Criminal Procedure (Reform and Modernisation) Bill

Submission of the
New Zealand Police Association

Submitted to the

Justice and Electoral Committee

18 February 2011

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About the New Zealand Police Association

The New Zealand Police Association (the Association) is a voluntary service organisation representing nearly 8,700 sworn police members across all ranks. The Association also represents more than 2,500 non-sworn members, who carry out invaluable support roles across the full spectrum of policing. Members are generally very active in engaging in debate and discussion within the Association on matters relevant to policing. The high engagement level of the membership is critical to the Association's ability to speak and act credibly on behalf of members.

In putting together this submission, the Association has consulted with members who have first-hand experience in the matters addressed by this Bill.

Introduction

1. The Police Association welcomes the Criminal Procedure (Reform and Modernisation) Bill as the culmination of a lengthy project to revise and consolidate criminal procedure statute. The Association has had some input into the work which led to this Bill and overall we are optimistic that it will deliver benefits in simplifying and streamlining the criminal process, with resultant efficiency gains. That is in the interests of all participants, but particularly those who are not involved in a professional capacity: i.e., victims, witnesses, and even offenders. We believe these ends can be achieved without compromising the interests of justice.

2. Issues of particular interest to the Association are noted below, in the order in which they are dealt with by the Bill.

Representative charges

3. We are generally supportive of the approach taken to representative charges in **clause 17**. However, it is important that sentencing adequately reflects the totality of offending and not merely the number of convictions recorded. In our view, current sentencing for (for example) fraud and sex offenders on representative charges often appears lenient compared with cases where charges are individualised, as is usually the case for (for example) repeat burglars. This risk must be addressed particularly in respect of the use of representative charges in cases where separate charges would be 'unmanageable' (**clause 17(2)**).

4. Nevertheless we fully support the use of representative charges in cases where large numbers of individual charges can be charged, as desirable in terms of the file administration. For example, in drugs cases where there are sometimes hundreds of individual charges, the current approach may be to

lay one representative charge, and attach a schedule of individual offences to the summary when the investigation is complete. It may be prudent to write this practice into the law: i.e., that when representative charges are laid due to the large number of offences, an attached schedule is an acceptable alternative when more than 10 (or other suitable number) individual offences are identified.

5. Recognition of such a schedule would ensure the totality of the offending is able to be properly recorded and expressed against the conviction, and reflected in the sentence. An offender proceeded against in this more efficient way would therefore not be so likely to receive a lighter sentence than a different offender properly convicted of the same totality of offending filed as individual charges.

Private prosecutions

6. The Association is very pleased to see the creation of a new mechanism through **clause 30** by which a Judge may require somebody who wishes to commence a private prosecution to provide prima facie evidence of an offence sufficient to justify a trial, before accepting the charge for filing.

7. There has been an increasing tendency in recent years for police officers to be subjected to trivial and vexatious court proceedings arising from actions taken by them in the conduct of their duties. Such court proceedings are often civil suits alleging breaches of various torts, human rights and/or privacy legislation; and private criminal prosecutions for alleged assaults or unlawful detention.

8. The overwhelming majority of such cases are, eventually, found to have no merit and are disposed of by the courts accordingly. But it can take many months and some considerable court process before the matter is determined. During that time, the officers involved and their families are subject to considerable personal stress, may be required to devote time and energy to fighting the spurious claims, and the process creates significant direct and indirect financial costs.

9. The overwhelming majority of these cases are taken by aggrieved individuals who for personal reasons wish to 'hit back' at Police. In most cases, the fact that one officer is named rather than another is nothing more than bad luck. Often officers who are more identifiable by virtue of characteristics such as race or gender bear the brunt of allegations.

10. The increasing popularity of such suits and prosecutions has unfortunately become a fashion amongst a segment of the population. It is widely known that the costs of initiating such a case by filing documents are practically nil, and that the simple act of so filing itself achieves the objective of 'getting back' at Police. There has even been a website devoted to encouraging individuals to do so.

11. In view of this situation, we are pleased to see a higher hurdle being introduced to the laying of private prosecutions along the lines we submitted to the Law Commission during the consultative process which has led to this

Bill. In due course, we would also like to see the courts have a greater ability to weed out unmeritorious civil proceedings against public officials at an earlier stage.

Threshold for electing trial by jury

12. The Association supports the move to raise the threshold for jury trials from an offence punishable by a term of imprisonment of more than 3 months, to a term of imprisonment of more than 3 years (**clause 48**). We believe this move will improve efficiency at the 'bulk' end of the court system, without impacting on the interests of justice. In fact, allowing experienced judges to deal with more commonplace offending should promote the overall interests of justice by promoting more timely resolution of matters (which is in the interests of all participants) and in ensuring a more consistent approach across similar cases.

Identification of issues in dispute

13. We agree with the requirement that the defence should identify issues in dispute so as to allow for a more efficient and focussed trial process (**clause 64**). Similarly, we agree that the fact-finder ought to be able to draw inferences from the failure to adequately meet this requirement (**clauses 106 and 114**).

14. However, it is important that the prosecution not be constrained by the defence's decision in the evidence it may put forward on matters that are not in dispute. Such evidence may be important to presenting the full circumstances of the case: since that evidence might (for example) reveal facts which are important in conveying to the judge or jury the true nature of the defendant's overall conduct.

15. As a related issue, there would be merit in increasing the onus on the defendant to advance matters relating to their defence at the earliest opportunity (i.e. during their police interview/when making a statement), once they have had the opportunity to take legal advice. We would suggest a reform similar to that adopted in the UK (and elsewhere), which allows a judge or jury to draw "such inferences as appear proper" from a defendant's refusal to make statements or give accounts to the police or court, while providing that a finding of guilt cannot be based solely on such inferences (sections 34 to 39 of the UK's Criminal Justice and Public Order Act 1994). Royal Commissions of Inquiry, which recommended the reform in the UK, established on at least two occasions (1981 and 1991) that such a reform did not adversely impact on the 'right to silence.' Indeed it is not clear that such a reform if adopted here would necessarily require amendment to the NZ Bill of Rights Act, though clearly it would need to be reflected in a revised police caution.

Filing formal statements

16. The Association has some concerns that the requirements of **clause 85** to file formal statements within "the prescribed time" will be unable to be met in relation to major crime investigations. By **clause 85(4)**, failure to meet the

timeframe (which is to be prescribed by rules made under **clause 382**) risks the charges being dismissed.

17. The main area of risk is around predominantly electronic drug operations, which can involve police routinely having to review, grade and assess in excess of 100,000 individual phone communications to evaluate which of the individual communications are capable of supporting a criminal charge. This is extremely time-consuming work, and each communication relied upon needs to be related to a charge and other corroborating evidence such as video/physical surveillance to quantify the amount of drug supplied (if possible).

18. It would be impossible to put a standard timeframe on all such large or complex cases as they are all different, but ideally at a case conference the prosecution should be able to submit a reasonable date for filing based on what work is required to be completed. In some cases this may be up to six months after a charging document is filed.

19. Related to this issue are timeframes for entering a plea. While the Bill does not appear to prescribe timeframes for requiring a defendant to plead, at the current point in time defence counsel in drug trials involving methamphetamine will not enter into any early discussions around pleas until police give them the relevant alleged quantity of drug supplied or manufactured. This is so that counsel can see which sentencing band the offence would fall into following *Queen v Whatu*, and thus assess whether their client should be advised to take the 25% early plea discount.

20. Currently plea enquiry hearings are held within 21 days. Police cannot supply the information sought within the 21 days so the plea enquiry hearings are a complete waste of time. It would take considerable pressure off investigators if on large cases, the plea enquiry hearing could be put off at first call for reasonable periods of up to 6 months in order for this work to be completed. This would allow serious discussions to be had at the plea hearing with the Crown, Police and defence all having a complete picture of the scale of offending alleged and likely sentencing outcomes, upon which a judge would actually be able to give a sentence indication.

Proceeding in the absence of a defendant

21. We generally agree that a defendant should not be able to dictate the progress of a case merely by absconding (after having entered a plea), because doing so imposes costs and stress on all other parties, particularly the victim(s) and witnesses. For that reason, it is important to be able to proceed in absence of the defendant (as allowed by **clauses 126-129**). Merely allowing for this to occur could be expected to dis-incentivise defendants from attempting to delay matters by failing to appear.

22. However, allowing a conviction entered in the defendant's absence to be set aside if the defendant can show they would have had a defence with a reasonable prospect of success (**clause 131**) risks undermining the approach, unless it is very tightly restricted in its application by the court. It is arguable that a defendant, in absconding after entering a plea, chooses to

forfeit their right to advance a defence. Clearly, if the defence is one relating to identification of the offender (e.g. a strong alibi) the interests of justice (taking into account the costs and stresses on other parties that are involved in a re-trial) may be in favour of a re-trial; but if the defence relates (for example) to technical breaches of investigative or other procedures, the interests of justice may favour the conviction being allowed to stand, notwithstanding the defence might have a had a reasonable prospect of success had it been advanced at trial. An interests of justice test added to **clause 131(4)** might assist in this regard.

Crown prosecutions

23. The Association supports the Government's expressed intention to have the Crown take responsibility for a greater proportion of prosecutions at an earlier stage (**clause 192**, with the exact proceedings to be prescribed by regulations). It is important to have the Crown involved as early as possible in higher level cases, as this reduces the risk of errors being made early which may have consequences for a case at later stages. It should also reduce the pressure to complete tasks at the 'last-minute' just before a trial.

24. It is also beneficial for the Police officer-in-charge of a case to be able to raise and discuss issues with the Crown early; and for victims to meet the Crown prosecutor early rather than on the day of or shortly before the trial.

Name suppression

25. While the Association is generally in favour of the assumption that the justice process should be open, there is a risk in the modern era that this assumption may at times be in conflict with the principle that an accused person should be presumed innocent until proven guilty. We are concerned that the push to essentially end the practice of name suppression is being driven by a sense of unfairness at 'celebrity name suppression', but that the changes proposed have far wider implications.

26. Modern mass-communications (particularly Internet and mobile-device based communications tools) allow for virtually instantaneous dissemination of information to literally millions of people worldwide. This power of information dissemination is not restricted to "responsible" media, such as those governed by a code of ethics, who might be expected to ensure some degree of fairness and accuracy in the information so disseminated. As a result, the old adage that 'a lie can travel the world before the truth can get its boots on' has never been truer.

27. The risk is therefore that the fact of a person's being charged, along with selective alleged facts pertaining to the alleged offence, may rapidly become "common knowledge". This is especially the case where characteristics of the accused person or the alleged offending are out of the ordinary and so pique the general public's interest. The subsequent acquittal of the person may not be so widely disseminated because it is not as sensational or "newsworthy". Many of the recipients of the original information will continue to believe the person did as was alleged, and the reputational damage is therefore done and unable in any practical sense to be undone. Compounding this fact is

that, once reported, the reports linking an individual's name to the allegations effectively remain available in perpetuity on the Internet. If the individual's name is typed into a search engine such as Google, reports of allegations/charges will likely be returned amongst top search results, while the fact of a subsequent acquittal/dismissal of those charges is unlikely to be obvious.

28. Clearly, such concerns would not arise if the presumption against suppression was aimed at those who have been convicted, rather than those charged. On the other hand, public naming of defendants in some cases (particularly sexual abuse) is an important step in giving other alleged victims of the same person the courage to come forward with their allegations.

29. The area of name suppression is therefore a vexed and difficult issue. However we would caution against elevating the principle of openness (which principle ought to reflect the public interest in being able to assure itself justice is being done in its courts, and not be mistaken for a public right to have its curiosity satisfied) over the principle that an accused ought to be presumed innocent until proven guilty. We are not sure the approach to the competing interests represented by **clauses 198, 204,** and **206** currently strikes the appropriate balance.

30. We are not persuaded by the argument that the Internet's existence makes suppression impossible to enforce and thus worthless. This argument has been frequently put forward by those who seek the right to publish names (particularly names that sell newspapers). Merely because a law is difficult to enforce does not mean that the prohibited conduct should be legitimised.

31. We believe it is important to step back and reconsider exactly what is trying to be achieved by this proposed law change. The media (and subsequently popularised) outrage about name suppression appears to have its origins in the 'billionaire drug smuggler' case of 2000. In that case the defendant was discharged without conviction, and granted permanent name suppression (later overturned on appeal by media). Irrespective of the rights or wrongs of the judicial decision in that case, the two issues were firstly the fact of <u>permanent</u> name suppression (despite the facts essentially being admitted); and secondly the perceived unfairness arising from the assumption that the man's wealth had afforded him 'special treatment'.

32. Subsequent cases which have been seized on to fuel the popular sense that current rules around name suppression are 'wrong' have focussed on 'celebrity name suppression'. Again the issue is essentially one of perceived unfairness – that celebrities get special treatment.

33. The Police Association fully agrees that celebrities should not get special treatment. Similarly, we see very few situations where permanent name suppression should be granted after a conviction. However the changes proposed in the Bill go far wider than addressing those two issues. Name suppression even for those who ought to be 'presumed innocent until proven guilty' will in future essentially be limited to cases where "extreme hardship" can be shown. That is a very high test, which will inevitably lead to a huge

number of appeals both to establish jurisprudence, and later in general argument.

Solicitor-General's references

34. The Association supports the Solicitor-General's reference appeal process described at **Part 6 Subpart 10**. There is currently a feeling amongst Police that the Crown is extremely conservative in its decisions on whether to lodge appeals. A reference procedure for receiving rulings on points of law should assist in providing more confidence in making decisions on appeals in subsequent cases, where justified.

Conclusion

35. The Police Association is grateful for the opportunity to submit on this Bill. Overall we believe it should assist in promoting greater efficiency in the criminal justice system without compromising the interests of justice. We look forward to an opportunity to speak to this submission before the committee.

Greg O'Connor
PRESIDENT