cases. After 10 or 15 years of debating these issues with my friend, Ms Ablett-Kerr, she's finally taken on board a lot of what I've been saying, but, of course, Sir, I've been debating these same issues with you for 10 or 15 years but the question is whether you'll take them on board.

I don't intend going through the submissions word-for-word but I refer to the Terms of Reference and at the bottom of paragraph 3, the Commissioners, I am acknowledging of course that the Commissioners are excluded from determining the guilt or innocence of any particular individual in relation to any alleged sexual assault or other alleged criminal offence.

I then refer to the general provisions with regard to hearings in private, so we don't need to go anywhere with regard to inherent jurisdictions or anything like that. You have power within the Terms of Reference.

At the outset I refer to perhaps the most well-known of the Court of Appeal decisions on commissions of inquiry, the Fay, Richwhite case, in referring to Hardie-Boys J just at the very outset, the clear indication that the Commission will always start from the premise that it's going to be in public.

I have also referred to sections 4 and 13, noting that the Commission is sitting in a civil jurisdiction but cases dealing with these issues out of a criminal jurisdiction are going to be important.

With regard to issue one, it is submitted that this inquiry is a classic case where the principles of openness should apply. I am at paragraph 7. At the heart of this inquiry is public confidence in the Police. Issues relating to public confidence in the Police should not be dealt with behind closed doors. It is vitally important to New Zealand society that an inquiry such as this, that is looking into conduct of the Police, and in particular whether Police procedures were and are appropriate in certain circumstances, is itself open to full public scrutiny. In short, there must be full confidence in this Commission itself, as well as restoring, I think were the words used by one of counsel, full public confidence in the Police.

In this respect, the media are the eyes and ears of the public.

Legally, the starting point must be the twin principles of freedom of expression and open administration of justice. I have referred to some well-known cases that Your Honour, Sir, the Commission is aware of.

In the civil context I have referred at the final bullet point at paragraph 8 to *Brown v Attorney-General*, a recent decision of Miller J which he reviewed all the law relating to suppression in the civil context.

At 9 I make the point, as my friend Ms Ablett-Kerr made, there is a heavy onus on those who seek to displace the principle of open justice to demonstrate that the interests of justice, in this case fair trial rights, would be frustrated if an order for suppression were not made.

The Courts have considered public/private hearings and stays in relation to commissions of inquiries in a number of cases.

At 11 I make the point that the earlier cases are not entirely helpful as they pre-date the New Zealand Bill of Rights Act and the greater emphasis on openness of the Court proceedings since that Act, as witnessed by the cases that I have referred to.

I do make a special reference with regard to the Mahanga decision:

"A further purpose of open justice is the maintenance of public confidence in the judicial system which flows from making it more transparent and comprehensible to the public."

Of course, my friend Ms Ablett-Kerr referred to the word "transparency".

At paragraphs 12, 13, 14 and 15, right through to 16 and 17, I quote directly from the decision of the Court of Appeal in the *Fay, Richwhite* case. But at the very outset at paragraph 13, I say that the Court of Appeal held that the Commissioner had not erred in law in exercising its discretion to hear evidence in public since he was entitled to conclude that public and

personal interests, such as the public perception of the integrity of the inquiry process, the significance of the public office held by certain parties and the impracticality of a closed inquiry outweighed the interests of taxpayer confidentiality.

Now, I don't intend going through those quotes in detail, but the learned President of the Court of Appeal noted what Sir Ronald Davidson said at 6 and 7:

"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?"

In 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."

Over the page at paragraph 15 I refer to Hardie Boys J, just the first paragraph there:

"He then proceeded to indicate the matters he had taken into account in reaching his conclusion that the evidence should all be given in public. Some are obviously of greater weight than others. The more important were: the public interest arising from allegations of tax law abuse by major New Zealand companies; the ability of the Director of the SFO adequately to defend himself; the desire of the Commissioner of the IRD and the Director to defend themselves in public; the possibility that helpful witnesses would not come forward if evidence were not published; the limitations put on the parties as to cross-examination and the calling of witnesses if evidence were taken in secret; and the maintenance of public confidence in the conduct of the inquiry and in the validity of the Commission's final report.

That is emphasised again at paragraph 16, the middle paragraph there:

"Another important consideration is the nature and significance of the public offices held by the two state servants whose honesty and competence are under

challenge; particularly the Commissioner of Inland Revenue, in whose integrity the community must have the utmost confidence. These men have been subjected to the gravest of attacks in public, and it must be in the public interest that they should have the fullest opportunity to defend not only themselves, but also their office and their staff, in public. Much the same may be said of Mr Peters. Although he is the initiator and not the target, his reputation may also be at stake."

In my submission, the same principles will apply in this submission.

Again, I refer to Hardie Boys J at paragraph 17.

And the emphasis again is always on the public confidence, not only in the Department that was under attack in that inquiry but in the public confidence in the Commission of Inquiry itself.

At paragraph 18 I refer to a recent decision out of England, the Wagstaff case. The Court in that case quashed the Secretary of State's decision to set up an inquiry to be held in private in examining the issues raised by the deaths of many of the patients of Dr Harold Shipman. Now, this case, Sir, is in the casebook that I provided but I do, in particular, refer to the evidence that was given by Sir Louis Blom-Cooper QC to the Court, in which he said that he had conducted 11 public inquiries since 1985 and he was firmly of the view that if there are any attempts made to have any parts of public inquiries in private, it does not work. And his opinion is set out at page 310, line G, of that decision.

At page 310 the Court outlined the factors which might be regarded as persuasively in favour of opening up the inquiry.

At page 320 the three considerations put forward for a private hearing which were dismissed.

But I've summarised these below. In particular, witnesses are less likely to exaggerate or try to pass on responsibility. Others come forward, openness helps to restore confidence; absence of significant risk of leaks leading to distorted reporting; an open inquiry was what the families wanted in that particular case.

The evidence that was given by Sir Louis Blom-Cooper, there was no reason why the inquiry should take longer if evidence was heard in public and a presumption very much in favour of a public hearing. Again, the public confidence, its report and recommendations would demand restoration of public confidence being a matter of high public importance. No reasons for delay. Do not accept that private hearsay lead to more candor. A private hearing will lead to the totality of available information being reduced and the ability to test one piece of evidence against another being inhibited.

Now, I'm not going to take you or Dame Margaret to those decisions but I do, Sir, invite you both to read it because it is a good summary of what the issues are very much as seen from the United Kingdom's perspective.

There have been other cases since then that distinguish it, but those cases have been on whether or not the Sector of State concerned had the power to order a Commission of Inquiry in private, and those cases upheld the relevant Minister 's prerogative in that respect.

At 19, as submitted at the outset, openness in the search for truth on an issue relating to public confidence in the Police, outweighs concerns about privacy and reputation, and any concerns about fair trial rights will not materialise.

The reasons for this submission are as follows.

The issues involved call for openness. The allegations by the complainants, and the public concern is, that allegations of wrongdoing by certain Police Officers have not been investigated properly and hidden away. There's a real risk that having this inquiry in private will simply perpetuate a general disquiet about the Police conduct.

Now, I accept at the very outset, Sir, that the Terms of Reference are not in any way to determine right or wrong, guilt or otherwise. It is about procedure. But you, with respect, tested my friend with regard to what was the harm or what was to be gained by - what was the harm in not naming certain people? What was to be gained by naming certain people?

Well, in my submission, there are two points. First

of all, it is unrealistic to expect, that those names of people involved would not already be known. They are in the public domain.

Indeed, the Terms of Reference 2(a), as obviously the Commissioners are aware, refers to the practice of Police in relation to the investigations of the complaints alleging sexual assault by members of the Police, or by associates of the Police.

Now, in my submission, Sir, if there is going to be an investigation into the process that was carried out, that must of itself involve some consideration of who the allegations were made against, what steps were taken in those allegations, and what was their involvement, or the involvement of their associates.

The second point I make, Sir, is this. If complaints or evidence is put before the Commission the danger of not naming people involved who are complained about is that you're casting aspersions on other people.

Take, for example, a small local Police Force somewhere something like Opotiki, or Whakatane or something like that. By not naming people, do you leave it open that others - there's a shadow put over other people.

The whole purpose, with respect, Sir, of this inquiry is to bring openness into something where the public concern has been whether or not there has been, in some way, and one doesn't want to use an emotive word like "cover up" or pejorative word like "cover up", but whether or not things have been swept under the carpet. Whether or not the practices and procedures that were laid down by the Police for investigation of these sort of allegations were, in essence, not put into practice, or, if they were put into practice, whether or not the processes that took place left a situation where people were looking after their own.

In my submission, Sir, this is the sort of inquiry where admittedly there are going to be other interests involved. It is a balancing exercise and what my

submission is about is that the balance must come down on the side of complete openness.

At 21 - in fact I've made the point there already at 21, as was referred to in Fay, Richwhite & Co, it is important for the integrity of this inquiry that it is not seen to be conducting its investigation behind closed doors.

What I've said there, following on, may not in fact be correct, if in fact people to whom complaints are made are not going to be giving evidence. So, clearly that does not apply.

22, having the hearing or parts of the hearing in private is also unrealistic. There has already been a large amount of publicity with regard to the Rotorua case. The names of those involved are already in the public domain. Breaking up the hearing into parts will inevitably lead to suspicion as well as practical difficulties.

Now, we as lawyers totally understand that, yes, at various times hearings are heard in private for reasons that ensure fair trial rights, but the concern that - in the normal Court process. But the concern we have here, Sir, with regard to a public inquiry, is that as soon as there's some closing down of that importance of freedom of expression of public openness, which is the very essence of a Commission of Inquiry, then again the concern is, what's going on here? Is something being hidden up?

It's better in my submission, Sir, to have it all out and then look at what happens - what can be done by the Courts to protect fair trial rights, and that's what I'm going to come to in a short moment.

HON JUSTICE ROBERTSON: Do you say that going private would never be an acceptable mechanism to deal with that interface between potential criminal trials and the Commission?

MR AKEL: Exactly, Sir. I am going to come to that -

HON JUSTICE ROBERTSON: Well then, how do we cope with the danger in the criminal trial from the perspective of the media? No doubt Ms Crutchley is going to give me all the answers on that, but you're saying that to manage that difficult interface, private hearings is never going to

be an alternative?

MR AKEL: It's never going to be an alternative. When I get on to the issue of individual suppression, clearly if complainants come forward and they say, "I want to have privacy," then I acknowledge on behalf of TVNZ and TV3 that that would obviously be an appropriate case. It goes without saying.

But my submission, Sir, is this.

HON JUSTICE ROBERTSON: I don't know that it's totally obvious to me why you would draw that line, Mr Akel.

Why would you draw the line between a complainant and a person complained about in that way?

MR AKEL: Can I develop, first of all, it this way, Sir. As the Court of Appeal said in the Gisborne Herald case, we have to be concerned that we're not just working on speculation, that we're not readily assuming in some way that whatever takes place at this hearing is going to affect fair trial rights.

Now, with the greatest of respect to you, Sir, it seems to me you've come - your approach in this hearing has been that whatever takes place here is inevitably going to affect fair trial rights; whereas, my submission is it should be the other way around. You don't approach it that way, you approach it on the basis of saying, we start from the idea of openness. We then look and say, is there really any basis for the fear that we have that fair trial rights may, in fact, be inhibited in some sort of way?

Now, the Court of Appeal in the Gisborne Herald case said that it lacked empirical evidence as to the effect of pre-trial publicity on jurors, and as a result of that, and I point - at paragraph 24 I set out what the Court of Appeal in essence said, what its concerns were.

Now we have the benefit of Professor Young's study, juries in criminal trials, and I've put in the casebook the relevant part of the Law Commission paper in that respect, where Professor Young and his associates came down and said that, in fact, jurors were not influenced by what they read in the papers, that jurors took note of the directions that were given by judges in the criminal - in any criminal trial that took place.

HON JUSTICE ROBERTSON: I am just wanting to see whether Ms Ablett-Kerr is shaking her head or adopting that submission as well.

MS ABLETT-KERR: She is not doing anything, actually. She is adjusting her jacket.

MR AKEL: Well, significantly, and it's a case, Sir, that you and I -

HON JUSTICE ROBERTSON: Are you able to point me to any decision where a Court has had to decide in advance whether there is a real likelihood of contamination?

The issue for this Commission is if it doesn't meet in private, is there a real risk of contamination of any potential criminal process?

MR AKEL: Yes, I can, and I was just going to refer you to the case that you and I, with respect, had a debate on. You might have won.

HON JUSTICE ROBERTSON: I made orders in Burns, I think.

MR AKEL: Travis Burns, and I refer to this in my submission. You will recall in Travis Burns, Mr Burns had been convicted of the murder of Joanna McCarthy. There was a huge amount of evidence and certain disquiet that Travis Burns was also involved in some way in the killing of Tania Furlong at Howick, and you, Sir, injuncted at that time the Howling at the Moon article by Mr Wishart.

The case was heard, Mr Burns was convicted of the murder of Joanna McCarthy. The media then wanted to publish what had taken place in the investigation with regard to Tania Furlong, and in particular the allegation made by Lewis, who had been arrested by the Police, that in fact he'd been set up by Burns who was in the pockets of the Police, he was a paid informer.

Chambers J who heard the trial made an order allowing the media to publish that article, obviously Mr Burns then went straight to the Court of Appeal and the Court of Appeal said, "No, we would not allow publication because there was so much publicity with regard to the Joanna McCarthy trial and so much publicity with regard to the appeal," but where that case, with respect, is distinguishable, there was no publicity in that case with regard to Burns and his association with Tania Furlong.

I do invite Your Honour to consider what the Court of Appeal said in that case. They said on the special circumstances of this case, the fact that allegations were made that Burns had killed Tania Furlong meant that if there was a retrial on Joanna McCarthy it was unlikely he could get a fair trial on that particular case.

But what the Court of Appeal also accepted was the importance of the media being able to report on events openly and, in particular, in a period of current news worthiness.

So, that, in some way, responds to what you, Sir, said about the media coming down here and then having some orders made that they could only publish in the future.

Well, my submission, Sir, is this. The media, they know what the rules of contempt are. If they don't, then they're going to be consulting their lawyers, hopefully, anyway.

And then the next point that I make is at 26, the Courts have long recognised the focusing effect of listening over a prolonged period to the evidence in a particular case, thereby minimising the risk of prejudice to a fair trial.

In essence, endorsing exactly what the Law Commission paper was all about.

I ask you, Sir, what's the point, as head of the Law Commission, what's the point of having Law Commission papers if we're not in fact going to put them, in effect, into practice?

HON JUSTICE ROBERTSON: I don't think you want to lock in that submission. I notice a little later in your submission you're not wanting to pick up a submission of the Law Commission, so you better make sure you're not blowing hot and cold, Mr Akel.

MR AKEL: Oh, I'm always doing that, Sir.

If I can take - I'm not going to take you through all those authorities that I've referred to there, Sir, but all the cases make it clear that the focusing effect of a trial itself, that jurors do listen to the instructions of judges; they are not influenced by

pre-trial publicity.

So, that, in my submission, Sir, is where the safeguard is.

You see, again with respect, it seems to me that this hearing is started on the basis, well, whatever we do here is automatically going to affect fair trial rights. My proposition is that that starting point is wrong.

Fair trial rights and freedom of expression rights are an equal poise. It is a matter of getting the balance and then seeing how in some way can we accommodate all rights.

My submission is, you accommodate all rights by going ahead with your hearing a full public hearing and then saying, we've got to be reliant and accept the integrity of the trial process that jurors will, in fact, take notice of only what they hear in the Courtroom, all the more so, Sir, where your report and your inquiry is not into the guilt or innocence of certain Police Officers that are named.

Reference is made in the submission by senior counsel for the Commission to cases like Fitzgerald and Thompson. In my submission, the rationale behind those cases needs to be reconsidered, particularly in view of the Law Commission paper. And, again, I refer to the Burns case, and I say Burns is clearly distinguishable because here what the Commission has to deal with, the issues are already very much in the public domain and, on top of that, we've had statements through the media by the Police Officers involved all denying liability, all denying any wrongdoing.

From one of them, "her allegations have absolutely no foundation". From another one, "a full Police investigation in the early 1990s completely cleared me of any wrongdoing". Another one, "I denied the allegations absolutely then and I deny them absolutely now".

So, they've had their say through the media.

Turning now to the next issue, that of suppression of name. Again, the same submissions apply. Name suppression will relate to those witnesses who can be described as complainants, those witnesses who complaints have been made against, other witnesses, complainants,

well, the names of the two leading complainants perhaps are already in the public domain. Ms Ablett-Kerr is here representing her client who wants to be publicly identified.

Again, there's been a wind change by the legislature with section 139(2)(a) of the Criminal Justice Act. In essence, the names of complainants can be publicised if the complainant consents in certain circumstances. In essence, if she knows what she's doing in allowing her name to be publicised.

It is submitted that if any witness who is a complainant does not object to being identified then there should be no identity suppression. Obviously for other complainants some sort of identity protection may be appropriate. This should be made clear to encourage other potential witnesses to come forward.

With regard to those whose complaints are made against or will be made against, it is submitted that the Court standards should apply. Really there's been very much a move against name suppression. I mean, again, Ms Ablett-Kerr referred to the fact if you name people this may encourage others to come forward. That was very much the rationale behind the Court of Appeal decision in the Liddell case.

Indeed, that's proved prophetic in a way.

Others may come forward. The concern we're going to have is this, Sir -

HON JUSTICE ROBERTSON: I'm sorry, let's just talk about that. The only people who could come forward here are other people who allege they made a complaint which was not properly dealt with.

Now, this thing has consumed our media for the last seven months. The fact that it is Inspector Bloggs or Constable C against whom a complaint is made is not going to make any difference to that.

You see, we're not investigating Inspector C or Constable Bloggs. We're investigating what happened after someone fronted up at a Police Station.

I mean, I'm not unfamiliar with the principles - I was trial Judge in Dr Procter's case. I am relatively familiar with the approach of these things but the issues are quite different.

MR AKEL: Well -

HON JUSTICE ROBERTSON: The issues are not whether an identified person did other bad things allegedly, it is how the system responded to the complaint about them. And Ms Ablett-Kerr, with all her interesting approaches, did not appear to me to answer the question, what is the relevance of that name?

MR AKEL: What would happen if -

HON JUSTICE ROBERTSON: It is not the *Afeaki* sort of situation. It is not flushing out the people or anything like that.

MR AKEL: Well, with respect, Sir, it is in a bigger sort of way.

Take this example. Say there was one complaint involving a smallish country Police Station and the issue with that one complaint was, was the procedure once a complaint - was it properly investigated? Now, that's going to go to all sorts of issues of integrity and credibility of particular complainants.

Say there was one person involved in making that complaint with regard to that, say. Say there were two other women in that country locality who feared that they didn't want to go ahead and become involved in this public inquiry because they thought, "Here I am in a small country community in Whakatane," or wherever it may be, "and I'm going to be left, sort of, making accusations where no-one is really going to believe what I say, that I laid a complaint."

If you bring out names, there is always going to be the chance that someone who is timid or fearful, or just inherently shy, or worst of all ashamed of what may have taken place, may turn around and say, "Because others were in the same situation as me, I'm going to come forward," and that, in my submission, Sir, is the reason why candor is all important. It's going to enable people - but if you have openness and if you adopt an approach, a total approach towards openness, then hopefully that will encourage others to come forward, obviously with the

caveat that if you want - as a complainant you want some sort of an anonymity, then we're prepared to consider that.

With regard to other witnesses, Sir, I've just referred to again Victim X, where the Court of Appeal made it clear in the Bill Trotter case that it would be rare indeed for any witness to have name suppression.

And then, finally, I don't know what orders have been made with regard to televising of the hearing, but I make a formal application now on behalf of both TVNZ and TV3 to televise the hearing in line with the Court media coverage guidelines.

I have referred to what Fisher J said in the Choy decision and that, again, is in the bundle.

I have made some concluding comments, which again senior counsel for the Commission referred to Taylor, again it is my submission that the law in New Zealand has moved some distance from Taylor post Bill of Rights and convention issues, but I don't know whether they're particularly relevant to today's hearing.

HON JUSTICE ROBERTSON: Well, the question, Mr Akel, I probably want to hear you on, just to summarise it all, if the Commission were in any circumstance to reach the conclusion that it would be unwise or imprudent, to hear evidence in public, is it better that the Commission postpones its hearings or hears in private?

MR AKEL: I find that very difficult to answer in the abstract, Sir. The reason I say that -

HON JUSTICE ROBERTSON: I thought you might.

MR AKEL: There's going to be such a variety of cases.

HON JUSTICE ROBERTSON: Do you accept there may be some circumstances where private hearings would be a last resort acceptable?

MR AKEL: My submission is this, Sir, that, as I've perhaps emphasised too much, this Commission should proceed on its way on the basis obviously of concern about future fair trial rights, a concern. It's got to take that into account clearly, but it is not a principle that overrides everything else.

I then move to the step and I say -

HON JUSTICE ROBERTSON: When are fair trial rights to be overridden in New Zealand in 2004, Mr Akel?

MR AKEL: Fair trial rights are never going to be overridden in New Zealand in 2004 or any time in the future, nor for that matter, hopefully, in the past.

But I'm going to say this, Sir, on this particular issue, which gets down to is the fear that publicity arising out of this hearing will affect those fair trial rights, that's the issue. And my submission, Sir, we now have the Young report, we have decisions by Courts saying that the protection that can be provided by directions to the jury and how juries operate, that really overcomes what concerns you may have.

HON JUSTICE ROBERTSON: Thank you.

Have we lost Mr McKnight, Mr Gray? Mr Stewart, you're going to be Mr McKnight.

MR STEWART: Yes, Sir. I am simply going to inform you, Sir, that the Dominion Post and the Fairfax Group Publications supports the submissions by the other media representatives, particularly those you are about to hear of Mr Gray, which we've had the benefit of reading, and in particular the submission that the hearing be heard in public and that media be present at all times, even if there were suppression orders in place during those times. Thank you, Sir.

HON JUSTICE ROBERTSON: Thank you, Mr Stewart.

SUBMISSIONS BY MR GRAY
ON BEHALF OF APN NEW ZEALAND LIMITED

MR GRAY: It's difficult to know what to say without sounding like a Greek chorus, and even then whether it's a lead nickle or golden nickle, only time will tell.

I do not wish to go through the synopsis that I sent to counsel assisting the Commission yesterday but I do wish to ask the Commission, when it makes its decision in this matter, to start from asking the question, what is the juridical basis upon which we claim to have power to exclude people from our hearings and to prevent people from talking about what happens in our hearings? because that's what suppression orders are.

So far as hearings in private are concerned, it's perfectly clear that the Commission has power to do that. The power is expressly conferred by the Terms of Reference. So, there can be no question that when this Commission was established and empowered, it was contemplated that it may become appropriate for it to conduct some of its proceedings in private.

But as to other orders, the juridical basis upon which powers are available and can be exercised to stop people talking about what has happened in here is less clear. You have the power of the High Court in its civil jurisdiction. That means that the powers conferred on the Court in its criminal jurisdiction by sections 138, 139 and 140 are not available. So, we're relying only on the inherent power that the High Court has in its civil jurisdiction, and there are not many cases dealing with the nature of the inherent powers of the High Court in its civil jurisdiction.

I wonder if I can, before developing that, make one aside to answer a question posed by Your Honour Robertson J to Mr Akel and I think to Ms Ablett-Kerr, how is there a bright line to be drawn between people who are complainants and people about whom complaints are made? In my submission, there's a very easy basis upon which that line can be drawn. Section 139 of the Criminal Justice Act provides that the identity of complainants of crimes of a sexual nature should be suppressed. The Commission may decide that that is evidence of a public policy that it should give effect to in exercising the inherent powers of the High Court in its civil jurisdiction, but there is no similar public policy that can be derived either from the other provisions of the

Criminal Justice Act or otherwise.

HON JUSTICE ROBERTSON: I accept that, Mr Gray. The difficulty I have is the corollary that in any criminal case a person against whom an allegation made has the ability to defend themselves.

The issue is how, without giving people the opportunity to defend themselves, we can put them in jeopardy of their reputation?

I say again, if we are going to allow Police Officers, or former Police Officers, against whom allegations are made to tell their side of the story, it is no part of our Terms of Reference, but what I am troubled about, and what neither Mr Akel nor Ms Ablett-Kerr appeared to answer directly, is how you deal with what appears on its face to be a fundamental breach of the principles of natural justice, on the one hand, by saying a person's name can come out but they can not defend themselves because to do so would go outside our Terms of Reference?

MR GRAY: I heard -

HON JUSTICE ROBERTSON: If you have a juridical answer to that, I'd be really most appreciative.

MR GRAY: I don't know it's a juridical question. I did hear your exchange with Ms Ablett-Kerr and it did seem to an observer of that exchange, that the floor that underlay it is it treats a statement that an allegation has been made as a statement that the allegation is true.

So, where a statement is made in the proceedings before this Commission that a person came along to a Police Station, made a complaint and that complaint was not investigated appropriately, it is not necessary for a proper understanding by this Commission of what it must do or by the public of what the Commission is doing, that the inference is drawn that the allegation was well-founded.

And so, the guilt or innocence of the person against whom the allegation was made, not only is not part of the Terms of Reference of this Commission, but is not inferred or able to be inferred from the acknowledgment of the true fact that an allegation was made.

Now, members of the public know that people make

allegations, that those allegations are the commencement of a Police investigation and the Police investigation may be conducted well or not.

They also know that in order to determine the guilt or innocence of a person, the investigation proceeds to the laying of charges and there is a trial. Members of this community well understand that if there has been no charge laid and there has been no trial, that there cannot be said to be a true allegation, or one which is capable of proof on the criminal standard.

So, it is not correct to say that merely because somebody might come to this Commission and say, "I made a complaint," that the media will run away and publish in fact a different fact, which is that a complaint was true or that the members of the public who would come to hear of that would think that.

The law does control the manner in which people talk about things which touch the reputation of others, and the law controls it by the law of defamation.

What the law says is, people can say things which are true but they may not say things which are untrue. And the law says that people can say things where it's important in the public interest that they be said so that there's a defence of qualified privilege, but in order for that defence of qualified privilege to be available, what is said must be fair and accurate, it can't go too far, it has to be reasonably complete.

So, when those propositions are applied to what this Commission must do, it is necessarily the case that people will come and say, "I made an allegation." The public needs to know that allegations were made. It is not necessarily the case that this Commission or the public or those reporting to them will say because an allegation is made you should treat that allegation as if it were true. And so, evidence from any party about the truth or otherwise of the allegation forms no part of this Commission's work.

HON JUSTICE ROBERTSON: To which Ms Hughes' submission is, if what the public needs to know is that an allegation was made, how are the public better off in knowing the name of the person against whom the allegation is made?

We're down to that - there's a very narrow gap between you.

MR GRAY: That's right.

HON JUSTICE ROBERTSON: Everyone who has made submissions thus far agrees the public needs to know all these things and everything should be in public, but the issue is if it is outside our Terms of Reference, why is it relevant to have a name attaching to that complaint?

MR GRAY: And I've got several answers. The first is to turn the question round and say that's not the appropriate question. The question is, on what basis can this Commission restrict people talking about the identity of the person against whom a complaint is made? What's the legal basis for the exercise of that power?

The second part of the answer is, judges, and the judgment of Lord Stain in *Ex parte Simm*, for example, is probably the most prominent recent example, are very careful to say it is not for Courts to say what people should hear. It's not for Courts to say what's relevant and not relevant and in the public interest and not in the public interest, because, frankly, that's outside their skill set and that's a matter that ought to be left to others.

I suppose the third part of the answer is to say this Commission is in part about real people and real facts, and if the public is going to understand what is giving rise to these complaints, what it is the Commission is investigating and why the Commission has come to the conclusion that ultimately it will come to, it needs to understand who are the real people, what happened in respect of the investigation, and what should be done about it, and it does help public confidence for there to be the reality that is brought about by the provision of factual accuracy.

HON JUSTICE ROBERTSON: Yes, all right, thank you, Mr Gray.

MR GRAY: That was a somewhat lengthy interlude, Sir, into what I had set out to say, which is if the Commission asks itself, on what basis are we empowered to interfere with people talking to each other about what happens here and when should we do it? then it is necessary to start with section 16 of the Judicature Act, which is the statutory expression of the inherent power, to look at cases, such as *Scott v Scott*, which is where really any modern discussion of the extent of the inherent power in the Court's civil jurisdiction comes from, and then to go

to New Zealand applications of that case, like Taylor which is a decision that other counsel have referred to.

What those cases say is the inherent jurisdiction is one which can be exercised in the interests of the administration of justice. The cases make very, very clear that it's not a power which can be exercised simply because the Court thinks it would be a good idea. It is not a power which can be exercised because the interests of someone before the Court are affected. It's a power which can be exercised only where that exercise is necessary to enable the Court to do its work, and so it's the ability of the Court to do its work that is the driver of any exercise of what is called the inherent jurisdiction, and I suppose, and I'm grateful to my learned friend Ms Scholtens because we've had an opportunity to exchange submissions and have reached a very large measure of agreement. Probably the only difference between us is the matter of emphasis on the difference between the interests of justice and the interests of the administration of justice and the extent to which I say that the inherent jurisdiction of the Court is not to do whatever is necessary in the interests of people before it, but to do what is necessary in enabling the Commission in this case to do its job.

You might say that is a semantic -

HON JUSTICE ROBERTSON: Doesn't that ignore the Terms of Reference, Mr Gray?

MR GRAY: Which part of them, Sir?

HON JUSTICE ROBERTSON: The Terms of Reference which specifically say we may sit in private and exclude people. I don't know why you say we come back to the juridical civil standard when, in setting us up, those who advised the Governor-General took a rather different view.

I, with respect to you, think it is rather too narrow to say you're in the position that you would be in a civil Court. I would have been there in any event as a Judge with a warrant.

So, surely the starting point, although it's got to be influenced by the whole environment in which we live, that the Terms of Reference acknowledge the possibility of something which would not be the way it would be dealt with in a general Court.

MR GRAY: I started by acknowledging, Sir, that you may sit in private, that the Terms of Reference empower you to do that. The Terms of Reference don't empower you to make suppression orders.

HON JUSTICE ROBERTSON: I see. So that, if we were satisfied that the interests of justice required some limitation, we would have to go into private, rather than make suppression orders. I didn't think that everybody else in the room thought that was a good idea, but if that's the challenge you put before me, then I might have to respond to it.

MR GRAY: I am not making submissions, Sir, on whether it's a good idea or not. I am making submissions on what it is that the law enables this Commission to do.

HON JUSTICE ROBERTSON: So, you're saying that we could sit in private but that defined a juridical basis to make a Suppression Order, we're thrown back into the civil jurisdiction of the Court, Scott v Scott onwards?

MR GRAY: That's correct.

HON JUSTICE ROBERTSON: All right, thank you.

MR GRAY: I must acknowledge, of course, that the Taylor decision makes perfectly clear that in the exercise of the inherent jurisdiction it is preferable to make suppression orders than it is to sit in private, and the Court of Appeal, despite there being some disagreement between the judges on other matters in the decision, were very much together on that, and of course, as you would expect, if it's appropriate to exercise the inherent jurisdiction, then the Bill of Rights Act probably would require that in doing so you do it to the minimum extent necessary to interfere with the freedom of expression that's affirmed by section 14.

But I do say, Sir, that it is necessary to stop and ask before a Suppression Order is made, what interest is the Commission serving? And I say the cases do not support the exercise of the power in the interest of parties only in the interest of doing the Commission's business, and that's a slightly different mindset, although I do also concede that there may be times when the distinction is so small as to be difficult to find.

I go on to say, as I have said at the beginning,

that in relation to complainants who wish to have their name suppressed, section 139 of the Criminal Justice Act I think is authority for a public policy, that creates the kind of exception that would normally give rise to an opportunity to use the inherent jurisdiction of the Court.

So far as people accused of committing offences are concerned, I, however, say the position is much, much more difficult. In this there is a distinction between those against whom charges may already have been brought, and I agree with my learned friend Mr Akel, that the task for the Commission then is to ask, are section 25 of the Bill of Rights Act fair trial values invoked? And, if they are, then of course some kind of suppression orders would be required. But, like Mr Akel, I remind the Court that Dr Young's work for the Law Commission suggests that pre-trial or extra trial publicity, even during trial, doesn't seem to affect jurors.

I read the Court of Appeal judgment of Burns slightly different from my learned friend. In Burns. (No.1) Thomas J for the Court said, "Well, we regard these facts as so exceptional that we think suppression is warranted in this case. We are mindful of Dr Young's work and we're mindful that in most cases suppression won't be necessary, but we think these facts are so extraordinary, the possibility that Burns may have committed a murder and then provided evidence of a confession by someone else to procure their conviction and so avoid prosecution himself, was so sensational that that was the kind of information which probably was an exception to what Dr Young had written."

If you read Burns (No.2), Sir, you can see that the Court of Appeal acknowledged, when it resat in a different bench, acknowledged the decision of the Court of Appeal in Burns (No.1) had been to that effect but then moved quite quickly to remind everybody about Dr Young's work, and you might think that the second Court of Appeal looking at it really wondered whether it had been the case, that the evidence was so sensational that there needed to be suppression.

And Burns (No.2) is a case in which the Court of Appeal was asked to consider the possibility of a future trial in respect of the first murder and said, "Well, no, based on Dr Young's work we think even if there was a future trial, a jury properly directed would be able to deal with the facts appropriately."

So, in my submission, Burns 1 and 2 read together are quite strong authority for the proposition that the Court of Appeal is very mindful of the work that Dr Young has done and acknowledges that in most cases it does seem that juries are not affected by publicity outside the Court in which they are sitting.

In any event, Sir and Ma'am, the position of persons otherwise mentioned is controlled by the law of defamation, controlled by the requirement that what is said is true, and the challenge posed for this Commission and for others is why should the State ever act to restrict free speech which is true? Why should people be prevented from saying to each other things which are true?

But, of course, the ability to say what is true is not a licence to say what is untrue, whether because there's an absence of defence of truth under the Defamation Act, or because there's an absence of defence of qualified privilege because it's not legitimately in the public interest that the topic be debated.

And so, I argue that persons who may be mentioned in proceedings before this Commission have the protection of the law but it is a protection that's available if what is said about them is untrue. It would be untrue to say that the statement "an allegation has been made" implies that the allegation was true and that what is alleged in fact took place. And the difficulty for those who wish to talk about what will happen before this Commission is they will need to be very careful to remind people to whom they speak that what is said here is that there is an allegation, not that the allegation is true, and that's the balancing act, but it's a balancing act that ought to be performed by those who are speaking, not by the Commission seeking to control whether they speak and what they say when they do speak. It's a responsibility which lies with those which seek to publish.

And so, I say, Sir and Ma'am, that this Commission ought to sit in public as much as possible. I don't think I need say any more about that. And this case, in this regard, is very like the Fay, Richwhite one where Sir Ronald Davidson, the Commissioner, said, "Well the whole point of this Commission is to deal with a challenge to integrity of a public body in carrying out enforcement functions. That challenge must be talked about in public. What we think about it must be said in

public. And, in fact, the Commission," he said in that case, "can't do its job if it's asked to do so in private," and that proposition, with respect to my learned friends who have made it, must have considerable weight.

So far as suppression is concerned, as I've said, it seems that for complainants who wish it, there's a published policy which might justify the inherent powers being used, but for other people the grounds, in my submission, are much less clear, and I suppose I finish by asking the Commission to do no more than this. Do not make a general decision that people mentioned should not be talked about. If particular cases seem to the Commission to require suppression, then particular cases should be dealt with when the time comes on their particular facts, rather than by a general decision made at the beginning.

Unless you have some questions, those are my submissions.

HON JUSTICE ROBERTSON: Thank you, Mr Gray.

SUBMISSIONS BY MS CRUTCHLEY
ON BEHALF OF THE SOLICITOR-GENERAL

MS CRUTCHLEY: I appear by invitation of the Commission on behalf of the Solicitor-General without any particular or specific representational interests, but really to provide some general submissions on the issue of public and private from that perspective.

My opportunity to hear what the arguments have been in respect of those who represent specific or have specific representational interests, have been really listening rather than reading their written submissions.

My approach is perhaps somewhat different, Commissioners. I have looked at matters around what might be limits on the Commission's hearing the evidence in public, rather than looking at the powers of the Commission to do so, including the assumption that all of this inquiry should be in public.

I perhaps won't read every word of my submissions but take the Commission to those aspects of the submissions which might be the most apposite.

I refer, of course, to the purpose of the Commission of Inquiry and the specific exclusion. My first submission would be that clearly a criminal investigation into allegations by two named individuals in the Terms of Reference which may, or which have or may lead to criminal proceedings, may need to have priority over the Commission's inquiries into the adequacy of those Police investigations into those matters.

The reason I make that submission is that the hearing of their evidence in public could interfere with the investigations in any criminal prosecutions.

These individuals as complainants in trials of relevant sexual offences would have the automatic protections provided to them as complainants, unless of course they chose to be public, this would be despite publicity given to their allegations, and the Commission may therefore need to determine whether all of their evidence to it could be in public.

I then refer to the Seventh Recital which sets out investigations carried out by the Police into other allegations of sexual assaults and whether they have been inadequate.

I understand this to be referring to matters that are reported directly to the Commission. I am unaware of the nature of such self referrals, Sir, in detail. They may be matters where they deal with consensual sexual conduct involving Police Officers and associates or where allegations of sexual misconduct have been made where the Police after investigation have decided not to prosecute.

For either category, I submit there is an argument that the impact of publication of such evidence about Police Officers may poison the atmosphere for the hearing of any criminal trials arising in unassociated allegations, so that notwithstanding the differences in the cases from those the subject of criminal charges, it may not be possible because of the atmosphere poisoned by that evidence for serving and former Police Officers to have a fair trial. I raise that just as an argument.

It may be that the balance between public and private falls on the side of private hearings of evidence in these other matters because of the likelihood of interference in the due administration of justice otherwise.

The Commission could, of course, approach these other matters on a case-by-case basis in determining whether the evidence, or all of it, should be heard in private or public.

I have referred to two legal concepts that could be used to examine the issue about whether the evidence that this Commission hear should be heard in public or private, and they are principles from the law of contempt, limitations on coercive power of the Commission through the application of the doctrine of abuse of power.

The footnote I have put there, Sir, I have taken the basis of this discussion from a particular chapter which is an Australian text, but very useful in teasing out some of the issues.

I have two qualifications to the discussion. The first one is that the principles from both areas of the law, the authorities that deal with both those principles are for the most part authorities that have discussed challenges to the exercise of power, rather than looking

at the issues in anticipation which this Commission is doing this morning.

The other qualification is while that text is useful to illuminate relevant issues, it is a discussion of Australian law and, while the basic concepts are very similar to New Zealand law, they don't have the overlay of our Bill of Rights Act, and other counsel have mentioned that as significant.

I then set out the New Zealand definition of what the law of contempt is concerned with from the Solicitor-General v Radio New Zealand case, being conduct which tends to undermine the system for administration of justice by the Courts or to inhibit civil advance from prevailing themselves from the settlement of their dispute. I am really only concerned with the first aspect of that test.

I then refer to what Lord Diplock set out in the AG v Times Newspaper case, what he considered to be the requirements of the administration of justice, in particular, the two second requirements that he talks about:

"... secondly, that they should be able to rely upon obtaining in the Court (that is all citizens) the arbitrament of the Tribunal which is free from bias against any party and whose decisions will be based upon these facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in the courts of law; and thirdly, that, once a dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law."

I think in respect of this matter, it's the second and third requirements that are, perhaps, useful to have a discussion about. I'll go on to do so in a second.

HON JUSTICE ROBERTSON: That's really what the first - Ms Ablett-Kerr, but particularly Mr Akel and Mr Gray are saying, rely on Dr Young, there isn't any problem, and I understood Mr Akel really to go as far as to say, even if there were criminal trials going on, we should just carry on regardless and investigate in a totally public, full and uninhibited way what we are bound to do. And the back row seems to say, "Well, you've got the law of contempt and you've got defamation to deal with it."

None of them talked about the possibility that a person in a criminal trial would get a total discharge on the basis that the Court could not guarantee the integrity of the criminal process, and that's an issue on which I would like to hear from you in due course.

MS CRUTCHLEY: Yes, Sir.

HON JUSTICE ROBERTSON: And to whether that is a proper risk for this Commission to be taking.

MS ABLETT-KERR: I wonder if I could raise a point because when you talk about the "back row", you talk about us as - I don't think I went as far as Mr Akel.

HON JUSTICE ROBERTSON: No, you didn't go as far as; part of the Greek chorus, but just which part of it, a little different.

MS ABLETT-KERR: I think I did alert my client's concern about the contamination of any criminal trial.

HON JUSTICE ROBERTSON: Yes.

MS CRUTCHLEY: Thank you, Sir. It did strike me when I was listening to the submissions of counsel from the news media that many of the cases they were talking about, of course, were about criminal jury trials, and I think there is a difference in the inquiry that needs to be looked at under the issue of public or private.

I will go on and develop that theme, but it seemed to me that evidence in public in front of this Commission about the issues that this Commission has to deal with could indeed influence the due administration of justice in the hearing of criminal jury trials.

The other distinction to be made about Dr Young's work is that his evidence from looking at what jurors did in jury trials was from a very small sample of jury trials and it wasn't as absolute as perhaps has been made out. It was an indication that jurors are not influenced by publicity about the trial they are sitting on when they are sitting on it.

So, that's quite a significant issue that is not what this - what my submissions are about in terms of what the Commission might be looking at.

I would like to go on perhaps and discuss, in

particular, from my paragraph 15.1, the considerations that must apply where criminal offending will be dealt with by trial by jury because I think that's not been talked about this morning at all, as well as the fundamental rights in sections 24 and 25 and the freedom of expression.

I set out the well-known statement from the Solicitor-General v TVNZ but perhaps I could just move on to consider the criminal jury - that criminal jury trials are conducted according to established procedures and principles, and that aspect is important.

I do think it would be important for this Commission at some point to have a factual statement of where the Police investigations and prosecutions are up to, and perhaps a likely timeframe for the remainder of the Police investigation work as the basis for some of the considerations here.

There are two principles related to the right of trial by jury that I think need some consideration, and I've quoted there from the relevant authority:

"A person accused of a crime is entitled to have the case presented to a jury with their minds open, unprejudiced and untrammelled of anything that any newspaper for the benefit of its readers takes upon itself to publish before any part of a case has been heard."

That fear trial right equally extends to the Crown, and that of course has been very long recognised. It's not generally a right that's as visible in comparison to discussion about fair trial rights of the accused but more of an assumption, but given that the Crown looks after the public interest in the prosecution function, it clearly is of vital importance in this particular discussion, and in particular to the second and third requirements that Lord Diplock identified.

I think the most important question, Sir, is to focus on what the effect could the publication of the evidence of this Commission have on the fact finding ability of a jury in associated criminal jury trials, which must be a really important issue when looking at what this Commission will look at? I go on to discuss that.

It must be that witnesses, particularly complainants

and putative accused may give evidence to this Commission on matters which are collateral to or associated with, rather than directly about, allegations of criminal conduct. They will be associated with the initial allegation but, of course, that material would not be admissible at trial.

If such evidence was provided to the Commission for the purposes of the Commission's area of inquiry but which trenches 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.

An example is 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 the consideration of adequacy of investigation. This evidence could well be inadmissible at the criminal jury trial of the sexual charges.

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 or when they come to their trial as an accused.

Now, witnesses at this Commission may well have to canvass matters at the heart of the allegations of sexual offending. This may provide a rehearsal for such witnesses which may have the following implications. It could cause witnesses to submit themselves on oath to a version of events in advance of the criminal proceedings; publication of the evidence of these 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.

Now, I am not suggesting that witnesses would come along here, Sir, and give false evidence, but the nature of what this Commission is looking at may impact on the type and nature of evidence they would give, which would be different, or have a different focus or cast, than the content of their allegations about the actual offending.

So then, your witness may feel compelled to repeat the evidence given at this Commission for fear of being prosecuted for giving false evidence.

Witnesses - publication of witness' evidence could

deprive of the opportunity for surprise contained in cross-examination at trial; and it may necessarily cover collateral matters and evidence which could be inadmissible at trial.

The latter point could influence the course of evidence given at trial if such consistencies obtained in evidence for the Commission's inquiry were used to undermine witness' credibility at criminal trials.

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

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 undermining of the credibility of witnesses and accused in a way that could affect the proper administration of justice through interfering with the more limited inquiry and stricter rules applicable to a jury trial.

For those witnesses who might also be expected to speak to the Commission of Inquiry about the matters it's charged with, who may be or who are also charged with criminal offending, then clearly one needs to consider the fundamental rights they have pursuant to the New Zealand Bill of Rights Act.

Now, in balancing that exercise between fair trial right and freedom of expression rights it may be argued that the fair trial rights will not necessarily be affected because of the procedural mechanisms which can be used to deal with possible prejudice. There's been some subtle or indirect discussion of that this morning. I refer, of course, to the Lama CJ in *Dagenais v Canadian Broadcasting Corp*, the procedural mechanisms considered available. But, of course, in the *Gisborne Herald* case the Court of Appeal didn't consider such measures would

be adequately effectively - effectively adequate in New Zealand and I've set out their approach. As well as another point from the Dagenais judgment.

In Australia, and I refer to the Australian text I have discussed in the first footnote, one of the procedural options available there appears to be a temporary staying of a trial to allow potential jurors' memories of prejudicial publicity to fade. Of course, in New Zealand this is not an option in criminal jury trials. To delay a trial for that purpose would ... part of the rights of an accused to a fair hearing.

In the New Zealand context, of course, the Court of Appeal in the Gisborne Herald did note that there may be even less scope for the staying of a proceeding or delaying a criminal proceeding if there's been publicity that affects trial rights.

It's also clear from the Gisborne Herald case any balancing exercise is only a temporary curtailment of publicity, rather than the absolutes that have been spoken about this morning.

In the second general provision in the Terms of Reference it's clearly contemplated that publication of evidence heard by the Commission in private and the report itself will be subject to public disclosure by the government. So, if this Commission decides not to hear evidence in public, then in future the government would be able to provide publication of both the evidence and the full report at a point where criminal charges have been dealt with by the system.

Now, normally, obviously curtailment of the right to publish is generally of short duration if all you're looking at is a criminal trial.

The best example of that is evidence given at pre-trial hearings on admissibility issues. While the media are generally present at such hearings, they can't publish details of the evidence, submissions or ruling until the trial is over. That curtailment of publication is of reasonably short order and it may be argued that of course the period of curtailment in this circumstance may be longer, and that's no doubt true, but the principles still apply, that is of temporary curtailment.

HON JUSTICE ROBERTSON: But what the media are saying to me is that's intolerable, that if there is to be publicity it

needs to be publicity at the time that the evidence is being given to the Commission, and that anything other, they say, would be totally unacceptable. I mean, I think they would argue that the temporary thing which was seen as acceptable by some Courts is a thin edge to the wedge.

MS CRUTCHLEY: I understand that, Sir. I suppose what I'm attempting to tease out is, where do the fair trial rights of accused persons who will stand trial on criminal charges arising out of the basic allegations which are the starting point of this Commission, how those - where the balance is in relation to protection of fair trial rights and the overall issue of the due administration of justice? I would suggest temporary curtailment is one obvious solution. Hearing evidence that may trench on those issues in private is another one.

Your Honour talked about the postponement of the Commission of Inquiry as a third possibility.

So, there are a variety of mechanisms where the balance of fair trial rights which is seen in New Zealand to be of more significant importance at the point of trial than the ability to publish for a temporary period.

HON JUSTICE ROBERTSON: Thank you.

MS CRUTCHLEY: The last point I haven't really developed in any great length basically, Sir, because of the small opportunity I had to consider the matters before coming here, but it's to look at the limitations of coercive powers of the Commission, again related to people who may be charged with offences.

Now, the Commission, like some other agencies, you can require people to answer questions which may be against interest. I've outlined some of the powers that there are available, situations where people can be compulsorily required to answer questions.

I would suggest there may be a limitation on the use of the Commission's coercive powers to insist that a putative accused compulsorily provide evidence to the Commission in public on matters directly related to matters which are likely to be the subject of criminal charges. So, I see there may be a need to be some careful consideration about what a putative accused could be asked by this Commission while there is an ongoing criminal investigation, the result of which is not yet

known, that is charges will be laid or charges will not be laid.

Again, if -

HON JUSTICE ROBERTSON: If the Commission to protect fair trial interests has to have one or two hands tied behind their back, how much confidence is the public going to have in the Commission's eventual report if it has not thoroughly, scrupulously and without halt or hinder, investigated every matter which is properly on the table?

MS CRUTCHLEY: That's not my argument, Sir. I think I make it very clear in that paragraph that I'm talking about that being in public. I don't think for a moment this Commission should do anything other than to do what you've described. But if you're going to compulsorily require a putative accused to discuss matters which may be the subject of a criminal jury trial for them, which may have to canvass matters which may be the subject of their defence, then to do that in public may well affect the fair trial rights of that person when they become an accused, but I wouldn't imagine that that could stop the Commission from hearing from that person in private, although immediately one begins to think about -

HON JUSTICE ROBERTSON: New Zealand is a very small place.

MS CRUTCHLEY: I wasn't going to say that. I was more thinking, who else would be present?

HON JUSTICE ROBERTSON: New Zealand is a small place and I think the reality of being able to maintain the integrity of that is something that I have to weigh.

MS CRUTCHLEY: Yes, Sir. I just thought it would be helpful to kind of address that.

HON JUSTICE ROBERTSON: I am grateful to you for raising it because these are the crunch issues that we have to work out.

Can we tailor a process which - you see, I don't hear anybody saying that the maintenance of fair trial has got to be a major concern, even if I can't get everybody to say a priority, even if that's what I would say for myself.

Then the issue is, can you ensure that and, as I understand the media, you will only be able to have a

process which has confidence, transparency and integrity about it if it is being done in public; and how do you marry those two things together? That is the challenge of today.

MS CRUTCHLEY: Yes, Sir.

HON JUSTICE ROBERTSON: I hear very loudly those who say, "This matter has got to be got on with and dealt with," but how do you prioritise that need, and it's an understandable need and a thoroughly commendable need, with the need for ensuring that you don't do anything which has the potential to interfere with the Court process because someone has to weigh and assess whether it is in the public interest, that if there were criminal charges they were not able to be run or that people were discharged because this Commission had contaminated the water to such an extent that a fair trial could no longer be assured?

What we have been looking at in this public/private thing, is to see whether going private is a way to enable that to occur, and certainly the message from the media is fairly consistent and it is pretty much the message of everyone else, you go public to the greatest extent you can, but where are the areas in which you can have privacy? Those are the challenges which I think face us at this point.

MS CRUTCHLEY: Sir, I wouldn't be of the view that you go public to the widest extent in this inquiry precisely because of the issues you've identified as being the difficult ones, and maybe - well, what Ms McDonald said this morning in terms of what work the Commission can do, there seems to be a body of work the Commission could engage on which wouldn't begin to directly impact on the fair trial rights of persons who are charged and who may be charged as a result of the current investigations.

HON JUSTICE ROBERTSON: Can one say that with confidence? I mean, Mr Akel has been making with confidence the submission that juries are never affected by things that go on outside, but can we say with confidence that people who were facing - former or present Police Officers - facing criminal charges, those trials would not be affected in any way by the fact that this Commission were scrutinising the activities of other Police Officers and their responses at the same time?

MS CRUTCHLEY: Well, I -

HON JUSTICE ROBERTSON: You see, those are the risk factors -

MS CRUTCHLEY: That's right.

HON JUSTICE ROBERTSON: - which need to be made because the outcome of the wrong call by the Commission is that people avoid criminal responsibility.

MS CRUTCHLEY: Yes. I wouldn't agree with Mr Akel in that respect, and that was my first submission, that you may in fact even run the risk if evidence about the - evidence of sexual conduct consensual and allegations of misconduct that have not formed the basis of any charge may poison the environment for those who are Police Officers who are charged and there may be a risk there, depending on the content of that evidence and how far one has to go into the nature of the allegations in order to look at adequacy of investigation.

HON JUSTICE ROBERTSON: So, then you come back to saying, well, let's do it in private so that we don't have any danger of that sort of process, and then I have to cope with the media's response that that is simply a never acceptable approach to this sort of public issue.

MS CRUTCHLEY: Isn't there a middle ground in respect to some of the issues that this Commission can deal with, can be happily dealt with in public and the matters dealt with on a case-by-case basis in relation to those witnesses who do have stories to tell, part of which it is important are in the public arena, part of which cannot be in the public arena because it will affect fair trial rights of Police Officers charged with criminal offending but which, after the temporary curtailment of that material, their evidence and the report of the Commission is actually public?

So -

HON JUSTICE ROBERTSON: But temporary curtailment, Ms Crutchley, realistically we're looking at 18 months/two years if we have major criminal charges, are we not?

MS CRUTCHLEY: Yes, Sir, absolutely.

HON JUSTICE ROBERTSON: I'd be looking at figures as to how long a matter which has pre-trial processes and more than normal things could run. That's even longer than the

Court of Appeal talked about in the temporary things before.

MS CRUTCHLEY: Yes. With respect, the Gisborne Herald case, the Court of Appeal was looking at one criminal proceeding rather than a Commission of Inquiry having to grapple with their business plus look at the effect on criminal trials.

The only other point, of course, once criminal charges have been laid, it would appear that the privilege against self-incrimination would immediately be available and the right to silence would probably take precedence over the Commission's ability to compulsorily require such persons to give evidence, particularly in public. And there may well be some arguments about that from those who represent persons who have been charged with criminal offences.

My conclusion really is that the Commission may need to just deal with this on a case-by-case basis, about whether evidence from a particular witness can all be heard in public, or parts of it can be heard in public, rather than looking at the issue on a global basis.

I mean, the mechanics of that may prove to be too troubling but one could imagine that the Commission could embark on that exercise, weighing the considerations for each witness where their evidence might trench on matters which will be dealt with in a criminal jury trial.

Unless you have any questions, Sir -

HON JUSTICE ROBERTSON: No, thank you, Ms Crutchley, I am obliged to you and all counsel.

SUBMISSIONS IN REPLY BY MS SCHOLTENS QC

MS SCHOLTENS: Can I make just a point, Sir, one relating to the suggestion that name suppression of subject persons might - one reason against name suppression would be that people might come forward if their names were in the public arena. I'd suggest, and it has been our experience, that the names themselves aren't relevant to whether people come forward or not. We have had individuals who have come forward essentially because they've been encouraged by the fact others have been prepared to come forward, and so that has been what has encouraged them. It's got nothing to do with the particular individuals who are the subject of complaint. The people who have come forward have said, "We made a complaint too and we're unhappy."

Now, whether there are other complaints around about the individual they're talking about, the Commission is going to get that information, not as a result of any publicity but as a result of the Police responding to our request for all the files of complaints over the last 25 years. So, any complaints that have been made in the last 25 years on matters touching on this sort of conduct will be brought to our attention through that process.

I just want to make that point about that submission.

HON JUSTICE ROBERTSON: Dame Margaret and I am obliged to you all for your assistance. We will take time to consider the issues and the competing values which have been advanced from various parts of the room. The Commission will now adjourn.

Hearing concluded at 12.50 p.m.

