

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

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Attorney-General

Legal Advice

Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Bill
Consistency With The New Zealand Bill of Rights Act 1990

1. This morning I received a copy of the above Amendment Bill. It is due to be introduced into the House this afternoon at 12.00 o'clock and will be subject to the urgency motion commencing at 9.00 pm this evening. Having considered the Bill I am of the view that nothing in it appears to be inconsistent with the New Zealand Bill of Rights Act 1990 ("BORA").

The Bill's principal features

2. In summary the Bill amends the secrecy provisions of the Police Complaints Authority Act 1988 ("1988 Act"), ss 32 and 33, by:

2.1 Allowing the Police Complaints Authority ("PCA") to disclose any matter to the Commission of Inquiry into Police Conduct ("the Commission") (other than a "restricted matter"). (cl 6 - new s 32(2A)(a)) A "restricted matter" includes any document, information or communication produced or made by the PCA or its staff (cl 4).

2.2 Permitting a member of the Police involved in a PCA investigation to disclose any matter (other than a restricted matter) in order to comply with a summons issued by the Commission under s 4D Commissions of Inquiry Act 1908 or in evidence before the Commission (cl 6 – new s 33(2A)).

2.3 Permitting any member of the Police, who is called to give evidence in proceedings before the Commission, to do so (cl 7 – new s 33(2A)).

3. By way of further background, it should be noted that in terms of s 6 Commissions of Inquiry Act 1908, every witness giving evidence before the Commission will have the same privileges and immunities as witnesses in courts of law, including, therefore, the privilege against self-incrimination. Furthermore, a Commission of Inquiry is not a criminal proceeding; its purpose is to investigate matters referred to in its terms of reference and make findings and recommendations in relation to the matters pertaining thereto. Any subsequent criminal proceedings, should they occur, will be conducted in the criminal courts. In those proceedings, any matter which comes to the Commission's attention from the PCA or a member of Police who gives evidence as to matters occurring during a PCA investigation, can be challenged for admissibility on grounds of unfairness at common law. It

may well be that, as part of assessing unfairness, a court would have regard to the fact that the information disclosed to the Commission had been originally disclosed to the PCA against a background of apparently guaranteed secrecy and privacy and this may well affect admissibility.

BORA assessment

4. A number of BORA rights might be thought to be relevant to the consistency of the Bill with BORA, viz, s 21 BORA (unreasonable search and seizure) and s 23(4) BORA (right to silence of detained person). In my view neither right is triggered.

5. Section 21 BORA protects everyone against unreasonable search and seizure. Unreasonable search and seizure extends to the forcible provision of information. However, s 21 BORA is not a general guarantee of privacy: see the references in the White Paper pp 103-104, para 10.144 and see also *Hosking v Runting* CA101/03 25 March 2004 passim. In my view s 21 BORA is confined in its scope to unreasonable searches and seizures carried out in a law enforcement purpose. While the Commission is concerned with how law enforcement officials conducted themselves, the purpose of the Commission is not to undertake law enforcement, but merely to review the actions of Police and the PCA in relation to their handling of complaints of sexual misconduct by Police Officers. Any law enforcement action taken in reliance upon the findings and recommendations of the Commission of Inquiry will take place at a later point. Section 21 BORA is, therefore, not engaged.

6. Section 23(4) BORA provides that everyone arrested or detained under any enactment "for any offence or suspected offence" shall have the right to "refrain from making any statement and to be informed of that right." Whilst it is true that the PCA has the power to order a person to produce such documents or things in his or her possession or under his or her control as in the opinion of the PCA are relevant to the subject matter of an investigation (s 24(1) of the 1988 Act) and to summon before it and examine on oath any person who in its opinion is able to give any information relating to the matter under investigation (s 24(2)), any detention which arises as a result of the issuance of summons under s 24(2) does not fall within the scope of s 23(4) BORA, because the person is not being detained under the 1988 Act "for any offence or of suspected offence" as the terms of s 23(4) BORA require. Accordingly, any answers given in response to an order to produce or summons issued by the PCA did not have to be preceded by a warning as to the right to silence.

7. In any event, even if s 23(4) BORA were thought to have been triggered, this office and the Ministry of Justice have long held that protections as to the use of answers given in response to compulsory questioning can amount to a reasonable limit upon the right to silence secured by s 23(4) BORA. In this regard, I note that nothing in the Commissions of Inquiry Act 1908 indicates that information disclosed to the PCA will, in turn, be publicised by the Commission nor made available for use in any subsequent criminal proceedings. Moreover, as noted above, the admissibility of any evidence disclosed to the PCA which is sought to be admitted at any subsequent criminal trial, can be challenged at common law on the grounds of "unfairness". In determining unfairness, it will be open to the accused to

point to the circumstances in which the material was originally obtained, ie pursuant to the provisions of the 1988 Act and, more particularly its secrecy provisions.

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