LAW·COMMISSION
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May 2008, Wellington, New Zealand | REPORT 102

A NEW INQUIRIES ACT

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Law Commission.

A New Inquiries Act.

(New Zealand Law Commission Report ; 102)

ISBN 978-1-877316-44-9

1. New Zealand. Commissions of Inquiry Act 1908.

2. Governmental investigations—New Zealand.

I. Title. II. Series: New Zealand. Law Commission. Report ; 102.

328.34520993—dc 22

Report/Law Commission, Wellington, 2008

ISSN 0113-2334 (Print)

ISSN 1177-6196 (Online)

ISBN 978-1-877316-44-9

This paper maybe cited as NZLC R102

This report is also available on the Internet at the Law Commission's website: www.lawcom.govt.nz

The Hon Annette King
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

23 May 2008

Dear Minister

NZLC R102 – A NEW INQUIRIES ACT

I am pleased to submit to you Law Commission Report 102, *A New Inquiries Act*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

Geoffrey Palmer
President

Since its inception the New Zealand Government has had a culture of inquiry. Indeed, the first formal inquiry held in New Zealand was to recommend the best site for the seat of government on the shores of Cook Strait. The members of the inquiry were Members of Parliament from the Australian colonies; New Zealanders apparently agreed in 1864 that they all exhibited too much bias on the issue of the appropriate place![1]

Modern government is an endless procession of policy reviews, investigations and inquiries of one sort or another. Some are tiny: they occur in government departments and seldom reach the level of public visibility. Others involve major matters of public policy or the propriety of official conduct.

Sitting at the apex of the inquiry pyramid are commissions of inquiry, including royal commissions. There is no significant legal distinction between these two forms of inquiry – the distinction lies rather in issues of possible prestige. Currently in legal terms, a commission of inquiry is the heavy artillery of the existing framework. Commissions have coercive powers to compel the production of information and witnesses. Their findings and recommendations are not legally binding, but are usually highly influential.

A long tradition in New Zealand shows that some of the most significant policy changes made flow from the reports of such commissions – accident compensation, the MMP Electoral System and the present structure of the courts, to name a trio of significant examples. Often it is not so much policy that is being inquired into, but conduct. How did a disaster occur and why? The inquiry into the tragic accident at the Department of Conservation's viewing platform at Cave Creek is an example of the second type.

Then there are inquiries that are a blend of the two where both policy and conduct come into play. Indeed, the topics of inquiries come in such a bewildering variety of shapes and sizes that it is difficult to characterise them in any systematic way. The Law Commission has not been able to establish a satisfying method for classifying inquiries.

It has become common in recent years to set up fewer commissions of inquiry than was previously the case. There have only been 5 since 1990. The Law Commission's issues paper *The Role of Public Inquiries*,[2] published during this review sought to analyse the reasons for this. A significant part of the explanation revolves around issues of expense, delays, formality and adversarial methods.

To avoid these problems it has become common in recent years to set up what are known as ministerial inquiries. These have little law governing them and no coercive powers at all. Neither do those conducting such inquiries enjoy any legal immunities. This situation can lead to significant limitations on the effectiveness of some such inquiries – they may not be able to get to the bottom of a matter because they cannot uncover the facts.

Much of the recent difficulty with commissions of inquiry flows from the out of date and inappropriate law that governs them. That law is the Commissions

1 Report of Commission of Inquiry (1864) AJHR D 2 (Sir Francis Murphy).

2 New Zealand Law Commission *The Role of Public Inquiries* (NZLC IP1, Wellington, 2007).

of Inquiry Act 1908. Since its enactment the statute has been amended seven times. And as is often the case, the amendments have not necessarily made the Act easier to use or to follow.

There has been a widespread recognition that the Act has been in need of revision for years. Promises have been made that it would be done.[3] Big changes were recommended by the Public and Administrative Law Reform Committee as long ago as 1980. But only a handful were implemented.

It is time to redeem the previous promises and re-engineer the law governing public inquiries so that it is useful, effective and up to date. The existing law has a heavy and formal feel to it that is out of step with the way modern public administration is conducted. What is worse, the penumbras that emanate from it have acted as a deterrent to its use.

The Law Commission has gone back to first principles to review the law relating to commissions of inquiry. We have preserved those elements of approach in the 1908 Act that seem sound, but we have also endeavoured to create a framework that will produce a new culture for inquiries. We believe this new framework will enable inquiries to be more effective.

Dr Briar Gordon of the Parliamentary Counsel Office has drafted what we believe to be an elegant and accessible new statutory framework in plain English. The Draft Bill is appended to our report.

The new Act we recommend establishes two types of inquiry – public inquiries and government inquiries. Public inquiries are designed for big and meaty issues that are of high level concern to the public and to Ministers – the occurrence of an accidental disaster or the devising of a comprehensive new policy framework for a particular topic. Government inquiries, on the other hand, are intended to deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer.

Under our recommendations both types of inquiry will enjoy the same legal powers. Thus, both will have the tools to get at the truth. The distinctions between the two lie in the way they are appointed – the first are established by the Governor-General by Order in Council. The reports will be formally tabled in Parliament. The second type of inquiry will be appointed by a Minister and report to that Minister. We hope that by recognising the current constitutional reality and practice, our recommendations will coax ministerial inquiries into a proper legal framework.

In constitutional terms the types of inquiry we recommend, like those that went before them, will be instruments of the Executive Government. But the inquirers will enjoy statutory independence. We propose that inquiries can be established to examine any matter of public importance. Such flexibility is required.

It needs to be remembered, however, that the findings of an inquiry bind no-one. It will always be up to the Government and Parliament to decide what, if anything, to do about the findings and recommendations of an inquiry.

3 See for example, Hon David Thomson (12 June 1980) 430 NZPD 748 and Hon D A Highet (12 June 1980) 430 NZPD 1153.

Despite the fact that the findings of an inquiry bind no-one, such findings can do individual reputations great damage. Inquiries must act fairly and they must be obliged to follow the rules of natural justice. They cannot be permitted to develop into free wheeling engines of oppression. Our recommendations achieve this balance.

A word of caution. In New Zealand there are many inquiries other than those dealt with in this report. There are inquiries by Parliamentary Select Committees. There are inquiries by permanent statutory officers such as the State Services Commissioner, the Health and Disability Commissioner and the Ombudsmen. There are also a range of other statutes that set up bodies to make particular inquiries into special subjects. We are not disturbing those statutes or making recommendations about them.

We do however recommend that, as a second stage to this project, consideration be given to the 55 or so statutes that give statutory bodies the powers of a commission of inquiry. These range from bodies such as the Waitangi Tribunal and Social Security Appeal Authority to inquiries under the Soil Conservation and Rivers Control Act 1941. At present, they will continue to operate under the 1908 Act, but each needs review to determine how it should conduct its proceedings or inquiries in the future.

The Law Commission has subjected an important segment of public law power to analysis and recommended a framework that will allow a new culture to emerge that will enhance the public good.

Geoffrey Palmer
President

ACKNOWLEDGEMENTS

We are most grateful to Dr Briar Gordon of the Parliamentary Counsel Office for her time and attention in drafting the Inquiries Bill, attached to this report. We also appreciate the many useful comments provided by Kim Murray, Barrister on the ideas contained in this report and for peer reviewing the draft report.

We are grateful to all those individuals and agencies who have written to us or met with us to discuss the issues involved in this reference. They are:

Grant Adam

Matthew Andrews

Archives New Zealand

Hon Justice Baragwanath

Hon Rick Barker MP

Dame Margaret Bazley

Rt Hon Justice Blanchard

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Dr Alan Simpson

Mel Smith, Office of the Ombudsmen

Phillippa Smith

State Services Commission

Statistics New Zealand

Transport Accident Investigation Commission

The Treasury

Wellington District Law Society Public Law Committee

Douglas White QC

Hon Justice Wilson

Rt Hon Sir Owen Woodhouse

The commissioners responsible for this reference were Helen Aikman and Geoffrey Palmer. The legal and policy advisers were Susan Hall and Julia Rendell.

A New Inquiries Act

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Summary

THE NEED FOR CHANGE

1 In this report, the Law Commission presents its recommendations to reform and modernise the law relating to inquiries. In the course of our review, the Commission has released and consulted on two papers: an issues paper *The Role of Public Inquiries* and a draft report entitled *Public Inquiries*. Accompanying this report is a draft Inquiries Bill that reflects our recommendations.

2 Our review has focused on commissions of inquiry and royal commissions, both of which operate under the Commissions of Inquiry Act 1908, and non-statutory ministerial inquiries.

3 The Law Commission has identified three broad problems with the existing inquiry structure. First, the 1908 Act is antiquated and has been amended many times, sometimes in response to one-off situations. Many of its provisions are confusing and some place constraints on procedure that add time and money to inquiries, without necessarily enhancing their effectiveness. A complete re-examination of the Act is therefore long overdue.

4 In addition, royal commissions and commissions of inquiry are costly. They tend to adopt legalistic procedures and have become constrained by the culture that has developed around them. As a result, the 1908 Act is used infrequently. Changes in both the law and culture are required to enable inquiries to be as effective and efficient as possible so that their use is not deterred.

5 Thirdly, non-statutory ministerial inquiries appear to be increasingly preferred but take place outside a statutory framework. They are often seen as a quick and cost-effective way to have an independent investigation, but do not have any coercive powers, instead relying solely on witness cooperation. They offer no immunities for those taking part; and there is a lack of clarity around how other protections such as judicial review and the Official Information Act 1982 apply to them. Ministers need to be provided with a form of statutory inquiry that they can use for both the less complex, discrete issues requiring investigation, as well as those of greater breadth and complexity.

A NEW INQUIRIES ACT

6 We propose that the 1908 Act be replaced by a new Inquiries Act. The new Act should maximise flexibility and free inquiries from the procedural constraints and traditions that have dogged commissions.

7 The new Act should provide for two forms of inquiry. "Public inquiries" should take over the ground previously inhabited by commissions of inquiry and royal commissions. "Government inquiries" will differ by being simpler and quicker to establish. They will be appointed by and report directly to a Minister. They should deal with smaller and more immediate issues where a quick and authoritative

answer is required from an independent inquiry. The framework we propose should largely remove the need for non-statutory ministerial inquiries. Both forms of inquiry should enjoy the same legal powers and protections, differing only in their manner of appointment and completion.

8 The adversarial concepts of "parties" and "persons entitled to be heard" should be removed from the Act. The automatic provisions that give these participants a right "to appear and be heard" should be abandoned in favour of more flexible provisions which accord with natural justice. The anachronisms of the 1908 Act, including the complicated provisions relating to contempt and differing powers depending on the status of individual inquirers, should also be removed.

9 The new Act should reduce the likelihood of costly and delaying litigation on the periphery of inquiries by enhancing inquirers' powers to conduct the inquiry as they see fit; clarifying the rules surrounding public access to inquiries; and giving directions about natural justice. The creation of new offences directed at controlling behaviour surrounding inquiries will enhance their ability to control abuse of their processes.

10 In this report, we also recommend that guidance be given to those establishing inquiries, by way of the Cabinet Manual, and those conducting them, by way of new Department of Internal Affairs guidelines. In particular, emphasis should be placed on the flexible nature of the new legislation and the less formal procedural options available to inquirers.

11 Not only are these amendments necessary to update and modernise the century-old legislation, they are required to make inquiries effective and efficient. The change in terminology and removal of certain provisions are necessary to encourage a change in the culture which now deters wider use of the 1908 Act. Furthermore, a complete reworking of the legislation is required to provide Ministers with a form of statutory inquiry that they can use when any matter of public importance, no matter its size or complexity, arises for independent review.

SUBSTANCE OF THE ACT

Appointment, status and conclusion of inquiries

12 The two new forms of inquiry will be established differently. Public inquiries should be appointed by the Governor-General by Order in Council. They should report to the Governor-General and their reports should be tabled in Parliament. Government inquiries should be appointed by, and report directly to a Minister. It would not be necessary for their reports to be tabled in Parliament, although in practice they are likely to be released publicly. The independence of both forms of inquiry should be cemented in legislation.

13 Both public and government inquiries should be appointed to inquire and report on "any matter of public importance", but it should be made clear that they are not to determine civil, criminal, or disciplinary liability. We also propose that, in consultation with government, inquirers be given express power to temporarily suspend their inquiry where to continue could prejudice a pending or ongoing investigation into the same matter. Where this would mean going beyond their reporting date, a change to the terms of reference would be required.

14 To ensure that the time and cost of an inquiry is not wasted, we recommend that consideration should be given to whether Government should respond to inquiry recommendations within 6 months of them reporting.

Procedure, natural justice and participation

15 The provisions of the 1908 Act encourage the adoption of unnecessarily adversarial practices. Arguments about an inquiry's procedural powers can be minimised by setting some of these powers out in legislation, while still emphasising that inquiries are free to regulate their own proceedings. The Act should make it clear that, subject to the rules of natural justice, the inquirer is free to decide whether oral hearings are held; and whether to allow or restrict cross-examination, call witnesses, and receive oral evidence and submissions from or on behalf of a participant.

16 Inquiries should be able to proceed by a wide variety of means, such as informal meetings and interviews. Formal hearings akin to court processes would only be required in the minority of instances. The legislation should not force such formal procedures upon inquiries where they are not effective or efficient or required by natural justice.

17 The provisions relating to "parties", the right to appear and be heard and the right to representation should be replaced, but inquirers should be given some direction as to when to accord some participants greater involvement in the inquiry than others. They should be able to appoint "core participants", but core participants should not automatically have the rights previously accorded to parties. While they should have a right to give evidence and make submissions to the inquiry, the manner in which this is done should be at the discretion of the inquiry.

18 The well-established rules of natural justice relating to adverse comment should be set out clearly in the legislation. The Act should also provide that inquirers are to act impartially.

Powers to inquire

19 The powers currently contained in the 1908 Act are adequate and should for the most part merely be updated. In contrast with developments in Australia, we do not think that inquiries should have access to search and seizure powers. We also propose restrictions on the delegation of an inquiry's inquisitorial powers.

20 The provisions of the 1908 Act relating to an inquiry's power to disclose information it receives to other participants in the inquiry; the service of witnesses summonses; and witness expenses should be clarified and modernised.

Public access to inquiries and documentation

21 Case law has established that inquiries have the power to decide whether proceedings are held in public or in private, but the 1908 Act is silent on the matter. The new Act should codify this power, and should provide that where an inquiry is considering whether to restrict public access, or to suppress information, it should take account of the following criteria:

(a) the risk that private hearings will inhibit public confidence in the inquiry's proceedings;
(b) the need for the inquiry to properly ascertain the facts;
(c) the extent to which a public hearing may prejudice the security or defence or economic interests of New Zealand;
(d) the privacy interests of natural or other persons;
(e) whether public hearings would interfere with the administration of justice, including the right to a fair trial.

22 A great deal can be done to enhance public access to inquiry documentation, and we suggest that greater use be made of the internet to publish inquiry material.

23 We also consider the status of inquiry documentation after an inquiry has completed its task. The existing treatment of inquiries by the Official Information Act 1982 and Public Records Act 2005 is, for the most part, appropriate, but there are some practical problems surrounding the transfer of documentation to Archives New Zealand. A particular problem relates to the current status of non-statutory ministerial inquiry documentation under the Official Information Act 1982 and Public Records Act 2005. We propose a process which seeks to clarify the roles of the various agencies, and facilitates public access to documents once they are lodged with Archives.

24 We also recommend that the Official Information Act 1982 be amended to make it clear that notes relating to the internal deliberations of an inquiry should not be subject to disclosure under that regime. We also suggest that the blanket exclusion on access to evidence and submissions be removed, unless it is subject to a suppression order by the inquiry. However, government, in consultation with the inquirer, should specify the date on which restrictions on access to the evidence, submissions and notes should be removed.

Cost orders and funding legal representation

25 At present, the 1908 Act grants inquiries the power to make cost orders. We question the general application of costs orders to inquiries which are established by governments and are inquisitorial processes. We conclude, however, that they may be appropriate to the extent that a person has unduly lengthened, obstructed or added undue cost to an inquiry. Inquirers should retain the ability to deter such action by recourse to a cost order.

26 Legal aid is not available to participants before inquiries, yet there will be circumstances where legal representation is required to protect a participant's interests, ensure equality, or ensure the inquiry is able to satisfy its task. We consider that funding for legal representation should be made available based on a consideration of:

(a) The prospect of hardship to the person if assistance is declined;
(b) The significance of the evidence that the person is giving or appears likely to give;
(c) Any other matter relating to the public interest.

27 An inquiry should, after considering these factors, be able to make a recommendation to the responsible department (usually the Department of Internal Affairs) that a participant's legal representation be funded, although this may be on certain terms.

Sanctions

28 At present, disobedience with an inquiry's orders can be punished by summary conviction and a $1,000 fine or by punishment for contempt. Inquirers have different powers to punish for contempt depending on their judicial status.

29 In the light of the purpose of contempt and its severe nature, we do not think that inquirers should be able to punish for contempt. Instead, the new Act should contain offences designed to deal with disobedience with inquiry orders and with conduct in the face of and on the periphery of inquiries. The penalty for these offences should be increased to $10,000. In addition, however, the new Act should expressly provide that the Solicitor-General may commence proceedings for contempt of an inquiry.

30 Some existing sanctions in the 1908 Act are qualified: a refusal to answer must be "without sufficient cause" to attract criminal consequences and powers of detention can be exercised where a person refuses to answer without "just excuse". We suggest that a consistent approach be taken to the qualifications in the new Act. As in the new Coroners Act 2006, the qualification of "lawful excuse" should be adopted and defined.

Evidence, privilege and inquiries

31 We propose that inquiries should continue to be able to receive evidence that would not be admissible in a court of law. The Evidence Act 2006 made certain adjustments to the common law privileges, and we suggest that ss 54 and 56 of that Act (relating to legal professional privilege) and s 69 (relating to confidentiality) should expressly apply to inquiries.

32 In line with the approach in the 2006 Act to the privilege against self-incrimination in civil proceedings, we suggest that the privilege be abrogated in relation to inquiries and replaced with an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence.

33 We propose a new power for inquirers or authorised inquiry officers to inspect documents in respect of which privilege or confidentiality is asserted to determine whether or not the document should be disclosed.

Immunities

34 It is desirable that a consistent approach is adopted to immunities and that inquiries should have no immunity beyond that necessary to allow its functions to be performed. On this basis, we do not consider that inquirers should be treated differently depending on their judicial status. An inquiry and its members should have no liability for anything it may report, say, do or fail to do in the exercise or intended exercise of its functions unless it is shown that the inquiry

or inquirer acted in bad faith. In addition, inquirers should not be compellable witnesses in relation to the inquiry except if bad faith is alleged. And, the new Act should state that the inquiry as a whole should be cited as defendant in review proceedings.

35 Witnesses and counsel should continue to have the same immunities as witnesses and counsel in a court of law.

Court supervision of inquiries

36 We suggest that inquiries should retain the ability to state a case to the High Court; but that the existing provision that cases stated by a commission including a current or former High Court judge are made to the Court of Appeal should not be retained in the new Act.

Membership

37 In the case of public inquiries, inquirers should be appointed by the Governor-General. Government inquirers should be appointed by the Minister. There should be no statutory requirement as to their qualifications or numbers. However, composition of an inquiry is fundamental to its success and we suggest that guidance about the appointment of inquirers be contained in the Cabinet Manual. In particular, we suggest that more than one inquirer be appointed to any complex or long-running inquiry.

38 Legislation should also provide for the replacement of members when they leave, subject to the principles of natural justice. Inquirers should only be removed from office by the Governor-General or Minister, as the case may be, due to misconduct, inability to perform the functions of office or neglect of duty.

Counsel assisting

39 The new Act should provide that where the appointment of counsel assisting is considered appropriate, he or she should be appointed by the Solicitor-General, after discussion with the inquirers. The Solicitor-General should also be responsible for setting terms and conditions of appointment and for approving invoices. We also suggest that the Solicitor-General develops guidelines setting out the role of counsel assisting.

Funding and administration

40 Inquiries are public bodies and should be fiscally accountable, notwithstanding their need to preserve independence as to outcomes. The expenditure and administration of inquiries under the Act should be overseen by the Department of Internal Affairs unless the subject-matter of a particular inquiry would give rise to bias or a perception of bias in respect of that Department.

41 If the Department of Internal Affairs' role in inquiries is formalised and its responsibilities increased as suggested in this report, we suggest that it may be desirable for the Department to receive a specific allocation for inquiries.

Other inquiry bodies and the status of the 1908 Act

42 Many statutory tribunals, standing commissions and officers take their powers by reference to the 1908 Act. In addition, there are many powers to establish inquiries with functions very similar to those of the one-off inquiries considered in this paper. As a general proposition, we consider that the incorporation of powers by reference, and the proliferation in inquiry powers on the statute book are undesirable.

43 We propose that when a new Inquiries Act is introduced, the provisions of the 1908 Act relating to the appointment of commissions of inquiry and royal commissions should be repealed. However, for now the other provisions of the Act should remain in force for the purpose of the many bodies taking their powers by reference. It is undesirable, however, that the 1908 linger on the statute book.

44 Work needs to be done to review the powers needed by the bodies which currently have recourse to the 1908 Act, and to rationalise the various inquiry powers on the statute book, with a view to finally repealing the 1908 Act. We recommend that the Government consider giving the Law Commission a further reference to do this work. In addition, we propose the inclusion of a provision in the new Act which requires such a review to take place with 5 years of the commencement of the new Act.

Recommendations

CHAPTER 1: INTRODUCTION

R1 The material on inquiries contained in the Cabinet Manual 2008 should be updated if a new Inquiries Act is passed.

R2 The Department of Internal Affairs should revise and update its publication *Setting Up and Running Commissions of Inquiry.*

CHAPTER 2: A NEW INQUIRIES ACT

R3 The 1908 Act should be replaced by a new "Inquiries Act" which substitutes "public inquiries" for commissions of inquiry and introduces a new category of "government inquiries".

R4 Public inquiries should be appointed by the Governor-General by Order in Council.

R5 Government inquiries should be appointed by a Minister and their appointment should be notified in the *New Zealand Gazette.*

R6 New inquiries legislation should not apply to royal commissions established under the Letters Patent. However, if this recommendation is not adopted, royal commissions should be referred to in the legislation in a manner that allows their removal by a simple amendment in the future.

CHAPTER 3: MATTERS RELATING APPOINTMENT, STATUS AND CONCLUSION OF INQUIRIES

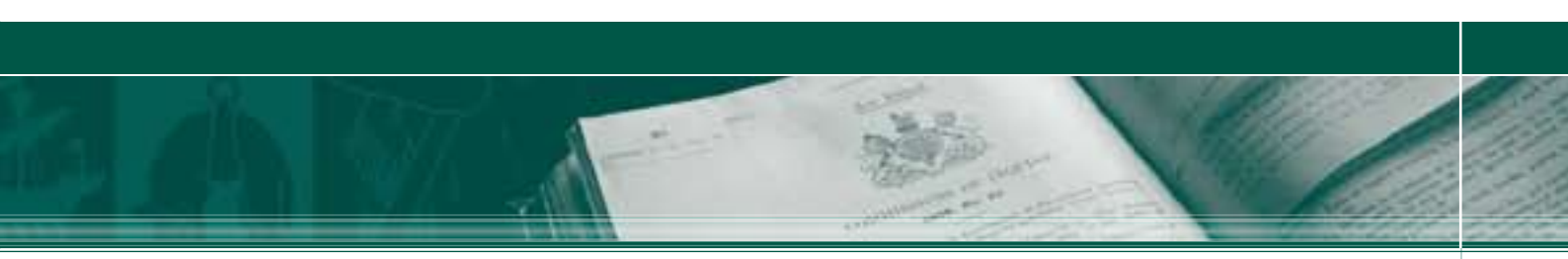
R7 The new Act should provide for both public and government inquiries to be established into "any matter of public importance".

R8 The new Act should provide that inquirers are not to determine civil, criminal, or disciplinary liability. This should not prevent inquiries from making findings of fault or making recommendations that further steps be taken to determine liability.

R9 The new Act should give inquiries an express power to postpone or temporarily suspend the inquiry where an investigation into the circumstances leading to the inquiry is being or is likely to be conducted and where to open or continue with an inquiry would be likely to prejudice the investigation or any person interested in it. Inquiries should reopen when to do so would not prejudice the investigation or any person interested in it. The Act should state that the inquiry must consult with Government before exercising this power.

R10 The new Act should provide that public and government inquirers are to act independently.

R11 Consideration should be given to a Cabinet circular or an addition to the Cabinet Manual setting out a process for responding to inquiry reports.



R12 Public inquiries should report to the Governor-General and their reports should be tabled in Parliament as soon as practicable after the inquiry completes its task. Government inquiries should report to their appointing Minister.

CHAPTER 4: PROCEDURE, NATURAL JUSTICE AND PARTICIPATION

R13 The powers given to an inquiry should not depend on the status of any inquirer.

R14 The new Act should state that, subject to the rules of natural justice and their terms of reference, inquirers may conduct their inquiry as they consider appropriate. Accordingly an inquiry may decide:

(a) whether to conduct interviews, and if so, who to interview;
(b) whether to call witnesses, and if so, who to call;
(c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held;
(d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry;
(e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions;
(f) whether to allow or restrict cross-examination of witnesses.

R15 The Act should also provide that where a person or body will be the subject of adverse comment or findings by the inquiry, the inquiry must:

(a) give prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings;
(b) disclose the relevant material relied upon, and state the reasons on which the finding or allegation is based;
(c) give the person or body reasonable time and reasonable opportunity to refute or respond to the proposed findings or allegations;
(d) give proper consideration to those representations.

R16 Inquiries may, by written notice, designate "core participants" and in doing so must consider whether:

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates; or
(b) the person has a significant interest in a substantial aspect of the matters to which the inquiry relates; or
(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

R17 Core participants should have a right to provide evidence and make submissions to the inquiry, but the manner in which they do so should be at the discretion of the inquiry.

R18 The new Act should provide that inquirers are to act impartially.

CHAPTER 5: POWERS TO REQUIRE EVIDENCE

R19 Inquiries under the new Act should be able to:

(a) require any person to—

(i) produce any documents or things in that person's possession or control or copies of those documents or things;

(ii) allow copies or representations of those documents or things to be made;

(iii) provide information to the inquiry, in a form approved by the inquiry;

(iv) verify by statutory declaration any written information, copies of documents, or representations of things provided to the inquiry;

(b) examine any document or thing that is produced by a witness;

(c) summon witnesses to attend the inquiry; and

(d) take evidence on oath or affirmation.

R20 Inquiries should not have access to search and seizure powers.

R21 The new Act should retain and clarify an inquiry's power to disclose information it receives to other participants in the inquiry.

R22 An inquiry's powers to inspect documents and administer oaths should be able to be delegated in writing to an officer of the inquiry.

R23 An "officer of the inquiry" should be defined as a person who is engaged to work for an inquiry.

R24 An inquiry's witness summons should be served personally on the witness; although an inquirer should be able to make a direction for substituted service in accordance with the High Court Rules.

R25 Where a participant to the inquiry requests that a witness be summoned, the participant should be primarily responsible for their expenses, subject to being able to request assistance from the inquiry. In other instances, the inquiry should pay them directly at a sum it considers reasonable.

CHAPTER 6: PUBLIC ACCESS TO INQUIRIES AND DOCUMENTATION

R26 Public access to inquiries should be facilitated by way of a comprehensive inquiry website.

R27 The new statute should state that inquiries may make orders to:

(a) forbid publication of—

(i) the whole or any part of any evidence or submissions presented to the inquiry;

(ii) any report or account of the evidence or submissions;

(iii) the name of any witness or any name or particulars likely to lead to the identification of a witness;

(iv) any rulings of the inquiry;

(b) hold the inquiry or any part of it in private;

(c) restrict public access to any part or aspect of the inquiry.

R28 However, before making any such order, an inquiry must take account of the following criteria:

(a) the risk to public confidence in the proceedings of the inquiry;
(b) the need for the inquiry to properly ascertain the facts;
(c) the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;
(d) the privacy interests of any individual; and
(e) whether such an order would interfere with the administration of justice, including the right to a fair trial.

R29 There should be no restriction on Government's ability to give directions about public access to inquiries by way of their terms of reference.

R30 Decisions about media access and the broadcasting of proceedings should be left to the inquirer's discretion, subject to any directions in the terms of reference.

R31 Legislation should clarify that once an inquiry has concluded its task and its documentation has been transferred to a public department, the Official Information Act 1982 applies to the documentation, except:

(a) sensitive evidence or submissions; and
(b) documents that relate to the internal deliberations of the inquiry.

R32 Guidelines should state that as soon as practicable after the inquiry has reported, all documentation should be transferred to Archives New Zealand.

R33 (a) Guidelines should make it clear that the inquiry, in consultation with the relevant public department should be responsible for the initial categorisation of inquiry documentation for archive purposes.

(b) Once inquiry records have been lodged with Archives New Zealand responsibility for subsequent decisions about access and changes to the original classifications should lie with the administrative head of the relevant public department.

(c) Except that the new Act should provide that if any documents or things are classified as restricted access records within the Public Records Act 2005, the responsible department, in consultation with the inquiry, must specify the date on which that classification must be withdrawn.

R34 Work should be done to clarify the status of non-statutory ministerial inquiries under the Public Records Act 2005 and the Official Information Act 1982.

CHAPTER 7: COSTS ORDERS AND FUNDING LEGAL REPRESENTATION

R35 An inquiry should be able to make a costs order if it is satisfied that the conduct of a person has unduly lengthened, obstructed or added undue cost to an inquiry, at a level the inquirer thinks reasonable in all the circumstances. At the inquirer's discretion he or she may order some or all of the costs to be paid to any other participant.

R36 Costs orders should be able to be made whether or not hearings have been held.

R37 Costs orders should be enforceable in any court of competent jurisdiction.

R38 Inquiries should be able to make a recommendation to their overseeing department that funding for legal representation be granted to certain persons.

In determining whether such a recommendation is made, the inquiry should consider:

(a) the likelihood of hardship to the person if assistance is declined; and

(b) the nature and significance of the evidence that the person will or is likely to give; and

(c) the extent to which representation is required to enable the inquiry to fulfil its purpose; and

(d) any other matter relating to the public interest.

CHAPTER 8: SANCTIONS

R39 The new Act should provide a specific power for the Solicitor-General to commence proceedings for contempt of an inquiry.

R40 The new Act should include the following offences:

(a) intentionally and without lawful excuse failing to attend the inquiry in accordance with the notice of summons;

(b) intentionally and without lawful excuse refusing to be sworn and give evidence;

(c) intentionally and without lawful excuse failing to produce any document or thing required by an order of the inquiry;

(d) intentionally and without lawful excuse destroying evidence, or obstructing or hindering any person authorised to examine, copy or make a representation of a document or thing required by an order of an inquiry;

(e) intentionally and without lawful excuse failing to comply with a procedural order or direction of an inquiry (including breaches of non-publication orders);

(f) intentionally disrupting the proceedings of an inquiry;

(g) intentionally preventing a witness from giving evidence or threatening or seeking to influence a witness before an inquiry;

(h) intentionally providing false or misleading information to an inquiry;

(i) intentionally threatening or intimidating an inquiry or a member or officer of an inquiry.

R41 "Without lawful excuse" should be defined in the new Act to mean that failures to comply with an inquiry's orders and directions may be excused where:

(a) compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel before an inquiry under the new Act;

(b) compliance would be prevented by an enactment, rule of law, or order of a court that prohibits or restricts disclosure of the document, any information, or thing;

(c) compliance would be likely to prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences, and the right to a fair trial.

R42 In a new Act, the maximum fine for offences should be $10,000. The offences should not attract a penalty of imprisonment.

CHAPTER 9: EVIDENCE AND PRIVILEGE

R43 Inquiries should continue to be able to receive evidence that would not be admissible in a court of law.

R44 Witnesses and people appearing before inquiries should no longer be able to refuse to disclose documentation or information in reliance on the privilege against self-incrimination. The privilege should be replaced with an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence.

R45 Section 61 of the Evidence Act 2006 should apply before inquiries in the same way as it applies before courts.

R46 Witnesses and people appearing before inquiries should continue to be able to refuse to disclose information or documentation on the grounds that legal professional privilege applies.

R47 Inquirers should have the power to inspect documents in respect of which privilege or confidentiality is asserted to determine whether or not the document should be disclosed. The Act should also make specific provision for an inquiry to ask an independent person or body to inspect one or more documents for the purpose of establishing whether a claim of privilege should be upheld.

R48 The privileges relating to confidentiality, religious communications, matters of state and confidential journalistic sources should apply before inquiries in the same way that they apply before courts.

CHAPTER 10: IMMUNITIES

R49 All inquirers should be protected by the same immunity.

R50 An inquiry and its members should have no liability for anything it may report, say, do or fail to do in the exercise or intended exercise of its functions unless the inquiry or inquirer acted in bad faith.

R51 Inquirers should not be compellable witnesses in relation to the inquiry, except with the leave of the court if bad faith is alleged.

R52 The new Act should state that the inquiry as a whole should be cited as defendant in review proceedings.

R53 Counsel should continue to have the same immunities as counsel in a court of law.

R54 Witnesses should continue to have the same immunities as witnesses in a court of law.

CHAPTER 11: COURT SUPERVISION OF INQUIRIES

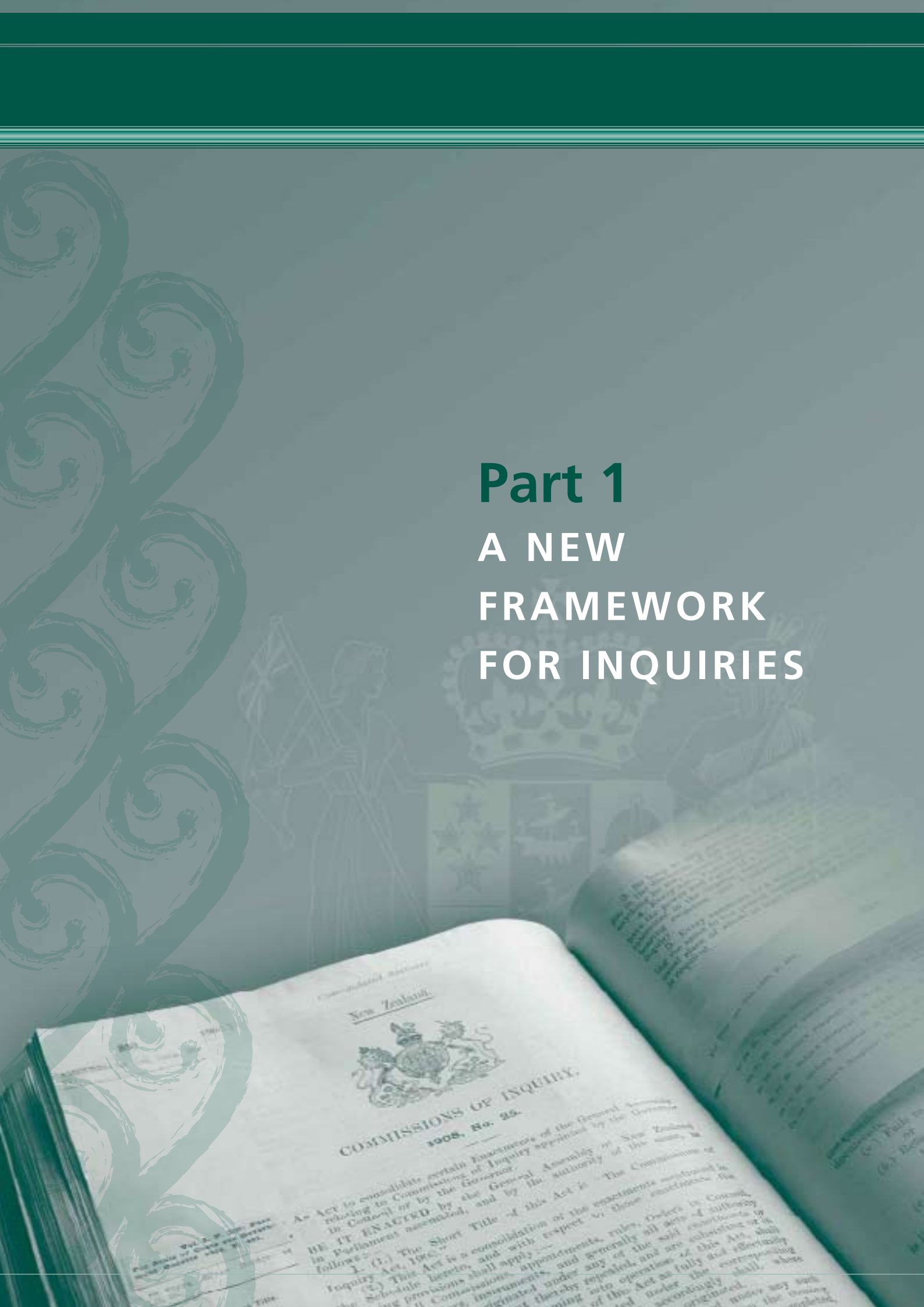
R55 The new Act should retain the ability for the inquiry to state a case to the High Court for directions on the exercise of any of its powers or functions.

R56 The requirement that applications to state a case be made to the Court of Appeal when a member of the inquiry is a serving or former High Court judge should not be retained in the new Act.

CHAPTER 12: MEMBERSHIP	R57	Public inquirers should be appointed by the Governor-General and government inquirers by the Minister establishing the inquiry.
	R58	There should be no statutory requirement as to numbers of inquirers, however, the scope or complexity of some matters will make the appointment of more than one inquirer highly desirable.
	R59	The new Act should provide that when an inquirer leaves an inquiry, Government may require the inquiry to continue with the remaining members, or, if it is appropriate and not contrary to principles of natural justice, replacement members may be appointed.
	R60	The commissioners' fee scales should be reviewed.
	R61	Inquirers should only be removed from office by the Governor-General or the appointing Minister, as the case may be, due to misconduct, inability to perform the functions of office, or neglect of duty.
CHAPTER 13: COUNSEL ASSISTING	R62	The new Act should provide that, where the appointment of counsel assisting is considered appropriate, he or she should be appointed by the Solicitor-General, after discussion with the inquirers.
	R63	The Solicitor-General should be responsible for setting terms and conditions of appointment and for approving counsel assisting invoices.
CHAPTER 14: FUNDING AND ADMINISTRATION	R64	Inquiries should be overseen by the Department of Internal Affairs unless another department is appointed to be the responsible department for that inquiry.
	R65	If the Department of Internal Affairs' role in inquiries is formalised and its responsibilities increased, as suggested in this report, it may be desirable for the Department to receive a specific allocation for inquiries.
	R66	The new Act should provide that in making a decision as to the conduct of an inquiry, an inquiry must have regard to the need to avoid unnecessary delay or cost, whether to public funds or to witnesses or other persons participating in the inquiry.
CHAPTER 15: OTHER INQUIRY BODIES AND THE STATUS OF THE 1908 ACT	R67	(a) Sections 2 and 15 of the 1908 Act should be repealed. (b) The remainder of the 1908 Act should remain in force but a review of the statutory entities that take their powers from 1908 Act, including those set out in Schedule 1 of the draft Bill, must take place to enable the 1908 Act to be finally repealed. The new Act should contain a review provision to this effect. (c) The Government should consider giving the Law Commission a further reference to review the powers needed by those bodies and to rationalise the various inquiry powers on the statute book.

Part 1

A NEW FRAMEWORK FOR INQUIRIES



Chapter 1
Introduction

SCOPE OF REVIEW

1.1 The Law Commission has been asked to review the law relating to public inquiries. We have reviewed the Commissions of Inquiry Act 1908 which sets out the overarching framework and powers of commissions of inquiry and royal commissions. The Act, which is in its hundredth year, has been the subject of a number of significant amendments and is now due for an overhaul.

1.2 In addition, we have considered non-statutory ministerial inquiries, which are used from time to time by the Government to investigate various matters. We have not directly examined other forms of inquiry such as:

- inquiries instigated by a Minister, Chief Executive or statutory officer under a specific statutory power;[4]
- inquiries by permanent bodies or officers, such as the Ombudsman, Auditor-General, State Services Commission, Transport Accident Investigation Commission and Parliamentary Commissioner for the Environment;
- inquiries carried out by parliamentary select committees;
- internal inquiries established by department heads into departmental practice and procedure;[5]
- day to day core business of government departments; and
- inquiries that take place in the private sector (for instance by sporting bodies or the stock exchange).

1.3 Nevertheless, we have considered those bodies and investigations as part of the landscape within which royal commissions, commissions of inquiry and non-statutory ministerial inquiries sit. Consideration of these other bodies has helped us make recommendations about particular aspects of inquiries.

4 For example, under the New Zealand Public Health and Disability Act 2000, ss 71 and 72.

5 Such as the Department of Corrections internal investigation into the Graeme Burton case, the report of which was released on 6 March 2007. See http//www.corrections.govt.nz (accessed 15 November 2007).

Commissions of inquiry

1.4 Statutory commissions of inquiry were introduced in New Zealand under the Commissioners' Powers Act 1867. Despite a number of amendments over the years and various extensions of commissioners' powers, the overall framework has remained consistent since 1903.[6]

1.5 Under s 2 of the 1908 Act, the Governor-General may, by Order in Council:

> appoint any person or persons to be a Commission to inquire into and report upon any question arising out of or concerning—
>
> (a) the administration of the Government; or
>
> (b) the working of any existing law; or
>
> (c) the necessity or expediency of any legislation; or
>
> (d) the conduct of any officer in the service of the Crown; or
>
> (e) any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury; or
>
> (f) any other matter of public importance.[7]

1.6 The 1908 Act gives commissions of inquiry the power to require the production of evidence, compel witnesses and take evidence on oath.[8] Those carrying out the inquiry, and witnesses to it, are protected by certain immunities and privileges.[9]

Royal commissions

1.7 Royal commissions are established by the Governor-General under powers conferred by the Letters Patent.[10] Section 15 of the 1908 Act extends the provisions of the Act to royal commissions. Therefore, other than their means of appointment, there is no difference in law between the two types of inquiry. Like commissions of inquiry, royal commissions are generally, but not always,

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6 The Act was extended in 1872 and replaced in 1903 by the Commissioners' Act, which gave more comprehensive powers to commissioners and specified the purposes for which a commission could be set up. A 1905 amendment allowed judges on commissions to exercise their (then) Supreme Court powers, and extended the Act to cover royal commissions appointed under the Letters Patent. The Commissions of Inquiry Act 1908 consolidated the 1903 and 1905 Acts. It has been amended five times since 1908, by the Commissions of Inquiry Amendment Acts 1958, 1968, 1970, 1980 and 1995.

7 Because of the initially narrow remit of s 2, paragraph (f) was added in 1970. Its "catch all" nature has the impact of significantly broadening the issues for which commissions of inquiry can be used.

8 See chapter 5.

9 See chapters 9 and 10.

10 Article X of the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (SR 1983/225) states: "And We do hereby authorise and empower Our Governor-General, from time to time in Our name and on Our behalf, to constitute and appoint under the Seal of New Zealand, to hold office during pleasure, all such Members of the Executive Council, Ministers of the Crown, Commissioners, Diplomatic or Consular Representatives of New Zealand, Principal Representatives of New Zealand in any other country or accredited to any international organisation, and other necessary Officers as may be lawfully constituted or appointed by Us."

chaired by a judicial or retired judicial officer.[11] They are seen by some as having greater status than commissions of inquiry: "Because they are appointed in the name of the Sovereign, royal commissions usually enjoy greater prestige than ordinary commissions …".[12]

1.8 There was previously some suggestion that because royal commissions are established by prerogative, they have a wider potential remit than s 2 of the Act allows for commissions of inquiry. However, the addition of s 2(f) of the Act in 1970 has largely removed the need for any such debate.[13]

Non-statutory ministerial inquiries

1.9 Ministers can establish non-statutory inquiries into areas of administration for which they are responsible (although frequently such decisions are made by Cabinet as a whole). For ease, we refer to these non-statutory inquiries as "ministerial inquiries" throughout this report.[14] Although ministerial inquiries have no official status, they appear to be increasingly preferred. No central record is kept of this form of inquiry but an incomplete list can be found in appendix D. For instance, recently a ministerial inquiry was announced into the Police, Department of Corrections, and Courts over their management of a parolee who caused death by dangerous driving.[15] Two other recent ministerial inquiries into the conduct of former Ministers, Taito Phillip Field[16] and John Tamihere,[17] were established by the Prime Minister and reported directly to her. Ministerial inquiries have also been held into the conduct of the Peter Ellis case,[18] and the telecommunications and electricity industries.[19]

1.10 A ministerial inquiry is conducted without the powers to compel witnesses or the production of documents, or to administer oaths. No person involved in such an inquiry – that is inquirers, lawyers or witnesses – is protected by any immunities or privileges. They often take place in private, although the resulting report is usually publicly available.

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11 The *Royal Commission on Broadcasting and Related Telecommunications* [1986] IX AJHR H 2 was a recent exception, chaired by Professor R Chapman.

12 Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980) para 27.

13 There is no restriction under the prerogative powers on the types of issues for which royal commissions may be appointed. The extent to which the s 2 restrictions apply to royal commissions established under the Letters Patent was considered, but not determined, in *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 261 (CA) Judgment of the Court. As every royal commission in the last 30 years has been expressed to have been created under both the Letters Patent and the 1908 Act, it is likely to be the case that s 2 does indeed apply to those commissions.

14 Although certain Acts give Ministers the power to establish an inquiry with identical or similar powers to those under the 1908 Act.

15 Announced by Minister of State Services, Annette King on 13 September 2007. The inquiry is to be conducted by Kristy McDonald QC. See *Ministerial Inquiry into Matters Relating to the Death of Debbie Marie Ashton – Terms of Reference* http://www.ssc.govt.nz (accessed 30 October 2007).

16 Dr Noel Ingram QC *Report to Prime Minister Upon Inquiry into Matters Relating to Taito Phillip Field* (2006).

17 Douglas White QC *Inquiry into Matters Relating to Te Whānau o Waipareira Trust and Hon John Tamihere* (2004).

18 Rt Hon Sir Thomas Eichelbaum *Ministerial Inquiry into the Peter Ellis Case* (2001).

19 Hon David Caygill *Ministerial Inquiry into the Electricity Industry* (2000) and Hugh Fletcher *Ministerial Inquiry into Telecommunications* (2000).

THREE BROAD PROBLEMS

1.11 In the process of our review, we have identified three broad problems with the existing inquiry structure. These relate to:

- the 1908 Act, which is antiquated, has been amended in an ad hoc fashion and is overdue for a complete re-examination;
- the cost of, legalistic procedures adopted by, and culture associated with commissions; and
- the fact that ministerial inquiries take place outside a statutory framework and without powers or protections.

COMMISSIONS OF INQUIRY ACT 1908

A "patchwork Act"

1.12 The 1908 Act needs to be modernised and streamlined. In 1962, in *Re the Royal Commission to Inquire into and Report upon State Services* (the *State Services* case)[20] Justice North said:

> The Act as it now stands is a patchwork Act and the meaning of the language used is by no means easy to ascertain.

1.13 The Act, which itself is a consolidation of pre-existing legislation,[21] has been amended seven times since 1908.[22] The application of some of those amendments has given rise to confusion.[23] Some amendments have been made hurriedly, in response to the circumstances or experiences of a single inquiry, without due consideration of their impact on the Act as a whole.

1.14 For instance, amendments were made during the Commission of Inquiry into Certain Matters Relating to Taxation (the Wine-box inquiry) to enhance that inquiry's coercive powers. The inquiry was headed by retired Chief Justice, Sir Ronald Davison. The amendments made it clear that current and former High Court judges conducting inquiries can punish for contempt both before and outside inquiry hearings,[24] and issue warrants for arrest and detention where, for instance, a subpoenaed witness fails to attend or refuses to give evidence.[25] Commissions which do not include current or former High Court judges do not have such extensive powers. The amendments were made notwithstanding a 1980 recommendation of the Public and Administrative Law Reform Committee that the different treatment of High Court judges and other commissioners under the Act be ended.[26]

1.15 The Act has also been described as having a heavy, "constitutional" feel which is out of step with the realities of modern public administration.[27] Given its age, this is not surprising. The emphasis on adversarial concepts such as "parties", prolixity of some of the provisions and outdated terminology preserve this feel.

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20 *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96, 107 (CA) North J.

21 See Commissions of Inquiry Act 1908, Schedule.

22 See above n 6.

23 *State Services* case, above n 20, 106 (CA) Gresson P, where amendments to the provisions relating to "parties" and persons "entitled to be heard" were considered. See chapter 4.

24 Commissions of Inquiry Act 1908, s 13B.

25 Ibid, s 13A.

26 Public and Administrative Law Reform Committee, above n 12, para 62.

27 Wellington District Law Society Public Law Committee (submission to the Law Commission, 13 March 2007).

No recent review

1.16 There has been no substantial examination of the Act since a 1980 review by the Public and Administrative Law Reform Committee.[28] The Committee recognised that "commissions of inquiry are part of the regular machinery of government" and stated that the Committee's aim was to ensure:[29]

> … that they have adequate powers to perform the functions entrusted to them and that, at the same time, the citizen is properly protected from the misuse of those powers.

1.17 The Committee proposed numerous changes to the Act and appended draft legislation to its report, but only around half of the proposals were adopted. We deal in detail with many of the same issues tackled by the Committee in the following chapters of this report. Among other things, their proposals sought to clarify the powers of inquiries and the sanctions they could impose, remove certain anomalous provisions,[30] and give statutory backing to some natural justice rules. While not all of our recommendations follow those of the Committee, a number of their recommendations deserve reconsideration in the light of significant inquiries and court cases that have taken place since 1980 (notably in relation to the Erebus disaster and the Wine-box documents). In addition, modern expectations of legislation and statutory developments relating to official information, human rights, and the rules of evidence have had an impact on inquiries.

CHANGE OF CULTURE REQUIRED

1.18 Commonly expressed concerns about commissions of inquiry and royal commissions relate to their cost and duration. Although the current Act does not require it, commissions have tended to adopt legalistic processes and to be burdened by adversarial practices. This results in delays, higher costs and increased likelihood of litigation.

1.19 The most expensive recent inquiry – the Wine-box inquiry – cost the taxpayer in excess of $10 million.[31] The broader inquiry costs, including all the parties' legal costs, were far in excess of this. In addition, over the last 30 years, commissions of inquiry and royal commissions have usually taken longer than predicted, at times significantly so (see appendix E). Only 2 of the 31 commissions over that period reported early, and one on time.

1.20 Cost and delay need to be considered in context. Often the timeframes are unrealistic to begin with, or the scope of the issues to be covered is not clear until considerably further along in the process. There may also be financial

28 Public and Administrative Law Reform Committee, above n 12. The members of the Committee were Professor J F Northey (Chair), Professor K J Keith, Professor D L Mathieson, Dr R G McElroy, Mr E A Missen, Mr R G Montagu, Judge D F G Sheppard, Mr E W Thomas and Mr D A S Ward.

29 Public and Administrative Law Reform Committee, above n 12, para 11.

30 Notably those relating to District Court and High Court judges, parties and "persons entitled to be heard", and the lack of provision for immunities and privileges for witnesses appearing voluntarily.

31 In comparison, the Department of Internal Affairs informs us that the Commission of Inquiry into Police Conduct costs are currently at around $4.894 million and that the Royal Commission on Genetic Modification cost $4.36 million.

and non-financial costs in not investigating a matter of public concern; hidden costs in having government departments or standing commissions investigate; costs of legal action that may be avoided; and future savings made by virtue of the implementation of an inquiry's recommendations. But, commissions have consistently cost significantly more than other forms of inquiry.[32]

1.21 Any one-off inquiry is likely to be expensive, but a great deal of this additional cost can be attributed to:

- the practice of holding formal proceedings, akin to court hearings;
- the exercise of commissioners' discretion to allow examination and cross-examination by parties' legal representatives;
- the adoption of obstructive or adversarial stances by some participants who approach the inquiry as they would a court case; and
- the infrastructure that tends to be assembled as a matter of course for each commission.

1.22 A change of culture is required. The costly and legalistic practices which have developed have dogged many recent inquiries. The negative perceptions associated with royal commissions and commissions of inquiry act as a deterrent to setting them up. The Wellington District Law Society Public Law Committee has expressed a similar view, observing that:[33]

> The term "commission of inquiry" has certain connotations of formality and independence, that are worth preserving for some types of inquiry. But the term tends to encourage certain assumptions about method and process, sometimes depending on one's background … (For example, lawyers trained in adversarial processes are more likely to favour instinctively a quasi-judicial approach over a fully inquisitorial one.)
>
> Those assumptions and trends are unfortunate … because it is clear that some forms of inquiry which do not necessarily justify the "commission" label would nevertheless benefit from some of the powers available under the 1908 Act.

1.23 The 1908 Act, as it stands, largely enables inquiries to be flexible in the processes they adopt to carry out their tasks. However, the application of some of its provisions has, we think, encouraged an unnecessarily adversarial approach to inquiries that has become the norm. The Act's inherent flexibility has therefore become constrained by the culture that has developed alongside it.

1.24 Our recommendations in chapter 2 for a new inquiry framework and the procedural enhancements suggested in this report are aimed, in part, at making inquiries more flexible and at effecting a culture change. The legislation, however, can only go so far. We think it is incumbent on the individual players in an inquiry to focus on this issue as well.

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32 The costs of recent ministerial inquiries are as follows: Report to the Prime Minister upon Inquiry into Matters Relating to Taito Phillip Field (2006) – $479,000; Inquiry into matters relating to Te Whānau o Waipareira Trust and Hon John Tamihere (2004) – $251,000; Allegations of Abuse at the Waiouru School from 1948 to 1991 and Events Surrounding the Killing of Cadet Grant Bain in 1981 (2005) – $456,000.

33 Wellington District Law Society Public Law Committee (submission to the Law Commission, 13 March 2007).

MINISTERIAL INQUIRIES

1.25 The third problem we have identified is that the existing statutory framework is too rigid. At present the only choice is between a "bells and whistles" commission on the one hand and a non-statutory ministerial inquiry on the other. While ministerial inquiries have the benefit of being accompanied by less fanfare, in many respects they are the poor cousins of inquiries under the 1908 Act.

1.26 Despite this, ministerial inquiries are often seen as a quick and cost-effective way to have an independent investigation. However, because they take place outside any statutory framework, they do not have any coercive powers or protections. The new statutory framework suggested in chapter 2 is also directed at tackling this issue.

OTHER MOTIVATIONS FOR CHANGE

1.27 Other factors suggest that the law relating to public inquiries warrants review. There has been a shift away from the use of commissions of inquiry and royal commissions in New Zealand, particularly since the early 1980s. During Prime Minister Muldoon's leadership, commissions were part of the regular machinery of government,[34] but they have been less popular with subsequent governments.[35] Whereas an average of three to four commissions a year were held between 1947 and 1980, only 10 have been established since 1984.[36]

1.28 Another factor is the considerable growth in the number of inquiries held by other bodies with inquisitorial functions. Many other bodies with policy or inquiry functions were established in the 1980s (for example, the Commerce Commission, Parliamentary Commissioner for the Environment and Law Commission).[37] In 1985, parliamentary select committees were given a general power to initiate inquiries.[38] With the introduction of mixed member proportional representation in 1996, the lack of a clear government majority on many select committees also means they have had far more freedom to exercise this power.

Other statutory inquiries

1.29 The 1908 Act has also served as a useful drafting tool in relation to other bodies with investigatory, regulatory or adjudicative functions. Sixty-two statutes provide for a person or body to be deemed a commission of inquiry under the 1908 Act, or for it to exercise some or all of the powers under the Act for specified purposes. Examples are the Waitangi Tribunal, Broadcasting Standards Authority, Environmental Risk Management Authority, Refugee Status Appeals Authority and Social Security Appeal Authority. Some of the bodies are tribunals with adjudicative powers and some perform regulatory tasks. However, at least 16 provisions relate to the appointment of inquiries similar to

34 Tony Black "Commissions of Inquiry" (1980) 19 NZLJ 425. See also, Geoffrey Palmer "Muldoon and the Constitution" in M Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004) 189.

35 It is true, however that future administrations may show an affection for them similar to that displayed by Muldoon and some of his predecessors: Dr Alan Simpson (submission to the Law Commission, 6 March 2007).

36 During our review, the Government announced a royal commission – the first since 2000 – into local government in Auckland.

37 Also in 1985, the Waitangi Tribunal was given the power to inquire into claims relating to treaty breaches dating back to 1840, when the Treaty was signed.

38 Standing Order 190(2) now enables them to initiate inquiries into any matters that fall within their defined subject portfolios.

commissions of inquiry.[39] For instance, s 27(4) of the Health and Safety in Employment Act 1992 gives the Minister the power to appoint an inquiry into the cause of an accident, and that inquiry is to have all the powers of a commission of inquiry.

1.30 At least a further 12 Acts contain powers to set up one-off inquiries which have coercive powers that are identical or similar to commissions but which do not rely on the 1908 Act.[40] The proliferation of varying inquiry provisions on the statute book suggests that a whole of government approach has been lacking.

1.31 This paper does not deal directly with such inquiries, however any recommendations we make about the 1908 Act have implications for these bodies. In chapter 15, we propose that the 1908 Act should remain in force for the purpose of these bodies. Work should then be undertaken to review which powers each entity needs and to rationalise the various inquiry powers on the statute book. We discuss this further in chapter 15.

INQUIRY ADMINISTRATION AND PROCEDURE

1.32 One of the Public and Administrative Law Reform Committee's proposals was that a handbook be drawn up to assist commissions of inquiry in determining their procedure and to ensure that all necessary steps are taken. In 2001, the Department of Internal Affairs, which has been responsible for administering most inquiries, published guidelines entitled *Setting Up and Running Commissions of Inquiry*. The guidelines state that they are directed primarily at those involved in the setting up and running of commissions of inquiry and they update two earlier publications.[41] These give overviews of the nature of commissions of inquiry, their manner of appointment and jurisdiction, powers, procedures and administrative arrangements.

1.33 We have drawn on these publications but have also considered the wider environment in which inquiries operate. No substantial review of the law relating to public inquiries in New Zealand can be undertaken in isolation from the pragmatic issues that face inquiries. Commissions of inquiry are peculiar bodies. The need for an inquiry can arise with little warning. Often their subject matter has not previously been the subject of an inquiry, indeed, few if any of the people involved will have been a participant in an inquiry before. Most inquiries will involve a unique mix of conduct, policy and other matters and once an inquiry has reported, its authority and status is, immediately, exhausted. Because of their

39 Statutory inquiry functions taking powers from 1908 Act include: Biosecurity Act 1993, sch 2; Environment Act 1986, s 16(2); Fire Service Act 1975, s 86; Forest and Rural Fires Act 1977, s 59; Health and Safety in Employment Act 1992, s 27; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 101; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 26; Local Government Act 2002, s 34; Maritime Transport Act 1994, s 58; Mental Health (Compulsory Assessment and Treatment) Act 1992, s 95; New Zealand Public Health and Disability Act 2000, s 71; Police Act 1958, s 12; Shipping Act 1987, s 5; State Sector Act 1988, s 25; Temporary Safeguard Authorities Act 1987, s 4; Transport Accident Investigation Commission Act 1990.

40 Inquiry powers conferred by their own statutes include: Children's Commissioner Act 2003, s 12; Electricity Act 1992, s 18; Gas Act 1992, s 19; Hazardous Substances and New Organisms Act 1996, s 11(1)(e); Health and Disability Commissioner Act 2004, s 14(1)(e); Human Rights Act 1993, s 5; Inspector-General of Intelligence and Security Act 1996, s 11; New Zealand Public Health and Disability Act 2000, s 7; Ombudsmen Act 1975, s 13(3); Police Complaints Authority Act 1988, s 12; Privacy Act 1993, s 13(1)(m); Public Audit Act 2001, s 18(1).

41 E J Haughey and E J L Fairway *Royal Commissions and Commissions of Inquiry* (Department of Internal Affairs, Wellington, 1974) and Mervyn Probine *Administrative Arrangements for Setting Up and Conducting Royal Commissions and Commissions of Inquiry* (Department of Internal Affairs, Wellington, 1989).

infrequent occurrence, they may encounter difficulties from a lack of institutional knowledge, both in the government agencies responsible for their establishment and from commissioners and staff appointed to carry them out. Each time an inquiry is appointed, there is some reinvention of the wheel.

1.34 While there is some temptation to propose legislative guidance for some of these administrative and procedural matters, our recommendations are for a new Act which remains relatively bare. Our broad approach is to recommend law changes that clarify matters for inquiries and provide a robust but understandable legislative framework, while at the same time promoting flexibility.

1.35 We do, however, consider that there should be more guidance about the initial decision to set up an inquiry. This decision can take place in a pressured environment and there is a need to ensure that it is as well-informed as possible. In our draft report we proposed that a section on the establishment of inquiries be added to the Cabinet Manual. Material on inquiries now forms part of chapter 4 of the revised Manual – the Cabinet Manual 2008 – which was published in April 2008. We suggest that the Cabinet Manual should be further updated if a new Inquiries Act is passed.

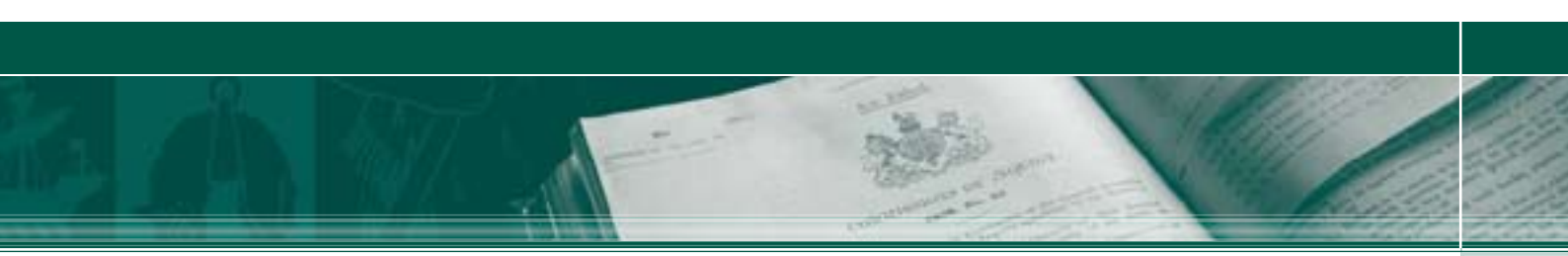
1.36 Secondly, the Department of Internal Affairs has confirmed that it will update its 2001 Manual if new legislation is passed. We consider this to be a very important task. We note in this report that legislative change can only go so far in ensuring that inquiries, once in operation, are conducted in the most effective and efficient manner. Guidance in the Manual on the flexible nature of the Act and on the available procedural options will, we hope, mean that it will be an important resource for government, inquirers and participants.

RECOMMENDATION

R1 The material on inquiries contained in the Cabinet Manual 2008 should be updated if a new Inquiries Act is passed.

RECOMMENDATION

R2 The Department of Internal Affairs should revise and update its publication *Setting Up and Running Commissions of Inquiry.*



Chapter 2
A New Inquiries Act

NATURE AND PURPOSE OF INQUIRIES

2.1 Commissions of inquiry, royal commissions and ministerial inquiries have no permanent structure or status. They often arise out of unanticipated events, such as major accidents, or other events that have given rise to significant public concern. It can be difficult to predict what mix of circumstances will give rise to an inquiry. Each will have its own different motivations, blend of facts and events, and each will be directed at a different combination of outcomes. Indeed, the various motivations for inquiries are as numerous and varied as the attempts to define them.[42]

2.2 Recently, the British House of Commons Public Administration Select Committee summarised the reasons why inquiries are set up.[43] These reasons are apt for New Zealand inquiries, but we have added to the list "policy development", which has featured prominently in New Zealand inquiries.

Establishing the facts—providing a full and fair account of what happened, especially in circumstances where the facts are disputed, or the course and causation of events is not clear.

Learning from events—and so helping to prevent their recurrence by synthesising or distilling lessons which can be used to change practice.

Catharsis or therapeutic exposure—providing an opportunity for reconciliation and resolution, by bringing protagonists face to face with each other's perspectives and problems.

Reassurance—rebuilding public confidence after a major failure by showing that the government is making sure it is fully investigated and dealt with.

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42 For example, K C Wheare *Government by Committee: An Essay on the British Constitution* (University of Oxford Press, London, 1955); Charles J Hanser *Guide to Decision: The Royal Commission* (The Bedminster Press, Totawa, 1965); R E Wrath and G B Lamb *Public Inquiries as an Instrument of Government* (Allen & Unwin, London, 1971); G Rhodes *Committees of Inquiry* (George Allen & Unwin Ltd, London, 1975); L A Hallett *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Lawbook Co, Sydney, 1982); Martin Bulmer "Commissions as Instruments for Policy Research" 26 American Behavioral Scientist 555; Scott Prasser "Royal Commissions and Public Inquiries: Scope and Uses" in P Weller (ed) *Royal Commissions and The Making of Public Policy* (Macmillan Education, Australia, 1994).

43 House of Commons Public Administration Select Committee *Government by Inquiry: Volume 1* (The Stationery Office Limited, London, 2005) 9–10. These reasons were adopted by the Law Reform Commission of Ireland in its report *Public Inquiries Including Tribunals of Inquiry: Report 73* (LRC, Dublin, 2005) 20. Most of the proposals in the Commission's report are now before the Irish Parliament in the form of the Tribunals of Inquiry Bill 2005 which commenced the Second Stage of its debate on 20 November 2007.

Accountability, blame, and retribution—holding people and organisations to account, and sometimes indirectly contributing to the assignation of blame and to mechanisms for retribution.

Political considerations—serving a wider political agenda for government either in demonstrating that "something is being done" or in providing leverage for change.

Policy development—isolating expertise, resources and time for an apolitical and in depth consideration of novel or wide-reaching matters of policy or legislation.

2.3 Common to all inquiries, however, is the need to find and receive information, whether in relation to a past event, an existing set of circumstances, or projections for the future; and to make recommendations based on that information. Any proposals about inquiries, therefore, need to provide the tools for them to achieve this.

2.4 The status of inquiries within the political and legal system is unique. In effect, they are established by and report to the Executive. The Executive appoints their members, determines their terms of reference, timeframes and budget. No individual has a right to an inquiry and there is no concrete process (other than political and media pressure) whereby the public can have a say in their establishment or the implementation of their findings. Unlike courts, Parliament and the Executive itself, they have no constitutional independence. Their findings are not binding – it is for Government alone to decide whether to implement their recommendations.[44]

2.5 Despite their lack of constitutional status, inquiries can and do act as tools for holding government and public bodies to account. Inquiries are often appointed where concern has reached such a level that it is necessary to hold one to allay public unease. Furthermore, investigation and criticism of government action or public employees frequently occurs as a consequence of inquiries. Improvements in procedures almost always result. Inquiries can provide the public with assurance that the facts surrounding an alleged failure will be subjected to objective scrutiny. Recent inquiries overseas bear this out. The Cole inquiry[45] in Australia into the activities of the Australian Wheat Board and the Hutton[46] and Butler[47] inquiries concerning the United Kingdom's

44 R A MacDonald "The Commission of Inquiry in the Perspective of Administrative Law" (1980) 18 Alta LR 366, 387.

45 Hon Terence RH Cole QC *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (November 2006) http://www.oilforfoodinquiry.gov.au (last accessed 12 December 2006).

46 Lord Hutton *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG* (The Stationery Office, London, 2004). The terms of reference were: "urgently to conduct an investigation into the circumstances surrounding the death of Dr Kelly." Dr Kelly was a senior civil servant and past UN weapons inspector.

47 Rt Hon Lord Butler of Brockwell *Report of a Committee of Privy Counsellors: Review of Intelligence on Weapons of Mass Destruction* (The Stationery Office, London, 2004). The terms of reference for the report were: "(1) To investigate the intelligence coverage available on WMD programmes of countries of concern and on the global trade in WMD, taking into account what is now known about these programmes. (2) As part of this work, to investigate the accuracy of intelligence on Iraqi WMD up to March 2003, and to examine any discrepancies between the intelligence gathered, evaluated and used by the Government before the conflict, and between that intelligence and what has been discovered by the Iraq Survey Group since the end of the conflict. (3) To make recommendations to the Prime Minister for the future on the gathering, evaluation and use of intelligence on WMD, in the light of the difficulties of operating in countries of concern."

involvement in the Iraq war, while not entirely fulfilling public expectations, have shed light on the processes of government in a way other mechanisms might not.[48]

A PLACE FOR INQUIRIES?

2.6 We consider that there is an ongoing need for inquiries such as those established under the 1908 Act. It is true that many other mechanisms, bodies and officers perform similar fact-finding, inquiry and policy functions.[49] In some cases a specialist or permanent body may be better placed to undertake an inquiry because of its expertise, experience and institutional knowledge. However, an inquiry under the 1908 Act, often headed by a judicial officer, may provide a more independent perspective.

2.7 The one-off nature of inquiries also means that they offer the opportunity for a flexible approach to problems. They can be adapted to suit individual issues by decisions about their terms of reference, composition, budget and resources, and by the procedure adopted by the inquirers themselves.

2.8 In some instances the scale of an incident warrants its own, dedicated inquiry. Whereas permanent organisations with ongoing work may be swamped by the magnitude of a large scale accident or event, a one-off inquiry means that resources can be isolated and uninterrupted attention given, untrammelled by normal organisational practices, capped staffing levels, existing budgets and other restrictions. It may also be undesirable for an organisation to be responsible for reviewing its own conduct or procedures.

2.9 The Commission of Inquiry into Police Conduct was an example where an internal police investigation or inquiry by the (then) Police Complaints Authority would not have met public concerns, particularly as the allegations were of such an historic, systemic and grave nature. It is this "independent" nature that appears frequently to be a deciding factor in whether a one-off body like a commission of inquiry is chosen over an alternative mechanism.

2.10 It is also worth reflecting on the very valuable contributions that inquiries have made to New Zealand policy and legislation. Our accident compensation scheme and electoral system owe their genesis to commissions, as do some of the most significant developments to our court system. It is unlikely that such sweeping changes would have been recommended by existing agencies. The recently established Royal Commission into Auckland Governance may likewise bring about significant changes.

48 See Peter Hennessy "The Lightning Flash on the Road to Baghdad: Issues of Evidence" in W G Runciman (ed) *Hutton and Butler: Lifting the Lid on the Workings of Power* (OUP, Oxford, 2004) 63.

49 These include the courts, Parliament, parliamentary select committees, government ministries and departments, as well as permanent review and investigatory agencies, such as the Ombudsmen, Auditor-General, Parliamentary Commissioner for the Environment, Commerce Commission, Securities Commission, State Services Commissioner, Inspector-General of Intelligence and Security, Privacy Commissioner, Children's Commissioner, Health and Disability Commissioner, Human Rights Commission, Law Commission, Families Commission and Mental Health Commission. Again, some of these take their powers from the 1908 Act.

2.11 Demands for one-off inquiries, whether justified or not, are no less prevalent than in the past. In May to September 2007, numerous calls for inquiries were reported in the media.[50] Such demands emphasise the public enthusiasm for inquiries, and they highlight that in our increasingly complex society, independent review is perceived as an important way of seeking answers and allaying public concerns.

2.12 British commentators Clokie and Robinson have concluded that "every democratic parliamentary system finds it necessary to establish some form of supplementary institution to aid in the preparation of legislation, to investigate maladministration on the part of the executive, and to protect the citizens at large from unintentional invasion by governmental agencies".[51] Recent law reform reviews of inquiries in the United Kingdom, Ireland, Australia and Canada have all supported the continuation of such bodies.[52] During our review, no one has advocated for their abolition. While the role and popularity of one-off, statutory inquiries may have declined in recent years, there is no doubt in the Law Commission's view that as a mechanism, they must be retained.

A NEW APPROACH

2.13 In chapter 1 we noted the problems caused by the cost and legalistic procedures often associated with commissions. Despite these concerns, commissions of inquiry and royal commissions have tended to adopt very formal processes. This means they often involve greater participation by lawyers, higher costs and more delay than might otherwise be the case.

2.14 We recognise that some issues require the formality and processes currently associated with commissions. Where large scale accidents take place, such as the Erebus plane crash in Antarctica, public confidence will likely only be restored by a formal inquiry where evidence is heard and tested in a public hearing. Any such inquiry is likely to be highly charged and will be required to take account of fiercely competing interests. Reputation and commercial interests, and the integrity of government systems and processes can be at stake. In these circumstances, public hearings, with the examination and cross-examination of witnesses may be the only way that natural justice can be met. The prestige that tends to accompany commissions can also be beneficial in reassuring the public that a matter of concern is being taken seriously.

50 See "Greens add voice to inquiry call" (7 September 2007, Christchurch Press) in relation to the downfall of carpet manufacturer Feltex; "Police calls for Commission of Inquiry on Gangs" (12 July 2007, Dominion Post); "Arthur Allan Thomas campaigner urges pardon for David Bain" (14 May 2007, Radio New Zealand Newswire) where a call was made for a royal commission into David Bain's conviction; and "Greens fear other Crown entities may be spying on protesters" (28 May 2007, Radio New Zealand Newswire) where the Green Party called for a commission of inquiry into Crown entities, saying some may be spying on people who oppose their operations. Three inquiries were announced in less than a month in September, relating to local government in Auckland (royal commission); a parolee who caused death by dangerous driving (ministerial inquiry); and the sacking of public servant Madeleine Setchell (inquiry under the State Services Act 1988). See also, reference to the suggestion that the Supreme Court should order a commission of inquiry into the Behaviour Management Regime at Auckland Prison in *Taunoa v Attorney-General* [2007] NZSC 70, para 222, (SC) Blanchard J.

51 H M Clokie and J W Robinson *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Octagon Books, New York, 1969) 22.

52 See The Law Reform Commission of Ireland, above n 43; Department for Constitutional Affairs *Effective Inquiries: A Consultation Paper Produced by the Department for Constitutional Affairs* (Department for Constitutional Affairs, London, 2004); Tasmania Law Reform Institute *Report on the Commissions of Inquiry Act 1995* (Tasmania Law Reform Institute, Hobart, 2003); Alberta Law Reform Institute *Proposals for the Reform of the Public Inquiries Act: Report 62* (Alberta Law Reform Institute, Edmonton, 1992); Ontario Law Reform Commission *Report on Public Inquiries* (Ontario Law Reform Commission, Toronto, 1992); Law Reform Commission of Canada *Advisory and Investigatory Commissions: Report 13* (Law Reform Commission of Canada, Ottawa, 1979).

2.15 However, many inquiries could more effectively and efficiently deal with the issues in less formal ways. Evidence concerning existing or future policies and procedures does not need to be presented before an open sitting of the inquiry. Many fact-finding steps could be undertaken, at least in part by, a wider variety of means than oral hearings. The scale of an issue may not warrant the time and cost involved in formal hearings. For example, some issues dealt with by ministerial inquiries have related to a particular geographic area,[53] specific issues within one industry,[54] or relatively narrow topics.[55] These were not considered sufficiently large or complex to demand the formal procedures and cost of a full commission of inquiry, but nevertheless called for independent review.

2.16 Because of the culture of formality that has developed, issues that are not considered to warrant a full commission (whether because of their perceived importance or concerns about cost) are often investigated outside a statutory framework. While many ministerial inquiries have been very successful, this has two potential downsides.

2.17 First, there are no protections in place for the inquirers, witnesses or counsel (if any). In some cases, it may be difficult to find people with appropriate skills willing to undertake some inquiries if they are not protected by an immunity against legal suit, including defamation proceedings. While the inquirer could seek a one-off indemnity, a statutory immunity provides a far more effective and transparent shield. Witnesses are also more likely to cooperate if it is clear that they have the protections of the standard privileges and immunities accorded to witnesses appearing before courts.

2.18 Non-statutory inquiries cannot compel witnesses or require the production of information. While some people, such as government employees, may have a professional incentive to cooperate with an inquiry, other witnesses may not. In those circumstances, an inquiry may find itself delayed or unable to complete its task satisfactorily. This adds to cost, and is undesirable for all those involved, especially for any person being investigated, whose reputation and livelihood are at stake.

Responses to our draft report

2.19 In our draft report we proposed that these problems should be dealt with by the introduction of a new Public Inquiries Act. We noted that our proposals are for the amendment of nearly all the provisions in the 1908 Act and that a new Act was required to lay the basis for a fresh start to public inquiries and to promote the required culture change. We proposed that the new Act would be used for matters which have, in the past, led to the appointment of a commission, but should also subsume matters currently dealt with by ministerial inquiries.

2.20 We suggested that the new Act would provide for one form of inquiry known as a "public inquiry". All public inquiries would be appointed by the Governor-General by Order in Council. The Act would contain provisions flexible enough to be adapted to suit smaller, less complex investigations that could be carried

53 J K Guthrie and J E Paki *Joint Ministerial Inquiry into Lake Waikaremoana* (1998).

54 Bill Wilson QC *Ministerial Inquiry into Tranz Rail Occupational Safety and Health* (2000).

55 Ailsa Duffy QC *Report into the Handling of Ron Burrow's Phone Call* (2004).

out with less formal procedures. We concluded that legal principle and practicality favoured a straightforward Act, and that Ministers should not be deterred from appointing an inquiry under the new Act where a smaller issue arose.

2.21 Our proposal for a new Act received unanimous support amongst submitters. However, a number of agencies and organisations suggested that the requirement that all inquiries under the Act be appointed in the manner described could discourage its use for smaller inquiries. Where Ministers did not think a matter which required independent review warranted appointment by the Governor-General by Order in Council, it was suggested that they would continue to establish inquiries outside the Act.

2.22 Furthermore, concerns were raised about our proposal that all inquiry reports be tabled in Parliament. It was suggested that a Minister will from time to time wish to engage an independent person to inquire into an issue which arises in his or her portfolio and that it was appropriate that such an inquiry be established by and report directly to the Minister. Although such reports almost always become public, it is not appropriate that they should automatically be tabled in Parliament.

2.23 It was therefore suggested that the new Act should provide that some inquiries should be able to be established by a Minister, and that those inquiries should report directly to the Minister, while having access to the same powers and protections as other inquiries.

2.24 We consider that matters of public importance should be given independent attention in an effective way which also protects the interests of all those involved in inquiries. It has therefore been our intention to recommend legislation which will be used as widely as possible for these matters. We have taken on board the comments made in submissions and have determined that these aims will not best be met by the adoption of framework which provides for one form of "public inquiry".

2.25 In the light of comments made by submitters the Law Commission has been persuaded that a two-tiered inquiry structure should be introduced, similar to that described at paragraphs 2.30 to 2.34 of our draft report.

Recommendation: Two forms of inquiry: a "public inquiry" and "government inquiry"

2.26 We recommend, therefore, that a new "Inquiries Act" should be introduced which provides for a two-tiered inquiry structure comprising "public inquiries" and "government inquiries". A draft Inquiries Bill is appended to this report.

2.27 All inquiries under the Act should have access to all the procedural and inquisitorial powers, and the protections contained in the Act. The difference would lie in the manner of appointment and reporting of the two inquiries. In similar fashion to existing commissions of inquiry, public inquiries should be appointed by the Governor-General by Order in Council, which would not be subject to review and disallowance by the House of Representatives.[56] In addition, their reports should be required to be tabled in Parliament.

56 Orders in Council establishing commissions of inquiry and royal commissions are not covered by the definition of "Regulations" in the Regulations (Disallowance) Act 1908, s 2 nor in the Acts and Regulations Publication Act 1989, s 2.

2.28 Government inquiries are designed to remove the need for non-statutory ministerial inquiries. They should be appointed by a Minister and should report directly to the Minister. There should be a requirement that the appointment of a government inquiry is notified in the *New Zealand Gazette*.[57] There should be no requirement that the report of a government inquiry should be tabled in Parliament. We note, however, that the reports of ministerial inquiries have usually been made public.

2.29 Although the legal differences between public inquiries and government inquiries would be slight, they may in practice be distinguishable by the gravity or breadth of circumstances they investigate. Public inquiries are designed for the particularly significant or wide-reaching issues that are of high level concern to the public and to Ministers. For example, the occurrence of a large scale disaster. Government inquiries, on the other hand, are intended to deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer. Their practices, surrounding mechanisms, manner of operation and expectations may also distinguish them.

2.30 In our draft report we suggested that a two-tier approach could complicate the inquiry landscape. However, we now consider that the introduction of a single form of inquiry will not recognise the reality of inquiries and the pressures on Ministers to react and deal with issues arising within their portfolios. Furthermore, we agree with comments to the effect that the model advocated in our draft report would be more likely to preserve the status quo where most inquiries take place without the powers and protections offered by the existing inquiries legislation.

2.31 While the new Inquiries Act would replicate some of the core aspects of the 1908 Act, it would be a vehicle for significant amendment to the procedural provisions, updating of the language of the Act, and other clarifications and enhancements. The assumptions surrounding inquiries would, we hope, be shifted by these changes. We also hope that these assumptions will change as a result of the discussion in this paper, guidance given in the Cabinet Manual, and a revised and updated version of the Department of Internal Affairs booklet *Setting Up and Running Commissions of Inquiry*.

Terminology

2.32 Some concerns have been raised about our proposed terminology. In particular, it has been suggested that use of the term "public" could give rise to an expectation that an inquiry will take place by way of public hearings. In this report we are keen to stress that inquiries can be conducted in a wide variety of ways and that full public hearings, akin to court proceedings, are not always going to be the most effective or efficient way of conducting an inquiry. We would not want our chosen terminology to militate against this. Nevertheless, the term "public" also highlights the fact that inquiries under the Act will relate to matters of public interest. Alternative terms such as "independent" and "official" have been suggested. We have reservations about these terms because we would not want to imply that other inquiries under the Act are not independent or official.

57 New Zealand *Gazette* http://www.dia.govt.nz (accessed 19 November 2007).

2.33 We therefore suggest that the Act be called the "Inquiries Act", and that it provide for "public inquiries" and "government inquiries". While we anticipate that "government inquiries" will replace ministerial inquiries, we are not keen to replicate the term "ministerial inquiries" in the legislation. This term is inherently ambiguous and will continue to be used, for example, for inquiries under other statutes.

A statute with a menu of powers

2.34 In our issues paper we also raised the possibility of a statute with a menu of powers, procedures and immunities, which could be applied to each inquiry according to its perceived needs and functions.

2.35 However, we determined that access to variable inquisitorial powers is not an appropriate way of distinguishing between statutory inquiries. It will not always be possible, at the outset, to determine which powers inquiries will require. For instance, in what appears to be a straightforward policy inquiry, it may not become clear until later that commercial or professional interests will dissuade key witnesses from giving evidence on relevant matters. The menu option also provides ground for politically motivated horse-trading and litigation at the inception of, and during an inquiry, around which powers are or are not needed. The decision-making around the appointment of an inquiry would be made even more complex. The idea that commissioners may need to go back to Government to seek additional coercive powers in such cases is unattractive, as it may undermine the independence of a commission. Nor would it be appropriate for courts to be able to order additional powers since this could encourage inquiry participants to seek judicial intervention.

2.36 It is preferable that all inquiries have recourse to statutory powers should they be needed. Coercive powers are rarely relied on by commissions of inquiry in New Zealand, but it is clear that their existence acts as a carrot, encouraging people to cooperate with an inquiry in the knowledge that the powers could actually be employed. Nearly all those we have consulted with who have run commissions felt their task was made easier, and their standing enhanced, by the potential to use their statutory powers. There is no evidence that inquirers have abused such powers in New Zealand. If an issue is important enough to warrant the establishment of an inquiry, the inquiry should have the tools at its disposal to carry out its task properly.

RECOMMENDATION

R3 The 1908 Act should be replaced by a new "Inquiries Act" which substitutes "public inquiries" for commissions of inquiry and introduces a new category of "government inquiries".

RECOMMENDATION

R4 Public inquiries should be appointed by the Governor-General by Order in Council.

See draft Bill, clause 6(1).

RECOMMENDATION

R5 Government inquiries should be appointed by a Minister and their appointment should be notified in the *New Zealand Gazette*.

See draft Bill, clause 6(2).

Royal commissions

2.37 Commissions of inquiry and royal commissions differ only in their mode of appointment and title. Since the introduction of the 1908 Act, there has been no discernable distinction in terms of their subject matter. It might be assumed that royal commissions are reserved for the most serious matters of public importance, but this is not borne out by a survey of the list of inquiries over the last 30 years. For instance, both the Cave Creek and Wine-box inquiries were commissions of inquiry, whereas the inquiry into broadcasting was a royal commission. And, while most of the 10 royal commissions in the past 30 years have considered issues that are solely questions of policy, three can be characterised more as fact-finding bodies (Arthur Allan Thomas, Erebus, and the Royal Commission on Drug Trafficking).[58]

2.38 From a legal perspective, we think that the distinction between commissions of inquiry (or our proposed public inquiries) and royal commissions adds unnecessary complexity. Statute law has now replaced the royal prerogative in most areas. In practice, both forms of inquiries are initiated by the Executive and are bound by the same legislation. The powers of a royal commission and commission of inquiry are therefore the same. In our draft report we proposed that royal commissions should not be referred to in a new Act, although without a concurrent change to the Letters Patent, there would still be power to appoint a royal commission under the prerogative. We suggested that this change would rationalise and modernise the law relating to inquiries.

2.39 We acknowledged, however, that there is an argument that the distinction is worth maintaining on grounds of status.[59] Sir Ivor Richardson has written that "Commissions are constituted as royal commissions where it is considered desirable to confer the greater prestige that the title is thought to convey".[60] In this context, we note the recent appointment of a royal commission to inquire into governance in Auckland.

58 See Hon Robert Taylor QC *Report of the Royal Commission to Inquire Into and Report Upon the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* [1980] IV AJHR H 6; Hon Peter Mahon *Royal Commission to Inquire Into and Report Upon the Crash on Mount Erebus, Antarctica, of a DC-10 Aircraft operated by Air New Zealand Limited* (1981); and Hon Mr Justice D G Stewart *Report of the Royal Commission to Inquire Into and Report Upon Certain Matters Related to Drug Trafficking* (1983).

59 In the view of the Alberta Law Reform Commission in 1992 a royal commission is "the highest form of official sanction that the executive branch of government can give, and a royal commission is given great deference and has a strong moral force." Alberta Law Reform Institute above n 52, 15.

60 Rt Hon Sir Ivor Richardson "Commissions of Inquiry" (1989) 7 Otago LR 1, 4.

2.40 Of those who commented specifically on this aspect of our draft report, a number of government agencies were not in favour of removing royal commissions from the legislation. At the other end of responses, some commentators favoured their removal and an amendment to the Letters Patent. Those in favour of retention suggested that royal commissions are perceived by the public to have added gravitas. We are not aware of an empirical basis for the suggestion that the public attach greater value to royal commissions than to commissions of inquiry at present. We do not think that this alone warrants their retention, given that there would be no legal difference between them and public inquiries under our proposed Act. Therefore we have not included reference to royal commissions in the draft Bill attached to this report.

2.41 However, we acknowledge that there does appear to be a body of opinion that royal commissions should be retained. In the event that a decision is taken to include royal commissions in any new inquiries legislation, and in consultation with the Parliamentary Counsel Office, we have devised a means of including royal commissions in a new Act in a way that means they could be removed from the scope of the Act by a simple amendment in the future.

2.42 Thus, if a decision is taken to include reference to royal commissions, we suggest that an application clause be added to the draft Bill, after clause 4. The application clause should state:

> This Act applies to—
>
> (a) every inquiry established under section 7(1) or (2);
>
> and
>
> (b) the entities referred to in Schedule 3.

2.43 A third Schedule could then be added to the Bill which provides for "Entities to which this Act applies", and includes reference to royal commissions. If, however, royal commissions are not retained, consideration should be given to amendment of the Letters Patent to exclude their appointment.

RECOMMENDATION

R6 New inquiries legislation should not apply to royal commissions established under the Letters Patent. However, if this recommendation is not adopted, royal commissions should be referred to in the legislation in a manner that allows their removal by a simple amendment in the future.

Part 2

SUBSTANCE OF THE NEW ACT

Chapter 3

Matters relating to appointment, status and conclusion of inquiries

GROUNDS FOR ESTABLISHING AN INQUIRY

3.1 Section 2 of the 1908 Act provides that commissions of inquiry can inquire into and report upon any question arising out of or concerning:

(a) the administration of the Government; or

(b) the working of any existing law; or

(c) the necessity or expediency of any legislation; or

(d) the conduct of any officer in the service of the Crown; or

(e) any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury; or

(f) any other matter of public importance.

3.2 We have considered whether these six categories are appropriate. Such a list can be useful in directing ministers to the sorts of matters that are appropriate for inquiries. Paragraphs (a) and (d) are directly concerned with the activities of the Executive. Paragraphs (b) and (c) relate to the effectiveness and development of legislation. Paragraph (e) recognises an obvious area for inquiries, although some such events may now be covered by a specialist agency, such as the Transport Accident Investigation Commission.

3.3 However, the addition of paragraph (f) in 1970 significantly broadened the areas that an inquiry could consider and effectively renders the other 5 categories redundant. By way of comparison, United Kingdom inquiries can be appointed where (a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred.[61]

61 Inquiries Act 2005 (UK), s 1.

3.4 Australian and Canadian inquiries legislation takes a similarly broad approach to appointment criteria.[62] There, commissions can be appointed, for example:

- into matters which relate to or are connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth;[63]
- where the Governor-General is "satisfied that it is in the public interest and expedient to do so";[64]
- into matters "specified in the instrument of appointment".[65]

3.5 The new Act should provide for both public and government inquiries to be established into "any matter of public importance". We suggest that guidance such as that in s 2 of the 1908 Act be provided by way of the Cabinet Manual or a new Department of Internal Affairs manual. Subject to what we have said below in relation to conduct inquiries, we do not think there is any reason to restrict the grounds on which an inquiry can be established.

RECOMMENDATION

R7 The new Act should provide for both public and government inquiries to be established into "any matter of public importance".

See draft Bill, clause 6.

INQUIRIES INTO CONDUCT

3.6 We have considered whether there are any matters which should be excluded from the remit of inquiries under the Act. In particular, in our issues paper we asked whether inquiries should take place into matters of conduct, and discussed the distinction between inquiring into conduct, determining blame, and making findings of criminal or civil liability.[66]

3.7 New Zealand courts have emphasised that inquiries are not courts of law, nor administrative tribunals.[67] They do not have the power of determination, and their recommendations and findings bind no one. However, inquiries do not come with all the protections of a court hearing. In court, a person is charged with a specific offence and cannot be required to give evidence. By contrast, witnesses before a statutory inquiry can be called and examined without

62 Exceptions are Queensland and South Australia which set no criteria for the establishment of a commission.

63 Royal Commissions Act 1902 (Cth), s 1A.

64 Commissions of Inquiry Act 1995 (Tas), s 4(1).

65 Royal Commissions Act 1991 (ACT), s 5(1). For similar formulations, see Special Commissions of Inquiry Act 1983 (NSW), s 4(1)(a); Inquiries Act 1985 (NT), s 4(1); Royal Commissions Act 1968 (WA), s 5.

66 New Zealand Law Commission *The Role of Public Inquiries* (NZLC IP 1, Wellington, 2007) 31–32.

67 See, for example, *Peters v Davison* [1999] 2 NZLR 164, 181 (CA) Richardson P, Henry and Keith JJ. See also *Peters v Davison* [1999] 3 NZLR 744 (HC).

necessarily knowing the accusations against them. If they refuse to be sworn and to answer they can be liable to a penalty.[68] In general, and in particular since the Erebus Royal Commission, New Zealand inquiries have been reluctant to make findings which could be seen as determinations of civil or criminal liability.

3.8 Australian inquiries have not been as reticent. Australian courts have consistently held that inquiries are free to inquire into guilt or innocence in the same way as any individual, and that they can draw public conclusions as to blame.[69] The only restriction is that they must do so without interfering with the administration of justice.[70] In *McGuinness v Attorney-General*[71] the High Court of Australia drew a distinction between inquiring into guilt or innocence and reporting on that to the Governor-General, and actually having the power to convict.[72]

3.9 The New Zealand position was first stated by the Court of Appeal in *Cock v Attorney-General*,[73] which concluded that inquiry into guilt or innocence as an incident to a "legitimate" inquiry may be justified in order for the Commission to fulfil its terms of reference.[74] In *Fitzgerald v Commission of Inquiry into Marginal Lands Board*[75] Hardie-Boys J stated:

> In my opinion the law is quite clear. A Commission of Inquiry is not prevented from inquiring into whether an individual is or is not guilty of a criminal offence, if that question arises in the course of otherwise properly constituted and conducted inquiry, and is relevant to the purpose for which the Commission has been established. If the question is irrelevant, then any attempt to investigate it will be an excess of jurisdiction and prohibition will lie.

3.10 In 1982, the Court of Appeal in *Re Royal Commission on Thomas Case*[76] weighed the competing interests of safeguarding the rights and reputation of individuals and of public inquiry into issues of national concern, and concluded that there were occasions when the first must give way to the second.[77] The result was that the Thomas commission, which had as one of its main objects to establish whether there had been any "impropriety" in respect of a fired .22 cartridge case which it had been alleged had been "planted" by the police, was considered valid.

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68 Although, the privilege against self-incrimination applies to commissions by virtue of ss 4C(4) and 6 of the 1908 Act.

69 *Clough v Leahy* (1905) 2 CLR 139 (HC). See also *McGuinness v Attorney-General* (1940) 63 CLR 73 (HC), *A-G (Cth) v Queensland* (1990) 25 FCR 125, *Re Winneke; Ex parte Australian Building Construction Employees and Builders' Labourers Federation* (1982) 56 ALJR 506 (HC), *State of Victoria v Master Builders' Association Of Victoria* [1995] 2 VR 121 (Vic SC) and *Bollag v A-G (Cth)* 149 ALR 355 (FC).

70 See *Clough v Leahy* (1905) 2 CLR 139 (HC), 157, 159 and 161. The question in *Clough v Leahy* was not whether a commission could inquire into a crime, but whether it usurped the jurisdiction of the Industrial Arbitration Court by inquiring into a matter which fell within the jurisdiction of that court.

71 (1940) 63 CLR 73 (HC).

72 Ibid, 84. The Court drew on the fact that any statements made by witnesses before a Commission of Inquiry were not admissible in any criminal or civil proceedings, to reinforce its view that there was no usurping of the functions of any court of justice. See also *Re Winneke* (1982) 56 ALJR 506, 515 (HC) Gibbs CJ.

73 *Cock v Attorney-General* [1909] NZLR 405 (CA).

74 The Court found that the real object of the commission had been to inquire into allegations of bribery, and the Governor-General had no power to issue such an inquiry under s 2 of the 1908 Act (as it was then worded).

75 *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368, 375 (HC) Hardie Boys J.

76 [1982] 1 NZLR 252, 261 (CA).

77 Ibid, 266.

3.11 In commenting on this issue, Chen has expressed the need to:[78]

> … recognise the distinction between a commission's investigative powers and its final determination. Although a commission can investigate questions of guilt and innocence, where that is relevant to the terms of reference, it must take particular care when making adverse findings about individuals. A commission must take particular care when making such findings that it does not exceed its authority or breach the rules of natural justice.

3.12 Many recent inquiries in New Zealand have considered matters of conduct – indeed the terms of reference of the Wine-box and Police Conduct commissions stated that this was a direct purpose of the inquiry.[79] It is inevitable that inquiries will continue to look into matters of impropriety. Indeed they fill an important gap in doing so where matters of significant public concern arise. However, they do so primarily to re-establish public confidence and to prevent similar issues from recurring. Their non-determinative nature means that they cannot make findings of liability.

3.13 Nevertheless, for the sake of certainty, we suggest the statute could provide expressly that this is the case. The Coroners Act 2006 states that coroners are not to determine civil, criminal, or disciplinary liability.[80] We propose that a similar provision be included in the new Act, and also agree that inquiries should not usurp the role of existing bodies by making findings of disciplinary liability. However, we suggest that the statute should make it clear that inquiries may make findings of fault and may make recommendations that further steps be taken to determine liability.[81]

RECOMMENDATION

R8 The new Act should provide that inquirers are not to determine civil, criminal, or disciplinary liability. This should not prevent inquiries from making findings of fault or making recommendations that further steps be taken to determine liability.

See draft Bill, clause 10.

78 Mai Chen "Government Inquiries: A Public Law Tool" (paper presented at 4th Annual Public Law Forum, 16 and 17 April 2002, Duxton Hotel, Wellington) para 44 http://www.conferenz.co.nz/2004/library/c/chen_mai.htm (last accessed 25 July 2006).

79 The Wine-box inquiry was appointed to inquire into and report upon "whether the Commissioner of Inland Revenue and his staff and the Director of the Serious Fraud Office and his staff acted, in the course of their official duties, in a lawful, proper, and competent manner": Rt Hon Sir Ronald Davison *Report of the Wine-box Inquiry: Commission of Inquiry into Certain Matters Relating to Taxation* [1997] LVI AJHR H 3. The terms of reference of the Police Conduct Inquiry provided that it was "to inquire into and report upon the conduct, procedure, and attitude of the Police" in relation to allegations of sexual assault by members of the Police and other matters, Dame Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (Wellington, 2007).

80 Coroners Act 2006, s 4(1)(e)(i). Section 4 of the Transport Accident Investigation Commission Act 1990 goes further and provides that: "The principal purpose of the [Transport Accident Investigation] Commission shall be to determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribe blame to any person."

81 See, for comparison, the United Kingdom Inquiries Act 2005, s 2 which provides: "(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability. (2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."

POWER TO POSTPONE OR TEMPORARILY SUSPEND THE INQUIRY

3.14 The question of the extent to which an inquiry can consider matters of impropriety and conduct needs to take into account whether it will prejudice ongoing or later prosecutions. The fact that a conduct issue is serious enough to prompt an inquiry may often mean it will warrant criminal investigation and charges. The Commission of Inquiry into Police Conduct dealt with this problem by having its terms of reference significantly amended because of the potential for prejudice. If inquiries are to consider matters of conduct, how should the risk of prejudice be minimised?

3.15 Commissions of inquiry have no express power to place their inquiries on hold and are reliant on the Executive to suspend them or vary their terms of reference where appropriate. By contrast, s 69 of the Coroners Act 2006 gives coroners an express power to adjourn when other investigations are pending or taking place:

> **Procedure if some other investigation to be conducted**
>
> (1) This subsection applies to a coroner to whom a death has been reported … and who is satisfied that—(a) an investigation into the death or the circumstances in which it occurred is being or is likely to be conducted under some enactment other than this Act; and either (b) the matters specified in section 57(2)(a) to (e) (purposes of inquiries) are likely to be established in respect of the death by an investigation of that kind; or (c) to open or continue with an inquiry would be likely to prejudice the investigation or any person interested in it.
>
> (2) A coroner to whom subsection (1) applies may—(a) postpone opening an inquiry into the death; or (b) adjourn an inquiry already opened into it.
>
> (3) A coroner who has under subsection (2) postponed or adjourned an inquiry may open or resume it if satisfied that—(a) an investigation into the death or the circumstances in which it occurred is not likely to be conducted under any enactment other than this Act; or (b) an investigation of that kind is being or is to be conducted, but—(i) the matters specified in section 57(2)(a) to (e) (purposes of inquiries) are unlikely to be established in respect of the death by the investigation; and (ii) to open or resume the inquiry will not prejudice the investigation or any person interested in it.

3.16 We recommend that inquiries under the new Act be given a similar express power. Although we acknowledge that inquiries, as instruments of the Executive, are constitutionally different from Coroners Courts, we believe it is preferable that the inquiry itself have a similar power, rather than having to rely on the Executive to adjourn or suspend an inquiry. We would emphasise that this should not imply a power to cease operation indefinitely, or in a way that would take an inquiry beyond its deadline. Any such decision should be taken after consultation with the Government and we recommend that the Act spell this out. Where a decision made to postpone or suspend the inquiry would take the inquiry beyond its deadline, the inquiry would have to ask Government for a formal extension.

RECOMMENDATION

R9 The new Act should give inquiries an express power to postpone or temporarily suspend the inquiry where an investigation into the circumstances leading to the inquiry is being or is likely to be conducted and where to open or continue with an inquiry would be likely to prejudice the investigation or any person interested in it. Inquiries should reopen when to do so would not prejudice the investigation or any person interested in it. The Act should state that the inquiry must consult with Government before exercising this power.

See draft Bill, clause 15.

INDEPENDENCE

3.17 Inquiries lack the traditional independence and strict procedural safeguards of the courts.[82] There is a strong public expectation that formal inquiries will be conducted independently. Yet, there are no rules setting out how an inquiry should interact with government; and no provisions as to their independence. An inquiry cannot "divorce itself from the main current of contemporary political sentiment".[83] Inquiries are also costly processes, resourced entirely from the public purse. Government therefore has a valid interest in ensuring that public money is not wasted. Also, to be effective, an inquiry's recommendations need to be pragmatic. Achieving this will often – and we believe should – involve engagement with government agencies.

3.18 However, the integrity of an inquiry's work and its outcome are reliant on the extent to which it is viewed as independent. The principle that justice should be done and be seen to be done applies to inquiries as well as courts.[84] An inquiry's independence should be made clear, rather than simply inferred. We recommend that the new Act states that public and government inquirers have a duty to act independently in the exercise of their functions, powers and duties. A precedent for such a provision, relating to the Auditor-General, can be found in the Public Audit Act 2001.[85] This will mean the Executive, public and inquirers themselves are in no doubt as to the role of inquiries.

82 Public and Administrative Law Reform Committee, above n 12, para 22.

83 H M Clokie and J W Robinson *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Octagon Books, New York, 1969) 141.

84 See *Re Wright* [2006] NIQB 90, para [43], relating to whether an inquiry into the death of a prisoner conducted under the Inquiries Act 2005 (UK) was compatible with the right to life under art 2 of the European Convention of Human Rights and, in particular, whether such an inquiry was sufficiently independent.

85 Section 9 provides "the Auditor-General must act independently in the exercise and performance of the Auditor-General's functions, duties, and powers". See also Commerce Act 1986, s 8(2); Human Rights Act 1993, s 19; Privacy Act 1993, s 13(1A); Securities Act 1978, s 10(2). The other bodies listed in Part 3 of Schedule 1 to the Crown Entities Act 2004 are also required by statute to act independently, including the Accident Compensation Corporation, the Accounting Standards Review Board, the Broadcasting Standards Authority, the Chief Archivist, the Children's Commissioner, Drug Free Sport NZ, the Electoral Commission, the Health and Disability Commissioner, the Independent Police Conduct Authority, the Judicial Conduct Commissioner, the Law Commission, the Office of Film and Literature Classification, the Takeovers Panel, the Telecommunications Commission, and the Transport Accident Investigation Commission.

RECOMMENDATION

R10 The new Act should provide that public and government inquirers are to act independently.

See draft Bill, clause 9.

CONCLUSION OF INQUIRIES

Ensuring an appropriate response to inquiry reports

3.19 Inquiries differ from standing commissions with an ongoing interest and "watching brief" over a specialist area in that they are disbanded once they have reported. They have no role in campaigning, overseeing the implementation of their recommendations, or informing and participating in debate or consequential action on the inquiry findings and recommendations. To overcome this problem, some inquiries have made recommendations to assist with the implementation of their recommendations. For example, Dame Margaret Bazley recommended that the Auditor-General be responsible for monitoring the implementation of recommendations made by the Commission of Inquiry into Police Conduct.[86] A recommendation in Judge Silvia Cartwright's inquiry report on cervical cancer[87] that a Health Commissioner be appointed to help deal with complaints, promote patients' rights and seek rulings on behalf of patients led to the establishment of the Health and Disability Commissioner.[88]

3.20 Such proposals in inquiry reports are extremely useful means of indicating that ongoing review is required. At present, there is no other formal means of ensuring a response to an inquiry's recommendations, or of ongoing review of their proposals. This is not to suggest that every inquiry's recommendations should necessarily be implemented. However, as a minimum, an inquiry's report should present all the evidence, enabling others to make their own assessment of the way forward.[89] There is an argument that the investment in time, experience and public resources justifies a formal government response. At present, public pressure is the only tool to keep inquiry findings and recommendations at the forefront of minds.

3.21 We have considered whether requiring a formal government response to inquiries would be appropriate. Similar requirements can be found in the Standing Orders of Parliament, which state that the Government must, not more than 90 days after a select committee report, respond to any recommendations of the committee that are addressed to it.[90] Section 8I of the Treaty of Waitangi Act 1975 provides that the Minister of Māori Affairs must lay before the House of Representatives a report on the progress made on the implementation of recommendations to the Crown made by the Waitangi Tribunal. Inquiries differ from both these bodies. Unlike select committee and Waitangi Tribunal inquiries, the Government appoints

86 Dame Margaret Bazley, above n 79, rec 60.

87 Judge Silvia Cartwright *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters* (1988) rec 5c(iv).

88 Under the Health and Disability Commissioner Act 1994. See also Ministry of Health *What Further Progress has been made to Implement the Recommendations of the Cervical Screening Inquiry?* (December 2003).

89 G Rhodes *Committees of Inquiry* (George Allen & Unwin Ltd, London, 1975) 205.

90 Standing Order 253(1).

ad hoc inquiries. Also, the risk of such a requirement is that Government may give pro forma responses. The process does however provide an opportunity for the Government to be called to account. Given the different nature of inquiries, we do not think that such a requirement should be included in the statute. However, we recommend that consideration be given to a Cabinet circular or addition to the Cabinet Manual setting out a process for responding to inquiry reports. A report to Parliament within 6 months of a public inquiry reporting and some formal means of Ministerial response to a government inquiry would be appropriate.

RECOMMENDATION

R11 Consideration should be given to a Cabinet circular or an addition to the Cabinet Manual setting out a process for responding to inquiry reports.

Release of inquiry reports

3.22 Our understanding is that some confusion has arisen around the process for the delivery and release of inquiry reports in the past. Little guidance is offered in the Act. Section 2 states that "The Governor-General may, by Order in Council, appoint any person or persons to be a Commission to inquire into and report …". While it may be inferred that the person or persons should report *to* the Governor-General, it is by no means clear who has the responsibility for publishing or releasing the report.

3.23 To avoid any ongoing confusion, we suggest that this should be clarified. Public inquiries should report to the Governor-General and government inquiries to the Minister who established them.

3.24 We propose that the reports of public inquiries should be tabled in Parliament as soon as practicable after the inquiry reports. No such requirement should exist for government inquiries, but we note that generally the practice has been that the reports of ministerial inquiries have been made public. Failure to publish an inquiry's report can tend to harm the integrity of the inquiry and undermine the rationale for establishing it in the first place.

RECOMMENDATION

R12 Public inquiries should report to the Governor-General and their reports should be tabled in Parliament as soon as practicable after the inquiry completes its task. Government inquiries should report to their appointing Minister.

See draft Bill, clause 11.

Suppression of material in inquiry reports

3.25 Although an inquiry's report should generally be made public, in some situations it will be appropriate to restrict publication of part or parts of a report. The United Kingdom Inquiries Act 2005, s 19(4) sets out a detailed test for omitting parts of a report. The responsible minister must have regard to the following matters:

(a) the extent to which it might inhibit the allaying of public concern;

(b) The risk of harm or damage that could be avoided by withholding material;[91]

(c) Any conditions as to confidentiality subject to which a person acquired information that he has given to the inquiry.

3.26 Writing in 1980, the Public and Administrative Law Reform Committee approved of the practice of publishing the report unless otherwise stipulated by the Minister when the commission was established. It thought that a restriction on the publication in the terms of reference should only occur in "exceptional circumstances". The Committee cautioned against a Minister limiting publication after the commission had reported as it was "not in the public interest for a Minister to decide that an unwelcome report should not be published".[92]

3.27 We consider that there may be situations where it is appropriate to omit part of a report when it is published. In many cases, sensitive information will already have been suppressed by the inquiry. However, in some cases sensitive material may be an essential element of informing the Government about the subject of the inquiry yet may not be suitable for public release. Rather than the inquiry giving the Government "secret reports" it is preferable that the Government is able to withhold parts of a report where appropriate. However, it would be unwise to allow Government to completely prohibit publication of a report if it considers it to be unfavourable. This would severely undermine public confidence in the inquiry.

3.28 In our draft report we suggested that this could be done by reference to particular criteria set out in the new Act. Some submitters have questioned whether the criteria we proposed adequately catered for all the circumstances in which it may be appropriate to suppress parts of a report. For example, it was questioned whether the criteria would capture situations where existing legislation requires information to be suppressed,[93] and whether it would protect witnesses forced to disclose confidential information against their will.

3.29 In chapter 6 we recommend that the application of the Official Information Act 1982 to inquiries be clarified. In particular, we suggest that it should be clear that the Act does apply to inquiry documentation including the report itself (but excluding material such as evidence and submissions) once the inquiry has reported.

3.30 We suggest therefore that the Official Information Act regime is the appropriate way of governing the withholding by Government of material in inquiry reports. Since the report as delivered would be subject to the Act, anyone seeking to obtain access to material suppressed by the Government would be able to apply through the Act and would then have access to the Ombudsman for review of the decision.

3.31 This would ensure that Government could give consideration to all the conclusive and other reasons for withholding information under the Official Information Act.[94] We do not think the Government should be able to commission secret reports under this legislation.

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91 Harm or damage includes death or injury, damage to national security or international relations, damage to economic interests of the United Kingdom, damage by disclosure of commercially sensitive information.

92 Public and Administrative Law Reform Committee, above n 12, para 84.

93 For example, the Immigration Act has provisions governing name suppression for refugees and this was relevant in the Taito Phillip Field inquiry.

94 Official Information Act 1982, ss 6 and 9.

Chapter 4

Procedure, natural justice and participation

INTRODUCTION

4.1 Commissions of inquiry are free to regulate their own proceedings,[95] subject to some statutory rules and the common law principles of natural justice. Decisions about procedure can be critical to an inquiry's ability to fulfil its function, but also influence its cost, efficiency and duration. A balance needs to be found between a process which:

- is responsible in terms of cost and time taken;
- enables the inquiry to effectively carry out its task; and
- adheres to the rules of natural justice.

4.2 Current inquiry practice can be excessively legalistic, yet such formality is not always necessary to enable an inquiry to be effective or meet natural justice. Furthermore, a legalistic approach will tend to maximise cost and duration. The appointment of parties before an inquiry is particularly influential in engendering this approach. At present, commissions confer party status and identify other participants who obtain certain rights of appearance and representation. This can be a considerable constraint on their freedom to regulate their proceedings.

4.3 In this chapter we consider the procedural options open to inquiries and propose legislative amendments to help inquiries achieve a better balance.

LEGISLATIVE PROVISIONS RELATING TO PROCEDURE

Enhanced powers of High Court judges

4.4 Inquiries under the 1908 Act are endowed with different powers depending on their composition. Where a current or former High Court judge is a commission member, the judge and the commission as a whole have the same powers as a judge of the High Court in the exercise of his or her civil jurisdiction, including its inherent jurisdiction.[96] In all other cases, the commission takes its procedural

95 *Jellicoe v Haselden* (1902) 22 NZLR 343, 351 (SC) Stout CJ: "The Commissioners … are not bound to examine witnesses on oath, they need not sit in public, and they are the sole judges of what procedures they adopt."

96 Judicature Act 1908, s 13(1). By virtue of sections 13A and 13B, a commission conducted by a serving or former High Court judge has express powers of enforcement relating to unwilling witnesses and powers to make orders of contempt. Orders made under ss 13, 13A and 13B can be filed in the High Court for enforcement purposes. See chapter 8.

direction from ss 4 and 4A of the 1908 Act and its powers to conduct and maintain order at the inquiry are the same as those of the District Court in the exercise of its civil jurisdiction.

4.5 Section 13, in effect, provides for two levels of commission within the 1908 Act – one with the greater powers of the High Court. Some of those who have headed previous inquiries told us that because they lacked the powers of High Court judges (most notably the power to make orders for contempt) they were at times unable to control issues peripheral to the inquiry. For example, where a person breaches a suppression order issued by a commission which comprises a High Court judge, the commission would be able to charge such a witness with contempt. Other commissioners are restricted to punishing for contempt only in respect of matters arising in the course of the proceedings.[97] In chapter 8 we seek to rectify this anomaly and recommend the replacement of a commission's general contempt powers with specific offences.

4.6 We do not consider that an inquiry's procedural or coercive powers should be dependent on the status of the inquirer and we have received no opposition to this proposal. In 1980, the Public and Administrative Law Reform Committee concluded that the distinction between High Court judges and other commissioners was anachronistic, and recommended its abolition.[98] The recommendation was not adopted, and indeed s 13 of the 1908 Act was subsequently extended to apply to *former* High Court judges,[99] because of the appointment of Sir Ronald Davison, a former Chief Justice, as commissioner in the Wine-box inquiry.

4.7 It is implicit in the appointment of the person to chair an inquiry or as a single inquirer that the Government has confidence in the ability of that person to run the inquiry effectively. It is important that the person has all the powers necessary to do so irrespective of his or her judicial status.

RECOMMENDATION

R13 The powers given to an inquiry should not depend on the status of any inquirer.

Conducting and maintaining order at the inquiry

4.8 Section 4 of the 1908 Act provides that commissions have the powers of a District Court in the exercise of its civil jurisdiction, in respect of conducting and maintaining order at the inquiry. So, like the District Court, a commission has implied powers which are procedural in nature and are incidental or ancillary to its substantive jurisdiction.[100] Section 4B provides that a commission can receive any evidence whether or not it would be admissible in a court of law.[101]

97 District Courts Act 1947, s 112.

98 Public and Administrative Law Reform Committee, above n 12, 24.

99 Commissions of Inquiry Amendment Act 1995.

100 These powers enable it to give effect to its jurisdiction by enabling it to regulate its procedure. See R Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" [2005] Canterbury LR 220, 221. See also *McMenamin v A-G* [1985] 2 NZLR 274 (CA) and *Clifford v Commissioner of Inland Revenue* [1966] NZLR 201 (CA).

101 See chapter 9.

4.9 There is no exhaustive list of courts' implied powers. A question arises as to which of the courts' implied and statutory powers fall within the category of "conducting and maintaining order at the inquiry". In the absence of more detailed statutory rules, the courts have inferred certain procedural rules and emphasised the broad discretion that inquiries have to run their proceedings under the 1908 Act.[102]

More direction

4.10 We recommend that a new Act should provide greater clarity and guidance for inquiries. The scope of an inquiry's powers should be made more explicit, with the particular powers envisaged set out in the statute. In 1980, the Public and Administrative Law Reform Committee suggested this and to an extent, its recommendations were adopted by the introduction of ss 4C and 4D of the 1908 Act (relating to powers of investigation and to summon witnesses), and amendment of s 9 (relating to offences). The Committee also recommended that the power to hold hearings in private and prohibit publication of evidence should be made explicit. These last recommendations were not acted on.[103]

4.11 There are good reasons why an inquiry's powers should be clearly set out and defined:[104]

- Those affected by the inquiry have a legitimate interest in knowing the extent of the commission's powers so that they can prepare and respond appropriately to the inquiry.
- Those conducting the inquiry need to understand the powers available to them and the limits of their role. This is particularly the case if an inquirer is not legally trained.
- The serious, public and inquisitive nature of commissions of inquiry gives rise to a general public interest in clarity around the scope of its powers.

4.12 The wider public interest is also served by clarity and definition since it is around the boundaries of these powers that the costly and lengthy litigation which has delayed or followed inquiries has arisen.[105] However, we do not wish to overly constrain the way inquiries can operate by cementing an exhaustive list of procedural powers in statute. While some of the powers should be clearly spelt out in the statute, flexibility should be retained by making it clear that inquirers are free to conduct their inquiries as they consider appropriate.[106]

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102 In *Jellicoe v Haselden* [1902] 22 NZLR 357, 358 (SC) Williams J said "Commissioners … are subject to no rules of procedure. They can sit with open or closed doors. They may hear counsel or not, as they please." In *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96, 106 (CA) Gresson P stated "… all questions of procedure relating to allowing the appearance of persons claiming to be interested and the extent to which they may be heard are entirely for the Commission to decide …".

103 See our recommendations in chapter 6.

104 The Law Reform Commission of Ireland, above n 43, 129.

105 For example, *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA) relating to an inquiry's decision that evidence be given in public, *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) and *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA), [1983] NZLR 662 (PC) both relating to an inquiry's powers to make certain findings.

106 See Recommendation 14, below.

Procedural directions in the terms of reference

4.13 A practice has developed of clarifying or emphasising individual commissions' powers by way of the terms of reference appointing the inquiry. For example, commissions have been given express powers to adjourn the inquiry and exclude persons from hearings in this way. Reporting powers and other requirements have also been set out.

4.14 We believe this is appropriate. For example, Government may wish to instruct an inquiry to consult widely by way of public meetings. In paragraph 4.68 below we note that Government should also be able to indicate who should be core participants in an inquiry and we consider the Executive's power to give instructions about the open or closed nature of an inquiry in chapter 6. Any such procedural directions should be given expressly and in specific terms.

Statutory constraints on procedure

4.15 At present, the only statutory constraints on inquiries are found in s 4A of the 1908 Act, which gives "parties" or certain interested persons:

> (1) a right to appear and be heard; or
>
> (2) a right to be heard in respect of evidence that may adversely affect their interests; and
>
> (3) a right to appear in person or by their counsel or agent.

4.16 Sections 4A(2) and (3) were added in 1980 after the Public and Administrative Law Reform Committee recommended that the Act should incorporate express protections for witnesses in order to accord with natural justice. Section 4A does not purport to enact a complete code of procedure,[107] but it creates three classes of persons who are statutorily recognised as having standing before an inquiry:

- "parties";[108]
- those with "an interest in the inquiry apart from any interest in common with the public"; and
- those who "satisfy the Commission that any evidence given before it may adversely affect his interests".

4.17 This three-tiered approach is not replicated in any other jurisdiction.[109] The relevant provisions have been added and amended since inquiries legislation

107 See *Re Erebus (No 2)* [1981] 1 NZLR 618, 628 (CA) Woodhouse P and McMullin J and *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688, 696 (HC) Barker J.

108 Appointed under s 4, which provides: "For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of citing parties …"

109 Not all jurisdictions provide for the categorisation of participants. In many instances, rights exist only to give effect to rules of natural justice. For example, in Tasmania a person may make oral or written submissions to an inquiry when they are subject to an allegation of misconduct (Commissions of Inquiry Act 1995 (TAS), s 18(3). See also Public Inquires Act RS A 2000 c P-29, s 12). Other jurisdictions give the inquiry a broad discretion to decide whether to allow people to appear before it. (For example, Section 6FA of the Royal Commissions Act 1902 (Cth) implies that a commission has a broad discretion to authorise people to be heard. In contrast in New South Wales a commission has a discretion to allow a person to appear where he or she is "substantially and directly interested in any subject-matter of the inquiry", Special Commissions Inquiry Act 1983 (NSW), s 12(2); Royal Commissions Act 1923 (NSW), s 7(2).) However, in some jurisdictions, including the United Kingdom and the Australian Capital Territory, provisions similar to our s 4A exist. In the Australian Capital Territory a person is entitled to appear before a royal commission, if they have a sufficient interest in the inquiry (Royal Commissions Act 1991 (ACT), s 31(b)).

was first enacted in New Zealand, with little apparent consideration given to the overall framework. The first reference to "parties" appeared in s 6 of the Commissioner's Powers Act Amendment Act 1872, and the purpose was a limited one – to enable Commissioners to order that the cost of the inquiry, in whole or in part, be paid "by any of the parties to such inquiry".[110] As the costs provision is now wider (see chapter 7), this apparent rationale is less meaningful.

4.18 In addition, the courts have struggled with the use of the term "parties", particularly in its application in inquiries which relate entirely to matters,of policy or legislation. In *Timberlands Woodpulp Ltd v Attorney-General,* Myers CJ said:[111]

> There must, we think, be some limit placed upon the words "parties interested in the inquiry". If it were not so, then in the case of an inquiry regarding the necessity or expediency of any proposed legislation or perhaps the working of some existing law any or every member of the public might be regarded as being within the category.

4.19 In an apparent attempt at clarification, in 1958 the category of persons "with an interest in the inquiry apart from any interest in common with the public" was added.[112] Yet, in the *State Services* case, an apparently confounded Gresson P said:[113]

> Persons qualifying under the section because of a special interest have the same rights of appearance and of being heard as those actually made parties. If therefore the inquiry is one which of its nature does not admit of the citation of persons as parties, it seems to me that to give other persons a right to appear and to be heard as if cited as parties gives them no rights at all.

4.20 "Parties" and persons with "an interest in the inquiry apart from any interest in common with the public" are given nearly identical rights. Both are entitled to representation and both are entitled "to appear and be heard at the inquiry" under s 4A(1). The only distinction is that parties alone are able to draw up a case stated under s 10(2).[114]

110 *State Services* case, above n 102, 107 (CA) North J.

111 *Timberlands Woodpulp Ltd v Attorney-General* [1934] NZLR 270, 294 (SC) Myers CJ.

112 The section provided "Any person interested in the inquiry shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry."

113 *State Services* case, above n 102, 106 (CA) Gresson P, see also 115, Cleary J: "Indeed, the whole legislative process, whereby at first there was a reference to parties and then the conferment of a power to cite parties, without in either case any attempt to elucidate the meaning of the term, and then finally an oblique recognition that parties cited acquire rights, has been particularly indirect."

114 It may also be that only those cited as "parties" can have their costs paid under s 11 of the Act. Costs orders may be made against both parties and persons entitled to be heard. See chapter 7.

The term "parties"

4.21 The term "parties" is inapt for inquiries. It is liable to mislead as to their nature and purpose, and as to the involvement of interested persons.[115] As Cleary J said in the *State Services* case, in relation to whether there is a right to cross-examine witnesses in inquiries:[116]

> I think the flaw in the argument addressed to us lies in the assumption that a "party" to an inquiry by Commissioners has the same rights to appear by counsel, to be present throughout the hearing, and to cross-examine witnesses as is possessed by a party to a suit at law. This argument overlooks the basic difference between a *lis inter partes* and an inquiry by Commissioners. In a controversy between parties the function of the Court is "to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings" .... The function of a Commission of Inquiry, on the other hand, is inquisitorial in nature. It does not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate. There are, indeed, no issues as in a suit between parties; no "party" has the conduct of proceedings, and no "parties" between them can confine the subject-matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain.

4.22 We consider there should be a move away from the concept of "parties", the expectations created by the term, and the adversarial practices it encourages. The term can militate against the constructive involvement of individuals, groups or organisations according to their degree of interest. It can result in those with only a limited interest in the inquiry demanding full participation to protect perceived rights. The fundamental purposes of inquiries – to establish what happened and make recommendations for improvement – do not require "parties". While certain rights may need to be accorded to ensure people's interests are not unfairly harmed, there is no "dispute", as such.

The right to appear and be heard

4.23 The formulation "appear and be heard" in s 4A(1) of the 1908 Act suggests a right to appear in person and to orally present evidence and submissions.[117] In addition to the unfortunate terminology of "parties", it has created assumptions about the way inquiries are conducted. Indeed, the Department

115 The Public and Administrative Law Reform Committee considered the focus on parties inappropriate in the context of policy inquiries: Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980), 26. In 1962, the Court of Appeal held, in relation to a policy inquiry that if it was an inquiry that could not have parties then "to give other persons a right to appear and to be heard as if cited as parties gives them no rights at all". See *State Services* case, above n 102, 106 (CA) Gresson P; see also *Timberlands Woodpulp Ltd*, n 111 above.

116 *State Services* case, above n 102, 115–116 (CA) Cleary J.

117 See Brendan Brown QC "Legal Opinion Regarding Parties, Persons and Confidentiality: Provided to the Royal Commission on Genetic Modification" in Roger Fitzgerald *Setting Up and Running Commissions of Inquiry: Guidelines for Officials, Commissioners and Commission Staff*" (Department of Internal Affairs, Wellington, 2001) 117, 119. Brown concluded that the entitlement to "appear and be heard" amounted to the oral presentation of the person's own evidence and submissions. However, he considered that it did not confer the status of a civil litigant, and did not confer the right to cross-examine. This position is supported by case law. See also *State Services* case, above n 102, 115 (CA) Cleary J "… the section contemplates clearly enough that the party cited acquires a right to appear and be heard, but it throws no light upon the extent of this right or the corresponding obligations on the Commissioners."

of Internal Affairs' booklet *Setting Up and Running Commissions of Inquiry* describes an inquiry process which assumes that a number of hearings will take place. Given the varied issues dealt with by inquiries, we question whether this assumption is appropriate.

4.24 Public hearings involve substantial costs and time. Substantial infrastructure is required to organise and manage them. They are also likely to give rise to strong arguments for representation, cross-examination and to maximise the involvement of lawyers. As discussed below, the natural justice requirement to be "heard" in instances of adverse comment does not necessarily require the right to appear in person.[118] While public hearings and formal rights to call, examine and cross-examine witnesses are usually fundamental to court processes, inquiries differ from courts in that:[119]

- they are driven by their terms of reference, not by a dispute between two (or more) opposing sides;
- they play a more active and inquisitorial role;
- the inquiry itself will often call witnesses;
- while commissions do consider past facts, they are also concerned with the formulation of proposals for the future directed at preventing future occurrences;
- since inquiries do not make decisions, witnesses have no "case" to promote in the traditional sense and there is no "case" against any witness.

4.25 The appropriate question to be asked at the start of any inquiry is what process and forms of information gathering will be the most effective for the subject matter. It is by no means necessary to assume that full hearings are the best means, or that the same result cannot be achieved by alternative forms of investigation. Where, for example, generic policies and processes are being considered, this need not be carried out in open hearings. To gather and consider evidence, an inquiry could:

- write or talk to people who may be able to advise where information relevant to the inquiry might be obtained;
- request written submissions or statements from relevant people about matters relevant to the terms of reference;
- employ experts or consultants to produce written opinions about relevant issues;
- hold one-on-one or roundtable discussions with relevant people;
- request that witnesses meet with the inquirers to answer questions either formally or informally.

4.26 Thus, the manner in which evidence is collected can vary. Hearings should not be assumed in all cases. Subject to what we say about natural justice below, a new Inquiries Act should not grant any participants an automatic right to "appear and be heard". Furthermore, the Act should make it clear to inquirers that a wide range of processes can be adopted.

118 See P A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 976.

119 See K J Keith *A Code of Procedure for Administrative Tribunals* (Legal Research Foundation Occasional Pamphlet 8, Auckland, 1974) 21.

The right to appear in person or by counsel or agent

4.27 Section 4A of the 1908 Act, which includes a "right to appear in person or by his counsel or agent", is also framed in a way which appears to assume the use of adversarial hearings. The provision contains two components: the right to appear and the right to representation. These need to be considered separately, and as discussed above, we do not think that participants should have an automatic right to appear in person.

4.28 We do not suggest that a person's right to engage legal help and advice should be constrained. The time when those affected by an inquiry could be denied counsel, as the Hon Colin Moyle was in the Moyle inquiry have long past.[120] However, it should be for the inquiry, in accordance with the rules of natural justice, to decide whether and how participants and any legal representatives are to be heard.

4.29 For example, adequate representation may be achieved by legal assistance on a participant's written submissions, or by a lawyer's presence during an interview with the inquiry. As discussed below, we consider that s 4A(3) goes beyond what natural justice requires in according rights of appearance.[121] A new Inquiries Act should not grant any participants an *automatic* right to appear and be heard either personally or by way of their counsel or agent.

NATURAL JUSTICE AS A CONSTRAINT ON PROCEDURE

4.30 Despite their broad procedural powers, like other public or administrative bodies, inquirers are under a duty to act fairly.[122] The common law[123] and various amendments to the 1908 Act have made it clear that the rules of natural justice apply.[124] Natural justice incorporates two central rules: the rule against bias[125] and the hearing rule – in essence that persons affected should have his or her case fairly considered.[126]

4.31 Depending on the circumstances, the hearing rule may mean that the inquiry may be required to:[127]

- grant an oral hearing, potentially with the right to examine and cross-examine witnesses;
- give prior notice of proposed findings or the risk or likelihood of adverse findings;
- give prior notice of any allegations that a person or body is to answer;

120 Rt Hon Sir Alfred North *Report of the Commission of Inquiry into an Alleged Breach of Confidentiality of the Police file on the Honourable Colin James Moyle MP* (1976). Whether the inquiry should contribute to the cost of retaining counsel in some circumstances is a separate issue, discussed in chapter 7.

121 Ibid.

122 R Scott "Procedures at Inquiries: the Duty to be Fair" (1995) 111 LQR 596, 597.

123 See, *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC); *Thomas*, above n 105; *Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98 (HC); *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC); *Peters v Davison*, above n 67.

124 See also, chapter 11.

125 Whoever takes a decision should be impartial having no personal interest in the case (nemo judex in re sua). See Paul Jackson and Patricia Leopold *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8 ed, Sweet & Maxwell, London, 2001) 707.

126 A decision should not be taken until the person affected by it has had an opportunity to state his or her case (audi alteram partem). See Paul Jackson and Patricia Leopold, ibid.

127 Adapted from Crown Law *The Judge Over Your Shoulder: A Guide to Judicial Review of Administrative Decisions* (Crown Law, Wellington, 2005) 12.

- disclose the relevant material relied upon;
- give the person or body reasonable time and a fair opportunity to make representations;
- give proper consideration to those representations;
- depending on the context, give reasons for a decision;
- allow legal representation.

4.32 The manner in which natural justice applies depends on the circumstances and the nature of the issue under consideration.[128] As Cleary J said in the *State Services* case:[129]

> No formula has been evolved which can be applied to all cases, other than one expressed in quite general terms, for so much depends upon the nature of the inquiry, its subject-matter and the circumstances of the particular case.

4.33 The courts have made it clear that parties to an inquiry should not assume they have the same procedural rights as parties to a suit at law.[130] In some ways, inquiries have a freer hand than many other bodies because they do not make binding determinations. However, their broad procedural discretion means that they need to be very aware of natural justice issues. For example, the fact that inquirers frequently take an active inquisitorial role can give rise to a danger of predetermination, or an impression of predetermination.

Whether to include natural justice rules in legislation

4.34 The Legislation Advisory Committee (LAC) guidelines state that where a statutory power may significantly affect rights or interests, it is generally desirable to specify which protections decision-makers must accord to those affected and what, if any, procedural requirements are to apply in respect of a particular statutory power.[131] General statutory provisions that simply require the decision-maker to, for example, "act in accordance with the principles of natural justice" should be avoided.

4.35 Although inquiries do not affect rights and interests in the same way as adjudicative bodies, we think it is important that legislation should specify clearly the basic procedural requirements that apply to the exercise of powers by an inquiry. The provisions we propose only go so far as to set out those principles of natural justice which are now very well-established tenets of our law. We believe that setting out some of these requirements is necessary to provide inquirers (some of whom are not legally qualified) and courts, with

128 *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA).

129 *State Services* case, above n 102, 116 (CA) Cleary J.

130 *State Services* case, above n 102, 115–116 (CA) Cleary J. "The function of a Commission of Inquiry … is inquisitorial in nature. It does not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate. There are, indeed, no issues as in a suit between parties; no 'party' has the conduct of proceedings, and no 'parties' between them can confine the subject matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain. It is, in my opinion, fallacious to suggest that because the Legislature has spoken of parties to an inquiry undertaken by Commissioners such persons are to be treated as being in the same position and as having the same rights as parties to a legal cause."

131 Legislation Advisory Committee Guidelines on Process and Content of Legislation, chapter 13 Appeal and Review, Part Three, (2003) http://www.justice.govt.nz/lac/ (accessed 4 September 2007).

greater direction about the applicable protections. As the LAC guidelines state, leaving the question to the common law can lead to uncertainty, legal risk and associated litigation cost.[132] It can also lead to the application of more or fewer procedural protections than was intended.[133]

The hearing rule

4.36 In the Privy Council's decision on the *Erebus*[134] case, Lord Diplock described the requirements of natural justice so far as inquiries are involved as follows:

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some *probative value* in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule requires that *any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material* of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result. [Emphasis added.]

4.37 The second rule set out above embodies the hearing rule which is reflected in a number of New Zealand statutes relating to inquiry or decision-making bodies. Most make a broad statement allowing a person who may be adversely affected a "reasonable opportunity to be heard" or "an opportunity to be heard".[135] However, a few give greater direction. The Coroners Act 2006, s 58(3) provides that a coroner must take "all reasonable steps to notify" a person of a proposed adverse comment; and give them a reasonable opportunity to be heard "personally or by counsel". The Health and Disability Commissioner Act 1994, s 67 states that in addition to being "heard" a person must be able to make a written

132 Ibid.

133 In determining what procedural protections should apply, the LAC directs policy makers to consider: the character of the decision-maker and the decision; the nature and importance of the affected rights or interests; whether a procedural protection will benefit or burden the decision-making process; whether there are other interests beyond that of the individual to be represented; whether the decision involves the expert evaluation of facts; whether the decision involves complex legal issues; whether the decision is final or preliminary and whether there is a right of reconsideration, appeal or review; whether there are particular reasons to exclude a given procedural protection in relation to the decision-making power.

134 *Re Erebus*, above n 123, 671 (PC) Lord Diplock.

135 See Children's Commissioner Act 2003, s 25; Human Rights Act 1993, s 138; Land Transport Act 1998, s 30H (not yet in force); Lawyers and Conveyancers Act 2006, s 214; Local Government Official Information and Meetings Act 1987, ss 30(2), 38(6); Official Information Act 1982, ss 29A(7), 30(3), 35(6); Ombudsmen Act 1975, s 22(7); Independent Police Conduct Authority Act 1988, s 31; Privacy Act 1993, s 120.

statement in answer to the adverse comment and that they may require that the statement or a summary of it is to be included in the report.[136] To avoid confusion, we propose that inquiries legislation also contain explicit procedural requirements. There are a number of elements to this.

Notice and time to prepare

4.38 Legislation should provide that persons about whom allegations have been made before or during the inquiry, or about whom adverse comment or findings will be made in the inquiry report should be given prior notice; and a reasonable time to prepare a response.[137] In cases where there are no hearings, this requirement can be accompanied by the circulation among interested parties of the draft report, or elements of it, for comment.[138]

Requirement for inquirer to give reasons

4.39 There is no general legal principle yet established that decision-makers must give reasons for their decisions.[139] However, interests in transparency, accountability and good practice make the provision of reasons desirable, and judicial dicta has reinforced the importance of these interests.[140] As a minimum, they ensure that the inquirer has focused his or her mind on the appropriate issues and that the issues have been conscientiously addressed. However, the provision of reasons takes time, particularly where many and complex issues are under consideration and where inferences have been drawn from a wide range of evidence.[141]

4.40 While we are keen that costs and time be contained by inquiries, it is axiomatic that the inquirer should give reasons. Inquiries are established to find out what happened, not to adjudicate – their inquisitorial nature whereby the inquirer directs the form and content of their process, the fact that normal evidence rules do not apply, and the lack of appeal make the need for full reasons more compelling. While inquiries do not make binding decisions, their impact on reputation and credibility means that their findings need to be well-founded.

136 Other examples can be found in the not yet in force s 30W of the Land Transport Act 1998, relating to the licensing of taxi drivers, which will require that the subject of an adverse decision receives written notification; is informed of the grounds of the decision; is given a date by which to respond. The Shipping Act 1987, s 5 requires that a person adversely commented on may appear in person or be represented by a counsel or agent.

137 P A Joseph, above n 118, 971 and 975.

138 P A Joseph, above n 118, 983 describes this as a form of public law estoppel.

139 P A Joseph, above n 118, 984, fn 302. See also Legislation Advisory Committee Guidelines, above n 131. The LAC state that decision-makers should generally be required to disclose all material upon which they may base their decisions; that a statement of reasons can be requested under s 23 of the Official Information Act 1982 if it applies; and that reasons are generally desirable but if it will unnecessarily formalise or require unacceptable cost or delay it may be appropriate to provide for giving reasons on request after a decision is made.

140 See P A Joseph, above n 118, 985. See for example, *R v Awatere* [1982] 1 NZLR 644, 648–649 (CA) Woodhouse P; *Potter v NZ Milk Board* [1983] NZLR 620, 624 (HC) Davison CJ; and *Singh v Chief Executive, Dept of Labour* [1999] NZAR 258, 262–263 (CA) Keith J for the Court.

141 In *R v Higher Education Funding Council, ex parte Institution of Dental Surgery* [1994] 1 All ER 651 (QB) Sedley J said: "it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge."

Lord Diplock's requirement that an inquiry's findings be based on evidence of "probative value" supports this conclusion.[142] As a minimum statutory requirement, we suggest that the new Act should state that in a case of adverse comment, an inquiry should be required to disclose the relevant material relied upon, and state the reasons on which the finding is based.

Oral or written submissions

4.41 As noted, the 1908 Act suggests that some participants have a right to appear in person and to orally present evidence and submissions. A number of the statutory formulations referred to above also indicate that parties before some tribunals have a right to appear in person. However, a few tribunals are required to deal with cases on the papers, and some do so in practice.[143] Oral hearings and an emphasis on the right to be heard in person are by no means consistent practice. Many inquiries undertaken by bodies such as the Ombudsmen and Auditor-General follow a more informal process.

4.42 We do not consider that the natural justice requirement to be "heard" in relation to inquiries requires the right to appear in person.[144] Indeed, that formulation does not follow from Lord Diplock's words in the *Erebus* case, set out above. In some instances, the provision of written submissions and evidence in response to an allegation or an opportunity to provide written comment on draft findings or both will be adequate to protect the subject's interests. A formulation that provides for a reasonable opportunity to refute or respond to allegations would provide an adequate balance between adhering to natural justice requirements and enabling inquirers to match their procedure to the needs of the inquiry.

4.43 Certainly, there will be cases where fairness requires that oral submissions can be made. An oral hearing may be required where significant rights are at stake, or where a person's credibility is at issue.[145] But that will not be the case in all inquiries. Where, however, an inquiry is conducted through interviews, it must still comply with the requirements of fair procedure, including the need for notice and disclosure and a fair opportunity to respond to allegations.[146]

4.44 We propose that the statute should make it clear that the right to respond relates to the allegations made, or evidence adduced that go towards an adverse comment or finding. It does not necessarily provide a right to comment on the inquiry as a whole.

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142 See also *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 All ER 81 (CA).

143 The Removal Review Authority, the Residence Review Board and the Legal Aid Review Panel are all required to deal with applications on the papers. Under cls 208 and 209 of the new Immigration Bill the Immigration Protection Tribunal will hear appeals on the papers unless the matter falls within specified exceptions. A few other tribunals such as the Student Allowance Appeal Authority invariably deal with matters on the papers. The regulations governing the operation of the Authority, while not precluding oral hearings, make no provision for them and appear to assume that matters will be dealt with on the papers.

144 In *Evans v Bradford* [1982] 1 NZLR 638, 641 (HC) Hardie Boys J distinguished courts of law, where oral submissions are required, from administrative decision-makers (which are a remove from inquiries) before which written submissions may suffice.

145 Legislation Advisory Committee Guidelines, above n 131.

146 See *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) and P A Joseph, above n 118, 976.

Cross-examination

4.45 Natural justice may demand that cross-examination should be allowed, but again this depends on the surrounding circumstances. North J in the *State Services* case considered that the absence of a general rule that the principles of natural justice required a right to cross-examine in other arenas[147] meant that there was, similarly, no general rule before commissions of inquiry.[148]

4.46 However, in *Badger v Whangarei Refinery Expansion Commission of Inquiry*[149] a commission of inquiry[150] was reviewed on the basis of its decision at the commencement of sittings that no party would be permitted to cross-examine any witnesses at any stage in its proceedings. The Commission had ruled that it would itself ask questions either directly or through counsel assisting; although supplementary submissions could be made. It emphasised that the proceedings were to be inquisitorial, but that it would give people a full opportunity to answer any prejudicial material. The court ruled that a commission could not make such a blanket ruling as it could not possibly know at the outset the extent to which issues would arise that required cross-examination.[151] It went further and held that the circumstances of that inquiry were that cross-examination had to be allowed.

4.47 The LAC guidelines state that normally when witnesses are called there should be a right to cross-examination. However, the guidelines state that commissions of inquiry can be considered an exception to the rule. We endorse this. There is no basis for participants in an inquiry to demand the right to cross-examine as a matter of course. However, it is also clear that it is undesirable and contrary to natural justice to ban cross-examination outright.[152]

4.48 Also, the manner of cross-examination can vary. Inquiries have allowed cross-examination by parties' representatives, or through the inquirer or counsel assisting, or they have restricted cross-examination altogether. Again, this will be dependent on the circumstances of the inquiry. We suggest that the new Act makes it clear that the inquiry has the power to allow or disallow cross-examination.

Representation before inquiries

4.49 Natural justice does not confer an absolute right to legal representation, although, it may be required in some circumstances. Legal representation was considered by the Court of Appeal in relation to the State Services Royal Commission:[153]

147 See, for example, *Ceylon University v Fernando* [1960] 1 All ER 631, 641 (PC) Lord Jenkins.

148 *State Services* case, above n 102, 116 (CA) Cleary J.

149 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC).

150 Appointment of the commission of inquiry was withdrawn in 1984, and it continued as a non-statutory committee of inquiry.

151 See also *David v Employment Relations Authority* (2001) 6 HRNZ 636.

152 Indeed, cross-examination may often be the least cumbersome way of adequately dealing with natural justice requirements. In *Badger*, above n 149, Barker J canvassed the various alternatives to cross-examination, including the exchange of written submissions or briefs of evidence; but noted that there could be "considerable logistic difficulties in this procedure which would call for great co-operation by all concerned … the applicants (and probably others) would have to give their evidence in several stages under this procedure. I see the whole suggestion as counter-productive and fruitful of adjournment applications".

153 *State Services* case, above n 102, 117 (CA) Cleary J.

> No doubt in some inquiries a greater degree of participation should be allowed than in others, as, for instance, where the sole object of the inquiry is to investigate the conduct of an individual … In such an inquiry, or in one where questions of law are involved, Commissioners would no doubt welcome the appearance of counsel, and one might imagine inquiries of such a nature that it could not fairly be said that a party cited or person interested has been "heard" in any proper sense of the word unless he has had the assistance of counsel. That situation would arise,however, from the special circumstances of a particular inquiry, but as a general rule I think it must remain correct … that Commissioners may hear counsel or not, as they please. Likewise I think it is plain that in the regulation of their own procedure they may prescribe or restrict the extent of participation in the proceedings by parties cited or persons interested, the one limitation being that such persons must be afforded a fair opportunity of presenting their representations, adducing their evidence, and meeting prejudicial matter …

4.50 Since then, the emphasis on a right to legal representation has probably increased,[154] although it is still recognised that the right is context specific. In the context of prison disciplinary hearings in *Drew v Attorney-General*,[155] the Court of Appeal stated that relevant considerations are the seriousness of the charge (if any) and of the potential penalty, the question whether points of law are likely to arise, the ability of a person to present a case, the potential for procedural difficulties, the desirability of a prompt determination, and the need for fairness between the parties.[156]

4.51 These considerations are repeated in the LAC guidelines, which suggest that where there is an oral hearing it is generally appropriate to permit representation. Representation may be excluded where it is inconsistent with the nature of the decision-making process or is impracticable.[157]

4.52 Clearly, references to charges and penalties are not relevant to inquiries. However, inquiries can have a very significant impact on reputation, and there are influential judicial statements that legal representation should be permitted in matters affecting reputation.[158] It has been suggested that an injustice may have occurred in the Moyle inquiry which reported in 1978 because the subject of the inquiry was denied legal representation.[159] The introduction of s 4A(3) of the 1908 Act occurred as a result of these concerns. However, we consider that the way the right is framed in the Act – in terms of a right to "appear in person or by his counsel or agent" – confuses two aspects of inquiries.

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154 See the New Zealand Bill of Rights Act 1990, ss 23(1)(b) and 24 in the criminal context.

155 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA), adopting *R v Secretary of State for the Home Office, ex p Tarrant* [1984] 1 All ER 799 (UK QB).

156 See also P A Joseph, above n 118, 978.

157 Legislation Advisory Committee Guidelines, above n 131.

158 See statements of Lord Denning in *Pett v Greyhound Racing Assn Ltd* [1968] 2 All ER 545, 549 (CA); *Maynard v Osmond* [1977] 1 QB 240, 252 (CA).

159 Auckland District Law Society Public Issues Committee *Representation by Counsel before Commissions of Inquiry where Reputation is at Stake* (Auckland District Law Society, Auckland, 1978). See also Hon G Palmer (26 June 1980) 430 NZPD 1156–1157.

4.53 Every person subjected, or likely to be subjected, to adverse comment should be able to respond to those comments and may seek the assistance of counsel in doing so. But this may not involve a formal hearing. Nor does natural justice require that every witness or person questioned by an inquiry should have a right to seek legal representation. This will depend on the circumstances. In some instances, counsel assisting the commission, or counsel appointed by the commission to assist a class of persons may meet natural justice requirements.

PROPOSED PROCEDURAL PROVISIONS

4.54 To conclude, we consider that, subject to natural justice and directions in their terms of reference, inquiries should retain the broad discretion to determine their own procedures. Indeed, we think this discretion should be enhanced by the removal of some of the restrictions contained in s 4A of the Act. However, we also think that greater guidance can be given as to which powers they have in their armoury to make decisions about procedure. In addition, some well-established common law rules relating to adverse comment apply to inquiries. We think these rules should be set out in statute to give clear direction to those conducting and participating in inquiries.

RECOMMENDATION

R14 The new Act should state that, subject to the rules of natural justice and their terms of reference, inquirers may conduct their inquiry as they consider appropriate. Accordingly an inquiry may decide:

(a) whether to conduct interviews, and if so, who to interview;

(b) whether to call witnesses, and if so, who to call;

(c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held;

(d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry;

(e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions;

(f) whether to allow or restrict cross-examination of witnesses.

See draft Bill, clause 13.

RECOMMENDATION

R15 The Act should also provide that where a person or body will be the subject of adverse comment or findings by the inquiry, the inquiry must:

(a) give prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings;

(b) disclose the relevant material relied upon, and state the reasons on which the finding or allegation is based;

(c) give the person or body reasonable time and reasonable opportunity to refute or respond to the proposed findings or allegations;

(d) give proper consideration to those representations.

See draft Bill, clause 16.

PARTICIPATION

4.55 We have considered whether there remains a need for a provision in the Act which allows inquirers to distinguish a class of participants in an inquiry from other interested persons. An inquiry may receive submissions and evidence from a very wide range of people, but most inquiries have found it useful to differentiate between those who merely give evidence and those who have a greater interest in the process.

4.56 To date, varying approaches have been taken: the Royal Commission on Genetic Modification involved an issue of wide public interest, illustrated by the fact that it received 292 applications to be heard and accorded "entitled to be heard" status to 117 groups. While not giving any persons a particular standing before it, the Royal Commission on the Electoral System gave all those who wished the opportunity to support their submissions with a personal appearance before the Commission.

4.57 The Committee of Inquiry into Cervical Cancer at the National Women's Hospital gave "party" status to all who sought it. In comparison, the Commission of Inquiry into Police Conduct conferred "party" status on four organisations: the New Zealand Police, Police Complaints Authority and Police Association; and on later application, the Police Managers' Guild. Seven police officers who were the subject of allegations before the Commission are referred to in the report as "people with a direct interest in the inquiry" and were kept informed of key commission processes as a result. Ten individuals were identified as having complaints that fell within the Commission's terms of reference, and were referred to as "submitters".

4.58 By way of example, it is easy to foresee that in an inquiry into a tragic incident which was witnessed by many, and suspected to be caused by systemic issues within an organisation, the inquiry may wish to hear from:

- those injured in the incident;
- the families of those killed;
- members of the public who witnessed events preceding, and during the incident;
- members of the public who wish to be heard as concerned citizens with views to put forward;
- employees of the organisation who were involved in events preceding, during and after the incident;
- employees and managers within the organisation;
- individuals or organisations whose conduct may be directly or indirectly implicated;
- technical experts on the factors that caused the incident;
- experts in organisational practice and procedures.

4.59 Some of these may justifiably have an interest in being involved and kept advised throughout; others may add value by giving evidence or merely supplying written submissions; some may have nothing to add that can aid the inquiry in coming to its conclusions, but may also have a direct interest in its outcome.[160]

160 For instance the families of victims may have very strong views about the matter which must be accommodated, but may be able to contribute little of a probative nature. Although there are exceptions: the survivors of a plane crash that occurred outside Christchurch in June 2003 gave helpful evidence at the Coroner's inquest. See http://www.nzherald.co.nz/location/story.cfm?l_id = 121&ObjectID = 3612827 (accessed 19 November 2007).

The inquiry needs to be able to distinguish between these groups both in the interests of efficiency and effectiveness of the inquiry, but also to allow relevant people an opportunity to participate without unduly prolonging it.

4.60 These are matters where there can be no set procedure but where the Act can perhaps provide a systematic approach. We consider that enabling the inquiry, in its discretion, to give some people a statutory status may aid it in clearly distinguishing between different categories of participants. Doing so can serve as a signal to the person and to the community at large that the person has a particular interest in and relationship to the events. In some cases, their greater interest may justify them having some rights of participation. Being able to confer standing may also help the inquiry itself in distinguishing between witnesses when it comes to the way they give evidence. It can make the inquiry process more transparent.

4.61 One concern is that retaining a named category of participants may result, to an extent, in the continuation of a "parties" mentality. It is therefore important that clear indication is given that any decision about participation is at the inquirers' discretion. No one has an automatic right to participate and whether any such status is accorded will depend on the substance and type of the inquiry. Flexibility in deciding levels of participation in inquiries needs to be preserved but nothing is to be lost, and greater transparency and convenience can be gained, by some delineation.

"Core participants"

4.62 In the United Kingdom, rules made under the Inquiries Act 2005 enable the chairman of an inquiry to designate persons as "core participants".[161] In doing so he or she must consider whether:

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

4.63 Core participants have a right to have their legal representative (if they have one), designated as a "recognised legal representative" in respect of the inquiry proceedings.[162] A "recognised legal representative" can apply to the chairman for permission to ask questions of a witness giving oral evidence,[163] and have a right to make opening and closing statements.[164] Finally, core participants and their recognised legal representative must be given a copy of the final report, after it has been given to the Minister, but before publication.

161 See the Inquiries Rules 2006, r 5, made under s 41 of the Inquiries Act 2005.

162 Rule 6. Rule 7 enables the inquiry, with the core participants' agreement, to order that two core participants with similar interests be represented by the same lawyer.

163 Rule 10(4). Rule 10(5) provides: "When making an application under paragraphs (3) or (4), the recognised legal representative must state (a) the issues in respect of which a witness is to be questioned; and (b) whether the questioning will raise new issues or, if not, why the questioning should be permitted."

164 Rule 11.

Recommendation

4.64 We recommend the adoption of the United Kingdom approach of appointing core participants and the use of this terminology in preference to "parties" for the reasons discussed. However, unlike the UK legislation, core participants should only have a right to give evidence and make submissions to an inquiry. The manner in which they do so should be entirely at the discretion of the inquiry. In particular, there need not be a right to an oral hearing. The inquiry could determine, for example, that core participants have the right to give evidence in chief on their own behalf and for their representative to make submissions, but not to have the right to cross-examination.

4.65 At present, s 4A of the 1908 Act establishes a test as to who qualifies for status – a person *shall* have a right to appear and be heard if he or she is a party to the inquiry or satisfies the commission that he or she has an "interest apart from any interest in common with the public".[165] As currently formulated, the test offers little guidance as to whether an interest exists.[166] For instance, the Royal Commission on Genetic Modification stated:[167]

> [I]t was obvious many members of the public were acutely interested in the inquiry and often highly informed … many people [were] concerned to varying degrees of intensity but, by itself, this [did] not amount to "an interest apart from that of the general public".

4.66 Review of other inquiry reports does little to inform us how decisions about "party" and "persons entitled to be heard" status were made. The formulation can give rise to debate about the boundary between the extent to which a person has "an interest" in an issue, and the extent to which they are part of the "common herd" being generally interested in it.[168]

4.67 A variety of alternative tests can be found in inquiries legislation in other jurisdictions.[169] The Ontario Law Reform Commission recommended that anyone with a "genuine interest" can make submissions and that an inquiry could determine the "form and extent of these submissions".[170] The Commission thought that the "substantial and direct interest" test was "too restrictive given the importance of public participation in the inquiry process".[171]

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165 In a ruling relating to a decision-making body with the powers of a commission of inquiry, it was found that "responsible bodies representing a relevant aspect of the public interest" should not have been excluded under s 4A(1): in *Moxon v Casino Control Authority* (24 May 2000) HC HAM M 324/99, para 112 Fisher J criticised the Authority's narrow interpretation of interested persons that excluded "special interests in the social implications and repercussions of casinos".

166 But some jurisdictions give no guidance at all. For instance, s 6FA of the Royal Commissions Act 1902 (Cth) states that "any person authorized by a Commission to appear before it … may so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry". For criteria to consider when exercising this discretion see Royal Commission into the Building and Construction Industry Vol 2 Conduct of Commission: Principles and Procedures, para 23.

167 Royal Commission on Genetic Modification, 117.

168 See, for example, *Murray v Whakatane District Council* [1999] 3 NZLR 276, 307 (HC) Elias J.

169 In the Australian Capital Territory, commissions are to determine whether a person has a "sufficient interest" (Royal Commissions Act 1991 (ACT), s 31(b)). A more restrictive test requires a "substantial and direct" interest in the inquiry (Special Commissions of Inquiry Act 1983 (NSW), s 12(2); Royal Commissions Act 1923 (NSW), s 7(2); Public Inquiries Act RS O 1990 c P-41, s 5(1); Public Inquiries Act RS NWT, s 7(1)).

170 Ontario Law Reform Commission *Report on Public Inquiries* (Ontario Law Reform Commission, Toronto, 1992) 217.

171 Ibid, 208.

4.68 Giving some guidance in the statute will aid inquirers when they come to consider whether to appoint core participants, and will help them to draw the line between people or bodies with different interests. We therefore propose that statutory guidance be given, as set out below. Greater clarity will be of benefit to all those involved in inquiries. However, it must be made clear that the decision to appoint core participants is at the discretion of the inquirer, subject to any stipulations in the terms of reference.

Naming core participants in the terms of reference

4.69 Inquiries are executive bodies and it would be inappropriate to restrict the Executive from indicating whether any persons should be designated as core participants in the terms of reference or instrument appointing the inquiry. It is desirable that any such indication be given expressly and in specific terms.

"Citing parties"

4.70 The term "citing parties" is used in s 4 of the 1908 Act. On its face, "citation" could merely mean the power to name (or determine) who the parties to the inquiry are. However, in the context of s 4(1), it has been interpreted as a "warning to the party to attend".[172] The original formulation of the provision referred to "citing parties interested in the inquiry", and was thought to require the issue of a notice, "analogous to a summons", but without the usual formal requirements.[173] It is not entirely clear whether, like a summons, such a citation amounts to a requirement to attend. To avoid confusion arising from the term "citing", we suggest that inquiries should be able to designate core participants by way of written notice, but where such a person is unwilling to attend, a formal summons may be required.

Conduct and policy inquiries

4.71 In the past, the courts have drawn distinctions between conduct and policy inquiries when it has come to citing parties. In 1934, the Supreme Court was of the opinion that:[174]

> [W]here a Commission is appointed to inquire and report upon the working of any existing law or expediency of any legislation … it is difficult to see how it is competent, speaking generally (though there may be exceptional cases), for the Commission to cite parties.

4.72 Generally, the courts adopted an approach that parties were likely to be appointed only in matters "involving status, or a charge affecting individuals, or any dispute or claim which properly comes within any of the four classes of cases set out in section 2 and which by its nature is (or perhaps may be) a dispute between parties".[175]

172 *Pilkington v Platts and Others* [1925] NZLR 864, 869 (CA) Herdman J. Here, the question of whether individuals had been "cited as parties" was relevant to identifying those against whom cost orders could be made. Section 11, relating to costs, now relates to both those who have been cited as parties and those authorised by the Commission to appear and be heard at the inquiry under section 4A, and those summoned to attend and give evidence at the inquiry.

173 Ibid, 870 (CA) Herdman J considered this to be the case because the statute was silent about the method of serving the citation. This interpretation was cited with approval by the President of the Court of Appeal in the *State Services* case, above n 102, 105 (CA) Gresson P.

174 *Timberlands Woodpulp Ltd*, above n 111, 294–5 (SC) Myers CJ for the Court. Similarly in the *State Services* case, above n 102, 105 (CA) Gresson P suggested the nature of the inquiry made it impracticable to cite parties.

175 *Timberlands Woodpulp Ltd*, above n 111, 294 (SC) Myers CJ.

4.73 Although there is nothing in the legislation preventing commissions from appointing parties in policy inquiries or differentiating the nature of their rights, in the *State Services* case, Cleary J was clearly influenced by the fact that:[176]

> the rights of parties interested to participate in the proceedings cannot be as extensive as might be the rights of a party cited to an inquiry of quite a different nature, such as one where there is a complaint against conduct.

4.74 There may be occasions in any inquiry, be it primarily concerned with issues of conduct or policy, when an inquirer may find it useful to designate core participants. No differentiation should be made on this basis, particularly as the inquiry also has discretion to determine the mode by which evidence and submissions are presented.

RECOMMENDATION

R16 Inquiries may, by written notice, designate "core participants" and in doing so must consider whether:

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates; or

(b) the person has a significant interest in a substantial aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

RECOMMENDATION

R17 Core participants should have a right to provide evidence and make submissions to the inquiry, but the manner in which they do so should be at the discretion of the inquiry.

See draft Bill, clause 17.

BIAS OR PREDETERMINATION

4.75 As noted at the outset of this chapter, natural justice also requires that decision-makers be free from bias or predetermination. The Royal Commission on the Thomas Case was reviewed[177] on the allegation that there was a real likelihood or reasonable grounds for suspecting that the Commissioners had been biased during the course of the inquiry and in the preparation of the report against the members of the Police Association, the Police Officers Guild, and the two police officers alleged to have planted the .22 cartridge. The Court of Appeal held that the test for determining whether or not bias by predetermination had been established in the case of a commission inquiring into and reporting on allegations of impropriety was whether *an informed objective bystander would form an opinion that a real likelihood of bias existed*. The Court said:

176 *State Services* case, above n 102, 117.

177 *Thomas*, above n 105, on appeal from the decision of the Full Court of the High Court that the allegations had not been established.

> In this case … what is under scrutiny is not the conduct of a Court. However grave the allegations which are being investigated, under the New Zealand system of law an inquiry is different from a trial. As a Commissioner has an inquisitorial role, it is natural that he should take the initiative more freely than a Judge traditionally does. His role is to report to the Executive which has selected him personally to carry out the particular inquiry. The Commissioner is not acting as a Judge, and he is not to be expected to project the same standards of detached impartiality. The standards expected of Courts may require the application to them of a different and stricter test, such as whether there is a real suspicion of bias; but we are not now called on to consider how the bias test for Courts should be formulated. For the present kind of case, the real likelihood test is enough.

4.76 The standard approach to bias has changed in New Zealand since the *Thomas* case.[178] The Court of Appeal in *Muir* has recently adjusted the general rule and stated it to be as follows:[179]

> … the correct enquiry is a two stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask *whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case*. This standard emphasises to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct. [Emphasis added.]

4.77 The judgment in *Muir* has brought New Zealand into line with English[180] and Australian[181] authority, and established North American practice.[182] A question remains, whether the standard of bias which applies to inquiries differs because of their particular nature. In 2001, for example, the Court of Appeal indicated that because of their nature, hearings before administrative tribunals were likely at times to involve expert decision-makers making robust interventions, and that this should not necessarily be taken to be bias.[183]

178 An account of the development of the law can be found in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, paras 44–61 (CA) Hammond J.

179 Ibid, para 62 (CA) Hammond J.

180 *Porter v Magill* [2002] 2 AC 357 (UK HL).

181 *Webb v R* (1994) 181 CLR 41 (HCA).

182 See *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 and *R v RDS* [1997] 3 SCR 484 for the Canadian position ("reasonable apprehension of bias"); and *Liteky v United States* 510 US 540, 564 (1994) for the United States test ("If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely …").

183 *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA). See para 70: "… we have gained the impression of an experienced member of the authority bringing to the public sittings considerable experience in the field and a familiarity with the written material already considered. Throughout, his interventions showed that he closely followed the proceedings and challenged matters he did not immediately accept. He clarified evidence and inquired when he sought elaboration or further information. He showed particular interest in local social circumstances … He probed for assistance on whether their susceptibility to problems from gambling resulted from socio-economic circumstances … He participated actively throughout and, when corrected, he readily acknowledged error. His unnecessary robustness at times to us reflected more his personality and background than bias."

4.78 The difference between the tests in *Thomas* and *Muir*, as we see it, falls on the use of "might not" as opposed to "real likelihood". "Real likelihood" implies more of a probability rather than possibility, and the trend in the cases, since the adoption of the "real danger" test in the *Auckland Casino* case,[184] to the adjustment in *Muir* now clearly places the emphasis on "possibility". It may well be, therefore, that the *Muir* test should be considered to apply to inquiries as well. However, this is a question for the courts to decide if the matter arises.

4.79 The LAC guidelines state that it will not normally be necessary for a statute to specify that the rules about bias apply, but that sometimes it may be appropriate to qualify or exclude the application of this rule. The membership of inquiries often comprises people who have a specialist background in the subject matter of the inquiry. We believe it is important to emphasise that, while appointed for their expertise, they are not representative of any particular interest and therefore consider there is value in the statute confirming that inquirers are to act impartially.

RECOMMENDATION

R18 The new Act should provide that inquirers are to act impartially.

See draft Bill, clause 9.

184 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, 149 (CA) Cooke P for the Court, adopting the rule in *R v Gough* [1993] AC 646 (UK HL). See, also *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA); *Man'O War Station Limited v Auckland City Council* [2001] 1 NZLR 552 (CA); *Erris Promotions Ltd v CIR* (2003) 16 PRNZ 1014 (CA); *R v Jessop* (19 December 2005) CA13/00 and *Lamb v Massey University* (13 July 2006) CA241/04.

Chapter 5

Powers to require evidence

5.1 Commissions of inquiry are inquisitorial bodies. They have an express function to seek out information to assist them in answering their terms of reference. To be effective in that function they will often require specific powers to receive information and ask questions.

THE NEED FOR POWERS TO INQUIRE

5.2 In a statutory inquiry, the Executive has at its disposal a powerful tool for inquiring into citizens' private and professional lives. Inquiries are not subject to the many protections available in court proceedings. There is no appeal from an inquiry's findings and it may be difficult for individuals to vindicate themselves after the inquiry has reported.

5.3 There are at least two reasons for questioning whether they should have coercive powers. First, use of the 1908 Act is open to abuse: for example, the motivation for the Moyle inquiry has been called into question, arguably being used at least in part to discredit the Member of Parliament for political advantage.[185] The target of such an inquiry has limited defence against its impact and its powers. There is also a risk that the powers may be misapplied.

5.4 Secondly, the impact on some of those involved in an inquiry can be disproportionate to the ends achieved by the process. Not only those being directly investigated, but those called to provide information or give evidence may find themselves facing significant cost in time and money by having to appear and provide documentation; and possibly employ legal representation for the duration of the inquiry. Participants may also be faced with the emotional stress accompanying the process, and the risk of adverse comment by other witnesses or the inquiry report.

5.5 Nevertheless, we have encountered no dispute that there is a place for inquiries with coercive powers: in a modern complex society the power to constitute an inquiry with coercive powers is essential.[186] Inquiries are of limited duration and they need to be adequately armed to carry out their function within the time allotted. As noted in chapter 2, coercive powers are not frequently relied on by

185 Geoffrey Palmer "Muldoon and the Constitution" in M Clark (ed) *Muldoon Revisited* (Dunmore Press, P North, 2004), 189. See Rt Hon Sir Alfred North *Report of the Commission of Inquiry into an Alleged Breach of Confidentiality of the Police file on the Honourable Colin James Moyle MP* (1976).

186 See discussion in chapter 2.

commissions of inquiry in New Zealand, but their existence acts as a carrot, encouraging people to cooperate with an inquiry in the knowledge that the powers could actually be employed. Nearly all those we have spoken to who have run commissions felt their task was made easier, and their standing enhanced, because of the potential to use the powers. Conversely, those conducting inquiries without powers have at times felt restrained.

SCOPE OF THE POWERS

Law and natural justice

5.6 An inquiry's powers and discretion must be exercised within the boundaries of natural justice and the law. Inquiries are subject to review on the usual administrative law grounds that the inquirer has acted on a wrong principle, taken into account irrelevant considerations, failed to give proper weight to relevant considerations, or has exercised it in a wholly unreasonable way.[187]

Within its terms of reference or statutory function

5.7 An inquiry's powers to ask questions or require information are limited by their terms of reference (or in the case of statutory bodies with the powers of commissions of inquiry, by their statutory functions). Questions that are clearly outside the scope of the inquiry are irrelevant and cannot be permitted.[188] A commission of inquiry is:[189]

> an inquiry, not an inquisition … the commission is not a roving commission of a general character authorizing investigation into any matter that the members of the commission may think fit to inquire into and … the ambit of the inquiry is limited by the terms of the instrument of appointment of the commission.

5.8 However, this statement should not be interpreted too strictly – matters "incidental" to the inquiry may be allowed.[190] The question is one of interpretation of the terms of reference or statute establishing the inquiry or tribunal. The cases suggest that the functions of a statutory body (rather than an ad hoc inquiry) will be interpreted more narrowly. Accordingly, in *In re St Helens Hospital*[191] the commission of inquiry's duty was to inquire not only into the circumstances surrounding the death that prompted the inquiry, but also into the general administration of the hospital. It followed that it had the power to demand records that went wider than those relating to the death. Conversely, the Veterinary Council of New Zealand (which had the powers of a commission of inquiry in relation to its disciplinary functions[192]) was considered to have gone "well beyond" its statutory powers in seeking a broad audit of a veterinarian's practice to aid it in a disciplinary hearing.[193]

187 *Fay Richwhite & Co Ltd*, above n 105, 529 (CA) Cooke P. See chapter 11.

188 *In re Royal Commission of Licensing* [1945] NZLR 665, 679 (CA) Myers CJ.

189 Ibid, 680 (CA) Myers CJ.

190 See, for example *Cock v Attorney-General* [1909] NZLR 405 (CA).

191 *In re St Helens Hospital* (1913) 32 NZLR 682 (SC).

192 Veterinarians Act 1994, s 35.

193 *Doherty v Judicial Committee of the Veterinary Council of New Zealand* [2001] NZAR 729. Nevertheless, the Court of Appeal has commented that an inquirer can consider any evidence that "in its opinion may assist it to deal effectively with the subject of the inquiry." *Comalco New Zealand Ltd v Broadcasting Standards Authority* (14 December 1995) CA 148/95 and 159/95.

EXISTING POWERS TO INQUIRE

5.9 Until 1980, s 4 of the 1908 Act provided for commissions' powers to summon witnesses, administer oaths and hear evidence by reference to District Court powers.[194] The powers are now found in ss 4B(2) and (3), 4C and 4D, and apply by virtue of statute alone.

5.10 Section 4C(1) provides:

> For the purposes of the inquiry the Commission or any person authorised by it in writing to do so may—
>
> (a) Inspect and examine any papers, documents, records, or things:
>
> (b) Require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made:
>
> (c) Require any person to furnish, in a form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records as aforesaid.

5.11 Commissions can also require that any written information, particulars or copies be verified by statutory declaration (s 4C(2)) and they can, of their own motion or on application, order that any information produced be supplied to any person appearing before the commission (s 4C(3)). In doing so, the commission can impose such terms and conditions as it thinks fit.

5.12 Section 4D(1) states:

> For the purposes of the inquiry the Commission may of its own motion, or on application, issue in writing a summons requiring any person to attend at the time and place specified in the summons and to give evidence, and to produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the subject of the inquiry.

5.13 Section 4D(2) relates to delegation of the commission's inquisitorial powers.

5.14 Commissions therefore have the power to inspect papers and other material; require any person to produce material for examination; and require any person to provide the commission with information in any form it dictates. Section 4D allows them to go further and require any person to attend to give evidence and to bring with them papers and other material.

5.15 Sections 4B(2) and (3) provide that the commission may take evidence on oath, and for that purpose a member or officer of the commission may administer an oath; and that the commission can permit witnesses to give evidence by tendering a written statement verified by oath.

5.16 There has been little challenge to the use of these powers, and any challenges have been founded on protections against the production of information as opposed to the existence or exercise of the powers per se.[195]

194 Relevantly, the section provided "Every such Commission shall for the purposes of the inquiry have the power and status of a Magistrate in respect of citing parties *interested in the inquiry, summoning witnesses, administering oaths, hearing evidence,* and conducting and maintaining order at the inquiry." [Emphasis added.]

195 See *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

5.17 We consider these powers are adequate for inquiries and other than some modernisation of the language used in the provisions, they should for the most part remain unchanged in the new Act. However, some matters require clarification, as discussed below.

RECOMMENDATION

R19 Inquiries under the new Act should be able to:

(a) require any person to—

(i) produce any documents or things in that person's possession or control or copies of those documents or things;

(ii) allow copies or representations of those documents or things to be made;

(iii) provide information to the inquiry, in a form approved by the inquiry;

(iv) verify by statutory declaration any written information, copies of documents, or representations of things provided to the inquiry;

(b) examine any document or thing that is produced by a witness;

(c) summon witnesses to attend the inquiry; and

(d) take evidence on oath or affirmation.

See draft Bill, clauses 19, 20 and 23.

SEARCH AND SEIZURE POWERS

5.18 A number of Australian jurisdictions have given inquiries certain search, seizure and surveillance powers. For example, the 1902 Federal Act provides that, where the Letters Patent establishing the commission have stated that the relevant section of the Act applies, the commission can apply to court for search warrants.[196]

5.19 Inquiries in the Australian Capital Territory can issue search warrants without the need for recourse to a judge.[197] In the Western Australian legislation there is express provision for the person exercising the warrant "to use such force as is necessary".[198] Queensland's legislation is even more far reaching.[199]

196 Royal Commissions Act 1902 (Cth), s 4. Where there are: "(3)(a) … reasonable grounds for suspecting that there may be, at that time or within the next following 24 hours, upon any land or upon or in any premises, vessel, aircraft or vehicle, a thing or things of a particular kind connected with a matter into which the relevant Commission is inquiring …; and (b) the relevant Commission, or the person, believes on reasonable grounds that, if a summons were issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed." Inquiries in Tasmania (Commissions of Inquiry Act 1995 (Tas), s 24) and Western Australia (Royal Commissions Act 1968 (WA), s 18) have similar powers.

197 Royal Commissions Act 1991 (ACT), s 25.

198 Royal Commissions Act 1968 (WA), s 18(5).

199 A commission, or person authorised may enter and inspect any land, building, place, vehicle, aircraft or vessel, and inspect any books, documents, writing, records, property or thing of whatever description, the entry upon or the inspection of which appears to it, him or her to be requisite. The occupier or owner is required to provide "all reasonable facilities and assistance". Commissions of Inquiry Act 1950 (Qld), s 19(2). Under section 19A a chairperson can issue a search and seizure warrant if he or she is satisfied on reasonable grounds that there may be things there relevant to the inquiry, or that it may be evidence of an offence. Section 19B provides that material so seized may be held beyond the end of the inquiry for the purpose of establishing whether a person should be charged with a related offence. The South Australian Royal Commissions Act 1917, s 10 is in similar terms. Section 19C of the Queensland Act also provides that a chairperson may apply to a Supreme Court judge for an approval to use a listening device.

5.20 In 1992 the Ontario Law Reform Commission recommended an elevated threshold before a search could take place under its inquiries legislation. The Commission recommended that upon the application of an inquiry, a judge of the Ontario Court (General Division) should be permitted to issue a warrant authorising a search in certain circumstances.[200]

5.21 Are there circumstances where search and seizure powers may be needed in New Zealand inquiries? We note that the Australian developments need to be seen in their context, notably the expansion of Australia commissions into permanent bodies investigating corruption.

5.22 Furthermore, search and seizure powers are normally associated with criminal and regulatory functions.[201] Inquiries in New Zealand do not, and in our view, should not fulfil those roles. Where search and seizure powers are considered necessary, there is likely to be some suspicion of criminal or illegal behaviour. There are other appropriate bodies with access to search and seizure powers for certain purposes and those powers are constrained by specific legislation. Those specialist bodies should be used in such circumstances. Providing inquiries with search and seizure powers would amount to a significant change to their nature that we do not consider is warranted, particularly given their potentially wide scope and limited procedural safeguards. We propose that inquiries should not have access to search and seizure powers.[202]

RECOMMENDATION

R20 Inquiries should not have access to search and seizure powers.

COMMISSION'S POWER TO ACCESS CONFIDENTIAL INFORMATION

5.23 Inquiries have encountered difficulties in accessing information where disclosure is prevented by legislation. Temporary amendment was made to the Police Complaints Authority Act 1988 to enable disclosure of information to the Commission of Inquiry into Police Conduct.[203] Resolving this issue delayed the Commission's task. Similar difficulties were encountered in the 2004 "Scampi"

200 For any documents or things only upon showing that: (a) the documents and things are material to the subject matter of the inquiry; (b) the public interest in obtaining access to such documents and things clearly outweighs the privacy interests of the individual; and (c) there are reasonable grounds to believe that such documents or things will not be produced before the commission in a full and accurate condition through reliance on the commission's power to summon the production of such evidence. Ontario Law Reform Commission *Report on Public Inquiries* (1992), rec 8. The recommendation has not been adopted, and s 17(2) of the Ontario Public Inquiries Act RSO 1990 c P 41, provides that a judge may issue a warrant if there are "reasonable grounds for believing that there are in any building, receptacle or place, including a dwelling house, any documents or things relevant to the subject-matter of the inquiry".

201 The Law Commission has recently released a report entitled *Search and Surveillance Powers* (NZLC R 97, Wellington, 2007) which reviews the law relating to search and surveillance powers for criminal investigative purposes.

202 We note, however, that the Coroners Act 2006, s 122 provides that the police can apply to a District Court Judge for a search warrant on the grounds that an order of a coroner has not been complied with. The warrant must be granted by a judge other than the coroner.

203 Police Complaints Authority (Commission of Inquiry into Police Conduct) Amendment Act 2004. Section 5 provided that the Amendment Act expired 1 day after the Commission reported to the Governor-General.

inquiry[204] and the 1988 Cervical Cancer inquiry.[205] The process of legislative amendment on an inquiry by inquiry basis, as occurred in the Police Conduct inquiry, could remain. However, there are precedents in existing legislation that could avoid this.

5.24 Section 19 of the Ombudsmen Act 1975[206] provides:

> (3) ... any person who is bound by the provisions of any enactment ... to maintain secrecy in relation to, or not to disclose, any matter may be required to supply any information to or answer any question put by an Ombudsman in relation to that matter, or to produce to an Ombudsman any document or paper or thing relating to it, notwithstanding that compliance with that requirement would otherwise be in breach of the obligation of secrecy or non-disclosure.
>
> (4) Compliance with a requirement of an Ombudsman (being a requirement made pursuant to subsection (3) of this section) is not a breach of the relevant obligation of secrecy or non-disclosure or of the enactment by which that obligation is imposed.

5.25 Section 19 is countered by s 21 which creates a qualified duty for ombudsmen and their staff to maintain secrecy. A similar approach was taken by the amendments to the Police Complaints Authority Act. Section 32(2B) of that Act, as amended, states:

> Before the Authority discloses to the Commission any matter which the Authority could not disclose but for subsection (2A), the Authority must obtain from the Commission—
>
> (a) an acknowledgement that the Commission is aware of the confidentiality that persons who have informed the Authority of the matter were entitled to expect under this Act before it was amended by the insertion of subsection (2A):
>
> (b) an undertaking that, in exercising its power and discretions, the Commission will take all steps necessary or desirable to protect that confidentiality, so far as this may be achieved without materially prejudicing the Commission's ability to ascertain and report the truth, which steps may include—(i) restricting or prohibiting publication: or (ii) excluding persons from hearings.

5.26 In our draft report we questioned whether elements of these sections should be included in a new Inquiries Act. We suggested that inclusion of such a provision would reduce potential for delay and it would better arm inquiries to effectively conduct their task.

5.27 However, the Transport Accident Investigation Commission, which benefits from a secrecy provision, submitted to us that such a power could have a significant impact on their manner of operation. In its case, inclusion of the secrecy provision was the subject of detailed parliamentary consideration, which should not be overridden by general inquiry legislation. Other submitters raised similar concerns.

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204 Helen Cull QC *Report for the State Services Commissioner of an Inquiry into Fisheries Management of the Scampi Industry* (2004) 19, appendix 4. Relating to disclosure of returns or information furnished under the Fisheries Act 1983, s 66(6). See *Simunovich Fisheries Ltd v Chief Executive of Ministry of Fisheries* (11 June 2003) HC WN CP 36/03 France J.

205 Judge Silvia Cartwright *Report of the Cervical Cancer Inquiry* (1988) 225, relating to the inquiry's access to patient records. We understand that similar difficulties were encountered during the Gisborne cervical cancer inquiry: A P Duffy, D K Barrett, M A Duggan *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (2001).

206 The Public Audit Act 2001, s 28 provides similarly.

5.28 Because the broad scope of inquiries cannot be predicted in advance, we have concluded that this issue should be left for particular consideration by Parliament on an inquiry by inquiry basis where the need arises. While this may add delay to an inquiry's processes, we acknowledge that where similar circumstances arise again, Parliament is best placed to balance all the interests on a case by case basis. Where such issues are likely to arise, it would assist if they could be addressed at the outset of the inquiry, to minimise delay and disruption.

DISCLOSURE OF MATERIAL PROVIDED TO COMMISSION

5.29 Section 4C(3) of the 1908 Act states that a commission can provide any part of any papers furnished to it to other persons appearing before the commission. The commission may impose terms before releasing the information. In 1913 (before the provision was introduced in 1980) the Supreme Court ruled that it was "clear that the Commissioner is not bound to allow the complainants or their counsel liberty to inspect and examine all the books and documents which the Commissioner may think it necessary for him to examine. What they should be allowed to inspect must depend upon the discretion of the Commissioner."[207]

5.30 The limits of s 4C(3) have been considered in the context of the application of the 1908 powers to adversarial bodies with adjudicative powers. In 1980, the Equal Opportunities Tribunal concluded that sections 4(1) and 4C do not include the powers to make general orders for discovery[208] since any such power had to be set out expressly in the statute.[209]

5.31 In 1995, the Court of Appeal ruled that the Broadcasting Standards Authority, which has the powers of a commission of inquiry, could make an order that an agency release information to another.[210] However it later recalled and substituted that decision.[211] The outcome of the second ruling appears to be that the Court confirmed that the power is subject to claims of privilege, and that s 4C(3) does not authorise the Authority to require documents to be produced directly to another party. They must first be produced to the Authority, which can then exercise the s 4C(3) power at its discretion.

5.32 This decision was not referred to in a 2002 ruling relating to hearings before the Liquor Licensing Authority, where Fisher J held that s 4C(3) directly contemplates "the equivalent of an order for discovery".[212] Fisher J also considered that the combination of s 4C(1)(c) and (3) gave the Authority power to order the equivalent of answers to interrogatories.[213]

207 *In re St Helens Hospital* (1913) 32 NZLR 682, 688 (SC) Cooper J.

208 In the sense of an order that parties answer on affidavit stating what documents are or have been in their possession or power relating to the matter in question.

209 *Human Rights Commission v Eric Sides Motors Company Limited* (1980) 2 NZAR 407 (EOT).

210 *Comalco New Zealand Ltd v Broadcasting Standards Authority* (1995) 9 PRNZ 153 (CA).

211 *Comalco New Zealand Ltd v Broadcasting Standards Authority* (4 March 1996) CA 148/95 and 159/95.

212 *Waitakere Licensing Trust v 3mi Choices Ltd* (10 July 2002) HC AK AP109-PL01, para [36] Fisher J.

213 Ibid, para [37] Fisher J.

5.33 These recent rulings relate to tribunals, but they have cast some confusion on the general power in s 4C(3).[214] Usually, the issues in an inquiry are not so narrowly defined as in court or tribunal proceedings and the scope of relevant documents may be far harder to determine. We do not think that s 4C(3) contemplates an order for discovery between the participants in an inquiry, and the power should not be confused with processes employed in litigation. The power should be retained but the new Act should clarify that an inquiry has the power to disclose information it has received during the proceedings of the inquiry to other participants, subject to any relevant privileges or confidentiality and natural justice.[215] It may order a participant to provide certain classes of information but should not, however, have the power to order general discovery or automatically release information received to other participants.

RECOMMENDATION

R21 The new Act should retain and clarify an inquiry's power to disclose information it receives to other participants in the inquiry.

See draft Bill, clause 22.

DELEGATION

5.34 The powers in sections 4C and 4D of the 1908 Act may be delegated, but in different ways. Delegation of the power of inspection must be done in writing and may be to "any person".[216] The power to summons may be delegated to an officer of the commission purporting to act by direction or with the authority of the commission or its chairman.[217] An "officer of the commission" can also administer oaths. The 1908 Act does not define "officer of the commission". Under s 14 of the Oaths and Declarations Act 1957, all "courts and persons acting judicially are empowered to administer an oath". The High Court and District Courts Rules provide for judges, registrars and persons authorised by judges to administer oaths in various circumstances.[218]

5.35 An inquiry's powers to issue summonses and require attendance or documentation tend to be used sparingly. Because of their intrusive nature, we think they should only be exercised by the inquirer. However, there is often a practical need for someone other than the inquirer to inspect evidence and to administer oaths. Those powers should be able to be delegated to an officer of the inquiry, as authorised in writing by the inquirer.

RECOMMENDATION

R22 An inquiry's powers to inspect documents and administer oaths should be able to be delegated in writing to an officer of the inquiry.

See draft Bill, clause 21.

214 They also illustrate the difficulties caused by the incorporation by reference of powers designed for inquiries, by statutes establishing adjudicative bodies. See chapter 15.

215 Natural justice requirements are discussed in chapter 4.

216 Section 4C(1).

217 Section 4D(2).

218 See High Court Rules, r 369 and District Courts Rules 2002, rr 378, 519.

RECOMMENDATION

R23 An "officer of the inquiry" should be defined as a person who is engaged to work for an inquiry.

See draft Bill, clause 4.

SERVICE

5.36 Under s 5 of the 1908 Act, a summons may be served by delivering it to the person summoned, in which case it must be served at least 24 hours before attendance is required; or by posting it by registered letter addressed to the person summoned at that person's usual place of abode, which must be done at least 10 days before the date of attendance. If the summons is posted by registered letter it is deemed to have been served at the time when the letter would be delivered in the ordinary course of post.

5.37 This differs from the rules relating to the service of witness summons in the High Court and District Court rules which both provide for personal service.[219] High Court Rule 498 provides: "The order of subpoena shall be served on the witness personally, by leaving a sealed copy thereof with the witness …" We consider that personal service should be required for summonses to appear before inquiries. We also suggest that the new Act should provide for substituted service, like that provided for under r 211 of the High Court Rules. This will ensure that the witness has actually received the summons.

RECOMMENDATION

R24 An inquiry's witness summons should be served personally on the witness; although an inquirer should be able to make a direction for substituted service in accordance with the High Court Rules.

See draft Bill, clause 24.

WITNESS ALLOWANCES AND TRAVELLING FEES

5.38 Linked to this issue are the existing provisions in the 1908 Act referring to witness allowances and travelling fees. It is standard practice that a person should not be prosecuted for non-compliance with a witness summons unless some contribution has been made towards the expenses of attending. The payment of witness expenses will be particularly appropriate for expert witnesses and those from overseas.

5.39 The 1908 Act currently deals with this by a convoluted process. Section 7 provides for witness allowances to be assessed according to the same scales used by the courts.[220] Section 8 provides for the allowance to be met either by the person requiring the evidence of a witness or, on the certification of the chairman of the commission, by the Minister of Finance out of the Consolidated Fund. Where the latter situation applies, the commission needs to seek authority in

219 See High Court Rules, r 498 and District Courts Rules 2002, r 496.

220 Being the Witnesses and Interpreters Fees Regulations 1974, made under the Summary Proceedings Act 1957.

writing for the summoning of the witness from the Minister of Internal Affairs.[221] To navigate around this provision, the Department of Internal Affairs publication *Setting Up and Running Commissions of Inquiry* sets out a pro forma letter to be sent to the Minister of Internal Affairs requesting that the Minister delegate this responsibility to the Secretary of Internal Affairs, and requesting a sub-delegation of the responsibility to the Executive Officer of the commission.[222]

5.40 This process is unnecessary. We see no reason why allowances and fees for witnesses summoned by the inquiry itself cannot be provided for in its general operating budget or by its overseeing department, and paid directly by the inquiry. We recommend that where a participant to the inquiry requests that a witness be summoned, the participant should be primarily responsible for their expenses, subject to being able to request assistance from the inquiry if appropriate. As to the quantum at which expenses may be paid, we do not think inquiries should link into the Witnesses and Interpreters Fees Regulations 1974, made under the Summary Proceedings Act 1957.[223] In the calling of witnesses, inquiries operate quite differently from courts, and will often call witnesses themselves. We note that there is provision in the Te Ture Whenua Māori Act 1993 for the Māori Land Court to pay all reasonable costs and reasonable out-of-pocket expenses of any person called by the Court as a witness.[224] This reflects the fact that the Māori Land Court unlike most courts, has broad inquisitorial powers and often calls its own witnesses. We suggest that, similarly, inquiries should be able to pay witness expenses at a level that it determines is "reasonable".

RECOMMENDATION

R25 Where a participant to the inquiry requests that a witness be summoned, the participant should be primarily responsible for their expenses, subject to being able to request assistance from the inquiry. In other instances, the inquiry should pay them directly at a sum it considers reasonable.

See draft Bill, clause 25.

221 Section 8(1).

222 Appendix VIII.

223 This is the existing situation under s 7 of the 1908 Act.

224 Section 98. A fund is maintained by the Registrar of the Court for this purpose.

Chapter 6

Public access to inquiries and documentation

INTRODUCTION

6.1 In this chapter we look at the general principles relating to public access to inquiries, including access to evidence, rulings and submissions; hearings if they are held; and to inquiry documentation and records once they have completed their task.

6.2 The 1908 Act is silent about public access. In all inquiries, access is currently decided on a case by case basis, and any restrictions are either contained in the terms of reference or are ruled on by the inquirer(s). Practice has generally been that commissions take place in public, while ministerial inquiries are generally conducted in private. Both, however, tend to release public reports.

6.3 We have considered whether there should be a presumption of accessibility in relation to inquiries held under a new Inquiries Act, consistent with increasing emphasis on the openness of Government processes. On balance, however, we have concluded that such a presumption could encourage the use of formal hearings where they are not in fact desirable or necessary. While inquiries should be as open as possible, there will be cases where their purposes are better served without formal hearings and where witnesses can speak freely without fear of public exposure. Therefore we propose that the new Act should set out its own access regime and the circumstances in which access to evidence, documents and hearings may be restricted. In this chapter we also examine limitations that may be placed on access by the media, and, in particular, the electronic media.

6.4 The 1908 Act is also silent as to the status of a commission's papers on the conclusion of an inquiry. We consider the status of inquiry records under the Official Information Act 1982 (OIA) and the Public Records Act 2005 (PRA) and conclude that, while the OIA should not apply to inquiries while they are in operation, the OIA and PRA should apply once they have reported, with some exclusions and protections.

CURRENT POSITION

6.5 Inquiries have the power to control whether proceedings are held in public or in private. In 1902, the Court of Appeal held that inquiries "can sit with open or closed doors".[225] This position was confirmed in 1962:[226]

> It is beyond dispute that Commissioners may hear evidence or representations in private, for such a power is inseparable from the functions of a body set up to initiate an investigation and inquiry, unless the instrument of appointment otherwise provides … They may, if they think fit, exclude parties cited or persons interested from their private sittings.

6.6 This power may stem either from the inherent powers of a commission or from s 4(1) of the 1908 Act, which grants the commission the powers of a District Court judge in the exercise of his or her civil jurisdiction. In *Thompson v Commission of Inquiry into Administration of District Court in Wellington*, Barker J held that the power of an inquiry to hold hearings in private existed separately from s 4(1) and was required by the "very nature of its task".[227]

6.7 It is common for the terms of reference of commissions under the 1908 Act to explicitly set out the power to hold an inquiry in private and restrict publication. The first terms of reference of the Commission of Inquiry into Police Conduct empowered the Commission to exclude any person from hearings and directed that the Commission not publish or otherwise disclose evidence or information unless it was obtained in a public hearing.[228] The second Order in Council went further and directed that the investigations were to be held in private and that the Commission was not to identify people who made allegations of sexual assault or those who were alleged to have committed sexual assault or other criminal offences.[229]

6.8 An inquiry's decision to hear evidence in private or public is judicially reviewable. In *Fay, Richwhite Ltd v Davison* the Court of Appeal found that Sir Ronald Davison had not made an error in law in insisting that evidence be given in public.[230] It held that: "[p]ublic confidence in the Commission, and the very purpose of constituting the Commission, could be substantially impaired or thwarted if all the truly important evidence and all the truly important submissions were heard in private".[231]

6.9 The OIA treats statutory inquiries essentially in the way it treats courts: it does not apply to information held by commissions[232] and specifically provides that official

225 *Jellicoe v Haselden* [1902] 22 NZLR 343, 358 (CA) Williams J.

226 *State Services* case, above n 102, 117 (CA) Cleary J.

227 *Thompson v Commission of Inquiry into Administration of District Court in Wellington* [1983] NZLR 98, 106 (HC) Barker J.

228 "Commission of Inquiry into Police Conduct" (20 February 2004) *New Zealand Gazette* Wellington 379.

229 "Commission of Inquiry into Police Conduct" (5 May 2005) *New Zealand Gazette* Wellington 1796. The Commission itself had already indicated that, "our ability to sit in private would provide sufficient warrant for us to influence the degree of publication of those proceedings where unique circumstances so demand". Its jurisdiction was said to derive from the inherent jurisdiction of the High Court to make suppression orders, as the then chair of the Commission was a High Court Judge. See Commission of Inquiry into Police Conduct *Ruling of the Commission* (27 August 2004) para 34. See also *Taylor v Attorney General* [1975] 2 NZLR 675 (CA). Such powers would, however, also be available to other commissions by reference to the powers of a District Court judge. See for example, *Brown v Attorney-General* (2004) 17 PRNZ 257 (HC).

230 *Fay Richwhite & Co Ltd*, above n 105.

231 Ibid, 524 (CA) Cooke P.

232 Official Information Act 1982, s 2(6).

information does not include evidence or submissions made to statutory inquiries.[233] The application of the Act to ministerial inquiries is less clear (see paragraph 6.21 below).

6.10 The Privacy Act 1993 relates to the collection, retention and disclosure of personal information. The Act does not apply to royal commissions or commissions of inquiry,[234] but it does appear to apply to ministerial inquiries.[235]

RELEVANT PRINCIPLES

6.11 In 2006, the Law Commission released its report *Access to Court Records* and proposed a specific legislative framework to govern access to court records, premised on the presumption that court records should be accessible unless there is a good reason to withhold them.[236] Inquiries are not courts, but many of the same principles governing access to court records are relevant.

6.12 We propose that a new Inquiries Act should establish a specific legislative framework to give guidance on public access to inquiries. By "access to inquiries" we mean access to oral and documentary evidence received by the commission, exhibits, rulings, submissions, and hearings, where they are held. The framework should be guided by the following principles, some of which support public access and some weigh against it. The principles are:

- establishing the truth;
- public confidence;
- freedom of expression;
- freedom of information;
- open justice; and
- privacy.

In most cases, public inquiries will be held in public, whereas practice with government inquiries is likely to be more variable, depending both on the subject matter and the processes adopted by the inquiry.

Public confidence

6.13 The advantages of holding inquiries in public were described by the High Court of Australia in 1982:[237]

> By virtue of the publicity which usually attends the proceedings and ultimately the report when it is made public, the commission of inquiry serves the beneficial purpose of enlightening the public, just as it enlightens government…The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public left in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

233 Ibid, s 2(1). See paragraph (h) under the definition of "Official information".

234 Privacy Act 1993, s 2(1). See paragraphs (b)(x)–(xxi) under the definition of "Agency".

235 The definition of "Agency" includes "any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and, for the avoidance of doubt, includes a Department". This definition presumably includes a ministerial inquirer.

236 New Zealand Law Commission *Access to Court Records* (NZLC R 93, Wellington, 2006) 87.

237 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 41 ALR 71, para 49 (HC) Mason J.

6.14 Inquiries are often set up to re-establish public confidence. Public confidence and perceptions of independence are likely to be maximised by an open process. The Salmon Royal Commission on Tribunals of Inquiry emphasised: "[i]t is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth."[238] The more open an inquiry, the harder it is to denounce it as a whitewash.

6.15 While inquiries are an executive tool, the public also has a proprietary interest in an inquiry.[239] Inquiries are publicly funded and there is an expectation that in general the public should have access to them, unless there are clear reasons otherwise.

Freedom of expression

6.16 Section 14 of the New Zealand Bill of Rights Act 1990 states that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

6.17 While the ability to access public information is an important facet of this right, s 14 is not a right to insist on access to information.[240] The United Kingdom courts have held that the equivalent provision under the European Convention on Human Rights does not cover the right to access the proceedings of inquiries that are held in private: "[a] closed form of inquiry having been determined upon, article 10 cannot then be invoked to transform it into some quite different process".[241] If s 14 was similarly tested, this position would likely be adopted in New Zealand. However, the initial decision to hold a hearing in private, or to restrict access to inquiry documentation, cannot be taken in isolation from s 14. In *R v Mahanga*[242] the Court of Appeal indicated that freedom of expression was closely linked to the principle of freedom of information under the OIA. It has also been increasingly relied on as a justification for the open justice principle, discussed below.[243]

Freedom of information

6.18 The OIA establishes a presumption that information held by the executive branch of government will be accessible to the public unless there is a good reason for withholding it.[244] The Committee on Official Information did not consider that courts were within its terms of reference and in the OIA itself,

238 Rt Hon Lord Justice Salmon *Royal Commission on Tribunals of Inquiry* (1966) para 115.

239 See Morag McDowell "The Principle of Open Justice in a Civil Context" [1995] NZ Law Rev 214, 222–223 for discussion of this in the context of the justice system.

240 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) 320; *Leander v Sweden* 9 EHRR 433, 456.

241 *R (Persey) v Secretary of State for the Environment* [2002] EWHC 371, para 53 (QB); see also *R (Howard) v Secretary of State for Health* [2002] EWHC 396, paras 110–112 (QB); but contrast *R v Secretary of State for Health ex parte Wagstaff* [2001] 1 WLR 292 (QB) Kennedy LJ where the court found that the prohibition on reporting was a breach of art 10, although the court's decision that the inquiry could not be held in private was based on rationality not on art 10.

242 [2001] 1 NZLR 641, 651 (CA) McGrath J for the Court.

243 See *R v Liddell* [1995] 1 NZLR 538, 546 (CA) Cooke P for the Court; *Television New Zealand Ltd v R* [1996] 3 NZLR 393, 395–397 (CA) Keith J; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 456, 558 (CA) Elias CJ; *R v Mahanga* [2001] 1 NZLR 641 (CA); *R v Burns* (*Travis*) [2002] 1 NZLR 387, 403–405 (CA) Thomas J.

244 Official Information Act 1982, s 5.

commissions and other statutory inquiries are dealt with by analogy with courts and tribunals.[245] The committee considered, however, that its proposals regarding government information would in due course affect practices in those areas.[246]

6.19 Section 2(6) of the OIA states that the definition of "department" or "organisation" in the Act does not include royal commissions or commissions of inquiry under the 1908 Act. So, the OIA does not apply to any information held by commissions while they are in existence. Nor does it apply at any stage to evidence given or submissions made to commissions, since they do not fall within the definition of "official information" under the Act.[247]

6.20 Once an inquiry has reported and no longer exists, inquiry documentation tends to be held by the Department of Internal Affairs until it is transferred to Archives New Zealand. It would appear that inquiry documentation other than evidence and submissions can then be sought under the OIA. It is, however, the exempt information which is likely to be of greatest interest to the public.

6.21 Whether the OIA applies to ministerial inquiries is unclear. Section 2(2) of the Act provides that where information is held by an unincorporated body established by a Minister for the purpose of assisting or advising him or her, the information shall be deemed to be held by that Minister and the OIA applies. Whether this would enable OIA claims for documentation relating to ministerial inquiries is uncertain. In practice we understand that such inquiry information may often remain with the inquirer. This, however, is undesirable, as such information should form part of the public record, subject to any necessary restrictions.

6.22 Inquiries have a unique status. They are tools of executive government but in practice are independent bodies. They do not form part of the justice machinery but can operate in a similar way to courts, and can hold information and hear evidence that is of significant public importance, but that can also be very sensitive. We discuss the application of the OIA to inquiries below, but, we think that, in line with the principle of the availability of information, inquiries should make more information available during their existence. Where an inquiry under the new Act has restricted public access to information however, the OIA should continue to apply as at present. Below, we make proposals about how inquiry documentation is dealt with after an inquiry has completed its task, and about its transfer to Archives New Zealand.

Open justice

6.23 The principle of open justice embodies the principle of freedom of information as it applies to courts. The Law Commission has consistently favoured openness within the court system in recent years, while recognising certain limits.[248] Like courts, inquiries usually operate in the public environment and require public accountability.

245 Committee on Official Information (Danks Committee) *Towards Open Government: General Report 1* (Wellington, 1980) 8.

246 As predicted, the scope of official information has been broadened since 1982: Local Government Official Information and Meetings Act 1987 and Privacy Act 1993. See also the Law Commission's proposal in respect of courts: *Access to Court Records* (NZLC R 93, Wellington, 2006).

247 Official Information Act 1982, s 2(1).

248 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R 88, Wellington, 2004) 299–324.

Open justice maintains public confidence in the justice system, and the tenet "[j]ustice should not only be done, but should manifestly and undoubtedly be seen to be done" arguably applies to inquiries just as it does courts.[249] However, there are limits on the principle of open justice where issues such as national security, dignity, privacy and special vulnerability arise.[250] Inquiries are also frequently concerned with sensitive information, which may justify limitations on public access to their proceedings or information held by them.

Privacy

6.24 Privacy values increasingly influence many areas of law, and while the concept of privacy is difficult to define, it is generally agreed that it includes the protection of personal information.[251] A right to privacy, including the protection of personal information, is endorsed by international human rights conventions ratified by New Zealand and national legislation.[252]

6.25 The need to protect personal privacy is also relevant to public access to inquiries. Individuals often have little choice in becoming involved in an inquiry and having personal information disclosed. They may for instance be victims and not personally the subject of the inquiry, but still be required to give evidence. New Zealand's two inquiries into the detection of cervical cancer are examples of this.[253]

6.26 The definition of "agency" in the Privacy Act 1993 expressly excludes royal commissions, commissions of inquiry and other statutory inquiries, so the Act does not directly apply. An "agency" is defined as "any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector".[254] The Act may therefore extend to ministerial inquiries. Nevertheless, whether directly applicable or not, the principles in the Act, and other statutory or common law restrictions should have relevance to the way inquiries conduct their business.

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249 *R v Sussex JJ Ex p McCarthy* [1924] 1 KB 256, 259 (KBD) Lord Hewart.

250 See for example, Adoption Act 1955, s 22; Children, Young Persons, and their Families Act 1989, s 166; Child Support Act 1991, s 123; Domestic Violence Act 1995, s 83; Family Proceedings Act 1980, s 159; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 129; Protection of Personal and Property Rights Act 1988, s 79. Under s 35 of the Property (Relationships) Act 1976 proceedings may be held in private if any party so desires it. See also, Care of Children Act 2004, s 137. See also s 329 of the Children, Young Persons and their Families Act 1989 which allows accredited news media to attend proceedings in the Youth Court. The Criminal Justice Act 1985, s 138(2)(c) also provides that in the general courts public access may be limited where it is required by the interests of justice, the interests of public morality, the interests of the reputation of a victim of alleged sexual offence or offence of extortion, or the interests of security or defence of New Zealand.

251 The Law Commission is currently undertaking a review of privacy. As part of this review, the Commission has released a study paper which explores the concept of privacy. See New Zealand Law Commission *Privacy: Concepts and Issues: Review of the Law of Privacy: Stage 1* (NZLC SP19, Wellington, 2008).

252 See the International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 17; Official Information Act 1982, s 9(2)(a); and the Privacy Act 1993. See also the majority decision (3:2) of the Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1 that the tort of invasion of privacy is a reasonable limit on free expression in terms of section 5 of the Bill of Rights Act in certain circumstances involving the publication of private facts.

253 The Cartwright Inquiry conducted some of its proceedings in private and the Duffy Inquiry kept some of its evidence confidential through the use of suppression orders.

254 Section 2(1).

6.27 Inquiries may be significantly hindered if people are unwilling to cooperate because of concerns about what will happen to their personally sensitive information. In its report on *Access to Court Records* the Law Commission considered that the optimal way to deal with the protection of personal information in court records is to allow such protection as a good reason for withholding information in some circumstances, involving, for example, sensitive, personal or commercial information.[255] We agree with this approach and believe it should be applied to inquiries.

Establishing the truth

6.28 The very purpose of inquiries must also be relevant in considering the extent to which inquiries should be open or not. As noted above, openness can in some circumstances have a chilling effect on witnesses' cooperation with inquiries. In some circumstances, inquiries may be more likely to get cooperation if witnesses can be sure that what they say will be treated in confidence. This should be a valid consideration.

6.29 Conversely, there is also an argument that inquiries may obtain better evidence by being held in public. Advantages of evidence in public include:[256]

(a) witnesses are less likely to exaggerate or attempt to pass on responsibility;
(b) information becomes available as a result of others reading or hearing what witnesses have said;
(c) there is a perception of open dealing which helps to restore confidence;
(d) there is no significant risk of leaks leading to distorted reporting.

6.30 Inquirers should also take account of these factors when considering whether any restrictions should be placed on public access.

Interference with the administration of justice

6.31 There may be external reasons influencing whether an inquiry should take place in public, particularly if court proceedings might arise from the inquiry, or are running at the same time. For example, in *Thompson v Commission of Inquiry into Administration of District Court at Wellington,* where there were concurrent criminal proceedings against court staff, the High Court refused to prevent the inquiry from continuing. It held that "the Commission should sit in private if any matter arises in the course of the hearing which could … prejudice the applicants' right to a fair trial".[257]

6.32 In general, in these circumstances, we believe it is preferable that an inquiry be put on hold, rather than continuing and have recommended that there be express power for a commission to suspend its operation in such circumstances.[258] However, if an inquiry does continue in these circumstances it needs to take account of any risk of interference with the administration of justice in determining public access to it.

255 New Zealand Law Commission *Access to Court Records* (NZLC R 93, Wellington, 2006) 56.

256 *R v Secretary of State for Health ex parte Wagstaff* [2001] 1 WLR 292, 319 (QB) Kennedy LJ. See also *R (Persey) v Secretary of State for the Environment* [2002] EWHC 371 (QB); *R (Howard) v Secretary of State for Health* [2002] EWHC 396 (QB).

257 *Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98, 113 (HC) Barker J. See also *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368, 375 (HC) Hardie Boys J.

258 Recommendation 9.

CONCLUSION

6.33 We consider that generally inquiries should be public processes. This is consistent with the nature and purpose of most inquiries. It is also supported by the New Zealand climate that promotes open justice and the freedom of information and expression. There will, however, be occasions where public access to inquiry evidence, documentation or hearings will need to be limited if the inquiry is to achieve its purpose. This should be guided by statutory criteria contained in an Inquiries Act, which we discuss below.

USE OF WEBSITES

6.34 As few members of the public will actually attend inquiry proceedings, the practicalities of facilitating access need consideration. In chapter 4 we suggested that hearings should not be assumed to be the norm in inquiries. Whenever a hearing does take place, subject to the exceptions set out below, it should do so in public. But, open hearings are not the only way an open procedure can be achieved.[259] Considerable improvements can be made to facilitating public access to inquiry information, evidence and documentation.

6.35 In particular we would draw attention to the websites maintained by the Hutton inquiry in the United Kingdom,[260] Cole inquiry in Australia[261] and Arar Commission in Canada.[262] Transcripts of inquiry hearings can be found on the Hutton inquiry website, as well as copies of all of the evidence from the first phase of the inquiry. Where access to any evidence was restricted, the inquiry has provided explanations in line with the United Kingdom's Code of Practice on Access to Government Information. Similarly, hearing transcripts and 1577 exhibits, which include written submissions to the commission, can be found on the Cole inquiry website. The Arar Commission website houses hearing transcripts, expert witness reports and a summary of hearings held in camera.

6.36 In the past, New Zealand inquiry websites have not generally been used in such an effective way, although all the submissions received by the recent Local Government Rates Inquiry were placed on the inquiry website.[263] The current Royal Commission on Auckland Governance also has a dedicated website[264] on which all submissions will be displayed unless confidentiality is sought.

6.37 A website is a convenient and relatively inexpensive medium by which the public can access information regarding the inquiry. It enables the inquiry to ensure that information given to the public is accurate. It may include information

259 The Alberta Law Reform Institute did not think that hearings were essential and that "the openness principle could be satisfied in other ways". Alberta Law Reform Institute *Proposals for Reform of the Public Inquiries Act* (ALRI R 62, Edmonton, 1992) 54.

260 The Hutton Inquiry http://www.the-hutton-inquiry.org.uk/ (accessed 2 October 2007).

261 Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme http://www.ag.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Home (accessed 2 October 2007).

262 Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar http://www.ararcommission.ca/eng/index.htm (accessed 2 October 2007).

263 See Local Government Rates Inquiry http://www.dia.govt.nz/diawebsite.nsf/wpg_URL /Agency-Independent-Inquiry-into-Local-Government-Rates-Index?OpenDocument (accessed 2 October 2007). See also Commission of Inquiry into Police Conduct www.cipc.govt.nz (accessed 2 October 2007); Confidential Forum for Former In-House Patients of Psychiatric Hospitals http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Confidential-Forum-for-Former-In-Patients-of-Psychiatric-Hospitals-Index?OpenDocument (accessed 2 October 2007).

264 See http://www.royalcommission.govt.nz (accessed 26 March 2008).

on the inquiry's inception, the inquirers and other people involved in the inquiry, press notices, witness statements, transcripts of interviews or hearings, evidence, rulings and eventually the inquiry's final report.

6.38 More inquiry information should be made readily available to the public by way of the internet, subject to the statutory restrictions we discuss below. Where full hearings take place, hearing transcripts can be made available. Where relevant information is accumulated by way of informal interviews, meetings, written submissions and previously existing documentation, these, or summaries can also be made public. This information should remain available after the conclusion of the inquiry.

6.39 We suggest that the Department of Internal Affairs (DIA) could be responsible for establishing a generic inquiry website to be adapted and used by future inquiries. We understand that this is DIA's intention.

RECOMMENDATION

R26 Public access to inquiries should be facilitated by way of a comprehensive inquiry website.

REASONS TO RESTRICT PUBLIC ACCESS

6.40 The OIA sets out conclusive reasons for withholding information under the Act, if the information would be likely:[265]

(a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand;

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government; or any international organisation;

(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial;

(d) to endanger the safety of any person;

(e) to damage seriously the economy of New Zealand.

6.41 The Act also provides for other reasons for withholding official information, unless they are outweighed by the public interest.[266] These include protecting the privacy of natural persons, including that of deceased natural persons; protecting trade secrets or information which would be likely to unreasonably prejudice the commercial position of a person; protecting information which is subject to an obligation of confidence; avoiding prejudice to the substantial economic interests of New Zealand; and maintaining legal professional privilege. The Law Commission's recommendations in *Access to Court Records* built on the OIA model and set out conclusive reasons for withholding court records and other reasons which must be balanced against the public interest.[267]

265 Official Information Act 1982, s 6.

266 Ibid, s 9.

267 New Zealand Law Commission *Access to Court Records* (NZLC R 93, Wellington, 2006) 92–93.

6.42 The grounds in the OIA and those proposed in *Access to Court Records* are relevant to restricting public access to inquiries. For instance, information relating the security, defence or economic interests of New Zealand may arise in the course of inquiry proceedings.[268] There may also be matters of commercial sensitivity to be respected.[269] We have drawn on those grounds, but have adapted them to suit inquiries. We suggest that any decision to restrict public access should take account of the considerations set out in the recommendation below. We have not framed the considerations as conclusive or non-conclusive factors, but rather suggest they are to guide an inquirer's discretion when considering whether to restrict public access.

Suppression orders

6.43 Inquiries should also have the express power to suppress the name of any witness or any particulars likely to lead to their identification, in order to provide for concerns about privacy, without unduly undermining public access.[270] Such orders should be able to be made after consideration of the same criteria set out below.[271]

RECOMMENDATION

R27 The new statute should state that inquiries may make orders to:

(a) forbid publication of—

(i) the whole or any part of any evidence or submissions presented to the inquiry,

(ii) any report or account of the evidence or submissions,

(iii) the name of any witness or any name or particulars likely to lead to the identification of a witness,

(iv) any rulings of the inquiry;

(b) hold the inquiry or any part of it in private;

(c) restrict public access to any part or aspect of the inquiry.

See draft Bill, clause 14.

268 Official Information Act 1982, s 6(e).

269 The United Kingdom Inquiries Act 2005 directs the person deciding whether to restrict public access to hearings and information to consider not only damage to national security but also damage to the economic interests of the United Kingdom. See also Official Information Act 1982, s 6(e).

270 The High Court can invoke its inherent jurisdiction (Judicature Act 1908, s 16) to suppress the name of a witness: see *Taylor v A-G* [1975] 2 NZLR 675 (CA). See also the Criminal Justice Act 1985, ss 138(2)(a) and (b) which provide that a court can forbid the publication of any account of the whole or any part of the evidence or submissions or forbid the publication of the name of a witness if it feels that it is in the interests of justice, of public morality, of the reputation of an alleged victim of a sexual offence or extortion, or of the security or defence of New Zealand. Subsection (3) provides that accredited news media can remain in attendance even though the public are excluded. Under s 139 of the Criminal Justice Act 1985 when the case involves sexual offending, the name of the alleged victim can only be published if the person is over 16 and a court order permits publication.

271 In determining whether to suppress information, the United Kingdom Act uses the same detailed test as for determining whether to hold an inquiry in public or in private (Inquiries Act 2005 (UK), s 19). See also Special Commissions of Inquiry Act 1983 (NSW), s 8; Commissions of Inquiry Act 1950 (Qld), s 16; Royal Commissions Act 1917 (SA), s 5. The Tasmanian legislation allows a restriction on publication where the commission is satisfied that public interest in publishing evidence is outweighed by any other consideration including public security, privacy, or the right to a fair trial.

RECOMMENDATION

R28 However, before making any such order, an inquiry must take account of the following criteria:

(a) the risk to public confidence in the proceedings of the inquiry;

(b) the need for the inquiry to properly ascertain the facts;

(c) the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;

(d) the privacy interests of any individual; and

(e) whether such an order would interfere with the administration of justice, including the right to a fair trial.

See draft Bill, clause 14.

Should Government be able to restrict access to inquiries?

6.44 Should an inquiry's terms of reference be able to restrict public access? In 1980, the Public and Administrative Law Reform Committee felt that the inherent power to hold a hearing in camera or to prohibit publication "should not ultimately be left with the Government".[272] The Committee's draft Commission of Inquiry Bill expressly provided that every hearing be held in public, but if the commission was of the opinion that "it was in the interests of any person and the public interest", it might hold hearings, or parts of hearing in private, and suppress any evidence heard or documents produced.[273]

6.45 We think that Government should remain free to include access restrictions within the terms of reference. Inquiries are after all tools of the Executive, which must be free to fashion their construction, and will face any political consequences of doing so. A term of reference that an inquiry be held in public or private would reduce the scope for arguments before the inquiry itself.

6.46 However, we do not propose that Government should be able to limit public access to an inquiry once it is underway, other than by changing the terms of reference. Any such attempt is likely to be criticised as political interference with the inquiry, as it has in the United Kingdom where restrictions can be placed by the Minister at any time before the end of the inquiry.[274]

RECOMMENDATION

R29 There should be no restriction on Government's ability to give directions about public access to inquiries by way of their terms of reference.

272 Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980) 25.

273 Ibid, draft bill, cl 6(1) and (2).

274 Inquiries Act 2005, s 19(2). See "Judges Oppose Secret Inquiry Plan" (25 February 2005) *The Times*.

MEDIA COVERAGE AND BROADCASTING OF INQUIRIES

6.47 Media access aids public access to inquiries. In the context of court proceedings, Sir Ivor Richardson has said:[275]

> It is only those members of the public who have the time, resources and inclination to travel to a court and for whom public seating is available who will see at first hand what transpires. For the remaining vast majority their understanding of particular proceedings and of the general functioning of the courts is derived from the media.

6.48 This is equally true for inquiries. While our proposals for the greater use of websites to disseminate information should greatly enhance the public's ability to comprehensively inform themselves about an inquiry's progress, the media also play a vital role.

6.49 At times it may be suitable to allow accredited news media access to the inquiry proceedings even where members of the public are denied entry. Where information heard in front of the inquiry is suppressed, it is likely to be easier to prevent the media from disclosing this information than the general public. Proceedings in the Family and Youth Courts will sometimes allow the media despite excluding other members of the public,[276] and by convention accredited news media can attend voir dire and chambers hearings in the High Court and can attend bail hearings.

Broadcasting inquiry hearings

6.50 Today radio and television are often the major source of information for many people, but the presence of electronic media in a court or inquiry, and the broadcasting of proceedings, can be more disruptive and intrusive than print media. Without proper controls, broadcasting can turn inquiries into a media circus[277] and can have an impact on the willingness of witnesses to be forthcoming.

6.51 The different nature of electronic media means that the decision to permit them to attend and record hearings is usually considered separately from the decision of whether to admit print media and members of the general public. On this subject the Irish Law Reform Commission stated:[278]

> The Commission is unable to think of any situations in which inquiry proceedings would be broadcast yet sit in private. On the other hand, it would, we think, be quite common for an inquiry to sit in public while, for whatever factors of concerns for witnesses or the wider public, it was not appropriate to broadcast.

6.52 We agree with this statement. Again, the question of broadcasting only relates to inquiries where hearings are to be held. Equally though, it is likely to be this type of inquiry where the public interest and concern is at its highest, and where

275 Sir Ivor Richardson "The Courts and the Public" (1995) NZLJ 11, 14.

276 See for example proceedings in the Youth Court (Children, Young Persons and their Families Act 1989, s 329) and the Family Court (Care of Children Act 2004, s 137) which allow only accredited news media and exclude the general public.

277 Law Reform Commission of Ireland *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (ILRC CP 22-2003, Dublin, 2003) 223.

278 Ibid, 230.

media access might be maximised. However, while broadcasting of inquiry hearings may aid public access, this must be offset against the impact on the witnesses involved in the inquiry. It can make the experience of giving evidence more distressing, or witnesses may be less frank.

6.53 Broadcasting of proceedings does not always improve public understanding by providing the most accurate evidence. In the United Kingdom, the media was permitted to broadcast the Southall Rail Accident Inquiry but the inquirer, John Uff QC, stated:[279]

> Television coverage was … spasmodic and apparently concerned more with personal or human issues than with technical or management issues … the parties to the Inquiry continued to give interviews commenting on the Inquiry proceedings, which were often given prominence over televising of the actual Inquiry proceedings.

6.54 Dame Janet Smith, the chair of the United Kingdom Shipman Inquiry devised her own protocols governing broadcasting of the inquiry.[280] Broadcasting was limited to the phases of the inquiry that involved people professionally involved in the events.[281] Media representatives could not bring their own cameras but had access to a feed from the inquiry's camera.[282] The protocol also limited how the material could be broadcast, for example, broadcasting had to give a "fair reflection of the nature of the proceedings", and it could not be used in "humorous, satirical or fictional drama programmes, for the purpose of advertising or with any sound other that that recorded at the time".[283]

6.55 The United Kingdom Inquiries Act 2005 allows inquirers to decide whether it is appropriate to broadcast proceedings.[284] Recordings can only be made at the request of the chair of the inquiry or with the permission of the chair and in accordance with any terms on which the permission is granted.[285] The Irish Law Reform Commission recommended that in deciding whether to allow broadcasting the tribunal of inquiry should consider various statutory criteria.[286]

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279 John Uff QC *Southall Rail Accident Inquiry Report* (2000) 104.

280 The Inquiry's approach was developed after CNN argued that the freedom of expression rights contained in article 10 of the European Convention of Human Rights gave them the right to broadcast the inquiry, either by obtaining a feed from the inquiry's cameras or by filming the inquiry themselves. Dame Janet Smith considered that they had no right to access the feed from the inquiry's own cameras and that "article 10 does not provide a right to film a public event if the person with lawful control of the event is not willing to allow it".

281 *Second Protocol Governing the Recording or Broadcasting of the Shipman Inquiry* (20 September 2002).

282 Ibid, para 8.

283 Ibid, paras 18 and 19.

284 See also s 14 Commissions of Inquiry Act 1995 (TAS) which enables a Commission to prohibit or restrict the public reporting of evidence if it is satisfied that public interest in reporting is outweighed by any other consideration including public security, privacy, or the right to a fair trial.

285 Inquiries Act 2005 (UK), s 18(2).

286 The Law Reform Commission of Ireland *Public Inquiries Including Tribunals of Inquiry: Report 73* (LRC, Dublin, 2005), 95. The criteria are: (a) the interests of the general public, particularly the right to have the best available information on matters of urgent public importance; (b) the proper conduct and functioning of tribunal proceedings; (c) the legitimate interests of the participants; (d) the risk of prejudice to criminal proceedings; (e) any other relevant considerations.

6.56 In New Zealand, the *In-Court Media Coverage Guidelines 2003* apply to media who want to film, take photographs at, or record court proceedings. They require the electronic media to obtain the consent of the judge to cover court proceedings.[287] In a criminal trial, a witness other than the accused or an official witness, may receive "witness protection", which would mean that the witness would have to be unrecognisable in television coverage and not photographed.[288] The accused and official witnesses, and witnesses in civil trials, can also apply for discretionary witness protection.[289] In making decisions under the guidelines the court is directed to consider:[290]

(a) the need for a fair trial;
(b) the desirability of open justice;
(c) the principle that the media have an important role in the reporting of trials as the eyes and ears of the public;
(d) the importance of a fair and balanced reporting of trials;
(e) court obligations to the victims of offences;
(f) the interests and reasonable concerns and perceptions of victims and witnesses.

6.57 The schedules to the guidelines set out rules for specific broadcasting media. The rules relating to television provide that there can only be one television camera in the court and it cannot film jurors, members of the public, and counsel's papers. Exhibits can only be filmed with the leave of the Judge, and filming of the accused is subject to certain limitations. There can be no live television coverage. The footage can only be used for the programme nominated on the application form and it cannot be used as promotional material. Similar rules apply to taking still photographs of the proceedings and radio recordings.[291] Under the Broadcasting Act, broadcasters are also responsible for maintaining certain standards[292] which already apply to inquiries.

6.58 Decisions about media access, including whether an inquiry's hearings should be allowed to be broadcast will be highly dependent on matters such as the type of inquiry and the witnesses involved. The question should be left to the inquirer's discretion, but we anticipate that any inquirer would consider matters like those relevant to media access to court hearings. Inquirers must balance the risk of harm to witnesses and disruptions of proceedings against the need to give the public effective access to the inquiry. This flexibility is important given the varying nature of inquiries and the different considerations that will be relevant.

RECOMMENDATION

R30 Decisions about media access and the broadcasting of proceedings should be left to the inquirer's discretion, subject to any directions in the terms of reference.

287 *In-Court Media Coverage Guidelines 2003*, guideline 5.

288 Ibid, guideline 10.

289 Ibid, guideline 11.

290 Ibid, guideline 2(2).

291 Ibid, schedules 2–4.

292 Broadcasting Act 1989, s 4(1). The standards include the observance of good taste and decency; the maintenance of law and order; and the privacy of the individual.

ACCESS TO INQUIRY RECORDS

6.59 As already noted, the Official Information Act 1982 (OIA) does not apply to commissions in general while in operation and never applies to evidence and submissions presented to them.

6.60 While we believe that the restriction on access while the inquiry is in progress should continue, people may wish to access inquiry information that is not already in the public domain after the inquiry has reported. While the OIA does not apply to information held by commissions of inquiry,[293] once an inquiry concludes it is *functus officio* and the documentation tends to be held physically by the overseeing public agency (usually the Department of Internal Affairs (DIA)) until it is transferred to Archives New Zealand. At that interim stage, the documentation, other than evidence or submissions which are not official information,[294] is likely to be subject to OIA requests since it is "held by" a department under the Act.[295]

6.61 We think it should be made clear that once an inquiry has concluded its task, the OIA does apply to inquiry information, excluding evidence or submissions. We think that it is appropriate that the OIA continues not to apply to sensitive evidence and submissions, even once the inquiry has reported. In addition, we consider that any notes relating to the internal deliberations of the inquiry should be excluded from the OIA.

Transfer to Archives New Zealand

6.62 After an inquiry has reported, its documents tend to be transferred to Archives New Zealand under the Public Records Act 2005 (PRA).[296] The PRA recognises the importance of retaining a historical record of significant events for the information of future generations. Since inquiries, particularly those into significant disasters, hold great historical interest for New Zealanders, it is important that their records are preserved and made available where appropriate.

6.63 Generally, records that have existed for 25 years must be transferred to Archives, unless agreed otherwise.[297] We note that a permissive "disposal authority" was agreed between Archives and DIA in 2001 which gives direction as to which of an inquiry's records are to be transferred to Archives on completion of the inquiry and which can be destroyed.[298] We suggest that new guidelines should state that as soon as practicable after the inquiry has reported, all documentation should be transferred to Archives New Zealand.

293 Official Information Act 1982, s 2(6).

294 Ibid, s 2(1). See para 6.19, above.

295 Ibid, s 2(1).

296 The Act applies to public offices, which means the legislative, executive and judicial branches of the Government and the agencies and instruments of those branches. Public Records Act 2005, s 4.

297 Ibid, s 21. If a body has ceased to exist, the records must be transferred to the public office designated by the Chief Archivist as the public office responsible for those public records: s 23(1).

298 The authority expires in 2008.

Access to records once transferred

6.64 On their transfer to Archives, the PRA requires that records be classified as open access or restricted by the administrative head of the controlling public office.[299] The administrative head can change that classification at any time.[300] Because an inquiry's records have tended to be transferred to DIA before being passed on to Archives, the Chief Executive of DIA tends to be treated as the relevant "administrative head".

6.65 Under the PRA, a record should be classified as "restricted access" if there are good reasons to restrict public access or another enactment requires the public record to be withheld from public access.[301] Restricted access can be for a specified period of time or subject to conditions.[302] An "open access record" is available to the public as of right and free of charge.[303]

6.66 Where a record that has been classified as restricted access is sought, the applicant may be able to access it under the conditions imposed under s 44(3) of the PRA, or apply to the relevant department head for a change to the classification, or seek access under the OIA.

Practice for inquiries

6.67 Our impression is that there is uncertainty surrounding the existing procedures for the transfer of inquiry records, and particularly surrounding decisions about their categorisation and subsequent access. Potentially as a result of this confusion, all of the material relating to the Commission of Inquiry into Police Conduct has been subjected to a blanket 100 year restriction. Although we appreciate that some of the information given to the Commission was of a sensitive nature, we think that such blanket restrictions are highly undesirable.

6.68 The one-off nature of inquiries means they may not easily fall within standard departmental and Archives practices. Because they are of significant public interest, decisions and processes around the archiving of their records need to be given proper and informed consideration.

6.69 As noted, in most cases the "administrative head" responsible for decisions about an inquiry's records will be the Chief Executive of DIA.[304] This is an impractical approach. The inquirer(s) and their staff have intimate knowledge of the inquiry documents, and it is the inquiry that makes decisions about access during the inquiry itself.

6.70 We think responsibility for decisions about the initial classification of inquiry records upon transfer to Archives should lie primarily with the inquirer, but in consultation with the relevant staff at DIA. Those staff are likely to have general

299 Public Records Act 2005, s 43(1).

300 Ibid, s 43(2).

301 Ibid, s 44.

302 Ibid, s 44(3).

303 Ibid, s 47.

304 As noted in chapter 14, where DIA has a direct interest in an inquiry, it may be advisable for the inquiry to be overseen by a different agency.

expertise regarding classification issues and will be responsible for ongoing application of the OIA and PRA to those records. Once the inquiry records have been lodged with Archives,[305] responsibility for subsequent decisions about access and changes to the original classifications should continue to lie with the administrative head of the relevant public department.

6.71 A question remains as to whether evidence suppressed by an inquiry should remain suppressed for all time. In the Law Commission's report on *Access to Court Records* the Commission proposed that any restrictions on access to court records held by Archives, including those containing suppressed material, should lapse after 60 years. One submitter has suggested that this is not long enough for some sensitive inquiry material to be suppressed, and that some witnesses may be deterred from taking part. We are not entirely persuaded by this argument.

6.72 However, we suggest that the responsible department, in consultation with the inquirer should be well-positioned to dictate how long the lapse period should be for suppressed material. Instead of proposing that a blanket 60 year lapse period be applied, we suggest that the department should stipulate, for the purposes of restrictions under the PRA, the period after which suppressed material should become available. We reiterate our strong view, however, that a blanket restriction on all inquiry material for a very lengthy period is unsatisfactory and directly conflicts with the principle of open government.

Ministerial inquiries

6.73 The application of the PRA and OIA to ministerial inquiry documentation is less clear. In the light of their purpose and nature, we think it is desirable that all inquiry documentation is retained safely and, where appropriate, is made available to the public.

6.74 However, if non-statutory ministerial inquiries continue to take place, a question arises as to whether their documentation should be transferred to Archives as a "public record".[306] This depends on whether they are categorised as an "agency or instrument of the executive branch of Government" under the PRA,[307] or whether they fall under the definition of "Minister's papers", which are not required to be lodged with Archives. Our view is that a ministerial inquiry is an "agency or instrument of the executive branch of Government", and their documentation should not be classed as Minister's personal papers. Therefore, they should be transferred and classified as public records. As ministerial inquiries operate outside the scope of legislation, however, we propose that work should be done to clarify the status of ministerial inquiries under both the PRA and OIA, and that legislative amendments be considered.

305 And thus once the records become a "public archive" under s 4 of the Public Records Act 2005.

306 As defined in the Public Records Act 2005, s 4

307 Public Records Act 2005, s 4.

RECOMMENDATION

R31 Legislation should clarify that once an inquiry has concluded its task and its documentation has been transferred to a public department, the Official Information Act 1982 applies to the documentation, except:

(a) sensitive evidence or submissions; and

(b) documents that relate to the internal deliberations of the inquiry.

See draft Bill, clause 32 and Schedule 2.

RECOMMENDATION

R32 Guidelines should state that as soon as practicable after the inquiry has reported, all documentation should be transferred to Archives New Zealand.

RECOMMENDATION

R33 (a) Guidelines should make it clear that the inquiry, in consultation with the relevant public department should be responsible for the initial categorisation of inquiry documentation for archive purposes.

(b) Once inquiry records have been lodged with Archives New Zealand responsibility for subsequent decisions about access and changes to the original classifications should lie with the administrative head of the relevant public department.

(c) Except that the new Act should provide that if any documents or things are classified as restricted access records within the Public Records Act 2005, the responsible department, in consultation with the inquiry, must specify the date on which that classification must be withdrawn.

See draft Bill, clause 33.

RECOMMENDATION

R34 Work should be done to clarify the status of non-statutory ministerial inquiries under the Public Records Act 2005 and the Official Information Act 1982.

Chapter 7

Costs orders and funding legal representation

COSTS ORDERS

7.1 The 1908 Act grants the inquiry the power to make orders for costs. Section 11 provides:

> The Commission, upon the hearing of an inquiry, may order that the whole or any portion of the costs of the inquiry or of any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held:
>
> Provided that no such order shall be made against any person who has not been cited as a party or authorised by the Commission, pursuant to section 4A of this Act, to appear and be heard at the inquiry or summoned to attend and give evidence at the inquiry.

7.2 Costs can therefore be paid either to the inquiry or to parties to the inquiry. They can be made against parties or persons who have procured the inquiry to be held provided that such persons are parties, persons entitled to be heard under s 4A, or persons summoned to give evidence at the inquiry. What is meant by "procured" is not clear,[308] and while in many cases those seeking the establishment of the inquiry may be "parties", this is not always the case.

7.3 In other jurisdictions, it is unusual for inquiries to have the power to order costs.[309] Also, many other New Zealand statutes which grant bodies powers of a commission of inquiry under the 1908 Act often expressly exclude the application of ss 11 and 12.[310]

308 Although in *Pilkington v Platts* [1925] NZLR 864, 865 (SC) Herdman J said that "it is evident that the petitioners for the abolition or partial abolition of the district were responsible for the creation of the Commission".

309 An exception is the Irish Tribunals of Inquiry (Evidence) Amendment Act 1997, s 6(1).

310 For example, New Zealand Public Health and Disability Act 2000, s 71; State Sector Act 1988, s 25; Transport Accident Investigation Commission Act 1990, s 11; and Treaty of Waitangi Act 1975, sch 2 cl 8.

7.4 It does not appear that the power has been used often. One of the few examples was the Erebus Royal Commission[311] when Justice Mahon incorporated in his report an order that Air New Zealand should pay $150,000 to the Department of Justice by way of contribution to the public cost of the inquiry. However, this order was subsequently quashed on judicial review.[312]

7.5 Inquiries differ from court proceedings. Unlike in civil cases, there can be no presumption that a winning party is entitled to costs, or an unsuccessful party is liable to pay costs.[313] We do not believe that individuals who have been drawn into an inquiry, possibly unwillingly, should normally be expected to pay large sums to other parties or to the Government. Also, the process of its investigation is determined almost entirely by the inquiry itself. Unlike civil cases, cost orders in inquiries do not serve the purposes of indemnifying successful litigants; deterring frivolous actions; or encouraging settlement. Although the costs provisions have been a feature of the Act since 1908, in principle, we do not think that inquiries should be able to make costs orders which reflect the pre-inquiry conduct of participants.

Discouraging improper or unnecessary steps

7.6 However, costs orders may be entirely appropriate where a participant takes actions which unduly lengthen, obstruct or add cost to an inquiry. In Ireland, the Tribunals of Inquiry (Evidence) (Amendment) Act 1979 provides that costs orders can be made against inquiry participants if they have added to the duration of the hearings by:[314]

> Failing to cooperate with or provide assistance to or knowingly giving false or misleading information to the tribunal.

7.7 In determining whether to impose costs, the chairperson would make reference to factors such as the nature and extent of cooperation given to the tribunal, the findings of the tribunal, excessive use of professionals or experts, and the extent to which any costs incurred by the relevant person were disproportionate. The Irish Law Reform Commission recommended that this provision be amended to clearly show that it is intended to allow the inquiry to make orders based on the substantive findings of inquiries.[315]

7.8 We do not believe that is appropriate for an inquiry to make cost orders based on the substantive findings of the inquiry – inquiries are not charged with making findings of civil or criminal liability and the presumption that costs follow the event should not be applied in the context of an inquiry. Nor should those likely to be found at fault be deterred from cooperation with an inquiry by a potential costs order. However, we support an inquiry having the flexibility to make orders for costs based on a person's behaviour during the inquiry itself.

311 Hon Justice Mahon *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antartica of a DC10 Aircraft operated by Air New Zealand Limited* (1981) 166–167.

312 The Court found that in the process of arriving at his finding that there had been an "orchestrated litany of lies", on which the costs order had been based, Justice Mahon had failed to observe the rules of natural justice. *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662, 670–671 (PC) Lord Diplock.

313 See High Court Rules, r 47(a) and *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491, 494 (CA) Fisher J.

314 Tribunals of Inquiry (Evidence) Amendment Act 1979, s 6(1).

315 See The Law Reform Commission of Ireland, above n 286, 125 and 129.

7.9 This could be done in circumstances similar to those where a judge might make an order for increased costs. In the High Court, costs can be increased where a party has contributed unnecessarily to the time or expense of a hearing by failing to comply with the rules or a direction of the court; taking unnecessary steps or putting forward arguments that lack merit; and failing, without reasonable justification, to admit facts, evidence, documents, to accept a legal argument, to comply with orders for discovery, notices for further particulars and interrogatories, or to accept an offer of settlement.[316]

7.10 Recent changes in the United Kingdom also include conduct as a relevant consideration in making costs orders in courts. In his report on access to justice, Lord Woolf recommended that courts use their "powers over costs to encourage co-operative conduct on the part of litigants and to discourage unreasonable conduct".[317] In making decisions about costs under the Civil Procedure Rules 1998 the court must have regard to the conduct of the parties. This includes conduct before and during proceedings and compliance with any pre-action protocol; the reasonableness of raising, pursuing, or contesting particular allegations or issues; the manner by which the party has pursued or defended his or her case; and whether a successful claimant exaggerated his or her claim.[318]

7.11 Cost orders are a blunt instrument for controlling conduct, but inquiries need adequate powers to control their own proceedings and circumscribe any time-wasting behaviour which falls short of an offence. We consider a costs sanction would provide a useful tool for controlling behaviour before an inquiry, but suggest it should be restricted to actions which unduly lengthen, obstruct or add cost to an inquiry.

Who should be subject to costs orders?

7.12 Under the 1908 Act orders can be made against parties, other persons entitled to appear under s 4A and people summoned to attend and give evidence at the inquiry. As noted, s 11 is also drafted so that orders can be made against those who have "procured the inquiry to be held". We find it difficult to contemplate a situation when such a costs order could be appropriate in an inquiry, and are unclear as to the boundaries of "procurement" in this context. The provision does not seem apt for inquiries which are held into matters of public concern and appointed by the government. It should not be carried into new inquiries legislation.

7.13 Our recommendations in chapter 4 would remove the categories of "parties" and "persons entitled to be heard". The question is whether an inquiry should be able to make costs orders against core participants only or against any person. Costs orders are likely to be employed very rarely. However, any person could cause improper or unnecessary steps to be taken. We have expressed the view that the categorisation of core participants will not take place in all inquiries, and is essentially intended as a tool of convenience. We do not think that the status should be used as delineating who can and cannot be the subject of costs orders. An inquiry should be able to make a costs order against any person.

316 High Court Rules, r 48C(3)(b).

317 Rt Hon Lord Woolf *Access to Justice: Final Report* (HMSO, London, 1996) 79.

318 Civil Procedure Rules 1998, r 44.3.

Enforcement

7.14 Section 12 of the 1908 Act provides for the enforcement of costs orders in excess of $200 in the High Court, and those under $200 in the District Court. These sums are clearly well out of line with the current jurisdictional limit of the District Court.[319] We propose instead that a cost order made by an inquiry can be recovered in any court of competent jurisdiction.[320]

When can costs orders be made?

7.15 In 1925, the Court of Appeal determined that costs orders under the 1908 Act can be made only after the inquiry has held a hearing. In *Pilkington v Platts*,[321] the Court said that a hearing had not been held: "not a single witness was called, not a single argument put forward".[322] One of the general premises for our recommendations is that, in the interests of efficiency and containing costs, inquiries need not always hold formal hearings. However, a participant could lengthen, obstruct or add cost to an inquiry which does not hold formal hearings. It should be made explicit that costs orders can be made where hearings have not been held.

SCALE OF COSTS

7.16 Section 14 of the 1908 Act provides that rules establishing a scale of costs can be made in the same manner as for the High Court. As far as we are aware, the last scale of costs made specifically for commissions of inquiries was in 1903 under the Commissioners Act 1903.[323] This scale was still in force in the early 1980s when the Erebus case was decided.[324] This meant that the highest order Justice Mahon could properly have made was $600.[325] It appears that this scale is still in force. The infrequent use of the inquiry costs provisions means that any specific scale can quickly get out of date.

7.17 Under the High Court Rules and District Court Rules, costs are revised from time to time and based on categories of skill and expertise required,[326] related daily recovery rates[327] and the time allocated for each step.[328] These rules are not readily applicable to inquiries, which often take much longer and usually involve highly experienced barristers. Also, only some elements of inquiry processes can be considered akin to those that go into the preparation and format of court processes.[329]

319 Which is $200,000: District Courts Act 1947, s 29.

320 See, for example, Health Practitioners Competence Assurance Act 2003, s 105.

321 *Pilkington v Platts* [1925] NZLR 865 (CA).

322 Ibid, 873 Stout CJ.

323 11 February 1904, *New Zealand Gazette*, 491.

324 *Re Erebus*, above n 312, 687 (PC) Lord Diplock for the Court.

325 Justice Mahon had ordered that Air New Zealand pay the Department of Justice $150,000 as contribution to the public cost of the inquiry which was $275,000.

326 High Court Rules, r 48; District Court Rules, r 47.

327 High Court Rules, sch 2; District Court Rules, sch 2.

328 High Court Rules, sch 3; District Court Rules, sch 2A.

329 Other scales which could be referred to are the legal aid rates and Crown Solicitors Regulations. We consider that the Costs in Criminal Cases Regulations 1987, based on a maximum of $226 per half day of trial, is out of date and should not be used. (The Law Commission recommended that a criminal scale of costs should be modelled on the civil rules, New Zealand Law Commission *Costs in Criminal Cases* (NZLC R 60, Wellington, 1999) 27.)

7.18 Other courts have adopted a formulation that enables them to make costs orders that they consider "reasonable".[330] A wide discretion is given to the judges of those courts to determine what is a "reasonable" costs order,[331] without being confined to the more rigid scale imposed by the court rules. A similar formulation is appropriate for inquiries and inquirers should be entrusted with power to make costs orders that they consider "reasonable". Costs orders would, of course, remain open to judicial review. The jurisdiction of the New Zealand courts to determine the validity of orders for costs by commissions is well established.[332]

RECOMMENDATION

R35 An inquiry should be able to make a costs order if it is satisfied that the conduct of a person has unduly lengthened, obstructed or added undue cost to an inquiry, at a level the inquirer thinks reasonable in all the circumstances. At the inquirer's discretion he or she may order some or all of the costs to be paid to any other participant.

See draft Bill, clause 28.

RECOMMENDATION

R36 Costs orders should be able to be made whether or not hearings have been held.

RECOMMENDATION

R37 Costs orders should be enforceable in any court of competent jurisdiction.

See draft Bill, clause 28.

FUNDING LEGAL REPRESENTATION

7.19 We believe that provision needs to be made for an inquiry to be able to fund certain participants' legal representation where appropriate. In some inquiries, legal representation will be required to protect a person's interests, to ensure equality, or to ensure the inquiry is able to satisfy its task. These interests will not be fulfilled if the person does not have a lawyer.

330 See Resource Management Act 1991, s 285(1): "The Environment Court may order any party to pay—(a) To any other party, such costs and expenses (including witness expenses) incurred by that other party as the Environment Court considers reasonable: (b) To the Crown, all or any part of the Environment Court's costs and expenses." And see Employment Relations Act 2000, sch 3, cl 19: "(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable. (2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable."

331 See, for example, *Project Hibiscus Ltd v Rodney District Council* (6 June 2007) AK AO47/07, para 19 (EC) Judge Newhook.

332 See *Hughes v Hanna* (1910) 29 NZLR 16 (SC); *Whangarei Co-operative Bacon-Curing and Meat Company v Whangarei Meat-Supply Company* (1912) 31 NZLR 1223 (SC); *Pilkington v Platts* [1925] NZLR 864 (SC); *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618, 624 (CA) Woodhouse P.

Legal aid

7.20 Section 7(4)(h) of the Legal Services Act 2000 states that legal aid is not available in "proceedings before a Commission of Inquiry under the Commissions of Inquiry Act 1908". This provision, which came in to effect on 1 March 2007, was said to confirm the status quo, rather than alter the law.[333] It appears that the previous situation was a source of confusion for the Commission of Inquiry into Police Conduct. While acknowledging that people may be entitled to representation, the Commission stated that "the financing of such representation is not within the power or control of the Commission and those requiring assistance will need to seek it elsewhere".[334] The Commission also stated that the "normal provisions with regard to civil legal aid apply".[335] The Commission went on to provide some free legal assistance to certain people involved in the inquiry, although not on an individual basis.[336]

7.21 The express exclusion of legal aid for inquiries was criticised by the New Zealand Law Society in their submission on the Legal Services Amendment Bill, which introduced s 7(4)(h). According to the Society, legal representation is necessary because "Commissions of Inquiry can, and often do, involve complex questions of fact or law".[337] It considered the provision "has potential to breach s 27 of the New Zealand Bill of Rights Act 1990 ("right to justice") and to impede access to justice where there is a complex question of fact or law".[338]

7.22 A Ministry of Justice Discussion Document on Eligibility for Legal Aid from 2002 acknowledged that "[a]dverse findings by a commission can have significant negative impacts on an individual".[339] It queried whether aid should be available at an original hearing, as it is if the person takes the findings to the High Court on judicial review, it. However, it pointed out that allowing legal aid in these situations "would create an anomalous situation with respect to one type of inquisitorial body",[340] as the proceedings of a commission of inquiry "lead only to an expression of opinion on the part of the Inquiry rather than an outright determination of rights".[341] This concern about anomalies ignores the fact that legal aid is expressly available for proceedings before the Waitangi Tribunal under s 7(1)(f) of the Legal Services Act 2000, despite this being a primarily recommendatory body (with the powers of a commission of inquiry).[342]

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333 See Hon Phil Goff (17 May 2005) NZPD 20634.

334 Commission of Inquiry into Police Conduct *Ruling of the Commission* (16 April 2004) para 37.

335 Ibid, para 29.

336 Lawyers were made available to provide advice to complainants, police officers, ex-police officers and police associates involved in the inquiry. The lawyers were available to address concerns participants felt unable to raise with the counsel assisting the Commission or other Commission staff. The lawyers were not able to appear before the Commission.

337 Submissions of New Zealand District Law Society on the Legal Services Amendment Bill (No 2).

338 Ibid.

339 Ministry of Justice "Eligibility for Legal Aid Discussion Document" (2002) 21.

340 Ibid.

341 Ibid.

342 In the 2004/2005 financial year $17,960,000 was spent on legal aid for the Waitangi Tribunal, Legal Services Agency *Annual Report 2004/2005* [2005] AJHR E7 52.

7.23 We consider that people who are drawn into an inquiry should not be prevented from having legal representation because they cannot afford it. Representation is not an individual right. Hallett considered that legal aid is very important to ensure individuals and organisations are properly represented at an inquiry "not only to enable his or their particular interest to be adequately represented, but also because effective representation is of valuable assistance to the person who has the function of ultimately making a report".[343]

7.24 Effective representation becomes even more important when a person is subject to adverse allegations. In 1980, the Public and Administrative Law Reform Committee held the view that, while generally legal aid would be unnecessary for commissions of inquiry, "in respect of inquiries concerning the conduct of any person, thereby placing him in the position of a defendant, legal aid should be extended to that person".[344] Denial of funds to pay for counsel for a person who is subject to adverse comment and cannot afford a lawyer is essentially the denial of a right to counsel. An issue of equity also arises since government officials will tend to have representation paid for by their department,[345] and others may have the backing of employers or unions.

7.25 Funding for legal representation should not, however, be limited only to those who are the subject of investigation. For instance in the Ingram Inquiry into Taito Phillip Field MP, a key witness refused to give evidence unless provided with funded legal representation.[346] Withholding legal aid or other assistance to witnesses could mean vital evidence is not heard.

7.26 Finally, inquiries are relatively rare occurrences. Compared to the draw on the legal aid budget by the courts and other standing bodies such as the Waitangi Tribunal, the potential cost of funding legal representation in defined circumstances before inquiries would be limited. We consider that legal assistance should be available for inquiries.

Alternatives to legal aid

7.27 Having said that, legal aid under the Legal Services Act 2000 is not an appropriate model for inquiries. Legal aid is often available to parties to adversarial proceedings but it is not available to fund the legal representation of witnesses to the proceedings. A decision to extend civil legal aid is based on both parties' financial circumstances, but also an assessment as to the prospects of success. This model of funding is inapt in inquiry proceedings where it may be appropriate for witnesses and participants who have been drawn into the proceedings to have their own representation, whether or not they are likely

343 Leonard Arthur Hallett *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (The Law Book Company Ltd, Sydney, 1982) 205.

344 Public and Administrative Law Reform Committee, above n 272, 30.

345 See, for example, *Jones v Canada* (*RCMP Public Complaints Commission*) (1998) 162 DLR (4th) 750 (FC), which involved a successful claim for representation costs before an inquiry by student participants in an inquiry. The Court noted that other participants, namely the Royal Canadian Mounted Police and individual members of the force, had the benefit of publicly funded representation, as did the inquiry itself.

346 Noel Ingram QC *Report to Prime Minister Upon Inquiry into Matters Relating to Taito Phillip Field* (2006) 61.

to be personally subject to adverse findings.[347] In addition, means testing is often not the only ground on which decisions about funding of legal representation before inquiries ought to be based.

7.28 Section 36 of the Tasmanian Commission of Inquiry Act 1995 allows a commission to "order that the whole or any part of the legal costs of a person who appears before it are to be paid by the Crown". The commission may consider whether the person has shown a valid reason to have representation; whether it is a hardship or an injustice for the person to bear the costs; the nature and possible effect of any allegations about the person; whether criminal or other charges have been recommended or instituted; and other matters.[348]

7.29 New South Wales has a Legal Representation Office (LRO) that was originally established in 1994 to provide representation to those involved in the Royal Commission into the NSW Police Service.[349] The LRO is not a statutory office but is Crown funded and provides free, independent legal assistance to witnesses to any special commission of inquiry.[350] Legal representation is provided by their two in-house solicitors or a panel of lawyers and is not based solely on means. Instead the decision is made on the following criteria:[351]

(a) the prospect of hardship to the witness if assistance is declined;

(b) the significance of the evidence that the witness is giving or appears likely to give;

(c) any other matter relating to the public interest.

7.30 We do not think that inquiries in New Zealand are of such a frequency to justify a new public body tasked with providing their participants with legal assistance. However, we think a role could be performed by the department overseeing the inquiry, either on an inquiry by inquiry basis or as a discrete fund for this purpose as part of an annual allocation for all inquiries.

Recommendation

7.31 A balance needs to be found between containing costs, adequately protecting rights and ensuring equality before inquiries, and maximising their potential to fully serve their purpose. We consider that inquiries should expressly be given the power to recommend to their overseeing department that a person's representation be funded in part or in whole, and either on a representative group or individual basis depending on the circumstances.

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347 See also the recent controversy surrounding the provision of legal aid under the Legal Services Act 2000 to fund the legal representation of the victims of crime before coronial inquiries: "Legal Aid Debt of $19,000 Wiped" (4 February 2008) *The Dominion Post* (Wellington); "Clark Speaks out on Legal Aid Law Change" (5 February 2008) *The Dominion Post* (Wellington).

348 Commission of Inquiry Act 1995 (TAS), s 35(2).

349 http://www.lawlink.nsw.gov.au/lawlink/legal_rep-office/ (accessed 11 December 2006). In relation to the (now closed) Queensland Inquiry Legal Representation Body, see Peter Bartholomew "Assistance for Inquiry Witnesses: The Legal Representation Office Bill 1998" (Legislation Bulletin No 5/98, Queensland Parliamentary Library, Brisbane).

350 As well as those involved in the ongoing Police Integrity Commission and Independent Commission against Corruption and limited coronial inquests. Attorney General's Department NSW *Annual Report 2005–2006* 103–104.

351 See Independent Commission Against Corruption Act 1988, s 52(2); Police Integrity Commission Act 1996, s 43(2).

7.32 Funding decisions by way of a recommendation to the overseeing department would require that the proposal for financial assistance be properly justified. This would provide some separation from the inquiry itself, both to maintain its independence and also to ensure financial accountability. The ability to make such a recommendation would not greatly differ from the existing practice whereby an inquiry requests additional funds to conduct its task. Furthermore, funding levels could be controlled by reference to guidelines similar to those of the Legal Services Agency or Crown Solicitors.[352]

7.33 We suggest the following criteria be adopted. Although the financial means of an applicant may be relevant, the significance of the evidence or other matters mean it should not be determinative. The Department of Internal Affairs has indicated that it considers our suggested criteria, set out below, appropriate.

RECOMMENDATION

R38 Inquiries should be able to make a recommendation to their overseeing department that funding for legal representation be granted to certain persons.

In determining whether such a recommendation is made, the inquiry should consider:

(a) the likelihood of hardship to the person if assistance is declined; and

(b) the nature and significance of the evidence that the person will or is likely to give; and

(c) the extent to which representation is required to enable the inquiry to fulfil its purpose; and

(d) any other matter relating to the public interest.

See draft Bill, clause 18.

352 A potential model to build on is the current Public Defence Service pilot in Auckland. Although at present it is restricted to cases eligible for legal aid and to the Auckland and Manukau courts, the brief of such agencies could be extended to cater for inquiries.

Chapter 8
Sanctions

INTRODUCTION

8.1 There needs to be a means of enforcing an inquiry's powers, either by inquirers themselves, or through the courts. At present, inquiries under the 1908 Act have three tools at their disposal for enforcing their orders or to deal with disobedience with them: (1) the offences set out in s 9 of the Act; (2) punishment for contempt; and (3) costs orders under ss 11 and 12, as discussed in the previous chapter.

OFFENCES UNDER SECTION 9

8.2 Section 9 of the 1908 Act establishes offences for any person who:

- after being summoned to attend to give evidence or to produce any documentation, without sufficient cause fails to attend in accordance with the summons, refuses to be sworn, give evidence, or answer questions or fails to produce the required documentation;
- wilfully obstructs or hinders the commission, its members or any authorised person in any inspection or examination of papers, documents, records, or things ordered by the commission;
- without sufficient cause, acts in contravention of or fails to comply with requirements of the commission or any authorised person relating to the production and copying of documentation.

8.3 These offences carry a maximum fine of $1,000. We are not aware of any occasions when a prosecution under s 9 has taken place. The only detailed consideration of s 9 in the case law relates to the interpretation of the qualification "without sufficient cause",[353] which we discuss in paragraphs 8.32–8.36 below.

RANGE OF OFFENCES

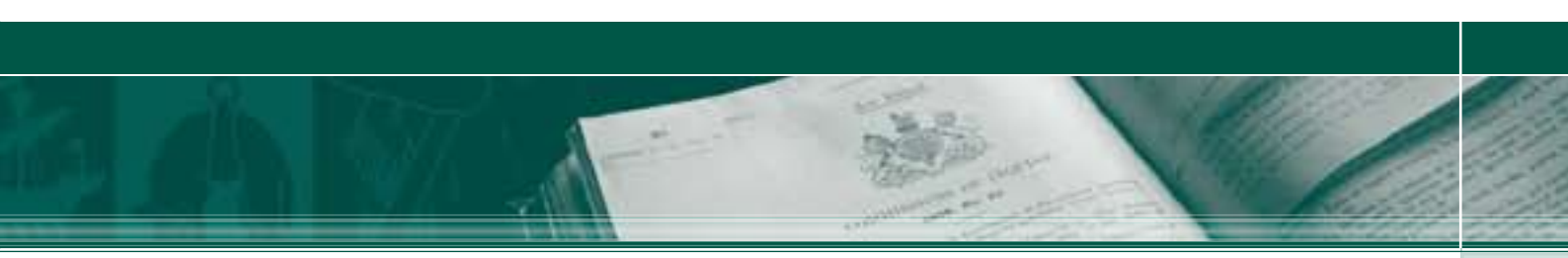
8.4 Inquiry statutes in a number of Australian jurisdictions create a wider range of offences than the 1908 Act. The formulation adopted in many of these jurisdictions creates a greater overlap between offences and behaviour more traditionally dealt with by contempt of court. Offences in those statutes include:

- bribery of a witness, fraud, destroying evidence, preventing a witness giving evidence and injury to a witness;[354]
- false and misleading testimony, subornation, destroying documents or other things, delaying and obstructing commission;[355]

353 See *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140 (PC) and *Controller and Auditor-General v Sir Ronald Davison; KPMG Peat Marwick and Others v Sir Ronald Davison; Brannigan and Others v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

354 Royal Commissions Act 1902 (Cth), ss 6I–6M.

355 Royal Commissions Act 1923 (NSW), ss 19–23A.



- the offence of "contempt of a commission", defined as:
  - failing to produce as required that which is in the person's custody or control; or
  - refusing to be sworn or to answer; or
  - wilfully threatening or insulting a commission; any commissioner; any lawyer or other person appointed, engaged or seconded to assist a commission; any witness or person summoned to attend before a commission; or any lawyer or other person having leave to appear before a commission;
  - writing or speech using words false and defamatory of a commission, or any commissioner; or
  - misbehaving before a commission; or
  - interrupting the proceedings of a commission; or
  - obstructing or attempting to obstruct a commission, a commissioner, or a person acting under the authority of the chairperson, in the exercise of any lawful power or authority; or
  - doing any other thing which, if a commission were a court of law having power to commit for contempt, would be contempt of that court; or
  - publishing, or permitting or allowing to be published, any evidence given before a commission or any of the contents of a book, document, writing or record produced at the inquiry which a commission has ordered not to be published.[356]

8.5 Offences directed at preventing the distortion of evidence, or giving of false and misleading evidence are also included in the recent United Kingdom Inquiries Act 2005, and the Irish Law Reform Commission has recommended their inclusion in new inquiries legislation.[357] Section 135 of our Coroners Act 2006 provides for an offence of false or misleading statements and omissions in certain documents, punishable by a fine not exceeding $1,000. The offence is limited to certain types of documents.[358]

CONTEMPT

8.6 Commissioners' current powers to punish for contempt differ depending on whether or not the inquiry comprises a High Court judge or former High Court judge.[359] We do not think this distinction is sustainable.

356 Commissions of Inquiry Act 1950 (Qld), s 9.

357 The Law Reform Commission of Ireland, above n 286, 115.

358 Being: a doctor's report required under s 40 of the Act; a witness's evidence put into writing, read over to or by the witness, and signed by the witness, in accordance with s 79(3); reports commissioned by a coroner under s 118; and documents prepared under s 120(1)(a) (coroner may by written notice require person to supply information or documents or other things).

359 Section 4(1) of the 1908 Act provides that "for the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of … conducting and maintaining order at the inquiry". Section 13 gives a commission greater powers where one of its members is a High Court judge or former High Court judge.

Section 4(1)

8.7 Generally, commissions have the same powers as District Courts to punish individuals for contempt. Section 112 of the District Courts Act 1947 provides that:

> If any person—
>
> (a) Wilfully insults a Judge or any witness or any officer of the Court *during his sitting or attendance in Court, or in going to or returning from the Court;* or
>
> (b) Wilfully interrupts the proceedings of a Court or otherwise misbehaves *in Court;* or
>
> (c) Wilfully and without lawful excuse disobeys any order or direction of the Court *in the course of the hearing* of any proceedings,—
>
> any officer of the Court … may, by order of the Judge, take the offender into custody and … commit the offender to prison for any period not exceeding 3 months …[360] [Emphasis added.]

8.8 Contempt under s 112 is therefore largely restricted to contempt committed "in the face of the court". Like the District Court, under s 4(1), commissions cannot punish for contempt in relation to anything done outside inquiry hearings themselves.

Sections 13, 13A, 13B and 13C

8.9 The situation is different where a commissioner is a current or former High Court judge. Section 13 provides that, in such cases, the commission shall have the same powers as a judge of the High Court in the exercise of his or her civil jurisdiction under the Judicature Act 1908. By virtue of s 13B, the commission can rely on s 56C of the Judicature Act 1908, which is in similar terms to s 112 of the District Courts Act. However, s 56C(3) goes on to state that:

> Nothing in this section shall limit or affect any power or authority of the Court to punish any person for contempt of Court in any case to which this section does not apply.

8.10 Section 56C therefore maintains the High Court's inherent powers to punish for contempt – which include things said or done outside the courtroom. Section 13B itself also provides that where a person does anything in relation to a commission of inquiry, its members or officers, witnesses, hearings, orders and directions that would be a contempt of court, that action shall be a "contempt of that Commission".

8.11 Section 13B is reinforced by s 13A which gives the High Court the power to issue a warrant for arrest and detention where, without just excuse, a subpoenaed witness fails to attend or refuses to give evidence. Orders made under ss 13A and 13B can be appealed to the Court of Appeal.[361] Such orders can be filed in the High Court and enforced as judgments of that court.[362]

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360 The judge can, in the alternative, impose a fine of up to $1000 for each offence.

361 In the terms of s 384 of the Crimes Act 1961. See s 13C of the 1908 Act. With leave of the Supreme Court, such appeals can be further appealed to that Court (s 384(5) of the 1961 Act).

362 Section 13(2).

Types of contempt and their application to inquiries

Criminal contempt

8.12 Many types of conduct can constitute contempt of court, and the list of punishable conduct is not closed. Two broad categories of contempt are recognised: criminal contempt consists of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice. It includes contempt that takes place "in the face of the court" which, as noted, is captured by s 4(1) of the 1908 Act. Thus, under s 4(1) commissions of inquiry can punish conduct such as violence or insults, interruption of proceedings, refusals by witnesses to be sworn or to answer once sworn and outrageous behaviour by anyone in the inquiry.[363]

8.13 Criminal contempt also includes words spoken or otherwise published, or acts done outside the court, such as publications likely to prejudice court proceedings or which scandalise the authority of the court. This behaviour is not covered by s 4(1) of the 1908 Act, so the ability of a commissioner other than a High Court judge to control behaviour on the periphery of the inquiry is limited. It is unclear whether the Attorney-General or Solicitor-General can commence contempt proceedings on behalf of these inquiries, to protect them from such behaviour (as they can, and have done in relation to the District Courts).[364]

8.14 The Waterfront Royal Commission Act 1950 (now repealed)[365] dealt with this issue by providing that "without limiting the powers … conferred on the Chairman and the Commission, it is hereby declared that the Supreme Court or a judge thereof shall have a full power to punish any person guilty of contempt of the Commission, whether committed in the face of the Commission or otherwise, as if that person were guilty of contempt of the Court."[366] This formulation has not been adopted in other New Zealand legislation and should perhaps be read in the light of other legislation surrounding the 1951 waterfront dispute.

Civil contempt

8.15 Civil contempt is procedural in nature and consists of disobedience with the judgments, orders or other processes of the court. In the case of commissions of inquiry not comprising any former or current High Court judges, such disobedience is dealt with by the offences in s 9 alone. Thus a summoned person who fails to attend or give evidence faces, at most, a fine of up to $1000.

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363 *Laws of New Zealand* (LexisNexis, Wellington) Contempt of Court para 9 (last updated 1 July 2007) www.lexisnexis.com.

364 The Attorney-General has traditionally assumed the role of defender of the judiciary by instituting contempt of court proceedings. See *Attorney-General v Times Newspaper Ltd* [1974] AC 273, 311 (HL) Lord Diplock: "He is the appropriate public officer to represent the public interest in the administration of justice." In New Zealand, this is a role which has long been delegated to the Solicitor-General to remove it from the political sphere: see John McGrath QC "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 New Zealand Universities Law Review 197, 213. See, for example, *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) for the Solicitor-General's successful application for orders that the MP Dr Nick Smith was in contempt of the Family Court. The contempt was of a nature of an "intentional effort improperly to influence a litigant to give up her litigation and the Court to give a particular result".

365 The Waterfront Royal Commission Act 1950 concerned the establishment and process of a royal commission relating to industrial disputes in the waterfront industry.

366 Section 3(2). The Royal Commission on the Waterfront Industry was chaired by Sir Robert Kennedy. See [1952] IV AJHR H 50.

Should contempt apply to commissions of inquiry?

8.16 There is a question whether the contempt rules should apply to inquiries at all. The purpose of contempt is "to preserve an efficient and impartial system of justice and public confidence in it, by dealing with challenges to the fundamental supremacy of the law".[367] Its purpose is not to defend the dignity of the court or judge in question.[368] Do inquiries need similar protection for their "efficient and impartial" running or to achieve obedience with their orders? They are not ongoing institutions like courts and their only powers to make binding orders are procedural in nature.

8.17 Under the common law, only two forms of contempt exist: contempt of court and contempt of Parliament.[369] Notwithstanding that, s 13B of the 1908 Act is worded in terms of "contempt of the commission". Since commissions of inquiry are not courts,[370] in principle, the application of common law contempt rules to them seems misplaced. In *R v Arrowsmith*,[371] Dean J said:

> I have already referred to authority establishing the proposition that contempt of Court is punishable because it constitutes an interference with the administration of justice, and the various types of contempt represent various ways in which the course of justice may be the subject of some interference. But a Royal Commission cannot be said to be administering justice at all. There are no parties before it; no one is on trial for an offence; no person is seeking any private remedy from it. It is merely concerned to inquire into and report upon the matters referred to it.

8.18 Lord Justice Salmon's 1969 consideration of the law of contempt as it affects tribunals of inquiry[372] came to the opposite conclusion. He considered that there "is no such profound difference between a trial before a judge alone and proceedings before a Tribunal of Inquiry as would justify affording the protection of the law of contempt to a person involved in the one but not in the other".[373] His committee argued that it was of no less public importance that justice should be done to individuals by tribunals of inquiry than it should be done by the courts; and that it was very much in the public interest that tribunals of inquiry should reach the right conclusions and not be impeded in their efforts to do so.[374]

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367 *Laws of New Zealand* (LexisNexis, Wellington) Contempt of Court para 1(5) (last updated 1 July 2007) www.lexisnexis.com.

368 See *Johnson v Grant* [1923] SC 789, 790 and *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

369 See Enid Campbell *Contempt of Royal Commissions* (Monash University, Melbourne, 1984) 1.

370 See *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96, 109 (CA) North J "A Commission of Inquiry is certainly not a Court of law. Courts of law by ancient usage have formulated their own rules of procedure and rights of audience, representation, and the like which are now well defined: see *Collier v Hicks* (1831) 2 B & Ad 663, 671, 109 ER 1290, 1293. Nor is a Commission of Inquiry to be likened to an administrative tribunal entrusted with the duty of deciding questions between parties. There is nothing approaching a *lis*, a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one." See also *Jellicoe v Haselden* [1902] 22 NZLR 337, 351 (SC) Stout CJ. On the other hand, in *In re St Helen's Hospital* (1913) 32 NZLR 682 (SC) Cooper J emphasised that a commissioner was given the same powers as a Magistrate acting under the Magistrates' Court Act 1908. He considered that an inquiry was therefore "analogous in respect to its conduct … to a civil proceeding in the Magistrates' Court" (at 687). The result, Cooper J considered, was that doctor/patient privilege therefore applied in the same way as before a court. We consider privileges and immunities in chapters 9 and 10.

371 [1950] VLR 78, 85–86.

372 Lord Justice Salmon *Report of the Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Enquiry* Cmnd 4078 (HMSO, London, 1969).

373 Ibid, 8.

374 Ibid, 9.

The committee, however, recommended that the law of contempt should apply to inquiries in a narrower form than to courts,[375] and saw no advantage in replacing contempt with offences under United Kingdom legislation.

8.19 More recently, the United Kingdom Government has rejected this approach in its Inquiries Act 2005, on the ground that contempt is a formal concept that is specific to the courtroom.[376] Instead, the Act creates offences that mirror elements of the law of contempt.[377]

8.20 Practice in other jurisdictions varies. Contempt remains available to inquiries in most states of Australia and Canadian provinces. Some jurisdictions have instead created an offence of "contempt of the commission" to be prosecuted as a normal offence.[378] In some cases the extent to which commissioners can punish for contempt depends on whether they are a judge, or how long they have been legally qualified,[379] however, legal experience is not always a pre-requisite.[380] Practice also varies as to whether, and how, the contempt should be brought before the courts.

8.21 Contempt has a pragmatic appeal. Its potential for immediate coercive action, rather than merely potential future conviction is relevant. In applying a sanction to an individual because of their disobedience of an inquiry's order, what the inquiry is seeking to achieve first and foremost is compliance. This is more likely to be achieved by the threat of immediate imprisonment. The time involved in prosecuting an offence can also add delay to an inquiry, particularly where the inquiry is awaiting the outcome of the prosecution. Contempt carries with it the additional practical benefit of an indeterminate sentence, which the court can rescind at any time, for example, when the contemnor decides to comply.

8.22 But, even in the context of the court system proper, contempt is recognised as a very severe mechanism, to be exercised only as a last resort.[381] It carries with it the risk of punishment which can far outweigh the seriousness of the offence. The power is exercised summarily, often with the court or judge against which the contempt was directed both laying and determining the charge. Contrary to principles of certainty in punishment, before the superior courts, it raises the

375 Ibid, 11. In particular, it concluded that comments on or statements about matters referred to a Tribunal of Inquiry should not amount to contempt.

376 Department for Constitutional Affairs *Effective Inquiries* CP 12/04 (Department for Constitutional Affairs, London, 2004) 28.

377 Section 35 provides "(1) A person is guilty of an offence if he fails without reasonable excuse to do anything that he is required to do by a notice under section 21. (2) A person is guilty of an offence if during the course of an inquiry he does anything that is intended to have the effect of (a) distorting or otherwise altering any evidence, document or other thing that is given, produced or provided to the inquiry panel, or (b) preventing any evidence, document or other thing from being given, produced or provided to the inquiry panel, or anything that he knows or believes is likely to have that effect. (3) A person is guilty of an offence if during the course of an inquiry (a) he intentionally suppresses or conceals a document that is, and that he knows or believes to be, a relevant document, or (b) he intentionally alters or destroys any such document. For the purposes of this subsection a document is a "relevant document" if it is likely that the inquiry panel would (if aware of its existence) wish to be provided with it …".

378 See Royal Commissions Act 1902 (Cth), s 6O(2) and Royal Commissions Act 1991 (ACT), s 46.

379 Royal Commissions Act 1902 (Cth), s 6O(2) and Commissions of Inquiry Act 1950 (Qld), s 50.

380 For example, chairpersons in South Australia can commit contemnors to jail for three months. There is no requirement that they be legally qualified or have judicial experience: Royal Commissions Act 1917 (SA), s 11.

381 See *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

potential for an unlimited term of imprisonment. Furthermore, intent does not need to be proved for all forms of contempt, and its exercise has the potential to raise issues in relation to the freedom of expression, arbitrary detention and fair trial provisions of the New Zealand Bill of Rights Act 1990.[382]

8.23 We agree with the Irish Law Reform Commission which concluded "the uncertainty that surrounds the law of contempt, even in its home territory of the administration of justice, is such that it seems to us to be inappropriate to attempt to transpose it to other areas of the law".[383]

CONCLUSION ON CONTEMPT

8.24 We do not think inquiries should be able to punish for contempt in the same way courts can. In particular, we do not think it should be available at the instigation of the inquirers themselves, whatever their status. While it may be that current or former judges have the judicial experience and temperament to exercise the power with great circumspection, an inquiry is not a court. Moreover, inquiries can also be headed by non-judicially qualified individuals.[384]

8.25 Instead, below we propose a framework which relies primarily on specified offences for conduct in the face of and on the periphery of inquiries. The proposed offences will give adequate protection to inquiries from most forms of disobedience or contemptuous behaviour. However, we have noted the benefits that contempt procedures can give in terms of immediate coercion. There may also be rare occasions when a person's failure to comply with an inquiry's orders is of such a grave nature that more strict measures are required. We note therefore the mechanism used in Ireland, which gives inquiries access to the benefits of the contempt procedure, but with greater security for those connected with inquiries. Section 4 of the Irish Tribunals of Inquiry (Evidence) (Amendment) Act 1997 provides:

> Where a person fails or refuses to comply with or disobeys an order of a tribunal, the High Court may, on application to it in a summary manner in that behalf by the tribunal, order the person to comply with the order and make such other order as it considers necessary and just to enable the order to have full effect.

8.26 Such a provision would allow an order made by an inquiry to, in essence, be transformed into an order of the High Court, with all that that entails, including the possibility of committal for contempt if the order was not obeyed.

8.27 As noted above, it is unclear whether under the current law the Attorney-General or Solicitor-General could commence contempt proceedings on the part of inquiries. We think it is desirable in cases of ongoing non-compliance or serious contempt of the inquiry for the Solicitor-General to commence contempt proceedings in the High Court, rather than the inquiry exercising contempt powers itself. This process carries the advantage that it avoids the inquiry itself having to enter court proceedings. The new Act should provide for this power.

382 See ss 14, 22 and 25.

383 The Law Reform Commission of Ireland, above n 286, 6.37.

384 We do note, however, that coroners have the power to commit for contempt (and had the power before the new requirement that coroners have 5 years legal experience). Coroners Act 2006, ss 103 and 117(3)(e). This power also existed under the 1988 Act, s 35(2)(e), when coroners were not required to be legally qualified.

RECOMMENDATION

R39 The new Act should provide a specific power for the Solicitor-General to commence proceedings for contempt of an inquiry.

See draft Bill, clause 31.

OFFENCES

8.28 As noted, the power proposed above relates only to instances of ongoing non-compliance. For less grave behaviour a broader range of offences should be included in the new Act. In chapter 4 we discussed the benefits of legislation setting out, in more detail, the particular powers at an inquiry's disposal. We consider that a similar approach should be adopted here, and suggest a formulation that does more to specify the instances of behaviour that may lead to criminal charges.

8.29 In common with the distinction between civil and criminal contempt, the offences will deal with two types of behaviour: (1) failures to comply with an inquiry's orders and directions; and (2) words or acts interfering with, seeking to influence, or lowering the authority of the inquiry.

RECOMMENDATION

R40 The new Act should include the following offences:

(a) intentionally and without lawful excuse failing to attend the inquiry in accordance with the notice of summons;[385]

(b) intentionally and without lawful excuse refusing to be sworn and give evidence;

(c) intentionally and without lawful excuse failing to produce any document or thing required by an order of the inquiry;

(d) intentionally and without lawful excuse destroying evidence, or obstructing or hindering any person authorised to examine, copy or make a representation of a document or thing required by an order of an inquiry;

(e) intentionally and without lawful excuse failing to comply with a procedural order or direction of an inquiry (including breaches of non-publication orders);

(f) intentionally disrupting the proceedings of an inquiry;

(g) intentionally preventing a witness from giving evidence or threatening or seeking to influence a witness before an inquiry;

(h) intentionally providing false or misleading information to an inquiry;

(i) intentionally threatening or intimidating an inquiry or a member or officer of an inquiry.

See draft Bill, clause 29.

POWER TO ISSUE WARRANT FOR ARREST AND DETENTION

8.30 It follows from our discussion of contempt that we do not consider that inquirers themselves should be able to issue warrants for the arrest of individuals, or to order their detention. Instead, under our proposal once a contempt order has been made by the High Court, that Court will be able to use its powers under ss 56A and 56B of the Judicature Act 1908.

385 We discuss this term in paragraphs 8.32–8.36 below.

8.31 We have considered whether the removal of these and the contempt power will overly diminish the powers of inquiries to bring people and information before them. However, we have taken account of the fact that at present the powers are only available to inquirers who are or were High Court judges. We are not aware of any instances where the powers of arrest and detention have ever been used. Furthermore, in principle we consider that such powers should be exercised under the auspices of the court system.

SUFFICIENT CAUSE AND JUST EXCUSE

8.32 The sanctions in the 1908 Act for refusing to give evidence contain certain qualifications. A refusal to answer must be "without sufficient cause" to attract criminal consequences under s 9(1)(b). This is the same formulation used in the District Courts Act 1947 for persons who refuse or neglect to appear or to produce any documents required to be produced.[386] Section 13A(1)(b) of the 1908 Act provides that powers of detention can be exercised where a person refuses to answer "without offering any just excuse".[387]

8.33 The Privy Council considered the breadth of these qualifications in *Brannigan v Sir Ronald Davison*.[388] Their Lordships ruled that they provided "ample scope for all the circumstances to be taken into account" and considered that "inherent in these two expressions … is the concept of weighing all the consequences of the refusal to give evidence: the adverse consequences to the inquiry if the questions are not answered, and the adverse consequences to the witness if he is compelled to answer."[389] They disagreed with the approach taken by Sir Ronald Davison, the Commissioner in the Wine-box inquiry, that if a witness could not claim the privilege against self-incrimination (preserved under s 6 of the 1908 Act) he or she necessarily lacked sufficient cause within s 9 or just excuse within s 13A. Their Lordships stated that the "width and elasticity of the relieving exceptions are not to be confined and restricted in this way".[390] However, it was not for the courts to carry out the balancing exercise required – that role was for the commissioner who was "in a far better position than the Court to assess how important the witness's evidence may be and to weigh that against the proferred excuse."[391]

386 District Courts Act 1947, s 54 provides: "(1) Any person summoned in pursuance of the rules as a witness in any Court who—(a) Refuses or neglects, without sufficient cause, to appear or to produce any documents required by the summons to be produced; or (b) Refuses to be sworn or to give evidence, is liable to a fine not exceeding $300." Application may be made to the High Court to set aside a witness summons if what is sought is irrelevant, privileged, oppressive, or an abuse of process.

387 This mirrors the wording in s 56B(1) of the Judicature Act 1908. By way of comparison, the Tasmanian and Western Australian inquiries Acts adopt the comparably broad formulation of "reasonable excuse". See Commissions of Inquiry Act 1995 (Tas), s 28 and Royal Commissions Act 1968 (WA), s 13. The Western Australian Act defines "reasonable excuse" as not including that the production of information "might incriminate or tend to incriminate the person or render the person liable to a penalty; or (b) would be in breach of an obligation of the person not to disclose information, or not to disclose the existence or contents of a document, whether the obligation arose under an enactment or otherwise."

388 *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140 (PC). See also, *Controller and Auditor-General v Sir Ronald Davison*; *KPMG Peat Marwick and Others v Sir Ronald Davison; Brannigan and Others v Sir Ronald Davison* [1996] 2 NZLR 278, 292 (CA).

389 *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140, 147–148 (PC) Lord Nicholls of Birkenhead. The issue in the case was whether the witnesses should be excused from giving evidence since their testimony could open them up to criminal prosecution in the Cook Islands, where they carried on much of their business.

390 Ibid, 148.

391 Ibid, 148.

8.34 At present, commissioners can therefore take into account a broad range of matters which might include the impact on a witness's professional or personal reputation, or commercial interests, but equally the interests of other individuals and the public at large in seeing the inquiry fulfil its role. The balancing exercise will vary depending on the nature of the inquiry. In the context of inquiries into incidents where people have been injured or killed, this would include the interests of the victims or their family members in finding out what happened.[392] Notwithstanding this, we think the current formulation of "without sufficient cause" is too broad.

8.35 By contrast s 112 of the District Courts Act limits valid non-compliance in the course of proceedings to "lawful excuse". This is also the basis of the formulation adopted in the new Coroners Act 2006, except the Act goes further by essentially specifying what amounts to a lawful excuse for refusing to produce a document. Section 121 provides that a person can refuse to comply with a notice requiring the supply of information or documentation if to do so:[393]

> (a) would, if the thing were sought from the person as a witness giving evidence in a court of law, be prevented by a privilege or immunity that the person would have as a witness, or as counsel, in that court:
>
> (b) is prevented by an enactment, rule of law, or order or direction of a court that prohibits or restricts the making available of the thing, or the manner in which the thing may be made available:
>
> (c) would be likely to prejudice the maintenance of the law (including the prevention, detection, investigation, prosecution, and punishment of offences, and the right to a fair trial).

8.36 This formulation gives more guidance to inquirers and judges and arguably allows less scope to witnesses to avoid orders to appear or produce information. We suggest that a similar formulation be adopted for inquiries.

RECOMMENDATION

R41 "Without lawful excuse" should be defined in the new Act to mean that failures to comply with an inquiry's orders and directions may be excused where:

(a) compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel before an inquiry under the new Act;

(b) compliance would be prevented by an enactment, rule of law, or order of a court that prohibits or restricts disclosure of the document, any information, or thing;

(c) compliance would be likely to prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences, and the right to a fair trial.

See draft Bill, clause 29.

392 A similar balancing exercise will need to be undertaken when deciding questions of public and private interests, and immunity, in relation to the release of information acquired in the course of an inquiry. See, for example, *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA). We discuss this in chapter 6.

393 See also, Victims' Rights Act 2002, s 13(1).

PENALTIES

8.37 The 1908 Act provides for a penalty of $1,000 for the offences in s 9. The level of fine has not been amended since 1980. There is no penalty of imprisonment in the Act. Imprisonment is provided for in some other countries' inquiries legislation and the terms of imprisonment range from 3 months[394] to 51 weeks.[395] The penalty for contempt before the District Court is imprisonment for up to 3 months or a fine of $1,000.[396] The new Coroners Act 2006 provides for fines of $1,000 for similar offences.[397]

8.38 By comparison, s 86 of the New Zealand Public Health and Disability Act 2000 provides for a penalty of up to $10,000 for almost identical offences in relation to inquiries under that Act.[398] We suggest that this benchmark is more appropriate, given that inquiries will often involve corporate players. We consider that the current level is very unlikely to be an effective punishment or deterrent to witnesses refusing to give evidence or provide information. Wealthy individuals or corporate bodies intent on obstructing or delaying the progress of an inquiry are very unlikely to be deterred by such a fine.

8.39 We do not think that in the normal run of events offences against inquiries are of sufficient gravity to warrant a penalty of imprisonment, especially since inquiries are not judicial bodies. As we have noted, there is a distinction to be drawn between the coercive nature of imprisonment for contempt and the use of imprisonment as a punishment alone. Where there is a grave instance of ongoing non-compliance, it will be able to be dealt with by the High Court, which could order imprisonment for contempt.

RECOMMENDATION

R42 In a new Act, the maximum fine for offences should be $10,000. The offences should not attract a penalty of imprisonment.

See draft Bill, clause 30.

PROSECUTING OFFENCES

8.40 Section 9 of the 1908 Act does not set out the procedure for prosecutions to take place. The implication is that it is for the police to act on their own instigation or in response to a complaint from the inquiry to lay a charge against an offender, although the Act does not rule out the inquiry itself being the informant. We have considered whether inquiries in New Zealand should have the power to lay charges themselves, but see no reason to bypass the usual prosecution process. Thus, an inquirer who considers that a person has committed an offence under the Act can report the fact to the police who can exercise its discretion whether or not to charge the individual. New legislation does not need to deal directly with this issue.

394 For example, Royal Commissions Act 1917 (SA), s 11; Evidence Act 1958 (Vic), s 20.

395 Inquiries Act 2005 (UK), s 35(8).

396 District Courts Act 1947, s 112.

397 The State Sector Act 1988 which gives the State Services Commissioner the powers of a commission of inquiry adopts the same level of fine.

398 Notably, that Act does not allow for a penalty of imprisonment.

Chapter 9

Evidence and privilege

9.1 In this chapter, we consider the extent to which the rules of evidence and privilege should apply to inquiries. The Evidence Act 2006 has largely codified the rules of evidence and introduced some changes to the law which warrant consideration in relation to inquiries. Recent Australian developments in relation to the application of legal professional privilege and inquiries also need to be considered.

9.2 We recommend that evidence rules in relation to inquiries should, largely, remain unchanged, but that the privilege against self-incrimination should be replaced by an immunity for the purposes of inquiries, and inquirers should be able to inspect documentation and information to determine whether it is protected by privilege or confidentiality.

EVIDENCE RULES AND INQUIRIES

9.3 At present, commissions of inquiry are not bound by the general laws of evidence. Section 4B(1) of the 1908 Act provides:

> The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

9.4 The provision was added after a 1979 recommendation by the Public and Administrative Law Reform Committee, and reflects the common law position.[399] The impact of an unrestricted approach to admissibility is mitigated by ss 4C(4) and 6 of the 1908 Act which provide respectively:

> Every person shall have the same privileges in relation to the giving of information to the Commission, the answering of questions put by the Commission, and the production of papers, documents, records, and things to the Commission as witnesses have in Courts of law.
>
> Every witness giving evidence, and every counsel or agent or other person appearing before the Commission, shall have the same privileges and immunities as witnesses and counsel in Courts of law.[400]

399 See for example *Jellicoe v Haselden* [1902] NZLR 343, 358 (SC) Williams J.

400 Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980) 31. Before 1980 the provision applied only to witnesses attending and giving evidence in pursuance to a summons.

9.5 In the light of changes made by the Evidence Act 2006, these privileges and immunities require consideration. We discuss the privileges and immunities of witnesses later in this chapter. The immunities of counsel and inquirers are dealt with in chapter 10.

SHOULD THE RULES OF EVIDENCE APPLY TO INQUIRIES?

9.6 In 1902, *Jellicoe v Haselden*[401] confirmed that commissions of inquiry are not bound by any rules of evidence. The Public and Administrative Law Reform Committee justified this position, stating that "a commission is not to be compared with a court of law and some flexibility in the rules is undoubtedly required".[402] This situation is mirrored in many other bodies with inquiry functions;[403] and for proceedings in the Family[404] and Coroners Courts.[405]

9.7 While the New Zealand approach to commissions of inquiry is commonly followed in other jurisdictions,[406] in New South Wales, inquiries may only receive evidence which "in the opinion of the Commissioner, would be likely to be admissible in evidence in civil proceedings".[407] If the subject matter of the inquiry relates to whether or not offences have been committed, the commission must disregard evidence which would be inadmissible in criminal proceedings.[408]

9.8 Court rules of evidence have developed largely as a response to the adversarial process, and notably jury trials.[409] We agree that their application to inquiries, which are inquisitorial bodies and do not make binding decisions, would be unduly restrictive. Indeed, the inability to seek and receive all the relevant evidence can frustrate the very purpose of an inquiry. Inquiries must however abide by natural justice. An inquiry which draws negative inferences from untested or unsubstantiated evidence is likely to find itself the subject of judicial review.[410]

9.9 It is therefore desirable that protections are in place to ensure untested or sensitive material presented to an inquiry is treated with appropriate restraint, particularly where conduct is at issue. In particular, the powers discussed in chapter 6 to restrict the publication of certain evidence can reduce the potential for harm. With those protections, appropriate immunities and privileges, and natural justice rules in place, we see no reason for any change in relation to the admissibility of evidence in new inquiries legislation.

401 *Jellicoe v Haselden* [1902] NZLR 343, 358 (SC) Williams J.

402 Public and Administrative Law Reform Committee, above n 400, 31.

403 For example, select committees can receive evidence not admissible in Court (Legislature Act 1908, s 253(4)), as can the Ombudsmen (Ombudsmen Act 1975, s 19(6)), Securities Commission (Securities Act 1978, s 69B); Inspector-General of Intelligence and Security (Inspector-General of Intelligence and Security Act 1996, s 19(5), 22).

404 Family Proceedings Act 1980, s 164.

405 Coroners Act 2006, s 79.

406 See for example, Royal Commissions Act 1991 (ACT), s 23(b); Inquiries Act 1991 (ACT), s 18(b); Inquiries Act (NT), s 6; Commissions of Inquiry Act 1950 (Qld), s 17; Royal Commissions Act 1917 (SA), s 7; Commissions of Inquiry Act 1995 (Tas), s 20.

407 Special Commissions of Inquiry Act 1983 (NSW), s 9(3).

408 Ibid, s 9(4).

409 See, for example, Colin Tapper (ed) *Cross on Evidence* (Butterworths, London, 1990) 1.

410 Notably, see *Re Erebus*, above n 312, 671 (PC).

RECOMMENDATION

R43 Inquiries should continue to be able to receive evidence that would not be admissible in a court of law.

See draft Bill, clause 19.

PRIVILEGED MATERIAL UNDER THE EVIDENCE ACT 2006

9.10 The Evidence Act 2006 introduced significant changes to how privileged material is protected in court proceedings. Matters of privilege and confidentiality as they apply in courts of law are now largely governed by part 2, subpart 8 of the Act.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

9.11 The privilege against self-incrimination has long been protected in criminal and civil proceedings by the common law and statute.[411] Since 1990 it has received the protection of the New Zealand Bill of Rights Act in relation to criminal proceedings only.[412] The Evidence Act 2006 has now made changes to the way the privilege operates. Section 5 of the 2006 Act provides generally that where an inconsistency exists between the provisions of the Act and any other enactment, the provisions of that other enactment will prevail, unless the 2006 Act expressly provides otherwise. It is therefore open to a new Inquiries Act to provide that the privilege either does or does not apply.[413]

Sections 60 and 63 of the Evidence Act 2006

9.12 Section 60(1)(a) of the Evidence Act states that the privilege against self-incrimination applies when a person is required to provide specific information:

> (i) in the course of a proceeding; or
>
> (ii) by a person exercising a statutory power or duty; or
>
> (iii) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or possible criminal offence; …

9.13 Section 60(3) provides that the privilege applies unless an enactment removes the privilege expressly or by necessary implication.[414] The section confines its application to situations where the information would be likely to incriminate a person under New Zealand law for an offence punishable by a fine or imprisonment. Therefore, the privilege no longer applies where disclosing the information may result in civil liability.

411 See, for example, *Holmes v Furness* (1884) 3 NZLR 417 (SC) and *Roskruge v Ryan* (1897) 15 NZLR 246 (SC). The privilege was protected by the Evidence Act 1908: see s 5 in relation to criminal proceedings and s 4 in relation to parties to a civil suit. The Evidence Act 1908 was repealed by the Evidence Act 2006, Schedule 1.

412 Section 25(d): "Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: … (d) The right not to be compelled to be a witness or to confess guilt …" See also, s 23(4): "Everyone who is— (a) Arrested; or (b) 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."

413 Section 25(d) does not apply to commissions of inquiry, not being criminal proceedings.

414 The 2006 Act also limits the application of the privilege to circumstances where a person will incriminate himself or herself. Section 60(1)(b) provides: "the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment."

9.14 It is not clear whether s 60(1)(a)(i) extends to inquiries since "proceeding" is strictly confined in the Evidence Act to court proceedings. However, it may be that the effect of ss 4C(4) and 6 of the 1908 Act is to extend the paragraph to commissions of inquiry.[415]

9.15 It is clear, however, that under paragraph (ii) above, the privilege applies to information provided in response to the exercise of a commission's powers to summon witnesses or order the production of documents. A question remains as to whether it would apply in the absence of a summons or order under those provisions. In this regard, we note that s 6 of the 1908 Act was amended in 1980 to make it clear that the privileges applied to witnesses whether or not they were summoned.[416]

9.16 Section 63 of the Evidence Act has removed the protection of the privilege with respect to disclosure requirements in civil proceedings:

> (1) This section applies to a person who is required by an order of the court made for the purposes of a civil proceeding—
>
> (a) to disclose information; or
>
> (b) to permit premises to be searched; or
>
> (c) to permit documents or things to be inspected, recorded, copied, or removed; or
>
> (d) to secure or produce documents or things.
>
> (2) The person does not have the privilege provided for by section 60 and must comply with the terms of the order …

9.17 Section 63(3) of the Evidence Act replaces the privilege with an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence. Again, it is not clear how s 63(3) applies to inquiries in the light of ss 4C(4) and 6 of the 1908 Act. If inquiries are considered "civil proceedings" then it is arguable that it is s 63, and not s 60, that applies.

9.18 Section 63 goes beyond what the Law Commission envisaged in its 1996 proposals for a draft Evidence Code.[417] The section was inserted at the Select Committee stage to replace a clause which restricted the application of the privilege in respect of Anton Piller orders.[418] The Select Committee was of the opinion, however:[419]

> that a complete abrogation of the privilege in civil proceedings with an associated criminal shield for all purposes, except those concerning the falsity of the information, would *facilitate the determination of rights* in civil proceedings without unnecessarily increasing a party's exposure to criminal proceedings.

415 "Proceeding" is strictly defined in the Evidence Act, s 4(1) as "a proceeding conducted by a court; and any interlocutory or other application to a court connected with that proceeding".

416 Before 1980, the provision applied only to witnesses attending and giving evidence in pursuance to a summons.

417 New Zealand Law Commission *The Privilege Against Self-Incrimination* (NZLC PP25, Wellington, 1996) 53.

418 Ibid.

419 Evidence Bill 2005, no 256-2 (Select Committee Report) 8.

9.19 The boundaries of the privilege in the civil sphere have been the subject of continuing debate both here and abroad[420] and already it has been partially abrogated in other New Zealand legislation and elsewhere.[421] Section 63 is illustrative of this move towards a narrower application of the privilege. The question must be asked whether it should continue to apply to inquiries, given that they are usually more akin to civil than criminal proceedings.

Should the privilege apply to inquiries?

9.20 In its recent report on *Search and Surveillance Powers*, the Law Commission noted that it is desirable to maintain uniformity in relation to privilege rules.[422] The application of a privilege in some forums but not in others does little to enhance respect for the law and in practice can amount to a significant inroad into the privilege. In the case of the privilege against self-incrimination, the Evidence Act itself does not treat criminal and civil proceedings in the same way. Ultimately, in the light of Parliament's recent decision to remove the privilege from civil proceedings – which do affect legal rights – we find it difficult to argue for its retention for inquiries – which have no such direct effect.

9.21 Some of the interests protected by the privilege are more relevant to inquiries than others.[423] For example, concerns about the maintenance of a fair balance between the power of the state and the individual, and about procedural abuses, seem applicable. Also, given the broad public coverage that accompanies inquiries, the interest in maintaining privacy is relevant, insofar as it is a justifiable rationale for the privilege.

9.22 Placing a witness in the difficult position of having to opt between self-accusation, perjury or contempt is also pertinent to inquiries. Self-accusation in the context of an inquiry is likely to be widely reported and may have a very significant impact on the person's reputation and livelihood. In such circumstances, one can imagine that a person might commit perjury or refuse to answer, even if an immunity is in place. Placing individuals in circumstances where they are likely to prefer the potential for criminal conviction for perjury rather than answer questions before an inquiry is undesirable.

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420 See for example, New Zealand Law Commission above n 417, 49ff; *A T & T Istel Ltd v Tully* [1993] AC 45; Queensland Law Reform Commission *The Abrogation of the Privilege Against Self-Incrimination* (QLRC R 59, Brisbane, 2004).

421 See for example, Commerce Act 1986, s 106(4)–(6), Companies Act 1993, s 267; Electoral Act 1993, s 248; Electricity Act 1992, s 116; Gas Act 1992, s 49; Legislature Act 1908, s 253 (relating to Select Committees); Public Audit Act 2001, s 31; Tax Administration Act 1994, ss 18, 19.

422 Law Commission *Search and Surveillance Powers* (NZLC R97, Wellington, 2007) para 12.9.

423 The interests are said to be: the avoidance of the "cruel trilemma" of self-accusation, perjury or contempt; the preference for an accusatorial system; the prevention of inhumane treatment and abuses; the maintenance of a fair state-individual balance; the protection of the human personality and individual privacy; the unreliability of self-deprecatory statements; and the protection of the innocent. Taken from dicta of Justice Goldberg in the United States Supreme Court case *Murphy v Waterfront Commission* 378 US 52, 55 (1964) and summarised in New Zealand Law Commission, above n 417, 20. As the Law Commission has previously commented, no one interest predominates or applies in every situation in which the privilege can be claimed: New Zealand Law Commission above n 417, 29.

9.23 On the other hand, the stated public interest in a preference for an accusatorial system, where parties to proceedings take part in a relatively equal and fair contest, so that an impartial adjudicator can establish the truth does not accord with the fundaments of inquiries. While fairness is required by inquiries, they are designed to be inquisitorial mechanisms, and the concept of a "contest" is not appropriate.

9.24 Other characteristics of inquiries are relevant. In favour of the application of the privilege is that there is no specific charge for a person to answer – a person can be asked questions relating to a broader range of activities than arise in court proceedings. Inquiries also lack some of the protections of the criminal process and there is no automatic right of cross-examination. They differ from both criminal and civil proceedings in that there is no appeal and the inquiry will not necessarily be led by a person with legal qualifications.

9.25 Nevertheless, although inquiries are generally more widely reported than the vast majority of civil proceedings and can thus have a very significant impact on the reputations of those implicated, the very purpose of an inquiry – that is, an inquisitorial tool for establishing what happened, which cannot make binding determinations – tend to weigh against the privilege's retention. We suggest that the privilege against self-incrimination should not apply to inquiries.

Replacement with an immunity

9.26 The privilege against self-incrimination should be replaced by an immunity in similar terms as applies to civil proceedings under the Evidence Act 2006, that is:[424]

> No evidence of any information that has directly or indirectly been obtained as a result of the person's compliance with the order may be used against the person in any criminal proceeding, except in a criminal proceeding that concerns the falsity of the information.

9.27 A number of other New Zealand statutes have replaced the privilege with an immunity,[425] although the form of the immunity differs.[426] Section 248 of the Electoral Act 1993 prevents the use of self-incriminating information in any proceedings against that person, civil or criminal. The privilege has also been abrogated in relation to select committees and replaced by an immunity whereby the select committee provides the witness with a certificate.[427] It is common for the immunity not to protect against proceedings for perjury.

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424 Section 63(3).

425 See, above n 421.

426 Immunities generally take the form of (1) use immunities which means that the evidence is inadmissible in subsequent proceedings, but does not prevent other agencies using the information; or (2) derivative use immunities which render inadmissible evidence discovered as a consequence of the incriminating disclosure. The immunity contained in s 63 of the Evidence Act 2006 takes the second form as it applies to information directly or indirectly obtained as a consequence of the incriminating evidence. Transactional immunities can also be used, which grant immunity from prosecution arising as a direct or indirect result of the incriminating evidence.

427 Legislature Act 1908, s 253.

9.28 The privilege against self-incrimination has also been replaced by an immunity in inquiries legislation in some other jurisdictions, but practice varies.[428] Generally the immunity takes the form that statements made to inquiries cannot be admissible as evidence in any court proceedings;[429] but in other cases it only relates to criminal proceedings.[430] Some legislation expressly excludes the application of the immunity to prosecution for perjury offences.[431] Under the Australian Federal Royal Commissions Act 1902 the privilege against self-incrimination only applies where producing documents or answering a question may incriminate a person in relation to an offence with which they have been charged, or make them liable to a penalty for which proceedings have commenced and have not been finally dealt with.[432] However, statements made by the witness are not admissible in civil or criminal proceedings in evidence against the witness.[433]

9.29 We prefer to follow the lead of the Evidence Act. In relation to inquiries, the privilege should be replaced by an immunity against the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence.

Brannigan v Davison[434] - extraterritorial application of the privilege

9.30 The scope of the extraterritorial application of the privilege was considered by the courts in relation to the Wine-box inquiry. The question was whether the privilege extended to possible offences in foreign jurisdictions. The Privy Council in *Brannigan* agreed with the Court of Appeal, that the privilege does not apply when giving evidence that could incriminate a witness in a foreign jurisdiction.[435]

9.31 Under the 2006 Act, the privilege against self-incrimination generally only applies when the evidence would incriminate the person under New Zealand law.[436] However, under s 61, a judge has discretion to direct that the person is not required to provide the information where the evidence would be likely to incriminate them under foreign law for an offence punishable by capital punishment, corporal punishment or imprisonment. Section 61 should also apply to inquiries.

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428 It is retained in other jurisdictions, including Inquiries Act (NT), s 15; Royal Commissions Act 1917 (SA), s 16B(2); Commissions of Inquiry Act 1995 (Tas), s 8(5); Inquiries Act 2005 (UK), s 22.

429 Royal Commissions Act 1991 (ACT), s 24; Inquiries Act 1991 (ACT), s 19. See also Commissions of Inquiry Act 1950 (Qld), s 14A(1); Evidence Act 1958 (Vic), s 19C; Royal Commissions Act 1968 (WA), s 20; Special Commissions of Inquiry Act 1983 (NSW), s 23; Royal Commissions Act 1923 (NSW), s 17.

430 Tribunals of Inquiry (Evidence) Amendment Act 1979 (Ireland), s 5.

431 For example, s 24 of the Royal Commissions Act 1991 (ACT) excludes the immunity where the offence relates to the falsity or misleading nature of the answer or is an offence against chapter 7 of the Criminal Code, which relates to administration of justice offences.

432 Royal Commissions Act 1902 (Cth), s 6A.

433 Ibid, s 6DD.

434 *Brannigan v Davison* [1997] 1 NZLR 140 (PC).

435 Ibid, 146 (PC) Lord Nicholls, dismissing an appeal against the Court of Appeal's decision in *Controller and Auditor-General v Sir Ronald Davison*; *KPMG Peat Marwick and Others v Sir Ronald Davison*; *Brannigan and Others v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

436 Evidence Act 2006, s 60(1)(b).

RECOMMENDATION

R44 Witnesses and people appearing before inquiries should no longer be able to refuse to disclose documentation or information in reliance on the privilege against self-incrimination. The privilege should be replaced with an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence.

RECOMMENDATION

R45 Section 61 of the Evidence Act 2006 should apply before inquiries in the same way as it applies before courts.

See draft Bill, clause 27.

LEGAL PROFESSIONAL PRIVILEGE

9.32 Modern case law on legal professional privilege has divided the privilege into two categories: legal advice privilege; and litigation privilege.[437] The rationales for the two forms of privilege vary slightly. Litigation privilege is intimately connected with the adversarial system of trial.[438] In particular, it limits the scope of discoverable documents which are closely connected with the way in which the parties intend to develop their case.

9.33 Legal advice privilege has a wider basis and arises out of the relationship of confidence between a lawyer and client. It is considered a "fundamental condition on which the administration of justice as a whole rests",[439] and is based on the idea that:[440]

> … a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent.

9.34 Both categories of legal professional privilege are "owned" by the client – the client alone can waive the privilege (subject to statutory exceptions) – such that it has been re-termed "client legal privilege" in some jurisdictions.[441]

437 *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48, [2005] AC 610, para 10 (HL). Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. Litigation privilege is available when legal proceedings are in existence or contemplation and embraces a wider class of communication, such as those passing between the legal adviser and third parties such as potential witnesses. Legal professional privilege is usually absolute (fraud is an exception) – the court cannot override the privilege where it applies.

438 For a summary of the basic principles, see *Harrison v AG* (1989) 4 PRNZ 122, 128–130.

439 *R v Derby Magistrates' Court, ex parte B* [1996] AC 487, 507 (HL) Lord Taylor.

440 *B v Auckland District Law Society* [2004] 1 NZLR 326, para 47 (PC) Lord Millett. And that "In fostering the confidential relationship in which legal advice is given and received the common law is serving the ends of justice because it is facilitating the orderly arrangement of the client's affairs as a member of the community." See *Baker v Campbell* (1983) 153 CLR 52, 95, Wilson J (HC). See also dicta of Lord Scott in *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48, [2005] AC 610, para 34 (HL) Lord Scott.

441 Hence the title of the recent Australian Law Reform Commission publication *Client Legal Privilege and Federal Investigatory Bodies* (Issues Paper 33, Sydney, 2007).

Legal privilege under the Evidence Act 2006

9.35 While legal professional privilege was a concept developed by common law, ss 54 and 56 of the Evidence Act have codified the privilege as it relates to court proceedings.[442] By virtue of ss 4C(4) and 6 of the 1908 Act, ss 54 and 56 are likely to apply to commissions of inquiry. Section 54 relates to legal advice privilege and applies to any communications between the person and the legal adviser if the communication was (a) intended to be confidential; and (b) made in the course of and for the purpose of (i) the person obtaining professional legal services from the legal adviser; or (ii) the legal adviser giving such services to the person.

9.36 Section 56 of the Evidence Act 2006 relates to litigation privilege and only protects communications or information if they are made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.

Australian position

9.37 While the principle of legal professional privilege appears secure in New Zealand and the United Kingdom, the issue of the privilege and inquiries has arisen in Australia in a number of contexts.

9.38 Victoria has expressly abrogated the privilege as it applies to inquiries. Section 19D of the Evidence Act 1958 was added in 1998[443] and authorises royal commissions to compel any witness to give evidence despite any claim that the person might have legal professional privilege in respect of the evidence. The amendment was motivated by an inquiry into a gas explosion which led to a major disruption of Victoria's natural gas supply. The intent for the amendment was that:[444]

> To ensure that the commission is able to properly fulfil its functions, it is vital that the commission be able to obtain access to all necessary documents and information … [the effect of the new sections] will be to ensure that valuable time and resources are not wasted on associated litigation or technical legal disputes about whether various vital evidence should be produced to a commission.

9.39 A party to the inquiry, Esso sought a declaration that s 19D was invalid because it was an impermissible interference with the judicial power of the Commonwealth, or undermined confidence in the impartial administration of justice.[445] The Federal Court noted that the amendment did not purport to abolish legal professional privilege altogether, being confined to royal commissions. It also considered that ss 19D(2) and 19B, which expressly give commissions the power to hold hearings in private, restrict access by certain individuals, and limit the disclosure of confidential material, mitigated the impact of removing the privilege.[446] Furthermore, it was the practice of the Executive not to make public any part of a report that might be

442 Section 67(1) of the Evidence Act 2006 provides that a judge must disallow a claim of privilege if satisfied that there is a prima facie case that the communication or information claimed to be privileged involved a dishonest purpose or enabled or assisted anyone to commit an offence. This section adopts the existing law, which excludes a claim of legal professional privilege for a communication intended to further the commission of a crime or fraud, and extends it to all privileges.

443 By Act 80 of 1998 on 13 November 1998.

444 Hon Louise Asher (10 November 1998) VicPD 637.

445 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588.

446 Also, evidence given before court proceedings would not lose privilege where information was disclosed pursuant to a statutory compulsion. Relying on s 122(2)(c) of the Evidence Act 1995 (Cth).

prejudicial to pending or contemplated legal proceedings. The Court, however, made the point that privileged material coming before a royal commission was unlikely to remain private for all time because of the public nature of inquiry reports.

9.40 In respect of other arguments put forward in favour of the privilege, the Court stated that:[447]

> In reality … it is but mere speculation that the passage of s 19D will deter a client from making a full and frank disclosure to his lawyer in the course of obtaining legal advice. In Victoria, Royal Commissions are few and far between. Legal proceedings arising from facts disclosed during the course of a commission are not common … So exceptional is the position, that the suggestion that s 19D will inhibit full and free communications between a lawyer and his client, so as to interfere with that exercise, must be rejected.

9.41 The Court was not persuaded by the argument that s 19D would undermine public confidence in the administration of justice in courts:[448]

> First, as we have pointed out, it is by no means clear that privileged material will ever find its way into evidence in such courts other than in limited circumstances. Second, the public may well accept the view that the public good will be better served if Royal Commissions are able to conduct their enquiries on behalf of the executive government for a purpose of government by having access to as much relevant evidence as possible. The public may also accept the view that if this results in some marginally adverse effect on the functioning of our adversary system (which in any case may be doubted) it will be seen as serving a greater public good …

9.42 The Victorian approach, and dicta in the *Esso* case, is in contrast with the trend in the United Kingdom[449] and New Zealand,[450] where courts have upheld the privilege in relation to inquiry bodies.

Australian Law Reform Commission review

9.43 The Australian Law Reform Commission[451] has just completed a review of legal professional privilege as it applies to federal investigatory bodies, including federal royal commissions. Motivation for the review came, in part, from issues faced during, and a recommendation by, the 2006 Royal Commission into the Australian Wheat Board (AWB) in relation to the UN's Oil-for-Food Programme (the Cole Commission). Recommendation 4 of Commissioner Cole's report stated:

> That consideration be given to amending the Royal Commissions Act 1902 (Cth) to permit the Governor-General in Council by Letters Patent to determine that in relation to the whole or a particular aspect of matters the subject of inquiry, that legal professional privilege should not apply.

447 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, para 20 Judgment of the Court.

448 Ibid, para 27.

449 *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48, [2005] AC 610 (HL).

450 *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC).

451 See Australian Law Reform Commission *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report 107, Sydney, 2008). The review concentrated on the application of legal professional privilege to the coercive information gathering powers of Commonwealth bodies such as the Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investments Commission, the Australian Taxation Office and federal royal commissions.

9.44 During its lifetime, the Cole Commission received up to 40 claims for legal professional privilege relating to more than 1,400 documents.[452] In Australia, such practices have resulted in a perception that legal professional privilege can be used to frustrate inquiries. The inquiry itself gave rise to litigation on the question of legal professional privilege as it applies to inquiries;[453] and on the question of waiver.[454]

9.45 The ALRC review has determined that the privilege should be maintained in relation to federal investigatory bodies, but suggested that Parliament should abrogate the privilege in relation to specific bodies where it considers that to do so would serve a higher public interest. The ALRC has gone farther, however, in relation to royal commissions. It considers that three factors – the very purpose of those bodies; the urgency with which they are usually set up; and their nature as part of the executive arm of government – justify allowing the Governor-General to determine whether the privilege should be abrogated when he or she establishes a royal commission. The ALRC suggests that the Royal Commissions Act 1902 (Cth) should set out factors which should be taken into account when a decision to abrogate the privilege is being considered.[455]

AWB Ltd v Cole

9.46 In error, AWB included a "draft statement of contrition" in documents it produced to the Cole inquiry. On discovery of the error, AWB argued that legal professional privilege attached to the document. The Commissioner ruled that privilege did not apply to the document, and AWB unsuccessfully challenged the Commissioner's ruling. The Federal Court held that:

- The document was not brought into existence for the dominant purpose of obtaining legal advice.
- It would not, if disclosed, allow a reader to know or infer the nature, content or substance of any legal advice given, nor would disclosure result in any waiver of the privilege inhering in that legal advice.
- The litigation limb of legal professional privilege did not extend to documents brought into existence for use in relation to a commission of inquiry. Further, the document was not brought into existence for the dominant purpose of being used in connection with litigation which might follow from the report of the Commissioner.

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452 T Cole *Report of the Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme* (2006), para 7.44. See also Australian Law Reform Commission *Client Legal Privilege and Federal Investigatory Bodies* (Issues Paper 33, Sydney, 2007), para 6.16.

453 *AWB Ltd v Cole* [2006] FCA 571.

454 *AWB Ltd v Cole (No 5)* [2006] FCA 1234.

455 Australian Law Reform Commission *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report 107, Sydney, 2008), Rec 6–2. The factors are: (a) the subject of the royal commission, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community; (b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially; (c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the royal commission and, in particular, whether the legal advice itself is central to the issues being considered by the Commission.

9.47 The Court also considered whether a commissioner has the power to order the production of a privileged document or to determine whether a document is protected by privilege. Commissioner Cole had considered that the Royal Commissions Act 1902 (Cth) conferred upon him an ancillary or incidental power to determine whether the document was indeed privileged. The ALRC has now concluded that inquirers should be able to require production of a document to decide whether to accept or reject the claim.[456]

Issues

9.48 We consider that the following three issues are relevant for our purposes:

- Should legal professional privilege be qualified for the purposes of inquiries?
- Should the litigation limb of legal professional privilege extend to documents brought into existence for use in relation to inquiries?
- Should an inquirer be able to order the production of a document to determine whether it is privileged?

Should legal professional privilege be qualified for the purposes of inquiries?

9.49 Legal professional privilege could be limited in relation to inquiries in New Zealand, provided it is done by way of a clear statutory statement.[457] We take on board the comments of the Federal Court that the public good will be better served if inquiries can access as much relevant evidence as possible.[458] However, we do not consider that inquiries are of so different a nature from courts or other bodies as to justify the abrogation of the privilege for their purposes. The argument that "the benefits obtained from the maintenance of legal professional privilege do not always outweigh the harm caused by the exclusion of relevant evidence" could be made equally for court proceedings generally. There is strong New Zealand authority upholding the absolute nature of the privilege in relation to inquiry bodies.[459] The New Zealand legislature has also applied the privilege to other investigatory bodies – many of which have taken over the ground once held by commissions of inquiry.

9.50 In its 1999 report on *Evidence*, the Law Commission noted that information that cannot be obtained in court proceedings should not be available in government inquiries, unless the government is relying on the same strong and compelling circumstances which would impel a court to override the privilege. Any obvious discrepancy between the two systems can have serious effects on public perception of the law.[460] Given the recent enactment of the Evidence Act 2006, a departure from its approach would need to be justified. We have already noted the desirability of uniform privilege rules.

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456 See paragraph 9.58, below.

457 *CIR v West-Walker* [1954] NZLR 191 (CA); *Rosenberg v Jaine* [1983] NZLR 1 (HC); *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 (HCA).

458 See paragraph 9.40, above.

459 *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC); *Commerce Commission v Bay of Plenty Electricity Ltd* (13 February 2006) HC WN CIV 2001 485 917 Wild J. See also *Shannon v Shannon* [2005] 3 NZLR 757 (CA), relating to the privilege generally.

460 New Zealand Law Commission *Evidence Law: Privilege* (NZLC PP23, Wellington, 1994) para 30.

9.51 Thus, while inquiries reflect the valid public interest in the discovery of truth, and notwithstanding developments in Australia, we consider that people appearing before them should continue to have the protection of legal professional privilege.

RECOMMENDATION

R46 Witnesses and people appearing before inquiries should continue to be able to refuse to disclose information or documentation on the grounds that legal professional privilege applies.

See draft Bill, clause 27.

Should the litigation privilege extend to documents brought into existence for use in relation to inquiries?

9.52 It seems clear that advice falling under s 54 of the Evidence Act includes legal advice given in relation to an inquiry. Similarly, both the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*[461] and the Federal Court of Australia in *AWB v Cole*[462] concluded that legal privilege extends to professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of inquiry.

9.53 The question considered in *AWB v Cole* was whether communications or information falling under litigation privilege – that contained in s 56 of the Evidence Act 2006 – includes communications or information created for the dominant purpose of preparing for a commission of inquiry.

9.54 Section 56 only protects documents if they are made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding. "Proceeding" is defined by reference to court proceedings alone.[463] The definition of "court" in the Act is not exhaustive and it is not clear whether it will be interpreted to apply, for example, to information prepared for proceedings before administrative tribunals. It is unlikely to extend to inquiries.

9.55 Determining whether the litigation limb of legal professional privilege should in fact extend to documents brought into existence for use in relation to inquiries in essence demands consideration of whether an inquiry should be treated as if it were litigation. In considering this question, courts have drawn a distinction between adversarial and inquisitorial proceedings.[464] The rationale for the litigation limb of the privilege can be traced to the requirements of a fair trial and the administration of the justice system. On this basis, courts have been quick to note that the rationale cannot readily be said to apply

461 [2005] 1 AC 610 (HL).

462 (2007) 232 ALR 743, para 100 (FCA).

463 Section 4.

464 See *In re L (a minor) (Police Investigation: Privilege)* [1997] 1 AC 16 (HL) and *United States of America v Philip Morris* [2004] EWCA (Civ) 330.

to inquisitorial proceedings, and does not apply to documentation brought into existence for an inquiry.[465] However, there are judicial statements in the United Kingdom that the law requires reconsideration.[466]

9.56 We think this question should be left to the common law and do not propose that statute should deal with whether there is privilege in documents brought into existence for use in relation to inquiries.[467]

Should an inquirer be able to order the production of a document to determine whether it is privileged?

9.57 In *AWB v Cole*, the Federal Court refrained from making a declaration that a commissioner had implied authority under the Royal Commissions Act 1902 (Cth) to inspect a document in respect of which legal professional privilege had been claimed to determine whether the claim was valid.[468] After the decision, amendments were made to the Royal Commissions Act 1902 at the request of Commissioner Cole.

9.58 The Act now provides a royal commission with the power to require or summon a person to produce a document that is subject to client legal privilege (s 2(5)) and can inspect it to decide whether to accept or reject the claim (s 6AA(3)).[469] The ALRC has supported the retention of this rule.[470]

9.59 This issue is relevant to other privileged and confidential information as well as legal professional privilege (see below, paragraph 9.74). Section 69 of the Evidence Act enables a judge to give a direction against the disclosure of information if, broadly speaking, the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in maintaining confidentiality. There is also a link with s 67 of the Act which provides that a judge may disallow a claim for privilege if "satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence".

9.60 Ordinarily, in court proceedings when a claim of legal privilege in respect of a document is challenged by the other party, the judge may inspect the document and make a ruling on its disclosure. We have considered whether a commissioner should also be able to inspect documents in such circumstances. The alternative is that a court or independent person determines the issue.[471] This carries the likelihood of adding unnecessary time and cost to an inquiry.

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465 See *AWB v Cole* (2007) 232 ALR 743, para 163. See also, *Three Rivers* [2004] UKHL 48, [2005] AC 610, para 35.

466 *Three Rivers* [2004] UKHL 48, [2005] AC 610, para 29.

467 Indeed, s 53(5) of the Evidence Act 2006 arguably adopts this view in stating that "This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding."

468 See *AWB v Cole* (2007) 232 ALR 743, paras 184–194.

469 Where the claim is accepted the Royal Commission must return the document and disregard the privileged material for the purposes of any report or decision it makes (s 6AA(4)). Where the claim is rejected the Royal Commission may use the document for the purposes of its inquiry (s 6AA(5)).

470 Australian Law Reform Commission *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report 107, Sydney, 2008), para 8.296.

471 For example, two advocates (Stuart Grieve QC and Chris Morris) were appointed to review classified SIS material on behalf Ahmed Zaoui during the review of the risk security certificate issued against him by the SIS.

9.61 Whereas in court proceedings, such matters are usually dealt with on an interlocutory basis, often by another judge, the concern is that an inquirer, having seen material that he or she determines is confidential or privileged, would be influenced by it. Natural justice concerns could arise if another participant to the inquiry is criticised on the basis of such information without an opportunity to inspect it or comment.

9.62 We consider that there are adequate protections in place to protect against this. Inquirers are frequently legally trained and well-versed in the need to remain neutral and to adhere to natural justice rules. Where an inquirer is not legally qualified, he or she is able to get legal advice on the status of documentation where privilege is claimed. We do not think that non-legally qualified inquirers would be less able to remain neutral.

9.63 Finally, an inquirer's decisions, including the intention to review documents, can be referred to the court under the case stated procedure; or can be the subject of judicial review. We consider that inquirers should be able to inspect documentation or information to determine whether it should or should not be disclosed on the grounds of privilege or confidentiality. However, we also suggest that the new Act makes specific provision for an inquiry to ask an independent person or body to inspect one or more documents for the purpose of establishing whether a claim of privilege should be upheld.

RECOMMENDATION

R47 Inquirers should have the power to inspect documents in respect of which privilege or confidentiality is asserted to determine whether or not the document should be disclosed. The Act should also make specific provision for an inquiry to ask an independent person or body to inspect one or more documents for the purpose of establishing whether a claim of privilege should be upheld.

See draft Bill, clause 20(c).

CONFIDENTIALITY

9.64 Under s 69 of the Evidence Act 2006, confidential information may be protected from disclosure for the purpose of court proceedings[472] but the presumption is that such information is to be disclosed, subject to a judicial discretion to make an order against disclosure on the basis of certain public interest criteria. Section 69 does not define "confidential information" but gives detailed direction as to when the discretion should be exercised. A judge is to consider whether the public interest in the disclosure of a communication or information is outweighed by the public interest in preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or preventing harm to certain relationships; and maintaining activities that contribute to or rely on the free flow of information.[473] Under this provision, third party confidentiality and privacy can be afforded protection, subject to the exercise of the judge's discretion.

472 Section 69 potentially protects a confidential communication, any confidential information and any information that would or might reveal a confidential source of information.

473 Section 69(2).

Medical information

9.65 An example of confidential information is doctor-patient communications. Most doctor-patient communications now fall under the protection of s 69. At common law there was no privilege protecting the confidentiality of communications between a medical practitioner and patient.[474] However, until the Evidence Act 2006 came into force, statute recognised that in certain circumstances communications from a patient to a registered medical practitioner or a clinical psychologist were privileged in civil and criminal proceedings.[475] Section 32 of the Evidence Amendment Act (No 2) 1980, which provided for the privilege in civil proceedings, has recently been considered at length by the Supreme Court.[476]

9.66 Section 59 of the 2006 Act now restricts doctor-client privilege to communications made to a medical practitioner or clinical psychologist by a patient who believes that the communication is necessary to enable the practitioner to treat him or her for drug dependency or any other conditions that manifest themselves in criminal offending. Any other doctor-client communications will now be presumptively disclosed unless a judge (or, for our purposes, inquirer) orders otherwise.[477]

9.67 A number of inquiries have operated in the medical sphere in the past, and there is no reason to consider that they will not in the future. The issue of access to medical records arose in the Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region, but was resolved informally.[478]

9.68 Under the wording of s 4C(4) of the Commissions of Inquiry Act, it is not clear that s 69 applies to commissions. Section 69 is not couched in terms of a "privilege", but relates to "confidential information". In essence, however, what s 69 creates is a qualified privilege in relation to such information. Commissions of inquiry, however, have frequently exercised their inherent powers to protect confidential information. But, to avoid doubt, a new Inquiries Act should state that s 69 applies to inquiries. The proposal that inquirers should be able to inspect documentation or information to determine whether it should or should not be disclosed should also extend to claims based on confidentiality.

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474 See *C v Complaints Assessment Committee* [2006] NZSC 48, at paras 13–16, 105–110. See also *Duchess of Kingston's case* (1776) 20 State Trials 355. But in *Hunter v Mann* [1974] QB 767 at 775 Widgery CJ said obiter that a doctor need not answer a question involving a breach of confidence. See also Richard Mahoney "Evidence" [2006] 4 NZ Law Rev 717, 727.

475 Evidence Amendment Act (No 2) 1980, ss 32 and 33. The privilege was more restricted in criminal proceedings (s 33) than in civil proceedings (s 32). In particular, in civil proceedings, s 32 granted privilege to a protected communication whether the patient was a party to the litigation or not (nor did the patient's death terminate the privilege). In contrast, s 33 made it clear that in criminal proceedings protected communications were privileged only if the patient was "the defendant in the proceeding". See Hon J. Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf, Brookers, Wellington, 1992) 2.20.12.

476 The Supreme Court has recently considered whether the privilege in s 32 of the 1980 Amendment Act applied to medical disciplinary proceedings, which are not deemed to be commissions of inquiry, but almost identical powers, evidence and privilege rules apply. The Court held that medical disciplinary proceedings are civil proceedings, and that the tribunal's general power to admit evidence not admissible in a court did not authorise it to override privilege. The privilege could therefore be invoked in respect of the tribunal's statutory powers to require the production of documents: *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2006] 3 NZLR 577 (SC).

477 See Richard Mahoney "Evidence" (2006) 4 NZ Law Rev 717, 727: "… medical privilege in civil proceedings, part of the law of New Zealand since its entry into the statute books in 1885, has disappeared under the Act."

478 A P Duffy, D K Barrett, M A Duggan *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (2001), 3.32–3.34. The inquiry was appointed under s 47 of the Health and Disability Act 1993 and the provisions of the 1908 Act applied.

Religious communications

9.69 Under s 58 of the Evidence Act 2006, an absolute privilege for confidential religious communications with a minister of religion is recognised for the purpose of court proceedings. The Justice and Electoral Committee had reservations about the continued relevance of this privilege, but as no submissions opposing its continuation were received, the Committee did not consider that it had authority to repeal it. The privilege has therefore been continued and broadened to protect all confidential communications made for the purpose of obtaining spiritual advice, benefit or comfort, not just confessions.[479]

9.70 If such religious or medical communications and information are subject to absolute privilege for the purpose of court proceedings, they should also be protected before inquiries, to ensure the privilege is consistently applied.

Matters of state

9.71 Section 70 of the Evidence Act 2006 puts the present doctrine of public interest immunity (also known as Crown privilege) into statutory form.[480] The presumption is that matters of state are to be disclosed, subject to a judicial discretion to make an order against disclosure on the basis of certain public interest criteria. The clause is a counterpart to s 69: whereas s 69 applies to private confidential information, s 70 applies to information whose confidentiality is important to the state or to the effective conduct of public affairs.

9.72 Again, we consider that this provision should apply before inquiries, to ensure the privilege is consistently applied. As inquiries are set up by the Executive, it is in a position to consider the extent to which public interest immunity should be waived, as this may be essential if an inquiry is to achieve its purpose.

Confidential journalistic sources

9.73 Section 68(1) of the Evidence Act 2006 introduces a qualified protection for the identity of confidential journalists' sources.[481] Under s 68(2), however, the court may order disclosure of material that would disclose or enable the identity of the source to be discovered where it would be in the public interest to do so.

9.74 Section 68 does not create a privilege but merely protects the identity of journalists' sources by granting limited non-compellability to journalists and their employers.[482] Protecting the identity of journalistic sources appears to sit somewhere between the protection of privileged material on the one hand, and the qualified protection for confidential information and matters of state on the other hand. Unlike the absolute privileges, the protection for the

479 The predecessor to the new section is the Evidence Amendment Act (No. 2) 1980, s 31.

480 See New Zealand Law Commission *Evidence*: *Evidence Code and Commentary* (NZLC R55, Vol 2, Wellington, 1999) 179.

481 The protection does not extend to journalistic material generally, although there may be other grounds for the protection of other journalistic material, for example, under the Evidence Act 2006, s 69.

482 *Evidence*, Vol 2, above n 480, para C243.

identity of journalistic sources can be overridden where required in the public interest.[483] Unlike the other qualified protections, however, the presumption is against disclosure.

9.75 This provision should apply before inquiries, to ensure the privilege is consistently applied.

RECOMMENDATION

R48 The privileges relating to confidentiality, religious communications, matters of state and confidential journalistic sources should apply before inquiries in the same way that they apply before courts.

See draft Bill, clause 27.

PARLIAMENTARY PRIVILEGE

9.76 Parliamentary privilege defines the powers and protections available to the House of Representatives and its members. A breach of parliamentary privilege is a contempt of the House. There are two broad types of privilege:[484]

- The first emphasises Parliament's collective authority. Parliament therefore has the power to punish for contempt and the right to be the sole judge of its proceedings.
- The second category primarily benefits the members of the House, for example, by protecting freedom of speech.

9.77 In relation to inquiries, it is the privilege of freedom of speech that is most relevant. Article 9 of the Bill of Rights 1688 provides:[485]

> That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

9.78 Thus, members of Parliament are protected for statements made inside Parliament.[486] Given their nature, inquiries may, from time to time, involve things said or done by Members of Parliament. The Moyle Inquiry is an example of an inquiry that may have breached parliamentary privilege, although the matter was never raised.[487] The terms of reference directed Rt Hon Sir Alfred North to compare the information given to certain members of Parliament with their public statements and to consider the extent to which the public statements made by Hon Colin Moyle MP corresponded to or differed from the accounts on the police file. North had some difficulty with the term "public statements" and stated that although he had a number of news clippings from the relevant period, these were

483 This can be contrasted with the privilege afforded to police informers under the Evidence Act 2006, s 64.

484 P A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 401.

485 Part of New Zealand law by virtue of the Imperial Laws Application Act 1988.

486 If a Member repeats a statement outside Parliament it will no longer be privileged: the Privy Council has held that where a Member of Parliament makes a comment outside the House that affirms or adopts what he or she said in the House this is effective repetition of the privileged statements: *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

487 Rt Hon Sir Alfred North *Report of the Commission of Inquiry into an Alleged Breach of Confidentiality of the Police file on the Honourable Colin James Moyle MP* (1976) 39–40; See David R Mummery "The Privilege of Freedom of Speech in Parliament" LQR (1978) 94, 276.

incomplete and subject to the criticism of hearsay. He therefore thought it was better to confine himself to the statements made in Parliament and recorded in Hansard.[488] He went on to criticise some of those statements.[489]

9.79 Mummery considered that the Moyle inquiry acted in breach of article 9 of the Bill of Rights 1688.[490] He concluded that if it is necessary to hold an inquiry into the integrity of assurances given to Parliament, "the legislature is free … to constitute an inquiry within itself or alternatively to establish an inquiry outside itself under express statutory authority."[491]

9.80 Similarly, the Wine-box inquiry examined allegations that the Rt Hon Winston Peters MP had made in the House. Among other things, the commissioner said "in making his allegations of fraud [the Rt Hon Winston Peters] grossly overplayed his hand and elevated the four types of transactions which he specifically identified to a level of fraudulent conduct which in fact none has been proved to have possessed".[492] In *Peters v Davison*[493] the High Court considered, but refrained from directly criticising, such use of statements made inside the House. The Court would not comment on the speeches, even though the inquiry they were reviewing had:[494]

> For constitutional reasons it would not be proper for the Court to comment upon the merits of the plaintiff's speeches in the House. Whether it may have been similarly inappropriate for the commission to do so has not been adverted to in pleadings or submissions.

9.81 The Supreme Court of Western Australia has also refused to determine whether a royal commission could proceed under its terms of reference without breaching parliamentary privilege as this would intrude on the role of parliament.[495]

9.82 The extent to which inquiries can comment on matters raised in Parliament is therefore unclear. The purpose of introducing things said in Parliament as evidence in inquiry proceedings is relevant. Article 9 of the Bill of Rights 1688 only forbids proceedings in Parliament being "impeached or questioned". The Privy Council in *Prebble v TVNZ Ltd* said that courts cannot "bring into question anything said or done in the House by suggesting … that the actions or words were inspired by improper motives or were untrue or misleading".[496]

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488 Rt Hon Sir Alfred North, above n 487, 39–40.

489 The following section is particularly problematic: "In view of what occurred between him and Chief Superintendent Kelly, and later Deputy Commissioner Walton he [Moyle] could not possibly with any justification describe the incident as 'a small but wholly innocent incident that occurred about eighteen months ago'. Nor could he properly describe the incident as relating to his observation of a suspicious character who he thought was a burglar. Again, he could not possibly justify saying – 'the Police were completely satisfied that no crime or criminal intention was involved'. Nor could he with propriety say as he did that he had never been 'picked up' by the Police for any action, any happening or any crime or misdemeanour of any sort."

490 David R Mummery "The Privilege of Freedom of Speech in Parliament" LQR (1978) 94, 276, 289.

491 Ibid, 289–290.

492 Rt Hon Sir Ronald Davison *Report of the Wine-box Inquiry: Commission of Inquiry into Certain Matters Relating to Taxation* (1997) 2:7:8.

493 [1999] 3 NZLR 744, 764–766 (HC) Judgment of the Court.

494 [1999] 3 NZLR 744, 765–766 (HC) Judgment of the Court.

495 *Halden v Marks* (1996) 17 WAR 447, 461–464.

496 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1, 10 (PC) Lord Browne-Wilkinson.

However, it also stated that "there could be no objection to the use of Hansard to prove what was done and said in Parliament as a matter of history".[497] Courts frequently resort to Hansard for such purposes.

9.83 The parliamentary privilege of freedom of speech applies to "any court or place outside of Parliament." This phrase should not be applied too broadly:[498]

> To read the phrase as meaning literally anywhere outside Parliament would be absurd. It would prevent the public and the media from freely discussing and criticising proceedings in Parliament. That cannot be right, and this meaning has never been suggested. Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a healthy democracy as the freedom of members to discuss what they choose within Parliament.

9.84 Does "any place" cover inquiries? McGee suggests that this phrase was intended to cover "parallel, non-curial, executive and judicial functions" which are commonly exercised by tribunals and other bodies.[499] McGee also states "there would seem to be little doubt that a commission of inquiry or a Royal Commission does fall within the expression "place" in the Bill of Rights".[500]

9.85 In Australia, section 16 of the Parliamentary Privileges Act 1987 (Cth) expressly applies the principles in article 9 to courts and tribunals. Tribunals are defined as including a royal commission or commission of inquiry with the power to examine witnesses on oath.[501]

9.86 The privilege cannot be waived by either the House or by individual members of Parliament.[502] Legislation or other special authorisation would be necessary to allow an inquiry to consider matters covered by parliamentary privilege. For instance, the United Kingdom Joint Committee on Parliamentary Privilege recommended that article 9 should not apply to inquiries under the Tribunals of Inquiry (Evidence) Act 1921[503] where both Houses so resolve at its establishment.[504] This was considered appropriate because Parliament controlled the appointment of tribunals.[505]

9.87 We have no recommendation to make in relation to how parliamentary privilege applies to inquiries. There is nothing to be gained by trying to clarify the relationship between this difficult doctrine and inquiries. There is no precedent for this on the New Zealand statute book, and we prefer that the development of these principles be left to the courts. It is notable, however, that the existing law has not always been followed, as in the Moyle inquiry.

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497 Ibid, 11.

498 Joint Committee on Parliamentary Privilege *Parliamentary Privilege: First Report* (United Kingdom Parliament, 1999) para 91.

499 David McGee *Parliamentary Practice in New Zealand* (3 ed, Dunmore Publishing Ltd, 2005) 629.

500 Ibid, 630.

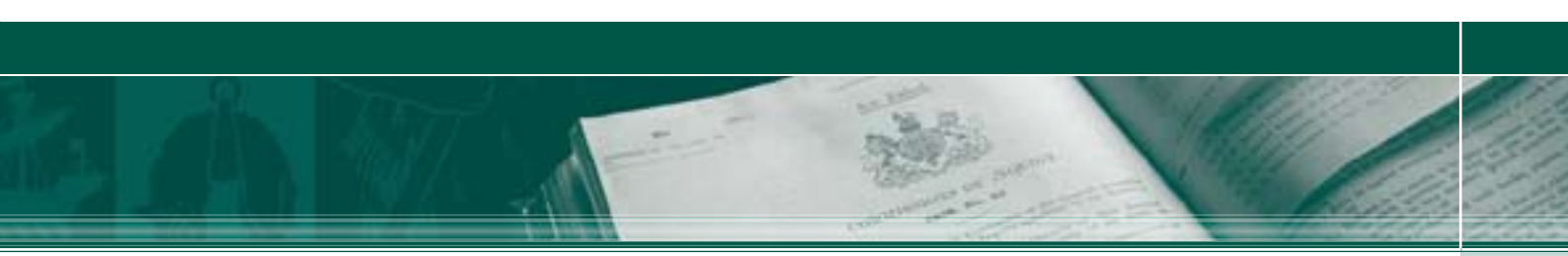
501 Parliamentary Privileges Act 1987.

502 See P A Joseph, above n 484, 436–437.

503 Now repealed.

504 Joint Committee on Parliamentary Privilege, above n 498, para 94.

505 Ibid, para 95



Chapter 10
Immunities

INTRODUCTION

10.1 One of the advantages of formal commissions of inquiry is the statutory immunity which is conferred on commissioners, witnesses, participants and their counsel.[506] However there are certain inconsistencies in the present legislation that require amendment and updating. In addition, we are concerned that ministerial inquiries take place without any immunities in place. Wherever possible, inquiries should take place within a statutory framework so that immunities apply. This is a major reason for bringing non-statutory inquiries within a new Inquiries Act.

10.2 Inquiries need to balance the need for protections for inquirers with public accountability in the exercise of their functions and powers. Appropriately skilled people should not be deterred from assuming the role of inquirer or from conducting a thorough inquiry into the truth of the matter. Nor should they have to rely on ad hoc arrangements for indemnities from the Crown. Similarly, witnesses and counsel require appropriate protection to encourage cooperation with the inquiry and to enable the inquiry to perform its function of seeking out facts.

IMMUNITIES FOR INQUIRERS

10.3 Generally, where there is a right there should be a remedy. Immunities, including judicial immunities, are an exception to this principle. Judges enjoy complete civil immunity, based on the rationale that it is highly desirable that judges are able and willing to carry out their essential role in the maintenance of public order without the fear of vengeful claims by unhappy litigants.

10.4 At present, commissioners carrying out inquiries under the 1908 Act are subject to different immunities depending on their status and the nature of the action involved. Inquirers conducting ministerial inquiries have no statutory immunities. A wide variety of immunities apply to standing commissions.[507]

506 1908 Act, ss 3, 4C(4), 6 and 13(1).

507 See for example the Children's Commissioner Act 2003, s 27; Commerce Act 1986, s 106; Crown Entities Act 2004, ss 121and 124; Human Rights Act 1993, s 130; Inspector-General of Intelligence and Security Act 1996, s 24; Ombudsmen Act 1975, s 26(1); Privacy Act 1993, s 96; Public Audit Act 2001, s 41; Securities Act 1978, s 28(1); Sentencing Council Act 2007, Schedule 1, para 17; State Sector Act 1988, s 86. See Law Commission *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R 37, Wellington, 1997) 98–170 for a detailed account of the various legislative immunities.

Immunities under the 1908 Act

10.5 Section 3 of the 1908 Act sets out a general immunity for commissioners:

> So long as any member of any such Commission acts bona fide in the discharge of his duties no action shall lie against him for anything he may report or say in the course of the inquiry.

10.6 If, however, a judge or former judge of the High Court is a member of the commission, s 13(1) of the 1908 Act applies the immunities of a judge of the High Court to that commission as a whole.[508]

10.7 Section 119 of the District Courts Act 1947, as amended in 2004, now gives "every District Court judge, at all times, the same immunities as a judge of the High Court."[509] This replaces the earlier immunity which did not extend to acts in excess of jurisdiction or without jurisdiction.[510]

10.8 The application of this extended immunity to District Court judges acting as commissioners is not clear. "At all times" does not extend to purely personal actions, and it is not clear whether it would extend to their actions as commissioners. It would probably not extend the immunity to other members of the commission, in the way the immunity of a High Court judge cloaks the whole commission. In addition, the immunity does not extend to former District Court judges as it does to former High Court judges.[511]

10.9 Non-statutory inquirers do not have such indemnities and have to specifically request an indemnity from the Crown when appointed to non-statutory inquiries. Many inquiries, especially ministerial inquiries, are led by barristers or other senior legal practitioners who at least carry their own professional indemnity insurance.[512] But, this does not prevent claims against them or other inquirers who may not carry any such insurance.

Application of the Defamation Act

10.10 The Defamation Act 1992 gives absolute privilege against defamation actions to anything said, written, or done in proceedings before a tribunal or authority that is established by or pursuant to an enactment and has the power to compel witnesses by a member of the tribunal, a party, representative or witness.[513] In respect of witnesses and counsel, the absolute privilege is confirmed by s 6 of the 1908 Act which gives them the same privileges and immunities as if they were in a court of law. In contrast, the specific provision in s 3 of the 1908 Act that

508 The scope of the indemnity was extended to former High Court judges in 1995 during the Wine-box inquiry.

509 This followed the Law Commission's recommendations in *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick* (NZLC R 37, Wellington, 1997). The same immunity is expressly extended to non-High Court judges under other legislation: see Te Ture Whenua Māori Act 1993, s 12A, Employment Relations Act 2000, s 203 and Resource Management Act 1991, s 261(3).

510 Formerly Summary Proceedings Act 1957, s 193(1).

511 An Associate judge of the High Court has the same immunity as a High Court judge, Judicature Act 1908, s 26Q.

512 Advocate's immunity no longer applies due to *Lai v Chamberlains* [2007] 2 NZLR 7 (SC).

513 Defamation Act 1992, s 14.

imports a good faith requirement for commissioners would probably override the general absolute privilege against defamation.[514] The protection granted in s 3 has been described as comparable to that of qualified privilege in defamation.[515]

Immunity for inquirers justified

10.11 Inquirers should be able to carry out their task with confidence that they will not be open to personal suit. The criteria identified for granting immunity to judges also apply to inquiries, whether headed by a judge or not. These are to:[516]

- promote the fearless pursuit of the truth;
- ensure that the role of inquirer is fairly and efficiently exercised without improper interference;
- safeguard a fair hearing in accordance with natural justice, which should reduce the prospect of error;
- promote the independence of inquirers; and
- ensure that any challenges to the inquiry are through the proper channels, for example, judicial review or political means.[517]

10.12 The question, however, is what form of immunity is necessary and appropriate to effect this protection and to achieve a balance between the rights of those being investigated and the effects of the arbitrary use of inquirer's powers.

What form of immunity should apply?

10.13 In *Crown Liability and Judicial Immunity*, the Law Commission considered that the immunities of public bodies should be subject to a necessity test:[518]

> The Crown and other public bodies should have no power or immunity beyond those of the citizen, except to the extent necessary to allow its public functions to be duly performed.

10.14 At present, immunities are very varied in scope. In their narrowest form they simply mirror the extent of the statutory authority under which an officer may be acting: as long as the officer has acted within his or her power, then he or she will be immune

514 See New Zealand Law Commission, above n 509, 51. Section 3 was enacted the year after *Jellicoe v Haselden* [1902] 22 NZLR 343 (SC) when the Supreme Court held that in defamation actions inquirers have a qualified, rather than absolute, privilege. The Court considered that, while a witness before an inquiry is in the same position as a witness in court and should have all the same protections, commissioners are not in the same position as judges and need not have the same protections (see 360–361, Williams J).

515 See *Lange v Atkinson* [1998] 3 NZLR 424, 446 (CA) Blanchard J (Richardson P, Henry and Keith JJ concurring).

516 Compare with the rationales for judicial immunity outlined in New Zealand Law Commission, above n 509, 46. See also *Harvey v Derrick* [1995] 1 NZLR 314, 324 Richardson J (CA).

517 Where an inquirer is a judge there is the possibility of laying a complaint with the Judicial Conduct Commission. The Commission deals with complaints about judges regardless of whether the subject matter of the complaint arises in the exercise of judicial duties or otherwise (Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 11(1)). The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 contemplates the possibility of removal and this may be inappropriate for inquirers (see s 32).

518 New Zealand Law Commission, above n 509, 7.

from criminal or civil liability.[519] In their widest form, they completely exempt a person from liability regardless of the nature and extent of unlawfulness in issue.[520] Judges enjoy complete civil immunity. Between these extremes, some bodies and officers benefit from a qualified immunity from criminal and/or civil liability.

Should all inquirers be treated in the same way?

10.15 There are benefits in streamlining the approach to immunities and having the same immunities for all inquirers, whether they are members of the judiciary or not. In *Crown Liability and Judicial Immunity*, the Law Commission emphasised the desirability of a consistent approach to immunities. In 1980, the Public and Administrative Law Committee was of the opinion that the distinction between High Court judges under s 13 and ordinary commissioners under s 3 could not be justified and it recommended that s 3 apply to all commissioners.[521] Instead, in 1995 the Act was amended to extend s 13 to former High Court judges.

10.16 Since judicial and non-judicial individuals carry out identical tasks as inquirers, reliance on the necessity principle set out above makes it difficult to justify different treatment. Nevertheless, judges acting in other public roles which are not strictly within the judicial remit and which are also carried out by non-judges, are treated differently from other members. For example, the Crown Entities Act 2004 rationalised the immunities applying to most Crown Entities. A member of a statutory entity is immune from civil liability unless they act in breach of duties under the Act, relating to requirements to act with honesty and integrity, in good faith, with reasonable care, and not to disclose information.[522] In contrast, judges have the same immunity under the Crown Entities Act as they would when acting as judges.[523] The Coroners Act 2006 is also a model where different immunities apply depending on the coroner's status.[524]

10.17 While the task for a judicial inquirer is the same as for a non-judicial one, there is an argument that the ongoing need for judicial independence justifies their greater protection. The Crown Law Office has voiced concerns that only offering a limited form of immunity to judicial inquirers will negatively impact on judicial independence. There is also a perceived risk that reduced immunity may dissuade judges from assuming the role. The risk that a threat of liability will deter judicial appointees was acknowledged in the explanatory note to the Judicial Matters Bill 2003,[525]

519 See for example Crimes Act 1961, s 26(3). The Commission considered that these provisions are redundant as "the courts will always assume that a statute that authorises people to do particular acts is intended to immunise them from criminal or civil liability for acts done within the limits of that statutory authority." New Zealand Law Commission *Search and Surveillance Powers* (NZLC R 97, Wellington, 2007) 423.

520 This form of immunity is unusual and has traditionally been frowned upon. In New Zealand complete civil and criminal immunity is only enjoyed by the Sovereign and the Governor-General.

521 Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980), 23.

522 Crown Entities Act 2004, ss 53–57 and 121.

523 Crown Entities Act 2004, s 124.

524 The Coroners Act 2006 is not an appropriate model to follow. It gives coroners the same powers, privileges, authorities and immunities as a District Court judge under the Summary Proceedings Act 1957, but a coroner who is not a District Court judge has the same immunities as a High Court judge. The Summary Proceedings Act no longer gives District Court judges any express immunity, this being now covered by the District Courts Act, leaving coroners who are also District Court judges liable to claims they lack immunity or have less immunity than fellow coroners who are not District Court judges: Coroners Act 2006, s 117(1) and (2).

525 The Bill resulted in the new s 119 of the District Courts Act 1947, which extends absolute immunity to other judges (see para 10.7, above).

as an immunity "assists in ensuring high quality potential appointees to the judiciary are not deterred from judicial office by the possibility of being the subject of actions from unsuccessful litigants".[526] However, the judiciary has not raised either of these concerns with us.

10.18 The Law Commission is not convinced that, given their different and temporary nature, inquiries give rise to the same considerations as judicial appointments. Further, all inquirers perform similar roles and their personal immunities or that of the inquiry as a whole should not be dependent on their particular judicial status. We believe that the proposals below will provide sufficient protection for judges and others in their role as inquirers, and that a requirement not to act in bad faith should be fundamental to all inquirers, irrespective of their status.

RECOMMENDATION

R49 All inquirers should be protected by the same immunity.

Absolute or qualified immunity?

10.19 Two options present themselves:

- all inquirers could have judicial immunity, which is absolute in respect of civil claims;[527] or
- all inquirers could have a qualified immunity akin to that in s 3 of the 1908 Act.[528]

10.20 An inquiry is not a court, and although inquiries must be independent, they do not have the same ongoing need to ensure individual or institutional independence. Complete immunity is usually only justified in those cases where the harassment of unmerited law suits would substantially outweigh the likelihood that powers will be arbitrarily exercised. However, inquiries' relaxed application of evidence rules and their inquisitorial nature may mean that unfair harm to a person's interests is more likely to arise than in court proceedings. We consider inquiries do not justify complete immunity. Furthermore, it is not evident to us that complete immunity is required for an inquiry's public functions to be performed, relying on the necessity principle set out above.

10.21 In its 1997 report, the Commission set out an extensive compilation of the immunity provisions contained in about 200 statutes and noted that there was considerable variation over who was given protection, what form of protection they were given, what acts were protected, and what prerequisites had to be met in order for them to rely on the immunity. There appears to be no particular rationale for these variations.[529]

526 Judicial Matters Bill 2003, 71-1 (Explanatory Note) 4. See also *Harvey v Derrick* [1994] 1 NZLR 314, 324 (CA) Richardson J.

527 In Australian jurisdictions, it is common for inquiries' legislation to grant inquirers the same immunity as superior court judges, see for example, Royal Commissions Act 1902 (Cth), s 7.

528 In contrast, in the United Kingdom inquirers' immunity only extends to any act done or omission made in the execution of his or her duty, or any act done or omission made in good faith in the purported execution of his or her duty irrespective of any judicial status, Inquiries Act 2005 (UK), s 37(1).

529 The Commission recommended that all existing immunities should be reviewed in light of the necessity principle described above.

10.22 Most public bodies offer qualified immunity to their members. These take a number of different forms, for example:

- No proceedings, civil or criminal, may lie against the Commerce Commission and its members for anything "it may do or fail to do in the course of the exercise or intended exercise of its functions unless it is shown that the commission acted without reasonable care or in bad faith".[530]
- No proceedings, civil or criminal, shall lie against the Ombudsmen for anything they may do, report or say in the course of the exercise or intended exercise of their functions unless it is in bad faith.[531]
- Members of the Sentencing Council are not personally liable for any act done or omitted to be done by the Council in good faith in the performance or intended performance of the functions or powers of the Council.[532]

Actions covered?

10.23 Section 3 of the 1908 Act only covers things that a commissioner reports or says when discharging his or her duties in the course of the inquiry. The scope of this provision has not been tested, but it could be interpreted narrowly to only apply to things said by the inquirers, to the exclusion of acts or omissions. Other statutory immunities cover more broadly anything done by the public body or its members. We consider that inquirers should be protected in relation to what they do or omit to do as well as what they say.

Form of qualification

10.24 Absence of bad faith is a common statutory requirement. Section 3 of the 1908 Act refers to the need for the commissioner to be acting in good faith. A good faith provision may be read into an immunity provision where the statute is silent.[533] We consider that where an inquirer acts in bad faith, he or she should not be shielded from liability. Often, in addition, the member of the public body must also have acted with reasonable care to be protected by the immunity provision. However, we do not suggest the adoption of this qualification. The issue of "reasonableness" is often difficult to determine and may open inquiries to unnecessary litigation. Any recklessness by inquirers may be sufficient to establish bad faith on their part.

Protection from liability or from proceedings

10.25 There is also a great deal of variation in existing immunity provisions as to whether protection is from liability itself or merely from proceedings (as evidenced by the three examples set out above). Immunity from liability means that the person is not bound by the relevant law (generally of tort) and is not subject to the relevant substantive obligations. Where the person is protected from action or proceedings, they may still be subject to an obligation, but have immunity from suit. We suggest the statute should protect the inquirer from

530 Commerce Act 1986, s 106(1).

531 Ombudsmen Act 1975, s 26(1)(a).

532 Sentencing Council Act 2007, s 17(1).

533 *Simpson v Attorney-General (Baigent's* case) [1994] 3 NZLR 667, 673 (CA) Cooke P, 688, Casey J, 716, McKay J.

liability not just proceedings, to avoid arguments that the State or any other body might be vicariously liable for an inquirer's actions, even where proceedings cannot be brought against an inquirer.

RECOMMENDATION

R50 An inquiry and its members should have no liability for anything it may report, say, do or fail to do in the exercise or intended exercise of its functions unless the inquiry or inquirer acted in bad faith.

See draft Bill, clause 26.

Compellability of inquirers

10.26 The 1908 Act does not prevent commissioners being compelled to give evidence in respect of their conduct as a commissioner, although this provision is often included in the immunity provisions for other investigative bodies.[534] Judges are not compellable witnesses in relation to the exercise of their judicial functions.[535] Arguably, s 13(1) extends this protection to commissions if the judge concerned is a High Court judge or former High Court judge. Other commissioners' immunity is limited to that under s 3 of the 1908 Act, so they may be compellable, even though no action can be taken against them for acts in good faith.

10.27 There are other methods that might allow non-judicial inquirers to avoid having to give evidence. For example, s 69 of the Evidence Act 2006 gives the court discretion to direct that confidential information not be disclosed in a proceeding. This may include information that has been disclosed to an inquirer in compliance with an order of the inquiry.[536] This principle can be readily extended to inquiries under the "public interest" criteria of s 69(2) of the Evidence Act 2006. However, this would not extend to other evidence or matters before an inquiry. We therefore believe more direct protection should be provided.

10.28 To avoid bad faith being alleged inappropriately as a means of getting around this exclusion, we suggest that leave of the court be required before any inquirer can be made a compellable witness.

RECOMMENDATION

R51 Inquirers should not be compellable witnesses in relation to the inquiry, except with the leave of the court if bad faith is alleged.

See draft Bill, clause 26.

534 See for example, Inspector-General of Intelligence and Security Act 1996, s 24(1)(b); Privacy Act 1993, s 96(2)(b); Ombudsmen Act 1975, s 26(1)(b). While many bodies with such protection are adjudicative some are not, for example, Law Commission Act 1985, sch 1, cl 14 and Children's Commissioner Act 2003, s 27(3).

535 Section 74(d) of the Evidence Act 2006 provides that a judge is not compellable to give evidence in respect of their conduct as a judge. See also *Warren v Warren* [1996] 3 WLR 1129.

536 The common law has long accepted that matters such as the internal work of judges or tribunals is confidential: see *Tau v Durie* [1996] 2 NZLR 190 (HC); *ENZA Ltd v Appeal and Pear Export Permits Committee* [2001] 2 NZLR 456 (CA).

Defendant in judicial review proceedings

10.29 Practice has varied but it is unclear whether, where an inquiry is the subject of a judicial review, the inquiry as a whole should be named as the defendant, rather than the individual inquirer(s). Since inquiries do not have their own legal personality, it would seem that judicial review proceedings would have to be named against the inquirer(s) personally.

10.30 In relation to courts, s 9(4A) of the Judicature Act 1972 states:[537]

> … where the act or omission is that of a Judge, Registrar, or presiding officer of any Court or tribunal,—
>
> (a) That Court or tribunal, and not that Judge, Registrar, or presiding officer, shall be cited as a respondent; but
>
> (b) That Judge, Registrar, or presiding officer may file, on behalf of that Court or tribunal, a statement of defence to the statement of claim.

10.31 Naming individual inquirers is unwieldy and may be inappropriate, especially where there is a multi-person inquiry. We propose, therefore, that a similar provision should be included in the new Inquiries Act in relation to judicial review proceedings.

RECOMMENDATION

R52 The new Act should state that the inquiry as a whole should be cited as defendant in review proceedings.

See draft Bill, clause 35.

IMMUNITIES OF COUNSEL

10.32 Section 6 of the 1908 Act provides that every counsel appearing before a commission will have the same privileges and immunities as counsel in courts of law. Traditionally advocate's immunity applied to barristers and solicitors in respect of litigation or preparation that was "so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing".[538] However, in 2006, this immunity was rejected by the Supreme Court on the basis that the rationale for its existence no longer held true.[539] It is clear that, whether or not in the past advocate's immunity extended to counsel before inquiries, it no longer does.

10.33 In the United Kingdom, barristerial immunity was also rejected by the House of Lords in respect of civil and criminal proceedings in 2000.[540] However, counsel assisting the inquiry are specifically protected from action in respect of any act or omission in the execution of his or her duty, or any act done or omission made in good faith in the purported execution of his or her duty.[541]

537 See further, High Court Rules, Pt 10, r 709(2); *Tau v Durie* (1996) 9 PRNZ 283 (HC).

538 *Rees v Sinclair* [1974] 1 NZLR 180, 187 (CA) McCarthy P.

539 *Lai v Chamberlains* [2007] 2 NZLR 7 (SC).

540 *Arthur J S Hall v Simons* [2000] 3 All ER 673 (HL).

541 Inquiries Act 2005, s 37.

10.34 Under the Defamation Act 1992, anything said, written, or done by a representative in proceedings before a tribunal or authority that is established pursuant to any enactment and has the power to compel the attendance of witnesses is protected by absolute privilege.[542]

10.35 Although general barristerial immunity no longer exists, the proposed Inquiries Act should continue to state that counsel have the same immunities as in a court of law. This recognises that when appearing in front of an inquiry, counsel is in the same position as when appearing in front of a court. It will ensure that the privilege against defamation will continue to apply to counsel and safeguards against any developments in the law relating to counsel's immunity in a court.

RECOMMENDATION

R53 Counsel should continue to have the same immunities as counsel in a court of law.

See draft Bill, clause 27.

WITNESS IMMUNITIES

10.36 As well as the privileges discussed in chapter 9, witnesses in court proceedings are protected against liability for defamation and other civil liability in respect of anything said, written, or done in those proceedings.[543] By virtue of s 6 of the 1908 Act, these immunities apply to witnesses before commissions. Section 85 of the Evidence Act 2006 also protects witnesses from improper, unfair, and misleading questions.[544] We see no reason to depart from these rules, and suggest that witnesses should continue to have the same immunities as witnesses in a court of law.

RECOMMENDATION

R54 Witnesses should continue to have the same immunities as witnesses in a court of law.

See draft Bill, clause 27.

542 Defamation Act 1992, s 14.

543 See Defamation Act 1992, s 14 and *Dentice v Valuers Registration Board* [1992] 1 NZLR 720.

544 Evidence Act 2006, s 85. Section 85 replaces provisions relating to protections for witnesses from indecent, scandalous, insulting, annoying, or needlessly offensive questions, and questions injurious to their character: Evidence Act 1908, ss 13, 14, and 15.

Chapter 11

Court supervision of inquiries

INTRODUCTION

11.1 In this chapter, we describe the High Court's jurisdiction to review inquiries, and the matters for which they may be reviewed. Royal commissions and commissions of inquiry are subject to judicial review, and have been reviewed on numerous occasions. Inquiries under the 1908 Act also have the power to state a case to the High Court.[545] There is also the possibility of a claim that an inquiry has breached the New Zealand Bill of Rights Act 1990. Non-statutory ministerial inquiries are also potentially subject to judicial review.

11.2 Judicial review, or threats of review, can have an impact on the progress of inquiries and can cause considerable delay. On the other hand, reviews can in some cases be necessary to ensure that inquiries remain within their terms of reference and act in accordance with natural justice.

JURISDICTION TO REVIEW INQUIRIES

Commissions of inquiry and royal commissions

11.3 The High Court's ability to review commissions of inquiry and royal commissions is well-established. Challenges to date have related to the following matters:

- the validity of their terms of reference;[546]
- the scope of the terms of reference;[547]
- the procedures the commission is following or is proposing to follow;[548]
- allegations of bias;[549]
- the law they are applying or intending to apply, such as the effect of a pardon;[550]
- whether the report of the inquiry has exceeded its terms of reference;[551]

545 Commissions of Inquiry Act 1908, s 10.

546 *Cock v Attorney-General* (1909) 28 NZLR 405 (CA).

547 *Re the Royal Commission on Licensing* [1945] NZLR 665 (CA).

548 *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA); *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA); *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140 (PC); *Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98 (HC); *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC).

549 *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA).

550 Ibid.

551 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).

- whether findings in the report of the inquiry breached the principles of natural justice;[552]
- whether determinations in the report of the inquiry were based on an error of law.[553]

11.4 A survey of the case law on commissions of inquiry and royal commissions can be found in appendix B. The impact of these cases is discussed in the relevant chapters.

11.5 Reviews of commissions have been instrumental in the development of judicial review principles in New Zealand. While commissions' procedures have always been subject to review, the traditional view was that their findings were not: a body had to be exercising a public power that affected rights or liabilities for its decisions or recommendations to be subject to court supervision. Since commissions, being recommendatory bodies, can make binding decisions only in relation to its power to make costs orders,[554] jurisdiction to review them was originally considered to be limited.[555]

11.6 Common law developments mean that the focus for deciding whether a body is subject to review is now the nature of the power being exercised, rather than its origin. In the United Kingdom *Datafin* case, Lloyd LJ said that:[556]

> … it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review.

11.7 This approach has been adopted in New Zealand. Over recent decades, courts have increasingly been willing to review exercises of power which in substance are public or, notably for inquiries, have important public consequences, however their origins and the persons or bodies exercising them might be characterised.[557]

11.8 The position of the law is that stated by the Court of Appeal in *Peters v Davison*. The Court concluded that commission reports should be subject to review because:[558]

552 Ibid.

553 *Peters v Davison* [1999] 2 NZLR 164 (CA).

554 Presumably, its power to punish for contempt would also have been subject to review.

555 In *Timberlands Woodpulp Ltd*, above n 111, the Full Court of the Supreme Court considered that a commission could only be reviewed insofar as it had power to cite parties against which costs could be awarded: "Whether or not prohibition will lie … depends upon whether or not having regard to the nature of a particular commission, there are parties who are liable to be cited and against whom costs may be awarded."

556 *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, 847 (CA) Lloyd LJ.

557 See for example, developments in relation to commercial decisions of state controlled bodies (*Mercury Energy v ECNZ* [1994] 2 NZLR 385, 391 (PC) Lord Templeman); private bodies operating under a statute (*Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 11 (CA) Judgment of the Court); and non-statutory bodies with public functions (*R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (UK CA); and *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA)).

558 *Peters v Davison*, above n 553.

> …[i]n some situations condemnation of a person in a commission report will be scarcely distinguishable in the public mind from condemnation by a Court of law … Where a report calls a person's reputation into question in a direct way, both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis. It would be contrary to the public interest if the Courts were not prepared to protect the right to reputation in such a context…

11.9 The following matters supported close judicial supervision of commissions of inquiry:[559]

- the major significance of most if not all commissions in practical, public and other senses;
- the fact that Government makes the decision to establish commissions only relatively rarely;
- inquiries, especially into alleged wrongdoing, generally excite public and media attention, and their reports receive major publicity;
- the work of commissions of inquiry is important and they impact on significant interests of individuals, evidenced by the fact that commissions are not infrequently reviewed in court proceedings.

11.10 Thus it is the real as opposed to technical force of commission reports that make them susceptible to review. The fact that their findings are merely recommendatory is not automatically a barrier.[560]

Remedies

11.11 Where a decision of a commission is reviewed before it has reported, one of two results is normally sought: either the plaintiff seeks to have a procedural decision quashed or the process stopped; or a direction is sought that the power should be exercised in a different manner. However, in the case of a commission which has already reported, those remedies are not available. The only remedy open to the court is a declaration that an error of law or fault of procedure has been made. However declarations can excise or invalidate various paragraphs of inquiry reports, in effect setting aside those paragraphs.[561] In *Peters*, the majority of the Court of Appeal confirmed that a declaration in those circumstances can be of real benefit:[562]

> First, the Ministers and others involved in setting up the inquiry and in considering how to respond to the resulting report are informed by the Court judgment of that defect – as are the public at large. Such a Court ruling is of real practical value. To repeat, there will in general be a strong public interest in ensuring the correctness of determinations of law in the report of a commission of inquiry. Second, where a Court rules that a commission has made a material error of law which damages reputation the plaintiffs gain the significant comfort of a ruling that the findings

559 Ibid, 181–183 (CA).

560 See also *Phipps v Royal College of Surgeons* [2000] 2 NZLR 513 (PC).

561 See *Peters v Davison* [1999] 3 NZLR 744 (HC); *Campbell v Mason Committee* [1990] 2 NZLR 577 (HC).

562 *Peters v Davison*, above n 553, 186–187 (CA).

damning them are based on an error of law. In such cases the Court is not embarking upon a hypothetical exercise; rather judicial review is appropriate because its declaration will serve some useful purpose in protecting a private or public interest.

Non-statutory ministerial inquiries

11.12 Ministerial inquiries cannot be reviewed under the Judicature Amendment Act 1972 because of their non-statutory basis.[563] We are not aware of any instances where non-statutory inquiries instigated by a minister have been reviewed by the courts. This has perhaps been one of their perceived attractions. However, it is likely that they are susceptible to judicial review under the common law in the light of the courts' increasing willingness to review non-statutory bodies exercising public power.[564]

11.13 Despite their lack of formal status, powers or protections, ministerial inquiries are also likely to "greatly influence public and Government opinion and have a devastating effect on personal reputations".[565] Some ministerial inquiries have received broad media coverage and have been of as much public interest and debate as commissions of inquiry.

11.14 Ministerial inquiries cannot force people to take part so, on one view, those who agree to give evidence to such inquiries do so willingly. However, public pressure and concern about adverse comment may make it very difficult for an individual not to cooperate. Furthermore, witnesses to ministerial inquiries do not enjoy the immunities and protections given to those before inquiries under the 1908 Act. Arguably, this gives further weight to the argument that participants should be able to ensure fair procedures are followed, particularly in regard to adverse comment, by having access to review by the courts.

11.15 Another notable distinguishing feature is that non-statutory inquiries often do not hold public hearings. They can be characterised as merely advice to the Minister and in many cases may be more akin to external consultancy work, sometimes barely differing from the normal policy processes that take place within departments. While the courts have accepted that advice alone will rarely be actionable,[566] it is possible that the processes adopted by the inquiry, and findings made, could be reviewed given their public impact.

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563 The uniform procedure for review of the exercise of a "statutory power" was introduced by the Judicature Amendment Act 1972 and applies to the review of bodies insofar as they are exercising such a statutory power. Statutory power is relevantly defined as the exercise of a "statutory power of decision", and a 1977 amendment extended that definition to include bodies that "make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person".

564 See *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815 (UK CA) and *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

565 In *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618, 653 (CA) Cooke, Richardson and Somers JJ said "Findings made by a Commissioner are in the end only expressions of opinion. They would not even be admissible in evidence in legal proceedings as to the cause of a disaster. In themselves they do not alter the legal rights of the persons to whom they refer … Nevertheless they may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice."

566 See *Christchurch City Council v Attorney-General* [2005] NZAR 558 (CA) and *Milroy v Attorney-General* [2005] NZAR 562 (CA).

IMPACT OF NEW ZEALAND BILL OF RIGHTS ACT 1990

11.16 It is also possible that either a statutory or ministerial inquiry could be subject to a claim under the New Zealand Bill of Rights Act 1990 (NZBORA). In particular, inquiries could be reviewed on grounds that there has been a breach of natural justice under s 27(1):

> Every person has the right to the observance of the principles of natural justice by any tribunal *or other public authority* which has the *power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.* [Emphasis added.]

11.17 The practice of judicial review applicants including a breach of NZBORA and claim for compensation[567] in their statements of claim is becoming common.[568] However, the Court of Appeal has indicated that compensation may not normally be available for natural justice breaches.[569]

11.18 An applicant for review of an inquiry would first have to establish that the inquiry is subject to the NZBORA. Section 3 of NZBORA states that it only applies to acts done (a) by the legislative, executive, or judicial branches of the government of New Zealand; or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

11.19 There has been little analysis of the meaning of the "executive" for the purposes of the section, and New Zealand courts have tended to take a comparatively narrow view of the term.[570] While the Executive Council's decision to establish an inquiry could give rise to NZBORA scrutiny, the actions of the inquiry itself arguably do not amount to executive acts under s 3(a). An inquiry can be described as a tool of executive government, but in practice they act as independent bodies. Conversely, the actions of an inquirer carrying out a non-statutory ministerial inquiry might more readily be interpreted as being acts of executive government and thus open to NZBORA review.

11.20 The meaning of "judicial" has also received little scrutiny.[571] While the term clearly applies to the actions of judges, it is not clear whether it is limited to their actions within the judicial branch of government, or whether it could apply to a judge's actions while conducting an inquiry.

567 See generally Allison Bennett "Compensation Under the New Zealand Bill of Rights Act 1990 for Breach of Process Rights" in New Zealand Law Society *Judicial Review Intensive Seminar* (September 2007) 143.

568 Karen Clark QC "Section 27(1) New Zealand Bill of Rights Act: Modifying or Recognising Natural Justice as we know it?" in New Zealand Law Society *Judicial Review Intensive Seminar* (September 2007) 131.

569 In *Attorney-General v Udompun* [2005] 3 NZLR 204, paras 168–170 (CA) Glazebrook J stated that "… there is force in the proposition that compensation should not be available for breaches of natural justice as a matter of course …" The court reasoned that where there was already an effective remedy, BORA compensation was not required. William Young J also argued strongly against such compensation in *Brown v Attorney-General* [2005] 2 NZLR 405 (CA). Compensation has been awarded for s 27(1) breaches in two cases: *Upton v Green (No 2)* (1996) HRNZ 179 (HC) and *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel* [2002] NZAR 865 (HC).

570 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005), 91. See, for example, *Federated Farmers v New Zealand Post* [1990–92] 3 NZBORR 339 (HC) and *Innes v Wong* (No 2) (1996) 4 HRNZ 247.

571 Ibid, 94.

11.21 Turning to s 3(b), the Court of Appeal has held that "a generous interpretation" should be given to the provision.[572] In *Ransfield v Radio Network Ltd*,[573] Randerson J set out a detailed framework for considering when a function or power will count as public.[574] Using this framework of analysis, it seems highly likely that commissions are subject to review under s 3(b).[575]

11.22 A question remains whether the rulings and decisions of, or processes adopted by, inquiries are "determinations in respect of that person's rights, obligations, or interests protected or recognised by law" under s 27(1). In considering this question, courts have thus far been quick to place emphasis on such determinations needing to be of an adjudicative character.[576] The case law so far on s 27(1) has not therefore followed the expansive approach to decision-making that it has in relation to common law judicial review. However, this narrow approach has been criticised, and it has been suggested that the courts may also be ready to clarify the situation.[577] Arguably then, inquirers need to be alert to the possibility of claims that invoke s 27(1).

JUDICIAL REVIEW – PROCEDURAL ISSUES

Judicial review interrupting inquiry proceedings

11.23 Judicial review proceedings have the potential to significantly delay an inquiry. Indeed, the delay they cause can, of itself, advantage a participant in the inquiry: uncooperative parties may wish to stymie or derail the inquiry proceedings. On the other hand, review proceedings can ensure the inquiry's scope is limited to its terms of reference or that it complies with natural justice.

11.24 Although the grant of judicial review is a discretionary remedy, New Zealand has liberal laws in relation to the right to bring a judicial review action. In contrast, both the United Kingdom and Ireland require leave for judicial review.[578]

572 *R v N* [1999] 1 NZLR 713, 721 (CA) Richardson P for the Court.

573 [2005] 1 NZLR 233 (HC).

574 Relevant aspects of his summary, relevant to inquiries, are: whether the function, power, or duty is carried out in public is immaterial; whether the entity is amenable to judicial review is not necessarily decisive; the primary focus of inquiry under s 3(b) is on the function, power, or duty rather than on the nature of the entity at issue, nevertheless, the nature of the entity may be a relevant factor; no single test of universal application can be adopted to determine what is a public function, duty, or power under s 3(b); non-exclusive indicia may include: whether the source of the function, power, or duty is statutory; the extent and nature of any governmental control; whether and to what extent the entity is publicly funded; whether the entity is effectively standing in the shoes of the government; whether the function, power, or duty is being exercised in the broader public interest; whether coercive powers analogous to those of the state are conferred; whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person.

575 Andrew and Petra Butler also judge it to be plain that s 3(b) would capture commissions of inquiry. Andrew Butler and Petra Butler above n 570, 99.

576 See for example, *Daniels v Chief Executive of the Department of Work and Income* [2002] NZAR 615 (HC); *Chisholm v Auckland City Council* [2005] NZAR 661 (CA); *Ubilla v Minister of Immigration* (19 February 2004) HC WN CIV 03-485-2757 MacKenzie J; and *Blair v Attorney-General* [2006] NZAR 117 (HC).

577 Karen Clark QC, above n 568, 139.

578 See The Law Reform Commission of Ireland *Public Inquiries Including Tribunals of Inquiry: Report 73* (LRC, Dublin, 2005), draft Bill, cl 22, which refers to Order 84 of the Rules of the Superior Courts (SI No 15 of 1986). For the United Kingdom, see the Supreme Court Act 1981 s 31(3) and Civil Procedure Rules 54.4.

11.25 Other law reform bodies have considered ways of fast-tracking review applications into ongoing inquiries in order to minimise the effects of delays. The Irish Law Reform Commission made recommendations designed for achieving this:[579]

- A time limit of 28 days from the date on which the grounds for the application arose on the institution of judicial review proceedings in the context of inquiries, subject to the court being able to extend this time for "good and sufficient reason".
- An obligation on the High Court to deal with such proceedings as expeditiously as possible. While the Commission acknowledged that this was the Court's practice, it saw a benefit in this being elevated to a statutory requirement.[580]

11.26 The United Kingdom Inquiries Act 2005, s 38 provides for a 14 day time limit for an applicant to apply for judicial review of a decision by the Minister in relation to an inquiry, or by a member of an inquiry panel, unless that time limit is extended by the court. However, the time limit does not apply to a decision as to the contents of the report of the inquiry (including the interim report) or a decision of which the applicant could not have become aware until the publication of the report.[581]

11.27 In some Australian states, the legislation goes further and provides that proceedings for an injunction, declaration or writ of mandamus, prohibition or certiorari shall not be brought against a commission.[582]

Should limits be placed on applications for review of inquiry decisions?

11.28 The situation in New Zealand is affected by s 27(2) of the New Zealand Bill of Rights Act 1990 Act which provides that "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."[583]

11.29 Section 27(2) does not impose a blanket restriction on limits to judicial review – it only requires that those limits be "in accordance with law". There are some examples of statutory limits on the right to judicial review, in the form of limited privative clauses.[584] Joseph notes that the "courts uphold these clauses in the interests of certainty and finality and because they preserve a sufficient degree of remedial protection." Section 6 NZBORA means that courts must strive to interpret privative clauses consistently with s 27(2), and it follows that precise drafting is required for any such clause.

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579 The Law Reform Commission of Ireland, above n 578, 143–146.

580 The Commission also suggested that inquiries should be able to seek "directions in relation to its functions", similar to the power of New Zealand commissions of inquiry to state a case under the 1908 Act, s 10.

581 Section 38(3).

582 See Royal Commissions Act 1991 (ACT), s 48; Special Commissions of Inquiry Act 1983 (NSW), s 36; and Royal Commissions Act 1917 (SA), s 9.

583 As to whether s 27(2) applies to inquiries, see the discussion at paragraphs 11.16–11.22, above.

584 P A Joseph, above n 484, 859.

11.30 A handful of provisions place time limits on judicial review. Examples can be found in the Immigration Act 1987[585] and in relation to certain decisions in relation to protection orders under the Children, Young Persons and Their Families Act 1989.[586] We do not think a specific time limit is appropriate in this case, however, as it may tend to encourage rather than discourage interlocutory applications.

11.31 In our draft report we considered whether other limits should be placed on applications for review of inquiry decisions. The balance to be weighed is between the interest in certainty and minimising cost and delay in inquiries, and the interest in protection against unfair or illegal decision-making. The fact that inquiries do not directly make decisions on individual rights is relevant. However, as discussed, the impact of an inquiry's rulings can be severe and it is clear that they are rightly bound by the rules of natural justice.

11.32 We sought feedback on whether it was appropriate to require applicants to seek leave from the High Court for judicial review of inquiries while they are ongoing. While there are no examples of leave being required for judicial review hearings in New Zealand (in contrast to leave for appeal), such a provision would not contradict s 27(2) NZBORA since it would only delay a remedy for the applicant – it would therefore preserve a "sufficient degree of remedial protection". We suggested that leave would not be required for the review of an inquiry after it had completed its task. Inclusion of such a provision in new legislation would have ensured that the requirement under s 27(2) that individuals have the "right to apply, *in accordance with law*, for judicial review" would be fulfilled.

11.33 In our draft report we acknowledged that a practical alternative to a leave provision is the ability to seek interim relief under s 8 of the Judicature Amendment Act 1972. A successful application will often have the desired effect without the need for a substantive fixture, or will lead to an urgent substantive hearing. By contrast, where an application for interim relief is not successful, in most cases the inquiry can continue notwithstanding. In this way, the ability to seek interim orders has the effect of winnowing out most non-meritorious interlocutory applications for review.

11.34 On balance, submitters who specifically considered this issue did not think that applicants should be required to seek leave from the High Court for review of inquiries. It was suggested that such a process would be disruptive, and that it was difficult to justify special rules for inquiries alone. It was also suggested that s 8 of the Judicature Amendment Act allowed adequate prompt judicial oversight of applications for judicial review.

11.35 In the light of the weight of submissions, we have decided not to pursue this proposal in this report.

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585 Section 146A places a 3 month limit for applications for review of decisions taken under the Act. However, subsection (4) provides that "Nothing in this section limits the time for bringing review proceedings challenging the vires of any regulations made under this Act." The Immigration Bill 2007 currently before Parliament would reduce this time limit. Clause 222(1) states that "Any review proceedings in respect of a statutory power of decision arising out of or under this Act must be commenced within 28 days after the date of the decision, unless the High Court decides that, by reason of special circumstances, further time should be allowed."

586 Sections 207J, 207P and 207V set time limits of 13, 10 and 3 days respectively and in each case the time limit cannot be extended. See also Fisheries Act 1996, s 186J re. judicial review of aquaculture decisions.

Fast-tracking applications

11.36 Under the High Court Rules, r 426, judicial review proceedings are placed on the High Court's standard case management track. However, it is general practice that such proceedings are given some priority.

11.37 We do not consider that there is a need for a specific provision requiring the High Court to deal with such applications as expeditiously as possible. The Court has the power to move any application from one track to another according to its urgency and other caseload imperatives. This power helps the Court control its own caseload, and we see no reason for judicial review or cases stated emanating from inquiries to be automatically accorded special treatment over other types of application.

STATING A CASE

11.38 Section 10 of the 1908 Act provides:[587]

> (1) The Commission may refer any disputed point of law arising in the course of an inquiry to the High Court for decision, and for this purpose may either conclude the inquiry subject to such decision or may at any stage of the inquiry adjourn it until after such decision has been given.
>
> (2) The question shall be in the form of a special case to be drawn up by the parties (if any) to the inquiry, and, if the parties do not agree, or if there are no parties, to be settled by the Commission.
>
> (3) The decision of the High Court shall be final and binding upon all parties to the inquiry and upon the Commission.

11.39 Section 10 has been used at least 5 times since 1908.[588] The procedure in s 10 can be contrasted with appeals from courts and tribunals by way of case stated,[589] which have been the subject of general criticism on the grounds that they waste time and weaken the value of the appellant's right of review or appeal, because the tribunal controls the formulation of the question.[590]

11.40 As there is no right of appeal from an inquiry, judicial review of an inquirer's decision provides the sole form of redress, and while the case stated procedure can cause delay, so can subsequent judicial review. Where there is a genuine dispute about a proposed ruling in an inquiry, it may be preferable that the inquirer seeks directions from the court on that issue, rather than wait to see if judicial review will result. A case stated may also be less adversarial than a judicial review. A potential issue with the procedure, however, is that it raises

587 Some Canadian jurisdictions provide for a similar power. In Ontario, commissioners may state a case to the Court of Appeal on their own motion or if asked to do so by an affected person. If the commissioner refuses to do so, the person can apply to the court for an order that a case must be stated. Proceedings are stayed while the process is played out. Ontario Public Inquiries Act RSO 1990 c P 41, s 6. A similar procedure is provided for in the Manitoba Evidence Act CCSM c E 150, s 95.

588 See *Re Manawatu Gorge Road and Bridges* [1917] NZLR 36 (SC); *Re Waipawa, Waipukurau, and Dannevirke Counties* (1909) 29 NZLR 836 (SC); *Re Royal Commission of Licensing* [1945] NZLR 665 (CA); *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (CA); and *Re Marginal Lands Board Commission of Inquiry into Fitzgerald Loan* [1980] 2 NZLR 395 (HC).

589 Examples are High Court Rule 719 and s 107 of the Summary Proceedings Act 1957 which allows a District Court judge to consult the High Court on a question of law via appeal by way of case stated.

590 *McGechan on Procedure* (Brookers, Wellington, 1988), 1-3616. The LAC also describes case stated procedures as "cumbersome", and prefers a right of appeal limited to questions of law: Legislation Advisory Committee Guidelines on Process and Content of Legislation, chapter 13 Appeal and Review, Part Three, (2003) http://www.justice.govt.nz/lac/ (accessed 4 September 2007).

the potential for parties to seek reimbursement of their costs from the inquiry. Nevertheless, we consider that persons involved in an inquiry should remain able to ask the inquiry to state a case to the High Court for directions on the exercise of any of its powers or functions under the Act. We suggest that the power should be rarely exercised because of the costs and delay involved.

RECOMMENDATION

R55 The new Act should retain the ability for the inquiry to state a case to the High Court for directions on the exercise of any of its powers or functions.

See draft Bill, clause 34.

Removal to Court of Appeal

11.41 At present, s 13(5)(c) of the 1908 Act provides that applications under s 10 of the Act must be made to the Court of Appeal rather than the High Court where any member of the commission is a serving or former High Court judge. No such provision exists in relation to judicial review. The Judicature Act 1908, s 64 already provides a procedure whereby civil cases may be transferred to the Court of Appeal in exceptional circumstances. The s 64 procedure is used sparingly, but was used in relation to judicial reviews of the Erebus Royal Commission and Wine-box inquiry.[591]

11.42 We do not see the need to duplicate the procedure in s 64 or to provide automatic referral to the Court of Appeal. Subsections (2)–(4) of s 64 largely codify the case law and provide the court with ample direction as to whether a case should be transferred. Relevant matters are:[592]

- The primary purpose of the Court of Appeal as an appellate court.
- The desirability of obtaining a determination at first instance and a review of that determination on appeal.
- Whether a Full Court of the High Court could effectively determine the question in issue.

11.43 We see no reason why these considerations should not also apply to inquiries. If an application arises involving an inquiry led by a current or former High Court judge, a full bench of the High Court may be the better way to deal with the case than referral to the Court of Appeal in the first instance.

RECOMMENDATION

R56 The requirement that applications to state a case be made to the Court of Appeal when a member of the inquiry is a serving or former High Court judge should not be retained in the new Act.

591 *Re Erebus*, above n 565, (CA); *Fay Richwhite v Davison* [Removal To Court Of Appeal] 11 PRNZ 177 (HC); and *Peters v Davison* (1998) 18 NZTC 13,656 (HC).

592 Judicature Act 1908, s 64(3)(a)–(c).

Chapter 12
Membership

APPOINTMENT

12.1 Decisions about the appointment of inquirers are fundamental to an inquiry's success. There is no statutory direction about how to appoint a commission or the number or expertise of its members.

12.2 Although commissioners are formally appointed by a warrant from the Governor-General, the current practice in New Zealand is for Cabinet to make the recommendation. The advice of the Solicitor-General and relevant departments is usually, but not necessarily, sought before approval is given. In practice, ministerial inquirers are appointed by the Minister usually after consultation with the Solicitor-General and/or relevant government departments, and after discussion with the Cabinet.

12.3 We suggest that, for public inquiries, inquirers should continue to be appointed by the Governor-General. Government inquirers should be appointed by the Minister who establishes the inquiry. We also suggest that there should be a broader and more established practice of consultation before final decisions are made.

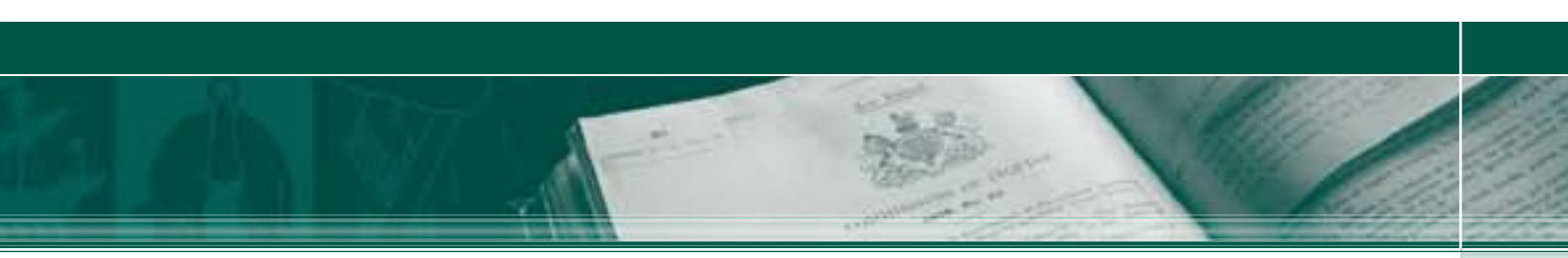
12.4 While inquiries usually arise because of matters of urgency and appointments need to be made quickly, sufficiently wide consultation and time for reflection should be allowed to ensure the terms of reference are well thought out, people with the correct skills are appointed and time lines and budget are appropriate. The Attorney-General, Department of Prime Minister and Cabinet and Solicitor-General should be consulted as a matter of course. Guidelines about consultation could usefully be included in the Cabinet Manual.

12.5 Where a judge is to be appointed, wider consultation should be undertaken. The Council of Chief Justices of Australia and New Zealand has adopted principles on the appointment of judges to other office by the Executive. These include that:[593]

- The holder of a judicial office should not assume such an office without prior consent of the judicial head of the relevant court.
- The proper procedure is for the Prime Minister or the Attorney-General to approach and consult the judicial head.
- Before giving consent the judicial head should consult other members of the court, have regard to the judge's duties, and the terms of reference of the commission.[594]

593 "Statement on Appointment of Judges to Other Offices by the Executive" (11 April 2007).

594 The principles apply equally to reappointment and to proposed changes in the terms of reference of commissions.



12.6 The guidelines have generally been followed when appointing judicial inquirers. The practice has also been that a retired or sitting judge is only appointed after Crown Law makes a formal approach to the Attorney-General who then consults the Chief Justice.[595] We endorse the continuation of this practice, but do not suggest that, as in some other jurisdictions, it be formalised in legislation.[596]

RECOMMENDATION

R57 Public inquirers should be appointed by the Governor-General and government inquirers by the Minister establishing the inquiry.

See draft Bill, clause 6.

QUALIFICATIONS

12.7 There is no requirement that inquirers appointed under the 1908 Act or to ministerial inquiries have any particular qualifications. The United Kingdom Inquiries Act 2005 seeks to provide direction by indicating that, in selecting the members of the panel, the Minister must have regard to whether the panel as a whole has "the necessary expertise to undertake the inquiry"; and to the "need for balance … in the composition of the panel".[597] The Minister must also consider whether potential members of the inquiry panel are sufficiently impartial and they cannot be appointed if they have "a direct interest" in the inquiry or "a close association with an interested party".[598]

12.8 We do not consider that any statutory guidance is necessary. The United Kingdom criteria are self-evident and inquiries have extremely varying subject matter.[599] However, it has been frequently stressed that the success or failure of an inquiry often turns on who is appointed to carry out the inquiry, so this matter needs to be carefully considered. Some guidance as to relevant skills could, we suggest, be included in the Cabinet Manual.

595 Roger Fitzgerald *Setting Up and Running Commissions of Inquiry: Guidelines for Officials, Commissioners and Commission Staff* (Department of Internal Affairs, Wellington, 2001) para 11.2.

596 For example, the United Kingdom Inquiries Act 2005 sets out that, before appointing judges to an inquiry panel, the Minister must consult the senior judge of the court to which the judge in question belongs (Inquiries Act 2005 (UK), s 10). The Irish Law Reform Commission recommended that legislation should require the approval of the senior judge of the court to which an inquirer belongs: see The Law Reform Commission of Ireland, above n 578, 58.

597 Inquiries Act 2005 (UK), s 8(1).

598 Ibid, s 9(1). The United Kingdom Department for Constitutional Affairs also considered the option of a panel of individuals who could be specifically trained, and from which inquiry members must be selected. But we agree with their conclusion that this would be impractical and costly. See Department for Constitutional Affairs *Effective Inquiries: a Consultation Paper Produced by the Department for Constitutional Affairs* (Department of Constitutional Affairs, CP 12/04), para 54.

599 The dominant consideration should be the chair's competence and not his or her training. Alan C Simpson "Commissions of Inquiry and the Policy Process" in Stephen Levine (ed) *Politics in New Zealand: A Reader* (George Allen & Unwin, Auckland, 1978) 22, 28.

Judges and lawyers as inquirers

12.9 An examination of past royal commissions and commissions of inquiry reveals a strong preference for chairpersons with judicial or legal experience. Since 1976, 72% of royal commissions or commissions of inquiry have had a judicial or legally qualified chair, and 43% of these were current or former judges of the New Zealand High Court. There has also been a preference for ministerial inquirers to have legal qualifications.[600]

12.10 This practice has been criticised as "unnecessarily restrictive and limiting".[601] The practice may, however, be justified because of judges' relevant skills in hearing and evaluating evidence, recognising and resolving complex legal and factual issues, setting out reasons for their decisions, and handling public hearings.[602] Judges also bring authority to the proceedings,[603] and may enhance the appearance of independence. The Irish Law Reform Commission indicated that the nature of tribunals of inquiry increases the need for legal experience:[604]

> In the first place the subject matter before a tribunal of inquiry is generally much more voluminous and diverse. Secondly, the tribunal is more likely to sit in public. Finally, the parties affected will almost invariably be represented by the ablest counsel in the jurisdiction. The net result of all this is that … it is much more common for a tribunal chairman to be called on to give sophisticated procedural rulings.

12.11 These skills are particularly necessary in the context of inquiries that are primarily focused on issues of conduct.[605] However they may be less apt where issues of social or economic policy with political implications are involved.[606] It has been said that the tendency of judges and lawyers to adopt courtroom processes may prejudice a proper outcome[607] and can be responsible for adding time and cost. The adversarial approach is usually particularly inappropriate in the context of policy matters.[608]

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600 See appendix D. Often the inquirer has been a senior barrister, for example, Ailsa Duffy QC *Report into the Handling of Ron Burrow's Phone Call* (2004) and Helen Cull QC *Inquiry into the Disciplinary Processes* (2001). Occasionally ministerial inquiries have been conducted by retired judges, for example, Rt Hon Sir Thomas Eichelbaum *Ministerial Inquiry into the Peter Ellis Case* (2001).

601 Alan C Simpson "Commissions of Inquiry and the Policy Process" in Stephen Levine (ed) *Politics in New Zealand: A Reader* (George Allen & Unwin, Auckland, 1978) 22, 28.

602 See Hon D G McGregor QC "The Case For" in Glenys Fraser (ed) *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals: Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration* (Australian Institute of Judicial Administration Incorporated, Adelaide, 1986) 95, 103.

603 Diana Woodhouse "Matrix Churchill: a Case Study in Judicial Inquiries" (1995) 48 Parliamentary Affairs 24, 25.

604 The Law Reform Commission of Ireland, above n 578, para 5.13.

605 It has been said that if an inquiry is of the type "where some person's professional or personal reputation is at stake, or there is some possibility of criminal conduct, there is a significant judicial element in the inquiry and it should be chaired by a judge or lawyer of comparable experience": Mervyn Probine *Administrative Arrangements for Setting Up and Conducting Royal Commissions and Commissions of Inquiry* (Department of Internal Affairs, Wellington, 1989), 14.

606 Jack Beatson "Should Judges Conduct Public Inquiries?" (2005) 121 LQR 221, 230.

607 Alan C Simpson "Commissions of Inquiry and the Policy Process" in Stephen Levine (ed) *Politics in New Zealand: A Reader* (George Allen & Unwin, Auckland, 1978) 22, 28.

608 "It not only wastes time and money, but, more fundamentally, is simply an unsuitable method for analysing issues of policy": George Winterton "Judges as Royal Commissioners" (1987) 10 UNSWLJ 108, 119–20. One commentator has gone so far as stating that judges are "unsuitable for the investigative work required of an inquiry of this nature": Diana Woodhouse "Matrix Churchill: a Case Study in Judicial Inquiries" (1995) 48 Parliamentary Affairs 24, 25.

12.12 Furthermore, while judges may more easily be released from their normal duties than other senior officials,[609] this also means a depletion of scarce judicial resources. It is questionable whether this is the best use of judges if there are others who are capable of performing the role.[610] Members of other professions can offer similar skills and provide additional expertise. Specialist inquiry bodies commonly appoint non-judicial chairs.[611]

12.13 Ultimately, despite the concerns expressed about whether it is appropriate for judges to chair inquiries, it is likely that there will always be matters that require investigation and report where it is highly desirable that a person with judicial or senior legal experience chair the inquiry.

Is it appropriate for sitting judges to chair inquiries?

12.14 There is considerable debate about whether it is appropriate for sitting judges to assume the role of inquirers. Although the appointment of judges is common practice in other common law jurisdictions, in Australia the practice varies.[612] Some Australian states allow judicial chairs,[613] but in Victoria it is considered to be outside judicial functions and is only permitted in exceptional circumstances.[614]

12.15 Becoming involved in a inquiry may be seen as detracting from the independence and impartiality of the judiciary.[615] Beatson sets out five reasons why using judges as royal commissioners may compromise their independence.[616]

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609 See Jack Beatson, above n 606, 232–234.

610 See Tony Black "Judges as Royal Commissioners" [1982] NZLJ 37, 37–8. The depletion of scarce judicial resources should be avoided: See Jack Beatson, above n 606, 232–234.

611 For example, the Transport Accident Investigation Commission.

612 See "Irvine Memorandum" reproduced in Hon Sir Murray McInerney QC and Garrie J Moloney "The Case Against" in Glenys Fraser (ed) *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals: Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration* (Australian Institute of Judicial Administration Incorporated, 1986, Adelaide) 3, 11.

613 For example in the Australian Capital Territory a royal commissioner must be either a judge or a legal practitioner of not less than 5 years (Royal Commissions Act 1991, s 6 (1)). This contrasts with inquiries under the Inquiries Act 1991 (ACT) which has no qualification requirements. In New South Wales only a judge or a legal practitioner of 7 years experience can be a commissioner under the Special Commissions of Inquiry Act 1983, s 4(2). Section 15 of the Royal Commissions Act 1923 (NSW) gives greater powers to the commission if the chair or sole commissioner is a judge or legal practitioner.

614 "Irvine Memorandum", above n 612, 11.

615 A recent Australian case found that it was constitutionally incompatible with judicial office for a judge to prepare a report under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) for the Minister. The majority considered that writing the report "was performed as an integral part of the process of the minister's exercise of power … [placing] the judge firmly in the echelons of administration" (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220, 232 (HCA) Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.) However, the Court distinguished the role of the judge in this case from the role of a royal commissioner and indicated that it was constitutionally acceptable for a judge to perform that function: "A judge who conducts a Royal Commission may have a close working connection with the Executive Government yet will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the Executive Government except where those wishes or advice are given by way of submission for the judge's independent evaluation." ((1996) 138 ALR 220, 231.) See also Tom Sherman "Should Judges Conduct Royal Commissions?" (1997) 8 PLR 5, 8.

616 Jack Beatson, above n 606, 235–241.

- The appointment of a judge does not depoliticise an inherently political issue.
- When a report is non-binding, unenforceable and not subject to appeal, critics will seek to discredit its findings by criticising the judge. Likewise, where the disagreement results from the limitations of the terms of reference and the practice of not making findings as to civil or criminal responsibility, the judge will be discredited.
- Independence is undermined by the fact that it is the Government which sets up an inquiry, determines its terms of reference and chooses the person or persons to conduct it.
- Risks of perceived partiality because of the discretion as to the procedure to be adopted by an inquiry.
- Risks arising from increasing recourse to judicial review during an inquiry.

12.16 Judicial review of an inquiry's procedure or report "is said to damage the perception that the judge conducting an inquiry so challenged is impartial or that the process is fair".[617] Moreover, judicial review can have a significant impact on the judge conducting the inquiry, as evidenced by the impact of the *Erebus* case[618] on Justice Peter Mahon and his career. In particular, a sole inquirer is wholly responsible for a report and "any apparent deficiency in a report will follow a Judge back to the bench".[619]

12.17 We do not hold a strong view on whether sitting judges should serve on inquiries. The question is dependent on the substance or form of the inquiry under consideration, and judicial resources at the time. However, if it is considered that an inquiry could benefit from a judicial chair, consideration should always be given to whether the role could be adequately performed by a senior lawyer or retired judge, taking account of the likely length of the inquiry and age of the prospective inquirer.[620]

SIZE OF THE INQUIRY

12.18 On average in New Zealand, royal commissions or commissions of inquiry have had three inquirers, and it has been unusual for there to be more than five.[621] Some commissions, and most ministerial inquiries, have had a single, usually legally qualified, inquirer.[622]

12.19 There is a risk involved in using sole inquirers for long and complex inquiries. The sole inquirer will often have to deal with a mass of detail with no sounding board or means of testing ideas. There is a greater risk of error and an inquiry's

617 Ibid, 240.

618 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).

619 See Tony Black, above n 610, 37.

620 However, the use of retired judges raises the issue of their age. Currently the age of judicial retirement is 70 (the Judicial Retirement Age Act 2006 amended the District Courts Act, s 7(2) and Judicature Act 1908, s 13 by changing the age from 68 to 70.) This can cause problems, for example, Sir Edward Somers, a former judge of the New Zealand Court of Appeal, had to resign from the United Kingdom Bloody Sunday Tribunal due to ill-health.

621 One exception was the Royal Commission on Social Policy, which had six members: Rt Hon Sir Ivor Richardson, Ann Ballin, Marion Bruce, Len Cook, Mason Durie and Rosslyn Noonan.

622 For example, Sir Ronald Davison on the Wine-box Inquiry, and Hon Peter Mahon on the Erebus Royal Commission.

report may be less compelling without the agreement of more than one competent mind.[623] There is also a risk that the inquirer may become incapacitated or die. If this occurs late on in the inquiry, it could be that natural justice would require the whole process to begin again, with added disruption and cost.[624]

12.20 Having several inquirers can protect the independence of the inquiry. In the United Kingdom, the Select Committee on Public Administration stated, "[w]e particularly recommend the use of panels in politically sensitive cases as a non-statutory means of enhancing the perception of fairness and impartiality in the inquiry process."[625] However, too many inquirers may also cause practical problems.[626] Some jurisdictions have established inquiries with large numbers of members, for example, royal commissions in the United Kingdom often have had more than ten members.[627]

12.21 Although sole inquirers may continue to be appropriate for smaller inquiries, we consider that where numerous and complex issues need to be considered, more than one inquirer should be appointed as a matter of course. Guidance to this effect could usefully be contained in the Cabinet Manual.

RECOMMENDATION

R58 There should be no statutory requirement as to numbers of inquirers, however, the scope or complexity of some matters will make the appointment of more than one inquirer highly desirable.

ABILITY TO APPOINT REPLACEMENT MEMBERS

12.22 The 1908 Act is silent on whether, once an inquiry has commenced, new inquirers should be able to be appointed, either to increase numbers or as replacements. In contrast, in the United Kingdom, a Minister may fill a vacancy that has arisen on the panel (including the position of the chair) at any time,[628] and may increase the number of the panel in certain circumstances.[629] The Australian Capital Territory's Royal Commissions Act 1991 provides for the continuation of a commission if one member dies, resigns or is removed from office.[630]

623 Mervyn Probine, above n 605, 15.

624 Ibid,14.

625 House of Commons Public Administration Select Committee *Government by Inquiry: Volume 1* (The Stationery Office Limited, London, 2005), 30.

626 Martin Bulmer states that "[l]arge commissions of more than 12–15 members are quite unwieldy and only workable if a proportion of members are relatively inactive, *or* if they divide into smaller working groups". Martin Bulmer "Increasing the Effectiveness of Royal Commissions: a Comment" (1983) 61 Public Administration 436, 437.

627 See for example the Royal Commission into Civil Liability and Compensation (1978) which had 16 members, the Royal Commission on Long Term Care (1999) which had 12 and the Royal Commission on the Reform of the House of Lords (2000) which had 11.

628 Inquiries Act 2005, s 7(1)(a).

629 Under s 7(2) the Minister must have either given the chair notice of his intention to appoint more members in accordance with s 5(1)(b)(ii) or have the consent of the chairperson.

630 Section 6(3) provides that the remaining members constitute the commission. Under s 6(4) if the member was the chairperson, the executive will appoint one of the remaining members as the chairperson.

12.23 Practice in New Zealand reveals that both approaches have been used. In the Commission of Inquiry into the Distribution of Motor Vehicle Parts, the first chairman resigned two months after the commission's inception due to ill health and was replaced.[631] In contrast, when Justice J Bruce Robertson resigned from the Commission of Inquiry into Police Conduct over a year into the inquiry, he was not replaced and Dame Margaret Bazley continued as the sole commissioner.[632]

12.24 In 2003, the Treaty of Waitangi Act 1975 was amended to include special provisions for the replacement of members.[633] This was due to the length of time taken to resolve some claims and was designed to avoid any suggestion that, in cases where the tribunal's membership had changed, the inquiry should start again from the beginning. There are controls on the power: it can only occur if the member has ceased to hold office, the member is unfit by reason by his or her physical or mental condition, or it would be unreasonable to expect him or her to continue because of his or her personal circumstances.[634]

12.25 If a member leaves an inquiry and no replacement is appointed, there is a risk of lack of balance and expertise on the inquiry panel. Inquirers will often be appointed so that their skills and experience complement each other. In these situations it may be difficult to continue without a replacement if one leaves.

12.26 As suggested above, replacing members of an inquiry can raise issues of natural justice. For instance, should all members of an inquiry have heard all the arguments or is it enough for them to read the transcripts? To address this problem, the Irish Law Reform Commission recommended that, in addition to the legislative requirements, new appointments must "not affect decisions, determinations, or inquiries, made or other actions taken by the tribunal concerned before such an appointment or designation".[635] They also should not "occur unless the tribunal is satisfied that no person affected by the proceedings of the tribunal would be unduly prejudiced thereby".[636] We agree that replacement members should only be appointed where it would not be contrary to natural justice.

RESERVE MEMBERS

12.27 An alternative to finding new members after a member leaves an inquiry is to appoint reserve members before or during the inquiry. This practice was used in the Bloody Sunday Inquiry in the United Kingdom after the resignation of Sir Edward Somers, one of the three original members. He was replaced by the Hon John Toohey and, as it was clear that the inquiry would continue for several years, a reserve member, Justice Esson, was appointed. If a member

631 M J Moriarty *The Report of the Commission of Inquiry into the Distribution of Motor Vehicle Parts* [1977] III AJHR H 5.

632 Douglas White QC was subsequently appointed as a legal adviser to the Commission.

633 Treaty of Waitangi Act 1975, sch 2 cls 5AA and 5AB; Treaty of Waitangi Amendment Act 2003.

634 Treaty of Waitangi Act, sch 2 cl 5AC.

635 Tribunals of Inquiry (Evidence) (Amendment) Act 2002, s 4(7).

636 The Law Reform Commission of Ireland, above n 578, 62.

had to stand down, the reserve member would become a full member.[637] His role was to sit in the hearing chamber and observe all proceedings; review all written evidence; not to contribute to inquiry decisions or seek to influence those decisions in any way; and attend inquiry discussions as an observer only.[638]

12.28 The practice of appointing reserve members resolves the natural justice issues raised by the appointment of new members[639] and can provide "a safety net in the event that, due to death, illness or other unforeseen circumstance, a member is unable to continue".[640] We consider it, however, unrealistic and expensive. If the inquiry cannot continue without that member or it would be contrary to natural justice that one member be appointed, there seems little choice but to conclude that inquiry, and if need be, begin again.

RECOMMENDATION

R59 The new Act should provide that when an inquirer leaves an inquiry, Government may require the inquiry to continue with the remaining members, or, if it is appropriate and not contrary to principles of natural justice, replacement members may be appointed.

See draft Bill, clause 8.

REMUNERATION

12.29 At present, Cabinet sets commissioners' fee scales by reference to a Cabinet Office circular.[641] Notwithstanding that the circular was updated in 2006, the framework cannot be said to accurately reflect the level of fee that would normally be paid to an inquirer. We understand that it is usually necessary for an exemption to be sought from the framework so that an appropriate level of remuneration can be negotiated for inquirers. This can place an awkward hurdle in the way of establishing an inquiry. A review of the framework would be desirable to ensure it reflects realistic rates, or to assess whether another means of setting remuneration is appropriate.

RECOMMENDATION

R60 The commissioners' fee scales should be reviewed.

637 However, when Justice Esson resigned in 2001 as the reserve member, he was not replaced due to the advanced stage of the inquiry, Bloody Sunday Inquiry "Resignation of Bloody Sunday Inquiry's Reserve Judge" (21 August 2001) Press Notice http://www.bloody-sunday-inquiry.org.uk (accessed 29 January 2007).

638 Bloody Sunday Inquiry "Reserve Member Appointed to Bloody Sunday Inquiry Tribunal" (10 November 2000) Press Notice http://www.bloody-sunday-inquiry.org.uk (accessed 29 January 2007). Compare with Irish Tribunals of Inquiry (Evidence) (Amendment) Act 2002, s 5.

639 The Law Reform Commission of Ireland, above n 578, 106.

640 The Law Reform Commission of Ireland *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22, 2003, Dublin) 107.

641 Cabinet Office Circular "Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown" (6 November 2006) CO (06)08. A chair of a royal commission can be paid $570 to $920 per day and a member $430 to $690. A chair of a commission of inquiry can expect $430 to $720 per day and a member $320 to $540.

POWER TO DISMISS

12.30 In chapter 3 we recommended that the independence of inquirers be protected in legislation. Their independence should also be protected through the terms of their appointment. This would place them in a similar position to judges and other public officers, although their appointment is short-term.

12.31 The 1908 Act does not set out whether or when inquirers can be dismissed, although Cabinet Office Circulars and the State Services Commission *Board Appointment and Induction Guidelines* indicate that termination procedures should be set out in the letter of appointment.[642] Obviously, there are no requirements regarding the dismissal of ministerial inquirers.

12.32 Under the Constitution Act 1986, a judge of the High Court can only be dismissed by the Sovereign or the Governor-General acting on an address of the House of Representatives "on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office".[643] District Court judges have more limited protection: the Governor-General may remove a judge for inability or misbehaviour.[644]

12.33 Under the Crown Entities Act 2004, members of independent Crown entities can be removed for just cause by the Governor-General on the advice of the responsible Minister after consultation with the Attorney-General.[645] Just cause includes misconduct, inability to perform the functions of office, neglect of duty, breach of any of the collective duties of the board or the individual duties of the members.[646] Where a judge is a member of a Crown entity, the judge can be removed in accordance with the general removal provisions only if all of the other members are being removed for the same breach at the same time. Otherwise he or she can only be removed under the general law applying to the removal of judges from office.[647] The members of several other bodies that perform inquiry functions can only be removed from office by the Governor-General upon an address from the House of Representatives for specified grounds such as inability to perform the functions of office, bankruptcy, neglect of duty or misconduct.[648]

642 Cabinet Office Circular "Guidance for Members of Statutory, Commercial and Other Bodies Appointed by the Crown" (23 August 1999) CO 99/12, para 6; State Services Commission *Board Appointment and Induction Guidelines* (State Services Commission, Wellington, 2006) 29–30.

643 Constitution Act 1986, s 23.

644 District Courts Act 1947, s 7(1).

645 Crown Entities Act 2004, s 39. This applies to some bodies with an inquiry function, for example, the Privacy Commissioner, the Commerce Commission and the Children's Commissioner.

646 Ibid, s 40.

647 Ibid, s 42.

648 Ombudsmen Act 1975, s 6(1); Inspector-General of Intelligence and Security 1996, s 7; Public Audit Act 2001, sch 3, cl 4(1).

12.34 Similar protections are accorded to inquirers in other jurisdictions, and should be in New Zealand.[649] We consider that protections similar to those in the Crown Entities Act are necessary in order to protect inquirers' independence. However, the protection need not be as extensive as that granted to judges, even where one of the inquiry members is a judge. While inquiries must be independent, they are primarily executive tools and their independence is not as constitutionally significant as the independence of the judiciary. An inquirer who is not fit for the position should be able to be removed with adequate safeguards short of requiring parliamentary approval.

RECOMMENDATION

R61 Inquirers should only be removed from office by the Governor-General or the appointing Minister, as the case may be, due to misconduct, inability to perform the functions of office, or neglect of duty.

See draft Bill, clause 7.

ASSESSORS OR EXPERTS

Experts on the inquiry panel

12.35 We can envisage a situation where an inquiry might seek expert advice or assistance. At times it may be possible to appoint an inquiry panel with the relevant experience or knowledge. For example, the Royal Commission on Genetic Modification included, as well as the Rt Hon Sir Thomas Eichelbaum (a former Chief Justice), a scientist, a Māori doctor, and a church minister with expertise in religious studies and ethics.

12.36 However, it is necessary to draw a distinction between people with a broad knowledge of the relevant subject matter and people who are experts in the particular area. As Probine suggests, the appointment of an expert as a member of the inquiry may detract from its independence. Rather it is preferable for experts and academics to help an inquiry by being commissioned to provide an expert report or giving evidence.[650] This way expert evidence is openly presented and can be tested by others involved in the inquiry process.

12.37 In addition, we consider that representative inquiries that include stakeholders as inquirers are generally undesirable, as inquiry by a selection of individuals who have formed views and positions to defend is not appropriate.[651] While there may be instances where diversity in age, gender, and ethnicity on inquiries should be addressed, representation of all interested parties is usually impossible without making the body unwieldy.[652]

649 For example, in the Australian Capital Territory under s 11 of the Royal Commissions Act 1991 the executive may terminate the appointment of a commissioner due to "misbehaviour or physical or mental incapacity". The United Kingdom Inquiries Act 2005 enumerates more grounds where a Minister may terminate the appointment of an inquirer, after first consulting the chair: by reason of physical, or mental illness, or any other reason the member cannot carry out his or her duties; the member has failed to comply with duties imposed by the Act; the member has a direct interest in the matter to which the inquiry relates; or a close association with an interested party; the member is guilty of misconduct which makes the member unsuitable. See Inquiries Act 2005, s 12(3).

650 Mervyn Probine, above n 605, 14.

651 See for example, Helena Catt "Are Commissions Representative?: The Composition of Commissions of Inquiry Created In New Zealand since 1970" (2005) 57 Political Science 77, 78.

652 Martin Bulmer "Increasing the Effectiveness of Royal Commissions: a Comment" (1983) 61 Public Administration 436, 437.

Assessors

12.38 Some bodies use expert assessors to assist them when the subject matter calls for particular expertise.[653] The United Kingdom Inquiries Act 2005 allows the Minister to appoint assessors after consulting the chairperson provided that the assessor has expertise making him or her "a suitable person to provide assistance to the inquiry panel".[654]

12.39 However, an assessor is not an ordinary expert witness. There may be issues surrounding the transparency of the advice that they give and whether they are present during the inquiry's deliberations. Similar legislation in New Zealand prevents such officers from being present during the deliberations of the board which they advise.[655] Due to the potential lack of transparency, we believe that assessors should generally not be appointed to assist inquiries, and that instead such people should be called as witnesses.

653 For example, some bodies can appoint legal assessors: Veterinarians Act 2005, s 36; Plumbers, Gasfitters and Drainlayers Act 1976, s 44. See also the role of legal advisers under the Health Practitioners Competence Assurance Act 2003, s 73. See also the Commerce Act 1986, ss 77 and 78 which allow lay members of the High Court who are appointed "by virtue of that person's knowledge or experience in industry, commerce, economics, law, or accountancy".

654 Inquiries Act 2005, s 11.

655 Health Practitioners Competence Assurance Act 2003, s 73(3).

Chapter 13
Counsel Assisting

13.1 It has been common practice for counsel to be appointed to assist most commissions, and some ministerial inquiries. Where the inquiry is formal and has hearings, or when a very significant amount of evidence needs to be sorted and presented, the appointment of counsel assisting can indeed be essential to an inquiry.[656] It should not, however, be assumed that it is necessary or appropriate to appoint counsel assisting for all inquiries.

WHEN TO APPOINT COUNSEL ASSISTING

13.2 James Dingemans QC provided a non-exhaustive list of the tasks of counsel assisting based on his experience in that role in the United Kingdom Hutton Inquiry:[657]

- to provide whatever assistance and advice is requested by the inquiry;
- to attempt to ensure that all relevant evidence (whether documentary or witness) is obtained and adduced before the inquiry by identifying the relevant evidence;
- to attempt to ask the right questions of witnesses giving evidence to the inquiry;
- to keep the inquiry going forward by timetabling and extensive coordination with the represented parties;
- to ensure that duties of fairness are discharged.

13.3 Counsel assisting, then, can play an important role in interacting with witnesses and will play a central role in hearings, where they are held, by making opening and closing statements, calling witnesses, and where appropriate, examining or cross-examining witnesses.

13.4 Where there are likely to be disputed questions of fact, or an investigation into conduct of individuals or organisations, it will often be helpful to appoint counsel assisting. However, when an inquiry is directed more at matters of policy and will be conducted on a more informal basis and, in particular, when it does not hold hearings, there may be less need for counsel assisting. Their appointment can suggest that an inquiry will adopt a legalistic approach, where this may not be necessary. As with all of an inquiry's processes, the need for counsel assisting should depend on the subject matter at hand, and the needs of the inquirer(s). Thus, where an inquirer is not legally qualified and issues of natural justice may be likely to arise, the appointment of counsel may be advisable. In other instances, the form and substance of the inquiry may require research or administrative

656 See for example L A Hallett *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Lawbook Co, Sydney, 1982) 210; Peter M Hall QC *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (Lawbook Co, Sydney, 2004) 672.

657 Master Hutton and James Dingemans QC "The Conduct of a Public Inquiry" The Inner Temple 162, 173.

assistance alone, rather than the costly assistance of senior counsel. Where an inquiry is likely to be conducted on the papers or without formal hearings, it is unlikely that counsel assisting will be necessary.

APPOINTMENT PROCEDURE

13.5 Greater guidance would be helpful for those making appointments and for counsel coming into the role. Our understanding is that the appointment procedure has varied from inquiry to inquiry.

13.6 In Australia, the Attorney-General is formally responsible for appointing counsel assisting,[658] although presumably this is done on the advice of officials. We consider that the Solicitor-General should be responsible for appointing counsel assisting inquiries in New Zealand, and that this should be expressly provided for in legislation. The Solicitor-General has a duty to provide independent legal advice and the Crown Law Office is likely to have the best understanding of the nature and demands of the role and suitable appointees.

13.7 Other jurisdictions have enacted legislation that gives the inquiry itself the right to appoint counsel assisting.[659] We do not think this option is desirable. It is, however, important that the inquiry and counsel assisting should be able to work together. Inquiry members should therefore be consulted before an appointment is made. However, some distance is also advisable – there is a risk that inquirers may appoint someone who is too close to them to perform the role effectively. The cost to the public purse is also relevant. Decisions that can have such a significant impact on the cost of the inquiry should, we think, be made outside the inquiry itself. To control costs, we also suggest that the Solicitor-General should be responsible for setting terms and conditions and for approving counsel assisting invoices, within an overall budget and in consultation with the responsible department. As with inquiries as a whole, this budget may need to be varied from time to time, but should not be open-ended.

RECOMMENDATION

R62 The new Act should provide that, where the appointment of counsel assisting is considered appropriate, he or she should be appointed by the Solicitor-General, after discussion with the inquirers.

RECOMMENDATION

R63 The Solicitor-General should be responsible for setting terms and conditions of appointment and for approving counsel assisting invoices.

See draft Bill, clause 12.

658 See Royal Commissions Act 1902 (Cth), s 6FA. See also Royal Commissions Act 1991 (ACT), s 18; Inquiries Act 1991 (ACT), s 15; Special Commissions of Inquiry Act 1983 (NSW), s 12(1); Royal Commissions Act 1923 (NSW), s 7(1); Commissions of Inquiry Act 1995 (Tas), s 6(1)(B)(i); Inquiries Act RS C 1985 c 1-11, s 11(1)(b); Public Inquiries Act RS A 2000 c P-29, s 3(1)(a); Public Inquiries Act RS PEI 1988 c P-315, s 5; Public Inquiries Act RS S 1978 c P-38, s 5(1); Public Inquiries Act RS NWT 1988 c P-14, s 10(b); Public Inquiries Act RS NL 1990 c P-38, s 4.

659 Royal Commissions Act 1991 (ACT), s 18; Inquiries Act 1991 (ACT), s 15; Special Commissions of Inquiry Act 1983 (NSW), s 12(1); Royal Commissions Act 1923 (NSW), s 7(1); Commissions of Inquiry Act 1995 (Tas), s 6(1)(B)(i).

Solicitors to the Inquiry

13.8 In the United Kingdom it is common practice to appoint solicitors to the inquiry.[660] The Inquiry Rules 2006 define this role as "the qualified lawyer (or other person certified by the Head of the Government Legal Service as suitable) appointed by the chairman to act as solicitor".[661] If no counsel to the inquiry has been appointed the solicitor may perform their role and ask questions of the witness.[662]

13.9 This approach has not been adopted in New Zealand, probably because we have a fused profession. In addition, the administrative and other tasks normally performed by solicitors are generally carried out by staff appointed as a secretariat to assist the inquiry (usually by the Department of Internal Affairs). There may, however, be situations where it is more efficient to appoint a firm of solicitors which already has an infrastructure and relevant expertise to support counsel assisting. In the past the Crown Law Office has fulfilled this role, and it could do so again, except where it may be actively involved in the inquiry on behalf of a participant (usually a government department).

NATURE OF COUNSEL ASSISTING'S ROLE

13.10 The role of counsel assisting will vary depending on the type of inquiry and its specific requirements. As noted, counsel assisting are most likely to be necessary where an inquiry is to be conducted by way of public hearings, and where a great deal of complex evidence needs to be presented. Generally, counsel assisting have been experienced barristers, and this is usually appropriate: a good understanding of legal process and the principles of natural justice is required. Also, counsel must be able to interact with other senior counsel in a robust way.

13.11 The role of counsel assisting tends to be less defined than amicus curiae[663] or other counsel appointed to assist a court or represent a particular interest.[664] Legal assessors or advisors sometimes perform a similar role before specialist tribunals.[665]

660 See Brian McHenry "The Public Inquiry Solicitor" (1999) 149 NLJ 1772.

661 Inquiry Rules 2006, r 2.

662 Ibid, r 10(1).

663 Rule 81 of High Court Rules allows an amicus to be appointed to represent other people's interests. Literally "friend of the court", amici can be appointed in the High Court, under its inherent jurisdiction. Section 99A of the Judicature Act 1908 allows the court to make orders as to payment of costs where the Attorney-General, Solicitor-General or any other person appears in a civil proceeding. This is considered to cover amicus curiae. See Raynor Asher QC "The Role of Amicus Curiae in Ethical Dilemmas" (Brookfields Lawyers' Medical Symposium, Auckland, 11 June 1999) 1; see also *Registered Securities Ltd (in liq) v C* (1999) 13 PRNZ 699, 704–705 Williams J (HC).) However, amicus can assume a partisan position and represent specific interests. See *Solicitor-General v Miss Alice* (5 September 2006) CA168/06, para 16 Glazebrook J for the Court; *Z v Z* [1997] 2 NZLR 258, 273 (CA) Judgment of the Court; Raynor Asher QC "The Role of Amicus Curiae in Ethical Dilemmas" (Brookfields Lawyers' Medical Symposium, Auckland, 11 June 1999) 9–10; and Samuel Krislov "The Amicus Curiae Brief: From Friendship to Advocacy" (1963) 72 Yale LJ 694.

664 Under rule 438A of the High Court Rules at the request of the court, the Solicitor-General must appoint a counsel to assist the court. A number of other statutes provide a similar right in relation to specific proceedings. For example, Care of Children Act 2004, s 130(1); Domestic Violence Act 1995, s 81(1)(a); Protection of Personal and Property Rights Act 1988, s 65(3); Evidence Act 2006, s 115. Other legislation allows specific bodies to appoint counsel assisting: Copyright Act 1994, s 214(2); Sale of Liquor Act 1989, s 107(6); Trans-Tasman Mutual Recognition Act 1997, s 62(2); Treaty of Waitangi Act 1975, sch 2, cl 7.

665 A number of statutes explicitly provide the right for certain bodies to appoint a legal assessor. See for example Veterinarians Act 2005, s 36; Plumbers, Gasfitters and Drainlayers Act 1976, s 44. Many former references to legal assessors in the health area have been removed by the Health Practitioners Competence Assurance Act 2003, s 73 which refers to "legal advisers" who are appointed to advise "on matters of law, procedure, or evidence". However, despite the change in terminology the role appears to be the same.

13.12 The fundamental 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. He or she must provide the inquiry with legal advice and "obtain and call probative evidence that is relevant to a commission's terms of reference".[666] As such the person can be termed a "counsel at large" and has an open brief.

13.13 Counsel often also has a role in advising the inquiry on legal issues. This function is similar to that of a legal assessor or adviser, appointed to advise "on matters of law, procedure, or evidence".[667] Sometimes, however, this role can be seen as conflicting with counsel's quasi-adversarial role before hearings by an inquiry.

13.14 Different inquirers will use counsel in different ways. Some inquirers have a hands-on approach to the proceedings, while others make more use of counsel to avoid having to descend into the fray themselves. The latter may avoid perceptions that the inquiry is assuming a partisan role, but may also import a particularly legalistic approach. Whatever approach is adopted it is important that there is a certain degree of distance between the counsel and the inquiry.[668] In particular, issues of fairness and transparency can arise where counsel gives advice to an inquiry before or during inquiries which is not disclosed to the participants if it has an impact on substantive findings. In the *Thomas* case, the Court of Appeal criticised the practice of counsel assisting retiring and deliberating with the Commission.[669] As noted, some statutes make it clear that a legal adviser to a decision-making body cannot be present during deliberations,[670] and this has been the subject of case law in the context of disciplinary bodies.[671]

13.15 In our draft report we suggested that the Solicitor-General should develop guidelines setting out the role of counsel assisting. Greater clarification of the role would benefit counsel assisting, inquirers, other counsel, and parties. It would be difficult and impractical to inflexibly cement a standard definition of counsel's role in legislation.[672] We suggested that the guidelines could follow the form and premise of the Solicitor-General's Prosecution Guidelines. We believe this is the best way to offer guidance to counsel assisting, while still allowing flexibility. The Solicitor-General has agreed to our proposal.

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666 Peter M Hall QC *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (Lawbook Co, Sydney, 2004) 673.

667 See for example, Health Practitioners Competence Assurance Act 2003, s 73(1). However, some jurisdictions refer to counsel's ability to examine and cross-examine witnesses: see Royal Commissions Act 1902 (Cth), s 6FA; Royal Commissions Act 1991 (ACT), s 33; Inquiries Act 1991 (ACT), s 25; Special Commissions of Inquiry Act 1983 (NSW), s 12(3); Royal Commissions Act 1923 (NSW), s 7(3); Commissions of Inquiry Act 1950 (Qld), s 21; Inquiry Rules 2006 (UK), r 10. Other Acts are silent as to the role of counsel assisting – Inquiries Act (NT); Royal Commissions Act 1917 (SA); Royal Commissions Act 1968 (WA).

668 *Bretherton v Kaye & Winneke* [1971] VR 111, 123.

669 *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, 273 (CA) Judgment of the Court: "after the Commission concluded its hearings, counsel who had assisted the Commission at the inquiry took part with the Commissioners in the conferences on the contents of the report, which were arrived at by a process of seeking consensus, and in the actual drafting of the report. When a Commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutors. It is not right that they should participate in the preparation of the report."

670 Health Practitioners Competence Assurance Act 2003, s 73(3).

671 See *Beautrais v Psychologists Board* (29 March 1996) HC AK HC.51/95 Williams J; *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29, 34–35 (SC) Speight J.

672 The Alberta Law Reform Institute considered the question and decided that the role of commission counsel should not be defined or regulated by legislation, Alberta Law Reform Institute *Proposals for Reform of the Public Inquiries Act* (Report 62, Edmonton, 1992) 93.

Chapter 14

Funding and administration

ADMINISTRATION

14.1 Our terms of reference ask us to consider the role of the secretariat for inquiries. As with many of the issues considered in this report, practice in administering inquiries can vary from inquiry to inquiry. As a matter of convention, inquiries – both those under the 1908 Act and ministerial inquiries – are usually overseen and funded through the Department of Internal Affairs (DIA), but practice varies.[673]

14.2 Locating inquiries in DIA offers advantages since it has acquired significant institutional knowledge and is frequently neutral to the matters being investigated. To illustrate, the appearance and reality of independence in the Cave Creek inquiry would have been difficult to maintain had the inquiry been overseen by the Department of Conservation. Absolute separation is not always necessary however. For example, DIA was responsible for overseeing the administration of the Local Government Rates Inquiry, chaired by David Shand,[674] although the Secretary for Internal Affairs is also the Secretary for Local Government.[675]

14.3 In the role of responsible department, DIA, where necessary, employs a manager for the inquiry and helps find premises, employ staff and establish the necessary infrastructure. To assist, DIA has published its guide, *Setting Up and Running Commissions of Inquiry*. Once the inquiry is established, DIA plays an ongoing role. The Department, through its Minister, can take requests for additional funding to Cabinet; and it can provide additional administrative and technological help, for instance in hosting the inquiry website. It also tends to play a significant role in the wind down of an inquiry once it has fulfilled its role (see chapter 6).

14.4 We have considered whether the Ministry of Justice, which administers most tribunals, might be a more natural home than DIA, but rejected this option because that agency is more likely to be involved in the subject matter of inquiries, and administration of inquiries differs from the administration of courts and tribunals.

673 The Department housed the rates inquiry (http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Agency-Independent-Inquiry-into-Local-Government-Rates-Index?OpenDocument (accessed 24 October 2007)), the Confidential Forum for Former In-Patients of Psychiatric Hospitals, and the Ministerial Review into Allegations of Abuse at the Regular Force Cadet School. However, both the Taito Phillip Field and John Tamihere inquiries were administered through the Department of Prime Minister and Cabinet.

674 Ibid.

675 Local Government Act 1974, s 2B.

Also, there was general consensus that DIA has performed its role very well. Furthermore, it usually has a neutral position on the subject-matter of inquiries and is well-placed to provide support without any appearance or reality of prejudice. We recommend that inquiries should continue to be overseen by DIA. However, there may be occasions where the subject of an inquiry is so connected to DIA's core business that a perception of bias could arise if it were responsible for overseeing an inquiry. In those circumstances, it should be possible for an alternative department to be appointed as the responsible department for that inquiry.

RECOMMENDATION

R64 Inquiries should be overseen by the Department of Internal Affairs unless another department is appointed to be the responsible department for that inquiry.

See draft Bill, clause 4.

FUNDING INQUIRIES

14.5 Inquiries are expensive enterprises. Among other things, funding is required for their personnel, including commissioners, administration, premises and hearings (if needed) and publication. To an extent, these costs are a justifiable trade off for the need for an independent investigation into a matter of public concern. The cost of an inquiry also needs to be measured against the financial and non-financial costs of not investigating a matter of public concern; hidden costs in having government departments or standing commissions investigate; costs of legal action that may be avoided; and future savings made by virtue of the implementation of an inquiry's recommendations. If they are properly used and set up, inquiries should be seen as a relatively inexpensive means of getting to the heart of an issue.[676]

14.6 However, cost containment has become a significant problem for inquiries. It is common for inquiries to exceed their initial deadlines,[677] and to require more funding than originally anticipated. Mounting costs appear to be a substantial reason for decision-makers' reluctance to set them up.

Departmental funding

14.7 The Department of Internal Affairs receives an approved budgeted amount for each inquiry it administers, as each is established. At present, any administrative costs that are incurred before this money becomes available or that fall outside the amount specifically budgeted must be absorbed from funding received by DIA for other aspects of its work. Where further funds are needed, DIA, on behalf of the inquiry, returns to Cabinet to request more money.

14.8 If, as suggested in this report, DIA's role in respect of inquiries is formalised and its responsibilities increased[678] it may be desirable for DIA to receive a specific allocation for inquiries.

676 See for example, Martin Bulmer "Increasing the Effectiveness of Royal Commissions: A Comment" 61 Public Administration 436.

677 See appendix E.

678 See for example Recommendation 26 that the department be responsible for maintaining detailed and informative websites for inquiries.

RECOMMENDATION

R65 If the Department of Internal Affairs' role in inquiries is formalised and its responsibilities increased, as suggested in this report, it may be desirable for the Department to receive a specific allocation for inquiries.

Funding and accountability

14.9 It can be difficult to accurately estimate the cost of an inquiry at its inception.[679] Cost will depend on matters such as the breadth and complexity of issues, the extent to which public hearings may be required, the number of participants, the need for separate premises, or a secretariat with research and administrative assistance. There may also be intervening court proceedings which cannot be predicted, but which incur significant expense and delay.

14.10 In setting up an inquiry both Treasury and the responsible department should be involved in making a realistic assessment of likely costs. The inquiry should have an obligation to work closely with the department to ensure that costs do not escalate unreasonably. Despite this, a near universal response about commissions of inquiry is that they cost a great deal of money, and that cost is a disincentive for their establishment. We have considered whether more can be done at an administrative level to ensure that costs can be kept in check, without compromising the inquiry's independence.

14.11 There is nothing to prevent a Government refusing to provide additional funds when an inquiry exceeds its budget,[680] but refusing to do so will often defeat the purpose for which the inquiry was set up and open the Government up to political criticism for interfering with the independence of the inquiry.

14.12 In the United Kingdom, a particular Minister is responsible for the expenses incurred by an inquiry.[681] Where he or she believes that the inquiry is acting outside their terms of reference and has given notice of this belief to the chair, the Minister is not obliged to meet the inquiry's expenses.[682]

14.13 We do not believe such provisions are helpful, but inquiries must be fiscally accountable. Through its normal processes, the Department of Internal Affairs monitors an inquiry's progress and budget in a manner that is separate from the substantive issues of the inquiry.

14.14 The United Kingdom's Inquiries Act 2005 also provides that "In making any decision as to the procedure or conduct of an inquiry, the chairman must act … with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."[683]

679 Mervyn Probine, above n 605, 30.

680 In Australia, the federal government refused additional funding for the Royal Commission into Agent Orange. The findings of this commission have subsequently come under criticism: see Scott Prasser "Public Inquiries: Their Use and Abuse" (1992) Current Affairs Bulletin 4, 5.

681 Inquiries Act 2005 (UK), s 39.

682 Ibid, s 39(4) and (5).

683 Ibid, s 17(3).

14.15 It is important that inquiries are able to act independently and without unnecessary constraints. However, independence does not require that inquiries should have an open cheque book. Decisions made by an inquiry can have a significant impact on the costs incurred. On reflection, we suggest that a formulation like the United Kingdom provision should be included in the new Act. We note, however, that this recommendation was not included in our draft report and has not been consulted on.

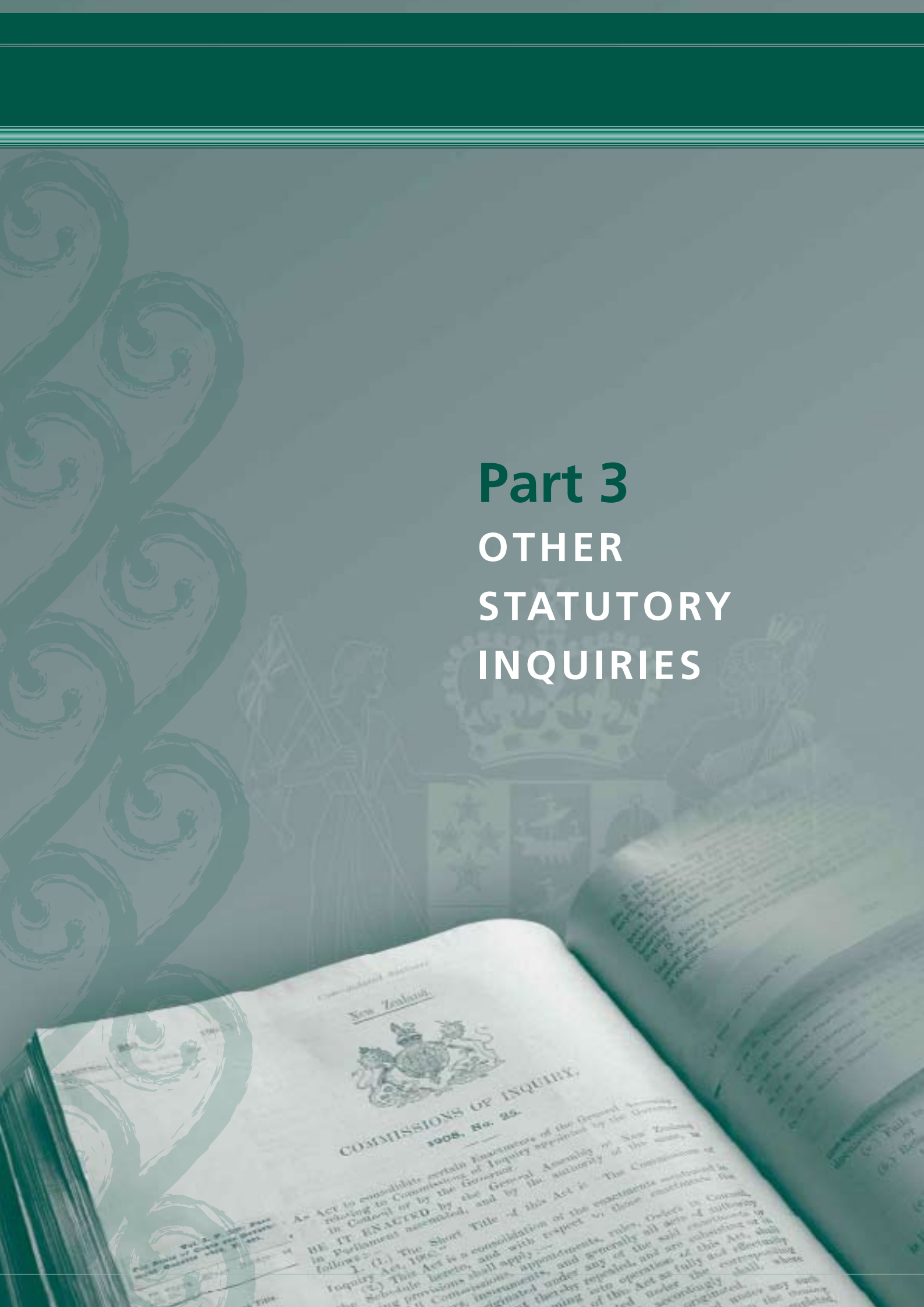
RECOMMENDATION

R66 The new Act should provide that in making a decision as to the conduct of an inquiry, an inquiry must have regard to the need to avoid unnecessary delay or cost, whether to public funds or to witnesses or other persons participating in the inquiry.

See draft Bill, clause 13.

Part 3

OTHER STATUTORY INQUIRIES



Chapter 15

Other inquiry bodies and the status of the 1908 Act

USE OF THE 1908 ACT TO INCORPORATE POWERS BY REFERENCE

15.1 The 1908 Act has served as a convenient drafting tool for giving powers to other bodies with investigatory, regulatory or adjudicative functions. The practice has developed whereby the legislation establishing a tribunal or other investigative body often gives it some or all of the powers of a commission of inquiry, or deems it to be a commission of inquiry. Alternatively, some Acts state that the Minister, Governor-General, or other person can appoint a commission under the 1908 Act.

15.2 In this way, bodies such as the Waitangi Tribunal and Broadcasting Standards Authority take their powers to conduct inquiries or hearings by reference to the 1908 Act. By way of example, s 12M(6) of the Social Security Act 1964 provides that the Social Security Appeal Authority:

> … shall, within the scope of its jurisdiction, be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and subject to the provisions of this Act, all the provisions of the Act, except sections 2, 10, 11, and 12, shall apply accordingly.[684]

15.3 Around 66 bodies, agencies or persons are given powers in this way.[685] The bodies are listed below, and are variously:

- one-off bodies or officers who may be given powers to inquire and report, or investigate;
- statutory standing commissions, authorities or officers;
- adjudicative bodies, some of which fall within the scope of the Law Commission's current review of tribunals (marked with an asterisk in the table below).[686]

684 Sections 11 and 12 relate to costs orders and are frequently omitted.

685 These bodies are listed in Schedule 1 of the draft Bill.

686 The Law Commission and Ministry of Justice are currently undertaking a review of New Zealand's tribunals. At the time of publication of this report, the review team had identified a list of bodies that they were treating as tribunals for the purpose of the project. However this list is subject to change. The review will consider the powers and procedures used by the tribunals within their scope. Not all the tribunals within the review take their powers from the 1908 Act.

ENTITIES THAT TAKE POWERS BY REFERENCE TO THE 1908 ACT	
Statute	Entity
Biosecurity Act 1993, Sch 2, cl 5	Boards of Inquiry appointed to inquire into and report on proposals for a pest management strategy
Broadcasting Act 1989, s 12	Broadcasting Standards Authority
Cadastral Survey Act 2002, s 40	*Cadastral Surveyors Licensing Board
Charitable Trusts Act 1957, s 58	Inquiries appointed into the condition and management of charities
Companies (Bondholders Incorporation) Act 1934–35, s 12	Bondholders Incorporation Commission
Electricity Act 1992, s 136	*Electrical Workers Registration Board
Engineering Associates Act 1961, s 25	*Engineering Associates Appeal Tribunal
Environment Act 1986, s 16	Parliamentary Commissioner for the Environment
Fire Service Act 1975, s 86	Inquiries appointed as to fires
Fisheries Act 1996, ss 181, 121	Inquiries by "tribunal" into submissions and objections and inquiries into complaints against fishery officers
Forest and Rural Fires Act 1977, ss 59, 64A	Inquiries appointed as to fires and Rural Fire Mediators deemed to be COI
Gambling Act 2003, s 225	Gambling Commission
Hawke's Bay Earthquake Act 1931, s 43	Investigations by committee into applications for assistance
Hazardous Substances and New Organisms Act 1996, ss 3, 61	Environmental Risk Management Authority and inquiries into incidents involving any hazardous substance under the control of the Minister of Defence, where the incident is not being investigated under the Armed Forces Discipline Act 1971
Health Act 1956, s 124	*Boards of Appeal
Health and Safety in Employment Act 1992, s 27	Inquiries into cause of accidents
Immigration Act 1987, ss 129P, Sch 2, cl 7, Sch 3C, cl 7	*Deportation Review Tribunal and Refugee Status Appeals Authority[687]
Independent Police Conduct Authority Act 1988, s 23	Independent Police Conduct Authority
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 101	Inquiries by district inspector
Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 26	Judicial Conduct Panel
Land Drainage Act 1908, ss 15, 65	Commissions appointed to fix costs of works and commissions appointed to make decisions on united districts

687 Both these tribunals are due to be replaced by the proposed Immigration and Protection Tribunal, which will not have the powers of a commission of inquiry. See Immigration Bill 2007, cl 193.

ENTITIES THAT TAKE POWERS BY REFERENCE TO THE 1908 ACT *(CONTINUED)*	
Statute	Entity
Land Drainage Amendment Act 1913, s 6	Inquiries into alteration of district boundaries
Land Drainage Amendment Act 1922, s 2	Inquiries into constitution of districts
Land Valuation Proceedings Act 1948, s 19	*Land Valuation Tribunals
Legal Services Act 2000, s 99	Legal Services Agency
Local Government Act 2002, s 34 and Sch 15, cl 7	Local Government Commission and Review Authority
Māori Reserved Land Act 1955, s 74	Valuation Appeal Committee
Maritime Transport Act 1994, ss 58, 235, Sch 2, cl 10	Director of Maritime NZ and *Maritime Appeal Authority
Mental Health (Compulsory Assessment and Treatment) Act 1992, s 95, 104	Inquiries by district inspector and *Mental Health Review Tribunal
Mortgagors and Lessees Rehabilitation Act 1936, s 24	Adjustment Commissions
New Zealand Public Health and Disability Act 2000, s 71	Commission appointed by Minister
Niue Act 1966, s 75	Commissioners able to examine witnesses
Petroleum Demand Restraint Act 1981, s 4	Tribunal established by regulations may be deemed to be a commission of inquiry
Plumbers, Gasfitters, and Drainlayers Act 2006, s 118	*Plumbers, Gasfitters and Drainlayers Board
Police Act 1958, s 122[688]	Inquiry into misconduct
Private Investigators and Security Guards Act 1974, s 10	*Registrar of Private Investigators and Security Guards
Remuneration Authority Act 1977, s 25	Remuneration Authority
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915, s 38	Commission appointed by Minister
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1917, ss 61, 110, 129, Sch 5, cl 9	Commissions appointed by Governor-General
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1920, ss 91, 108	Commissions appointed by Governor-General
Resource Management Act 1991, s 41	Local Authority, Consent Authority or person given authority to conduct hearings
River Boards Amendment Act 1913, s 4	Commission appointed by Governor-General
Rotorua Borough Act 1922, s 10	Commission appointed by Governor-General
Sale of Liquor Act 1989, s 110	District Licensing Agencies and *Liquor Licensing Authority
Secondhand Dealers and Pawnbrokers Act 2004, s 27	*Licensing Authority
Shipping Act 1987, s 5	Minister when investigating suspected unfair practices
Social Security Act 1964, s 12M	*Social Services Appeal Authority
Soil Conservation and Rivers Control Act 1941, s 33A	Minister or Soil Conservation and Rivers Control Tribunal appointed by Minister

688 If the Policing Bill 2007 becomes law, this power, and the Police Act 1958, will be repealed.

ENTITIES THAT TAKE POWERS BY REFERENCE TO THE 1908 ACT *(CONTINUED)*	
Statute	Entity
Soil Conservation and Rivers Control Amendment Act 1946, s 9	Commission appointed by Governor-General
State Sector Act 1988, s 25, 26	State Services Commissioner
Taupiri Drainage and River District Act 1929, s 3, 11	Commissions to divide district into subdivisions and to hear appeals against Board's apportionment of cost scheme
Taxation Review Authorities Act 1994, s 15	*Taxation Review Authority
Temporary Safeguard Authorities Act 1987, s 4	Temporary Safeguard Authorities
Transport Accident Investigation Commission Act 1990, s 11	Transport Accident Investigation Commission
Treaty of Waitangi Act 1975, Sch 2, cl 8	Waitangi Tribunal
Veterinarians Act 2005, s 48	*Veterinary Council of New Zealand
War Pensions Act 1954, s 13	*War Pensions Appeal Boards

THE 1908 ACT AND FURTHER REVIEW

15.4 As is evident, the 1908 Act has been used very widely as a drafting tool, and for a very diverse range of entities. There is no apparent rationale for referring to the 1908 Act powers for some bodies but not for others. For example, the Veterinarians Act 2005 gives the Veterinary Council of New Zealand the powers of a commission of inquiry for the purposes of disciplinary hearings.[689] However, the powers of professional conduct boards under the Health Practitioners Competence Assurance Act 2003 (which replaced legislation regulating most medical disciplines) are set out in full in that Act. A peculiar framework appears in the New Zealand Public Health and Disability Act 2000. Section 71 allows the Minister to appoint one or more persons as a commission to conduct an inquiry or investigation into the funding or provision of health services, the management of any publicly-owned health and disability organisation, or complaints or matters arising under the Act. However, ss 72 to 86 provide for a similar, but more tailored form of inquiry for essentially the same purposes.

15.5 The entities set out above vary widely in their scope and frequency of use. In some cases the 1908 Act powers are rarely, if ever, used by the bodies in question (for example, Temporary Safeguard Authorities), or have been included in an Act with a very narrow, and presumably exhausted, remit (for example the River Boards Amendment Act 1913; Rotorua Borough Act 1922); whereas other bodies use them on an almost daily basis (for example, the Social Security Appeals Authority).

15.6 The practice has also been for law-makers to pick and choose from the menu of provisions in the 1908 Act. Sometimes all of the powers of a commission of inquiry are incorporated and sometimes only the investigative powers. Frequently, the costs powers in ss 11 and 12 of the Act are excluded. It is also common for the legislation to supplement or modify the powers taken from the 1908 Act. For example, some bodies have additional powers of seizure.[690] This results in something of a hybrid.

689 Except the costs provisions of the 1908 Act: Veterinarians Act 2005, s 48.

690 See Transport Accident Investigation Commission Act 1990, s 12(1)(d) and Maritime Transport Act 1994, s 59(b). These bodies have the powers for different purposes – to investigate the cause of accidents in the former case, and for regulatory purposes in the latter.

15.7 Our recommendation that the 1908 Act be replaced by a new Inquiries Act has significant implications for these entities. As can be seen, the Act has an existence that extends far beyond the one-off commissions of inquiry that it caters for on its face. As a result, we consider that there is no option but to leave it in force for the purpose of all those bodies. We have rejected the idea that they could take their powers from the proposed Inquiries Act, which is directed at one-off inquiries of a general nature. Its provisions are not necessarily appropriate for bodies exercising regulatory, disciplinary or adjudicative functions.[691] In general, we think that such incorporation of powers by reference is undesirable. It renders the law less accessible to the public, and can cause difficulty where the analogy between a tribunal or other body, and an inquiry is not exact.

15.8 We recommend, however, that sections 2 and 15 of the 1908 Act – which provide for the establishment of commissions of inquiry and royal commissions under the Act – must be repealed to enable public inquiries and government inquiries to properly replace commissions.

15.9 In addition, review of all the entities set out in the table above must take place in a timely manner to determine what law changes need to be made to enable the final repeal of the 1908 Act. To ensure that such a review takes place, we recommend that the Government considers giving the Law Commission a further reference for this purpose. In addition, we have included a review provision in the draft Bill to the effect that a review of those entities must take place within 5 years of the commencement of a new Inquiries Act.[692]

OTHER STATUTORY INQUIRIES

15.10 At least a further 12 Acts provide for the establishment of inquiries with coercive powers that are identical or similar to those under the 1908 Act:

Children's Commissioner Act 2003, s 12

Electricity Act 1992, s 18

Gas Act 1992, s 19

Hazardous Substances and New Organisms Act 1996, s 11(1)(e)

Health and Disability Commissioner Act 2004, s 14(1)(e)

Human Rights Act 1993, s 5

Inspector-General of Intelligence and Security Act 1996, s 11

New Zealand Public Health and Disability Act 2000, s 72

Ombudsmen Act 1975, s 13(3)

Independent Police Conduct Authority Act 1988, s 12

Privacy Act 1993, s 13(1)(m)

Public Audit Act 2001, s 18(1)

691 Case law shows the confusion that can arise, depending on the different nature of the bodies, in particular whether or not they are adjudicative. See paragraphs 5.29–5.33, above relating to the use by adjudicative bodies of the power in s 4C(3) of the 1908 Act. The provision sets out a commission's power to make information available to participants in an inquiry, whereas the cases have sought to interpret the provision in the context of more traditionally adversarial processes.

692 As noted, the Law Commission is already undertaking a review of tribunals. Their use of the provisions of the 1908 Act will form part of that review. Some of the other Acts are also under review by the Law Commission or other agencies at present: the Law Commission is reviewing the War Pensions Act 1954. NZ Police have been leading a review of the Police Act 1958 and a new Policing Bill is now before Parliament. The Department of Labour is undertaking a review of the Immigration Act 1987 and a new Immigration Bill is also before Parliament.

15.11 The general proliferation of inquiry provisions on the statute book suggests that a whole of government approach has been lacking. We suggest that some rationalisation of these inquiries is needed. Review of the various inquiry powers on the statute book could also form part of a further Law Commission reference.

RECOMMENDATION

R67 (a) Sections 2 and 15 of the 1908 Act should be repealed.

(b) The remainder of the 1908 Act should remain in force but a review of the statutory entities that take their powers from 1908 Act, including those set out in Schedule 1 of the draft Bill, must take place to enable the 1908 Act to be finally repealed. The new Act should contain a review provision to this effect.

(c) The Government should consider giving the Law Commission a further reference to review the powers needed by those bodies and to rationalise the various inquiry powers on the statute book.

See draft Bill, clauses 36, 37 and Schedule 1.

Draft Inquiries Bill

Inquiries Bill

Draft prepared by Parliamentary Counsel for the
New Zealand Law Commission

Inquiries Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Inquiries Act **2008**.

2 Commencement

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

Part 1
Preliminary provisions

3 Purpose

(1) The purpose of this Act is to reform and modernise the law relating to inquiries, by—

(a) providing for the establishment of both public and government inquiries to inquire into matters of public importance; and

(b) enabling those inquiries to be carried out effectively, efficiently, and fairly.

(2) The Act therefore sets out, in relation to any inquiry set up under this Act,—

(a) how an inquiry and its members are to be appointed; and

(b) the powers, duties, and privileges of an inquiry and the immunities that apply to the inquiry and its members; and
(c) the protection available for witnesses and counsel appearing before an inquiry; and
(d) the principles governing the procedure of an inquiry, including those relating to evidential matters; and
(e) provision for recourse to the court by, or in relation to, an inquiry; and
(f) sanctions that may be applied by or on behalf of an inquiry.

(3) The Act also makes provision for—
(a) the repeal of sections 2 and 15 of the Commissions of Inquiry Act 1908, which provide, respectively, for the appointment of a commission of inquiry and the extension of that Act to commissions appointed under other Acts or under the Letters Patent; and
(b) the continuing application of the remaining provisions of the Commissions of Inquiry Act 1908 in specified circumstances.

4 Interpretation

In this Act, unless the context otherwise requires,—

appointing Minister means a Minister of the Crown who establishes a government inquiry under **section 6(2)**

core participant has the meaning it is given in **section 17**

document has the same meaning that it is given in section 4(1) of the Evidence Act 2006

government inquiry means an inquiry established under **section 6(2)**

inquiry means both a public inquiry and a government inquiry, as provided for by **section 6**

member means a member of an inquiry established under **section 6**

officer of an inquiry means a person who is engaged to work for an inquiry

public inquiry means an inquiry established under **section 6(1)**

responsible department means the Department of Internal Affairs unless, in relation to a particular inquiry, another department of State is appointed, under the terms of reference for that inquiry, to be the responsible department for that inquiry

responsible Minister means either—

(a) the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of the responsible department; or

(b) a Minister of the Crown appointed to be the Minister responsible for a particular inquiry.

5 Act binds the Crown

This Act binds the Crown.

Part 2
Establishment and membership of inquiry

6 Establishment of inquiry

(1) The Governor-General may, by Order in Council, establish a public inquiry for the purpose of inquiring into, and reporting on, any matter of public importance.

(2) A Minister may, by notice in the *Gazette*, establish a government inquiry for the purpose of inquiring into, and reporting on, any matter of public importance.

(3) In establishing an inquiry under **subsection (1) or (2)**, the Order in Council or *Gazette* notice, as the case may be, must specify—

(a) the matter of public importance that is the subject of the inquiry; and

(b) 1 or more persons appointed to be members of the inquiry; and

(c) if more than 1 person is appointed to the inquiry, the person who is to be the chairperson of the inquiry; and

(d) the terms of reference for the inquiry, including any directions as to—

(i) the events or matters that are relevant to the inquiry; and

(ii) the dates, persons, and locations that are relevant to those events; and
(iii) whether any part or aspect of the inquiry is to be restricted from public access; and
(iv) the date by which the inquiry must complete its inquiry and submit a report under **section 11**; and
(v) any other administrative or procedural matters.

7 Removal from office

(1) The Governor-General may, by Order in Council, remove any member of a public inquiry from office.

(2) The appointing Minister may, by notice in the *Gazette*, remove any member of a government inquiry from office.

(3) A member of an inquiry may only be removed under **subsection (1) or (2)**, as the case may be, if the member—
(a) has, since his or her appointment, been guilty of misconduct; or
(b) is unable to perform the functions of office; or
(c) has neglected his or her duty.

8 Vacancy in membership of inquiry

(1) If 1 or more members of an inquiry are, for any reason, unable to continue in office, the responsible Minister or appointing Minister, as the case may be, must consult with any remaining members of the inquiry as to how the inquiry should proceed.

(2) After consultation has been undertaken, as required by **subsection (1)**,—
(a) the responsible Minister or appointing Minister, as the case may be, may require the inquiry to continue to perform its functions, despite the vacancy in its membership; or
(b) a person may be appointed to be a replacement member, in accordance with **section 6**; or
(c) the inquiry may be terminated,—
(i) in the case of a public inquiry, by the Governor-General by Order in Council; or
(ii) in the case of a government inquiry, by the appointing Minister, by notice in the *Gazette*.

(3) The power under **subsection (2)(a) or (b)** must not be exercised if to do so would be contrary to the principles of natural justice.

Part 3
Duties, powers, immunities, and privileges

Duties and powers of inquiry generally

9 Inquiry must act independently, impartially, and fairly

In exercising its powers and performing its duties under this Act, an inquiry and each of its members must act independently, impartially, and fairly.

10 Limits to scope of power of inquiry

(1) An inquiry has no power to determine the civil, criminal, or disciplinary liability of any person.

(2) **Subsection (1)** does not prevent an inquiry, in exercising its powers and performing its duties under this Act, from making—

(a) findings of fault; or

(b) recommendations that further steps be taken to determine liability.

Reporting obligation

11 Reporting by inquiry

(1) Every inquiry must, in accordance with any requirements of the terms of reference for the inquiry, prepare a final report and present it,—

(a) in the case of a public inquiry, to the Governor-General; and

(b) in the case of a government inquiry, to the appointing Minister.

(2) The final report of an inquiry must set out—

(a) the findings of the inquiry; and

(b) any recommendations of the inquiry.

(3) The final report of a public inquiry must be presented by the responsible Minister to the House of Representatives as soon

as practicable after the inquiry has reported under **subsection (1)**.

Counsel assisting

12 Counsel to assist inquiry

(1) If it is considered appropriate to do so, the Solicitor-General, after consulting the inquiry, may appoint counsel—

(a) to assist the inquiry, either generally or in relation to a particular matter:

(b) to advise the inquiry on matters of law, procedure, or evidence.

(2) The Solicitor-General must—

(a) set the terms and conditions of any appointment made under **subsection (1)**; and

(b) approve payment of counsel in accordance with those terms.

Powers and duties of inquiry relating to procedure

13 Regulation of inquiry procedure

(1) An inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified—

(a) by this Act; or

(b) in the terms of reference of the inquiry.

(2) In making a decision as to the procedure or conduct of an inquiry, an inquiry must—

(a) not act inconsistently with the rules of natural justice; and

(b) have regard to the need to avoid unnecessary or delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.

(3) Without limiting **subsections (1) and (2)**, an inquiry may determine matters such as—

(a) whether to conduct interviews, and if so, who to interview:

(b) whether to call witnesses, and if so, who to call:

(c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held:

(d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry:
(e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions:
(f) whether to allow or restrict cross-examination of witnesses.

14 Power to impose restrictions on access to inquiry

(1) An inquiry may, at any time, make orders to—
(a) forbid publication of—
(i) the whole or any part of any evidence or submissions presented to the inquiry:
(ii) any report or account of the evidence or submissions:
(iii) the name of any witness or any name or particulars likely to lead to the identification of a witness:
(iv) any rulings of the inquiry:
(b) restrict public access to any part or aspect of the inquiry:
(c) hold the inquiry, or any part of it, in private.

(2) Before making an order under **subsection (1)**, an inquiry must take into account the following criteria:
(a) the risk of prejudice to public confidence in the proceedings of the inquiry; and
(b) the need for the inquiry to ascertain the facts properly; and
(c) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and
(d) the privacy interests of any individual; and
(e) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under **subsection (1)**.

15 Power to postpone or temporarily suspend inquiry

(1) An inquiry may, after consultation with the responsible Minister or appointing Minister, as the case may be, postpone or temporarily suspend the inquiry if—

(a) another investigation is being, or is likely to be, carried out into matters relating to the inquiry; and

(b) the inquiry is satisfied that to commence or continue the inquiry would be likely to prejudice—

(i) the investigation referred to in **paragraph (a)**; or

(ii) any person interested in that investigation.

(2) The inquiry must commence or continue when it is satisfied that to do so would no longer prejudice the other investigation or any person interested in it.

16 Application of principles of natural justice

An inquiry must not, in its report, make any finding that is adverse to any person (whether a natural person or a body corporate), unless the inquiry has—

(a) taken all reasonable steps to—

(i) give that person reasonable notice of the intention to make the finding; and

(ii) disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based; and

(iii) give that person a reasonable opportunity to respond to the proposed finding; and

(b) properly considered any response given under **paragraph (a)(iii)**.

Persons participating in inquiry

17 Designation of core participants

(1) At any time an inquiry may, by written notice, designate any person to be a core participant in the inquiry.

(2) In determining whether to designate a person as a core participant, an inquiry must consider whether that person—

(a) played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates:

(b) has a significant interest in a substantial aspect of the matters to which the inquiry relates:

(c) may be subject to explicit or serious criticism during the inquiry or in the report.

10

(3) Every person designated as a core participant has the right to give evidence and make submissions to the inquiry, subject to any directions of that inquiry as to the manner in which evidence is to be given and submissions made.

Legal representation

18 Recommendation as to legal representation

(1) An inquiry may, at any time, make a recommendation to the chief executive of the responsible department that funding be granted to assist with the provision of legal representation for specified persons required to appear before the inquiry.

(2) In determining whether to make a recommendation under **subsection (1)**, the inquiry must consider—

(a) the likelihood of hardship to the person if assistance with the provision of legal representation is declined; and

(b) the nature and significance of the evidence or submissions that the person will, or is likely to, give; and

(c) the extent to which legal representation is, or is likely to be, required to enable the inquiry to fulfil its purpose; and

(d) any other matters relating to the public interest.

(3) If a recommendation is made under **subsection (1)**, the chief executive may—

(a) grant funding for legal representation recommended under that subsection; and

(b) impose any conditions that he or she considers appropriate.

Evidential matters

19 Evidence

An inquiry may, for the purposes of its inquiry,—

(a) receive any evidence that, in its opinion, may assist it to deal effectively with the subject of the inquiry, whether or not the evidence would be admissible in a court of law; and

(b) take evidence on oath or affirmation, and for that purpose an oath or affirmation may be administered by any member of the inquiry; and

(c) permit a witness to give evidence by any means, including by written or electronic means, and require the witness to verify the evidence by oath or affirmation.

20 Powers to obtain information

An inquiry may, as it thinks appropriate for the purposes of the inquiry,—

(a) require any person to—

(i) produce any documents or things in that person's possession or control or copies of those documents or things:

(ii) allow copies or representations of those documents or things to be made:

(iii) provide information to the inquiry, in a form approved by the inquiry:

(iv) verify by statutory declaration any written information, copies of documents, or representations of things provided to the inquiry:

(b) examine any document or thing that is produced by a witness:

(c) examine any document or thing for which privilege or confidentiality is claimed, or refer the document or thing to an independent person or body, to determine whether—

(i) the person claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality; or

(ii) the document or thing should be disclosed.

21 Delegation

An inquiry may delegate in writing to an officer of the inquiry the powers of the inquiry under **sections 19(b) and 20(b)**.

22 Disclosure of evidence

(1) An inquiry—

(a) may, on its own initiative or on the application of another person, order any person to disclose to any person participating in the inquiry any specified document, information, or thing that the person has produced before the inquiry; but

(b) must not make orders for general discovery.

(2) An order given under **subsection (1)(a)** may impose appropriate terms and conditions in relation to—

(a) any disclosure required under that subsection; and

(b) the use that may be made of the information, documents, or things required to be disclosed.

23 Power to summon witnesses

(1) An inquiry may issue a witness summons in writing to any person, requiring that person to attend and give evidence before the inquiry.

(2) The witness summons must state—

(a) the place where, and the date and time when, the person is to attend; and

(b) the documents or things in that person's possession or control that he or she is required to produce to the inquiry; and

(c) the person's entitlement to be paid costs and travelling expenses, in accordance with **section 25**; and

(d) the penalty for failing to attend.

24 Service of summons to witnesses

(1) Unless a witness has consented to service by another means, a summons must be served personally on that witness by delivering a sealed copy of the summons to the witness not later than 24 hours before the witness must attend the inquiry.

(2) Despite **subsection (1)**, an inquiry may direct substituted service in accordance with the High Court Rules.

25 Expenses of witnesses

(1) Persons summoned to attend an inquiry as witnesses are entitled to be paid for their reasonable costs and travelling expenses, at the level determined by the inquiry.

(2) The payment required by **subsection (1)** must be made, if the witness is summoned—

(a) by an inquiry on its own initiative, by that inquiry; or

(b) by an inquiry on the application of any person participating in the inquiry, by that person, unless the inquiry itself agrees to do so.

Immunities and privileges

26 Immunity of inquiry

(1) This section applies to an inquiry, each member of the inquiry, and an officer of an inquiry acting under a delegation made under **section 21**.

(2) Neither an inquiry nor any person to whom this section applies—

(a) is liable for anything done, reported, stated, or omitted in the exercise or intended exercise of the powers and performance or intended performance of the duties of the inquiry, unless the inquiry or person acted in bad faith; or

(b) may be compelled to give evidence in court or in any proceedings of a judicial nature in relation to the inquiry, unless leave of the court is granted to bring proceedings relating to an allegation of bad faith against the inquiry or any person to whom this section applies.

27 Immunities and privileges of witnesses and counsel

(1) Witnesses participating in an inquiry have the same immunities and privileges as if they were appearing in civil proceedings and the provisions of subpart 8 of Part 2 of the Evidence Act 2006 apply to the inquiry, to the extent that they are relevant, as if—

(a) the inquiry were a civil proceeding; and

(b) every reference to a Judge were a reference to an inquiry.

(2) Counsel appearing before an inquiry have the same immunities and privileges as they would have if appearing before a court.

Part 4
Sanctions and miscellaneous matters

Subpart 1—Sanctions able to be imposed by or on behalf of inquiry

Orders for award of costs

28 Award of costs

(1) An inquiry may, on its own initiative or on the application of any person, by order make an award of costs against any person participating in, or summoned to appear before, the inquiry if it is satisfied that the conduct of the person against whom the order is made has unduly lengthened or obstructed the inquiry or has added undue cost to the inquiry.

(2) **Subsection (1)** applies whether or not an inquiry holds any hearings.

(3) An inquiry may—

(a) set the award of costs at any level it thinks reasonable, having regard to all the circumstances; and

(b) require the costs to be paid, in whole or in part—

(i) to the inquiry; or

(ii) to 1 or more persons who participated in the inquiry; or

(iii) to both, in the proportion specified in the order.

(4) An order for an award of costs made under this section, if filed in the registry of any court of competent jurisdiction, becomes enforceable as a judgment of that court in its civil jurisdiction.

Offences and penalties

29 Offences

(1) Every person commits an offence who intentionally—

(a) fails to attend the inquiry in accordance with the notice of summons:

(b) refuses to be sworn or to affirm and give evidence:

(c) fails to produce any document or thing required by order of the inquiry:

(d) destroys evidence or obstructs or hinders any person authorised to examine, copy, or make a representation of a document or thing required by order of an inquiry:

(e) fails to comply with a procedural order or direction of an inquiry, including an order made under **section 14(1)**:
(f) disrupts the proceedings of an inquiry:
(g) prevents a witness from giving evidence or threatens or seeks to influence a witness before an inquiry:
(h) provides false or misleading information to an inquiry:
(i) threatens or intimidates an inquiry, a member of an inquiry, or an officer of an inquiry.

(2) However, a person does not commit an offence under **subsection (1)(a) to (e)** if—
(a) compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel, were that person giving evidence or acting as counsel in civil proceedings before a court; or
(b) compliance is prevented by an enactment, rule of law, or order of a court prohibiting or restricting disclosure, or the manner of disclosure, of any document, information, or thing; or
(c) compliance would be likely to prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences, including the right to a fair trial.

30 Penalties

Every person who commits an offence against **section 29(1)** is liable, on summary conviction, to a fine not exceeding $10,000.

Contempt against inquiry

31 Contempt proceedings

(1) The Solicitor-General, on his or her own initiative or at the request of an inquiry, may commence proceedings in the High Court for contempt of an inquiry.

(2) In determining any proceedings commenced under **subsection (1)**, the court may make any orders that it considers necessary and just to enable the inquiry to fulfil its purpose.

Subpart 2—Miscellaneous matters

Official Information Act 1982 and Public Records Act 2005

32 Application of Official Information Act 1982

(1) When an inquiry has reported in accordance with **section 11**, all documents created by the inquiry or received in the course of the inquiry are, except as set out in **subsection (2)**, official information for the purposes of the Official Information Act 1982.

(2) However, the following are not official information for the purposes of the Official Information Act 1982:

(a) any evidence or submissions subject to an order under **section 14(1)**:

(b) any documents that relate to the internal deliberations of the inquiry and are—

(i) created by a member of an inquiry in the course of the inquiry; or

(ii) provided to the inquiry by an officer of the inquiry.

33 Application of Public Records Act 2005

(1) All documents and things created by an inquiry or received in the course of an inquiry—

(a) are public records for the purposes of the Public Records Act 2005; and

(b) when the inquiry has reported in accordance with **section 11**, must be transferred by the responsible department, after consultation with the inquiry, to Archives New Zealand for management in accordance with the Public Records Act 2005.

(2) If any documents or things are classified as restricted access records within the meaning of the Public Records Act 2005, the responsible department, after consultation with the inquiry, must specify the date on which that classification must be withdrawn.

Court proceedings

34 Reference of questions of law to High Court

(1) An inquiry may, at any time, state a case to the High Court on any question of law arising in any matter before the inquiry.

(2) If an inquiry exercises the power under **subsection (1)**, it may either—

(a) continue the inquiry, pending the decision of the High Court; or

(b) adjourn the inquiry until that court has delivered its decision.

(3) A question referred to the High Court under this section must be in the form of a case stated,—

(a) as consulted on and agreed by the core participants and the members of the inquiry; or

(b) if there is no agreement or there are no core participants, as settled by the inquiry.

(4) The decision of the High Court is final and binding on an inquiry and on all persons participating in the inquiry.

35 Inquiry to be cited in judicial review proceedings

In any application for judicial review of an inquiry under this Act, the inquiry, and not the chairperson or members of that inquiry, must be cited as the respondent.

Review required

36 Review of continuing application of Commissions of Inquiry Act 1908

(1) Not later than 5 years after the commencement of this Act, the Minister of the Crown who, under the authority of a warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act must ensure that a review is commenced, in relation to the entities referred to in **section 38(b)**, to consider—

(a) what powers each entity requires to carry out its functions and duties; and

(b) what changes to the law are necessary to replace any powers an entity derives from the Commissions of Inquiry Act 1908.

(2) The purpose of the review required by this section is to permit the repeal of the remaining provisions of the Commissions of Inquiry Act 1908.

Repeal, transitional provisions, and consequential amendments

37 Commissions of Inquiry Act 1908

Sections 2 and 15 of the Commissions of Inquiry Act 1908 are repealed.

38 Transitional provision

The Commissions of Inquiry Act 1908 continues to apply to—

(a) any commission of inquiry or Royal Commission appointed under that Act that has not completed its functions and obligations before the commencement of this Act; and

(b) any entity that is or may be established under an enactment enacted before the commencement of this Act, including those listed in **Schedule 1**, and that derives powers from the Commissions of Inquiry Act 1908.

39 Consequential amendments to other Acts

The Acts specified in **Schedule 2** are amended in the manner indicated in that schedule.

Schedule 1

s 38(b)

Acts under which entities have been, or may be, set up and to which Commissions of Inquiry Act 1908 applies

Act under which commission of inquiry powers derived	Relevant provisions
Biosecurity Act 1993	cl 5 of Schedule 2
Broadcasting Act 1989	s 12
Cadastral Survey Act 2002	s 40
Charitable Trusts Act 1957	s 58
Companies (Bondholders Incorporation) Act 1934–35	s 12
Electricity Act 1992	s 136
Engineering Associates Act 1961	s 25
Environment Act 1986	s 16
Fire Service Act 1975	s 86
Fisheries Act 1996	ss 181, 221
Forest and Rural Fires Act 1977	ss 59, 64A
Gambling Act 2003	s 225
Hawkes Bay Earthquake Act 1931	s 43
Hazardous Substances and New Organisms Act 1996	ss 3, 61
Health Act 1956	s 124
Health and Safety in Employment Act 1992	s 27

Act under which commission of inquiry powers derived	Relevant provisions
Immigration Act 1987	s 129P, cl 7 of Schedule 2, and cl 7 of Schedule 3C
Independent Police Conduct Authority Act 1988	s 23
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003	s 101
Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004	s 26
Land Drainage Act 1908	ss 15, 65
Land Drainage Amendment Act 1913	s 6
Land Drainage Amendment Act 1922	s 2
Land Valuation Proceedings Act 1948	s 19
Legal Services Act 2000	s 99
Local Government Act 2002	s 34, and cl 7 of Schedule 15
Maori Reserved Land Act 1955	s 74
Maritime Transport Act 1994	ss 58, 235, and cl 10 of Schedule 2
Mental Health (Compulsory Assessment and Treatment) Act 1992	ss 95, 104
Mortgagors and Lessees Rehabilitation Act 1936	s 24
New Zealand Public Health and Disability Act 2000	s 71

Act under which commission of inquiry powers derived	**Relevant provisions**
Niue Act 1966	s 75
Petroleum Demand Restraint Act 1981	s 4
Plumbers, Gasfitters, and Drainlayers Act 2006	s 118
Police Act 1958	s 12
Private Investigators and Security Guards Act 1974	s 10
Remuneration Authority Act 1977	s 25
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915	s 38
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1917	ss 61, 110, 129, and cl 9 of Schedule 5
Reserves and Other Lands Disposal and Public Bodies Empowering Act 1920	ss 91, 108
Resource Management Act 1991	s 41
River Boards Amendment Act 1913	s 4
Rotorua Borough Act 1922	s 10
Sale of Liquor Act 1989	s 110
Secondhand Dealers and Pawnbrokers Act 2004	s 27
Shipping Act 1987	s 5
Social Security Act 1964	s 12M
Soil Conservation and Rivers Control Act 1941	s 33A

Act under which commission of inquiry powers derived	Relevant provisions
Soil Conservation and Rivers Control Amendment Act 1946	s 9
State Sector Act 1988	ss 25, 26
Taupiri Drainage and River District Act 1929	ss 3, 11
Taxation Review Authorities Act 1994	s 15
Temporary Safeguard Authority Act 1987	s 4
Transport Accident Investigation Commission Act 1990	s 11
Treaty of Waitangi Act 1975	cl 8 of Schedule 2
Veterinarians Act 2005	s 48
War Pensions Act 1954	s 13

Schedule 2 s 39
Consequential amendments to other enactments

Commissions of Inquiry Act 1908 (1908 No 25)

New section 2A: insert before section 3:

"**2A Application of this Act and relationship to Inquiries Act 2008**

"(1) This Act applies to—

"(a) any entity that—

"(i) is or may be established under an enactment enacted before the commencement of this Act, including those listed in **Schedule 1** of the Inquiries Act **2008**, and that derives powers from the Commissions of Inquiry Act 1908; and

"(b) any commission of inquiry or Royal Commission appointed under this Act that has not completed its functions and obligations before the commencement of the Inquiries Act **2008**.

"(2) To avoid doubt, the Inquiries Act **2008** applies to every inquiry established under **section 6** of that Act."

Coroners Act 2006 (2006 No 38)

Definition of **other investigation authority** in section 9: add:

"(o) an inquiry established under **section 6** of the Inquiries Act **2008**".

Health Practitioners Competence Assurance Act 2003 (2003 No 48)

Definition of **investigation** in section 53: insert after paragraph (a):

"(aa) an inquiry established under **section 6** of the Inquiries Act **2008**:"

Section 61(1): add:

"(c) for the purposes of an inquiry established under **section 6** of the Inquiries Act **2008**."

Legal Services Act 2000 (2000 No 42)

Section 7(4): add:

"(i) proceedings before an inquiry established under **section 6** of the Inquiries Act **2008**."

Maori Language Act 1987 (1987 No 176)

Repeal paragraph (c) of the definition of **legal proceedings** in section 2, and substitute:

"(c) proceedings to inquire into and report on any matter of particular interest to the Māori people or any tribe or group of Māori people before—

"(i) a commission of inquiry under the Commissions of Inquiry Act 1908; or

"(ii) a tribunal or other body having any of the powers of a commission of inquiry under any other enactment; or

"(iii) an inquiry established under **section 6** of the Inquiries Act **2008**".

New Zealand Public Health and Disability Act 2000 (2000 No 91)

Clause 6(1) of Schedule 5: add:

"(c) for the purposes of an inquiry established under **section 6** of the Inquiries Act **2008**."

New Zealand Sign Language Act 2006 (2006 No 18)

Repeal paragraph (c) of the definition of legal proceedings in **section 4** and substitute:

"(c) proceedings to inquire into and report on any matter of particular interest to the Deaf community before—

"(i) a commission of inquiry under the Commissions of Inquiry Act 1908; or

"(ii) a tribunal or other body having any of the powers of a commission of inquiry under any other enactment; or

"(iii) an inquiry established under **section 6** of the Inquiries Act **2008**".

Official Information Act 1982 (1982 No 156)

Definition of **official information** in section 2(1): insert after paragraph (h):

"(ha) does not include—

"(i) evidence or submissions subject to an order made under **section 14(1)** of the Inquiries Act **2008**; or

"(ii) documents referred to in **section 32(2)(b)** of the Inquiries Act **2008**; and".

Section 2(6): insert after paragraph (e):

"(ea) an inquiry established under **section 6** of the Inquiries Act **2008**; or".

Privacy Act 1993 (1993 No 28)

Paragraph (b) of the definition of **agency** in section 2(1): add:

"(xiv) an inquiry established under **section 6** of the Inquiries Act **2008**".

Section 55(b): repeal and substitute:

"(b) evidence given or submissions made to—

"(i) a Royal Commission; or

"(ii) a commission of inquiry appointed by Order in Council under the Commissions of Inquiry Act 1908; or

"(iii) an inquiry established under **section 6** of the Inquiries Act **2008**,—

"at any time before the report of the Royal Commission, commission of inquiry, or inquiry, as the case may be, has been published or, in the case of evidence given or submissions made in the course of a public hearing, at any time before the report has been presented to the Governor-General or appointing Minister, as the case may be; or".

Transport Accident Investigation Commission Act 1990 (1990 No 99)

Definition of **proceedings** in section 14A: add "; and" and the following paragraph:

"(f) an inquiry established under **section 6** of the Inquiries Act **2008**."

Appendices

Appendix A

Terms of Reference

The Commission will review and update the law relating to public inquiries in New Zealand. This review will include inquiries established as Royal Commissions and other commissions established under the Commissions of Inquiry Act 1908, Ministerial inquiries, ad hoc inquiries under specific statutes, and departmental inquiries.

The paper will not look at inquiries conducted by Select Committees, the Ombudsman, Auditor-General or by standing commissions including the Law Commission, Human Rights Commission, Privacy Commission, Health and Disability Commission, Securities Commission and Commerce Commission.

It will also not specifically consider tribunals and other agencies which exercise powers derived from the Commissions of Inquiry Act, except to the extent they will be affected by any suggested changes to that legislation. Examples of these include the Broadcasting Standards Authority, Transport Accident Investigation Commission, Maritime New Zealand and Waitangi Tribunal.

The report will consider in particular the following issues:

- Purpose and role of inquiries;
- The way inquiries are established and their composition;
- Whether the legislation should extend to all public inquiries;
- Procedure at inquiries, including adversarial or inquisitorial approaches and possible standardisation;
- Powers of inquiries, including summonsing witnesses etc and contempt;
- Impact of the New Zealand Bill of Rights Act 1990 including natural justice requirements;
- Secrecy and impact of the Official Information Act 1982;
- Rules relating to evidence and potential impact of a new Evidence Act;
- Immunities and privileges of commissioners and witnesses;
- Review by the courts, including stating a case;
- Standing of parties / persons interested in the inquiry;
- Role of counsel for parties and counsel assisting;
- Costs and fees;
- Role of Secretariat.

The Commission will produce a draft report for circulation and discussion followed by a final report and draft legislation.

Appendix B

New Zealand case law involving commissions of inquiry and royal commissions

Jellicoe v Haselden (1902) 22 NZLR 343 (SC)

A defamation action was brought against a member of a commission established to inquire into charges made by a prisoner against a prison warden. The court found that while the Governor in Council could not establish courts of justice without the sanction of the legislature, a commission was not a court despite its powers under the Commissioners' Powers Acts of 1867 and 1872.

The key issue was whether commissioners benefited from absolute or qualified privilege from defamation. The majority of the Court (Stout CJ, Williams and Denniston JJ; Conolly and Edwards JJ dissenting) held that commissioners were subject to qualified privilege and a defamation action could lie where malice was proved.[1] While a witness in front of a commission was considered to be in the same position as a witness in a court and had absolute privilege, a commissioner was not in the same position as a judge. Commissions were described as follows:

> The Commissioners, however, need not examine witnesses on oath, nor are they bound by any rules of evidence. They have no power to commit for contempt. They are subject to no rules of procedure. They can sit with open or closed doors. They may hear counsel or not, as they please. They do not take the judicial oath … The purpose for which they are appointed is the purpose of reporting only …[2]

> I think, therefore, that the Commissioners are not in any sense a Court, but if in some remote way they come under that denomination they are not Judges, as their functions are non-judicial …[3]

1 The Commissioners' Act 1903 gave commissioners immunity against actions for this done in good faith. See now s 3 of the 1908 Act.

2 *Jellicoe v Haselden* (1902) 22 NZLR 343, 358 (SC) Williams J.

3 Ibid, 363 Williams J.

Cock v Attorney-General (1909) 29 NZLR 405 (CA)

The central issue in *Cock v Attorney-General* was whether an inquiry could be established under the Act to investigate and make findings about whether individuals had committed criminal offences. The Court of Appeal concluded that an inquiry would be unlawful if the "real, and in effect the sole, object … is to ascertain whether certain named individuals who occupy no official position have committed a specified offence". Such an inquiry was outside the scope of s 2 of the 1908 Act (as it was then worded). The Court acknowledged, however, that inquiry into guilt or innocence as an incident to a "legitimate" inquiry may be justified in order for a commission to fulfil its terms of reference.

The real object of the Commission under consideration had been to inquire into allegations of bribery, and the Governor-General had no power to issue such a commission, as since the Court of Star Chamber had been abolished,[4] no man was to be put to answer for a crime unless in the manner prescribed by law.[5]

The decision in *Cock* was in contrast to the High Court of Australia's 1904 decision in *Clough v Leahy*[6] that inquiries were free to inquire into guilt or innocence in the same way as any individual, and that they could draw public conclusions as to blame. The only restriction, the Court held, was that they had to do so without interfering with the administration of justice.[7] In *McGuinness v Attorney-General*[8] the High Court of Australia drew a distinction between inquiring into guilt or innocence and reporting on that to the Governor-General, and actually having the power to convict.[9]

In re Waipawa, Waipukurau, and Dannevirke Counties (1909) 29 NZLR 863 (SC)

A commission was established to make an apportionment between certain counties. The Commission stated a case to the Supreme Court under s 10 of the 1908 Act for direction as to the operation of the Counties Act 1886. The Supreme Court held that it was the Commissioner's duty to decide how to divide the counties. The Court could not lay down "any hard-and-fast rule for the guidance of the Commissioner" and to do so would inappropriately fetter the Commissioner.[10] However, it was acceptable to make general observations as to what the Commissioner should do. The Court also held that there was no jurisdiction for it to award costs in a case referred to it under s 10 as this was in the discretion of the Commissioner.

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4 Statute 10 Car I c 10.

5 Statute 42 Edw III c 3.

6 *Clough v Leahy* (1905) 2 CLR 139 (HC). See also *McGuinness v Attorney-General* (1940) 63 CLR 73 (HC); *A-G (Cth) v Queensland* (1990) 25 FCR 125; *Re Winneke; Ex parte Australian Building Construction Employees and Builders' Labourers Federation* (1982) 56 ALJR 506; *State of Victoria v Master Builders' Association Of Victoria* [1995] 2 VR 121 (Vic SC); and *Bollag v A-G (Cth)* 149 ALR 355 (FC). See also *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA).

7 See *Clough v Leahy*, above n 6, 157, 159 and 161. The question in *Clough v Leahy* was not whether a commission could inquire into a crime, but whether it usurped the jurisdiction of the Industrial Arbitration Court by inquiring into a matter which fell within the jurisdiction of that court.

8 *McGuinness v Attorney-General*, above n 6.

9 Ibid, 84. The Court drew on the fact that any statements made by witnesses before a Commission of Inquiry were not admissible in any criminal or civil proceedings, to reinforce its view that there was no usurping of the functions of any court of justice. See also *Re Winneke; Ex parte Australian Building Construction Employees and Builders' Labourers Federation*, above n 6, 515.

10 *In re Waipawa, Waipukurau, and Dannevirke Counties* (1909) 29 NZLR 863, 870 (SC) Cooper J.

Hughes v Hanna (1910) 29 NZLR 16 (SC)

A commission had been established to look into whether Hughes had a claim to a section of land, which the Supreme Court had found was a public street. In *Hughes v Hanna* the Court held that the subject matter of the inquiry did not relate to any of the grounds in s 2 of the Commissioners Act 1903 as it was then drafted. The Commission was therefore ultra vires and void.

Whangarei Co-operative Bacon-Curing and Meat Co v Whangarei Meat Supply Co (1912) 31 NZLR 1223 (SC)

The Supreme Court held that the terms of reference of a commission of inquiry did not have to expressly refer to any of the specific categories in s 2 of the 1908 Act to be valid. Furthermore, "administration of the Government" in s 2 meant that commissions could be established into both administrative omissions and actions.

In re St Helens Hospital (1913) 32 NZLR 682 (SC)

This was a case stated to the Supreme Court under s 10 of the 1908 Act. The Supreme Court held that the privilege contained in s 8(2) of the Evidence Act 1908 which protected communications made to members of the medical profession applied to inquiries under the 1908 Act. Commissions of inquiry had the same powers as a magistrate under the Magistrates' Courts Act 1908. The inquiry was "analogous in respect to its conduct, and in respect also to the adducing of evidence, the summoning of witnesses, and the production of books and documents, to a civil proceeding in the Magistrates' Court".[11]

Cooper J also held that the Commissioner was not required to allow the complainants and their counsel to inspect and examine all documentation which the Commissioner thought it necessary for him to examine. "What they should be allowed to inspect must depend upon the discretion of the Commissioner".[12] The Commissioner was to consider whether inspection was in the public interest and make an order that he thought was just.

In re Otara River Bridge [1916] GLR 38 (SC)

In another case stated to the Supreme Court, the Commission, on the request of a party to the Commission, asked whether it was lawfully appointed under the Public Works Act 1908. Hosking J considered that the questions put to the Court went "to the root of the Commission" and stated that in an ordinary case the correct process would have been for the party to commence independent proceedings to quash the Commission. But, he noted, the parties adopted the s 10 procedure to save expense.

Hosking J did not think it was for the Court, under the authority for stating a case, to advise or control the Governor as to his powers under the Act, but he considered that on the facts the steps taken were not in compliance with the Public Works Act 1908.

11 *In re St Helens Hospital* (1913) 32 NZLR 682, 687 (SC) Cooper J.

12 Ibid, 688.

Pilkington v Platts and Others [1925] NZLR 864 (SC and CA)

On the question of whether the Commission, which was appointed to inquire into the alteration of a river district, fell within the ground of "the administration of government" in s 2 of the 1908 Act, the Court of Appeal considered the Commission was invalid and issued a writ of prohibition. Reed J in the Court of Appeal suggested that there may be a power for the Governor-General to appoint a royal commission into such a matter under the Letters Patent,[13] but the Commission in question was declared to be appointed under the 1908 Act alone.

Herdman J in the Supreme Court held that a commission which formally opened, but never proceeded due to the non-attendance of petitioners, could still award costs under s 11 of the 1908 Act. This finding was overturned on appeal. The Court of Appeal held that as no hearing was held no cost orders could be made, because under s 11 they could only be made "upon the hearing of an inquiry". Also, costs orders could only be made against those cited as a party to the inquiry, and the Court of Appeal held that "citing" meant some formal notification of the proceedings.[14]

Timberlands Woodpulp Ltd v Attorney-General [1934] NZLR 271 (SC)

An inquiry was intra vires if it was to deal with a subject which fell "broadly" into one of the categories in s 2 of the 1908 Act (in this case, the expediency of new legislation). Specifically, prohibition would not be granted because an inquiry did not have an actual, defined proposal for legislation before it.

Myers CJ, for the Court, also stated that a commission could only be judicially reviewed insofar as it had power to cite parties against which costs could be awarded:[15]

> Whether or not prohibition will lie … depends upon whether or not having regard to the nature of a particular commission, there are parties who are liable to be cited and against whom costs may be awarded.

In the case of an inquiry where no parties were cited, the Court held the commission had no power to award costs, and could not be reviewed:[16]

> In such a case there is no obligation that it can impose on anyone. It has no legal authority to determine any questions affecting the rights of subjects, nor can its report affect any private rights. Its report is binding on nobody can cannot be made the foundation of any subsequent action against anyone. No civil consequences to individuals are involved…

The Court struggled with the use of the term "parties" in s 4 of the Act in its application to inquiries which related entirely to matters of policy or legislation. Myers CJ said:[17]

13 *Pilkington v Platts and Others* [1925] NZLR 864, 875 (CA) Reed J.

14 Ibid, 874 Sim J; 875 Reed J; 875 Adams J.

15 *Timberlands Woodpulp Ltd v A-G* [1934] NZLR 271, 293 (SC).

16 Ibid, 295. Since it followed that in that case none of the commissioners were acting judicially, there could also be no question of bias or interest on their part.

17 Ibid, 294–295 (SC).

> There must, we think, be some limit placed upon the words "parties interested in the inquiry". If it were not so, then in the case of an inquiry regarding the necessity or expediency of any proposed legislation or perhaps the working of some existing law any or every member of the public might be regarded as being within the category.
>
> [W]here a Commission is appointed to inquire and report upon the working of any existing law or expediency of any legislation… it is difficult to see how it is competent, speaking generally (though there may be exceptional cases), for the Commission to cite parties.

King v Frazer [1945] NZLR 297 (SC)

King v Frazer concerned a motion for removal to the Court of Appeal of a case stated by the Transport Appeal Authority under s 85 of the Statutes Amendment Act 1941 and s 10 of the Commissions of Inquiry Act. Myers CJ held that the words "special case stated" in s 64(d) of the Judicature Act 1908 could not extend to special cases stated under other statutes. There was therefore no provision authorising the removal of a case stated under s 10 of the 1908 Act to the Court of Appeal, except that in s 13(3) of the Commissions of Inquiry Act which only applied when a commissioner was a (then) Supreme Court judge.

In re Royal Commission on Licensing [1945] NZLR 665 (CA)

Commissions of inquiry are restricted to operating strictly within their terms of reference. Myers CJ made the statement that a commission:[18]

> … is not a roving Commission of a general character authorizing investigation into any matter that the members of the Commission may think fit to inquire into … the ambit of the inquiry is limited by the terms of the instrument of appointment of the Commission.

The Chief Justice noted that their remit depended on the interpretation of their terms of reference as set out in the warrant or Order in Council. The drafting of those documents could make the extent of the inquiry unclear. For example, the warrant appointing the Royal Commission on Licensing included the phrase:

> And generally to inquire into and report upon such other matters arising out of the premises as may come to your notice in the course of your inquiries and which you consider should be investigated in connection therewith, and upon any matters affecting the premises which you consider should be brought to the attention of the Government.

The Court of Appeal held that these words did not allow the Commission to add issues of a fundamentally different nature to its task. Specifically, the Licensing Commission was established to inquire into and report on the working of the liquor laws. The Court held, in answering this case stated, that certain questions relating to alleged contributions by particular brewing, hotel and wine and spirit companies to political parties were not relevant to the Commission's task, and so could not be asked.

18 *In re Royal Commission on Licensing* [1945] NZLR 665, 680 (CA) Myers CJ.

In re the Royal Commission to inquire and report upon the State Services [1962] NZLR 96 (CA)

The Commission agreed to state a case on the request of 3 civil service unions to whom it had refused party status. The Court of Appeal held that the Commission was acting within its powers, in refusing party status and could also limit the extent to which public hearings and cross-examination would be allowed. Moreover, full weight could be given to the requirements of natural justice if the Commission made the necessary arrangements for the giving of evidence and making representations – citing as parties was not required.[19] Continuing on the theme in *Timberlands*, Gresson P stated that, where the nature of the inquiry is such that parties could not be cited, s 4A of the 1908 Act gave persons to whom it applied no rights to appear and be heard.

The Court also found that there was no general rule that the principles of natural justice required the Commission to allow the applicants to be present on all occasions when it received evidence or to carry out its investigation in the presence of the person charged and give him rights of cross-examination:[20]

> … the occasions when the Commission will permit the representatives to take part in the proceedings, or allow cross-examination of witnesses or permit the associations to be represented by counsel, are, in my opinion, all matters within the discretion of the Commission.

Whether fairness places a duty on any court or inquiry depends on the circumstances and nature of the subject matter at hand. As Cleary J put it:[21]

> No formula has been evolved which can be applied to all cases, other than one expressed in quite general terms, for so much depends upon the nature of the inquiry, its subject-matter and the circumstances of the particular case.

The case contains some useful dicta on the nature of inquiries, and of participants before them:[22]

> I think the flaw in the argument addressed to us lies in the assumption that a 'party' to an inquiry by Commissioners has the same rights to appear by counsel, to be present throughout the hearing, and to cross-examine witnesses as is possessed by a party to a suit at law. This argument overlooks the basic difference between a *lis inter partes* and an inquiry by Commissioners. In a controversy between parties the function of the Court is 'to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings' …. The function of a Commission of Inquiry, on the other hand, is inquisitorial in nature. It does not wait for issues to be submitted, but itself originates inquiry into the matters which it is charged to investigate. There are, indeed, no issues as in a suit between parties; no 'party' has the conduct of proceedings, and no 'parties' between them can confine the subject-matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain.

19 *In re the Royal Commission to inquire and report upon the State Services* [1962] NZLR 96, 111 (CA) North J.

20 Ibid, 111 North J. See also 106, Gresson P and 117, Cleary J.

21 Ibid, 116 Cleary J.

22 Ibid, 115–116 Cleary J.

Fitzgerald v Commission of Inquiry into Marginal Lands Board [1980] 2 NZLR 368 (HC)

Prohibition was sought alleging the inquiry should be halted until a concurrent police investigation had been completed and any prosecutions determined. The applicants argued that it was within the High Court's inherent jurisdiction to ensure justice was done and that there would be a fair trial. Hardie Boys J applied the decision in *Cock v Attorney-General* in finding that a commission was not prevented from inquiring into whether an individual was or was not guilty of an offence if that question arose in the course of an otherwise properly constituted and conducted inquiry, and was relevant to the purpose for which the Commission had been established.

Drawing on the Australian High Court's decision in *Clough v Leahy*,[23] Hardie Boys J also held that the question was whether continuation of the Commission proceedings would amount to an interference with the course of justice. He concluded that the otherwise lawful proceedings of a commission, following lawful terms of reference could not amount to contempt which would only arise if newspapers chose to publish details about the inquiry. Since it was reporting of the Commission's processes that in fact posed the threat, the Court had no basis on which to order prohibition.

In re Marginal Lands Board Commission of Inquiry into Fitzgerald Loan [1980] 2 NZLR 395 (HC)

The Commission stated a case to the High Court as to whether it could rightfully inquire into one of its terms of reference, which stated:

> In respect of the approval of the application [for a loan] … whether there was any error of jurisdiction or otherwise.

Counsel for the Fitzgeralds had submitted that the Commission was not lawfully authorised and empowered to deal with that question because: (1) it did not arise out of or concern any of the matters in s 2 of the 1908 Act; and (2) the question fell to be decided by the High Court alone, exercising its supervisory jurisdiction over the Marginal Lands Board, as an inferior tribunal.

Davison CJ considered that the term of reference did not fall clearly within any of the s 2 grounds, noting that while there were some officers of the Crown (1908 Act, s 2(d)) on the Marginal Land Board, it was the conduct of the Board as a whole that was in question. The Chief Justice also considered that the approval of the application could not, in itself, be regarded as a "matter of public importance".

However, the particular term of reference was not to be looked at in isolation. Matters might be objectionable if they were the principal matters for inquiry but might be perfectly valid and within the power to establish an inquiry if they were merely incidental to the real objects of the Commission. Since the main and real object of the inquiry was to determine whether there had been impropriety in respect of the approval of the loan – which was a matter of public importance – the term of reference was valid because it arose incidentally to and was

23 *Clough v Leahy*, above n 6.

necessary for the purpose of the inquiry. Furthermore, the Commission was not acting judicially – it was merely to "inquire into and report" on whether there was such an error of jurisdiction. No determination of the Commission could have any effect on civil rights. Those rights still fell to be determined, if need be, by the High Court.

Re Royal Commission on Thomas Case [1982] 1 NZLR 252 (CA)

The terms of reference of the Thomas Royal Commission directed the inquiry to consider, in particular, "whether there was any impropriety on any person's part in the course of the investigation or subsequently".

The Court of Appeal examined the jurisdiction of the Court to look at these matters; the lawfulness of the warrant and the jurisdiction of the Commission to make findings of criminal misconduct; natural justice considerations; the effect of the pardon; and whether the Commissioners were likely to be biased.

Court's jurisdiction

At the outset the Court emphasised that it had no jurisdiction to adjudicate on any factual questions before the Commissioners and that the case was not an appeal against the conclusions the Commissioners reached.[24] The Court did however have jurisdiction to determine whether the terms of reference were lawful and whether the Commission was acting within the terms of reference. The Court could also intervene in cases where natural justice was breached, or in cases of bias or predetermination.

As to whether a commission could be reviewed under the Judicature Amendment Act 1972, the Court stated:[25]

> In particular we express no opinion on the much debated question of whether the words "rights" in the definition of "statutory power" and "statutory power of decision in s 3 of the Judicature Amendment Act 1972 are wide enough to include findings of a Commission of Inquiry the effect of which is to damage reputation or expose a person to risk of prosecution.

Whether the Commission could inquire into criminal misconduct

On the question of whether the Commission could inquire into potential criminal misconduct, the Court recognised that the Royal Commission "was constituted both in exercise of the powers conferred on the Governor-General by the Letters Patent and under the powers contained in s 2 of the Commissions of Inquiry Act 1908".[26] While the Court considered the Letters Patent did not permit the constitution of a commission to inquire into a crime, it distinguished the case from *Cock v Attorney-General* because of the addition of s 2(f) of the 1908 Act, which enabled an inquiry to look into "any other matter of public importance". Any impropriety in the investigation, it found, was clearly a matter of public importance, and the Commission was able to inquire into and report on the allegations of misconduct.

24 *Re Royal Commission on Thomas Case*, above n 6, 257 (CA) Judgment of the Court.

25 Ibid, 258.

26 Ibid, 261.

Natural justice

The Court noted that it was clear from the *Royal Commission on State Services* and *Erebus* cases, and from amendments made to the 1908 Act that there was an increasing concern that natural justice should be observed by commissions. This included affording a fair opportunity of presenting their representations, adducing evidence and meeting prejudicial matter. On the facts, however, the Court was satisfied that the Commission did afford such an opportunity. In addition, the Court was not satisfied that any of the Commission's findings were based on evidence that the Commission was not entitled to regard as having probative value.

Counsel assisting's role

The Court noted that counsel assisting had been involved in drafting the report. The Court stated that:[27]

> When a Commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutors. It is not right that they should participate in the preparation of the report.

The effect of the pardon

The High Court had held that the pardon granted to Arthur Allan Thomas did not limit the Commission's inquiries and it would be wrong to exclude evidence during the Commission that would otherwise be relevant on the grounds that it might implicate Thomas in the murders or on the grounds that it was circumstantial or indirect evidence. The Court of Appeal agreed that while the pardoned person is deemed never to have committed the offence, other persons implicated or charged with the murders would still be free to defend themselves by attempting to show that the pardoned person did the acts.

Bias

The final issue was whether the Commissioners were biased against the police on the grounds of predetermination. The Court found that in the case of a commission inquiring into and reporting upon allegations of impropriety, the test for bias was "whether an informed objective bystander would form an opinion that a real likelihood of bias existed."[28] The Court considered that in the case of a commission appointed to inquire and advise the Government considerable latitude was to be allowed:[29]

> … what is under scrutiny is not the conduct of a Court. However grave the allegations which are being investigated, under the New Zealand system of law an inquiry is different from a trial. As a Commissioner has an inquisitorial role, it is natural that he should take the initiative more freely than a Judge traditionally does … The Commissioner is not acting as a Judge, and he is not to be expected to project the same standards of detached impartiality. The standards expected of Courts may require the application to them of a different and stricter test, such as whether there is a real suspicion of bias; but we are not now called on to consider how the bias test for Courts should be formulated. For the present kind of case, the real likelihood test is enough.

27 Ibid, 273.

28 Ibid, 277.

29 Ibid, 277.

Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2) [1981] 1 NZLR 618 (CA)

Air New Zealand and other applicants sought orders quashing the Commissioner's allegations in paragraph 377 of the report that there was a conspiracy to commit perjury on the part of Air New Zealand and the $150,000 costs order against Air New Zealand. The Court of Appeal, in two separate judgments, held that the Commission had, in making those allegations, acted in breach of natural justice and quashed the costs order.

The Court was satisfied that the findings were collateral assessments of conduct made outside of the terms of reference. In doing so, a distinction was drawn between allegations of perjury and allegations of organised perjury. While it was within the scope of the Commissioner's jurisdiction to consider whether individual witnesses committed perjury, in alleging a conspiracy to perjure the Commissioner went beyond his jurisdiction. While an inquiry is authorised to do those things which are reasonably incidental to carrying out its functions, the Court did not believe that the powers went so far as to permit allegations of a conspiracy to perjure. Otherwise, "by mere implication any Commission of Inquiry, whatever its membership, would have authority publicly to condemn a group of citizens of a major crime without the safeguards that invariably go with express powers of condemnation".[30]

The applicants had also complained about the Commissioner's failure to warn them of the adverse findings and alleged that the findings were unsupported by any evidence of probative value. The majority stated that the rules of natural justice "would certainly have required that the allegations be stated plainly and put plainly to those accused".[31] The majority also acknowledged that they found it difficult to see any evidence that warranted the findings, but did not make an express finding on the matter. In contrast, Woodhouse P and McMullin J were prepared to base the breach of natural justice on the fact that the findings were unsupported by evidence of probative value.[32]

The significant distinction between the judgments of the majority and minority of the Court is that the minority (Woodhouse P and McMullin J) would have gone further and ordered that the relevant findings be set aside or declared invalid.

In the result, the Court quashed the costs order. It held that the order was designed to punish Air New Zealand and was not realistically severable from the Commissioner's findings.[33] The costs order was also in excess of the maximum amount allowed by a scale prescribed in 1903, which was apparently still in force.

30 *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618, 666 (CA) Cooke, Richardson and Somers JJ.

31 Ibid, 666 Cooke, Richardson and Somers JJ.

32 Ibid, 651 Woodhouse P and McMullin J.

33 Ibid, 665 Cooke, Richardson and Somers JJ; 624 Woodhouse P.

Justice Mahon appealed to the Privy Council. The Privy Council dismissed the appeal on the sole ground that Justice Mahon had acted in breach of the rules of natural justice. Their Lordships considered that two grounds of natural justice were relevant to the appeal:[34]

- a person making a finding in the exercise of such a jurisdiction had to base his decision upon evidence that had some probative value; and
- he or she must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

Thus, the decision-maker must base his or her finding "upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory".[35] The Privy Council, putting greater emphasis on this ground than the Court of Appeal, held that this requirement had not been met.[36] It agreed therefore that the costs order should be quashed.

Their Lordships declined, however, to go as far as the minority of the Court of Appeal:[37]

> [T]heir Lordships will refrain from going into the question whether upon an application for judicial review of a report of a tribunal of inquiry there is jurisdiction in the reviewing Court to set aside a finding of fact that is gravely defamatory of the applicant for review, or to make a declaration that such finding is invalid. This too is a matter which, in their Lordship's view is best left to be developed by the New Zealand Courts, particularly as these remedies, if they do exist, are discretionary.

The Privy Council did not base their decision on whether it was within the Commissioner's jurisdiction to make allegations of a conspiracy to perjure. They acknowledged that there was a grey area between "what is permissible comment upon evidence given before the Royal Commissioner that he has rejected, and what of a finding of criminal conduct by a witness which does not fall within the Commissioner's terms of reference".[38] They concluded that this was also a matter which the New Zealand courts should decide.

34 *Re Erebus Royal Commission: Air New Zealand Ltd v Mahon* [1983] NZLR 662, 671 (PC) Lord Diplock for the Court.

35 Ibid, 671 (PC) Lord Diplock for the Court.

36 See for example, Ibid, 679 (PC) Lord Diplock for the Court: "in their Lordship's view there was no material of any probative value upon which to base a finding that a plan of this kind ever existed".

37 Ibid, 687 (PC) Lord Diplock for the Court.

38 Ibid, 686 (PC) Lord Diplock for the Court.

Thompson v Commission of Inquiry into Administration of District Court at Wellington [1983] NZLR 98 (HC)

Several Assistant Deputy Registrars of the Wellington District Court sought an order of prohibition in response to the Commission's refusal to defer its investigations until their trial for conspiring to defeat the course of justice had concluded. The Chairman of the Commission had ruled that, since the Commission was required to report by a certain date, it should proceed with the inquiry.

Barker J distinguished *Fitzgerald v Commission of Inquiry into Marginal Lands Board* because the trial in the *Thompson* case involved allegations of conspiracy and the credibility of many was involved. He also considered that the issue was not the likelihood of the media committing contempt by misreporting proceedings. The real test was whether the matter published or to be published had or would have, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case.[39] In this regard, he relied on the High Court of Australia's decision in *Winneke*[40] – the question was whether, in reality, there was a "substantial risk of serious injustice".[41] Barker J noted that detriment to the applicants could lie in:[42]

- cross-examination before the Commission of persons who might reveal matters of defence which ought not to be revealed until the trial;
- the applicants themselves being summonsed to give evidence;
- the risk of unfavourable inferences being drawn if they declined to answer;
- the risk that evidence probative of their guilt might be given to the Commission which would be inadmissible at the trial.

Accordingly, he gave directions to the Commission that it could continue provided:

- the applicants were not called to give evidence;
- they would not be required to reveal their defence to the criminal charges; and
- the Commission would sit in private on any matters which could prejudice the applicants' right to a fair trial.

Barker J placed significant emphasis on the fact that the Chairman of the Commission in *Thompson* was an experienced Queen's Counsel and would therefore be alert to issues which could prejudice a trial. While not making it part of his order, he also noted that he would be "greatly surprised" if the Commission were to sit during the period of the trial.

Badger v Whangarei Refinery Expansion Commission of Inquiry [1985] 2 NZLR 688 (HC)

A consortium of various construction companies applied for review of the Commission's decision at the commencement of sittings that no participant

39 *Thompson v Commission of Inquiry into Administration of District Court at Wellington* [1983] NZLR 98, 109 (HC).

40 *Re Winneke, ex p Australian Building Construction Employees' and Builders' Labourers' Federation*, above n 6.

41 *Thompson v Commission of Inquiry into Administration of District Court at Wellington*, above n 39, 113 Barker J, quoting *Winneke*, above n 6, 535 Mason J.

42 *Thompson v Commission of Inquiry into Administration of District Court at Wellington*, above n 39, 112.

would be permitted to cross-examine any witnesses at any stage in its proceedings. The Commission had ruled that it alone would ask questions either directly or through counsel assisting; and that it would then be happy for supplementary submissions to be made. The Commission had emphasised that the proceedings were to be inquisitorial, but that it would give people a full opportunity to answer to any prejudicial material.

Barker J reiterated the principle that the Commission had wide powers to regulate its own procedure; and that no formula had been evolved which could be applied to all cases. So much depended on the nature of the inquiry, including the terms of reference, the rules under which the inquiry was acting, its subject-matter and the circumstances of the particular case. But, he noted that an inquiry into a disaster was an example of the kind of inquiry where the requirements of natural justice would be more extensive than in inquiries into a general field.

However, he ruled that a commission could not make such a blanket ruling because it could not possibly know at the outset the extent to which issues would arise that required cross-examination to adhere to natural justice rules. Furthermore, he found that the circumstances of the Whangarei Refinery Expansion inquiry were that controlled cross-examination had to be allowed. Generally, Barker J considered that the prime instance where cross-examination would be necessary to satisfy the demands of natural justice was when the reputation of a person or organisation was in issue.

The decision recognises the trade off between getting through an inquiry quickly, and adhering to natural justice. Barker J noted that the amount of time given to the inquiry was not long enough to give adequate attention to natural justice considerations.[43]

Fay, Richwhite & Co Ltd v Davison [1995] 1 NZLR 517 (CA)

A participant in the Wine-box inquiry sought review of the Commission's ruling that, subject only to such restrictions as it might find necessary, an officer of the Inland Revenue Department would give evidence in public. The contention was that at least initially, the Commission should sit in private when hearing evidence dealing specifically with taxpayers' affairs.

The Court ruled that the Commissioner had not made an error in law in assessing the relevant competing interests and determining that evidence be given in public. In particular, he was entitled to conclude that public and personal interests (such as the public perception of the integrity of the inquiry, the nature of the public offices held by two of the parties, and the impracticality of a closed inquiry) outweighed the interest of taxpayer confidentiality. Furthermore: "[p]ublic confidence in the Commission, and the very purpose of constituting the Commission, could be substantially impaired or thwarted if all the truly important evidence and all the truly important submissions were heard in private".[44]

43 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688, 702 (HC).

44 *Fay, Richwhite Ltd v Davison* [1995] 1 NZLR 517, 524 (CA) Cooke P.

Controller and Auditor-General v Sir Ronald Davison (CA 226/95); KPMG Peat Marwick v Sir Ronald Davison (CA 223/95); Brannigan v Sir Ronald Davison (CA 231/95) [1996] 2 NZLR 278 (CA)

Three challenges were made to Sir Ronald Davison's use of his powers under ss 4C and 4D of the 1908 Act to require witnesses to produce documents and give oral evidence. The applicants argued either that they were shielded from giving evidence by the doctrine of sovereign immunity; by the privilege against self-incrimination; or by the exceptions of "just excuse" in s 13A(1)(b) or "sufficient cause" in s 9 of the 1908 Act.

The Court was unanimous in determining that Cook Islands documents held by the Auditor-General in New Zealand by virtue of the Auditor's role as the Cook Islands' auditor, while falling within the concept of sovereign immunity, were nevertheless to be produced in this instance because the New Zealand public interest weighed too heavily in favour of disclosure of the evidence;[45] or because it would be inequitable for the evidence not to be produced.[46]

The Court was also unanimous in ruling that the Commissioner had erred in determining that the concepts of "just excuse" and "sufficient cause" under the 1908 Act were no wider than the privileges and immunities protected under s 6 of the Act. The concepts required a weighing of all the considerations properly bearing on the exercise of the discretion, including personal or professional factors. Although the witnesses were threatened with prosecution under Cook Islands law if they provided certain evidence to the inquiry, given the importance of the evidence to the inquiry in understanding the Wine-box transactions, the balance required the court to uphold the orders made by the Commissioner.

Finally, the majority of the Court (Cooke P, Richardson, Henry and Thomas JJ; McKay J dissenting) determined that the privilege against self-incrimination offered no protection to the witnesses. Richardson J stated:[47]

> The purpose of the privilege against self-incrimination is to protect the witness from compulsory disclosure of an existing criminal liability. It is not directed to the act of testifying or the attempt by foreign states, by imposing criminal sanctions for breach of their secrecy regime, to stop anyone from giving any evidence on a matter. The risk of prosecution for testifying is to be taken into account in determining under the relevant witness provisions of the Commissions of Inquiry Act 1908 whether the plaintiffs have a sufficient cause or just excuse for refusing to give evidence. In principle, that risk does not come within the common law privilege against self-incrimination.

Referring the strengthening of the Commission's powers by the Commission of Inquiry Amendment Act 1985, Cooke P said:[48]

45 Ibid, 286–287 Cooke P.

46 *Controller and Auditor-General v Sir Ronald Davison (CA 226/95); KPMG Peat Marwick v Sir Ronald Davison (CA 223/95); Brannigan v Sir Ronald Davison (CA 231/95)* [1996] 2 NZLR 278, 304–306 Richardson J, 309 Henry J (CA).

47 Ibid, 340 Richardson J.

48 Ibid, 286 Cooke P.

> it would subvert the intention of the New Zealand Parliament if the New Zealand Courts were to hold that, despite the apparently strengthening Amendment Act, the commissioner's inquiry into these tax matters could be frustrated by invoking the doctrine of sovereign immunity, or by resort to the "immunities" of witnesses preserved by s 6 of the Commissions of Inquiry Act or to the provision for "any just excuse" in the new s 13A(1)(b).

Brannigan v Sir Ronald Davison [1997] 1 NZLR 140 (PC)

On appeal, the Privy Council confirmed that the privilege against self-incrimination did not apply to prosecution under foreign law. The statutory "sufficient cause" and "just excuse" exceptions provided ample scope for all the circumstances, including the risk of prosecution in the Cook Islands, to be taken into account. The Court also confirmed that the Commissioner was in a far better position than the Court to assess how important the witnesses' evidence might be and to weigh the competing interests.

Peters v Davison [1998] NZAR 309 (HC), [1999] 2 NZLR 164 (CA), [1999] 3 NZLR 744 (HC)

In the High Court, Smellie J had granted the Commissioner's application to strike out the Hon Winston Peters' action for a declaration that the Wine-box report was a nullity on the grounds that the Commissioner had failed to carry out his terms of reference, made errors of fact and law and had acted in excess of jurisdiction. Smellie J stated that the report did not affect any of the plaintiff's rights and that commissions of inquiry could only be reviewed for breaches of natural justice, acts in excess of their powers and failure to comply with their terms of reference. Expressions of opinion were not reviewable under the Judicature Amendment Act 1972.

Smellie J's ruling was overturned on appeal. The Court of Appeal stated that although the reports of commissions of inquiry had no immediate legal effect, a number of matters support close judicial supervision of inquiries:[49]

- their major significance in practical, public and other senses;
- the fact that the Government only rarely establishes commissions of inquiry;
- the fact that inquiries and their reports attract media and public attention; and the importance of their work and the impact on individuals.

The Court held that:[50]

> An alleged error of law made by a commission of inquiry in its report which materially affects a matter of substance relating to a finding on one of the terms of reference is in general reviewable by Court proceedings. The reason for exercising that power of review is the stronger if that error damages the reputation of any person directly concerned in the inquiry.

49 *Peters v Davison* [1999] 2 NZLR 164, 182 (CA) Richardson P, Henry and Keith JJ.

50 Ibid, 166 Richardson P, Henry and Keith JJ.

Furthermore:[51]

> …[i]n some situations condemnation of a person in a commission report will be scarcely distinguishable in the public mind from condemnation by a Court of law … Where a report calls a person's reputation into question in a direct way, both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis. It would be contrary to the public interest if the Courts were not prepared to protect the right to reputation in such a context…

In making its decision, the Court referred to the Canadian case *Landreville v The Queen*[52] where a declaration had been given in similar circumstances. In that case, although the inquiry had also already reported, the declaration was made because it, "though devoid of any legal effect, would, from a practical point of view, serve some useful purpose".[53]

Despite the non-binding effect of inquiry reports there were situations where a declaration could have value. First, Ministers and others involved in establishing the inquiry and responding to its report, and the general public "are informed by the Court judgment of that defect".[54] Secondly, "where a Court rules that a commission has made a material error of law which damages reputation the plaintiffs gain the significant comfort of a ruling that the findings damning them are based on an error of law."[55] The declaration, therefore, served a practical purpose.

The Court of Appeal remitted the case to the High Court for trial. Anderson and Robertson JJ found that the Commission had erred in law in its application of the doctrine of act of state, in its application of certain provisions of the Income Tax Act 1976 and in its conclusions regarding the existence of tax avoidance, fraud and the incompetence of the Inland Revenue Department.

The High Court considered that "[e]ffect on reputation is a recognised indication for granting relief in such cases"[56] and granted declarations that certain express findings in the Commissioner's report were invalid, based on error of law and that criticisms made of the plaintiff in the report were also invalid to the extent that they were founded on those errors of law and invalid findings.

51 Ibid, 186 Richardson P, Henry and Keith JJ.

52 *Landreville v the Queen* (1973) 41 DLR (3d) 574.

53 Ibid, 581.

54 *Peters v Davison*, above n 49, 186 Richardson P, Henry and Keith JJ.

55 Ibid, 186–187 Richardson P, Henry and Keith JJ.

56 *Peters v Davison* [1999] 3 NZLR 744, para 92 (HC) Judgment of the Court.

Appendix C

Commissions of inquiry and royal commissions since 1976

INQUIRIES ON MATTERS OF PURE POLICY					
Inquiry	Proposed duration (months)	Duration (months)	Number of Extensions	Chair (and members)	Chair with judicial or legal expertise
Commission of Inquiry into Distribution of Motor Spirits and Ancillary Products [1976] IV AJHR H 3	7	18	2	Mr R T Feist (Mr G H Andersen, Mr J J O'Dea)	Yes
Royal Commission to Inquire Into and Report Upon Contraception, Sterilisation and Abortion [1977] II AJHR E 26	12	21	3	Hon Mr Justice McMullin (Denese Henare, Maurice McGregor, Maurice Matich, Barbara Thomson, Dorothy Winstone)	Yes
Commission of Inquiry into New Zealand Electricity Department House Rents (1976)	-	4	-	N R Taylor (J T Ferguson, A G Rodda)	Yes
Royal Commission on Nuclear Power Generation [1978] VII AJHR H 4	15	20	1	Rt Hon Sir Thaddeus McCarthy (Ian Blair, Vivienne Boyd, Bruce Liley, Lindsay Randerson)	Yes
Royal Commission on the Courts [1978] VII AJHR H 2	15	22	2	Hon Mr Justice Beattie (Prof I H Kawharu, Mrs R M King, J D Murray, J H Wallace)	Yes
Commission of Inquiry into the Heavy Engineering Industry (1978)	5	6	1	R K Davison QC (J W Dempsey)	Yes
Commission of Inquiry into the Distribution of Motor Vehicle Parts [1977] III AJHR H 5	14	18	1	K R Congreve, replaced by M J Moriarty (A C Begg, JA Connolly)	No
Commission of Inquiry Into Social Facilities in the Waiouru Camp Community (1978)	4	7	1	J H Macky	No
Royal Commission on the Maori Land Courts [1980] IV AJHR H 3	15	20	1	Rt Hon Sir Thaddeus McCarthy (W Te R Mete-Kingi, M J Q Poole)	Yes

INQUIRIES ON MATTERS OF PURE POLICY *(CONTINUED)*					
Inquiry	Proposed duration (months)	Duration (months)	Number of Extensions	Chair (and members)	Chair with judicial or legal expertise
Commission of Inquiry Into Chiropractic [1979] VIII AJHR H 2	14	20	2	Mr B D Inglis QC (Betty Fraser, B R Penfold)	Yes
Commission of Inquiry into Wage Relativities on New Zealand [1980] IV AJHR H2	6	9	1	G O Whatnall (N A Collins, G A P Lightband)	No
Commission of Inquiry Into Rescue and Fire Services At International Airports [1980] IV AJHR H 4	7	15	1	Captain J S Shephard (I G Lythgoe, D A Varley)	No
Commission of Inquiry into the Taxation of Travelling Allowances [1980] I AJHR B 28	3	3	1	William Wilson	No
Commission of Inquiry into the Freight Forwarding Industry (1980)	6	7	1	B Bornholdt (N H Chapman, L G Clark)	Yes
Commission of Inquiry into Air Traffic Control Services (1982)	3	4	1	Air Marshal Sir Richard Bruce Bolt (Henry van Asch, Edwin Robertson)	No
Royal Commission on Broadcasting and Related Telecommunications [1986] IX AJHR H 2	15	18	1	Prof R McDonald Chapman (Judge Michael Brown, Laurence Cameron, Elizabeth Nelson)	No
Royal Commission on the Electoral System [1986] IX AJHR H 3	13	15	1	Hon John Wallace (John Darwin, Kenneth Keith, Richard Mulgan, Whetumarama Wereta)	Yes
Royal Commission on Social Policy [1988] XII–XV AJHR H 2	23	18	0	Rt Hon Sir Ivor Richardson (Ann Ballin, Marion Bruce, Len Cook, Mason Durie, Rosslyn Noonan)	Yes
Royal Commission on Genetic Modification (2001)	13	14	1	Rt Hon Sir Thomas Eichelbaum (Jean Fleming, Jacqueline Allan, Richard Randerson)	Yes
Royal Commission into Auckland Governance	14			Hon Peter Salmon QC (Dame Margaret Bazley, David Shand)	Yes

INQUIRIES INTO CONDUCT					
Inquiry	Proposed duration (months)	Duration (months)	Number of extensions	Chair (and members)	Chair with judicial or legal expertise
Royal Commission to Inquire Into and Report Upon the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe [1980] IV AJHR H 6	9	7	0	Hon Robert Taylor Q C (Rt Hon J B Gordon, Most Reverend A H Johnston)	Yes
Royal Commission to Inquire Into and Report Upon Certain Matters Related to Drug Trafficking (1983)	? (Australia: 12)	4 (Australia: 19)	0	Hon Mr Justice D G Stewart, Judge of the Supreme Court of New South Wales	Yes

INQUIRIES INTO CONDUCT AND POLICY					
Inquiry	Proposed duration (months)	Duration (months)	Number of extensions	Chair (and members)	Chair with judicial or legal expertise
Commission of Inquiry into an Alleged Breach of Confidentiality of the Police File on the Honourable Colin James Moyle, MP (1978)	1	1	0	Rt Hon Alfred North	Yes
Commission of Inquiry into the Discharge by the Director-General of Social Welfare and other Officers of the Department of Social Welfare of their Respective Responsibilities in Respect of a 13-year-old Niuean Boy [1977] II AJHR E 25	1	2	1	William Mitchell	Yes
Commission of Inquiry into Abbotsford Landslip Disaster [1980] IV AJHR H 7	6	15	4	R G Gallen QC (G S Beca, Prof J D McCraw, T A Robert)	Yes
Commission of Inquiry into Allegations of Impropriety in Respect of Approval by the Marginal Lands Board of an Application by James Maurice Fitzgerald and Audrey Fitzgerald [1980] IV AJHR H 5, H 5A	1	1	0	Mr B D Inglis QC (Air Marshall Sir Richard Bolt, J J Loftus)	Yes
Royal Commission to Inquire Into and Report Upon the Crash on Mount Erebus, Antarctica, of a DC-10 Aircraft operated by Air New Zealand Limited (1981)	4	10	1	Hon Peter Mahon	Yes
Commission of Inquiry into the Administration of the District Court at Wellington (1983)	4	9	2	P G Hillyer QC (E A Missen, G Tait)	Yes
Commission of Inquiry into the Circumstances of the Release of Ian David Donaldson from a Psychiatric Hospital and of his Subsequent Arrest and Release on Bail (1983)	3	3	0	P B Temm QC (Margaret Clark, I G Lythgoe)	Yes
Commission of Inquiry into Contractual Arrangements Entered into by the Broadcasting Corporation of New Zealand With its Employees and into Certain Matters Related to Advertising [1984] IX AJHR H 2	3	7	2	Mr W R Jackson (Mr R Good)	No
Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast [1995] XL AJHR H 2	2	6	1	Judge G S Noble	Yes
Commission of Inquiry into Certain Matters Relating to Taxation [1997] LVI AJHR H 3	6	35		Rt Hon Sir Ronald Davison	Yes
Commission of Inquiry into Police Conduct	8	37	6	Dame Margaret Bazley (Hon Justice J Bruce Robertson Chair until May 2005)	No (from May 2005)

Appendix D

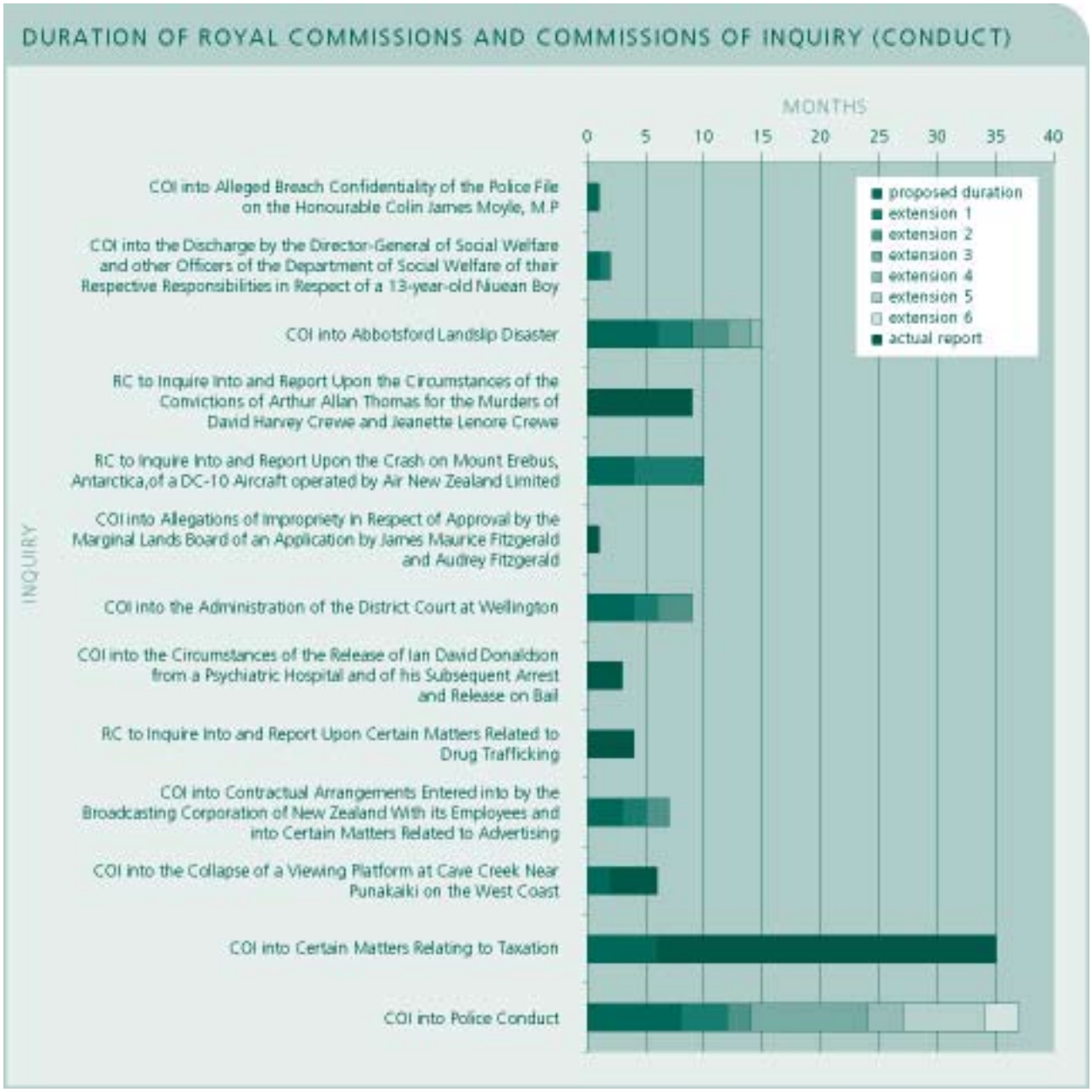
Some ministerial inquiries since 1990

SOME MINISTERIAL INQUIRIES SINCE 1990				
Date	Inquiry	Chair and Members	Judicial or legal expertise	How Established?
2007	Local Government Rates Inquiry	David Shand, Graeme Horsley, Dr Christine Cheyne	No	Established by the Minister of Local Government
2006	Report of the Joint Working Group on Concerns of Viet Nam Veterans	Michael Wintringham, John Campbell, Robin Klitscher, Rod Baldwin, John Dow, Chris Mullane, Diane Anderson	No	Established by Minister of Veterans' Affairs and Minister of Defence
2006	Report to the Prime Minister upon Inquiry into Matters Relating to Taito Phillip Field	Noel W Ingram QC	Yes	Established by Prime Minister
2005	Ministerial Review into Allegations of Abuse at the Waiouru School from 1948 to 1991 and Events Surrounding the Killing of Cadet Grant Bain in 1981	Hon David Morris	Yes	Established by Minister of Defence
2004	Report into the Handling of Ron Burrow's Phone Call	Ailsa Duffy QC	Yes	Established by Minister of Child Youth and Family
2004	Inquiry into matters relating to Te Whānau o Waipareira Trust and Hon John Tamihere	Douglas White QC	Yes	Established by Acting Prime Minister
2003	Ministerial Inquiry into the Management of Certain Hazardous Substances in Workplaces	Hon Dennis Clifford	Yes	Established by Minister of Labour
2002	Working Group on Pay Parity for Kindergarten Teachers	Hon Stan Rodger, Helen Kelly, Judith Nowotarski, Dawn Osman, Merren Dobson, Jan Ballantyne, Ruth Chapman, Raywyn Ramage.	No	Established by Minister of Education
2001	Inquiry into the disciplinary processes of the NZ Fire Service	Helen Cull QC	Yes	Established by the NZ Fire Service
2001	Review of Processes Concerning Adverse Medical Events	Helen Cull QC	Yes	Established by Minister of Health
2001	Ministerial Inquiry into the Peter Ellis Case	Rt Hon Sir Thomas Eichelbaum	Yes	Established by Minister of Justice

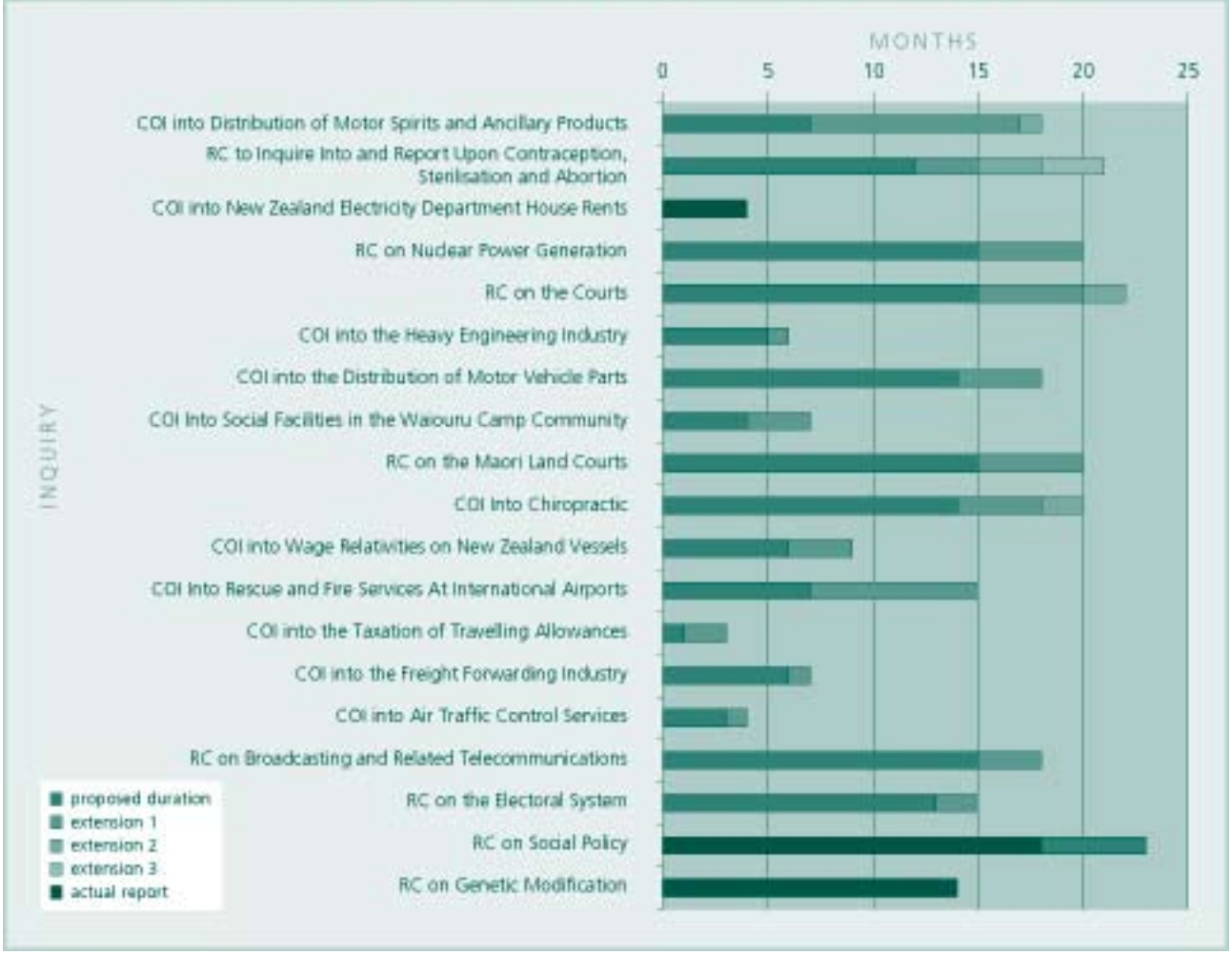
SOME MINISTERIAL INQUIRIES SINCE 1990 *(CONTINUED)*				
Date	Inquiry	Chair and Members	Judicial or legal expertise	How Established?
2001	Ministerial Review into Tax	Robert McLeod, David Patterson, Shirley Jones, Srikanta Chatterjee, Edward Sieper	Yes	Established by Minister of Revenue
2000	Ministerial Inquiry into the Electricity Industry	Hon David Caygill, Dr Susan Wakefield, Stephen Kelly	Yes	Established by Minister of Energy
2000	Ministerial Inquiry into INCIS (initially a Commission of Inquiry)	Dr Francis Small	No	Established by Minister of Justice
2000	Ministerial Inquiry into Telecommunications	Hugh Fletcher, Allan Asher, Cathie Harrison	No	Established by Minister of Communications
2000	Ministerial Inquiry into Tranz Rail Occupational Safety and Health	Bill Wilson QC	Yes	Minister of Labour, in consultation with Minister of Transport
2000	Shipping Industry Review: A Future for New Zealand Shipping	Ian Mackay, Graham Cleghorn, John Deeney, Rod Grout, Dave Morgan, Trevor Smith	Yes	Established by Minister of Transport
2000	Review of the Roles and Responsibilities of the Education Review Office	Hon Stan Rodger (chair), Jane Holden, Anne Meade, Alan Millar, Barry Smith	No	Established by the Minister of Education
2000	Ministerial Review of the Department of Work and Income	Don Hunn	No	Established by the Minister for State Service
1999	Report on DNA Anomalies	Rt Hon Sir Thomas Eichelbaum, Prof John Scott	Yes	Established by Minister of Justice
1999	Inquiry into the Health Status of Children of Vietnam and Operation Grapple Veterans	Sir Paul Reeves P, AL Birks, Margaret Faulkner, Colin Feek, Patrick Helm	No	Established by Cabinet
1998	Joint Ministerial Inquiry into Lake Waikaremoana	J K Guthrie and J E Paki		Established by Minister of Maori Affairs and Minister of Conservation
1998	Ministerial Inquiry into the Auckland Power Supply Failure	Hugh Rennie QC, Keith Turner, Don Sollitt	Yes	Established by Minister of Energy
1998	Report of the Ministerial Inquiry Into Various Aspects of the Civil Aviation Authority's Performance	John Upton QC (chair), Donald Spruston	Yes	Established by Minister of Transport
1994	Organisational Review of the Inland Revenue Department	Rt Hon Sir Ivor Richardson	Yes	Established by the Minister of Revenue
1993	Ministerial Inquiry into Management Practices at Mangaroa Prison, Arising from Alleged Incidents of Staff Misconduct	Basil M Logan	No	Established by the Minister of Justice
1993	Ministerial Committee on Assisted Reproductive Technologies	Bill Atkin, Dr Paparangi Reid	Yes	Established by the Minister of Justice
1991	Committee of inquiry into the death at Carrington Hospital of a Patient, Manihera Mansel Watene and Other Related Matters	J A Laurenson	Yes	Established by Minister of Health

Appendix E

Duration of 1908 Act commissions



DURATION OF ROYAL COMMISSIONS AND COMMISSIONS OF INQUIRY (POLICY)



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