

PROTECTION OF UNDERCOVER POLICE OFFICERS BILL

EXPLANATORY NOTE

THIS Bill deals with the case that recently came before the Full Bench of the Court of Appeal in *R v. Hughes* (unreported).

Hughes had been committed for trial on 4 counts under the Misuse of Drugs Act 1975 and 1 count under the Arms Act 1983. During the committal proceedings before Justices of the Peace, written statements by witnesses for the prosecution were admitted by consent. Included in these were statements by 2 Police officers, who said that at the material time they were stationed at Police Headquarters, Wellington but assigned to undercover duties in the Napier Police District. Each used only his "cover" name, and did not disclose his true name. The question was, was the defendant entitled to know the true identity of these witnesses?

Counsel for the defendant relied on 2 High Court decisions: *Barnard v. Williams* and *R v. Fantham*. The trial Judge (in the District Court) followed these decisions, and ruled that the defendant was entitled to know the true identity of any witness called by the prosecution. The Crown elected to call no evidence, and the Judge directed an acquittal to be entered. The question was then referred to the Court of Appeal for determination.

In that Court, all 5 Judges gave a separate judgement. However, the result was a 3-2 majority in favour of the proposition that an accused is entitled to know the true identity of a witness called by the prosecution.

It was common ground among the Judges that the real issue is the credibility of the witness. The majority (Richardson, Somers, and Casey JJ) held that the Court should not attempt to prejudge this issue in any way. The accused does not have to show that there is already some cloud over the credibility of the witness. The accused is entitled to conduct his or her own investigations to see whether or not there is anything with which the credibility of the witness may be assailed.

The minority (Cooke P. and McMullin J.) would not go that far. Emphasising the public interest in the successful apprehension and prosecution of offenders, they held that the Judge could protect the anonymity of an undercover Police officer called as a witness unless the accused is able to point some evidence that touches upon the credibility of the witness.

In broad terms, the Bill follows the view preferred by the minority in the Court.

Where an undercover Police officer is to be called as a witness for the prosecution, the Commissioner may file in the Court, at any time before the commencement of the trial, a certificate relating to that witness. The certificate is to state whether or not the witness has any convictions, or has been found guilty of misconduct or neglect of duty under the Police Act 1958, or has had adverse judicial comment passed upon his or her credibility in previous proceedings.

If such a certificate is filed, the true identity of the witness cannot be questioned without the leave of the Judge. The Judge must not grant leave unless satisfied that there is evidence tending to raise questions about the credibility of the witness, it is necessary in the interests of justice to allow the accused to question the credibility of the witness, and the accused would be unable to do so properly unless the true identity of the witness were disclosed to the accused.

Where an application for leave is made during the preliminary hearing, it is to be removed into the High Court for determination. If, in any case, a determination is made before trial, an appeal against that determination lies to the Court of Appeal.

Where leave is given during the preliminary hearing, the informant may elect to withdraw the information, without prejudice to the laying of a further information. Where leave is given during the trial, the prosecution may give notice that it does not intend to proceed with the indictment, or with any particular count in the indictment. In that event, the accused is entitled to acquittal.

For the avoidance of doubt, the Bill also makes it clear that written evidence from an undercover Police officer may be given and sworn in the officer's assumed name.

Right Hon. Geoffrey Palmer

PROTECTION OF UNDERCOVER POLICE OFFICERS

ANALYSIS

Title	6. Prosecution may withdraw in certain cases
1. Short Title	7. Right of appeal in certain cases
<i>Amendments to Evidence Act 1908</i>	<i>Amendments to Summary Proceedings Act 1957</i>
2. Sections to be read with Evidence Act 1908	8. Sections to be read with Summary Proceedings Act 1957
3. Undercover Police officers	9. Withdrawal of information by informant
4. Transitional provision	10. Application for leave to question undercover Police officer's identity to be removed into High Court
<i>Amendments to Crimes Act 1961</i>	11. Undercover Police officer may sign deposition, etc., by assumed name
5. Sections to be read with Crimes Act 1961	12. On committal, documents to be sent to trial Court

A BILL INTITULED

An Act to protect undercover Police Officers from disclosure of their true identity in criminal proceedings

BE IT ENACTED by the General Assembly of New Zealand in
5 Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Protection of Undercover Police Officers Act 1986.

Amendments to Evidence Act 1908

10 **2. Sections to be read with Evidence Act 1908**—This section and the next 2 succeeding sections shall be read together with and deemed part of the Evidence Act 1908* (in those sections referred to as the principal Act).

*R.S. Vol. 2, p. 339

Amendments: 1980, No. 6; 1980, No. 27; 1982, No. 48; 1985, No. 54; 1985, No. 161

3. Undercover Police officers—The principal Act is hereby amended by inserting, after section 13, the following section:

“13A. (1) This section applies in any case where a person is being or is to be proceeded against by indictment— 5

“(a) For any offence that is punishable by imprisonment for life or for a term of at least 7 years; or

“(b) For any other offence against any of the provisions of the Misuse of Drugs Act 1975 except sections 7 and 13; or 10

“(c) For conspiracy to commit, or for attempting to commit, an offence described in **paragraph (a)** or **paragraph (b)** of this subsection. 10

“(2) For the purposes of this section the term ‘undercover police officer’, in relation to any proceedings to which this section applies, means a member of the Police whose identity was concealed for the purposes of any investigation relevant to the proceedings. 15

“(3) Where, in any proceedings to which this section applies, it is intended to call an undercover Police officer as a witness for the prosecution, the Commissioner of Police may, at any time before an indictment is presented, file in the Court in which the proceedings are to be held a certificate given under the Commissioner’s hand stating in respect of that witness the following particulars: 20 25

“(a) That during the period specified in the certificate the witness was a member of the Police and acted as an undercover Police officer:

“(b) That the witness has not been convicted of any offence or (as the case may require) that the witness has not been convicted of any offence other than the offence or offences described in the certificate: 30

“(c) That the witness has not been found guilty of an offence of misconduct or neglect of duty under the Police Act 1958 or (as the case may require) that the witness has not been found guilty of any such offence except the offence or offences described in the certificate: 35

“(d) That, to the best of the Commissioner’s knowledge and belief, the credibility of the witness in giving evidence in any other proceedings has not been the subject of adverse comment by the Judge or other person before whom those other proceedings were held or (as the case may require) the credibility of 40

the witness in giving evidence in any proceedings has not been the subject of any such adverse comment except as described in the certificate.

“(4) If, in any proceedings to which this section applies, the
5 Commissioner of Police files a certificate under **subsection (3)** of this section relating to any witness, the following provisions shall apply:

10 “(a) If a witness is subsequently called for the prosecution and attests that, during the period specified in the certificate, he or she was a member of the Police and acted as an undercover Police officer under the name specified in the certificate, it shall be presumed in the absence of proof to the contrary that the certificate has been given in respect of that
15 witness:

“(b) It shall be sufficient if the witness is identified by the name by which the witness was known while acting as an undercover Police officer, and, except where
20 leave is given under **paragraph (d)** of this subsection, the witness shall not be required to state his or her true name or address or to give any particulars likely to lead to the discovery of that name or address:

“(c) Except where leave is given under **paragraph (d)** of this
25 subsection, no barrister, solicitor, officer of the Court, or other person involved in the proceedings shall state in Court the true name or the address of the witness or give any particulars likely to lead to the discovery of that name or address:

30 “(d) No evidence shall be given, and no question shall be put to the witness or to any other witness, relating directly or indirectly to the true name or the address of the witness, except by leave of the Judge:

35 “(e) On an application for leave under **paragraph (d)** of this subsection, the certificate shall, in the absence of evidence to the contrary, be sufficient evidence of the particulars stated in it.

“(5) The Judge shall not grant leave under **subsection (4) (d)** of
this section unless the Judge is satisfied—

40 “(a) That there is some evidence before the Judge that, if proved, could call into question the credibility of the witness; and

“(b) That it is necessary in the interests of justice that the accused be enabled to test properly the credibility of the witness; and

“(c) That it would be impracticable for the accused to test properly the credibility of the witness if the accused were not informed of the true name and true address of the witness. 5

“(6) An application for leave under **subsection (4) (d)** of this section—

“(a) May be made from time to time and at any stage of the proceedings; and 10

“(b) Shall, where practicable, be made and dealt with in chambers.

“(7) Where the Commissioner of Police gives a certificate under **subsection (3)** of this section in respect of any witness, the Commissioner shall serve on the accused or any solicitor or counsel acting for the accused, at least 14 days before the witness is to give evidence, a copy of the certificate.” 15

4. Transitional provision—Nothing in **section 13A** of the principal Act (as inserted by **section 3** of this Act) shall apply in any case where the information was laid before the commencement of this Act. 20

Amendments to Crimes Act 1961

5. Sections to be read with Crimes Act 1961—This section and the next 2 succeeding sections shall be read together with and deemed part of the Crimes Act 1961* (in those sections referred to as the principal Act). 25

6. Prosecution may withdraw in certain cases—The principal Act is hereby amended by inserting, after section 369, the following section: 30

“369A. (1) Where, on an application under **section 13A (3) (d)** of the Evidence Act 1908, leave is granted to the accused to put any question relating to the identity of a witness called by the prosecutor, the prosecutor may forthwith inform the Judge that the prosecution does not intend to proceed with the indictment, or with any particular count in the indictment. 35

“(2) In such a case the Court shall give judgment that the accused be discharged from the indictment or from that count, and every such judgment shall be deemed to be an acquittal.”

*R.S. Vol. 1, p. 635

Amendments: 1979, No. 5; 1979, No. 127; 1980, No. 63; 1980, No. 85; 1982, No. 46; 1982, No. 157; 1985, No. 82; 1985, No. 121; 1985, No. 160; 1985, No. 171

7. Right of appeal in certain cases—Section 379A of the principal Act (as inserted by section 8(1) of the Crimes Amendment Act 1966) is hereby amended by adding to subsection (1) the following paragraph:

- 5 “(e) Against the granting of leave on an application under **section 13A (3) (d)** of the Evidence Act 1908 relating to the identity of a witness, or against the refusal of a Judge to grant such leave.”

Amendments to Summary Proceedings Act 1957

- 10 **8. Sections to be read with Summary Proceedings Act 1957**—This section and the next 4 succeeding sections shall be read together with and deemed part of the Summary Proceedings Act 1957* (in those sections referred to as the principal Act).

- 15 **9. Withdrawal of information by informant**—Section 157 of the principal Act is hereby amended by inserting, after subsection (1), the following subsection:

- 20 “(1A) Notwithstanding anything in subsection (1) of this section, where, on an application under **section 13A (3) (d)** of the Evidence Act 1908, leave is granted to the defendant to put any question relating to the identity of a witness called by the informant, the informant may forthwith withdraw the information, and leave of the Court shall not be required.”

- 25 **10. Application for leave to question undercover Police officer’s identity to be removed into High Court**—The principal Act is hereby amended by inserting, after section 161, the following section:

- 30 “161A. Where the defendant applies for leave under **section 13 (3) (d)** of the Evidence Act 1908, to put any questions relating to the identity of a witness called by the informant, the application shall be removed into the High Court and heard and determined by a Judge of that Court, and no evidence or further evidence shall be taken from that witness pending the determination of that application.”

- 35 **11. Undercover Police officer may sign deposition, etc., by assumed name**—The principal Act is hereby amended by inserting, after section 178, the following section:

- “178A. Notwithstanding anything in this Part of this Act, any deposition or other written statement of evidence given by

*R.S. Vol. 9, p. 583

Amendments: 1982, No. 47; 1982, No. 131; 1982, No. 158; 1985, No. 51; 1985, No. 55; 1985, No. 99; 1985, No. 162; 1985, No. 191

an undercover Police officer (within the meaning of **section 13A (2)** of the Evidence Act 1908) may be given and signed by the officer in the name by which the officer was known during the relevant investigation.”

12. On committal, documents to be sent to trial Court— 5
Section 182 of the principal Act (as substituted by section 20 (1) of the Summary Proceedings Amendment Act 1976) is hereby amended by inserting in subsection (1), after the words “the Crimes Act 1961, “, the words “any certificate filed by the Commissioner of Police under **section 13A (2)** of the Evidence Act 10 1908 in respect of any witness,”.
