

# **Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill**

Government Bill

As reported from the Law and Order Committee

## **Commentary**

### **Recommendation**

The Law and Order Committee has examined the Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill and recommends that it be passed with the amendments shown.

### **Purpose of the bill**

The bill amends the Police Complaints Authority Act 1988 to allow the Commission of Inquiry into Police Conduct, established by the Governor-General on 16 February 2004, to fulfil its terms of reference to inquire into the adequacy of any investigations carried out by the police on behalf of the Police Complaints Authority.<sup>1</sup>

---

<sup>1</sup> The terms of reference for the Commission include an inquiry into the adequacy of any investigations which have been carried out by the police on behalf of the Police Complaints Authority and which have concerned complaints alleging sexual assault by members of the police or by associates of the police or by both, and if any of these investigations have not been adequate, the respects in which they were inadequate. As noted by the Police Association, the Commission cannot inquire into matters that are the subject of criminal investigations or before the courts, such as the criminal inquiries that are currently being undertaken into allegations involving incidents in Rotorua and Kaitaia. It will be addressing the way the previous criminal inquiries were conducted.

## **Submissions received**

We received nine submissions. Six were from members of the public and supported the bill. We also received submissions from the New Zealand Law Society, the Police Managers' Guild, and the New Zealand Police Association. Although none opposed the bill, believing that the Commission should be allowed access to Police Complaints Authority files in order to fulfil its functions, both the Guild and the Association did not support the bill in its current form and suggested amendments.

## **Which members of the police can disclose to the Commission?**

We recommend an amendment to clause 6 to clarify that only those police officers that carried out an investigation can disclose matters to the Commission. As currently drafted, clause 6 provides for "any member of the police involved in the investigation of a complaint" to provide information to the Commission. However, this wording is confusing as it could be interpreted to mean either members of the police who conducted an investigation, or members of the police who were actually the subject of an investigation. The second of these two possibilities is not intended.

## **Amendments to the definition of "restricted matter"**

We recommend an amendment to the definition of "restricted matter" in clause 4 to clarify that it refers to two separate categories of information. We recommend that the word:

- "means" is added after the words "restricted matter"
- "means" is deleted at the beginning of paragraph (a)
- "includes" is deleted at the beginning of paragraph (b).

As currently drafted, the definition may imply that both paragraphs (a) and (b) must be satisfied before information can be categorised as restricted. The amendments we propose make it clear that the definition refers to two separate categories of information.

We also recommend a further amendment to the definition of "restricted matter" to clarify that any communication in which a person made a complaint or raised a concern about the conduct of the police is a "restricted matter", regardless of whether that communication was received directly by the Authority or subsequently

forwarded or notified to the Authority. This amendment is made to take into account sections 14 and 15 of the Act.<sup>2</sup>

In addition, we recommend an amendment to the way that staff members or employees of the Authority are referred to in the definition of ‘‘restricted matter’’. We think it is more appropriate that they are referred to as ‘‘an officer or employee of the Authority’’. This will ensure consistency with section 10 of the Act, which provides that the Authority may appoint such officers and employees as may be necessary for carrying out the Authority’s functions.

### **Directions and instructions from the Authority to the police to be disclosed to the Commission**

We recommend an amendment to clause 4 to insert a definition of ‘‘instruction communication’’. Matters covered by this definition then become an exception to the definition of ‘‘restricted matter’’, which will allow the Authority to disclose to the Commission directions and instructions given to police investigating on the Authority’s behalf.

The Police Managers’ Guild submitted that communications from the Authority contextualise the actions of the police in conducting and reviewing investigations and maintain continuity in regard to the action the police took on an investigation. The Guild submitted that these communications should be available to the Commission and should not be included in the definition of ‘‘restricted matter’’.

We agree that instructions that the Authority has issued to the police may provide the Commission with a useful context. However, a fine balance must be struck to maintain the integrity of the Authority. We consider that this category of information should not include:

- information that would otherwise fall within paragraph (b) of the definition of ‘‘restricted matter’’ (relating to third party correspondence directly, or subsequently directed or notified, to the Authority); or

---

<sup>2</sup> Under section 14 a complaint may be made directly to the Authority, as well as to any member of the police, an Ombudsman or a Registrar or Deputy Registrar of any District Court. Any Ombudsman, Registrar or Deputy Registrar who receives a complaint must forward it to the Authority as soon as practicable. Under section 15, the Commissioner of Police must notify the Authority as soon as practicable of every complaint received by the police.

- any comment or discussion from the Authority relating to complainants or their complaints.

### **Protection does not extend to those who communicate directly with the police**

We do not recommend any amendments to extend the protection for third parties who correspond directly with the police.

The Guild agreed with the principle of protection in paragraph (b) of the definition of “restricted matter”, but considered that it should include a similar protection for communications made directly to the police. It argued that the agreement of the person complaining should be obtained regardless of whether the complaint is made to the Authority or to a member of the police.

We agree that the privacy of complaints is important. However, the secrecy provisions of the Act apply to information that comes only to the knowledge of the Authority. They do not apply to information that comes to the knowledge of the police independently of an investigation on behalf of the Authority. The bill seeks to overcome the secrecy provisions. The exclusion of correspondence made directly to the Authority respects the expectation of confidentiality of that information. In any event, the secrecy provisions place obligations only on the Authority not to disclose; they do not apply to correspondents with the Authority who may choose to make information available directly to the Commission.

### **Retrospective self-incrimination prevented by the presence of existing protections**

Although we agree with submitters that members of the police and public giving evidence to the Commission should not be incriminated retrospectively, we do not recommend any amendments to provide for further protections other than those that currently exist. However, as noted on page 8 we have recommended that an “avoidance of doubt” provision be inserted.

### **Concerns raised by the Police Managers’ Guild**

The Guild submitted that the bill could affect the interests of police officers who have reported and commented frankly while involved in investigations the Commission will be inquiring into. The Guild submitted that statements by the Commission at its first two public

meetings indicated that it would ensure the interests of persons before it would not be unfairly jeopardised. The Guild wants this to be included in the bill. The Guild seeks to have an express provision inserted into the bill to protect police officers from prosecution if they disclose information to the Commission that was previously provided to the Authority in secret.

### **Concerns raised by the New Zealand Police Association**

The New Zealand Police Association submitted that the secrecy provisions in the Act were designed to encourage people to come forward with concerns about police actions and that the bill will retrospectively strip the guaranteed protection of secrecy from all information held by the Authority, other than information by complainants. The Association views this as a betrayal of trust on the part of the legislature, believing that the only protections given by the bill are for complainants to the Authority, who will have to give permission for their documents to be released to the Commission. The Association believes that these individuals can prevent the Commission examining information they may have previously provided to the Authority. It considers that, without this information, the Commission's ability to assess the consistency of the complainant's claims will be severely limited, and will produce impediments to natural justice at the Commission.

### **Police Association proposal for protecting those who were previously guaranteed secrecy under the Act**

The Association considers that the Commission can fulfil its obligations without exposing those who have relied on the secrecy guaranteed under the Act, through the use of anonymity, aggregation and the review of individual cases.

Anonymity would require the Authority to remove identifying details, such as names and locations, from any material released to the Commission, while still allowing the Commission to assess the policies and procedures followed by the Authority.

Aggregation would allow the Authority to summarise cases of a particular area or type to give the Commission an indication of the general manner in which the Authority dealt with those cases, thereby providing the Commission with the information it requires while still retaining protection for individuals.

If any individual case became of interest to the Commission, each person who had communications with the Authority would be contacted to determine if they consented to those communications being released. The Association considers it is vital for this consent process to be applied to all individuals and not just complainants. If the Commission wished to have access to information that individuals refused to allow to be released, the Commission should have the ability to apply to the High Court to have the secrecy provisions waived on a case-by-case basis. The Commission would then have to demonstrate that the release of the information was necessary and in the public interest.

### **Concerns regarding the Police Association's proposal**

We do not support the Police Association's proposals, outlined above. First, while there may in some instances be a case for anonymity, the removal of identifying information could make it difficult for the Commission to investigate specific matters which have been raised with them. Second, there are practical difficulties with summarising information held by the Authority in the time available to the Commission. It is also possible that summarised or aggregated information may not be very helpful. Lastly, gaining the consent of all individuals (including police officers) would undermine the purpose of the inquiry, and application to the High Court would slow it down considerably. In addition, and of considerable note, is the fact that it is clearly not a matter for this bill to determine the procedure of a Commission of Inquiry set up under the Commissions of Inquiry Act 1908.

### **Distinction needs to be made between the secrecy provisions in the Act and the protections that witnesses to the Commission have**

We fully realise that the issue of the loss of the protection of secrecy is a major concern for submitters. However, we are confident that these concerns can be allayed through a better understanding of the clear distinctions between the secrecy provisions and provisions that provide protections to witnesses to the Commission.

Section 32 of the Act requires the Authority to operate under an obligation of secrecy. Nothing in the Police Association's submission addresses the legal impediment, which currently prevents the

Authority from providing information to the Commission. We reiterate that without the amendments proposed in the bill (which override the secrecy provisions in the Act), there is a legislative impediment to the Authority providing any information to the Commission. As such, the Commission cannot access information directly from the Authority in any way other than by a legislative exception to the secrecy provisions.

### **What are the existing protections?**

A number of protections currently exist in the principal Act, the Commissions of Inquiry Act and the Commission's terms of reference. These protections are outlined below.

Under section 25 of the principal Act every person has the same privileges as witnesses have in any court in relation to the giving of information to the Authority, the answering of questions put by the Authority, and the production of documents to the Authority. The most relevant privilege is the privilege against self-incrimination (except in proceedings for perjury or for an offence against the Act). This enables a person to refuse to provide information to the Authority, unless that privilege is waived. Section 25(4) of the Act states that no statement made by any person in the course of any investigation before the Authority is admissible in evidence against that or any other person in any court or other proceeding, and no evidence in respect of proceedings before the Authority may be given against any person.

Under the Commissions of Inquiry Act, the Commission has the power to sit in private. Commissions have used this power in the past when dealing with sensitive matters. In addition to this ability, should the Commission so wish every person has the same privileges in relation to the giving of information or the production of documents, etc, to the Commission and the answering of questions put by the Commission, as witnesses have in courts of law (section 4C(4)). Under section 6, any person appearing before the Commission has the same privileges and immunities as witnesses and counsel in courts of law.

In addition, the terms of reference for the Commission specifically exclude the determination of guilt or innocence of any particular individual in relation to any alleged sexual assault or other alleged criminal offence.

We acknowledge that, as it relates to matters before the Commission, the effect of the bill will be to remove the guarantee of secrecy that may have contributed to the willingness of witnesses to provide information to the Authority. However, the bill does not amend section 25, so does not remove or amend any protections guaranteed under that section. We consider that the existing protections under the Act should ensure that information previously supplied to the Authority—and now provided to the Commission under this bill—can not be used subsequently against Commission witnesses in any court, inquiry, or other proceeding.

### **An “avoidance of doubt” clause to be inserted**

We do not consider there is a need to provide any further protections in this bill. To allay concerns that existing protections have somehow been removed, we recommend the insertion of new clause 8 to make it very clear that these protections currently exist. This clause will be for the avoidance of doubt, and will not create any new protections for witnesses to the Commission.

### **People other than complainants also have these protections**

Given what we have said above, we disagree with the Police Association that the only group that will have protections are complainants to the Authority who give their permission for documents to be released to the Commission. Although information supplied by police officers in response to complaints may be made available to the Commission, the Commission is still bound by the principles of natural justice in considering any evidence placed before it. Any person who provides information to the Authority will have protections, and that information cannot subsequently be used against them in any proceedings, despite the fact that this information may have been disclosed to the Commission.

### **Amendment to clarify that section 33(3) does not prevent disclosure**

We recommend the insertion of new subclause 2 in clause 7. This is to provide consistency with the rest of the bill, as we wish to clarify that section 33(3) of the principal Act (a provision that provides privilege for anything said, or any information, document, or thing given or produced to the Authority, in the same manner as if the



investigation or proceedings were proceedings in a court) does not prevent the disclosure of information under clauses 6 and 7.

### **Automatic suppression of information is a matter for the Commission**

We disagree that information and evidence obtained as a result of the bill should be automatically suppressed by a provision in the bill.

The New Zealand Law Society submitted that there is no provision for suppression orders to be made in relation to any material subject to the bill, and anyone attending Commission hearings, including the media, will have access to such material unless access is restricted.

We consider that legislated automatic suppression of information obtained may open up the Commission and Parliament to criticism, as it could be seen as compelling the Commission to operate in secrecy.

We also consider that the Commission itself is best placed to make the decisions on whether or not to suppress information.

### **Bill to cover only the current Commission of Inquiry into Police Conduct**

We do not recommend any extensions of the proposals in the bill. One submitter would like to see the relaxation of the secrecy provisions in the bill extended to all Government-authorised investigations or inquiries. Another submitter comments that the Commission should remain continuously in operation, with an open mandate and no timeframe within which to complete its investigation of any complaints that may come forward in the future.

We consider it appropriate that, due to the unique circumstances surrounding this inquiry, the provisions of the bill apply only to this Commission. If they are extended the ability of the Authority to fulfil its functions effectively will be compromised. The Commission has been tasked with inquiring into police conduct, and the information held by the Authority under its obligation of secrecy is relevant to its ability to fulfil its terms of reference. We do not anticipate that this unique situation will arise again. Other Commissions of Inquiry have been able to rely on existing powers under the Commissions of Inquiry Act, as will future Commissions.

### **Expiry date of bill**

We recommend no change to the expiry date of the bill, which expires one year after the Commission finally reports to the Governor-General.

The Guild submitted that the expiry date should be brought forward. We do not agree. An explicit expiry date is necessary so that the bill's provisions will only allow information to be provided to this particular Commission. It is not intended to create a general exception to the secrecy provisions for any other purpose. The period of one year after the Commission has finally reported to the Governor-General will ensure that further material will be available for any subsequent proceedings, such as a redirection from the Government back to the Commission.

## **Appendix**

### **Committee process**

The Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill was introduced to the House on 30 March 2004 and referred to the committee on 30 March 2004. The closing date for submissions was 14 April 2004. We received and considered 9 submissions from interested groups and individuals. We heard 3 submissions. Total consideration took 4 hours and 30 minutes of which hearings of evidence took 55 minutes.

### **Committee membership**

Martin Gallagher (Chairperson)

Marc Alexander (Deputy Chairperson)

Georgina Beyer

Brian Connell

Ann Hartley

Ron Mark

Mahara Okeroa

Hon Tony Ryall

Clayton Cosgrove attended deliberation on the bill.

---

Police Complaints Authority (Commission  
of Inquiry into  
Police Conduct) Amendment

---

**Key to symbols used in reprinted bill**

**As reported from a select committee**

**New (unanimous)**

Subject to this Act,

Text inserted unanimously

*(Subject to this Act,)*

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

---

*Hon Phil Goff*

# **Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill**

Government Bill

## **Contents**

1	Title	
2	Commencement	
	<b>Part 1</b>	<b>Part 2</b>
	<b>Preliminary provisions</b>	<b>Disclosure to Commission of Inquiry into Police Conduct</b>
3	Purpose	6 Authority and staff to maintain secrecy
4	Interpretation	7 Proceedings privileged
5	Expiry	8 Certain privileges and protections unaffected by this Act

**The Parliament of New Zealand enacts as follows:**

### **1 Title**

- (1) This Act is the Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill **2004**.
  - (2) In this Act, the Police Complaints Authority Act 1988<sup>1</sup> is called “the principal Act”. 5
- <sup>1</sup> 1988 No 2

### **2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

## **Part 1**

### **Preliminary provisions** 10

#### **3 Purpose**

The purpose of this Act is to amend certain provisions of the Police Complaints Authority Act 1988 to ensure that they do not prevent the Commission of Inquiry into Police Conduct from gaining access to information needed in order to carry out its functions. 15

#### 4 Interpretation

For the purposes of this Act, but not the principal Act,—

##### **Commission—**

- (a) means the Commission of Inquiry into Police Conduct, the terms of reference for which are set out in the Supplement to the *Gazette* dated 20 February 2004; and
- (b) includes any person authorised by the members of the Commission to exercise any power under section 4C of the Commissions of Inquiry Act 1908

##### **New (unanimous)**

**instruction communication** means any request by, or instruction or direction from, the Authority to the police to investigate a complaint, and any subsequent amendment or addition that is made to that request, instruction, or direction, made in accordance with sections 17(1)(b) or (c), 18(2), or 19 of the principal Act, but does not include any other part of the communication that was made

**member of the police** includes a former member of the police (other than a person who is currently *(a staff member)* an officer or employee of the Authority)

##### **restricted matter** means—

- (a) *(means)* any document, information, or communication produced by or, as the case requires, made by a person holding office as the Authority or the Deputy Authority, or as *(a staff member)* an officer or employee of the Authority, other than an instruction communication; and
- (b) *(includes)* any communication by a person made to the Authority, or forwarded or notified to the Authority,—
  - (i) in which that person made a complaint or raised a concern about the conduct of the police, or any member of the police; and
  - (ii) in respect of which that person has not *(agreed that it may)* given consent to the Authority for it to be disclosed to the Commission.

**5 Expiry**

This Act expires at the close of the day that is 1 year after the date on which the Commission finally reports to the Governor-General.

**Part 2**

5

**Disclosure to Commission of Inquiry into  
Police Conduct**

**6 Authority and staff to maintain secrecy**

Section 32 of the principal Act must be read as if, after subsection (2), the following subsection were inserted:

10

“(2A) Subsection (1) does not prevent—

“(a) the Authority, or any person holding any office or appointment under the Authority, from disclosing any matter (other than a restricted matter) in order to comply with any (direction or order) requirement, order, or direction of the Commission under section 4C of the Commissions of Inquiry Act 1908:

15

“(b) any member of the police (involved in the investigation of) who was involved in investigating a complaint or other matter that was received by or notified to or otherwise came to the attention of the Authority from disclosing any matter (other than a restricted matter)—

20

“(i) in order to comply with any requirement, order, or direction of the Commission under section 4C of the Commissions of Inquiry Act 1908 or a summons issued by the Commission under section 4D of (the Commissions of Inquiry Act 1908) that Act:

25

“(ii) in evidence before the Commission.”

**7 Proceedings privileged**

30

(1) Section 33 of the principal Act must be read as if, after subsection (2), the following subsection were inserted:

“(2A) Nothing in subsection (1)(b) applies to any member of the police who is called to give evidence in proceedings before the Commission.”

35

**New (unanimous)**

(2) Section 33 of the principal Act must be read as if, after subsection (3), the following subsection were inserted:

“(3A) Nothing in subsection (3) prevents—

“(a) any matter (other than a restricted matter) from being disclosed to the Commission; or

5

“(b) evidence about any matter (other than a restricted matter) being given in proceedings before the Commission.”

**8 Certain privileges and protections unaffected by this Act**

Nothing in this Act affects—

10

(a) the privileges granted under section 25(1) of the principal Act; or

(b) the protections granted under section 25(3) and (4) of the principal Act; or

(c) the protections granted under section 33(1)(a) of the principal Act; or

15

(d) subject to section 7(1), the protections granted under section 33(1)(b) of the principal Act.

**Legislative history**

30 March 2004

Introduction, first reading, and referral to Law and Order Committee (Bill 114–1)