



– APPENDIX 3 – COMMISSION RULINGS AND MEMORANDA

Rulings and memoranda by the Commission of Inquiry into Police Conduct. Those that can be made public are published as Appendices 3.1 to 3.9. A record of all significant rulings and memoranda, which includes rulings that must remain confidential, is tabulated below.

Document	Date	Evidence and advice	Appendix
Ruling	16 April 2004	public hearing 8 April 2004	3.1
Ruling	13 May 2004	confidential hearing 10 May 2004	–
Ruling	19 May 2004	confidential hearing 17 May 2004	–
Ruling	28 May 2004	public hearing 24 May 2004	3.2
Ruling	17 August 2004	chambers hearing 13 August 2004	–
Ruling	27 August 2004	public hearing 13 August 2004	3.3
Ruling	29 August 2005	chambers hearing 24 August 2005	–
Ruling	22 November 2005	private hearing 21 November 2005	3.4
Commission memorandum (and memorandum of advice)	15 December 2005 (and 14 December 2005)		3.5
Memorandum of advice (and submission by counsel assisting)	15 February 2006 (and 13 January 2006)		3.6
Commission memorandum (and two memoranda of advice)	28 July 2006 (and 28 July 2006, 10 July 2006)		3.7
Commission memorandum (and memorandum of advice)	13 October 2006 (and 12 October 2006)		3.8
Commission memorandum	25 January 2007		3.9



APPENDIX 3.1: COMMISSION RULING, 16 APRIL 2004

Ruling of the Commission of Inquiry into Police Conduct, 16 April 2004. This deals with the parameters and time frame of the inquiry.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

PUBLIC HEARING

8 APRIL 2004, 10AM

Mary Scholtens QC, Counsel Assisting the Commission
Kristy McDonald QC and David Boldt, for the New Zealand Police
John Upton QC for the Police Complaints Authority
Ms Susan Hughes for the Police Association

RULING OF THE COMMISSION

DATED 16 APRIL 2004

Introduction

- 1 At our first public hearing on 22 March, Ms McDonald QC, counsel for the NZ Police, advised that there were issues upon which definition or delineation were required and it was agreed that we would hold a special public hearing on 8 April to deal with them.
- 2 Subsequently we received a request by Ms Hughes on behalf of the Police Association, and letters have been received particularly with regard to the issue of representation and the costs of it, which have also been raised on previous occasions.

Police Complaints Authority Act 1988

- 3 The issues raised by various Counsel overlap to an extent and have in part been overtaken by the passage of time.
- 4 There have been a number of questions relating to the meaning and effect of s32 and 33 of the Police Complaints Authority Act 1988. These provisions are subject to a statutory amendment which is presently before Parliament. All agreed that, until the passage of that proposed legislation through the House, it was non-productive to consider this issue until it is clear what the applicable law will provide.

Time Span

- 5 At the hearing on 22 March, we made clear that our current intention was to cover a period of 25 years, that is from 1 January 1979 to the present time. This time span is intended to cover complaints made during that period. That may have to be reviewed in light of issues which come to attention, but in the meantime that is the span in which we have interest. Ms Hughes raised the question as to whether the existence of a complaint to the Police prior to 18 February 2004 (being the date of the Order in Council constituting the Commission) was essential. We are not prepared to rule out the possibility that a complaint made after that date may need to be considered. We are unable to see any substantial reason why, if that occurred, we should not consider whether the Police response was satisfactory.

Localities

- 6 An issue was raised as to the meaning in paragraph 2(a) of the Terms of Reference of the phrase “other relevant localities”.
- 7 In our view the Terms of Reference read as a whole make it clear that there is an incident involving Ms Nicholas arising in Rotorua and an incident involving Ms Garrett arising in Kaitia which we must consider. We are also required to consider any other incidents which emerge, and the practice in the localities of any such incidents will need to be considered as well.

Definition of “Sexual Assault”

- 8 The question arose as to what was meant by the term “sexual assault” used in the Terms of Reference. Counsel suggested that the definition in s185A of the Summary Proceedings Act would be appropriate and we agree. Section 185A provides a useful and convenient starting point.
- 9 At this stage it is difficult to contemplate anything not covered by s185A. As in all matters the Commission cannot, in advance, circumscribe its inquiry or eliminate relevant matters which may require investigation and consideration. If any matter of potentially criminal behaviour which does not fall within the categorisation in s185A does arise, then it will have to be considered. All parties who could be affected will be provided with hearing opportunities on it.

Unprofessional Behaviour

- 10 A question has been raised as to what is meant by “unprofessional behaviour” which we will be required to consider.
- 11 The precise words of the Terms of Reference are:
- “... the conduct, procedure and attitude of the Police in relation to allegations of sexual assault by members of the Police or associates of the Police or by both, the extent (if any) to which unprofessional behaviour within the Police in the context of such allegations has been or is tolerated, and the manner in which such allegations have been or are investigated and handled by the Police, whether directly, or on behalf of the Police Complaints Authority.”

- 12 As Ms McDonald anticipated, there can be no argument that the term “unprofessional behaviour” would include anything that was less than an objective investigation into a relevant complaint and the exercise of the discretion to prosecute being undertaken other than in a scrupulously fair and impartial manner. In other words, whether the approach towards complaints against Police officers or those closely associated with them have been treated with the same measure of independence, objectivity and fairness which it would be anticipated would exist with regard to all other allegations of sexual offending.
- 13 It was acknowledged by all Counsel that, when the Terms of Reference are read as a whole, the Commission’s fundamental task relates to actual assaults and other sexual offending which has been complained about and in respect of which there is dissatisfaction with the response. There is not an open brief for the Commission to consider all complaints made against Police officers in respect of every matter, and the way in which they have been responded to. Taking some words out of the Order in Council and reading them divorced from the recitals could be quite misleading. The Commission has a specified and defined area, not a limitless roving brief.
- 14 Questions have been asked as the meaning of the phrases “sexual activity that gives cause for concern” and “the general propriety of the conduct of members of the Police in respect of sexual matters” and “personal behaviour including sexual conduct”.
- 15 We reject any suggestion that the Commission should confine this Inquiry solely to allegations of unlawful sexual conduct. It is clear that questions have been asked about areas of conduct which go beyond that, but we understand the concern is as to how much further it goes.
- 16 The Commission is not going to be involved with generalised questions of morality of members of the Police. Like every other member of the community they are free to engage in private sexual practices providing that conduct is lawful and it does not impact upon their role as a Police Officer.
- 17 In our view the starting point for this part of the Inquiry will be evidence from both the Police and the Police Association as to the circumstances in which action has been initiated against members of the Police during the last 25 years in relation to conduct which is not unlawful. In hearing that historical narrative, we would anticipate evidence being provided as to why action has been taken in the way that it has when it relates to non-criminal activity.
- 18 We anticipate that there will have been changing patterns. We are obviously interested to know of the present situation and to hear views as to what needs to occur in the future. All of this must involve a nexus between the behaviour which is being considered and the status of the individual as a Police officer at the time that it occurred.
- 19 We are unwilling to define in any more exact or limiting way the areas in which we will be interested. In part our areas of inquiry will be influenced by the nature of the complaints which are made to us. If, as a result of the generality of our approach, it is necessary for further or additional evidence to be called as the Inquiry progresses, then we accept that that is the consequence of our task.

Representation and Costs

- 20 Ms Hughes, on behalf of the Police Association, and a number of lawyers on behalf of Police officers or former Police officers have again raised questions relating to legal representation for interested persons who might be adversely affected by the findings of the Commission.
- 21 It is important to stress that the Inquiry is not an adversarial hearing and that the normal approach which applies in a criminal trial is inappropriate and would be unhelpful.
- 22 A number of submissions have been made on the basis of apparently reported comments about the possibility of the Government providing financial assistance for legal representation for people who have complained about the actions or inactions of the Police. We have no evidence about this possibility. It is not an issue which has been initiated by the Commission or which has in any way been influenced by us.
- 23 We will not, at any stage in our task, be reaching conclusions on the basis of media reports. We will deal with proper evidence presented in a proper manner with opportunity for challenge and confrontation where that is necessary or appropriate. What the Government considers to be necessary or appropriate in this regard is their business.
- 24 Our starting point is that evidence which we require to hear will be led by one of the Counsel Assisting the Commission. We will, however, place no impediment in the way of any person who wishes to have their own lawyer present at any stage preliminary to or in preparation for a hearing, or who wishes to have Counsel sitting with them during a hearing.
- 25 We will require that Counsel Assisting the Commission lead all relevant evidence, so it is difficult to see the circumstances in which a person who has evidence of complaint to make would need (or could be materially assisted by) the presence of their own counsel. That will be a matter for them, but at this early stage in the Inquiry we do not anticipate the need for their having legal assistance.
- 26 There is some neutral historical material that we will require to hear where Counsel assisting us may conclude that the leading of this sort of evidence would better be done by others. The potential for that to occur with witnesses can be explored between Counsel as the need arises.
- 27 This Inquiry is about what historically occurred and what is now occurring and, as a consequence of this Inquiry, what should happen in the future.
- 28 In the course of hearing such evidence, it is foreseeable that the actions or inactions of some people who were Police officers at the relevant times will come under scrutiny and could be the subject of criticism. We certainly will be vigilant to ensure that anyone who is in that category is, at all times, free to have their own Counsel with them, either in the preparatory stages of the process or at the hearing itself. Their ability to lead evidence will always be limited to matters which are strictly relevant to our Terms of Reference. Cross examination controlled in the same manner will be a possibility. Not only do we wish to avoid trawling through matters which will not assist in the determination of any of the issues with which we have been charged, but we must avoid anything which could have an effect on simultaneous processes.

- 29 As we have frequently said, the Commission has no funding to meet legal costs for anybody. The normal provisions with regard to civil legal aid apply. As matters develop, we may reach a view that a particular person or persons are in a special position where separate representation for them is of pivotal importance. At that time and in those circumstances we may be persuaded that we should express a view on the importance of separate representation. Anything at this stage would be pure conjecture and speculation. We have not yet reached the point that stories have even been received from anyone in a form from which Counsel Assisting can decide whether there is evidence which needs to be called and to which a response may be required.
- 30 The Commission will not be bulldozed into making premature decisions about matters which will always be the concern and responsibility of others. The Commission will ensure that, at all times and in all circumstances (whether a witness has separate representation or not) the principles of natural justice are strictly complied with and rights of individuals who could be in jeopardy properly protected and maintained. There is no point in extravagant and continual demands being made to the Commission in an area in which it is powerless to respond in any event.

SUMMARY

- 31 We acknowledge the need for everybody to understand the general parameters within which the Commission will work, so that proper preparation can be progressed. However, it is inappropriate for the Commission to curtail potential areas of inquiry which could require attention.
- 32 In a nutshell, our approach is that the Inquiry is based on concerns of people who allege that having been inappropriately treated by the Police/their close associates in a sexual manner, and having complained about it, they remain dissatisfied about the acts or omissions of Police officers in response.
- 33 Initially we will cover a 25 year period. We will have regard to the general position within the Police in New Zealand but will look specifically at localities where we find examples of this having occurred on the evidence which is called.
- 34 Obviously we will be concerned about behaviour which could be unlawful. We will be anxious to know whether there is other sexual conduct that impinges upon, or has a nexus with, an alleged wrongdoer's position as a member of the New Zealand Police. We are not undertaking a general inquiry into the moral behaviour of Police officers in their private capacity which properly has no consequence for their work as a Police officer.
- 35 We acknowledge that there are serious and legitimate concerns in the community about the difficulty which people have in raising concerns and complaints about those who abuse them sexually. Investigating that would be a far reaching inquiry in itself and is not our brief, except to the extent that the phenomena is more difficult or different where the alleged wrongdoer has been a member or close associate of the Police.
- 36 This is an Inquiry in which evidence will fundamentally be presented by Counsel appointed to assist the Commission, and individual representation and private advocacy will not be

necessary. It will be accommodated for those who wish to have that facility, providing their representatives maintain strict adherence to relevance.

- 37 The financing of such representation is not within the power or control of the Commission and those requiring assistance will need to seek it elsewhere. We are conscious of our duty to ensure that anyone who could possibly be subject to adverse finding or criticism by the Commission is afforded every opportunity to respond to allegations made against them and to confront and challenge those making the allegations.
- 38 At this very early stage, while wishing to assist with general responses to questions of delineation and definition, it is fundamental that everyone understands there can be no watertight or inflexible limiting.

Dated at Wellington this day of April 2004.



APPENDIX 3.2: COMMISSION RULING, 28 MAY 2004

Ruling of the Commission of Inquiry into Police Conduct, 28 May 2004. This deals with a time frame for hearings and confidentiality for persons giving evidence.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

HEARING

24 MAY 2004, 10AM

Mary Scholtens QC, Counsel Assisting the Commission
Kieran Raftery, Counsel Assisting the Commission
Kristy McDonald QC, for the New Zealand Police
David Boldt, for the New Zealand Police
John Upton QC, for the Police Complaints Authority
Susan Hughes, for the New Zealand Police Association
Mr Cooper and Mr Mears – for the Police Managers' Guild

RULING OF THE COMMISSION

DATED 28 MAY 2004

- 1 At the conclusion of Monday's public hearing, we indicated that we would meet with all counsel in Chambers on Tuesday 25 May to discuss future progress and timetabling.
- 2 That hearing took place, as did a subsequent hearing with some of the lawyers on Thursday 27 May.
- 3 As has been obvious from the commencement of this process, there are substantial difficulties in ensuring that the thorough, rigorous and comprehensive inquiry which our Terms of Reference mandate, are progressed without unfairly or unreasonably jeopardising the rights of any individuals.
- 4 The timeframe for our work was always acknowledged to be extraordinarily short, but we remain mindful of the fact that there was a public concern that led to an expectation of an early response and we are determined to ensure that any deviation from our reporting date is only contemplated if it is absolutely unavoidable.

- 5 The Commission has had a number of oral historians meeting with people who consider they have a grievance falling within our Terms of Reference. This process has been adopted to ensure that those with a story to tell can do so in an unrestrained and uninhibited way, but without compromising their rights to control whether they wish to become formally involved in the evidential processes of the Commission if what they had to say could be legally relevant.
- 6 The Commissioners themselves have had no involvement in this process or access to the material that it has produced.
- 7 Although there is still substantial work to be undertaken in this phase, there are now some stories available which enable counsel assisting the Commission to make a preliminary assessment and to signal what other evidential material may be required to enable hearings to take place with regard to specified incidents.
- 8 In recent times requests have been made to the Police in respect of relevant files. These also need to be referred to the Police Complaints Authority. There was some delay while an amendment to the Police Complaints Authority Act [1988] was considered by Parliament after serious issues arose about the confidentiality provisions of the [1988] Act.
- 9 We are advised that both the Police and the Police Complaints Authority have an absolute commitment to ensuring that information requested is provided in the most timely way possible, but we are reminded on all sides that, even with the best will in the world, there needs to be careful response and investigation in respect of any request received and appropriate management of initial contacts.
- 10 It will be necessary to allow sufficient time for people, whose acts or omissions are complained of, to have the opportunity to respond and to have their responses assessed for evidential value.
- 11 We are frequently reminded of the problems in respect of funding for those people that has the potential to slow things down. We note again that we do not have a budgetary allocation that enables the Commission to respond in that arena. It is worth noting that the funding arrangements currently available are not dissimilar to those that applied before the Royal Commission into the New South Wales Police Service in the 1990's.
- 12 All counsel for parties are fully aware of the urgency that the Commissioners consider attaches to our task and all have consistently expressed a willingness to co-operate.
- 13 We have been persuaded that it is unrealistic, if not impossible, to actually hear evidence relating to any incidents which are within our Terms of Reference in the month of June 2004. We have reached that conclusion with a degree of reluctance but in the firm conviction that, even with full co-operation on everybody's part, it will not be possible to have all the evidence about any specific instances investigated, assessed and briefed for presentation at a public hearing in that month.
- 14 We repeat that we are convinced that the interests of justice and equity require that we should not embark on any public hearing with regard to any alleged incident unless we can hear all versions and facets of it. We cannot receive piecemeal some of the story at one time and then return to an incident at a later stage.

- 15 Accordingly we are satisfied that we must leave counsel pursuing preparation and preliminary work during June. We have scheduled a further chambers hearing for Wednesday
- 16 June at 2pm when we will review their progress and reach a determination as to what can be done in July. 16 An issue has arisen relating to all witnesses who will be called to give evidence before the Commission. As the amendment to the Police Complaints Authority Act clearly demonstrated, there is major sensitivity about issues of confidentiality in our work.
- 17 We remain of the view that the starting point is that our hearings should, where possible, be in public and subject to media scrutiny. However, the rights of individuals must be respected. The fact that total confidentiality has been a hallmark of police complaints procedures in the past must be given proper and substantial weight.
- 18 Consequently, we direct that the identity of any person who it is proposed will give evidence before the Commission shall, unless they specifically and unequivocally waive that right themselves, be confidential until they have first appeared before the Commission and had the opportunity to seek orders prohibiting publication of any aspects of their identity or evidence. We recognise that their rights in this regard could be irretrievably subverted if there was any publication of details that identify them before they have an opportunity to make an application. The media in particular, and everyone in general, will understand that actions which effectively deny a potential witness the opportunity to apply for protection because of prior public identification could be contempt.
- 19 This inhibition on the public dissemination of information does not interfere with the Commission's staff, Counsel for parties before us and other persons responsible for preparing potential witnesses who might appear before the Commission, carrying out necessary work. However, care must be taken to ensure that the rights of potential witnesses are afforded full recognition in the course of those activities.

Dated at Wellington this day of May 2004.

J Bruce Robertson

for the Commissioners



APPENDIX 3.3: COMMISSION RULING, 27 AUGUST 2004

Ruling of the Commission of Inquiry into Police Conduct, 27 August 2004. This deals with private and public hearings; name suppression; and the possible effects of the Commission's planned programme on current police investigations and criminal processes, and the consequent need to amend the work programme of the Commission.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

HEARING

13 AUGUST 2004, 9.30AM

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

RULING OF THE COMMISSION

DATED 27TH AUGUST 2004

Introduction

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

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

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

Our Terms of Reference and Criminal Processes

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

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

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

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

...

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

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

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

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

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

The Last Few Months

- 8 The necessary preparatory processes had not long been in place when we were advised that the New Zealand Police were apprehensive as to the effect of our operation on their ongoing investigations although they were then, and always have been, anxious to see our work continue.
- 9 After a specific request was transmitted to us, we decided to hear evidence from the Commissioner of Police in a private hearing so he could outline the difficulties which were perceived to exist.
- 10 A hearing was held on 10 May 2004 following which we ruled as follows:

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

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

3 I was persuaded, on the basis of the representations made by Ms Scholtens, that it was both necessary and appropriate for the Commission to conduct this hearing (which related purely to questions of process and procedure) without giving public notification. I indicated that there was no

guarantee that evidence given or submissions made would necessarily be suppressed at all, or for all time.

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

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

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

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

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

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

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

Commission must be totally neutral and not have any effect on the criminal investigations one way or another.

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

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

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

14 We have consistently been of the view that we should not, at any stage, hear evidence from only one side of an incident. There is not a possibility of proceeding to hear evidence immediately from complainants when serving or former Police officers who may potentially be at risk of prosecution involved in such incidents will consider they are precluded from telling their side of the story at this stage as would probably want to exercise their right to silence.

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

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

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

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

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

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

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

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

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

7 If people are charged, then difficult issues will arise about our ability to progress our terms of reference without the potential for unintended deleterious consequences. Those are matters that we will consider at the time and in light of the reality that then exists.

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

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

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

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

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

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

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

15 It necessarily follows that this Ruling, like the one last week, must remain confidential in the meantime. After the Chambers hearing which is scheduled for Tuesday 25th May 2004 with all

counsel for parties, we will decide what public indications need to be made as to our hearings during the next three months.

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

Public or Private Hearings

- 17 On the issue of public or private hearings there was a consistency of approach from all counsel who appeared before us. No party suggested that hearings should not be in public to the greatest extent possible, consonant with people's individual rights and without compromising the proper administration of justice in any criminal proceedings. Stating the ideal is easy but giving it life and reality is much more challenging.
- 18 The starting point is the very significant public interest in the principle of open justice. This principle is well recognised in civil as well as criminal proceedings. The House of Lords held in *Scott v Scott* [1913] AC 417 that unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear a civil proceeding in camera. Lord Atkinson held at p463 that:

The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because

it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

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

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

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

Section 4 [of the 1908 Act] suggests that an inquiry will normally be conducted in the same way as Court proceedings: in public. So do the terms of reference. They appear to be drawn on the premise that in the ordinary course the proceedings will be in public. This is to be expected where it can fairly be said that the Commission was established ‘not as a matter of private information for the executive government, but for public information and confidence’: *Bretherton v. Kaye* [1971] VR 111 at 125 per Gillard J. Nonetheless the terms of reference confer specific power to sit in private or to exclude particular persons from the hearing. The power so conferred is plainly a discretionary one.

- 21 It found that the Commissioner (retired Chief Justice Sir Ronald Davison) had not erred in law in exercising his discretion to hear evidence in public since he was entitled to conclude that the relevant public interests outweighed the very significant interests of taxpayer confidentiality recognised in legislation.

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

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

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

“[A Commission of Inquiry] is a valuable method of comprehensive and authoritative fact finding on which to base wide-ranging proposals for legislative and administrative reform. It is a means of ascertaining whether abuses exist and eliminate them. By virtue of the publicity which usually

attends the proceedings and ultimately the report when it is made public, the commission of inquiry serves the beneficial purpose of enlightening the public just as it enlightens government.

...

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

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

- 24 In our view the carrying out of our task in public, to the greatest extent possible, is critical as our warrant arises from public concern about the adequacy and impartiality of the New Zealand police force in investigating complaints against their own, the police attitude towards and tolerance of alleged sexual offending by their own, and the general propriety of police conduct in respect of sexual matters. Allegations have been made that raise questions about the integrity of those who hold very high positions in the Police. These matters go to the heart of public confidence in the New Zealand Police, who are entrusted with significant powers for the protection of the public.
- 25 When the issues were first raised in the media, they evoked a reaction of such proportions that the Government was moved to recommend the establishment of this Commission of Inquiry. The purpose of the inquiry plainly and properly is to enable an open and public consideration of the allegations now in the public arena. In particular we are to inquire into whether there was substance in the suggestion that matters were not properly investigated, to consider the broader context of the way the police respond to allegations of sexual offending by the police and their associates so as to assess the scale of any problem, and to assess how things have changed over the past 25 years. These are matters of public interest which could not be properly addressed if the Commission were to meet in private, even if its evidence and report are eventually made public at the end of any criminal proceedings.
- 26 The confidence of the public in, and integrity of, the Commission’s processes is also advanced by public hearings. Although hearings in private might lead to recommendations that could be welcomed by some groups, they are less likely to receive universal acceptance if the evidence which supports them has not been the subject of the usual disciplines of the winds of publicity. Our recommendations may accordingly lack credibility.
- 27 Linked to this is a concern that, if we hear evidence in private or suppress essential evidence, our conclusions may be seen as either a whitewash or a kangaroo court assessment emerging from a star chamber arrangement. We are expected and instructed to call the police to account. Those who are called upon by us to justify or explain their conduct are entitled to the protections of natural justice and fair process. A transparent public process is essential to

give confidence to all that we have made full, proper and fair inquiries. Public access to our hearings is also a primary way in which we are accountable for the carrying out of our task. The justifications behind the principle of open justice include judicial accountability and with it the prevention of arbitrary decision making and abuse of process. The development of public hearings is attributed to a backlash against the practices of the English star chamber and its notorious equivalents, see Morag McDowell, *The Principle of Open Justice in a Civil Context* [1995] NZ Law Review 214, 216.

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

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

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

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

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

Name Suppression

- 32 As in all of life (and nonetheless in the law) there are competing interests. The first which arises within this context is the rights of confidentiality and privacy which each individual citizen enjoys within our community, versus the principle of open justice referred to earlier and the right to receive and impart information as recognised in section 14 of the New Zealand Bill of Rights Act 1990.
- 33 Apart from perhaps the more extreme positions espoused by one counsel for the media, there was a general acceptance that there may be strong and exceptional circumstances where individual factors may require assessment and orders suppressing names and identifying factors may become necessary.
- 34 Mr Gray questioned the juridical basis for suppression. Although acknowledging that sitting in private was specifically permitted under our terms of reference, he argued that, if we

concluded we should not sit in private, then we could not take the lesser step of curtailing publication of some of what was done. There is a fascinating theoretical stream in that argument, but we are of the view that if, in striking the balance between competing interests, we decide that public hearings are essential, our ability to sit in private would provide sufficient warrant for us to influence the degree of publication of those proceedings where unique circumstances so demand. In saying this we note that our jurisdiction derives from the civil jurisdiction of the High Court and its inherent jurisdiction to make suppression orders. We also note the recent judgment of the Privy Council in *Independent Publishing Company Ltd v Attorney General of Trinidad and Tobago & Anor* (Trinidad and Tobago) [2004] UKPC 26 to the effect that such powers do not in fact exist at common law and must be conferred by legislation (paras 65 and 67). The New Zealand position to the contrary derives from *Taylor v Attorney General* [1975] 2 NZLR 675(CA), which was expressly doubted (paras 40, 41, 52 and 64).

- 35 Both the New Zealand Police and the Police Association submitted that, wherever so requested, persons who made the initial complaints of sexual misconduct by Police Officers or those associated with them, together with the Police Officers about whom those complaints were made, should presumptively be granted suppression. The principal reason was that this Commission is not inquiring into whether those complaints had validity or whether any wrongdoing had occurred. We are explicitly prevented in our terms of reference from making any assessment or finding as to guilt or innocence. It was therefore argued that the identity of persons in those two categories was not a relevant or critical factor to anything going on before the Commission of Inquiry. However the nature of the evidence identifying them is likely to be of significant interest to some sections of the media. It was argued that there is a real likelihood their privacy would be compromised in circumstances where no particular public interest would be served. Further, if the names of those who were the subject of original complaints were published, then the rules of natural justice might require they be given the opportunity to respond to defend their reputations and honour. The Commission would be in the difficult position of being asked to hear evidence on matters outside its terms of reference. It is likely to be duty bound to exclude such evidence as having no relevance to anything it has to consider.
- 36 We had initial sympathy with the position that presumptively orders should be made protecting the identity of both of these groups of people. As Ms Hughes submitted:
- (a) The names of the subject persons are not relevant to this consideration of the Commission
 - (b) The Commission will make no finding as to guilt or innocence of a subject person
 - (c) The subject persons identified to date have not been requested to give evidence by the Commission and if they requested an opportunity to give evidence they could well find that the Commission declined to hear them on the basis that their evidence was not relevant.

She continued:

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

- 37 All Counsel were of the view that, although our powers are those of the High Court in its civil jurisdiction, it was reasonable when considering where the balance of public and private interests lay to consider analogous circumstances within the criminal justice system as our Commission is concerned primarily with complaints arising from behaviour alleged to be criminal.
- 38 As far as persons who have made complaints are concerned, it was noted that under ss138-140 of the Criminal Justice Act 1985 a clear policy position is espoused with regard to complainants in sexual cases – namely an automatic suppression of name. There are obvious reasons for that, and the policy should apply to those who have come forward to this Commission, and those whose names will become available to us as a result of receipt of information from the Police under the express exception to secrecy in the Police Complaints Authority Act 1988. We agree that it is appropriate to keep confidential the names of those people who complained to the Police. Some may not want anonymity but that is a matter of personal choice and will be accommodated where appropriate.
- 39 While acknowledging immediately that persons who were the subject of complaints are not in the same category, we note that the position under the criminal law with regard to persons accused of criminal offending which is now beyond debate. A useful starting point for our current jurisprudence is the decision of the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 where the principle of openness post-conviction was made plain and explicit. It was extended to cases where a person had been charged but not convicted by the decision of the Court of Appeal in *Proctor v R* [1997] NZLR 295 and reinforced in *Lewis v Wilson and Horton Limited* [2000] 3 NZLR 546. These cases emphasise that the starting point when considering the exercise of powers to suppress names or other evidence is the importance in a democracy of the freedom of speech, open judicial proceedings and the right of the media to report the latter fairly and accurately as “surrogates for the public”. Suppression should only occur where and to the extent that it is necessary to ensure that justice may be done in a particular case. The possibilities for a more restricted view have recently been articulated by the Law Commission in *Delivering Justice for All* (NZLC R85, chapter 8) but a law reform proposal cannot be given priority as against the clear, consistent and developing policy approach taken by the ultimate Courts of this country and in no way deflected from by the Parliament.
- 40 The approach to openness with respect to witnesses in criminal cases is demonstrated by the decision of the Court of Appeal in *Re Victim X* [2003] 3 NZLR 230. There the privacy interests of a kidnap victim did not outweigh the principles of open justice and free speech.
- 41 Earlier this week the High Court in Auckland declined to continue confidentiality orders restricting publication of the names of parties involved in a significant dispute with the Commissioner of Inland Revenue (*C and Multiple Parties v Commissioner of Inland Revenue* M725-728-IM02, High Court Auckland, 23 August 2004, Venning J). The Court noted the primary principle as one of open justice applying to criminal, civil and tax cases. The Judge said, at para 12:

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

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

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

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

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

The Fundamental Nature of Fair Trial Process

45 Any accused person enjoys the presumption of innocence and any allegations made against them in the criminal Courts must be proved beyond reasonable doubt by proper evidence in a fair, independent and impartial process. The right to a fair trial is one value in our system of justice which must prevail over the principles of free speech and open justice.

46 The Court of Appeal considered the principles in *R v Burns (Travis)* [2002] 1 NZLR 402, and noted at paragraph 8 and following:

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

"The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial Court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of these Courts invokes both these values ...

Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act 1990.”

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

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

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

Our Current Dilemma

- 47 As against that legal backdrop, we find ourselves in the position where we can have no current assuredness as to where matters are in respect of the Police investigations or charges arising from them. As noted above, there was always a potential for this problem but it has now reached the position where it would be foolhardy for us to plough ahead in the dark and perhaps inadvertently interfere with the fundamental right to a fair trial.
- 48 Counsel before us have taken a variety of positions on how we should manage this situation. At the one extreme Mr Akel was of the view that nothing done by this Commission would have any direct bearing or relevance on jury determinations in criminal trials. At the other end of the spectrum the Deputy Solicitor-General acknowledged the potential for problems. Counsel for the Police and the Police Association, (with their priority being that we should continue with our task), considered that the interface could be managed and that a juggling exercise could be undertaken. Their submissions appeared to assume we would not inquire into any complaints which were the subject of charges while those matters were before the

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

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

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

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

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

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

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

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

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

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

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

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

29. While depositions is an inquiry into whether there is a case to answer and trial is an inquiry into guilt or innocence, such cross-examination is always focussed on the substantive and relevant

evidence related to proof of charges and is always done in the strict context of procedures surrounding the criminal jury trial.

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

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

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

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

the criminal trials are completed, the issues that then appear to remain can and should be the subject of a full and public inquiry.

- 53 What this Commission is asked to do is to inquire into a set of circumstances which have existed over 25 years, to assess and audit processes and procedures to evaluate the environment and culture which has operated within the Police, and to make recommendations for the future. Those are all matters of immense public concern. They are issues which have been addressed to some extent by the police and we hope improved over the years. They are still under active consideration. Whether the reforms that have taken place are sufficient we do not yet know. To make that assessment there must be a totally uninhibited and thorough scrutiny of everything which has occurred. From the perspective of the Police, there is undoubtedly urgency in having this task undertaken sooner rather than later. From the perspective of people who feel that they were improperly responded to, the issues at hand have been festering sores in some cases for decades. Important as those perspectives are, they cannot be given priority over the need to maintain an environment in this small country in which there can be guaranteed criminal processes which have integrity and which are free from contamination by any simultaneous activity no matter how worthy its aims may be.

Interim Conclusion

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

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

Dated at Wellington this 27th day of August 2004.

Hon Justice J Bruce Robertson

Dame Margaret Bazley DNZM



APPENDIX 3.4: COMMISSION RULING, 22 NOVEMBER 2005

Ruling of the Commission of Inquiry into Police Conduct, 22 November 2005.¹¹ This deals with a proposal to seek information from people involved in supporting those who have complained of sexual assault.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

CHAMBERS HEARING

22 November 2005, 9.30am

Ms M Scholtens QC, Mr K Raftery, Counsel Assisting the Commission
Ms K McDonald QC and Mr D Boldt, Counsel for the New Zealand Police
Detective Superintendent M Burgess, the New Zealand Police
Mr J Upton QC, Counsel for the Police Complaints Authority
Mr A Galbraith, Police Complaints Authority
Ms S Hughes and Mr S Feltham, Counsel for the Police Association
Mr G O'Connor, Police Association
Mr E Cooper, Police Managers' Guild

RULING OF THE COMMISSION

DATED 22nd **NOVEMBER 2005**

1. At the hearing of the Commission on 21 November, Ms McDonald QC presented submissions on behalf of the Police opposing a proposed “survey” by the Commission seeking information from people involved in supporting those who have complained of sexual assault.

The grounds of opposition to the “survey” were that:

- a) It was not a scientific “survey”; and
- b) Pursuing the “survey” at this stage of the Commission’s inquiry would prejudice the Police, which would need to respond to the answers obtained and this would inevitably compromise the Commission’s processes.

11 *Editor’s note.* This ruling was the result of a private hearing held on 21 November 2005.

The Police submissions were supported by Mr Upton QC for the Police Complaints Authority and Ms Hughes for the Police Association.

2. Mr Raftery, Counsel Assisting the Commission, responded and explained that the questionnaire involved was not really a survey and that it was designed to obtain assistance for the Commission from organisations such as Safe, Help and the Rape Crisis Centres. Mr Raftery accepted that the Police would need to be given the opportunity to respond to the answers obtained and, if necessary, to call further evidence. If there were problems with the wording of the questions, they could be addressed.
3. Having heard these submissions, I adjourned the hearing in order to take advice from Mr White QC and to make my decision.

Mr White gave me the following advice -

- a) There is legal authority to support Ms McDonald's submission that surveys and questionnaires need to be scientifically sound in order to be of value.
 - b) The results of a scientifically sound survey would be evidence, which I could receive and take into account for the purpose of the Inquiry.
 - c) The rules of natural justice would require me to give the Police the opportunity to respond to the answers obtained to the proposed questionnaire – and the opportunity to call further evidence.
 - d) At this stage in the Commission's proceedings there would be a real risk that the Commission might as a consequence be delayed in completing the draft report and then reporting to the Government by the due date.
4. I have taken into account the submissions from the parties and the advice of Mr White. I have decided in the circumstances not to proceed with the proposed questionnaire.

Dated at Wellington this 22nd day of November 2005


Dame Margaret Bazley DNZM



APPENDIX 3.5: COMMISSION MEMORANDUM, 15 DECEMBER 2005

Memorandum of the Commission of Inquiry into Police Conduct re Jurisdiction in relation to the Police Complaints Authority, 15 December 2005. This appendix includes the memorandum of the Commission of 15 December 2005 and a memorandum of advice for the Commissioner by Mr Douglas White QC, dated 14 December 2005.

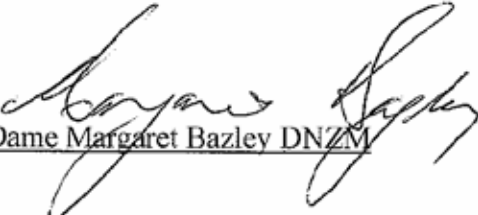
COMMISSION OF INQUIRY INTO POLICE CONDUCT

MEMORANDUM OF THE COMMISSION RE JURISDICTION IN RELATION TO THE POLICE COMPLAINTS AUTHORITY

DATED 15 DECEMBER 2005

1. Mr Upton QC, on behalf of the PCA, has challenged the jurisdiction of this Commission to inquire into the Authority and to make recommendations if I consider it appropriate to do so.
2. I have considered the submissions of all Counsel on the issue and I have received advice from my advisor, Mr White QC. For the reasons contained in his advice, a copy of which is attached, (and in the interests of communicating this Ruling to the parties as soon as possible), I rule that I do have jurisdiction to consider matters as appear to me to be relevant to the general and particular objects of my Commission.

Dated at Wellington this ^{15th} day of December 2005


Dame Margaret Bazley DNZM

DOUGLAS WHITE Q.C.

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14 December 2005

MEMORANDUM OF ADVICE FOR:

Dame Margaret Bazley
Commission of Inquiry into Police Conduct
P O Box 5684
WELLINGTON

Jurisdiction of Commission in relation to Police Complaints Authority

Background

1. Counsel Assisting the Commission have submitted to you that your terms of reference permit you to –
 - 1.1 Consider the current role of the Police Complaints Authority (the PCA), including its current structure and operation, insofar as it impacts on the investigation of complaints of sexual assault against members of the Police and their associates;
 - 1.2 Assess whether the current arrangements relating to the PCA in this area are adequate and/or appropriate;
 - 1.3 Take into account the provisions in the Independent Police Complaints Authority [Amendment] Bill currently before Parliament; and
 - 1.4 If you so decide, include your assessment and any recommendations for change in your report to the Governor-General.
2. Counsel for the Police supported the submissions of Counsel Assisting. The Police want you to consider and endorse their proposal for a major change in the role of the PCA, namely taking over full responsibility for the investigation of all serious complaints against members of the Police.

3. Counsel for the PCA has submitted that the Commission does not have jurisdiction to consider the Police proposal because it is outside the Commission's terms of reference. The submissions for the PCA may be summarised as follows –
 - 3.1 The terms of reference focus on the conduct of the Police and the adequacy of the Police investigation of complaints of sexual assault against members of the Police and their associates;
 - 3.2 The only specific references in the terms of reference to the PCA are to the manner or adequacy of **Police** investigations carried out by the Police “on behalf of” the PCA;
 - 3.3 The role of the PCA and the manner or adequacy of investigations carried out by the PCA itself are issues which have been deliberately excluded from the terms of reference;
 - 3.4 Paragraph (5) of the original terms of reference only authorises the Commission to inquire into matters which are “incidental” to those referred to in the specific terms of reference: *In re the Royal Commission on Licensing* [1945] NZLR 665, CA; and
 - 3.5 The Police proposal for a major change in the role of the PCA is not a matter “incidental” to the terms of reference, which relate to the Police, and is therefore outside the terms of reference. This conclusion is reinforced by the fact that the role of the PCA has recently been the subject of an independent review and amending legislation relating to the PCA is currently before Parliament.
4. In light of the different positions adopted by these parties and Counsel Assisting, you have sought my advice on the scope of your terms of reference insofar as they relate to the PCA.

The scope of the Commission's terms of reference

5. I have already advised you that the Commission must stay within its terms of reference: see my memorandum of 29 August 2005, para. 6.
6. There is little doubt that the original terms of reference do focus principally on the Police, their conduct and their investigation of complaints of sexual assault against them and their associates.
7. There are, however, a number of specific references to the PCA in both the original terms of reference in the Order-in-Council dated 18 February 2004 and in the amended terms of reference in the Order-in-Council dated 2 May 2005. The recitals to the original terms of reference referred to “a further investigation by the Police on behalf of the Police Complaints Authority” into a complaint by Louise Nicholas and allegations by her of defects in the investigations made by “both the Police and the Police Complaints Authority.” The appointment of the Commission in the original terms of reference referred to –

“the manner in which such allegations [of sexual assault] have been or are investigated and handled by the Police, whether directly, or on behalf of the Police Complaints Authority ...”

And the third term of reference required the Commission to inquire into and report on –

“the adequacy of any investigations which have been carried out by the Police on behalf of the Police Complaints Authority ...”

8. The preamble to the directions in the amended terms of reference noted that since the Commission had been appointed the Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Act 2004 had been enacted imposing specific obligations on the Commission with regard to confidentiality in respect of the undertaking required to be given by the Commission under s 32(2B)(b) of the Police Complaints Authority Act 1988. The purpose of the Amendment Act was to ensure that the Commission was not prevented from gaining access to PCA information “needed in order to carry out its functions”: s 3 of the 2004 Amendment Act. This Amendment Act provides legislative support for the view that information held by the PCA was considered to be within the ambit of the Commission’s functions.
9. The preamble to the directions in the amended terms of reference also recorded that there was a need for the Commission to continue with the inquiry but to exercise its powers and discretions –
- “(b) in such a way as to ensure that the Commission is not precluded from complying with any undertaking that the Commission has given or gives under section 32(2B)(b) of the Police Complaints Authority Act 1988.”

The need to ensure that the Commission was able to comply with such undertakings was one of the reasons why the amended terms of reference directed the Commission to conduct its hearings largely in private.

10. In addition to these various specific references to the PCA in the Commission’s terms of reference, the Commission’s original terms of reference contain paragraph (5) which authorises the Commission to inquire into and report on –
- “any other matter that may be thought by you to be relevant to the general or particular objects of the inquiry.”

This power was reinforced by the preamble to the directions in the amended terms of reference which recorded that the need for the Commission to exercise its powers and discretions in such a way as to avoid prejudice to prosecutions and any ongoing investigations meant that it was necessary that the Commission should be required –

- “(b) to make, in its report ..., findings of a more general nature than those that were envisaged when the Commission was appointed.”
11. On the face of it, paragraph (5) of the original terms of reference appears to authorise you to consider “any other matter” provided that you believe it is “relevant” to either the “general” or “particular” objects of the inquiry. While the provision leaves it to you to decide whether the “other matter” meets the test of relevancy, well-established principles of administrative law require you to make such a decision on reasonable grounds. You would need to be satisfied on such grounds that the “other matter” was relevant to the “general” or “particular” objects of the inquiry.
12. Before considering, however, whether there are reasonable grounds for you to decide that the matters relating to the PCA are “relevant” to the general or particular objects of the inquiry, it is necessary to refer to the submissions for the PCA, based on the decision of the Court

of Appeal in *In re the Royal Commission on Licensing*, that paragraph (5) of your terms of reference is limited to matters which are “incidental” to the specific terms of reference.

In re the Royal Commission on Licensing

13. *In re the Royal Commission on Licensing* [1945] NZLR 665 related to a Royal Commission established to inquire into the working of the laws relating to the manufacture and importation, sale, and supply of intoxicating liquors, and into the social and economic aspects of the question, and to examine and report upon proposals that might be made for amending the law in New Zealand. The Commission advised certain brewery and hotel companies and a wine and spirit company that it proposed to ask a series of questions relating to any contributions made by the companies directly or indirectly to any political party in New Zealand. Counsel for the National Council of the Licensed Trade of New Zealand submitted that the proposed questions were outside the Commission’s terms of reference. The Commission, which was chaired by a Judge of the Supreme Court, stated a case for the Court of Appeal.
14. The Court of Appeal decided that the proposed questions were outside the Commission’s terms of reference and were not saved by the Commission’s general power to inquire into and report on –

“such other matters arising out of the premises [ie the terms of reference] as may come to your notice in the course of your inquiries and which you may consider should be investigated in connection therewith, and upon any matters affecting the premises which you consider should be brought to the attention of the Government.”
15. The leading judgment in the Court of Appeal was delivered by the Chief Justice, Sir Michael Myers, who dealt with the meaning of the general power to inquire and report at 682 –

“I find no difficulty in the interpretation of this further mandate. Counsel representing the licensed trade contend in effect that the words confer no additional authority upon the Commission, but with that I am unable to agree. **The paragraph is what might be called an “omnibus” paragraph intended generally to gather up previously unspecified matters arising out of or affecting *the premises* – i.e., the working of the laws relating to the manufacture and importation, sale, and supply of intoxicating liquors – and to confer upon the Commission a power to inquire into matters which power would not otherwise have existed or the existence of which might at least have been open to doubt ...**

But I can find nothing anywhere in the Commission which warrants an inquiry into what might be called political issues, and, in my opinion, the disputed questions and matters are questions and matters relating to political issues.”

(emphasis added)
16. The other members of the Court of Appeal, Kennedy and Callan JJ, agreed with the Chief Justice. Callan J said at 686 –

“**I do not think this language [of the general power] extends the scope of the Commission’s authority so as to add to the task defined by the earlier words another task of a fundamentally different nature.** Nor do I think these concluding words ineffective. They may add something to the scope of the authority conferred by the earlier words. At the very least they prevent certain doubts

and difficulties as to the scope of the authority conferred which might have arisen had they, or some such words, not been used.”

And at 687 –

“... a Commission authorized to inquire into the law as to intoxicating liquors **should have power to inquire into and report upon allied incidental topics**. The concluding words of the definition of the scope of the Commission’s authority at least have the effect of stilling any doubts that this authority is given.”

(emphasis added)

17. The decision of the Court of Appeal is authority for the following propositions –
 - 17.1 The authority of a Royal Commission (or a Commission of Inquiry) is governed by its terms of reference;
 - 17.2 When an issue arises as to whether a particular matter is within the terms of reference, a close examination of the language used in the terms of reference will be required;
 - 17.3 Whether a matter which is not within the Commission’s specific terms of reference may be brought within the Commission’s authority by a general empowering provision will depend on the language of that provision; and
 - 17.4 When a general empowering provision refers to “other matters **arising out of ... or affecting**” the specific terms of reference, it authorises the Commission to inquire into and report on such matters. In other words, the Commission is not limited to the matters in its specific terms of reference. It does have authority to inquire into and report on “**other** matters” provided that those other matters arise out of or affect the matters raised by the specific terms of reference and are not of “a fundamentally different nature.” Topics which are allied and incidental to the subject matter of the inquiry will be included.
18. The judgments of the Court of Appeal do not support the submission for the PCA that the general empowering provision in that case was limited solely to matters which were “incidental” to those referred to in the particular terms of reference. Topics which were allied and incidental were to be included, as well as other topics arising out of or affecting the specific terms of reference.
19. For these reasons, therefore, the decision of the Court of Appeal in *In re the Royal Commission on Licensing* does not in my view limit you to matters which are solely “incidental” to your specific terms of reference. What the decision does require is a close examination of the language in the general empowering provision in your terms of reference to ensure that you do not embark on a task of “a fundamentally different nature.”

Your general empowering provision

20. I have already referred to your general empowering provision (paragraph (5) in your original terms of reference) and my initial approach to its interpretation in paragraphs 10-11 above. In order to rely on your general empowering provision, you must be satisfied on reasonable

grounds that the “other matter” is “relevant” to either the “general” or “particular” objects of your inquiry.

21. For one matter to be “relevant” to another, there needs in law to be a sufficient logical connection between the matters: Garrow and McGechan’s Principles of the Law of Evidence, 7th ed., 1984, 47 and Cross on Evidence, paras 1.44 – 1.45. In the new Evidence Amendment Bill, clause 7(3) provides that evidence is relevant in a proceeding –

“if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.”

Adopting, by analogy, a similar approach to the interpretation of your terms of reference, the “other matter” will need to have a sufficient logical connection to, or have a consequence for, the general or particular objects of your inquiry in order to be “relevant”.

22. The question here therefore is whether the issues relating to the PCA are relevant in that sense to the “general” or “particular” objects of your inquiry.
23. As already noted, your terms of reference focus principally on the Police, their conduct and their investigation of complaints of sexual assault against their members and their associates. You are specifically required to inquire into and report on amongst other matters the manner, adequacy and impartiality of the Police investigations of such complaints. But the terms of reference themselves recognise the existence of the PCA and the need for the Commission to obtain information from the PCA in order to conduct the inquiry.
24. And in addition there is also little doubt that the PCA has a significant role to play in relation to the investigation of complaints against members of the Police and that its operations have an impact on the investigations conducted by the Police, both those conducted by the Police for their own part and those conducted by the Police “on behalf of” the PCA. The statutory functions of the PCA make it clear that the PCA has a significant and overlapping role in this area, not only in conducting investigations itself, but also in reviewing the investigations conducted by the Police: see ss 12-24 of the Police Complaints Authority Act 1988. The evidence which you have heard during the course of the inquiry and the files which you have read for the purpose of the inquiry have confirmed the close relationship between the activities of the Police and the PCA in relation to the investigation of complaints against members of the Police for sexual assault and the review of such investigations.
25. Against this background it seems inevitable that when you consider the manner, adequacy and impartiality of the Police investigations into complaints of sexual assault against members of the Police you will be bound to consider the manner, adequacy and impartiality of any parallel review conducted by the PCA. The activities of the Police and the PCA in these areas, the subject of your terms of reference, are inextricably entwined. The role of the PCA and its operation in these areas must therefore be relevant to the objects of your terms of reference.
26. Furthermore, in inquiring into and reporting your findings generally on the adequacy and impartiality of the current arrangements relating to the investigation of complaints against members of the Police for sexual assault, you are entitled to draw attention to any inadequacies, which you may identify, and make recommendations for addressing those inadequacies. It is in this context that the Police have made a number of proposals for reform, including

the proposal that full responsibility for investigation of all serious complaints against their members should be with a “revamped” PCA. This proposal has arisen out of your inquiry into the specific objects of your terms of reference. It addresses a perceived inadequacy in the current arrangements, a matter clearly within your terms of reference. It is a proposal which is therefore relevant to the objects of your terms of reference and which on reasonable grounds you could decide to consider in terms of the general empowering provision.

27. The fact that the PCA has recently been the subject of an independent review and the fact that there is legislation relating to the PCA currently before Parliament does not mean that you are precluded from considering the Police proposal if you wish to do so. Indeed it might be considered surprising if, as a result of carrying out your inquiry and having had the benefit of the evidence which you have heard and read, you reached a view on a proposal put forward by the Police in the context of the terms of reference and you were then constrained by a narrow interpretation of your terms of reference from reporting your view to the Governor-General.

Conclusion

28. My conclusion is therefore that the general empowering provision in paragraph (5) of the original terms of reference does enable you to consider and report on the Police proposal for transferring responsibility for the investigation of all serious complaints against the Police to the PCA. To do so would not involve you in embarking on a task of a “fundamentally different nature” to that envisaged by your terms of reference.



D J White



APPENDIX 3.6: MEMORANDUM OF ADVICE, 15 FEBRUARY 2006

Use of and reliance on the Commissioner's knowledge and experience for the findings and recommendations in the report of the Commission of Inquiry into Police Conduct, a memorandum of advice for the Commissioner by Mr Douglas White QC, 15 February 2006. This appendix includes a submission to the Commissioner by counsel assisting, 13 January 2006.

DOUGLAS WHITE Q.C.

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15 February 2006

MEMORANDUM OF ADVICE FOR:

Dame Margaret Bazley
Commission of Inquiry into Police Conduct
P O Box 5684
WELLINGTON

Use of and reliance on your knowledge and experience for the findings and recommendations in your report

1. Late last year you asked me to advise you on the extent to which you might use and rely on your knowledge and experience in making the findings and recommendations in your report to the Governor-General. I suggested that the proper route was for you first to obtain a submission on the question from Counsel Assisting which could then be provided to the parties who would have an opportunity to make submissions in response. I would then be able to consider all the submissions before advising you.
2. Counsel Assisting provided their submissions to you on 13 January 2006. Their submissions set out the background to the question, including the areas in respect of which your knowledge and experience could be considered relevant, a summary of the positions which you have held over the last 45 years, the use of your knowledge and experience in the course of the inquiry to date and the relevant law and practice. Counsel Assisting submitted that on the basis of the relevant law and practice you are entitled to take into account your knowledge

and experience in considering the various matters referred to in their submissions. For ease of reference, a copy of the submissions by Counsel Assisting is attached.

3. In the course of their submissions, Counsel Assisting also pointed out in paragraph 20 that –

“In making this submission, we also take into account your express intention to provide the parties with a draft of your report and an opportunity to make whatever comments they see fit. Should a party dispute the conclusions you may draw from your experience or expertise, or any particular matters you might rely on, it can raise the matter at that stage and provide any further information that might bear on the point.”

4. In response to the submissions by Counsel Assisting, Mr Upton QC, counsel for the Police Complaints Authority [the PCA], advised by letter dated 19 January 2006 that the PCA did not wish to make any submissions on the topic, but relied “very much” on what was contained in paragraph 20 of the submissions by Counsel Assisting.

5. Ms McDonald QC and Mr Boldt, counsel for the New Zealand Police, provided submissions in response on 20 January 2006. In summary, they submitted that –

- 5.1 You may bring your years of experience, personal knowledge and common sense to the process of evaluating the evidence, drawing inferences and conclusions, and making findings and recommendations.

- 5.2 At the same time, the answers to the Governor-General’s questions must all have a proper evidential foundation. You may not supplement or second-guess the evidence with information from any other source, whether it be personal experience or otherwise. It would be a matter of real concern if you were to depart from this proposition because it would be wrong in principle, contrary to natural justice and s 4A of the Commissions of Inquiry Act 1908 if factual conclusions were reached in reliance on material that the parties had no opportunity to scrutinise or challenge.

- 5.3 The Police reserved the right to address this question further as part of their submissions on the draft report. With respect to the suggestion in paragraph 20 of the submissions by Counsel Assisting, it was unlikely to be appropriate, if any part of the report lacked an evidential foundation, for the Police to engage in the exercise of calling further evidence.

6. Mr Cooper, the Field Officer for the New Zealand Police Managers’ Guild, provided a submission on 21 January 2006 indicating that it would be “illogical” for you not to be able to use and rely on your extensive knowledge and experience for the purpose of findings and making recommendations in your report. The Guild also supported the Police submission that you could only use your knowledge and experience in addressing the evidence placed before the Commission and in satisfying the requirements of the terms of reference.

7. The New Zealand Police Association advised that it did not wish to make any submissions on this issue.

8. In light of the law and practice referred to in the submissions by Counsel Assisting and the views of the parties in their submissions, there does not appear to be any dispute that you

may use and rely on your knowledge and experience in evaluating the evidence which has been received by the Commission during the course of the inquiry, in drawing inferences and conclusions, and in making findings and recommendations. In particular, as acknowledged by counsel for the Police in paragraph 2 of their submissions, you may therefore use and rely on your knowledge and experience in evaluating the evidence in relation to the matters referred to in paragraph 2 of the submissions by Counsel Assisting. I agree with the submission by Counsel Assisting, paragraph 18, that you would not be expected to put your knowledge and experience to one side when evaluating the evidence relating to these matters and when making your findings and recommendations on them.

9. That then leaves for consideration the two specific matters referred to in paragraph 3 of the submissions by Counsel Assisting, namely –
 - 9.1 The significance or otherwise of the number of cases involving allegations of sexual misconduct against Police members over the relevant period of 26 years (ie up to and including 2004); and
 - 9.2 The approach of members of the Police to complaints of sexual misconduct by mentally disturbed persons and the ability or otherwise of members of the Police to recognise the signs of mental illness.
10. I have now been provided with the sections of the draft report dealing with these two matters. In both cases you propose to rely in part on your personal experience for the purpose of answering or qualifying the evidence which the Police provided during the inquiry. In the case of the first matter you also propose to take into account evidence provided by the Commissioner of Inland Revenue, after the inquiry, which has not yet been disclosed to the parties.
11. In my view what you propose to do in these two sections goes beyond simply evaluating the evidence relating to these matters which was received during the inquiry. You propose to take into account supplementary evidence or other information which was not received as evidence during the inquiry and which was not disclosed to the parties so that they had the opportunity to consider it. As presently envisaged, the parties will have the opportunity to do so when they receive the draft report containing these two sections. This process will meet the requirements of the rules of natural justice.
12. At the same time, however, now that these two sections of the draft report have been identified in this way, there would in my view be advantages for the Commission and the parties if they were given as much time as possible to comment on these sections. I therefore recommend that you provide the parties with copies of these sections of your draft report now, together with the evidence received from the Commissioner of Inland Revenue, and invite the parties to make such further submissions as they may wish at this stage. Copies of this memorandum of advice should also be provided to the parties.



D J White

COMMISSION OF INQUIRY INTO POLICE CONDUCT

SUBMISSION OF COUNSEL ASSISTING

IN RELATION TO USE OF AND RELIANCE ON KNOWLEDGE AND EXPERIENCE OF COMMISSIONER FOR THE PURPOSE OF FINDINGS AND RECOMMENDATIONS IN THE REPORT

13 January 2006

The issues that arise and their context

- 1 You have asked your legal advisor, Mr White QC, to advise you on the extent to which you may use and rely on your knowledge and experience in making the findings and recommendations in your report to the Governor-General. He has indicated the proper route is to seek a submission from Counsel Assisting, which will then be provided to the parties who will have an opportunity to make submissions also. He will then consider all the submissions received before advising you.
- 2 You have advised that the question arises because you believe that your knowledge and experience may assist you in evaluating the information which you have been provided with both during the hearings of the Commission and in the files which you have read in the course of conducting the inquiry. In general terms you would wish to take into account your expertise in managing large organisations and ensuring that staff are able to be held accountable for implementing policies and the expenditure of public money. In the context of the terms of reference for this inquiry your expertise in the following areas is relevant—
 - a The handling of complaints, disciplinary issues and performance management;
 - b The handling of sexual misconduct / harassment issues;
 - c The promulgation of consistent policies and ensuring front-line staff have read and understood them;
 - d Ensuring changes are implemented and followed and staff receive any training required;
 - e The reading and understanding of files;
 - f Ensuring people with mental illness are dealt with appropriately; and
 - g Managing organisations that have distinctive cultures arising from the particular attitudes and experiences of staff employed in the context of a particular work environment.

- 3 You have also asked whether you may take into account your knowledge and experience in considering some specific matters which have arisen in the course of the inquiry –
- a The significance or otherwise of the number of cases involving allegations of sexual misconduct against Police members over the relevant period of 26 years. (ie up to and including 2004); and
 - b The approach of members of the Police to complaints of sexual misconduct by mentally disturbed persons and the ability or otherwise of members of the Police to recognise the signs of mental illness.

Your knowledge and experience

- 4 The knowledge and experience which you seek to draw on when evaluating the information and when considering the specific issues has been acquired by you over 45 years of public service, including in particular the relevant knowledge and experience gained in –
- a The positions held by you in the public health and mental health sectors, namely –
 - Charge Nurse, Tokanui Hospital, Te Awamutu, 1961-63;
 - Assistant Matron, Seacliff Group of Hospitals, Dunedin, 1963-65;
 - Matron, Sunnyside Hospital, Christchurch, 1965-73;
 - Senior Public Health Nurse, Auckland District Health Office, Auckland, 1973-74;
 - Deputy Matron in Chief, Auckland Hospital Board, 1974-75;
 - Chief Nursing Officer, Waikato Hospital Board, 1975-78;
 - Director, Division of Nursing, Department of Health, 1978-84.
 - b The senior management positions held by you in the public sector in organisations with large numbers of employees, namely –
 - Deputy Matron in Chief, Auckland Hospital Board, which employed 10,000 staff, 1974-75;
 - Chief Nursing Officer, Waikato Hospital Board, which employed 5,500 staff, 1975-78;
 - Commissioner, State Services Commission, with responsibility for the discipline of 80,000 public sector staff (ie prior to enactment of the State Sector Act 1988 which made individual chief executives the employer of staff in the public sector), 1984-87;
 - Deputy Chairperson, State Services Commission, 1987-88;
 - Secretary for Transport with responsibility for 4,000 staff initially, including 1,200 traffic officers who transferred to the Police in 1992, 1988-93;
 - Director-General of Social Welfare with responsibility for 6,000 staff initially, 1993–1999.

- c You also currently have the role of Chairperson, New Zealand Fire Service Commission which has approximately 2,000 paid firemen and 8,000 volunteers. You have held this position since 1999.
- 5 As this outline of the positions which you have held indicates, you have had extensive management experience at the senior level in the public sector. You have directly managed very large service delivery agencies responsible for providing services to a wide range of client groups. You have had both direct and indirect responsibility for large numbers of operational staff. You also worked in the forefront of public sector management reform during your time at the State Services Commission and had responsibility for implementing the personnel aspects of the public and state sector reforms leading to the establishment of State-owned enterprises and a number of new Government departments and ministries. You also had responsibility for implementing the reforms of personnel management in the public sector leading the enactment of the State Sector Act 1988. During this time you also had responsibility for implementing Equal Employment Opportunities policies across the public service, and later in the Ministry of Transport and the Department of Social Welfare. You have personally led large-scale organisational change projects in the state sector, in particular in your various nursing roles, in the Ministry of Transport, the Department of Social Welfare and the New Zealand Fire Service.

Use of your knowledge and experience in the course of the inquiry to date

- 6 In the course of the hearings during the inquiry you have drawn on your experience to ask witnesses a number of questions on a variety of topics. This has informed much of your questioning of witnesses. However in the following passage for example you also referred specifically to your experience-
- a Superintendent Perry: an example where you had given a staff member a message that his “womanising activities” were “not on” (20 October 2005 transcript, p 14).
 - b Senior Sergeant Grace: your experience that staff miss training: (8 November 2005 transcript, p 26).
 - c Inspector Bell: your experience in other fields that where a person is known to have been involved in a case like rape that person does not remain on the staff even if there is not enough evidence to go to Court (9 November 2005 transcript, p 39).
 - d Detective Senior Sergeant Holden: your experience that often people are too busy to ever go to training unless someone is standing at the door ticking it off (10 November 2005 transcript, p 48).
 - e Inspector Jones: your experience in other areas that staff miss training (11 November 2005 transcript, p 22).
 - f Mr Annan: your experience in part-time work for some staff resulting in resistance from others (18 November 2005 transcript, p 40).
 - g Mr Annan: your experience that suggested that the Police lost a lot of people that other organisations would save by dealing with employment relationship issues early on (18 November 2005 transcript, p 42).

- h Mr Crotty: your experience that an enforcement agency would have zero tolerance for persons in the agency (5 December 2005 transcript, p 28).
(This list of 8 examples is not intended to be exhaustive).
- 7 In addition to these references to your experience when questioning these witnesses who gave evidence, you mentioned your experience on at least two other occasions during the inquiry which we can think of. First, at the hearing on 29 July 2005 (transcript p 40) you referred to your extensive experience in reading files and your ability to obtain a clear picture from the statements on the files, including the Police statements. Secondly, in paragraph 11 of your memorandum to the parties dated 2 December 2005 in relation to the arrangements for the calling of Mr David Butler, the Commissioner of Inland Revenue, to give evidence, you said –
- “I make it clear that I understand there are considerable differences between managing the Inland Revenue Department and managing NZ Police, as there are differences in managing the various organisations with which I have experience. Mr Butler will not be asked to comment on any matters relating to the Police. I simply want another perspective, to supplement my own experience, on how a large state organisation deals with various matters.”
- 8 None of the parties represented in the inquiry raised any issue about the propriety of your referring to your experience. Nor in their closing submissions did anyone suggest that it would be inappropriate for you to use or rely on your knowledge and experience in making findings and recommendations in your report to the Governor-General.

Submission in support of use and reliance on your knowledge and experience

The Law and Practice

- 9 It is well established that a commission of inquiry is not a Court of law or an administrative tribunal entrusted with the duty of deciding questions between parties. A commission has no general power of adjudication. Reports of commissions have no immediate legal effect. They are in the end “only expressions of opinion”: *Peters v Davison* [1992] 2 NZLR 164, CA at 171 and 181.
- 10 Subject to a commission’s terms of reference, it has wide powers under the Commissions of Inquiry Act 1908 to gather evidence and information. Under s 4B(1) of the Act –
- “The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, or whether or not it would be admissible in a Court of law”.
- 11 Subject to the obligation on a commission of inquiry to stay within its terms of reference and subject to the rules of natural justice, no party –
- “can confine the subject matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain.”
- Re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR, 96 at 115-116 per Cleary J.
- 12 The subject matter of a commission of inquiry will determine the qualifications of the Commissioner(s). If the inquiry could place someone’s professional or personal reputation

at stake, or there is the possibility of criminal charges being laid as a result of the inquiry, a Judge or experienced lawyer should be appointed as chairperson: Setting Up and Running Commissions of Inquiry, Department of Internal Affairs, 2001, 36, para. 10.5.1. In other respects the Commission's make-up should be "a good balance of experience, skills and outlook", op. cit., para. 10.2. Examples of inquiries where members were appointed for their relevant expertise were the Committee of Inquiry into Inflation Accounting, the Committee of Inquiry into Solicitors Nominee Companies and the Royal Commission on Social Policy: Sir Ivor Richardson, "Commissions of Inquiry" (1989) 7 Otago LR 1 at 8, 9 and 11

- 13 A commission of inquiry considering issues of policy or administration would be expected to consult with a wide range of parties and "seek out and digest experts' reports on the issues": Setting Up and Running Commissions of Inquiry, p 57, para. 20.10.7. Sir Ivor Richardson referred in his lecture on "Commissions of Inquiry" (1989) 7 Otago LR 1 at 8-12 to the wide-ranging consultation and analysis of submissions received and research conducted in relation to the three inquiries which he chaired.

This Commission of Inquiry

- 14 The terms of reference for your Commission of Inquiry require you to assess the adequacy of Police standards and procedures as a matter of internal Police policy for their investigation of complaints alleging sexual assaults by members of the Police or their associates, the practices of the Police in relation to such investigations, the adequacy of investigations carried out by the Police on behalf of the Police Complaints Authority and the adequacy and effectiveness of the standards and codes of conduct in relation to personal behaviour for members of the Police. These terms of reference raise issues of policy and administration
- 15 The policy and administration focus of the terms of reference was reinforced when the Commission was subject to further directions on 2 May 2005 and the Commission was directed not to inquire into or report on any allegations that were for the time being the subject of any investigation by the Police or any unresolved criminal proceedings. The further directions also recognised that it was necessary for the Commission to make findings of

"a more general nature than those that were envisaged when the Commission was appointed."
- 16 It is reasonable to assume that you were appointed to the Commission because of your knowledge and experience and your ability to advise the Governor-General on the policy and administrative issues raised by the terms of reference. You would be expected to use and rely on your knowledge and experience in evaluating the information you have received.
- 17 When, with the further directions to the Commission, the Hon. Justice Robertson ceased to be a member of the Commission and you became the sole Commissioner, your attributes for conducting this inquiry and reporting to the Governor-General on the issues raised by the terms of reference were brought more into focus.

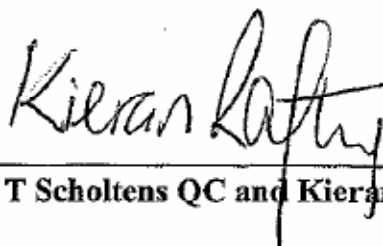
Submission

- 18 In our submission therefore you may in general terms take into account your expertise in relation to the matters referred to in paragraph 2 above. You would not be expected to put your knowledge and experience to one side when making your findings and recommendations in your report on these matters. It is clear from the lecture by Sir Ivor Richardson (referred

to earlier) that the members of the committees of inquiry and Royal Commission which he chaired took into account their knowledge and experience when making their findings and recommendations. In the case of the Committee of Inquiry into Solicitors Nominee Companies Sir Ivor noted that–

“Because of the restricted nature of the inquiry we did all the research and analysis and writing of the report ourselves.” (1989) 7 Otago LR 1 at 9

- 19 As far as the specific issues referred to in paragraph 3 above are concerned, we submit that for the same reasons you are entitled to take into account the particular knowledge and experience referred to in paragraphs 4 and 5 above when considering those issues. Again it would be surprising if you were required to disregard your relevant knowledge and experience when evaluating the Police evidence and submissions on these issues.
- 20 In making this submission, we also take into account your express intention to provide the parties with a draft of your report and an opportunity to make whatever comments they see fit. Should a party dispute the conclusions you may draw from your experience or expertise, or any particular matters you might rely on, it can raise the matter at that stage and provide any further information that might bear on the point.
- 21 We note, finally, that we have not overlooked the fact that as a general rule, a Judge is not entitled to act on his or her personal knowledge of particular facts and that the exceptions to the general rule, which permit a Judge to take judicial notice of facts, are relatively limited in scope: Cross on Evidence, NZ ed., paras 6.11 and 6.2-6.4. But a Commission of Inquiry is not a Court of law. A Commissioner (even one who is a Judge) is sitting as a Commissioner and not as a Judge. In your particular case, as a Commissioner appointed because of your expertise, especially in relation to those aspects of the Terms of Reference which raise issues of a policy or administrative nature, you would be expected to bring that experience to bear upon your examination of the material and use it to its fullest advantage.



Mary T Scholtens QC and Kieran Raftery

Counsel Assisting the Commission of Inquiry

13 January 2006



APPENDIX 3.7: COMMISSION MEMORANDUM, 28 JULY 2006

Memorandum of the Commission of Inquiry into Police Conduct re jurisdictional and statutory issues regarding the Police Complaints Authority, 28 July 2006. This appendix includes the memorandum of the Commission of 28 July 2006 and a memorandum of advice for the Commissioner by Mr Douglas White QC, dated 28 July 2006. *[Editor's note: references to chapter numbers in the latter memorandum applied to a draft report of April 2006 and may not match section numbering in the final report.]* Also included is a memorandum of advice of 10 July 2006 referred to in the memorandum of advice of 28 July 2006.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

MEMORANDUM OF THE COMMISSION RE JURISDICTIONAL AND STATUTORY ISSUES REGARDING THE POLICE COMPLAINTS AUTHORITY

DATED 28 JULY 2006

1. Counsel for the Police Complaints Authority (the PCA) in his submission dated 30 May 2006 raised four legal issues in respect of chapter 5 of my draft report. In particular:
 - 1.1. Whether chapter 5 is, in significant respects, outside the scope of terms of reference 3 and 5;
 - 1.2. Whether term of reference 3 is adequately addressed in chapter 5;
 - 1.3. The scope of s 29 of the Police Complaints Authority Act 1988; and
 - 1.4. The jurisdiction of the PCA to consider complaints arising prior to 1 April 1989.
2. I have received submissions from Counsel Assisting the Commission and Counsel for the PCA on these issues. I have considered these submissions.
3. I sought advice from Mr White QC, the Commission's Legal Advisor, on the jurisdictional issues raised in the submissions of Counsel for the PCA and on the interpretation of the Police Complaints Authority Act 1988. I received a memorandum of advice from Mr White dated 28 July 2006. A copy of Mr White's memorandum is attached.

The scope of the Commission's terms of reference

4. For the reasons contained in Mr White's advice, I am satisfied that the matters referred to in chapter 5 of my draft report are relevant to the general and particular objects of my Commission and I will record my decision on this matter in my final report.

Inadequate consideration of Term of Reference 3 in Chapter 5

5. Taking into account the advice received from Mr White, I have decided to include in chapter 5 both an introductory statement explaining that the issues raised in term of reference 3 are largely addressed in chapter 4 of my draft report and a summary of my conclusions in relation to term of reference 3.

Construction of s 29 of the Police Complaints Authority Act 1988

6. I note the advice of Mr White that Counsel for the PCA and Counsel Assisting appear to be in agreement as to the construction of s 29 of the Police Complaints Authority Act 1988 and I accept that this is a matter of policy on which I may appropriately express a view in my report.

Jurisdiction of PCA to consider pre 1 April 1989 matters

7. For the reasons contained in Mr White's advice, I am persuaded that the PCA has jurisdiction to consider complaints that relate to events that occurred prior to 1 April 1989. I will, however, record in my report that the PCA has a different view.

Dated at Wellington this 28 day of July 2006.



Dame Margaret Bazley DNZM

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28 July 2006

MEMORANDUM OF ADVICE FOR:

Dame Margaret Bazley
Commission of Inquiry into Police Conduct
P O Box 5684
WELLINGTON

Draft report – Police Complaints Authority submissions on Chapter 5

1. I refer to my memorandum of advice dated 10 July 2006¹² and the four legal issues raised in the submissions by Counsel for the Police Complaints Authority (the PCA) dated 30 May 2006 on Chapter 5 of your draft report. Following receipt of a detailed memorandum in response from Counsel Assisting dated 29 June 2006, I recommended for the reasons set out in my memorandum of 10 July 2006 that the opportunity should be taken to obtain further submissions from Counsel Assisting on the two issues of statutory interpretation in time for them to be considered and addressed by Mr Upton QC on his return on 18 July 2006.
2. You accepted my recommendation and the parties were advised accordingly by letter dated 11 July 2006 from the Executive Director.
3. Counsel Assisting provided a further memorandum on 11 July 2006 addressing the two issues of statutory interpretation. This memorandum was referred to the parties for comment.
4. Mr Upton QC for the PCA provided a memorandum dated 21 July 2006 which addressed the memoranda of Counsel Assisting dated 29 June and 11 July 2006 and my memorandum of 10 July 2006.
5. The position of the Police and the other parties on the four issues raised by the PCA remains as set out in paragraphs 3-4 of my memorandum of 10 July 2006.
6. As requested, I now provide my advice on the four legal issues raised by Counsel for the PCA.

12 *Editor's note.* This memorandum of advice of 10 July 2006 is also included.

The scope of the Commission's terms of reference

7. As noted in paragraph 1.3 of the PCA submissions dated 30 May 2006, the issue of the Commission's jurisdiction in relation to the PCA was addressed in your ruling of 15 December 2005 which was based on my memorandum of advice dated 14 December 2005. In that memorandum I reached the conclusion that the general empowering provision in paragraph (5) of the original terms of reference enabled you to consider and report on the Police proposal for transferring responsibility for the investigation of all serious complaints against the Police to the PCA. The reasons for the conclusion were set out in the memorandum and included an examination of the relevant law, your terms of reference and the statutory functions of the PCA: see paragraphs 5-24. I then expressed the following views –
 - “25. Against this background it seems inevitable that when you consider the manner, adequacy and impartiality of the Police investigations into complaints of sexual assault against members of the Police you will be bound to consider the manner, adequacy and impartiality of any parallel review conducted by the PCA. The activities of the Police and the PCA in these areas, the subject of your terms of reference, are inextricably entwined. The role of the PCA and its operation in these areas must therefore be relevant to the objects of your terms of reference.
 26. Furthermore, in inquiring into and reporting your findings generally on the adequacy and impartiality of the current arrangements relating to the investigation of complaints against members of the Police for sexual assault, you are entitled to draw attention to any inadequacies, which you may identify, and make recommendations for addressing those inadequacies. It is in this context that the Police have made a number of proposals for reform, including the proposal that full responsibility for investigation of all serious complaints against their members should be with a “revamped” PCA. This proposal has arisen out of your inquiry into the specific objects of your terms of reference. It addresses a perceived inadequacy in the current arrangements, a matter clearly within your terms of reference. It is a proposal which is therefore relevant to the objects of your terms of reference and which on reasonable grounds you could decide to consider in terms of the general empowering provision.”
8. Your ruling of 15 December 2005, based on my memorandum of 14 December 2005, was not challenged by the PCA or any other party. The reasoning in my memorandum of 14 December 2005, particularly paragraphs 25 and 26, is not addressed in the submissions for the PCA dated 30 May 2006 or in the memorandum from Mr Upton QC dated 21 July 2006.
9. In my view the reasoning in my memorandum of 14 December 2005 provides the answer to the PCA submission and the basis for the approach which you have adopted to the interpretation of your terms of reference which in turn is reflected in Chapter 5 of the draft report. I see no reason to alter the advice which I have previously given to you on this issue, particularly as the Police do not take issue with it.
10. In the event that you decide to accept my advice as to the scope of your terms of reference and decide not to revise Chapter 5 in the manner requested by the PCA, it would be appropriate to record your decisions on this issue in the final report: see submissions for PCA dated 30

May 2006, paragraph 1.6 memorandum for PCC dated 21 July 2006, paragraphs 4-5, and memorandum of Counsel Assisting, dated 29 June 2006, paragraphs 8-9.

11. As far as the specific topics addressed in Chapter 5 are concerned, I agree with the submissions in the memorandum of Counsel Assisting dated 29 June 2006, paragraphs 10-22.

Inadequate consideration of Term of Reference 3 in Chapter 5

12. There is no doubt that Chapter 5 of the draft report is intended to address term of reference 3 and that term of reference 3 requires consideration of the adequacy of investigations of sexual assault complaints against Police members and their associates by the Police on behalf of the PCA.
13. As the memorandum from Counsel Assisting recognises (paragraphs 27-29), it is apparent that the issue of the adequacy of the investigations referred to in term of reference 3 is largely addressed in Chapter 4 of the draft report and that, as submitted by the PCA, Chapter 5 does not do so directly. Counsel Assisting has therefore recommended the addition of a further introductory statement to Chapter 5.
14. I agree with the submissions for the PCA and Counsel Assisting that Chapter 5 should address term of reference 3 specifically. For this purpose, you may wish to consider whether, as well as the addition of the further introductory statement, a summary, albeit brief, of your detailed conclusions in relation to term of reference 3 should also be included in Chapter 5. In doing so you should also address the points made in paragraphs 6-7 of the memorandum for the PCA dated 21 July 2006.

Construction of s 29 of the Police Complaints Authority Act 1988

15. Counsel for the PCA made the following specific submissions in relation to s 29 of the Police Complaints Authority Act (paragraphs 5.2-5.4 of his letter of 30 May 2006 to Counsel Assisting) –
 - 15.1 The section has been seen as providing a reserve or residual power which since 1989 successive PCAs have not found it necessary to use. Nothing of sufficient significance has yet occurred.
 - 15.2 Successive PCAs have consistently construed s 29 as referring to issues of practice, policy or procedure, rather than disagreements on the facts of particular cases.
 - 15.3 It is unhelpful to draw a distinction between individual cases and specific outcomes on the one hand and broad practice, policy or procedure issues on the other.
 - 15.4 The discretion conferred on the PCA under s 29 should be retained. To remove the discretion would be a retrograde step.
16. Counsel Assisting in her memorandum of 11 July 2006 provided detailed advice on the construction of s 29 of the Police Complaints Authority Act to support the view that the PCA's power of recommendation to the Attorney-General and the Minister of Police was not restricted to matters of "policy, practice, or procedure" arising out of the subject-matter of

an investigation and that it extended to “any decision, recommendation, act, omission [or] conduct” which might be specific to the investigation: paragraphs 4-11.

17. Counsel for the PCA in his memorandum of 21 July 2006 has recorded that the PCA accepts that there may be a specific outcome on which there is formal disagreement and which is sufficiently serious in itself to be referred to the Government, but no such case has arisen to date in the view of successive PCAs: paragraph 16.
18. As Counsel for the PCA and Counsel Assisting appear to be in agreement as to the construction of s 29 of the Police Complaints Authority Act, there is no legal issue on which my advice need now be given.
19. As already noted, the Police support the PCA in opposing the recommendation in the draft report that the discretion in s 29(2) be removed. The question whether the PCA should have a discretion under s 29(2) is a matter of policy on which you may express a view after taking into account the submissions made on the question by the PCA and the Police. I therefore agree with the submission of Counsel Assisting in paragraph 35 of her memorandum.

Jurisdiction of PCA to consider pre 1 April 1989 matters

20. Counsel for the PCA submitted in paragraph 6.1 of his letter to Counsel Assisting dated 30 May 2006 that –
 - 20.1 The PCA lacks the legal jurisdiction to investigate matters which arose before the Police Complaints Authority Act came into force on 1 April 1989.
 - 20.2 This has been the consistent interpretation of the Act from the outset by all those who have held office as the PCA.
 - 20.3 This interpretation is consistent with the general presumption against retrospective legislation.
 - 20.4 Paragraphs 5.28-5.30 (and recommendation 6) of the draft report give an incorrect impression because they suggest that the PCA does not investigate pre 1 July 1989 allegations “as a matter of discretion”.
21. In response Counsel Assisting made the following points in paragraphs 37-38 of her memorandum dated 29 June 2006 –
 - 21.1 The draft report at paragraph 5.28 accurately records the PCA’s view of its jurisdiction.
 - 21.2 The draft report notes that s 18(1)(a) of the Police Complaints Authority Act provides the only “time limit”, that s 40 makes transitional arrangements and that the Act does not appear to preclude the receipt of complaints about historic conduct: see paragraph 5.29 of the draft report.
 - 21.3 The draft report at paragraph 5.30 then indicates that in your view the PCA should have a discretion to consider historic complaints and, if the PCA interpretation is correct or there is an ambiguity, it should be removed by amending legislation.
 - 21.4 The PCA did not comment on the suggestion that there should be amending legislation.

- 21.5 The issue of statutory interpretation does not require resolution.
- 21.6 The PCA's concern may be met by an appropriate addition to the report recording its position.
22. Counsel Assisting in her memorandum of 11 July 2006 provided detailed advice on the issue of the jurisdiction of the PCA to consider complaints relating to pre 1 April 1989 allegations. For the reasons set out in paragraphs 12-22 of her memorandum, she concluded that the PCA does have jurisdiction to do so.
23. Counsel for the PCA in his memorandum of 21 July 2006 has responded that the PCA remains of the view that it does not have jurisdiction to consider complaints relating to pre-1 April 1989 allegations: paragraph 17. It is submitted for the PCA that the Police Complaints Authority Act was not retrospective in effect and that this submission is supported by –
- 23.1 legislative acceptance of the interpretation of successive PCAs that it does not have such jurisdiction; and
- 23.2 comparisons between provisions of the Ombudsmen Act 1975 and the Police Complaints Authority Act 1988.
24. The issue whether the PCA should have a discretion to consider complaints relating to pre 1 April 1989 allegations is a policy issue on which you are entitled to express an opinion, but the need for you to do so only arises if as a matter of law the PCA does not currently have that discretion under its Act or the situation is ambiguous or doubtful. This legal issue does therefore need to be addressed in your report in order to provide the basis and context for your consideration of the policy issue.
25. As currently drafted, paragraph 5.29 of the draft report sets out the reasons why it is suggested that the PCA does have a discretion to consider historic complaints, but the draft report does not address the PCA submission based on the general presumption against retrospective legislation. In my view that submission should be addressed because if it is correct it may have an influence on your consideration of the policy issue.
26. As currently drafted, paragraph 5.30 of the draft report states that –
- “On my reading of the PCA Act it seems that it is open to the PCA to review such historic cases ...”
- Now that the PCA has made it clear that it takes issue with your reading of the Act as a matter of statutory interpretation you have sought further advice on the legal issue from me.
27. For this purpose I have given careful consideration to the submissions made by Counsel for the PCA and Counsel Assisting. For the reasons given by Counsel Assisting, I am satisfied that the presumption against retrospective legislation is not applicable to the issue whether the PCA has jurisdiction to consider pre 1 April 1989 allegations. It is significant in this respect that Counsel for the PCA has not endeavoured to respond to the detailed legal submissions made by Counsel Assisting.

28. Instead Counsel for the PCA relies on a claim that Parliament endorsed the PCA's view of its jurisdiction and on comparisons between the position of the Ombudsmen under their legislation and the PCA. In my view these points are not sufficient to answer the submissions of Counsel Assisting –
- 28.1 Subsequent legislation may indicate Parliamentary acceptance of a Court decision, but it is an unreliable presumption: Burrows, *Statute Law in New Zealand*, 3rd ed., 2003, 124-125. Here there is no suggestion that there was any relevant Court decision or that Parliament was aware of the PCA's view of its jurisdiction when the Act was amended in 1994. The issue was not addressed in the Police Complaints Authority Amendment Act 1994 or the Parliamentary debates which preceded the enactment of the Amendment Act in 1994.
- 28.2 Comparisons between the language of different Acts of Parliament enacted at different times may in some circumstances assist in the interpretation of the legislation, but this is not invariable: Burrows, *Statute Law in New Zealand*, 3rd ed., 2003, 308. Here, contrary to the submissions for the PCA, there is a strong argument that Parliament in enacting the Police Complaints Authority Act 1988 for the purpose of making "better provision" for the investigation and resolution of complaints against the Police from 1 April 1989 intended to give the PCA considerably wider powers than the Ombudsmen and that the PCA should have jurisdiction to exercise those powers in respect of complaints made from and after 1 April 1989 even if they relate to pre 1 April 1989 allegations. There is no constitutional reason why the PCA should not have that jurisdiction and the power to recommend that disciplinary or criminal proceedings be considered or instituted against members of the Police. As Counsel Assisting pointed out in paragraph 22 of her memorandum of 11 July 2006, the rights of members of the Police are fully protected by the provisions of the Act.
29. I appreciate that the conclusion which I have reached on this issue differs from that adopted by successive PCAs in practice. In these circumstances it is open to you to take one of the following steps –
- 29.1 Decide to accept my advice, but record in your report that the PCA has a different view and leave it to the PCA to challenge your decision by way of judicial review proceedings if it wishes to do so.
- 29.2 Note in your report that there are different views on the issue and avoid making a choice between them.
- 29.3 Decide that you need a definitive answer on the issue in which event you could state a case for the opinion of the High Court under s 10 of the Commissions of Inquiry Act 1908.



D J White

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10 July 2006

MEMORANDUM OF ADVICE FOR:

Dame Margaret Bazley
Commission of Inquiry into Police Conduct
P O Box 5684
WELLINGTON

Draft report – Police Complaints Authority submissions on Chapter 5

1. Counsel for the Police Complaints Authority (the PCA) by letter dated 30 May 2006 to Counsel Assisting has made the following submissions in respect of Chapter 5 of your draft report –
 - 1.1 In focussing on a wide number of the PCA's own functions and workings, Chapter 5 goes beyond the Commission's terms of reference and needs to be revised: paragraphs 1.1–1.6.
 - 1.2 Chapter 5 does not address Term of Reference 3 adequately: paragraphs 3.1–3.2.
 - 1.3 As successive PCAs have consistently construed s 29 of the Police Complaints Authority Act 1988, it refers to broad issues of practice, policy or procedure, rather than disagreements on the facts of particular cases: paragraph 5.2.
 - 1.4 The PCA lacks the legal jurisdiction to investigate matters which arose before the Police Complaints Authority Act came into force on 1 April 1989: paragraph 6.1.
2. Counsel Assisting has provided me with a detailed memorandum dated 29 June 2006 responding to each of these submissions. The memorandum was sent to counsel for the parties and Mr Cooper of the Police Managers' Guild inviting any response by 5 July 2006.
3. Counsel for the Police has advised me that the Police position on the four matters raised by the PCA is as follows –
 - 3.1 On the scope of the Commission's terms of reference in relation to the PCA, the Police position remains as recorded in my memorandum of advice for you dated 14 December 2005 on the jurisdiction of the Commission in relation to the PCA: see paragraphs 1-2.

- 3.2 The Police endorse the PCA view that Chapter 5 of the draft report does not address Term of Reference 3 adequately: see Police submissions on draft report dated 20 June 2006, paragraphs 345-346.
 - 3.3 While the Police have made no submissions on the PCA interpretation of s 29 of the Police Complaints Authority Act, they endorse the PCA submission that the discretion in s 29 should be retained: see Police submissions on draft report dated 20 June 2006, paragraph 338.
 - 3.4 The Police do not address the PCA submission on its lack of jurisdiction before 1 April 1989.
4. Neither the Police Association nor the Police Managers' Guild has commented on these issues.
5. The PCA has advised Counsel Assisting that Mr Upton QC is overseas until 18 July 2006 and will not be able to respond until after his return. It is to be hoped that the PCA will be in a position to respond immediately upon Mr Upton's return because I will need time to consider his response and provide my advice to you on these issues before I leave for overseas on 28 July 2006. As you know, although I return on 23 August 2006, I am then fully committed preparing for a four day Court of Appeal fixture commencing on 4 September 2006.
6. In the meantime I have given some preliminary consideration to the issues raised by the PCA and the submissions in response by Counsel Assisting. I have noted that in respect of the third and fourth issues questions of statutory interpretation of the Police Complaints Authority Act 1988 are raised, namely –
 - 6.1 Does s 29 cover only broad issues of practice, policy or procedure and not disagreements on the facts of particular cases?
 - 6.2 Does the PCA have jurisdiction to investigate matters which arose before the Act came into force on 1 April 1989?
7. It seems to me that the answers to both of these questions may inform your consideration of the relevant policy issues addressed in your report. In the case of the interpretation of s 29, the scope of the provision may affect the issue of whether there should be a discretion and, if the scope of the provision is wider than the PCA has considered it to be, the further question may arise whether there may have been any matters since 1989 which the PCA would have referred to the Attorney-General and the Minister of Police if a wider interpretation of the provision had been adopted.
8. In the case of the PCA's jurisdiction to consider pre-1 April 1989 matters, the need for you to express an opinion on the policy issue only arises if as a matter of law the PCA does not currently have the necessary discretion under its Act or the legal situation is ambiguous or doubtful. My preliminary view is that these legal issues may need to be addressed in your report in order to provide the basis and context for your consideration of the policy issue.
9. For these reasons I therefore recommend that the opportunity be taken to obtain further submissions from Counsel Assisting on these issues of statutory interpretation in time for

them to be considered and addressed by Mr Upton QC on his return on 18 July 2006. Provided I receive the PCA's submissions in reply by 21 July 2006, I should be able to give you my advice on the four issues which have been raised before I leave on 28 July 2006.

10. Copies of your decision on my recommendation and this memorandum should be sent to the parties.



D J White



APPENDIX 3.8: COMMISSION MEMORANDUM, 13 OCTOBER 2006

Memorandum of the Commission of Inquiry into Police Conduct re new material in the Commission's report, 13 October 2006. This appendix includes the memorandum of the Commission of 13 October 2006 and a memorandum of advice for the Commissioner by Mr Douglas White QC, dated 12 October 2006.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

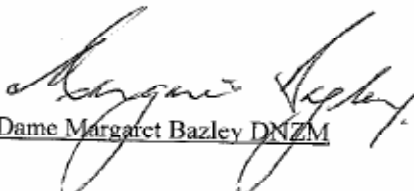
MEMORANDUM OF THE COMMISSION RE NEW SECTIONS OF THE COMMISSION'S REPORT

DATED 13~~th~~ OCTOBER 2006

1. Ms McDonald QC, on behalf of the New Zealand Police, has raised concerns in relation to new material provided by the Commission on 8 September 2006. Counsel for the Police in their submission dated 13 September 2006 sought "rulings" from my Legal Adviser, Mr Douglas White QC on two issues:
 - "14.1 The Commission's entitlement to make adverse findings based on files about which no criticism was signalled during hearings, and, as a related question, the Commission's entitlement, at this very late stage, to make adverse findings based on files about which no criticism was signalled either during hearings or in the Draft Report;
 - 14.2 The Commission's entitlement to make adverse comment about the quality of Police investigations without providing the Police with the opportunity to call evidence, including, where appropriate, expert evidence, on the files in question."
2. Counsel for the Police submitted in their submission in reply of 3 October 2006 that as a matter of "procedural fairness", the Commission should refrain from adverse comment except where concerns were indicated before the conclusion of oral hearings. Alternatively, the Police suggested the following procedure –
 - 2.1 Release of the draft report as it presently stands;
 - 2.2 An opportunity to analyse the draft report; and
 - 2.3 A further opportunity to call evidence and present submissions in response to the various areas where adverse comment "is now proposed, but where notice was not given before the conclusion of the hearings last year."

3. Mr White received submissions from Counsel assisting the Commission and Counsel for the Police on these issues. Counsel for the PCA and the Police Managers' Guild supported Counsel for the Police's submission. I sought advice on the issues from my Legal Adviser, Mr White (a copy of Mr White's Memorandum of Advice dated 12 October 2006 is attached).
4. Mr White advised me in summary that:
 - 73.1 You have to date conducted your inquiry in accordance with the Commissions of Inquiry Act, the rules of natural justice and my advice. There has been no "change in direction" since May 2005 or other procedural irregularity on your part as suggested by the Police ...
 - 73.2 The parties, including the Police, now have the opportunity to comment on the "new material" sent to them on 8 September 2006. They should be given a reasonable period of time for this purpose bearing in mind they have already had a month and the Commission's reporting date has been extended to 30 March 2007 ...
 - 73.3 Subject to ensuring that any adverse "findings" are supported by evidence of "probative value" and subject to receiving and considering such further relevant evidence and submissions as the Police may wish to provide within a reasonable period of time in respect of any new proposed "findings", the Commission is entitled to make adverse findings in the final report ...
 - 73.4 As the weight to be given to the evidence and information obtained during the course of your inquiry is a matter for you, you are entitled to interpret the evidence in the Police Loft files and to make such "comments" and form such "opinions", as distinct from making "findings", as you consider appropriate for the purpose of providing advice to the Government on the issues raised by your terms of reference. The parties have the opportunity now to respond to your proposed adverse "comments" by way of submissions. The rules of natural justice do not require you to release the whole draft report again. If the Police remain of the view that it is necessary to call further evidence from Detective Superintendent Burgess and/or an overseas expert as to the interpretation of the Police files, you should consider acceding to their request now that the Commission's reporting date has been extended to 30 March 2007".
5. I have considered Mr White's advice and taking into account the fact that the parties have had the new material since 8 September 2006, I now seek your submissions on that new material by 5pm Friday 27 October 2006. If any party thinks it necessary to call further evidence in relation to that material they should accompany their submissions with an application, with reasons.

Dated at Wellington this ^{13th} day of October 2006


Dame Margaret Bazley DNZM

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12 October 2006

MEMORANDUM OF ADVICE FOR:

Dame Margaret Bazley
Commission of Inquiry into Police Conduct
P O Box 5684
WELLINGTON

New sections of report – Police concerns

Background

1. On 8 September 2006 some seven redrafted paragraphs or sections of your draft report containing new material were sent to the parties for comment. These new paragraphs or sections had been prepared following consideration of the comprehensive submissions by the parties on the Commission's confidential draft report which had been sent to the parties for comment on 10 and 13 April 2006. The new material contained adverse comments which the Commission considered the Police should have the further opportunity to comment on before 15 September 2006. At that stage the Commission's reporting date was 30 September 2006.
2. Counsel for the Police in their memorandum of 13 September 2006 expressed concern that it appeared from the new material that the Commission had –

“disregarded a number of important submissions made by the Police in their submissions on the Draft Report.”
(paragraph 1)

It was said that the new extracts repeated and exacerbated many of the departures from the principles of natural justice that were evident in the original draft. It was of “even greater concern” that the Commission had –

“made a number of new adverse findings in its most recent draft, some of which are far more serious than any in the Draft Report.”
(paragraph 2)

3. Counsel for the Police raised the following particular concerns –
 - 3.1 Adverse comments made by the Commission on individual Police files about which no prior concern had been indicated: paragraphs 3-7;
 - 3.2 The Commission’s reliance on disputed or otherwise unproven allegations when criticising Police: paragraph 8;
 - 3.3 The Commission’s tendency to describe problems of a general nature in areas where, in fact, the problem was confined to isolated cases, and the overwhelming majority of files demonstrated compliance: paragraphs 9-11;
 - 3.4 Criticisms of the Police in the new extracts that were considerably broader than those advanced in the Draft Report and many of which were unfair or inaccurate, including a proposed finding that the Police’s investigation of colleagues was sometimes inadequate: paragraphs 12-13. The Police would have called expert evidence from Detective Superintendent Burgess if the proposed criticisms had been identified during the Commission’s hearings.
4. Counsel for the Police asked for “rulings” from me on –
 - 14.1 The Commission’s entitlement to make adverse findings based on files about which no criticism was signalled during hearings, and, as a related question, the Commission’s entitlement, at this very late stage, to make adverse findings based on files about which no criticism was signalled either during hearings *or* in the Draft Report;
 - 14.2 The Commission’s entitlement to make adverse comment about the quality of Police investigations without providing the Police with the opportunity to call evidence, including, where appropriate, expert evidence, on the files in question.”
5. Counsel for the Police Complaints Authority by letter dated 14 September 2006 supported the concerns of Counsel for the Police and requested that the Commission circulate a full copy of the further draft report.
6. The Police Managers’ Guild by letter dated 14 September 2006 supported the Police request for a “ruling”.
7. Counsel for the Police Association made no submissions on the issues raised by the Police.
8. Counsel Assisting provided submissions in response dated 22 September 2006 in which it was submitted in summary that –
 - 8.1 The issue was not whether notice of the adverse material should have been given earlier, but the adequacy of the opportunity provided to respond to it. Subject to the Commission providing the parties with an adequate opportunity to respond to the particular matters, the Commission was entitled, after considering that information, to make adverse comment if the Commission remained of the view that was warranted.
 - 8.2 As accepted by counsel for the Police, the quality of Police investigations was a matter that came within the Commission’s terms of reference. The Police had notice of the Commission’s concerns and an opportunity to provide whatever information they saw fit.

- 8.3 Whether adequate time has been given in relation to the new material was not a matter on which I could advise in the event that the Commission was required to report by 30 September 2006.
- 8.4 If the Commission's reporting date was extended, there would unquestionably be adequate time for the parties to respond to the new material.
9. In the course of the submissions of Counsel Assisting, it was suggested that the expectations reflected in the issues raised with me represented "a misconception of the nature of the overall process" because –
- 9.1 The Commission followed an inquisitorial process which, unlike an adversarial process, did not require disclosure of matters of concern at any particular time, nor that hearings be convened to enable the parties to call evidence, cross-examine witnesses, and make formal submissions: paragraph 18;
- 9.2 It was always intended that the circulation of a draft report would be a means of giving notice of specific concerns and an opportunity to respond to them. The Police case was not closed and they had that opportunity: paragraphs 20-21;
- 9.3 The Commission had focussed on a review of a very large number of historical files to assess the way the Police had carried out certain types of investigations. This was done without the assistance of the parties on the basis that they would have the opportunity to comment on any use of that material in the draft report: paragraph 17;
- 9.4 The Commission had cited files in a non-identifiable way thereby reducing or removing any potential for the interests of the individuals involved to be adversely affected. The Police had, however, been given the opportunity to comment on the use of particular cases: paragraphs 15-16 and 22.
10. Counsel for the Police in their submissions in reply dated 3 October 2006 suggested that the submissions of Counsel Assisting –
- "reveal procedural irregularities that are far more serious than had been previously appreciated by Police or the other parties."
(paragraph 1)
- The "procedural irregularities" identified by Counsel for the Police were the suggestions by Counsel Assisting that the Commission's inquisitorial process did not require assistance or input from the parties, particularly in relation to the Loft files, and that the issues of concern from these files would not be set out before the conclusion of oral hearings. Counsel for the Police claimed that these suggestions came as "a considerable surprise" to the Police and other parties because it involved a procedure "very different" to the one under which the parties believed they were working and which the Commission actually followed in 2005: paragraphs 2-11.
11. Counsel for the Police submitted that –
- "Had the Commission indicated that it did not intend to outline its concerns in advance, and that it would not afford the parties the opportunity to call evidence in response to them, its plans would have been the subject of vigorous debate, and probably judicial review."
(paragraph 12)

If the Police had been aware of the Commission's new criticisms, they would have called further evidence from Detective Superintendent Burgess and suggested that the Commission would have been assisted with overseas expert evidence.

12. Counsel for the Police have expressed "serious concern" that the Commission had decided to change the procedural rules of the inquiry "right at the end" and without consultation. It was suggested that –

"the Commission now regards direct input from the parties as necessary neither as a matter of procedural fairness, nor in the interests of enhancing the quality of the Final Report."
(paragraph 13)

13. Counsel for the Police submitted that the Commission had acted in contravention of s 4A(1) of the Commissions of Inquiry Act 1908 in failing to give the Police an opportunity to be heard in person in response to the new "matters of concern" and "the adverse comment now proposed": paragraphs 14-18. Counsel for the Police suggested that evidence called last year "was based on a false premise": paragraph 17.

14. Counsel for the Police have concluded by submitting that –

"The Police case will be significantly prejudiced by the change in direction now proposed."
(paragraph 19)

As a matter of "procedural fairness", the Commission should refrain from adverse comment except where concerns were indicated before the conclusion of oral hearings: paragraph 20. Alternatively, the Police suggested the following procedure –

14.1 Release of the draft report as it presently stands;

14.2 An opportunity to analyse the draft report; and

14.3 A further opportunity to call evidence and present submissions in response to the various areas where adverse comment "is now proposed, but where notice was not given before the conclusion of the hearings last year."

(paragraph 20).

Rulings?

15. It is not my function as your legal adviser to make rulings. I have no jurisdiction to do so. I am, however, able to provide you with legal advice on the various issues which have been raised by Counsel for the parties in order to assist you in making appropriate rulings. You have now asked me to provide advice on these issues.

Timeframe

16. On 25 September 2006 the Cabinet decided to extend the Commission's reporting date from 30 September 2006 to 30 March 2007.
17. As foreshadowed in the submissions of Counsel Assisting, this means that there is now unquestionably adequate time for the parties to respond to the new material which was sent to them on 8 September 2006.

The issues

18. It seems to me, having considered the submissions of Counsel, that the issues raised should be refined as follows –
- 18.1 Has the Commission adopted an irregular procedure in conducting the inquiry to date?
- 18.2 Is the Commission entitled to make adverse findings in the final report based on consideration of the Loft files if no advance notice of the proposed finding was given –
- during the oral hearings in 2005; and/or
 - in the confidential draft report sent to the parties for comment in April 2006?
- 18.3 Should the Commission now refrain from making any adverse comment in the final report except where concerns were indicated before the conclusion of oral hearings or should the Commission now release the draft report in its present form (to the parties on a confidential basis), give the parties an opportunity to analyse it and call evidence, including expert evidence, and present submissions in response in respect of the new material?
19. The answers to these questions depend on an analysis of the relevant law relating to commissions of inquiry and the procedure adopted by your Commission.

The relevant law

20. The starting point is s 4A of the Commission of Inquiry Act 1908 which provides –
- “**4A Persons entitled to be heard** - (1) Any person shall, if he is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.
- “(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.
- “(3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent.”
21. For present purposes this provision is significant in three respects –
- 21.1 It applies to any “person”, ie any natural person or, by virtue of the definition of “person” in s 29 of the Interpretation Act 1999, to any corporation sole, body corporate or unincorporated body.
- 21.2 A party to an inquiry is **entitled** to appear and be heard at the inquiry; and
- 21.3 A person who satisfies the Commission that any evidence given before it “may adversely affect his [or her] interests” **shall** be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.

22. The Courts have held that these mandatory, statutory requirements mean that Parliament has recognised that the rules of natural justice apply to commissions of inquiry and limit the power of commissions to regulate their own procedure: *Re Erebus Royal Commission (No.2)* [1981] 1 NZLR 618, CA at 628 and 665; *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, CA at 270; *Badger v Whangarei Commission of Inquiry* [1985] 2 NZLR 688 at 694; and *Peters v Davison* [1999] 2 NZLR 164 at 181-186.
23. The relevant rules of natural justice in this context were described by the Privy Council in *Re Erebus Royal Commission* [1983] NZLR 662 at 671 per Lord Diplock –
- “The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
- The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
- The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.”
24. In applying these rules in that case, the Privy Council decided that the Royal Commission had breached the rules because there was no material of any probative value on which to base a finding that a pre-determined plan of deception ever existed and the Commission had failed “by inadvertence” to put a number of adverse matters to individual Air New Zealand employees before making findings against them: [1983] NZLR 662 at 675-679 and 683. There was no suggestion in the judgment of the Privy Council that the reputation of Air New Zealand itself, as distinct from the personal reputations of its employees, was relevant in that case.
25. The importance of protecting the reputations of individuals involved in commissions of inquiry was also recognised by the Court of Appeal in *Peters v Davison* [1999] 2 NZLR 164 at 185-186. The Court endorsed the references in the judgments of the Court of Appeal in *Re Erebus Royal Commission* [1981] 1 NZLR 618 to “personal reputations” (at 653) and “individuals in their personal civil rights” (at 627). Similarly and perhaps more significantly in the present context it was the impact on the reputations of individual police officers, rather than on the Police as an organisation, which was relied on by the Police in seeking judicial review of the Royal Commission in the Thomas Case on the ground of breaches of natural justice or fairness: *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, CA at 267-273. Again there was no suggestion that the reputation of the Police as an organisation was relevant in that case.

26. There is no doubt that the reputations of individual Police officers, past and present, are entitled to protection under s 4A(2) of the Commissions of Inquiry Act and the rules of natural justice. Failure to provide the protection required by this provision would expose the Commission to judicial review proceedings by the individuals affected.
27. The position of individual Police officers, however, is to be distinguished from the position of the Police as an organisation. The reason why the reputation of the Police as an organisation was not raised in the Thomas Case is probably because it was considered that strictly speaking the Police as an organisation was not a body whose “interests” could be adversely affected in terms of s 4A(2) of the Commissions of Inquiry Act. The New Zealand Police is a national police service constituted under the Police Act 1958 and is part of the state services as an instrument of the Crown in respect of the Government of New Zealand: *Laws NZ, Police*, paras 1 and 12. The New Zealand Police as an organisation therefore has no individual “interests” capable of protection under s 4A(2). It has no rights under the New Zealand Bill of Rights Act 1990: s 29. As an organ of government, it has no “reputation” capable of protection by the law of defamation: *Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011, HL, at 1019, and *Laws NZ, Defamation*, para. 23. At the same time, however, the Police, as an organisation, can claim in a general way to have “interests” of a public nature which might be “adversely affected” by evidence at an inquiry. The desirability of public confidence in the Police as an organisation would be an example of such an interest. In this sense the rules of natural justice would still apply to the Police as an organization.
28. The view that strictly speaking s 4A(2) may not apply to the Police as an organisation appears to be accepted by the Police in the case of your Commission because Counsel for the Police have submitted that it is s 4A(1), the right of a party to “appear and be heard”, which provides “a complete answer”: submissions of Counsel for the Police dated 3 October 2006, para. 15. It is therefore necessary to consider the scope of s 4A(1).
29. There is no doubt that s 4A(1) does apply to the Police in your inquiry because they sought and obtained party status as “the New Zealand Police” at the initial hearing on 22 March 2004 (Transcript, p 4). This was the same approach as the Police adopted in the Thomas case: *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, CA, at 271. The alternative would have been for the Commissioner of Police to have been the party. No doubt if the Commissioner’s reputation had been in issue under your terms of reference that course would have been followed: cf. *Peters v Davison* [1999] 2 NZLR 164, CA, at 188. As the Police have party status in your inquiry, they are entitled to the benefit of s 4A(1).
30. Subject to the requirements of the rules of natural justice, the entitlement of a party under s 4A(1) of the Commissions of Inquiry Act to “appear and be heard” does not in my view import more than that. I agree with the opinion of Mr Brendan Brown QC that the entitlement relates to the presentation of that person’s own evidence and submissions and that it does not confer on such a person the status of a civil litigant or a general right to cross-examine other parties or witnesses: Legal Opinion Regarding Parties, Persons and Confidentiality provided to the Royal Commission on Genetic Modification dated 6 July 2000, paragraph 2.14, Appendix VI to Department of Internal Affairs publication, “Setting up and Running Commissions of Inquiry.”

31. There is a well-established distinction to be drawn between a dispute between parties in Court and a commission of inquiry. The distinction was explained by Cleary J in *In re the Royal Commission to inquire into and report on the State Services in New Zealand* [1962] NZLR 96, CA, at 115-116 –

“In a controversy between parties the function of the Court is “to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings”: *Labour Relations Board of Saskatchewan v John East Iron Works Ltd.* [1949] A.C. 127, 149. The function of a Commission of Inquiry, on the other hand, is inquisitorial in nature. **It does not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate.** There are, indeed, no issues as in a suit between parties; no “party” has the conduct of proceedings, **and no “parties” between them can confine the subject-matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain.** It is, in my opinion, fallacious to suggest that because the Legislature has spoken of parties to an inquiry undertaken by Commissioners such persons are to be treated as being in the same position and as having the same rights as parties to a legal cause.”
(emphasis added.)

The distinction was also recognised by the Court of Appeal in *Peters v Davison* [1999] 2 NZLR 164 at 181.

32. As the emphasised passages in the judgment of Cleary J make clear, a commission of inquiry has a wide-ranging power to obtain any evidence and information which may assist it in carrying out the inquiry required by its terms of reference. Unlike the parties in Court proceedings, whose dispute determines the issues for the Court, parties who appear before a commission of inquiry are not entitled to confine the subject-matter of the inquiry, which will be stipulated in the inquiry’s terms of reference, or place any limit on the nature of the evidence or information which the Commission may obtain in conducting its inquiry. This will be particularly so in an inquiry which is principally of an advisory nature.
33. While a commission of inquiry is constrained by the rules of natural justice in respect of evidence which may “adversely affect” the interests of any person, the commission is not prevented from including the matter in its report with reference to any evidence and/or submissions from the person affected and the commission’s view or finding on the matter. Furthermore, having given a party an opportunity to “appear and be heard” as required by s 4A(1), a commission is entitled when reporting to make findings and recommendations in the context of its terms of reference which are adverse to the parties concerned.
34. In making “findings” a commission of inquiry must comply with the rules of natural justice identified by Lord Diplock in *Re Erebus Royal Commission*, including the rule requiring the commission to base the finding on evidence that has some “probative value”, ie some material that tends logically to show the existence of facts consistent with the finding. The reasoning supportive of the finding, if disclosed, must not be “logically self-contradictory”. Having identified evidence which meets the “probative value” test, the weight to be given to the evidence is then a matter for the Commission and not for a Court in judicial review proceedings: *Re Royal Commission in Thomas Case* [1982] 1 NZLR 252, CA, at 273.
35. In this context it is also important to distinguish between “findings” of the character considered by the Courts in *Re Erebus Royal Commission* and *Re Royal Commission on Thomas Case*, which

must be supported by evidence of “probative value”, on the one hand, and the “opinions” formed or “comments” made by an advisory commission based on the commission’s review and/or interpretation of evidence or information obtained in the course of conducting its inquiry, on the other hand. In the former case, especially where the commissioner is a judicial officer or lawyer conducting an investigation where the outcome could place someone’s professional or personal reputation at stake or there is the possibility of criminal charges, “findings” unsupported by evidence of “probative value” or made without providing the adversely affected person with an opportunity to respond, are clearly open to review by the Courts. In the latter case, however, especially where a non-lawyer commissioner, selected for his or her other attributes, is conducting an inquiry which involves consideration of issues of policy and/or administration, “opinions” formed or “comments” made by the commissioner for the purpose of providing advice to the Government on the issues raised by the commission’s terms of reference and not having any impact on the reputation of any individual or on public confidence in an organization are unlikely to raise natural justice issues or be reviewed by the Courts. The distinction between “findings” and “opinions” or “comments” will not always be immediately apparent, particularly in the case of a commission having both investigatory and advisory terms of reference. It is necessary in each case to examine the character of the particular “finding”, “opinion” or “comment” and decide whether it is one to which the rules of natural justice identified by the Privy Council in *Re Erebus Royal Commission* are applicable.

The procedure adopted by your Commission

36. In considering the procedure adopted by your Commission of Inquiry it is important to bear in mind the nature of the inquiry and the significant change which occurred in May 2005 when the Hon. Justice Robertson ceased to be a member of the Commission and you became the sole Commissioner.
37. The current nature of your Commission of Inquiry is conveniently summarised in the submissions of Counsel Assisting dated 13 January 2006 in relation to the use of and reliance on your knowledge and experience for the purpose of the findings and recommendations in your report. Counsel Assisting stated –
 - “14. The terms of reference for your Commission of Inquiry require you to assess the adequacy of Police standards and procedures as a matter of internal Police policy for their investigation of complaints alleging sexual assaults by members of the Police or their associates, the practices of the Police in relation to such investigations, the adequacy of investigations carried out by the Police on behalf of the Police Complaints Authority and the adequacy and effectiveness of the standards and codes of conduct in relation to personal behaviour for members of the Police. These terms of reference raise issues of policy and administration.
 15. The policy and administration focus of the terms of reference was reinforced when the Commission was subject to further directions on 2 May 2005 and the Commission was directed not to inquire into or report on any allegations that were for the time being the subject of any investigation by the Police or any unresolved criminal proceedings. The further directions also recognised that it was necessary for the Commission to make findings of
 - “a more general nature than those that were envisaged when the Commission was appointed.”

16. It is reasonable to assume that you were appointed to the Commission because of your knowledge and experience and your ability to advise the Governor-General on the policy and administrative issues raised by the terms of reference. You would be expected to use and rely on your knowledge and experience in evaluating the information you have received.
 17. When, with the further directions to the Commission, the Hon. Justice Robertson ceased to be a member of the Commission and you became the sole Commissioner, your attributes for conducting this inquiry and reporting to the Governor-General on the issues raised by the terms of reference were brought more into focus.”
38. None of the parties to the inquiry took issue with this summary in their submissions in response which led to my memorandum of advice for you dated 15 February 2006.
39. It is also important to note the contents of the further Order in Council dated 2 May 2005 which –
- “(b) direct that you must –
 - (i) conduct in private your investigations into the manner in which allegations of sexual assault by members of the Police or by associates of the Police or by both have been investigated and handled by the Police; and
 - (ii) hear any responses to those allegations in private; and
 - (c) direct that, subject to paragraph (d) below, you may, to the extent that you consider necessary, refer, in the course of any public hearing, to particular investigations by the Police into allegations of sexual assault that were the subject of your investigations; and
 - (d) direct that, in exercising the powers conferred by paragraph (c) above, you must not give names or particulars that are likely to lead to the identification of any person who made an allegation of sexual assault or of any person alleged to have committed a sexual assault or any other criminal offence; and
 - (e) direct that you must not, in your report or in any interim report or in any findings made by you, report on investigations into particular allegations of sexual assault unless –
 - (i) you consider it necessary to do so; and
 - (ii) you can do so without giving names or particulars that are likely to lead to the identification of any person who made an allegation of sexual assault or of any person alleged to have committed a sexual assault or any other criminal offence ...”
40. These new directions were significant for several reasons –
- 40.1 in requiring you to hear any responses to allegations of sexual assault by members of the Police or their associates, they reflected the rules of natural justice;
 - 40.2 in prohibiting you from giving names or particulars likely to lead to the identification of any complainant or any person the subject of a complaint, they recognised that the reputations of individuals could be at stake and therefore should be protected; and
 - 40.3 in specifically protecting the interests of individuals, they recognised the prospect of findings or comments adverse to the Police as an organisation.

41. Following the change in direction and focus of your Commission after the Order in Council of 2 May 2005 and the revocation of the appointment of the Hon. Justice Robertson as a member of the Commission, you made it clear to the parties that you intended to rely heavily on your own reading of the Loft files which were provided to you by the Police and that the natural justice interests of the parties would be protected by your proposal to prepare and circulate for comment and submissions a confidential draft report. You made reference to that aspect of the procedure at the meeting with counsel for the parties held on 18 May 2005 to discuss the Commission's procedure following the new directions in the Order in Council of 2 May 2005.
42. You will recall that by letter dated 2 August 2005 Counsel for the Police raised a number of concerns relating to the procedures adopted by the Commission and invited the Commission to undertake a "fundamental overhaul" of its procedures. You sought advice from me at the time and, based on my advice, the Executive Officer of the Commission responded to Counsel for the Police by letter dated 5 August 2005. This letter, a copy of which was attached as Appendix B to the submissions of Counsel Assisting dated 22 September 2006, set out in detail the Commission's position. I note in particular the following paragraphs from this letter –
- “4. The directions to the Commission contained in the Order-in-Council of 2 May 2005 exclude from the Commission's inquiry allegations currently being investigated by the Police or which are currently before the Courts. The directions require the Commission to conduct the inquiry in private and also impose significant restrictions on the contents of the Commission's report. The requirements for the Commission to conduct the inquiry in private and not to report on any particular allegations or to identify any individuals, complainants or Police officers, marked a significant change in the Commission's procedures: cf. Commission's public hearing ruling of 27 August 2004. **As the Commission's focus is now principally on policy and practice issues, it is not expected or required to conduct a formal investigative type of inquiry.**
5. The appointment of the Hon. Justice Robertson as a member of the Commission was also revoked by the Order-in-Council of 2 May 2005. Dame Margaret was confirmed in office as the sole member of the Commission. The fact that Dame Margaret is not a lawyer reinforces the changed nature of the inquiry as a policy and practice focused one. ...
6. Against this background, Dame Margaret has been advised that she is not required or expected to follow a formal, investigative, adversarial process in conducting this inquiry. **She is entitled to conduct an informal inquiry.** This is reinforced by the following points –
- 6.1 The inquiry was established as a result of public and political disquiet about the allegations raised by the long-term grievances of the complainants. It is very important that Dame Margaret hear the complainants. In hearing the complainants, Dame Margaret appreciates that the Police will be concerned that the complainants' views may differ from the Police version of events recorded on the Police files, but that is inevitable, and it remains in everybody's interests that the complainants should be heard.

- 6.2 At the same time Dame Margaret is required by the terms of reference to focus on Police standards, procedures, policies, practices, investigations, and codes of conduct, which **do not require her to reinvestigate, review or determine the complaints which the Police have already investigated or to make adverse findings against any individuals.**
- 6.3 As the sole Commissioner and as a lay person, she is not qualified or, therefore, expected to conduct the inquiry on a formal basis.
7. Dame Margaret has been advised that she is entitled to listen to the complainants' version of events so that they are satisfied that she is aware of their concerns and feel that their grievances have been taken into account. Dame Margaret considers that it is in the public interest that she should follow this process. **She is also entitled to read all the relevant Police files, which provide the best evidence of the Police record of the complaints and how they were investigated, and to give such weight as she considers appropriate to their contents.** In this context it is to be noted that Dame Margaret has spent over 35 years in senior positions in the public service which has given her considerable experience in reading and evaluating the contents of such files.
8. Dame Margaret has been advised that she should follow the rules of natural justice taking into account the nature of the inquiry, the interests of those who have been given party status and the public interest. In this context Dame Margaret has decided that counsel assisting her should ensure that the Police are given notice of the statements from the complainants, the relevant supporting documents and the issues identified for consideration. It is understood that counsel assisting have complied with this obligation and will continue to do so. It is also to be noted that Dame Margaret is provided only with copies of the statements and documents which the parties see.
9. In addition the Police have been, and will continue to be, given every opportunity to respond to all matters raised that are relevant to the inquiry. **Dame Margaret will take into account the parties responses when preparing her report, but will derive her conclusions primarily from the content of the Police files.** As advised by counsel assisting the Commission in the letter of 28 July 2005, **Dame Margaret does not anticipate making findings where factual matters are disputed unless that becomes essential to her task, in which case the process will have to be adjusted to take that into account.** Dame Margaret's principal concern is with the responses by the Police to the various complaints, and the policies and practices in place at the relevant time for dealing with such complaints. If it appears that there are disputed facts which are or may be relevant to the Commission's inquiry, and may be the subject of findings, then **the parties will be given adequate notice of that, and will be given an opportunity to respond.** It will not of course be necessarily or readily apparent to the Commission that there is a factual dispute until the Police advise the Commission of their position.
- ...
13. **Dame Margaret has asked me to reiterate that she intends to prepare a draft report, copies of which will be made available to the parties for comment before it is finalised.** This procedure will ensure that the Police have a proper opportunity to raise any concerns they may have and to make any further submissions which they consider necessary. This draft report procedure will ensure that the interests of the Police in the

fairness of the process are protected and that the requirements of natural justice are met.

14. Dame Margaret has given careful consideration to the points raised in your letter of 2 August 2005 on behalf of the Police. **For the reasons given in this response, she is not prepared to undertake a “fundamental overhaul” of the Commission’s procedures. She is satisfied that the procedures which she has adopted, together with her intention to provide the parties with a draft report for comment, meet the requirements of fairness.** It appears to Dame Margaret that the concerns of the Police raised in your letter proceed on the assumption that Dame Margaret ought to be conducting a formal type of investigative inquiry. On the basis of the advice which she has received from Mr White and which is set out in this response, she considers that such an inquiry would be inappropriate in this case. ...”
(emphasis added.)
43. By letter dated 11 August 2005 addressed to Counsel Assisting, Counsel for the Police took issue with certain statements in paragraphs 3 and 11 of the Executive Officer’s letter of 5 August 2005, but no steps were taken by the Police or any of the other parties to challenge the procedure which the letter made clear you intended to adopt. You proceeded to conduct your inquiry on the basis of my advice as set out in the Executive Officer’s letter to Counsel for the Police. The procedure which you followed was known to the Police and the other parties represented during the inquiry. Counsel for the Police in their submissions in reply dated 3 October 2006 have not sought to suggest that the extracts from the Executive Officer’s letter of 5 August 2005 set out above recorded the position incorrectly.
44. Accordingly, you arranged for some six individual complainants to be heard privately last year and for all of the parties, ie the Police, the Police Complaints Authority, the Police Association and the Guild, to appear before you and present their cases. The parties were aware of your terms of reference and were given every opportunity to provide written evidence on relevant issues and to make such submissions as they wished. Various matters of particular concern to you arising from the Loft files, including those relating to the individual complainants, were disclosed by way of non-exhaustive “issues letters” sent to the parties during the inquiry last year.
45. The parties were aware that you were reading over 220 Loft files and intended to make use of the views which you reached as a result of your reading of the files in your report. The Police agreed that, subject to any specific evidence which they called and any submissions which they made, the files would speak for themselves. This was made plain in the following exchange between Senior Counsel for the Police and me at the hearing on 29 November 2005 (Transcript p 27) –
- “MR WHITE: Detective Superintendent Burgess has addressed one file specifically. He hasn’t addressed the others and you will be addressing submissions in relation to those, so that effectively Dame Margaret will be asked to hear from you and from Ms Scholtens talking about the files that she has read?
- MS McDONALD: As I understand, Ms Scholtens is asking for us to articulate the police position on those files and I think that’s appropriate for me to deal with as a submission and I will do that in relation to paragraph 6.

If Ms Scholtens has got specific factual questions, or questions about how an investigation is conducted or otherwise, then those are obviously more appropriately put to Mr Burgess to elicit information or evidence on that part. But if we're talking about a position, it's better for that to be done as a submission.

MR WHITE: In the absence of any evidence of a factual nature from the police, the file will be – the facts will be as they appear in the file itself, will speak for themselves, subject to the submissions that you wish to make as to the interpretation of the material on the file?

MS McDONALD: Yes, although I would expect that if Ms Scholtens has got particular factual information that she wants to know the answer to, then we are putting up a witness who is very familiar with the files and is here and ready to answer whatever questions he can answer about those files, so I would hope Ms Scholtens would ask her questions of the witness in that regard.

MR WHITE: With that qualification, the position, as I understand you're taking, is that the file will speak for itself, subject to the submissions that you wish to make?

MS McDONALD: Yes.”

46. By memorandum dated 2 December 2005, a copy of which was attached to the submissions of Counsel for the Police in reply dated 3 October 2006, you referred to the “issues letters” of September and October 2005 and noted in paragraph 5 that they followed your consideration of the evidence and submissions “to date”, as well as your reading of a large number of the Loft files which was “an ongoing task”, and that they gave “examples of issues” from those files. You repeated the statement that references to the Loft files were “examples of the issues raised” in paragraph 6 of your memorandum and noted that the evidence called “to date” had helpfully addressed or clarified a significant number of the matters raised, while others remained “for submission”. It is apparent from your memorandum that your consideration of the more than 220 Loft files, comprising over 55,000 documents, was incomplete and that further issues might well emerge. Your expectation that the Police would address other issues arising from the files in their submissions was consistent with the views expressed by Senior Counsel for the Police at the hearing a few days earlier on 29 November 2005.

47. Counsel Assisting in their submissions of 13 January 2006 submitted that you were entitled to rely on your knowledge and experience in evaluating the information which you had been provided with –

“both during the hearings of the Commission and in the files which you have read in the course of conducting the inquiry.”

(paragraph 2)

They also said in paragraph 20 –

“In making this submission, we also take into account your express intention to provide the parties with a draft of your report and an opportunity to make whatever comments they see fit. Should a party dispute the conclusions you may draw from your experience or expertise, or any particular matters you might rely on, it can raise the matter at that stage and provide any further information that might bear on the point.”

48. None of the parties disputed these submissions of Counsel Assisting. I summarised their responses in my memorandum of advice for you dated 15 February 2006 –

- “4. In response to the submissions by Counsel Assisting, Mr Upton QC, counsel for the Police Complaints Authority [the PCA], advised by letter dated 19 January 2006 that the PCA did not wish to make any submissions on the topic, but relied “very much” on what was contained in paragraph 20 of the submissions by Counsel Assisting.
5. Ms McDonald QC and Mr Boldt, counsel for the New Zealand Police, provided submissions in response on 20 January 2006. In summary, they submitted that –
 - 5.1 You may bring your years of experience, personal knowledge and common sense to the process of evaluating the evidence, drawing inferences and conclusions, and making findings and recommendations.
 - 5.2 At the same time, the answers to the Governor-General’s questions must all have a proper evidential foundation. You may not supplement or second-guess the evidence with information from any other source, whether it be personal experience or otherwise. It would be a matter of real concern if you were to depart from this proposition because it would be wrong in principle, contrary to natural justice and s 4A of the Commissions of Inquiry Act 1908 if factual conclusions were reached in reliance on material that the parties had no opportunity to scrutinise or challenge.
 - 5.3 The Police reserved the right to address this question further as part of their submissions on the draft report. With respect to the suggestion in paragraph 20 of the submissions by Counsel Assisting, it was unlikely to be appropriate, if any part of the report lacked an evidential foundation, for the Police to engage in the exercise of calling further evidence.
6. Mr Cooper, the Field Officer for the New Zealand Police Managers’ Guild, provided a submission on 21 January 2006 indicating that it would be “illogical” for you not to be able to use and rely on your extensive knowledge and experience for the purpose of findings and making recommendations in your report. The Guild also supported the Police submission that you could only use your knowledge and experience in addressing the evidence placed before the Commission and in satisfying the requirements of the terms of reference.
7. The New Zealand Police Association advised that it did not wish to make any submissions on this issue.”

49. In light of these submissions I advised you in my memorandum of advice dated 15 February 2006 (paragraph 2) that you would not be expected to put your knowledge and experience to one side when evaluating the evidence and when making your findings and recommendations on the following matters –

- “a The handling of complaints, disciplinary issues and performance management;
- b The handling of sexual misconduct/harassment issues;
- c The promulgation of consistent policies and ensuring front-line staff have read and understood them;
- d Ensuring changes are implemented and followed and staff receive any training required;
- e The reading and understanding of files;
- f Ensuring people with mental illness are dealt with appropriately; and

- g Managing organisations that have distinctive cultures arising from the particular attitudes and experiences of staff employed in the context of a particular work environment.”
50. I also advised you that in respect of two specific matters which went beyond simply evaluating the relevant evidence received during the inquiry it would be advantageous to provide the parties with the sections of your draft report in advance and invite further submissions. I understand that you accepted my advice and followed this course. Significantly, no party challenged my advice or your decision to proceed in accordance with it.
51. As already noted and consistent with the procedure which you had advised the parties you would follow, the Commission’s confidential draft report containing seven chapters in three volumes and one volume of appendices was sent to the parties for comment in April 2006. The covering letter stated that –
- “The draft report remains a ‘work in progress’. Dame Margaret will likely be adding to it and editing it during April and May. You will be advised of any substantial changes to this draft which may be adverse to your client’s interests, and given an opportunity to comment, as those changes are settled by Dame Margaret. Although it is a work in progress, the substance of Dame Margaret’s proposed response to the various Terms of Reference is clear from the draft.”
52. The parties, particularly the Police, provided substantial and comprehensive submissions on the draft report which were received by the Commission in May and June 2006. The Commission considered carefully all the submissions. As a result, you decided to change the report in a number of significant respects and where those changes were considered to involve new material and findings, opinions or comments adverse to the Police you decided to send the new material to the parties to provide them with a further opportunity for comment. While it is not for me to provide advice on the substance of the contents of the new material, I note that it contains –
- a substantial number of summaries of the evidence presented to the Commission and the contents of various Police files which you have read and interpreted;
 - numerous expressions of your opinions and a number of comments based on the evidence referred to and particular examples given; and
 - a relatively limited number of findings which could be described as adverse to the Police.
53. It is the response of the Police, supported by the Police Complaints Authority and the Police Manager’s Guild, which has given rise to the need for the advice in this memorandum. I turn now to address the specific issues which I have identified from the submissions for the Police and Counsel Assisting.

Procedural irregularities?

54. The essence of the Police complaint is that the Commission is proposing to make “new adverse findings” against the Police in respect of serious matters which were not disclosed to the Police before the conclusion of the oral hearings last year and that this is contrary to the procedure which the Police understood the Commission was going to follow. It appears to the Police that the Commission now regards direct input from the parties as unnecessary. The Police case will be “significantly prejudiced” by the Commission’s “change in direction”.

55. In my view the Police complaint appears to be overstated because –
- 55.1 The prospect of your report containing findings, opinions, comments and recommendations “adverse” to the Police has always been inherent in the Commission’s terms of reference. The Police have no basis for complaint against such findings, opinions, comments and recommendations in themselves provided that they have been given the opportunity to comment on them and you have taken their comments into account before finalising your report. The Police should also appreciate that you are not required to accept all their submissions.
- 55.2 The Police, as an organisation, have been a party before the Commission from the outset and have been represented throughout by Counsel. The Police have appeared at every hearing of the Commission. They have called evidence and made submissions on procedural issues and all substantive matters raised by the Commission’s terms of reference. They have had every opportunity to “appear and be heard”. They may have a further opportunity now that your reporting date has been extended to 30 March 2007.
- 55.3 The procedure which you adopted in conducting the inquiry after May 2005 was based on advice from Counsel Assisting and me and was disclosed in advance to the parties, including the Police. The August 2005 request by the Police for a “fundamental overhaul” of your procedures was not accepted for the reasons given in the Executive Officer’s letter to the parties of 5 August 2005. No steps were taken by any party to challenge the procedure which you adopted.
- 55.4 Your intention to conduct an informal inquiry and to derive your conclusions “primarily from the content of the Police files”, which you proposed to read because they provided the “best evidence” of the Police record of the complaints and how they were investigated, was made clear to the parties, including the Police: see Executive Officer’s letter of 5 August 2005, paragraphs 7 and 9.
- 55.5 Your intention to give such weight as you considered appropriate to the contents of the Police files was also mentioned. This was consistent with the decision of the Court of Appeal in *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 at 273.
- 55.6 The Police accepted that, subject to any questions by Counsel Assisting or their submissions, the Police files, which you read, would speak for themselves: see acknowledgement by Senior Counsel for the Police at the hearing on 29 November 2005 (Transcript p 27).
- 55.7 It was apparent from your memorandum of 2 December 2005 that your consideration of the more than 220 Loft files was “an ongoing task” and that further issues might well emerge from your reading of the 55,000 documents on those files.
- 55.8 The Police accepted that, subject to the requirement for there to be a proper evidential formulation for any findings, you were entitled to bring your years of experience, personal knowledge and common sense to the process of evaluating the evidence, drawing inferences and conclusions, and making findings and recommendations: see submissions of Counsel for the Police dated 20 January 2006.

- 55.9 Your intention to meet the requirements of the rules of natural justice by giving notice of any proposed findings where factual matters were disputed and by preparing a draft report which would be made available to the parties for comment before it was finalised was made clear to the parties, including the Police: see Executive Officer's letter of 5 August 2005, paragraphs 9 and 13. In complying with the rules of natural justice in this way, you have ensured that the Police have had the opportunity to protect not only the interests of individual Police officers but also the wider public interest in the Police as an organisation. You have recognised that the need for public confidence in the Police is important and that the Police should have the opportunity of calling evidence and making submissions for that purpose.
- 55.10 The Commission has implemented its intentions in respect of the rules of natural justice by –
- providing the parties with the non-exhaustive “issues letters” which identified matters of concern to you;
 - providing the parties with sections of your draft report in advance in February 2006;
 - sending the confidential draft report to the parties for comment in April 2006;
 - considering the comprehensive submissions by the parties on the draft report; and
 - sending the new material to the parties for comment in September 2006.
56. In light of the material summarised in this memorandum, it seems to me that you have to date conducted your inquiry in accordance with the requirements of the Commissions of Inquiry Act, the rules of natural justice and my advice. The procedure which you proposed to follow was disclosed in advance to the parties, including the Police, and you have followed that procedure. In conducting the inquiry in this way, you were not prepared to accede to various requests by the Police for a change in procedure. In these circumstances I do not consider that the Police complaint that you have departed from your procedure is correct. There has been no “change in direction” since May 2005 or other procedural irregularity on your part.
57. What has happened is that as a result of the submissions by the Police on the draft report you have decided to reconsider certain paragraphs or sections of the draft report and make changes to them. Such action was contemplated by the draft report process which you had adopted. Having made these changes to these paragraphs or sections, you decided that the new material should be referred to the parties for further comment. It is hard to see how this could be said to disclose a procedural irregularity or otherwise be in breach of the rules of natural justice.
58. The parties, including the Police, now have the opportunity to comment on the “new material” sent to them on 8 September 2006. In particular, they have the opportunity to –
- 58.1 identify any “findings” in the new material which they consider are not able to be supported by evidence of “probative value”;

- 58.2 provide reference to or adduce other evidence of “probative value” which you ought to take into account in reconsidering any “findings”;
 - 58.3 point to any alleged flawed reasoning in respect of any such “findings”;
 - 58.4 identify any individuals whose interests are claimed to be adversely affected by any evidence referred to in the new material;
 - 58.5 submit that as required by the Commission’s terms of reference any material likely to lead to the identification of the individual be deleted from the Commission’s report and/or seek the opportunity on behalf of such individuals to be heard in respect of the matter to which that evidence relates; and
 - 58.6 make such other specific submissions they may wish to make in respect of the substance of the “new material”, including in the case of the Police the matters referred to in paragraph 3 of this memorandum and any other matters which they consider may adversely affect public confidence in the Police as an organisation. In doing so, the parties will need to recognise that, after you have taken their further submissions into account, you will be entitled to make such findings, form such opinions and make such comments and recommendations as you consider appropriate on the basis of the evidence and information which you have received and considered in the course of your inquiry.
59. The parties should therefore now be given a reasonable period of time to provide any comment on the “new material” which was sent to them on 8 September 2006. You will need to consider in consultation with Counsel Assisting and Counsel for the parties what would be a reasonable period of time bearing in mind that the parties have already had a month to consider the new material and the Commission’s reporting date has been extended to 30 March 2007.

Adverse “findings” now?

- 60. The essence of the Police complaint is that the Commission is not now entitled to make adverse “findings” in the final report based on consideration of the Loft files because no advance notice of the proposed finding was given either during the oral hearings in 2005 or in the April 2006 confidential draft report.
- 61. I note at the outset that this question only arises if you propose to make an adverse “finding” and it was not foreshadowed in the oral hearings or the April 2006 confidential draft report. In other words, the question relates to an adverse “finding” included for the first time in the “new material” sent to the parties in September 2006 or proposed to be included in the final report without being referred to the parties at all.
- 62. In this context an adverse “finding” will either relate to an individual Police officer, past or present, or to the Police as an organisation. It will need to be a “finding” of the character considered by the Courts in the cases referred to above, rather than merely an expression of opinion or a comment for the purpose of providing advice to the Government on the issues of policy or administration raised by your terms of reference.

63. As far as any adverse “findings” against individual Police officers, past or present, are concerned –
- 63.1 the terms of reference prohibit their identification; and
 - 63.2 s 4A(2) of the Commissions of Inquiry Act requires the individuals concerned be given the opportunity to be heard in respect of the matter.
64. As far as any adverse “findings” against the Police as an organisation are concerned, the Commission is entitled, in the context of its terms of reference to make such “findings”, provided they are supported by evidence of “probative value” and the Police are given the opportunity to adduce such further relevant evidence, including if necessary evidence from Detective Superintendent Burgess, and to make such submissions in response as they wish. The provision to the Police of the “new material” now has given them that opportunity even if the proposed “findings” were not notified during the oral hearings in 2005 or in the April 2006 confidential draft report.
65. Subject to ensuring that any adverse “findings” are supported by evidence of “probative value” and subject to receiving and considering such further relevant evidence and submissions as the Police may wish to provide within a reasonable period of time in respect of any new proposed “findings”, the Commission is entitled to make adverse findings in the final report.
66. The Commission should not make any adverse “findings” in the final report unless the party or person affected by the “finding” has had the opportunity to be heard first.

Adverse “comment” now?

67. As already noted, the distinction between a “finding” and a “comment” or opinion in the final report is significant. The constraints on the Commission making an adverse “finding” without giving the person affected an opportunity to be heard first have been referred to above. A “comment” (or opinion), which does not constitute a “finding”, is in a different category, especially if it relates to the Police as an organisation and is based on evidence or information obtained by the Commission in the course of the inquiry.
68. For instance, if the “comment” (or opinion) is based on the evidence in the Police Loft files which you have read, then you are entitled to make the “comment” (or reach the opinion) because –
- 68.1 the evidence is in the files;
 - 68.2 the weight which you give to that evidence is a matter for you; and
 - 68.3 your interpretation of the evidence on the files is a matter for you.
69. The Police are entitled to make such submissions as they wish in respect of your interpretation of the evidence on their files, but they cannot require you to accept their submissions if you remain satisfied that your interpretation is correct. That is essentially a matter of weight for you, having considered and taken into account the Police submissions. For the Police to suggest otherwise would be contrary not only to the decision of the Court of Appeal in *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 at 273, but also to the approach

mandated by Cleary J in *In re the Royal Commission to inquire into and report on the State Services in New Zealand* [1962] NZLR 96, CA. You are entitled to make such “comments” and form such “opinions”, as distinct from making “findings”, as you consider appropriate for the purpose of providing advice to the Government on the issues raised by your terms of reference.

70. In my view therefore you are not now prevented from making any adverse “comments” in the final report provided that such “comments” were included in either the April 2006 draft report or the “new material” sent to the parties in September 2006 and the parties are given a reasonable period of time to respond.
71. As long as the parties have during the course of the inquiry been provided with all material which could be considered to constitute adverse “findings”, “opinions” or “comments”, it does not seem to me necessary for you to provide them with a further draft report. The requirements of natural justice would be met without the need for the whole draft report being released again. At the same time, however, there is nothing to prevent you if you wish from providing further sections or parts of the draft report to the parties on a confidential basis for further comment now that your reporting date has been extended to 30 March 2007.
72. To the extent that the parties may wish to invite you to interpret the evidence or information referred to in the “new material” differently, they should be able to do so by way of submissions rather than evidence. As already mentioned, in the end the interpretation of the evidence in the Police Loft files is a matter for you. If, however, the Police remain of the view that it is necessary to call further evidence from Detective Superintendent Burgess and/or an overseas expert to suggest a different interpretation of the evidence in the files, then, while it may not be strictly required by the rules of natural justice, I would advise you to consider acceding to their request on the basis that the Police agree to the necessary arrangements being made expeditiously and briefs of evidence are given to you in advance. You have the opportunity to proceed in this way now that your reporting date has been extended to 30 March 2007.

Summary

73. I summarise my advice as follows –
 - 73.1 You have to date conducted your inquiry in accordance with the Commissions of Inquiry Act, the rules of natural justice and my advice. There has been no “change in direction” since May 2005 or other procedural irregularity on your part as suggested by the Police: see paragraphs 54-57 above.
 - 73.2 The parties, including the Police, now have the opportunity to comment on the “new material” sent to them on 8 September 2006. They should be given a reasonable period of time for this purpose bearing in mind they have already had a month and the Commission’s reporting date has been extended to 30 March 2007: see paragraphs 58-59 above.
 - 73.3 Subject to ensuring that any adverse “findings” are supported by evidence of “probative value” and subject to receiving and considering such further relevant evidence and submissions as the Police may wish to provide within a reasonable period of time in

respect of any new proposed “findings”, the Commission is entitled to make adverse findings in the final report: see paragraphs 60-66 above.

- 73.4 As the weight to be given to the evidence and information obtained during the course of your inquiry is a matter for you, you are entitled to interpret the evidence in the Police Loft files and to make such “comments” and form such “opinions”, as distinct from making “findings”, as you consider appropriate for the purpose of providing advice to the Government on the issues raised by your terms of reference. The parties have the opportunity now to respond to your proposed adverse “comments” by way of submissions. The rules of natural justice do not require you to release the whole draft report again. If the Police remain of the view that it is necessary to call further evidence from Detective Superintendent Burgess and/or an overseas expert as to the interpretation of the Police files, you should consider acceding to their request now that the Commission’s reporting date has been extended to 30 March 2007: see paragraphs 67-72 above.


D J White



APPENDIX 3.9: COMMISSION MEMORANDUM, 25 JANUARY 2007

Memorandum of the Commission of Inquiry into Police Conduct relating to matters raised by Counsel for New Zealand Police at the hearing of 11 December 2006.

COMMISSION OF INQUIRY INTO POLICE CONDUCT

MEMORANDUM OF THE COMMISSION RELATING TO LEGAL ADVICE PROVIDED TO THE COMMISSION

DATED 25 JANUARY 2007

1. I refer to the matters raised by Counsel for the Police at the conclusion of the hearing on 11 December 2006. The transcript records Ms McDonald QC's position as follows:

While we are tidying up loose ends, I am conscious I haven't formally recorded, and I will if you want me to but I can record it now, the police's formal position should be perhaps on the record as we are today that, with the greatest of respect to him, we don't accept or agree with the legal advice that's been given to you by Mr White, that as a lay Commissioner you are entitled to express opinions without evidential basis. ... [Transcript of Hearing, 11 December 2006, p 41 lines 32 to 40]

2. After reflecting on the matter with Ms Scholtens QC, counsel assisting the Commission, we were unable to identify the advice Ms McDonald was referring to. Accordingly Ms Scholtens wrote to Ms McDonald, with a copy to the parties, on 12 December as follows;

At the conclusion of yesterday's hearing Ms McDonald indicated a wish to record the police's "formal position" that the police does not "accept or agree with" legal advice which Ms McDonald said had been given by Mr White QC to the effect that the Commission was "entitled to express opinions without evidential basis".

Could you please indicate the advice you are referring to?

3. Ms McDonald replied by letter dated 13 December (received 15 December) indicating the advice to which she referred. Before quoting her letter I record that Ms Hughes, Counsel for the Police Association, also wrote by letter dated 19 December confirming the Association's position as follows:

It adopts the submissions by the Police in relation to the proposition advanced, that the Commissioner as a lay Commissioner is free to express an opinion without any evidential foundation.

Accordingly, as with the Police I respectfully disagree with the advice proffered to the Commissioner by Mr White QC, that as a lay Commissioner Dame Margaret is free to express an opinion without the benefit of evidence.

It is the opinion of the Police Association, that an opinion without evidence is reviewable and would be *ultra vires* the Commissioner's terms of reference and as such would be unreasonable.

4. Returning to Ms McDonald's response to Ms Scholtens' request that the advice referred to be identified, Ms McDonald replied:

The advice referred to was that given by Mr White of 12 October last. The Police do not accept that Mr White's opinion as to the distinction between "findings" and "opinions" in the present context is correct. Mr White sets out his view that while probative evidence is required for a finding by Dame Margaret such evidence is not necessary where Dame Margaret expresses her opinion about matters. That view is set out in particular at paragraphs 35, 73.3 and 73.4 of Mr White's advice of 12 October 2006. I note that Mr White's view is not supported by authority.

5. The passages in Mr White's memorandum of advice of 12 October 2006 referred to by Ms McDonald are set out below:

35 In this context it is also important to distinguish between "findings" of the character considered by the Courts in *Re Erebus Royal Commission* and *Re Royal Commission on Thomas Case*, which must be supported by evidence of "probative value", on the one hand, and the "opinions" formed or "comments" made by an advisory commission based on the commission's review and/or interpretation of evidence or information obtained in the course of conducting its inquiry, on the other hand. In the former case, especially where the commissioner is a judicial officer or lawyer conducting an investigation where the outcome could place someone's professional or personal reputation at stake or there is the possibility of criminal charges, "findings" unsupported by evidence of "probative value" or made without providing the adversely affected person with an opportunity to respond, are clearly open to review by the Courts. In the latter case, however, especially where a non-lawyer commissioner, selected for his or her other attributes, is conducting an inquiry which involves consideration of issues of policy and/or administration, "opinions" formed or "comments" made by the commissioner for the purpose of providing advice to the Government on the issues raised by the commission's terms of reference and not having any impact on the reputation of any individual or on public confidence in an organization are unlikely to raise natural justice issues or be reviewed by the Courts. The distinction between "findings" and "opinions" or "comments" will not always be immediately apparent, particularly in the case of a commission having both investigatory and advisory terms of reference. It is necessary in each case to examine the character of the particular "finding", "opinion" or "comment" and decide whether it is one to which the rules of natural justice identified by the Privy Council in *Re Erebus Royal Commission* are applicable.

...

73 I summarise my advice as follows –

...

73.3 Subject to ensuring that any adverse "findings" are supported by evidence of "probative value" and subject to receiving and considering such further relevant evidence and submissions as the Police may wish to

provide within a reasonable period of time in respect of any new proposed “findings”, the Commission is entitled to make adverse findings in the final report: see paragraphs 60-66 above.

73.4 As the weight to be given to the evidence and information obtained during the course of your inquiry is a matter for you, you are entitled to interpret the evidence in the Police Loft files and to make such “comments” and form such “opinions”, as distinct from making “findings”, as you consider appropriate for the purpose of providing advice to the Government on the issues raised by your terms of reference. The parties have the opportunity now to respond to your proposed adverse “comments” by way of submissions. The rules of natural justice do not require you to release the whole draft report again. If the Police remain of the view that it is necessary to call further evidence from Detective Superintendent Burgess and/or an overseas expert as to the interpretation of the Police files, you should consider acceding to their request now that the Commission’s reporting date has been extended to 30 March 2007: see paragraphs 67-72 above.

6. I am puzzled by Ms McDonald’s reference to these specific paragraphs in Mr White’s memorandum of advice. I do not accept that in these paragraphs Mr White advised me that I could express opinions on matters which were not based on the evidence and information before me as suggested by Ms McDonald. On the contrary, it is clear to me from Mr White’s memorandum that my opinions, which are for me to form, must indeed be based on the evidence and information I received in the course of my inquiry (paragraphs 35 and 67-72). Mr White confirmed this advice in summary paragraph 73.4:

As the weight to be given **to the evidence and information obtained during the course of your inquiry** is a matter for you, you are entitled to interpret **the evidence in the Police Loft files** and to make such “comments” and form such “opinions, ... as you consider appropriate for the purpose of providing advice to the Government on the issues raised by your terms of reference [emphasis added].

7. The purpose of Mr White’s memorandum of advice was to advise me on concerns raised by the Police on seven redrafted paragraphs or sections of my draft report which I considered contained new material, comment or findings adverse to the parties and on which I sought to give them an opportunity to comment before finalising my views. The Police and other parties were concerned about this process. The parties sought rulings on my entitlement to make adverse findings based on files about which no criticism was signalled during hearings or in the April draft report, and my entitlement to make adverse comment about the quality of Police investigations without providing the Police with the opportunity to call evidence on the files in questions. Following Mr White’s advice on the issues set out in paragraph 18 of his memorandum, both these matters have been dealt with by receiving further submissions and evidence from the parties on those draft sections and the relevant files. These will of course be the subject of careful consideration before my report is finalised.
8. In his memorandum Mr White advised me on the relevant law relating to natural justice (paragraphs 22-29). He discussed the judgment of the Privy Council in *Re Erebus Royal Commission* [1983] NZLR 662, emphasising to me that the first rule of natural justice is that I must base my decisions upon evidence that has some probative value, that is the decision to

make a finding must be based upon some material that tends logically to show the existence of facts consistent with the finding (paragraphs 23 and 34). That is what I understand my primary obligation to be and I am endeavouring to carefully comply with it. As a second obligation, I understand both the Commissions of Inquiry Act 1908 and the rules of natural justice require that I must listen fairly to any relevant evidence conflicting with the proposed finding and any rational argument against the proposed finding that a party, whose interests may be adversely affected by it, may wish to place before me. These rules of natural justice, articulated in Mr White's advice, are matters I have become quite familiar with in the course of almost three years that this inquiry has been running. I believe I have complied with them and am continuing to do so as I finalise my report.

9. In paragraph 35 of his memorandum of advice, which is the primary paragraph to which Ms McDonald refers, I understand that Mr White was advising me on the relevant law relating to natural justice. He had earlier traversed the distinction between the wide-ranging power I have to obtain any evidence and information which may assist me (paragraph 32) and the constraints of natural justice on evidence which may “adversely affect” the interest of any person (paragraph 33). He then focused on “findings” in paragraph 34, once again emphasising they must be based on some material that tends logically to show the existence of facts consistent with the finding. Paragraph 35, to which Ms McDonald refers, did not say I am entitled to express opinions without evidential basis. On the contrary, Mr White made it clear in this paragraph that “opinions” and “comments” needed to be based on evidence or information obtained in the course of conducting the inquiry when he referred to –

the “opinions” formed or “comments” made by an advisory commission based on the commission's review and/or interpretation of evidence or information obtained in the course of conducting its inquiry ...

10. Furthermore, Mr White went on to advise in paragraph 35 that -

In the latter case [“opinions” formed or “comments” made, as opposed to “findings”], however, especially where a non-lawyer commissioner, selected for his or her other attributes, is conducting an inquiry which involves consideration of issues of policy and/or administration, “opinion” formed or “comments” made by the commissioner for the purpose of providing advice to the Government on the issues raised by the commission's terms of reference and not having any impact on the reputation of any individual or on public confidence in an organisation **are unlikely to raise natural justice issues or be reviewed by the Courts.** ... [Emphasis added]

I should note at this point that I do not take this to mean that such opinions or comments need not be based on the evidence and information obtained during the inquiry. It certainly did not say that. They must be, as Mr White reiterated at paragraph 73.4. I understand, however, that Mr White was indicating that the Courts were unlikely to review the weight I give to such matters, or any refusal to give parties an opportunity to comment on matters that do not adversely affect them in the way he described.

11. Paragraph 35 continued:

... The distinction between “findings” and “opinions” or “comments” will not always be immediately apparent, particularly in the case of a commission having both investigatory and advisory terms of reference. It is necessary in each case to examine the character of the particular “finding”, or

“opinion” or “comment” and decide whether it is one to which the rules of natural justice identified by the Privy Council in *Re Erebus Royal Commission* are applicable.

Again, I do not understand Mr White to be saying I am able to express my opinion about matters without some factual basis in the information and evidence I have received. On the contrary. However I understand all parties agree that I am expected to use and rely upon my knowledge and experience in **evaluating** the information I have received (see paragraphs 38 and 49 of Mr White’s memorandum) and there will be times where my particular experience and expertise will be of greater significance to the “comment” or “opinion” that I am expressing than to others. Again, I understand this advice to mean there are some matters that must be the subject of an opportunity for the parties to comment and/or provide further information before I finally determine my views or findings, and some that need not be.

12. Mr White also advised me in paragraph 55 of his memorandum that in his view the Police complaint about the procedure which I adopted appeared to be overstated for a range of reasons, including –

The prospect of your report containing findings, opinions, comments and recommendations “adverse” to the Police has always been inherent in the Commission’s terms of reference. The Police have no basis for complaint against such findings, opinions, comments and recommendations in themselves provided that they have been given the opportunity to comment on them and you have taken their comments into account before finalising your report. The Police should also appreciate that you are not required to accept all their submissions.

I have been at pains to ensure that the Police, and other parties, have had the opportunity to comment on all adverse findings, opinions, comments and recommendations in my report while it was in draft form. Where the parties have considered there was a lack of evidential foundation for those draft findings, opinions, comments and/or recommendations their counsel have made submissions to that effect and I have given those matters further close consideration.

13. I therefore reject the suggestion by the Police and the Police Association that Mr White advised me that probative evidence is not necessary where I express my opinion about matters. I record that I have taken his advice that the views and opinions I express must be based on the evidence and information obtained during the course of my inquiry, that I may use my experience and expertise in evaluating that evidence and information, and that the weight to be given to the evidence and information is a matter for me.

Dated at Wellington this 25th day of *January* 2007



Dame Margaret Bazley DNZM