IN THE CORONERS COURT
AT CHRISTCHURCH

CSU-2019-CCH-000165 to
CSU-2019-CCH 000214;
CSU-2019-CCH-000326

I TE KŌTI KAITIROTIRO MATEWHAWHATI
KI TE ŌTAUTAHI

UNDER **THE CORONERS ACT 2006**

AND

IN THE MATTER OF **Inquiries into the deaths of 51 people in relation to the 15 March 2019 Christchurch Masjidain Attack**

Date: 7 December 2022

DECISION ON APPLICATION TO REMOVE COUNSEL ASSISTING

Background

[1] Ms Alysha McClintock is presently engaged as counsel to assist the coronial inquiry into each of the 51 deaths resulting from the Christchurch Masjidain attack on 15 March 2019 (collectively, the **Inquiry**).

[2] Ms McClintock was appointed in mid-2020 by former Chief Coroner, Judge Marshall. Judge Marshall was responsible[1] for the initial coronial investigation and the subsequent Inquiry that was opened in 2021. Ms McClintock's retainer as counsel assisting continued when I assumed responsibility for the Inquiry in late 2021, after Judge Marshall announced her retirement.

[1] The "responsible coroner" must perform every part of the coroner's role in relation to a death other than where a duty coroner may do so, s 16, Coroners Act 2006.

[3] At the time of her appointment Ms McClintock was – as she still is – a partner and senior Crown prosecutor at Meredith Connell. The Crown Solicitor for Auckland is also a Meredith Connell partner and the firm routinely conducts Crown prosecutions in Auckland.

Removal application

[4] A number of the Interested Parties who are either immediate family members of those who died or themselves sustained injuries in the Masjidain attack, (**the Applicants**) have asked me to terminate Ms McClintock's retainer and appoint replacement counsel to assist the Inquiry.

[5] I must make clear that the application in no way alleges any misconduct by Ms McClintock. The Applicants seek Ms McClintock's removal on the grounds of conflict of interest and/or absence (or perceived absence) of independence. While the submissions have not always clearly distinguished the grounds, both grounds are underpinned by the same essential concern: that by virtue of Ms McClintock's position as a partner and Crown Prosecutor in the Auckland Crown Solicitor's office she cannot properly discharge her role to assist this coronial Inquiry in which the actions or inactions of the Police will be closely scrutinised, insofar as that conduct may bear on an issue for the Inquiry.

[6] For the reasons set out below, I am satisfied that the threshold that would require removal of Ms McClintock (and thereby Meredith Connell) from the role of counsel assisting the Inquiry is not met. Nonetheless, I acknowledge the concerns of the Applicants, and their intense interest in ensuring the integrity of the coronial process and consequently its outcome. When the Inquiry is scrutinising the conduct of the Police, I want to ensure the Applicants can focus on the evidence, free from distraction about the identity of the lawyer asking the questions. I have decided to exercise my discretion to modify the scope of Ms McClintock's role in the Inquiry as detailed further below.

The Coronial Jurisdiction

[7] Given the issues the application raises, it is useful to begin by traversing the distinct nature of a coronial inquiry and, by extension, the role of counsel assisting in this jurisdiction.

The inquisitorial nature of a coronial inquiry

[8] A coronial inquiry (and any inquest that may form part of that inquiry) is an inquisitorial process that is different, in many respects, from a criminal or civil trial. It is useful to reproduce a passage from the Laws of New Zealand, which was affirmed as a correct statement of law by the Court of Appeal in *Newton v Coroners Court*:[2]

> **[25] General**
>
> A Coroner's Court is a Court of record. A Coroner's inquest is a judicial hearing presided over by a warranted judicial officer, who has most of the ancillary powers of a District Court Judge. An inquest is a fact-finding exercise rather than a method of apportioning guilt. The procedures and rules of evidence that are suitable for one exercise are unsuitable for the other. In an inquest there are no parties, there is no indictment, and there is no trial. There is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial. The fact that cross examination by counsel for permitted Interested Parties is allowed does not detract from the inquisitorial nature of the inquiry, nor from the fact that the findings are not conclusive as to the civil or criminal liability of any person.

[9] Establishing the facts may require careful exploration and robust testing of the evidence. But – unlike in an adversarial trial – the fundamental interests of the Court and all Interested Parties are aligned. To the extent the Applicants believe or perceive that their interests and the interests of the Police are "directly opposed", it is important they understand that this is not the case. All Interested Parties (including the Police and the Applicants) along with this Court have the common goal of determining, to the extent it is possible, the cause(s) of death and the circumstances in which those 51 who lost their lives as a result of the Masjidain attack died. My decision on scope identifies the specific issues which will be explored in an effort to make those determinations.

[10] A number of the immediate families are highly critical of some aspects of the way the Police responded to the attack; Mr Rasheed describes them as "widely aggrieved".[3] The conduct of the Police on 15 March 2019 will be an important aspect of the first phase of the Inquiry. The nature and extent of the immediate families' concerns, and the Police response to those concerns, have yet to be fully identified. But more importantly, in this Court even a firm clash of perspectives, and strong criticism which another party rejects, does not mean Interested Parties' interests are opposed to one another. No-one will "win"

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[2] *Newton v Coroners Court* [2006] NZAR 312. Note that in the Coroners Act 2006 the term "inquiry" replaced the term "inquest" as it was used in the Coroners Act 1988 but preserved that term with reference to a hearing in court which may be convened as part of, and for the purposes of, an inquiry.

[3] Submissions of Mr Rasheed (25 October 2022) at [34].

or "lose" at the end of the Inquiry; no-one's civil, criminal or disciplinary interests can be affected.[4]

[11] It is an inherent and expected feature of inquiries in this Court that Interested Parties will usually agree on some matters and disagree on others. Whether fundamental or highly nuanced, disagreement is normal. By bringing their own perspective to the issues for inquiry Interested Parties will help the Court in endeavouring to make comprehensive findings of fact. That is a goal we all share.

[12] That said, the Applicants appear to be taking an intensely oppositional stance in relation to the issues which engage questions about Police conduct. This stance, and the consequent tendency to regard the Police as litigation adversaries, may lie at the root of many of the submissions in support of the removal application. It also may underpin the request, made on behalf of some of the immediate families, for an unprecedented degree of oversight of my assessment of the relevance of documents and other information which are currently the subject of a substantial and ongoing disclosure process. The fact that the Court will, as is entirely orthodox, independently evaluate all the evidence before the Inquiry, does not appear to have eased their concerns.

[13] This decision is not an occasion to set out all the differences between an adversarial proceeding and a coronial inquiry. But it is appropriate that I emphasise, for the benefit of all Interested Parties, that in this Court the approach to disclosure and examination of the evidence is grounded in achieving the purposes of the Inquiry and ensuring that the truth emerges. There is a firm expectation that Interested Parties (and their counsel) provide the Inquiry with all information they know of which might bear on the issues for the Inquiry, whether it reflects well on them or not, subject only to the limited withholding grounds under s 125. All evidence, and proposed lines of cross-examination, must be tendered well in advance of any inquest hearing so it can be reviewed and scrutinised, and so no-one is surprised at inquest.

[4] Coroners Act 2006, ss 4(1)(e)(i) and 57(1).

The role of counsel to assist

[14] As some of the Applicants' submissions acknowledged, a number of the concerns that underpin the removal application are unable to be resolved in the absence of a clear understanding of the role of counsel assisting in this jurisdiction.

[15] It is not uncommon for coroners to appoint counsel to assist particularly where, as here, the inquiry is complex and an inquest is to be held as part of the inquiry.[5] In the criminal context, the Court of Appeal has confirmed that the counsel to assist role is occupied by counsel appointed "by the court to help the court itself";[6] it is to be a friend of the court and not an advocate for any party in the proceedings. In *Cooke v Coroner's Court at Wellington* Grice J applied those dicta to the coronial context, holding that counsel to assist was "not to act for the Coroner or a party", but to act "independently as counsel assisting the inquest".[7]

[16] As the Law Commission stated in its *Public Inquiries* report, the "duty of counsel assisting throughout the inquiry is to help the inquiry ascertain the truth and to ensure that the inquiry answers its terms of reference".[8] Those comments apply with equal force (and appropriate modification) to the coronial context. Fundamentally, the role of counsel assisting a coronial inquiry is to assist the conduct of the inquiry in a way that complies with the Coroners Act 2006, achieves the s 57 purposes of an inquiry and promotes natural justice.[9]

[17] The role of counsel to assist a coronial inquiry is uniquely coloured by the jurisdiction's inquisitorial – rather than adversarial – nature. This point was emphasised by the High Court in *Cooke v Coroner's Court at Wellington.*[10] In that case Isac J considered the appropriateness of private meetings between the Coroner and counsel assisting. His Honour observed as follows:[11]

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[5] Appointments are typically an exercise of the Court's inherent power to regulate its own proceedings, although it is potentially open to a Coroner to request the Solicitor-General to appoint counsel to appear.
[6] *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [64].
[7] *Cooke v Coroner's Court at Wellington* [2021] NZHC 451 at [12].
[8] Law Commission *Public Inquiries* (NZLC R102, 2008) at [13.12].
[9] See also *Cooke v Coroner's Court at Wellington* [2021] NZHC 451 at [12], stating the "role of counsel to assist is to "assist the Coroner as best …[as counsel] could in the conduct of the inquest".
[10] *Cooke v Coroner's Court at Wellington* [2021] NZHC 3594.
[11] At [64].

> … it is helpful to remember that a coroner's inquest is not an adversarial process where the parties control the selection of issues and the presentation of evidence, or where the decision-maker takes a fundamentally passive role. Rather, a coroner's investigation is a form of inquiry. The role of counsel assisting an inquiry will often include the provision of (privileged) advice to the inquiry on procedural and legal issues. In addition, it is also common for witness evidence to be clarified and tested by counsel assisting rather than the decision maker. And there are good reasons why that might be so. It is therefore essential that members of an inquiry have an opportunity for confidential discussions with counsel assisting in relation to such matters as the witnesses to be called, or the issues on which they might be examined.

[18] The applicants have criticised the fact the parameters of Ms McClintock's role as counsel assisting the Inquiry have not been set out in detail. The absence of a formal "brief" is not unusual in this jurisdiction. The relationship between counsel assisting and the Court typically remains somewhat fluid and can change as inquiries unfold. Different coroners use counsel assisting to different degrees and different cases may require different types of assistance from counsel. The parameters of the role are (and must be) inherently flexible and will vary depending both on the demands of the inquiry itself and the particular approach of the responsible Coroner.[12] The role may, for example, be limited to clarifying and testing the evidence in open court at inquest. It may, in other cases, extend to matters such as assisting in identifying the issues of concern to Interested Parties, in particular where they are unrepresented, advising on the practical conduct of the inquiry, liaising with counsel and unrepresented Interested Parties, marshalling the relevant evidence, coordinating and managing disclosure, and in-chambers discussion and advice to the Coroner on ad-hoc matters.

[19] Importantly, whatever the precise scope of counsel to assist's role in a particular inquiry, the Coroner always retains overall control of, and ultimate responsibility for, the inquiry. The Coroner cannot delegate that responsibility to counsel assisting.

Conflict of Interest Ground

[20] I note from the outset that I am not aware of any cases in which counsel have been disqualified from appearing in the coronial jurisdiction on account of an actionable conflict. Jurisdiction to remove counsel is exercised sparingly even in adversarial proceedings. I consider that the fact coronial inquiries are inquisitorial in nature means truly exceptional circumstances would be required before a Coroner would contemplate disqualifying counsel from appearing in this Court.

[12] See, for example, Law Commission *Public Inquiries* (NZLC R102, 2008) at [13.14].

[21] Again, in this Court, the coroner and all Interested Parties share the common objective of seeking to establish the facts and to identify comments or recommendations which may reduce the chances of further deaths in similar circumstances. The cases which contemplate disqualification of counsel are designed to avoid one party deriving an unfair advantage over another in the course of an adversarial proceeding.

[22] While there is still scope for an impermissible conflict to arise in this Court the analysis is not the same as it is in an adversarial proceeding, where an outcome that benefits one party implies a corresponding detriment to another.

Analysis

[23] I can address the submission that Ms McClintock is subject to a conflict of interest, as that phrase is usually interpreted, in a relatively straightforward way. The leading case governing debarment of counsel on account of an impermissible conflict is the Court of Appeal's decision in *Black v Taylor*.[13] In that case the plaintiff brought proceedings against his late uncle's estate. He applied for an order debarring a solicitor, who had at one time acted for several family members, including the plaintiff himself, from representing the estate. Among other things, the plaintiff alleged that in his former role the solicitor had received confidential information relevant to the proceeding.

[24] Richardson J noted a decision of the Ontario Court of Appeal – *Everingham v Ontario*[14] – and observed (emphasis added):

> I respectfully agree with the approach of the Ontario Court. Disqualification will ordinarily be the appropriate remedy **where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other**. The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification.

[13] *Black v Taylor* [1993] 3 NZLR 403 (CA).
[14] *Everingham v Ontario* (1992) 88 DLR (4th) 755.

[25] All members of the Court noted that disqualification is an unusual remedy and that the case for removal must be clear. As Cooke P noted, it is a jurisdiction which must be "exercised with circumspection."[15]

[26] The *Black v Taylor* analysis was, as Richardson J's remarks make clear, inherently entwined with the adversarial nature of the underlying proceeding. The Court accepted that the interests of the plaintiff might be (or be seen to be) compromised if the solicitor were able to act for the estate in light of a pre-existing relationship which enabled him to acquire information he would not otherwise have received. As Cooke P noted, the solicitor also knew the members of the deceased's family and their personalities, which provides a very real advantage in litigation. And the solicitor was unable to demonstrate to "the reasonably informed person … that no use of confidential information would occur".[16]

[27] *Black v Taylor* reaffirmed that the courts may intervene where a lawyer's prior professional association with a client may operate to the former client's detriment. The jurisdiction only arises if the former client objects. As Mr Hodge submitted on behalf of Ms McClintock, even where a conflict exists it is open to the former client to waive its entitlement to seek removal.

[28] There are several reasons the present case does not give rise to a conflict of interest in this sense. First, the Police – who in this case would be the party with the relevant pre-existing professional relationship – would be entitled to give Ms McClintock permission to appear notwithstanding any involvement as their lawyer in other cases. Both Mr Zarifeh, on behalf of the Police, and Ms Laracy, on behalf of the Solicitor-General, confirm they have no concern about Ms McClintock appearing as counsel assisting in this Inquiry.

[29] In any event, a prior (or even an ongoing) solicitor-client relationship with an organisation as large as the Police will not give rise to a conflict provided there is no risk of the lawyer having been exposed to relevant information in the course of her previous

[15] At 406.
[16] Ibid.

role.[17] The Police are, as counsel emphasised, the most prolific professional litigant in the country; on any given day the Police are engaged in hundreds of discrete judicial proceedings, most of which do not overlap in any way. Though Mr Rasheed sought to rely on the fact that one of Ms McClintock's former colleagues had a role in the Royal Commission of Inquiry, there was no suggestion either that the latter role might be relevant to this Inquiry, or that Ms McClintock could have learned anything relevant as a result,[18] much less anything that might somehow disadvantage the Applicants. In any event, and as already noted, the rule exists for the benefit of the former client, not third parties.

[30] Finally, and as repeatedly noted above, the Inquiry is inquisitorial in nature. There is no adversarial relationship between counsel assisting the Inquiry and the Applicants (or other Interested Parties), nor between counsel assisting and the Police, or the Police and the Applicants (or other Interested Parties). While the "conflict of interest" analysis can be relevant in proceedings where the interests of the parties actually conflict, its application is far more limited in an inquisitorial setting, where the parties and the Court are working towards a common goal.

Lack of Independence Ground

[31] The Applicants' submissions in support of the "conflict" ground were nonetheless relevant to their related (and at times conflated) contention that Ms McClintock's capacity to provide me with independent and impartial advice as counsel assisting is compromised by her concurrent role as a partner and Crown prosecutor in the Auckland Crown Solicitor's office. This submission does not turn on her having acted for the Police or Crown in the past, but on Meredith Connell's current and ongoing role as the office of the Auckland Crown Solicitor. The Applicants argue that Ms McClintock is insufficiently independent of the Police to act as counsel assisting, or at least that a fair-minded reasonably informed member of the public (interchangeably known as a "lay observer") would conclude she may be subject to competing loyalties such that the administration of justice would require her removal.

[17] Although submitted by Mr Hampton to be relevant to the concern as to "actual conflict", the somewhat broader issue of whether Ms McClintock has, by virtue of her work as a Crown prosecutor, acquired inside knowledge is addressed under the 'Independence' heading below.
[18] Meredith Connell confirmed to Ms Dalziel in writing on 21 July 2022 that the firm does not hold, and has never held any information obtained in the course of one of its former partner's involvement in assisting the Royal Commission of Inquiry.

[32] It is common ground that the integrity of the Inquiry requires counsel assisting, whose functions will include examining witnesses at inquest and providing me with advice and assistance outside the courtroom, to be demonstrably impartial and independent. Mr Hodge confirmed, on behalf of Ms McClintock, that it is essential counsel assisting be, and be seen to be, independent of any of the Interested Parties. I agree. The Inquiry must be demonstrably impartial, and if a reasonably informed and fair-minded observer would form the view that counsel assisting lacks independence, or may be subject to competing loyalties, the administration of justice would require that she not continue to hold that position.

[33] Given the premise that counsel assisting this Inquiry must be demonstrably independent of the Police is not in contention, I need not engage in an extensive review of the relevant authorities in support. Rule 5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 requires that:

> A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

[34] In *Deliu v Auckland Standards Committee*,[19] the plaintiff, who faced a number of disciplinary charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, sought the removal of the lawyer who had been instructed to prosecute the charges. The Tribunal refused to debar the prosecutor, and the plaintiff appealed that decision to the High Court. Among other grounds, he alleged the prosecutor lacked independence and was conflicted; that allegation was based on discussions the prosecutor and the plaintiff had had as part of an attempt to resolve the matter. Woolford J observed:

> [22] I am of the view that the public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public. As noted in the Canadian case of *Everingham v Ontario* the issue is not whether any ethical rule has been breached, nor is the issue solely whether one of the parties has lost confidence in the process. The issue is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the solicitor.

[19] *Deliu v Auckland Standards Committee 1 and the National Standards Committee of the New Zealand Law Society* [2014] NZHC 2530.

[35] Mr Hampton KC, on behalf of the immediate family members he and Ms Dalziel represent, stressed there is no suggestion on the part of their clients that Ms McClintock has conducted herself improperly in any way. In his submission she should step aside because of the way a fair-minded reasonably informed member of the public would assess her respective roles as counsel assisting and as a partner and Crown prosecutor in a Crown Solicitor's office. He submitted, in effect, that an inherent part of the latter role involves a current and continuing relationship with, and loyalty to, the Police. He submitted that this unavoidable, and ongoing, relationship with the Police would lead the hypothetical fair-minded observer to perceive that Ms McClintock might "pull her punches" when scrutinising the evidence and submissions tendered on behalf of the Police. He submitted, in effect, that the relationship between Meredith Connell and the Police represents the kind of compromising influence or loyalty to which Rule 5 is directed.

[36] Mr Hampton also submitted – in support of both grounds of removal – that Ms McClintock may have been exposed to relevant "inside information" as part of her role in the Crown Solicitor's office, and that this provides a further ground on which it would be inappropriate for her to continue as counsel assisting. He provided no example of information that could, even theoretically, fall into this category, nor did he develop a submission as to why it might require her removal.[20]

[37] Mr Rasheed's submissions were similar, though he made a number of somewhat contradictory additional submissions in which he sought to insinuate that either Ms McClintock or Meredith Connell have demonstrated actual bias or have a track record which makes Ms McClintock's retention as counsel assisting inappropriate. For example, he referred to delays in the provision of disclosure in the Inquiry and submitted that Ms McClintock should have been more active in pressing the Police to make quicker disclosure.[21]

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[20] Refer also n17 above.

[21] For example, in his written submissions, Mr Rasheed said:

> [28] … The concerns around the role of Police in the substantive procedures of this process in which they have an immeasurable interest, not least disclosure, continue to increase. There has been a fundamental failure of Assisting Counsel to mitigate those longstanding concerns, which points back to the original issue: how appropriate is the Crown Solicitor who normally acts in the interests of Police, for a role that requires acting robustly and persistently in order to protect and preserve procedural fairness. The conduct fundamentally required of Assisting Counsel is directly against those Police interests.

[38] In his submissions Mr Rasheed sought to rely on Ms McClintock's questioning of counsel for the Human Rights Commission in the February 2022 hearing on the scope of the Inquiry as a "visual manifestation of bias and conflict of interest" in favour of Police.[22] When explored in the course of his oral submissions, Mr Rasheed recast this submission as a demonstration of "an adversarial role played by assisting counsel" which was amongst the "accumulation of concerns" when viewed by Interested Parties in the broader context.

[39] Mr Rasheed also referred to a number of miscarriages of justice in criminal matters over the last 35 years which have arisen in Auckland. His submissions appear to suggest that Meredith Connell was culpable for those miscarriages, and that the fact the firm has retained the warrant indicates a "lack of apparent accountability as perceived by any observer". He made a number of other submissions which suggest systemic and ongoing impropriety on the part of Meredith Connell. These allegations are very serious. In addition, Mr Rasheed submitted that all but one of the miscarriages involved "non-pākehā" defendants[23] though Mr Rasheed did not explain the relevance of the ethnicity of the defendants in those cases.

[40] I would not expect an Interested Party in any inquiry to have complete visibility of the work done under my instruction to marshal the evidence and prepare disclosure. This jurisdiction is markedly different to other jurisdictions in that it is ultimately my responsibility to ensure material relevant to the issues for Inquiry is identified, gathered and disclosed as appropriate. I do not accept the criticism that Ms McClintock has not been diligent in relation to disclosure in this Inquiry. Ms McClintock has been consistently proactive in pursuing timely disclosure from the Police, exactly as Mr Rasheed said she should have. When pressed during oral submissions, Mr Rasheed readily accepted that his submissions about disclosure were based on his own assumptions about what Ms McClintock was doing and should have been doing, and that he in fact had no basis to suggest she was neglecting her role. As I have said repeatedly in the course of pre-inquest conferencing, there are safeguards built into the disclosure process for the first phase to ensure all relevant material is identified and appropriately disclosed.

[22] Although Mr Hampton and Ms Dalziel had raised a similar concern in correspondence to Meredith Connell ahead of the hearing on the application, during the hearing Mr Hampton confirmed did not seek to rely on this point.

[23] See, in particular, paragraphs [26]-28] and [32] of Mr Rasheed's 25 October submissions. The allegations in those submissions would, if made outside the confines of this proceeding, be defamatory.

[41] Similarly, Mr Rasheed's reference to historic miscarriages of justice involving (mostly) non-pākehā defendants, and his other sweeping and serious allegations of impropriety against Meredith Connell, were misplaced and inappropriate in this context. As Mr Hodge noted, when the prosecution of Mr Alan Hall – whose case was one of those Mr Rasheed referred to – was before the Court, Ms McClintock was at primary school. Allegations of that kind have no place in judicial proceedings unless they are both directly relevant and properly substantiated. Mr Rasheed's assertions cannot possibly bear on the issue I have to determine here.

[42] This Inquiry is unprecedented in New Zealand in terms of its nature and scale. Ms McClintock has discharged her role as counsel assisting this Inquiry with complete diligence and to the highest standard, as I expect her to. I have no doubt she is committed to providing this Inquiry and me in my capacity as the Coroner responsible for it, with fair, impartial and independent advice, as she has to date. Similarly, I have no concerns that she will "pull her punches" in identifying and challenging Police in relation to their conduct where it is appropriate and necessary in order to achieve the prescribed purposes of this Inquiry.

[43] But, as the Applicants rightly note, the appearance of independence is also important. The person who assesses whether Ms McClintock may have competing loyalties is not someone aware of her unquestionable integrity, but a hypothetical fair-minded member of the public (or "lay observer"), who is reasonably informed as to the nature of the current relationship that exists between Crown Solicitors and the Police. Accordingly, it is necessary to examine the role and duties of those who hold Crown Solicitors' warrants throughout New Zealand, and by extension those who work in their offices.

Crown Solicitors

[44] New Zealand is unusual in the common law world in that it delegates Crown prosecutions to private practitioners throughout the country. Every region has a local Crown Solicitor, who holds a warrant issued by the Governor-General requiring the Crown Solicitor to "enter upon and duly discharge the duties of the office."

[45] At least since 2002, when Crown Law surrendered the Blenheim and Nelson warrants, Crown Solicitors have always been principals in a local private law firm.

Appointment as a Crown Solicitor carries with it a series of rights and obligations. The *Crown Solicitors Terms of Office* (**Terms of Office**) currently describe the duties of a Crown Solicitor – and by extension those working in his or her practice – as follows:

> **Provision of services**
>
> 11. The Crown Solicitor must, in respect of the region covered by the warrant of appointment:
>
> 11.1 Conduct Crown prosecutions for which the Solicitor-General has assumed responsibility in the High Court, District Courts and Youth Court and the related proceedings, including sentencing and bail hearings;
>
> 11.2 Conduct other appearances in the Youth Court as specified in the Memorandum of Understanding between the Solicitor-General and the Commissioner of Police;
>
> 11.3 Conduct High Court criminal appeals from departmental and Police prosecutions in the District Court;
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> 11.4 Accept instructions from government departments and the Police, to conduct prosecutions in the District Court;
>
> 11.5 Accept instructions from the Solicitor-General to conduct any litigation related to the matters in 11.1 to 11.3;
>
> 11.6 Accept instructions on matters related to the Criminal Proceeds (Recovery) Act, mutual assistance or extradition matters; and
>
> 11.7 All activities ancillary to the above or which may be necessary to support and assist the Solicitor-General to discharge the responsibilities of that office relating to the administration of criminal justice.
>
> 12. Each Crown Solicitor is expected to co-operate with and assist other Crown Solicitors as necessary to ensure the effective provision of Crown prosecution services throughout New Zealand.

[46] Paragraph 13 of the Terms of Office provides that Crown Solicitors are expected to uphold the highest standards of personal and professional conduct. It confirms (without strictly needing to) that they remain subject to the Lawyers (Conduct and Client Care) Rules.

[47] The Terms of Office carry with them a series of restrictions, which govern the circumstances in which Crown Solicitors may appear against the Crown. Those restrictions have evolved over time. The Terms of Office have been in force since 1 July 2013. Prior to that date, restrictions on acting against the Crown were set out in the Crown Solicitors Regulations 1994. Regulation 8 provided:

> **8 Obligation not to appear against Crown**
>
> (1) Subject to subclause (2), no Crown Solicitor or any member or employee of the Crown Solicitor's practice, shall accept employment, other than

from the Crown, in any matter in which the Crown is directly concerned, or appear against the Crown.

(2) The Solicitor-General may exempt a Crown Solicitor or Crown Solicitors from compliance with subclause (1) in a particular case or class of case generally.

[48] The Regulations were revoked in 2013 and replaced by the Terms of Office. The revocation of the Regulations occurred around the same time as a number of other important changes, including the coming into force of the Criminal Procedure Act 2011 and a new funding model for Crown Solicitors. Paragraphs 15 and 16 of the Terms of Office provide:

> **Conflicts of interest**
>
> 15. As prosecutors, Crown Solicitors are ministers of justice and serve the public interest. Crown Solicitors must be independent and free from compromising influences or loyalties when providing services as Crown Solicitor.
>
> 16. Unless granted dispensation by the Solicitor-General, for a specific case or class of cases, Crown Solicitors and lawyers in the Crown Solicitor firm may not:
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> 16.1 act against the Crown in any prosecution;
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> 16.2 act against the Police on any legal work;
>
> 16.3 act against the Crown in respect of any legal work where the substantive issue is a decision of the Attorney-General or Solicitor-General;
>
> 16.4 act for the prosecutor in any private prosecution;
>
> 16.5 act against the Crown in any legal work related to extradition, mutual assistance, criminal proceeds (recovery) or any judicial review related to a Crown prosecution or a prosecution initiated by a department.

[49] On their face, the Terms of Office have relaxed the previous restriction on Crown Solicitors appearing for non-Crown parties in proceedings in which a Crown agency, such as the Police,[24] is involved. Prior to 2013, a Crown Solicitor would have required an exemption from the Solicitor-General in order to appear as counsel assisting in a coronial

[24] The Regulations were promulgated under s 81(1)(g) of the Public Finance Act 1989, s 2 of which included the following definition:

> **Crown** or [[**the Sovereign**]]—
> (a) Means **[[**the Sovereign**]]**in right of New Zealand; and
> (b) Includes all Ministers of the Crown and all departments; but
> (c) Does not include—
> (i) An Office of Parliament; or
> (ii) A Crown entity; or
> (iii)A State enterprise named in Schedule 1to the State-Owned Enterprises Act 1986:

inquiry where a Government agency was an Interested Party. Despite the inquisitorial nature of the coronial jurisdiction, an inquiry which concerned a Government department (including Police) would have been "a matter in which the Crown is directly concerned".

[50] The Terms of Office, by contrast, relevantly provide that no-one who works in a Crown Solicitor's office may "*act against the Police* on any legal work" without dispensation from the Solicitor-General. As already noted, in an inquisitorial proceeding, even counsel for Interested Parties do not act "against" other Interested Parties. As for counsel assisting, to the extent she acts for anyone, she acts for the Court; she does not act against the Police, or anyone else. In other words, reading the two provisions on their face, the provisions have changed so that involvement which would, *prima facie*, have been prohibited under the Regulations is now not subject to any restriction by virtue of the Terms of Office.

[51] Given the Terms of Office represent an agreement between Crown Solicitors and the Solicitor-General, and in light of the Solicitor-General's overall responsibility for Crown legal business and the supervision of Crown Solicitors, I invited the Solicitor-General to intervene and make any submissions she might consider relevant to the removal application. Interpretation of the Terms of Office is, in the first instance, a matter for the parties to the agreement and I am entitled to rely, in particular, on the Solicitor-General's advice as to their scope and purpose.

[52] Ms Laracy, on behalf of the Solicitor-General, confirmed that the phrase "act against the Police" in cl 16.2 was always intended to bear its normal legal meaning – it is engaged when a Crown Solicitor's office proposes to act against the Police in an adversarial proceeding. In that respect, cl 16.2 represented a deliberate change from the regime in force before 2013. It follows that Ms McClintock does not require dispensation from the Solicitor-General to appear as counsel assisting in this Inquiry. In any event, Ms Laracy confirmed that if dispensation were required in the case of the Inquiry, it would readily be given.

[53] It is common for warrant-holders or staff in Crown Solicitors' offices to appear in coronial proceedings, including for non-Crown Interested Parties and as counsel assisting. It is also relatively common for them to do so even where another Crown Solicitor is representing the Police or a Government agency who are Interested Parties. Crown

Solicitors' eligibility to perform this work has never (before, at any rate) turned on whether the conduct of Crown agencies might be called into question. The fact Crown Solicitors have performed this role without objection for many years supports Ms Laracy's observation that coronial proceedings represent the sort of litigation in which Crown Solicitors are entitled to appear without restriction.

[54] Nonetheless, the Applicants' submission is that the ongoing relationship between Crown Solicitors and the Police would lead a reasonably informed fair-minded member of the public to conclude that Ms McClintock is not independent. In particular, the relationship between the Police and Crown Solicitors is an ongoing one which inherently needs to be maintained. They submit that conduct by counsel assisting which directly challenges the Police, even in an inquisitorial proceeding, may undermine the ongoing relationship of trust and confidence between Crown Solicitors and the Police. That relationship is an important one for any Crown Solicitor, and the Applicants submit that the need to preserve and maintain that relationship is not compatible with the need, should the occasion arise, to challenge and criticise the Police as counsel assisting this Inquiry.

[55] In her written submissions, Ms Laracy noted that one of the principal reasons for paragraph 16 of the Terms of Office (and presumably Reg 8 before it) is that "Crown Solicitors, by virtue of the work conducted under their warrant, will have a level of "inside" knowledge about the Police which would make it inappropriate for Crown Solicitors to act against them". The applicants submitted, in light of those remarks, that the possibility of Ms McClintock having acquired a degree of inside information about the Police is a further reason for her removal as counsel assisting.

[56] I do not regard the suggestion that Crown Solicitors may acquire a level of inside knowledge about the Police to be especially relevant in interpreting the paragraph 16 prohibition in this case. In exploring this with Mr Hampton and Mr Rasheed during oral submissions I understood that while the ongoing relationship with Police would mean Crown Solicitors remain *au fait* with Police policies and practices (Mr Rasheed describing this as "chronic familiarity") it was the ongoing nature of the relationship that was the greater concern. That former employees of Crown Solicitors, or barristers who accept instructions both for and against the Police, will naturally acquire a degree of knowledge about the way the Police operate, is not contentious and nor has it ever been regarded as a reason to restrict their freedom to act against the Police. There is no basis to suggest Ms

McClintock might be privy to any "inside information" that is beyond that which former Crown Prosecutors or experienced criminal barristers might reasonably be expected to generally possess. Moreover, there is no basis to suggest that Ms McClintock must have knowledge of particular Police operational matters that are of specific relevance to the issues for this Inquiry and must consequently bear on her independence. It follows, as Ms Laracy submitted, that this rationale underpinning the paragraph 16 Terms of Office prohibition is not engaged here.

[57] There are other aspects of the relationship between Police and Crown Solicitors which may be relevant to consider. In oral submissions, Ms Laracy observed that the relationship between the Police and a Crown Solicitor is an important working relationship. She noted there may be a perception that that relationship could be damaged if a Crown Solicitor were to act against the Police in their own region.

[58] I am aware of two High Court decisions which discuss the relationship between Crown Solicitors and Government agencies, albeit both were decided under the former 1994 Regulations.

[59] In *Greymouth Petroleum v Solicitor-General*[25] the then-Crown Solicitor for New Plymouth sought dispensation, under Reg 8, to act for a longstanding client in a Resource Management Act prosecution. Greymouth Petroleum had elected trial by jury and sought to engage the Crown Solicitor to act on its' behalf. The Deputy Solicitor-General (on behalf of the Solicitor-General) declined a dispensation. The High Court dismissed the Crown Solicitor's application for judicial review. In discussing Reg 8 and the requirement for dispensation, Gendall J observed:

> [49] Regulation 8 of course must be read in conjunction with the rights of an individual under the New Zealand Bill of Rights Act 1990, as well as the rights and duties of a practitioner to accept instructions and to represent clients who seek their services. But Crown Solicitors have a special status and responsibilities; they are subject to the Crown Solicitors Regulations and the obligation not to appear against the Crown. That obligation arises in two respects. Under reg 8(1) Crown Solicitors shall not "accept employment, other than from the Crown in any matter in which the Crown is directly concerned". Secondly, within reg 8(1) Crown Solicitors shall not "appear against the Crown". The prohibition is tempered or ameliorated, as the Solicitor-General "may exempt" compliance in a particular case or class of case generally.

[25] *Greymouth Petroleum v Solicitor-General* [2010] 2 NZLR 567.

[60] The Court referred to extracts from the then-current Crown Law guidelines which went some way towards explaining the rationale for the *prima facie* prohibition in Reg 8:[26]

> … where such situations arise, depending on their nature and long term prognosis, it may be appropriate for Crown Solicitors to seek dispensations to act against the Crown so long as this would not create conflict with the duties owed by Crown Solicitors to the Crown, nor impair the relationship which exists between Crown Solicitors and the Crown Law Office and the government. Dispensations may, for instance, be appropriate for work that is distinctly civil in nature and will not infringe upon the prosecutorial function.
>
> Dispensations for criminal matters should be treated with greater scrutiny to ensure there is not the possible conflict with the Police which would affect long term relationships which exist between Crown Solicitors, the Police, the Crown Law Office and government. Dispensations may, for instance, be appropriate for criminal matters which are minor in nature and which will not infringe upon the police prosecutorial function such as prosecutions involving Crown entities with no existing relationship to the Crown Solicitor's firm.

[61] The extract from the Crown Law guidelines then in force confirms that the maintenance of the long-term working relationship between Crown Solicitors and the Police, albeit in the context of ensuring the ongoing integrity of the prosecutorial function, was one of the reasons for the *prima facie* prohibition in Reg 8. Gendall J's wider comments about the special status of Crown Solicitors are also notable, though they were made in the context of the Regulations, rather than the more relaxed regime now in force.

[62] The second case which discussed Reg 8 and its rationale is *Weal v Accident Compensation Corporation.*[27] In that case the Timaru Crown Solicitor had been appointed to act as reviewer in an ACC matter involving the plaintiff. The plaintiff sought judicial review of the Crown Solicitor's appointment on the ground that, by virtue of his role as Crown Solicitor, he lacked the requisite independence and impartiality to perform that role. The application was dismissed on the basis that ACC is not "the Crown". In doing so, however, Ronald Young J observed:

> [31] The Corporation, therefore, is not the Crown. It is a Crown entity under the Crown Entities Act 2004 and in that sense it is a Crown agent. Mr Gresson therefore clearly does not owe the Corporation any duty of loyalty arising from being the Crown solicitor for Timaru. His duty of loyalty is directly to the Crown. That is why reg 8 prohibits him from acting other than for the Crown in any matter in which the Crown is directly concerned. The plaintiff appropriately accepted that in acting as a reviewer, Mr Gresson would not in

[26] Ibid at [46].
[27] *Weal v Accident Compensation Corporation* [2012] NZHC 1365.

> fact owe a duty of loyalty to the Corporation. The well informed observer would know this. Mr Gresson therefore will be in no different position than any other lawyer performing this task
>
> [32] Regulation 8 could not prevent Mr Gresson acting for a claimant challenging a Corporation decision. He would not be acting against the Crown on any matter in which the Crown is directly concerned. Without that obligation of loyalty, there is nothing to support the plaintiff's claim that there are serious concerns about the perception of independence of Mr Gresson. Nor can it be suggested the well informed fair-minded observer would think Mr Gresson lacked impartiality in the circumstances without any relevant duty of loyalty arising.
>
> …
>
> [38] The Corporation in appointing Mr Gresson complied with this regime. Mr Gresson in turn is obligated to follow the statutory directions in carrying out the review. The fact that Mr Gresson is the Crown solicitor and owes a duty of loyalty to the Crown in particular circumstances does not affect the appearance of independence or impartiality in Mr Gresson's function as a reviewer. Mr Gresson owes no duty of loyalty to the Corporation when he exercises his function as a reviewer. This ground of review therefore fails.

[63] *Weal* effectively confirmed there was a further reason for Reg 8, namely the existence of an ongoing duty of loyalty Crown Solicitors owed to Government agencies, including the Police.

[64] It is notable that the Terms of Office mirror the Client Care Rules in providing that Crown Solicitors "must be independent and free from compromising influences or loyalties when providing services as Crown Solicitor". Needless to say, it is also critical, from my perspective, that counsel assisting this Inquiry are free from any perception that they may be subject to competing influences or loyalties. Mr Hodge had no hesitation in accepting that independence and impartiality are essential qualities for counsel assisting.

[65] As *Weal* had featured only briefly in submissions, following the hearing I issued a Minute asking Mr Hodge, as well as the Solicitor-General and the Interested Parties what, if anything, I should make of the passages set out above.

[66] Ms Laracy submitted that *Weal* is no longer good law. The revocation of the Regulations, and their replacement by the Terms of Office have, she submitted, created a new and different environment in cases where Crown Solicitors seek to act for non-Crown parties. She submitted the Terms of Office:[28]

[28] Submissions of Ms Laracy (25 October 2022) at [4.1].

> … significantly and deliberately broaden the circumstances in which a Crown Solicitor may act even though another part of the "Crown" has an interest. The prohibition in Reg 8(1) was very expansive – covering *any matter* in which the Crown is *directly concerned*. By contrast, the exceptions in paragraph 16 of the Terms of Office are highly specific. Taken together, they make clear that Crown Solicitors do *not* owe a general duty of loyalty to the Crown in its broader sense – rather, paragraph 16 empowers them to act against the Crown *other than* in the specified situations. (emphasis in original)

[67] Ms Laracy also noted that s 193 of the Criminal Procedure Act 2011 expressly requires Crown prosecutors to act independently of the Police and other Government agencies when conducting Crown prosecutions. In other words, she submitted, "even in their core Crown prosecution work the Crown Solicitor must assess the case and make prosecution decisions independently of the investigating agency whose work has been invested in the case to date". That obligation of independence is also reflected in the Crown Solicitor's Prosecution Guidelines, which requires a Crown prosecutor to "undertake an independent review of the charges".[29] Even in giving investigative advice, the usual solicitor-client relationship is expressly modified to the extent that the investigators to whom the advice is directed are expected to act in accordance with the Crown Solicitor's advice.[30]

[68] Mr Hodge, on behalf of Ms McClintock, echoed Ms Laracy's submissions. He submitted:

> 4.4 There is no longer a prohibition on acting against the Crown (subject to dispensation) as was reflected in reg 8 of the 1994 Regulations. This is why, for example, a Crown solicitors' firm may act in proceedings against a Minister of the Crown and/or government departments without dispensation being required. There is no blanket "duty of loyalty to the Crown" binding on Crown solicitors' firms in proceedings concerning the Crown.

[69] Mr Hampton and Ms Dalziel, on behalf of the Applicants they represent, suggested the well-informed lay observer would struggle to "grapple with, let alone grasp, that a *Crown* Solicitor does not have a general duty of loyalty to the Crown". They submitted:

> 7. … that the Terms of Office have tried to encapsulate all of clause 8 of the Regulation into the clause "may not act against the police on *any legal work."* With this history, and what should be considered as a "transfer" of the general duty of loyalty from out of the Regulations into the Terms of Office means that the starting point must be that a Crown Solicitor must not accept

[29] Solicitor-General's Prosecution Guidelines (2013) at [9.3].
[30] Ibid at [28.6].

> employment, other than from the Police, in any matter in which the Police is directly concerned or appear against the Police.
>
> 8. The Terms of Office has not substantively altered the duty of loyalty that Crown Solicitors have to the Police, but rather has highlighted it. The Terms of Office make specific reference to Police, unlike the Regulations. This reflects an acknowledgement of the close relationship between the Crown and the Police, the Police's unique constitutional position, its independence and its coercive powers and the real need to protect such relationship and the self-evident perils if it is not so protected.
>
> 9. A fair-minded and reasonably informed member of the public would see that the change from the Regulations to the Terms of Office does not alter the duty of loyalty Crown Solicitors have to Police but emphasises it and reflects the close relationship between the Crown and Police and the risk of both a lack of independence and a conflict.

[70] Mr Rasheed's submissions were broad in scope. Importantly, however, he stressed the similarity between Reg 8 and paragraph 16 of the Terms of Office. Mr Rasheed echoed Mr Hampton's submission that counsel assisting in this Inquiry does, in fact, appear "against the Police", and is therefore prohibited from performing that role without the Solicitor General's dispensation.

[71] Mr Rasheed also stressed the financial relationship between the Police and Crown Solicitors, describing the relationship between Meredith Connell and the Crown as "an unprecedented commercial arrangement which has spanned generations and gained a sense of permanence". He also submitted that I must interpret the Coroners Act 2006 in a manner consistent with the New Zealand Bill of Rights Act 1991 , and in a manner which recognises that the Inquiry is a necessary step in New Zealand fulfilling its international obligations with respect to the Masjidain attack. He submitted that Ms McClintock's retention as counsel assisting would detrimentally affect the interests of the Applicants and other immediate families and would accordingly compromise the overall integrity of the Inquiry.

Analysis

[72] I propose to approach the "competing loyalties" ground by way of a two-step analysis. First, would a reasonably informed fair-minded member of the public (the lay observer) conclude that Ms McClintock will be subject to competing loyalties if she continues as counsel assisting this Inquiry such that the proper administration of justice requires that I remove her from her role as counsel assisting? If not, then a further question

arises: should I nevertheless exercise my discretion either to remove Ms McClintock, or to modify the scope of her role with respect to those parts of the Inquiry which call the conduct of the Police (insofar as it relates to an issue for the Inquiry) into question?

[73] Before assessing how a reasonably informed fair-minded member of the public might regard Ms McClintock's role as counsel assisting, I record that I do not accept Mr Hampton and Ms Dalziel's submission that counsel assisting will appear "against" the Police, as that phrase is used in the Terms of Office.

[74] I invited the Solicitor-General to make submissions on the Terms of Office because those terms represent an agreement to which neither the Court nor any of the Interested Parties are privy. Even if they are enforceable in the hands of a third party, it would be extraordinary for the Court to go behind the Solicitor-General's advice as to what the Terms of Office mean (and were intended to mean). It follows I accept Ms Laracy's advice that paragraph 16.2 was intended to bear its ordinary legal meaning and applies only where a Crown Solicitor seeks to act against the Police in an adversarial proceeding. That advice is consistent with the very common practice in this Court of Crown Solicitors appearing as counsel assisting, or on behalf of non-Crown Interested Parties. It is also consistent with my own assessment of the relationship between Interested Parties (and the relationship between Interested Parties and counsel assisting) in this Court. Interested Parties are engaged in a common endeavour to establish the facts. While they may each bring different perspectives, they are not opponents.

[75] That conclusion is important. In effect, Ms Laracy confirmed that accepting instructions in coronial proceedings, even if the Police are separately represented, does not put a Crown Solicitor in breach of paragraph 16 of the Terms of Office, which mirror the Conduct and Client Care Rules in requiring Crown Solicitors to avoid situations in which they may be subject to competing loyalties.

[76] Turning to the reasonably informed fair-minded member of the public, both Mr Hampton and Mr Rasheed have urged me to imbue her with qualities that differ from the orthodox "reasonable person". Mr Rasheed suggested instead "the contemporary reasonable person, such that the law will not be seen through the objective test to perpetuate a non-adaptive approach, with the result that those issues that were preferred not to be scrutinised remained so unscrutinised." It is unclear what the approach

advocated by Mr Rasheed might require in practice, but it is likely, at a minimum, to require the fictional member of the public to have endured a measure of the trauma and loss experienced by the immediate families in this case, and perhaps to share some of their distrust either of the Police or of Government institutions. Mr Hampton's submission was clearer in accepting the test is from the standpoint of a member of the public that is not a party to the matter, however:

> … when it comes to Coronial matters, the test of a fair minded reasonably informed member of the public must include a person who has experienced loss through death. It is part of the human experience of members of the public and part of being reasonably informed.

[77] I have only limited scope to adapt the reasonably informed fair-minded member of the public test. It has been prescribed consistently by the senior courts and is binding on me. In *Saxmere v Wool Board*,[31] the Supreme Court observed:

> [5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. Lord Hope of Craighead commented in *Helow v Secretary of State for the Home Department* that:
>
> > before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.
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> [6] The elaboration of the features of the objective observer is, as Kirby J remarked in *Smits v Roach*, a reminder to judges, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges to a particular complaint:
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> > It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that

[31] *Saxmere Company and others v Wool Board Disestablishment Company Ltd* [2009] NZSC 72.

> it provides an entirely objective standard by which to measure the individual case.

[78] What then would the reasonably informed fair-minded member of the public who is neither naïve nor excessively suspicious make of the relationship between Crown Solicitors and Police? She would be aware of the important ongoing working relationship between Crown Solicitors and the Police and, given its importance, of the inherent need for that relationship to be maintained. While understanding that independence is a key component of any Crown Solicitor's role, she may infer that counsel who works in a Crown Solicitor's office might be less ready to accuse the Police of serious misconduct, if the case were to require it, than counsel who does not have an ongoing relationship of that kind. She would also be aware there is one Police service across New Zealand, and that criticism of the Police in one part of the country is likely to naturally reflect on the Police as a whole. That concern may, however, be mitigated somewhat in cases where those members of the Police whose conduct is in issue work in a different region from the Crown Solicitor.

[79] However, the reasonably informed fair-minded member of the public would also know:

(a) Coronial proceedings are inquisitorial; the Interested Parties – much less counsel assisting – are not in an adversarial relationship with one another. All Interested Parties, and all counsel, share a common goal to establish the facts, no matter how abhorrent and no matter whether those facts disclose the basis for adverse comment.

(b) The 2013 revocation of the Crown Solicitors Regulations and introduction of Terms of Office reflected a deliberate relaxation of the previous restrictions on contestable work Crown Solicitor firms were permitted to undertake. Crown Solicitors are now regularly engaged to appear in coronial inquiries as counsel assisting the inquiry and also as counsel representing non-Governmental Interested Parties, even where the conduct of Government departments and agencies may be called into question.

(c) Crown Solicitor firms remain prohibited from "acting against" Police on any legal work unless granted a dispensation. The inquisitorial nature of a coronial inquiry means counsel assisting (and for that matter all counsel for Interested Parties) do not "act against" the Police in this inquiry and are therefore not captured by the Terms of Office prohibition (absent a dispensation). The Solicitor General also interprets this restriction as arising only in connection with adversarial

proceedings and not a coronial inquiry. Even if the circumstances were such that dispensation was required, the Solicitor General advises it would be given. Police, for whose protection the prohibition is established, have not expressed any objection to Ms McClintock acting in the capacity of counsel assisting this Inquiry.

(d) Although counsel assisting may play a significant role, the Coroner will always retain ultimate responsibility for the conduct of the Inquiry which itself is directed towards achieving the purposes set out in s 57. The ability to test evidence given at inquest is not confined to counsel assisting's cross-examination. All Interested Parties (or their counsel) along with the Coroner have the opportunity and ability to test the inquest evidence through cross-examination. Any apprehended risk that "pulling of punches" by counsel assisting is therefore well mitigated.

(e) Crown Solicitors and prosecutors, even when acting in Crown proceedings, are obliged to act independently of the Police or other Government agency involved. Even in contestable departmental prosecutions or advice work the client-solicitor relationship is modified. The Solicitor General Prosecution Guidelines require the Crown Solicitor to provide independent advice which Police are expected to follow.

[80] I conclude that a fair-minded member of the public who can be expected to have taken the time to be reasonably informed about all of the above would not consider Ms McClintock to be subject to divided or competing loyalties in discharging her role as counsel assisting this Inquiry. There is no question that this is an unprecedented and vitally important inquiry. But that, of itself, is not a proper basis to elevate the test or lower the threshold for removal.

[81] It follows that I do not consider the objective legal test met such that the proper administration of justice requires Ms McClintock's removal as counsel assisting this Inquiry.

Exercise of discretion

[82] My approach to this analysis means that is not the end of the matter. I turn now to the second question, namely whether, in my discretion, and in the particular circumstances of this Inquiry, it might nevertheless be appropriate either to replace Ms McClintock or modify the scope of her role in relation to some parts of the Inquiry. In doing so, I am able to take greater account of the subjective perceptions and concerns expressed on behalf

of the Applicants. While the legal standard for removal is set by reference to the objective member of the public, I am naturally concerned to ensure all Interested Parties, especially immediate family members of those who died, retain confidence in the integrity of this Inquiry. While the Inquiry is for the ultimate benefit of the community as a whole, it is the immediate family members who have the greatest interest in establishing the cause and circumstances of the deaths, and whether there are means by which other families might be spared the trauma and grief they continue to endure.

[83] I am particularly cognisant of the submissions of Mr Hampton and Ms Dalziel. Notwithstanding my analysis of the relationship between a Crown Solicitor and the Police, I do not want immediate families to fear that counsel assisting might be slower to criticise the Police than another lawyer would. I have no doubt Ms McClintock would continue – as she has to date – to be appropriately critical of the Police both over matters of disclosure and, to the extent the evidence ultimately warrants it, over their conduct as it relates to the issues for this Inquiry. That said, given their intense interest in the process and its outcome, this Inquiry will be better served by immediate families being able to focus on the evidence, free from distraction or suspicion regarding the identity of the lawyer who is asking the questions.

[84] This is a very large and complex Inquiry with multiple issues, many of which do not concern the conduct of the Police. For example, there has never been any objection to Ms McClintock's involvement in relation to Issue 5 which is directed towards exploring the role of, and processes undertaken by, Christchurch Hospital in responding to the attack. While Mr Hampton initially objected to Ms McClintock's involvement in Issues 11 and 12 – which concern radicalisation – in the hearing he helpfully acknowledged that his submissions about those issues were "a bit of an afterthought", and that he did not press the point. Some other issues for the Inquiry may involve the Police as part of the narrative but will not call their conduct into question.

[85] The scale of this Inquiry alongside my large caseload of other inquiries which I am responsible for is such that I recognised in the early part of this year that additional counsel assisting would need to be engaged. I have bolstered that assistance from within the Ministry of Justice and by engaging David Boldt, a barrister who has been counsel assisting in a number of my other inquiries.

[86] I have, entirely as a matter of discretion, decided to reshuffle aspects of the external counsel assisting assignments to take account of the concerns of the Applicants. Ms McClintock's responsibilities will be modified in that she will not cross-examine any Police witness in the First Phase Inquest, nor will she provide me with any formal or informal advice regarding the conduct of the Police to the extent it bears on an Inquiry issue. Mr Boldt will assume responsibility for cross-examination of Police witnesses in the First Phase Inquest and will be my principal adviser on all relevant matters regarding the conduct of the Police to the extent it bears on an Inquiry issue. In the event I decide to convene an inquest in relation to Issue 10(a) and (b) concerning the Police firearms licensing process, the same modification of counsel assisting roles will apply.

[87] For the avoidance of doubt, Ms McClintock will continue to have a role in the First Phase Inquiry with the modifications I have indicated. She and her firm will continue to assist with document management in conjunction with, and oversight by, the Ministry of Justice counsel assisting this Inquiry. It would be significantly disruptive and inefficient to move that assignment to another firm at this advanced stage when the disclosure process is nearly complete. More importantly, while Meredith Connell is assisting in the management of this very large volume of information, all decisions about relevance and disclosure are ultimately mine. The oversight by in-house counsel, escalation of any specific matters requiring my decision, and disclosure to all Interested Parties of the index of all Police-sourced materials (including that assessed as not relevant to an Inquiry issue) provides safeguards to ensure the disclosure process is robust.

[88] I record that this is the also the remedy I would have adopted if I had concluded the reasonably informed lay observer would consider that Ms McClintock was subject to competing loyalties. The reasonable observer would expect the clash of loyalties to be addressed; she would not expect counsel to be removed from those parts of the Inquiry where no question of competing loyalties might arise.

Result

[89] The application to remove Ms McClintock as counsel is dismissed, but her role will be modified in the manner described above.

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Coroner B Windley