

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 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 Kaitaia 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. 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.