LAW·COMMISSION
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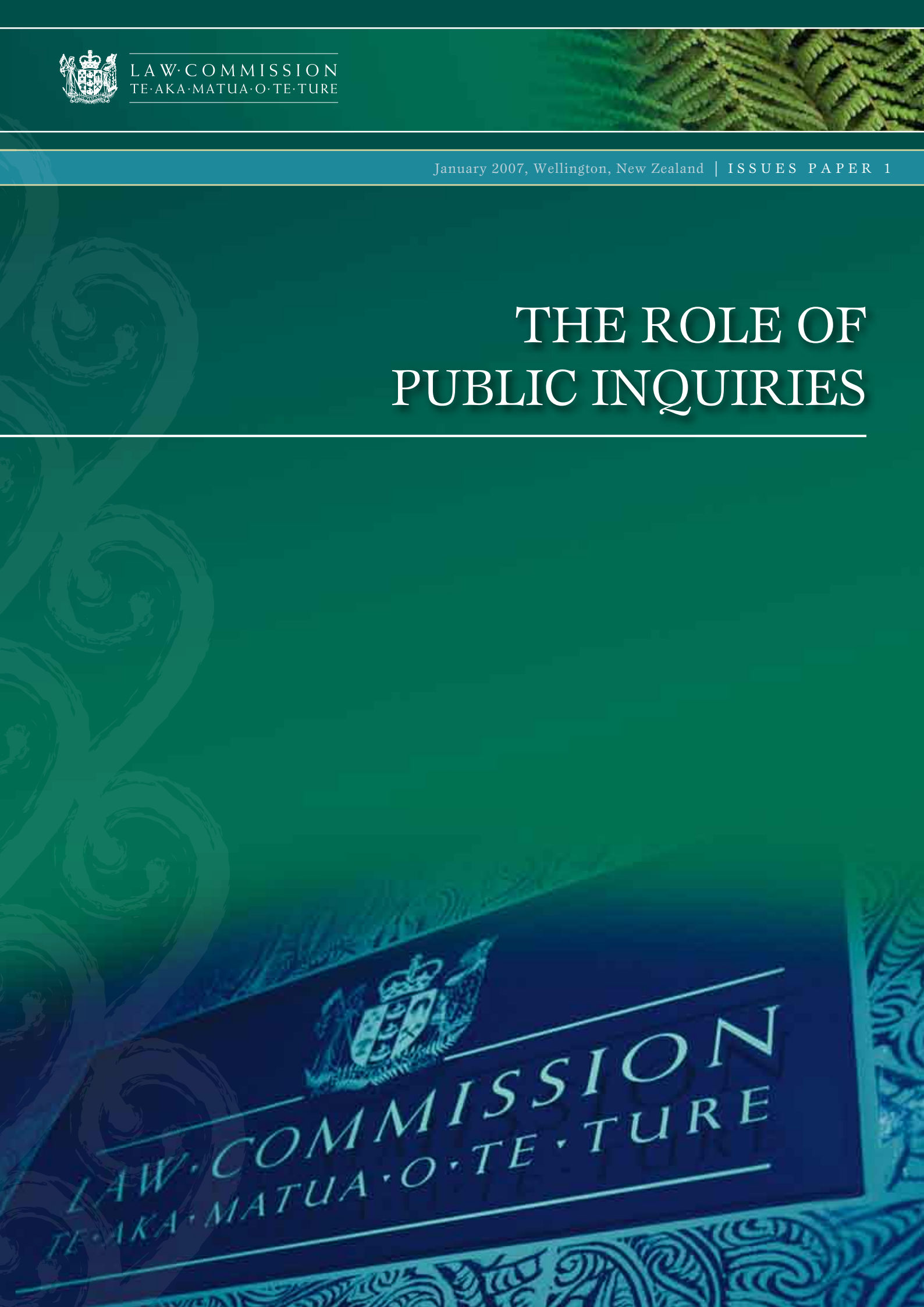
THE ROLE OF PUBLIC INQUIRIES



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THE ROLE OF PUBLIC INQUIRIES

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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The Role of Public Inquiries

Issues paper

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FOREWORD

The Government has asked the Law Commission to review the law relating to public inquiries in New Zealand. The central piece of legislation we will consider is the Commissions of Inquiry Act 1908, which sets out the overarching framework and powers of commissions of inquiry and royal commissions. We will also to consider various other forms of inquiry that are used from time-to-time by Government, to investigate events, disasters, procedures and policy.

We are releasing this discussion paper to stimulate debate about the purposes of public inquiries. We hope that it will help us develop a clearer picture of what motivates their establishment; what it is hoped an inquiry will achieve; and what their status and effect is within the political process. As we state in the text below, this will help us when we come to make recommendations about whether a new Act is needed, and what it should say.

The Law Commission intends to release its draft recommendations, in mid-2007. Our aim is then to publish our final report, including any draft legislation, by the end of 2007.

The deadline for responses to this paper is 2 March 2007. Responses can be sent to Submissions, Law Commission, PO Box 2590, Wellington, or by email to inquiriesproject@lawcom.govt.nz.

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 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.

The Role of Public Inquiries

INTRODUCTION

1. The Law Commission has been asked to review and propose changes to the law relating to public inquiries in New Zealand. A number of issues have to be tackled. Why have inquiries at all? What purpose do they serve that other mechanisms cannot? Why has there been a trend away from formal inquiries and what revisions to the Commissions of Inquiry Act 1908 (the 1908 Act) are required?

2. It has been said of inquiries in Britain that:

> "If public inquiries are to be known by their fruits, and if their proper fruits are reforms and improvements in law and practice, there is probably not a great deal to be said for them."[1]

3. Is this also true of New Zealand? Our aim in writing this paper is to stimulate discussion about the characteristics that differentiate public inquiries (and commissions of inquiry in particular) and about the traits that justify their unique existence. We do not draw definitive conclusions in this paper, but ask questions and seek feedback. We hope that, in turn, this will aid us in identifying the parameters for their overarching framework.

WHAT DO WE MEAN BY "PUBLIC INQUIRIES"?

4. There is a continuum of inquiries and investigations available to Government, ranging from day to day departmental or inter-departmental work at one end of the scale, through ad hoc departmental inquiries, ministerial inquiries and specialised or narrow inquiries under other statutes, to formal commissions of inquiry under the 1908 Act and royal commissions established under the Letters Patent.

5. Our terms of reference require us to consider, in particular:

   - commissions of inquiry established under the 1908 Act;
   - royal commissions; and
   - ministerial inquiries.

6. In this paper, we refer to these as "public inquiries" and we use the term "ministerial inquiry" to mean a non-statutory inquiry instigated by a minister. We do not include the many specialised inquiries that a minister can establish under his or her statutory powers. Our review does not specifically include tribunals and other agencies which exercise powers derived from the 1908 Act, except to the extent that they will be affected by any suggested changes to that

1 Stephen Sedley "Public Inquiries: A Cure or a Disease?" (1989) 52 MLR 469 at 469.

legislation. Nor are we directly concerned with standing commissions, parliamentary select committees, the multitude of other reviews and committees set up from time to time, or the many inquiries that take place in the private sector (for instance by sporting bodies or the stock exchange). Nevertheless, we do describe some of these bodies below: to properly develop an understanding of the role played by our "public inquiries", an understanding of the functions and tasks of other similar mechanisms is needed.

Commissions established under the Commissions of Inquiry Act 1908

7. Statutory commissions of inquiry were introduced in New Zealand under the Commissioners' Powers Act 1867. The legislation has been amended, and the powers of Commissioners extended a number of times since, but the overall framework has remained consistent since 1903.[2]

8. 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."[3]

9. A commission of inquiry has the power to require the production of evidence, compel witnesses and take evidence on oath. Those carrying out the inquiry, and witnesses to it, are protected by certain immunities and privileges.

Royal commissions

10. Royal commissions are constituted by the Governor-General under powers conferred by the Letters Patent issued by the Queen.[4] Section 15 of the 1908 Act extends the powers, immunities and privileges of commissions of inquiry to royal commissions so in practice there is little difference between the two types of

2 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.

3 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.

4 Article X of the Letters Patent 1983 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."

inquiry. Royal commissions are generally, but not always, chaired by a judicial or retired judicial officer[5] and are seen as having greater status than other commissions of inquiry. We examine whether this alone is reason for retaining the distinction in paragraphs 94–98, below.

Ministerial inquiries

11. There is no central record of ministerial inquiries but an incomplete list can be found in appendix 3. Two recent examples are those into the conduct of former Ministers Taito Phillip Field[6] and John Tamihere.[7] Both were established by the Prime Minister and reported directly to her. Other ministerial inquiries have investigated the conduct of the Peter Ellis case,[8] and the Telecommunications and Electricity industries.[9] In each instance, the persons appointed to conduct the inquiries carried them out without powers to compel witnesses or the production of documents, or to administer oaths.

12. Ministers can establish inquiries into areas of administration for which they are responsible (although frequently such decisions are made by Cabinet as a whole). Although such inquiries have no official status, they are included in our terms of reference because of their prevalence and also because of recent concern that their lack of powers may limit their efficacy.[10]

13. Ministerial inquiries are often seen as a quick and cost-effective way to have an independent investigation, while retaining some executive control over the process. Whether this is borne out in practice needs to be considered. Such inquiries have increased in popularity in recent years, whilst formal commissions of inquiry have waned. We consider some of the possible reasons for this.

14. Ministerial inquirers have encountered varying levels of success in conducting their inquiries. In many cases the lack of powers has not been seen as a handicap. But successful ministerial inquiries have often involved interviews with government employees or other persons who may have been directed to co-operate, or have a professional incentive to do so. They have been less successful where information has been sought from members of the general public – who often have less incentive to co-operate, and may have valid concerns about doing so.[11]

5 *The Royal Commission on Broadcasting and Related Telecommunications* [1986] IX AJHR H 2 was a recent exception, chaired by an academic, Prof R McDonald Chapman.

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

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

8 Sir Thomas Eichelbaum *Ministerial Inquiry into the Peter Ellis Case* (2001).

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

10 In the recent inquiry into the activities of Taito Phillip Field, Noel Ingram QC noted the limitations of his (non-statutory) inquiry. He concluded that, as a result of non-compliance, he was forced to proceed on the basis of inference in some instances, and was unable to reach conclusions in others. See Ingram, above n 6, 5.

11 Those giving evidence to ministerial inquiries are not given any of the immunities and protections set out in the 1908 Act.

An ideal form of inquiry?

15. Because inquiries differ in their status, manner of creation, oversight, and powers, they have contrasting attributes, strengths and weaknesses. The decision to establish one form of inquiry over another depends on numerous factors, including the gravity of the event or matter at hand, the issues and individuals involved, perceptions about what powers are needed, and the political imperatives at play. This complicated scene means that it is difficult to identify trends or generalise. It is also difficult to identify what might, in a given set of circumstances, be an "ideal" form of inquiry.[12] However, in this paper, we are concerned with the factors that influence the decision to have an inquiry at all, and with why one form of inquiry is established over another.

THE STATUS OF PUBLIC INQUIRIES

16. Commissions of inquiry under the 1908 Act have no formal constitutional status. Although creatures of the executive, their relationship with the Government, Parliament and the courts is not explicitly set out. Ministerial inquiries have even less status, and, technically, are merely a form of advice tendered to a Minister.

17. Nowhere is the independence of inquiries expressly articulated or given formal standing. The executive is responsible for setting inquiries up, deciding their terms of reference and appointing the commissioners, and it is ultimately responsible for deciding whether to implement their recommendations.[13] No individual has a right to an inquiry and there is no concrete process (other than political and media pressure) whereby others can have a say in their establishment or the implementation of their findings.

18. Even once established, an inquiry's relationship with the executive is unclear. There are no rules setting out how an inquiry should interact with government. There have been varying practices in New Zealand inquiries, ranging from self-imposed complete distance, to frequent briefings of ministers and officials as the inquiry progresses. Similarly, there is no express restriction on government varying the terms of reference of an inquiry, exerting direct or indirect pressure on commissioners, varying its resources, and ultimately halting its progress. Ministerial inquiries appear to have a less independent standing than those under the 1908 Act. Ultimately however, whatever the type of inquiry, the degree of influence by the minister will depend on the personalities involved – some ministers will have a more intrusive approach than others, and some inquirers will be more robust in resisting pressure.

19. There is however a strong public expectation that formal inquiries will be conducted independently, and usually they are. While inquiries lack official independence, they offer a more independent form of inquiry than government agencies. Since they do not have to manage ongoing consultative relations with central government, they may also be more independent than standing commissions such as the Securities Commission, Human Rights Commission or Law Commission. Generally, an inquiry's membership is drawn from outside the immediate circle of government, which enhances their independent status.

12 See B Winetrobe "Inquiries After Scott: The Return of the Tribunal of Inquiry" [1997] Public Law 18.

13 R A MacDonald "The Commission of Inquiry in the Perspective of Administrative Law" (1980) 18 Alberta LR 366 at 387.

Furthermore, the tendency to appoint judicial heads reinforces their "apolitical, independent, dignified, authoritative [and] serious nature …".[14] Nevertheless, we consider there is a question whether a more formal mechanism for determining the extent of, or even protecting against, government intervention is required. We discuss this further in paragraphs 127–130.

20. What the foregoing reveals is that there is a lack of clarity about the status of public inquiries. In the light of this, what is it that distinguishes the public inquiries within our terms of reference from the other bodies and processes involved in public policy and decision-making? What is their purpose and how has such an ill-defined and malleable mechanism been used by government in New Zealand?

THE PURPOSE OF PUBLIC INQUIRIES

21. Below, we examine the role public inquiries have played (i) as fact-finders, (ii) as tools for developing policy and legislation, (iii) as an independent check on executive action and (iv) as a form of participatory government.

Fact-finding inquiries

22. Arguably, inquiries are most useful and efficient as mechanisms for fact-finding tasks – that is, establishing what happened in relation to a particular incident or series of events. Unlike every day government fact-finding practices, inquiries are established for a specific function, have a clear purpose, and are resourced for fulfilling that purpose. Inquiries under the 1908 Act have protections and powers that give them "teeth", which non-statutory inquiries lack.

23. Inquiries also have more flexibility than court processes and are not dependent on parties bringing a case. The issues are determined by the inquiry itself, the only restriction being its terms of reference. The inquiry, rather than the parties and their counsel, is in charge of determining what evidence to call and which individuals it wishes to question; and it is not there solely to resolve a narrow dispute, or *lis*, between opposing parties.[15] Its findings, although recommendatory only, are not subject to appeal and can only be reviewed on narrow grounds. Inquiries therefore straddle other models – their public nature gives them the strength and solemnity of the legal system; but their inquisitorial nature means they escape the constrictions of subject-matter and procedure.[16]

24. Since 1976, 12 commissions of inquiry and royal commissions[17] have been established because of a single, identifiable event (or course of events) such as a disaster, or an allegation about an individual's or agency's conduct. Of these inquiries, two (those into the convictions of Arthur Allan Thomas,[18] and

14 Diana Woodhouse "Matrix Churchill: a Case Study in Judicial Inquiries" (1995) 48 Parliamentary Affairs 24 at 25.

15 Although, in reality there are frequently sharp issues between those people affected by an inquiry.

16 Sedley, above n 1.

17 See appendix 1.

18 Hon Robert Taylor Q C *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.

"Certain Matters Related to Drug Trafficking"[19]) were set up solely as fact-finding bodies, aiming to establish "what happened". The remaining ten were established to perform a similar fact-finding exercise but also to go on to make recommendations about policy, procedures and/or legislation.

25. While inquiries seem well suited to fact-finding, their success in New Zealand has been chequered. Arguably, the 1980 Abbotsfield Landslip[20] inquiry can be considered a fruitful and efficient inquiry that delivered many of the objects sought by government and the public. However, in other cases the motivation for using an inquiry to look into conduct has been called into question (for example, the Moyle Inquiry in 1978 was seen as having strong party political motives).[21] And it is fact-finding and blame attributing inquiries that have, by far, led to the most litigation in New Zealand (see appendix 5).

26. Inquiries are the most powerful inquisitorial and public tool available to ministers. But their coercive nature, particularly when combined with their flexibility should not be underestimated – they are capable of ruining professional, personal and commercial reputations. While they are therefore very effective mechanisms for obtaining the truth, there is a danger they can be used oppressively. Below we ask whether it is appropriate that inquiries are used to investigate an individual's conduct (see paragraphs 99–109, below).

27. There are now a large number of other fact-finding bodies which investigate specific events. Transport accidents are independently investigated by the Transport Accident Investigation Commission;[22] and medical concerns may be investigated by the Health and Disability Commissioner or by statutory inquiries initiated by the Minister of Health.[23] Inquiries into the administration of government may be undertaken by the Ombudsman, Auditor-General or State Services Commissioner. Inquiries into whether prosecutions were properly brought[24] may now be dealt with by the Police Complaints Authority.

28. There may be a question as to how broad the ongoing role for public inquiries is in this area. Our view is that while the need for such inquiries may increasingly be confined to major disasters or significant state sector failures, there is still a need for them where public confidence demands a greater impression of independence than other statutory officers and bodies can provide. For instance, the Cave Creek inquiry[25] could have been conducted as a departmental, state

19 Hon Mr Justice D G Stewart *Report of the Royal Commission to Inquire Into and Report Upon Certain Matters Related to Drug Trafficking* (1983).

20 R G Gallen QC *Report of the Commission of Inquiry into Abbotsford Landslip Disaster* [1980] IV AJHR H 7.

21 Rt Hon Alfred North *Commission of Inquiry into Alleged Breach Confidentiality of the Police File on the Honourable Colin James Moyle, MP* (1978). See Geoffrey Palmer "Muldoon and the Constitution" in M Clark (ed) *Muldoon Revisited* (Dunmore Press, Palmerston North, 2004), 189–194.

22 Transport Accident Investigation Commission Act 1990, s 8.

23 See, the Health and Disability Commissioner Act 1994, s 40 and Part 5 of the New Zealand Public Health and Disability Act 2000. See also, 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) and Ailsa Duffy QC *Report of the Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region* (2001).

24 For example, W H Carson, SM *Commission of Inquiry into the Police Prosecution of Donald James Ruka and Murdoch Campbell Harris* [1955] II AJHR H 16E.

25 Judge G S Noble *Report of the Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast* [1995] XL AJHR H 2.

services or ministerial inquiry, but probably none of these would have met the public demand for an independent inquiry as to whether there had been a systemic failure within the Department of Conservation. Similarly, the "Wine-box" inquiry grew out of ongoing concerns about the administration of the Income Tax Act 1976, which called for independent investigation at arms length from government.[26]

29. However, we predict that the need for such inquiries may increasingly be confined to major disasters or significant state sector failures

Inquiries into the development of policy and legislation

30. Policy inquiries tend to be used for matters that fall outside normal government procedure, where the issues straddle, or place in conflict, the responsibilities of a number of departments. They may also be used for topics that are genuinely novel, on which there are no historic party-political lines and where the decision-makers genuinely do not know which approach to take. An example, was the Commission of Inquiry into the Fluoridation of Public Water Supplies which reported in 1957.[27] Other inquiries may come about where parties in or allied with government may not agree on a policy, as was the case with the Royal Commission on Genetic Modification.[28]

31. One British view is that "the influence of Commission inquiries upon legislation is generally too elusive for accurate determination".[29] But this has not necessarily been the New Zealand experience. The emphasis on policy inquiries is a peculiarly New Zealand characteristic. A review of the 1908 Act inquiries that have reported over the last 30 years reveals that of 31 commissions of inquiry and royal commissions, 19 have solely tackled issues of policy.[30] Of these, some have concerned apparently narrow topics such as the distribution of motor vehicle parts[31] and wage relativities on New Zealand vessels.[32] Others have investigated issues of major importance to all New Zealanders.

32. New Zealand has benefited greatly from a number of these inquiries. Sir Owen Woodhouse's 1967 report on Compensation for Personal Injury had an extremely valuable and wide-reaching impact on law and policy. The mixed member proportional electoral system was adopted after the 1986 Royal Commission on the Electoral System.[33] The Beattie Royal Commission on the Courts[34] resulted in significant changes to the jurisdictions (and names) of the High Court and

26 Rt Hon Sir Ronald Davison *Report of the Commission of Inquiry into Certain Matters Relating to Taxation* [1997] LVI AJHR H 3.

27 Judge W F Stillwell *Commission of Inquiry into the Fluoridation of Public Water Supplies* [1957] V H 47.

28 Rt Hon Sir Thomas Eichelbaum *Report of the Royal Commission on Genetic Modification* (2001).

29 H M Clokie and J W Robinson *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Octagon Books, New York, 1969), 123.

30 See appendix 1.

31 Mr Moriarty *Report of the Commission of Inquiry into the Distribution of Motor Vehicle Parts* [1977] III AJHR H 5.

32 Mr G O Whatnall *Report of the Commission of Inquiry into Wage Relativities on New Zealand Vessels* (1979).

33 Hon John Wallace *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* [1986] IX AJHR H 3.

34 Hon David Beattie *Report of the Royal Commission on the Courts* [1978] VII AJHR H 2 and Sir Thaddeus McCarthy Royal Commission on the Māori Land Courts [1980] IV AJHR H 3.

District Court. Policy developed from the work and recommendations of the Royal Commission on Genetic Modification[35] is constantly informing policy and legislation in that field.

33. The value added by other policy inquiries has been harder to discern. The saga of the Royal Commission on Social Policy[36] shows how inquiries can become hamstrung by events outside its control (in this case, the shift of government agenda to economic reform). That inquiry is also evidence of the difficulties that can be encountered when the purpose is unclear, the terms of reference too broad, and where government commitment to the outcome is lacking.

34. Will there be such a need for this type of policy inquiry in the future? As with the growing number of fact-finding bodies, there are now many specialist permanent commissions, tribunals and other bodies in existence, vested with both policy roles and investigatory powers. For instance, whereas royal commissions have in the past inquired into matters involving Māori claims against the Crown,[37] the Waitangi Tribunal fulfils a similar role; parliamentary salary[38] issues are now governed by the Remuneration Authority; and the Law Commission has undertaken two reviews of the court system since its inception.[39]

35. Furthermore, government ministries and departments are increasingly resourced to undertake policy work, both internally and in collaboration with other public and private agencies. Without the powers of inquiries held under the 1908 Act, they also operate in an atmosphere of competing priorities and resources, and against the background of ministerial direction. Another weakness is that government officials may not be the best people to recommend paradigm shifts in policy. They are likely to have vested interests in the status quo because they either work with or are responsible for it. It follows that the scope for real innovation, and for engendering open public consultation, may be limited.

An independent check on executive action

36. It might be said that an important role of commissions of inquiry (particularly those of a fact-finding nature) is to provide an additional check on executive action. However, the extent to which they effectively play this role and to which they are equipped to do so in comparison with other mechanisms needs examination.

37. Investigation of, and criticism or recommendations about, government action or public employees is frequently a by-product of inquiries. Yet, as noted, they are established and exist solely at the discretion of government. A government under pressure to review its policy or actions will often resist such an inquiry unless it becomes politically untenable not to establish one.

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35 Eichelbaum, above n 28.

36 Sir Ivor Richardson *Royal Commission on Social Policy* [1988] XII–XV AJHR H 2. See the discussion in Brian Easton "Royal Commissions as Policy Creators: The New Zealand Experience" in P Weller Royal *Commissions and The Making of Public Policy* (Macmillan Education, Australia, 1994), 238.

37 For example, Hon Sir Harold Johnston *Royal Commission on Māori Claims to the Wanganui River* [1950] II AJHR G 2.

38 For example, Mr E D Blundell, OBE *Royal Commission on Parliamentary Salaries* [1961] IV AJHR H 50.

39 New Zealand Law Commission The Structure of the Courts (NZLC R7, Wellington, 1989) and *Delivering Justice for All* (NZLC R85, Wellington, 2004).

38. Nevertheless, while the findings of commissions of inquiry can and have been ignored, governments usually take their findings seriously, even when this may appear to be against their own immediate vested interests. This was the case with the establishment of the Royal Commission on the Electoral System[40] which led to the introduction of mixed member proportional representation (MMP) in 1996.

39. The public and those in opposition often call for inquiries because government or the public service is seen as incapable of giving an impartial response where one is needed. Thus, an inquiry's real or apparent independence tends to enhance public acceptance of the outcome. A good public inquiry also facilitates a "rational, calm, reasoned form of decision making", outside the hold of government and influences of party politics.[41] That said, whether the decision-making is in practice calm or reasoned may also be dependent on the personalities of the commissioners involved.

40. Inquiries can give an insight into the workings of government and public administration in a way few other processes can. This strength has recently been highlighted in relation to the Hutton[42] and Butler[43] inquiries in Britain which dealt, indirectly, with the decision to go to war in Iraq. Both have been described as "beams" in terms of "the light shed on the processes of government", because of what they revealed about the process of decision making in the United Kingdom government and the way in which information was released to the public.[44] In comparing the ability of those inquiries to other methods of eliciting information and thus assuring democratic accountability, it has been said that the Hutton inquiry has "exposed a yawning gap between the Hutton hearings and both the reach and the forensic powers of the [House of] Commons Foreign Affairs Select Committee" in its examination of the same events.[45] The recent inquiry into the Australian Wheat Board's involvement in the UN's Oil-for-Food programme,[46] also falls into this category. With the possible exception of the

40 Wallace, above n 33.

41 Scott Prasser "Public Inquiries in Australia: An Overview" (185) 44 Australian Jnl of Public Administration 1 at 8. See also G Rhodes *Committees of Inquiry* (George Allen & Unwin Ltd, London, 1975), Ch 8.

42 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 to: "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.

43 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."

44 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.

45 Hennessy, above n 44, 71.

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

Marginal Lands Board inquiry,[47] quite such a wide-reaching inquiry has not yet taken place in New Zealand, but there is little reason to think that comparable circumstances could not arise in the future.

A form of participatory government

41. Public inquiries can also be a "highly visible" tool for government.[48] They can serve government by being seen as bringing objectivity, impartiality and expertise to an issue.[49] These advantages appeal to both those inside and outside of government. Politicians may find there is a benefit in using the distance of an inquiry to change public perceptions by providing a more obviously impartial view on a controversial subject. Again, the Royal Commission on the Electoral System is an example of this.

42. Inquiries are participatory in the sense that they can provide a forum for a wide range of people to play a role in the policy or investigative process. While government departments, permanent commissions and select committees undertake public consultation, the relatively rare occurrence of commissions of inquiry, their high profile and distance from government may serve to encourage people to make submissions where otherwise they would not. Indeed part of many inquiries' tasks is to actively seek public input. The Royal Commission on Social Policy encouraged community participation by establishing a freephone service, holding 60 public meetings and hui, and by commissioners taking part in talkback radio sessions. The Royal Commission on Genetic Modification also held public meetings in 15 centres, held dedicated Māori and youth consultation, used an online tool to receive submissions and commissioned a public opinion survey.

43. Although there is no statutory presumption that inquiries under the 1908 Act should be held in public,[50] they generally operate openly unless there is a good reason not to (such reasons arose for some of the evidence to the Cartwright inquiry[51] and have arisen in the current Commission of Inquiry into Police Conduct). Similarly, there is no provision that an inquiry's report will be made public, but it might be considered that by appointing a commission of inquiry a government is opting for a public process and report.

44. Inquiries can also be used by governments as a means of co-opting, or as a minimum, mollifying the public.[52] A number of commentators have noted that the real benefit of inquiries lies not so much in their findings, but in the fact that they take place and follow an open, participatory process:

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47 Mr B D Inglis QC *Report of the 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.

48 MacDonald, above n 13, 366.

49 MacDonald, above n 13, 370.

50 Compare Royal Commissions Act 1923 (NSW), s 7 and Commissions of Inquiry Act 1995 (Tas), s 13 which establish presumptions of openness.

51 Cartwright, above n 23. Compare the Gisborne cervical smear inquiry where the hearings were largely heard in public; see Duffy, above n 23.

52 MacDonald refers to the public inquiry as a "pacifying institution" and a "cultural therapist". See MacDonald, above n 13, 387 and 391.

"In the case of commissions of inquiry, one is confronted by a process whose principal raison d'être is its process: there may be no goal for the process beyond the fact that it exists."[53]

45. The announcement of an inquiry as well as the ongoing publicity accompanying it can serve to prepare the public and consolidate support.[54] While their limited lifespan hinders their ability to influence the implementation of their recommendations, an inquiry report can be used to exert influence on the policy process long after the inquiry itself has disbanded.[55]

Summary – why are inquiries held?

46. The discussion above shows that formal commissions have been used in New Zealand for a very wide variety of reasons.[56] The British House of Commons' Public Administration Select Committee summarised the views of its submitters on why inquiries there are set up as follows:[57]

> **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;
>
> **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. [58]

53 MacDonald, above n 13, 394. See also, at 372.

54 Clokie and Robinson, above n 29, 139–140.

55 Prasser, above n 41, 8. An example is the Royal Commission on Genetic Modification.

56 See, for example, Brian Easton "Royal Commissions as Policy Creators: The New Zealand Experience" in P Weller Royal *Commissions and The Making of Public Policy* (Macmillan Education, Australia, 1994).

57 House of Commons Public Administration Select Committee *Government by Inquiry: Volume 1* (The Stationery Office Limited, London, 2005), 9–10.

58 These reasons were adopted by the Law Reform Commission of Ireland in its recent report Law Reform Commission of Ireland *Public Inquiries Including Tribunals of Inquiry: Report 73* (LRC, Dublin, 2005), 20.

47. These reasons are also apt for New Zealand inquiries, although, we would add "policy development" to the list given New Zealand's strong history of using inquiries for issues of policy. And we would emphasise the fact that inquiries are frequently used to get controversial issues off the front pages for a period of time. While all the above reasons may contribute to why an inquiry is established, an influential factor may be the more short term desire to provide politicians with some breathing space from politically sensitive issues.

48. Ultimately what the above shows is that there may be any number of motivations and broad purposes for different inquiries. As Clokie and Robinson put it: "The circumstances which lead a Ministry to appoint a Commission of Inquiry are as varied as the exigencies of political life".[59]

The problem of conflicting purposes

49. One of the key problems for many public inquiries – one that hinders their progress and value – arises where there is a conflict between the purposes set out above. For example, the desire for public reassurance, which is often really about blame and retribution, can be at a variance with what Government considers to be a politically expedient outcome of an inquiry. Similarly, where accountability and blame is sought by an inquiry, that background is often ill-matched to making broad and useful recommendations about procedures and policy to prevent a recurrence as policy decisions made on the basis of a one-off disaster are not necessarily the most pragmatic or rational. Finally, an inquiry that seeks to establish "what happened" may not deliver a therapeutic conclusion for those directly involved. Where public confidence is at issue, speed, openness and transparency may be required, but if the circumstances require that an inquiry be held in private, or that more time is taken, catharsis will not be achieved. An "unsatisfactory" inquiry can serve to aggravate rather than heal a wound.

50. No two inquiries result from the same motivation or combination of motivations. They can be created for a convenient combination of "overt" or "substantial" and implicit "instrumental" or "political" reasons.[60] For instance, Chen has criticised the State Services Commission's 2000 inquiry into the Department of Work and Income, which was portrayed as a policy inquiry, but in truth seemed to be directed at the conduct of the department's then Chief Executive.[61]

51. That their terms of reference can be tailored to the issue at hand, and that they can control their own processes and determine the approach to their task is the strongest appeal of inquiries – it gives them a flexibility not enjoyed by other investigatory and advisory bodies. However, there is some risk involved in this – it is not difficult to see how an inquiry might be considered a failure because those political motivations scupper the inquiry's overt aims.

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59 Clokie and Robinson, above n 29, 123.

60 T J Cartwright *Royal Commissions and Departmental Committees in Britain* (Hodder and Stoughton, London, 1975), 84.

61 Mai Chen "Government Inquiries: A Public Law Tool" (paper presented at 4th Annual Public Law Forum, 16th and 17th April 2002, Duxton Hotel, Wellington) see http://www.conferenz.co.nz/2004/library/c/chen_mai.htm (last accessed 25 July 2006), para 32.

52. A question arises whether those establishing an inquiry should be required to be more explicit about its purpose. Ought there be, at least, criteria to be taken into account before a public inquiry is established, with the aim that conflicts of purpose are fully recognised and considered before the inquiry commences? And, if so, how should this be done? We return to this question in paragraphs 116–122.

SHIFT AWAY FROM THE USE OF FORMAL COMMISSIONS

53. There has been a shift away from the use of formal commissions in New Zealand, particularly since the early 1980s. During Prime Minister Muldoon's Government, commissions were "part of the regular machinery of government",[62] but their use has reduced considerably in the following years. An average of 3 to 4 commissions a year were held between 1947 and 1980, but only 9 have been established since 1984. We consider this a remarkable statistic that warrants consideration. Below, we consider the influence of (i) the growth of other inquiry; (ii) delay; (iii) expense; and (iv) the composition of formal commissions.

Other inquiries

54. The tables in appendix 2 show considerable growth in the number of inquiries held by other bodies with inquisitorial functions. In particular, since the introduction of the Public Audit Act 2001, the number of inquiries undertaken by the Auditor-General has significantly expanded. Our table of ministerial inquiries in appendix 3 is incomplete, but we suspect an exhaustive list would show significant growth in their numbers over the past 10 to 15 years. Many other bodies have policy or inquiry functions, many of which were established in the 1980s (for example, the Commissioner for the Environment and Law Commission). Furthermore, in 1985 parliamentary select committees were given a general power to initiate inquiries themselves. Standing Order 190(2) now enables them to initiate inquiries into any matters that fall within their defined subject portfolios. Since the introduction of MMP in 1996, the lack of a clear government majority on many select committees means they have had far more freedom to exercise this power.

Delay

55. The time taken by commissions to report may well have influenced the shift away from formal commissions. Over the last 30 years, commissions of inquiry and royal commissions have, on average, taken nearly 5 months longer than predicted (see appendix 4). Only two of the 31 over that period reported early, and one on time. The trend of inquiries over-running their deadlines is well-established and we consider it should inform any decision to establish one, and in drafting its terms of reference.

56. The reasons for these delays vary considerably – they are not simply a result of inefficient processes. This problem is not unique to commissions of inquiry as many other inquiries also exceed their timeframes, but usually not as publicly. Often the timeframes are unrealistic to begin with or the scope of the issues to be covered is not clear until considerably farther along in the process.

62 Tony Black "Commissions of Inquiry" (1980) 19 NZLJ 425. See also, Palmer, above n 21, 189ff.

57. Litigation or other outside influences may also delay an inquiry. Commissions of inquiry are liable to judicial review, and they have been reviewed on many occasions, on many different bases (a list of cases involving commissions of inquiry in New Zealand can be found in appendix 5). This is the only recourse available to an individual who considers themselves unfairly treated by an inquiry, as there is no appeal from their findings. Nevertheless, the scope for judicial review of inquiries can add a whole other dimension to commissions of inquiry, in terms of cost, risk and controversy. The extent to which inquiries are reviewable is one of the issues that will be addressed during our review of the 1908 Act.

Expense

58 There is no doubt that some inquiries have been very expensive – and their cost has often been exacerbated by delay. However their cost needs to be considered against a number of factors: the financial and non-financial costs of not investigating a matter of public concern; the hidden costs in having government departments or standing commissions investigate; the costs of legal action that may be avoided; and the future savings made by virtue of the implementation of an inquiry's recommendations. Therefore, while cost containment is an issue for inquiries, if they are properly used and set up, they should be seen as a relatively inexpensive means of getting to the heart of an issue.[63]

Composition

59. Ministers may have been deterred from formal inquiries because of their predominantly judicial make-up and because of concern that they will become overly legalistic. There is an argument that judges are not best placed for policy reviews in particular and ministers may see a commission's arms length standing from government (enhanced by a judicial head) as making it less susceptible to their close supervision and influence. There is also an apparent reluctance of serving judges to take up such roles, or of their heads of bench to release them – often for lengthy periods.

OTHER FORMS OF "INQUIRY"

60. A frequent response in our consultations has been that inquiries should never be set up where an alternative mechanism exists. Answering the question "what role do 1908 Act inquiries play" therefore demands an understanding of why they are or are not chosen over other mechanisms, including inquiries conducted by select committees, the Ombudsman, Auditor-General or by standing commissions.[64] The purpose of this section of our paper is to give an indication of the innumerable bodies that perform inquiring and policy functions. Their scope and functions will inform our reconsideration of the overarching framework for the public inquiries within our terms of reference.

63 See for example, Martin Bulmer "Increasing the Effectiveness of Royal Commissions: A Comment" 61 Public Administration 436.

64 Including the Law Commission, Human Rights Commission, Privacy Commission, Health and Disability Commission, Securities Commission and Commerce Commission.

Other statutory inquiries with Commissions of Inquiry Act 1908 powers

61. Sixty-two statutes provide the power 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. An example of such an inquiry is the 1987 Cartwright inquiry into cervical cancer which was set up under the Hospitals Act 1957,[65] and thus had the powers of a commission of inquiry. While these statutory inquiries are, individually, outside the terms of reference for the Law Commission's review, it is clear that any proposals amending the 1908 Act will have a wide-ranging effect on them.

62. These inquiries are generally industry- or subject-specific, and in some cases their remit is strictly limited to purposes such as "to inquire into and report on proposals for a pest management strategy".[66] Other bodies have wider licensing and disciplinary roles,[67] while some establish permanent bodies or commissions with a dedicated investigatory function.[68]

63. Some of the bodies are considered to be "tribunals" but not all tribunals are regarded as commissions of inquiry. Many are administered by the Ministry of Justice, whereas others fall within the responsibility of other departments.[69] Some tribunals have some or all of the powers of commissions of inquiry and some do not. In many instances the body's powers are restricted to those under the 1908 Act but some, including the Transport Accident Investigation Commission and Maritime New Zealand, have additional powers of seizure.[70]

64. There is often little apparent rationale for the different approaches taken in conferring the powers of a commission of inquiry. Thus the Veterinarians Act 2005 gives the Veterinary Council of New Zealand all the powers of a commission of inquiry.[71] However, the investigatory powers of professional conduct boards under the Health Practitioners Competence Assurance Act 2003 (which replaced legislation regulating most medical disciplines) are not given by virtue of the 1908 Act. Another apparent anomaly is that the Police Complaints Authority[72] and Police Disciplinary Tribunal[73] are both tribunals, but only the latter's powers are drawn from the 1908 Act. Finally, our research suggests that in some cases the 1908 Act powers have never been used by the bodies in question (an example is the Bondholders Incorporation Commission, established by the Companies (Bondholders Incorporation) Act 1934-35), whereas other bodies use them on an almost daily basis (for example, the Social Security Appeals Authority, established by the Social Security Act 1964).

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65 Section 13(3) (now repealed).

66 See Biosecurity Act 1993, Sch 2, para 5(1)

67 For example, the Veterinarians Act 2005, s 48; Fisheries Act 1996, s 221(7) regarding the investigation of complaints against fisheries officers).

68 For example, the Transport Accident Investigation Commission Act 1990, ss 11–14A; Maritime Transport Act 1994, s 58; and the Treaty of Waitangi Act 1975, Sch 2.

69 For example, the Gambling Commission falls under the remit of the Department of Internal Affairs.

70 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.

71 Veterinarians Act 2005, s 48. Except the costs provisions of the 1908 Act.

72 See the Police Complaints Authority Act 1988.

73 See the Police Act 1958, s 12.

65. We consider that some rationalisation of the powers of these inquiries, and methods by which they are conferred, is needed. Work could be done to review which bodies should, and should not, take inquisitorial powers by reference to the commissions of inquiry legislation. This question is, however, beyond the terms of reference of this project.

Inquiries under the State Sector Act 1988

66. The State Sector Act 1988 provides that the State Services Commissioner may conduct any inspections and investigations, and make and receive any reports, which the Commissioner considers necessary or the Minister directs.[74] The provisions of the 1908 Act apply to the Commissioner's inquiries.[75]

67. State Services Commission inquiries are not usually held in public. Examples of recent State Services Commission inquiries are the 2004 Report for the State Services Commissioner of an Inquiry into Fisheries Management of the Scampi Industry and the investigation into the disclosure of the classified telecommunications paper to Telecom. A list of recent State Services Commissioner inquiries is set out in appendix 2. It is clear, from that list, that there is some overlap in the types of issues investigated by the Commissioner with the matters that can give rise to an inquiry under the 1908 Act, or under other mechanisms.[76] This raises a question of which is the most appropriate body to investigate issues involving the state sector.

The courts

68. The courts exert an important check on the executive arm of government, in particular, by exercising their judicial review function under s 4(1) of the Judicature Amendment Act 1972 (including judicial review of inquiries). Less frequently, the executive can also be subject to criminal and civil liability before the courts, or challenges under the New Zealand Bill of Rights Act 1990.

69. Courts cannot replicate the role of inquiries. As noted they are generally constrained by the issues and evidence placed before them by the parties, unlike inquiries which tend to adopt an inquisitorial approach. Courts however are not established at the sole discretion of the executive and their findings are binding on the parties.[77]

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74 State Sector Act 1988, ss 6(b), (ha), 8, 11, 25 and 57C.

75 Section 25(1) of the Act provides that: "For the purposes of carrying out the duties and functions imposed on the Commissioner by this Act or any other Act, the Commissioner shall have the same powers and authority to summon witnesses and receive evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908, and the provisions of that Act, except ss 11 and 12 (which relate to costs), shall apply accordingly."

76 For example, the inquiry into the Scampi Industry took place at the same time as a Select Committee inquiry into the same issues. See Report of the Primary Production Committee *Inquiry into the Administration and Management of the Scampi Fishery* (December 2003).

77 An exception is the coroner's inquest – a judicial hearing presided over by a warranted judicial officer who has most of the ancillary powers of a District Court judge. This is a fact-finding exercise rather than a method of apportioning blame. Consequently, like public inquiries, coroners adopt an inquisitorial process and they can make recommendations so as to reduce the chances of other similar deaths occurring. See Coroners Act 2006. See also, New Zealand Law Commission *Coroners* (NZLC R62, Wellington, 2000), 3.

Parliament

70. Parliament is able to hold the executive to account through both its general legislative function and its responsibility for approving the expenditure of public money. It is also a forum for raising matters of general concern. In practice, it is select committees which usually undertake specific inquiries within Parliament. Aside from their function of reviewing legislation, select committees can initiate their own inquiries into a wide range of issues.[78] Since the advent of MMP, select committees often do not have a Government majority, so there is more scope for inquiries to be initiated by opposition members or government back-benchers.

71. Select committees enjoy largely equivalent powers to those of inquiries under the 1908 Act.[79] Similar immunities apply for witnesses,[80] generally hearings are in public,[81] and Parliament accepts that the rules of natural justice apply to its processes.[82] However, it is questionable whether the rules of natural justice which apply provide adequate protection for individuals before select committees.

72. Since 1999 select committees can only send for persons, papers and records if that power has been delegated to them by Parliament. At present the Privileges Committee is the only committee with such a delegation.[83] All committees can however, ask the House or the Speaker to issue a witness summons.[84] Although Parliament also has the power to imprison for non-compliance, the power has never been exercised in New Zealand.[85] Parliament also has the power to fine – a power it used for the first time in 103 years against TVNZ in April 2006.[86]

73. Criticisms have been directed at the limitations of select committee inquiries in the United Kingdom because of their "structure, cross-examination techniques … [and] partisan nature" and because they lack appropriate staffing.[87] The pre-eminent example of this was the 1921 English Parliamentary Committee inquiry into the Marconi affair, where the committee split strictly along party lines and

78 Standing Order 190(2) states: "The subject select committees may receive briefings on, or initiate inquiries into, matters related to their respective subject areas…"

79 Select committees have the power to examine a witness on oath (Legislature Act 1908, s 252), but only Parliament itself can force one of its members to give evidence on oath. Witnesses giving evidence on oath to a select committee are liable to prosecution for perjury (Legislature Act 1908, s 252).

80 In recognition of Parliament's powers, witnesses enjoy certain protections, including immunity from prosecution in relation to evidence they give (Legislature Act 1908, s 253(5)) (with the exception of perjury) and non-admissibility of their evidence in court. However, Crown organisations cannot rely on the privilege against self-incrimination (Crown Organisations (Criminal Liability) Act 2002, s 10(1)(d)(ii)).

81 But they can hear evidence in private or in secret (Standing Orders 219 and 220).

82 See Standing Orders 165–167, 214, 215, 221, 223, 234, 236, 237, 242, 397 and 400. See also, (1993–1996) AJHR I 18A, 79; and David McGee Parliamentary Practice in New Zealand (3rd edn, Dunmore, Wellington, 2005), 433–434. The natural justice requirements are set out in appendix 6.

83 Standing Order 391(2).

84 Standing Order 198(1).

85 Although use of the power was debated in the House in 1896, when the President of the Bank of New Zealand refused to answer questions (see McGee, above n 82, 669.)

86 The Parliamentary Privileges Committee found TVNZ in contempt of the House for seeking to pressure a witness (Ian Fraser, former chief executive officer of TVNZ) who was giving evidence to a select committee.

87 Woodhouse, above n 14, 36.

the inquiry was universally considered to be a "whitewash". It has been said that that inquiry was "the defining moment when parliamentary committees gave way to independent committees or tribunals of investigation".[88]

74 Clokie and Robinson list four limitations on Parliament's ability to play an adequate role in in-depth inquiries:[89]

- It is inexpert and too preoccupied with transient political considerations to undertake serious and lengthy analysis;
- Its nature of selection is too haphazard to ensure the appropriate expertise;
- Parliament is dominated by partisan considerations, to the extent that the whole process of parliamentary procedure restricts and restrains the inquisitive and inquiring members and enforces a conformity of conduct;
- There are too many time pressures on individual members and on parliamentary business in general.

75. While the MMP environment in New Zealand has reduced limitations imposed by bipartisanship, the same barriers to effective accountability through Parliament apply in New Zealand. For instance, Chen has commented on the failure of the Education and Science Committee's 2001 inquiry into student fees, loans, allowances and the overall resourcing of tertiary education to come up with meaningful recommendations because it was hamstrung by opposing political views.[90]

76. Other difficulties can arise where select committee inquiries take place contemporaneously with other inquiries. For example, the Primary Production Committee held its inquiry into the scampi industry at the same time as a State Services Commission inquiry. Similarly, the Health Select Committee conducted an inquiry into Dr Graham Parry when a government inquiry was taking place into the same matter.[91]

Parliamentary officers

77. As "officers of Parliament", the Ombudsmen, Auditor-General, and Commissioner for the Environment are independent of executive government and are appointed by and answerable to Parliament.

Ombudsmen

78. Under the Ombudsmen Act 1975 the ombudsmen's primary purpose is to inquire into complaints raised against New Zealand central, regional and local government organisations or agencies.[92] Ombudsmen can initiate investigations on their own motion, although this power is not frequently exercised.[93] Recent examples have been the Investigation of the Department of Corrections in

88 House of Commons Public Administration Select Committee, above n 57, 11.

89 Clokie and Robinson, above n 29, 2–5.

90 Chen, above n 61, para 14.

91 See the inquiries discussed by Chen, above n 61, paras 19 to 25.

92 Ombudsmen Act 1975. The ombudsmen also have functions under the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987 and the Protected Disclosures Act 2000.

93 Ombudsman Act 1975, s 13(3). See < http://www.ombudsmen.govt.nz/ > (last accessed 3 January 2007). See appendix 6 for powers.

Relation to the Detention and Treatment of Prisoners (2006) and the Investigation into the Department of Labour (2004).

79. Findings made under the Ombudsmen Act are recommendatory only, but are usually acted upon as an ombudsman may send a copy of the report and recommendations to the Prime Minister or report to the House of Representatives (s 22(4)). That capacity, combined with the standing of the office, means it can "exert a considerable influence in righting administrative injustices and changing the way … officials approach … tasks."[94]

80. Ombudsmen, which have existed in New Zealand since 1962, operate in an inquisitorial manner, usually on the papers, and are a cost effective way of dealing with many public complaints.[95] The ombudsmen are also responsible for considering any complaints arising under the Official Information Act 1982, where their rulings are mandatory.[96] These mechanisms may prevent some matters from growing into large issues for which a more formal inquiry is needed.

Controller and Auditor-General

81. The Controller and Auditor-General polices public sector organisations' use of public resources and powers. The Auditor-General's main function is to provide independent assurance that central and local government and other public sector organisations are operating and accounting for their performance, in accordance with Parliament's intentions. The Public Audit Act 2001 gives the Auditor-General wide powers to initiate inquiries.[97]

82. Because the office is independent of the executive, inquiries may be made into matters which are politically sensitive, without government sanction. Recent examples of such reports have investigated the advertising expenditure incurred by the Parliamentary Service in the three months before the 2005 General Election (2006) and the use of accommodation allowances of Members of Parliament living in Wellington (2001). A list of Auditor-General inquiries is set out in appendix 2.

Parliamentary Commissioner for the Environment

83. Finally, the Parliamentary Commissioner for the Environment has powers to investigate and report on any matter where, in his opinion, the environment may be, or has been, adversely affected. Although under the Environment Act 1986 the Commissioner has coercive powers under the 1908 Act,[98] review of the Commissioner's reports[99] suggests that thus far the office's work has been predominantly of a policy, rather than inquisitorial nature.

94 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4th ed, OUP, Melbourne, 2004), 268.

95 See appendix 6 for powers.

96 Official Information Act 1982, s 28.

97 Public Audit Act 2001, s 18(1). See < http://www.oag.govt.nz > (last accessed 3 January 2007). See appendix 6 for powers.

98 Environment Act 1986, s 16.

99 See < http://www.pce.govt.nz/ > (last accessed 3 January 2007).

Government ministries and departments

Departmental inquiries

84. The chief executives of government agencies can institute their own internal reviews into conduct or operational issues within the remit of their department. Some have a specific statutory basis, such as those under the New Zealand Public Health and Disability Act 2000 or its predecessors.[100] Others are conducted under a chief executive's general powers as an employer, and example being the internal Department of Corrections review into the release of Graeme Burton, announced in January 2007. As noted, investigations into particularly serious matters of departmental and public employee performance are usually carried out by the State Services Commissioner.

Policy work

85. Government ministries and departments habitually undertake policy work, both internally and in collaboration with other public and private agencies. In doing so they may inquire into past practices and individual experiences, and undertake public and industry consultation. Complex or cross-sector issues will often result in inter-agency working parties or committees. The Official Information Act 1982, born from the work of the Danks committee, is one of many examples where a significant piece of policy development resulted from by such a committee.[101] The role played by the Department of Prime Minister and Cabinet in coordinating the work of core public service departments and ministries can facilitate this type of policy work. In carrying out this work, these agencies have none of the powers of inquiries held under the 1908 Act. Nor are they required to consult or undertake the work in public, although their work is subject to the Official Information Act.

86. While the policy arm of government has been an ever-growing and increasingly significant part of the public service, in paragraph 35 we noted the limitations of competing priorities and resources can restrict the ability of government departments to undertake long term, in depth focus on broader policy issues.

Permanent review and investigatory agencies/bodies

87. As noted above, there are a growing number of permanent bodies that perform investigatory, enforcement and review functions. Thus, the Commerce Commission has coercive powers similar to those under the 1908 Act available to it under the Commerce Act 1986.[102] Similarly, the Securities Commission, Inspector-General of Intelligence and Security, Privacy Commissioner, Children's Commissioner, Health and Disability Commissioner and Human Rights Commission also have recourse to coercive powers in the performance of their investigatory functions.[103]

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100 For example the 2001 *Ministerial Inquiry into the Under-Reporting of Cervical Smear Abnormalities in the Gisborne Region,* chaired by Ailsa Duffy QC, and established by the Minister of Health under s 47, Health and Disability Services Act 1993.

101 Committee on Official Information *Towards Open Government* (Wellington, 1980).

102 See appendix 6 for powers. The exercise of these powers has been drawn into question in the courts. See *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).

103 See appendix 6.

88. Other bodies have no coercive powers, but perform policy roles that have, at times in the past been undertaken by commissions of inquiry. The Law Commission investigates and reports to Parliament on how New Zealand laws might be improved. The Families[104] and Mental Health Commissions[105] play similar roles in their specialist areas.

The impact of "other" inquiries on inquiries under the 1908 Act

89. As noted, the purpose of this section of our paper has been to give an indication of the many bodies that perform inquiring and policy functions. Their existence has contributed to the reduction in the use of formal commissions. Indeed, depending on the matter in need of investigation, they may be better placed, because of their specialist nature and experience in undertaking similar inquiries, than an ad hoc body, often headed by a non-expert.

THE OVERARCHING FRAMEWORK: QUESTIONS

90. We are interested in feedback on the ongoing role for commissions of inquiry, royal commissions and ministerial inquiries, and we seek answers to the questions set out below, relating to the overarching framework for public inquiries.

An ongoing need for formal inquiries?

91. As is clear from this discussion, there is no single purpose for public inquiries, particularly those under the 1908 Act. Royal commissions and commissions of inquiry tend to be used for the most serious and complex issues, but not always – for example the Wahine sinking[106] was not investigated by either of those types of inquiry.

92. It is clear that the surrounding landscape has changed a great deal since 1908. There is evidence that the need for these formal inquiries is now much narrower than it was in the past – numerous specialist bodies and mechanisms can, and ought, to fulfil much of the role once played by commissions of inquiry and royal commissions. A question therefore arises whether there is still a need for a mechanism such as a commission of inquiry at all.

93. 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".[107] There could be events, like those considered by the Cole inquiry in Australia into the activities of the Australian Wheat Board and the Hutton and Butler inquiries concerning the United Kingdom's

104 The Families Commission has various functions, including "to consider, and to report and make recommendations on, any matter (for example, a proposed government policy) relating to families that is referred to it by any Minister of the Crown" (Families Commission Act 2003, s 8). It fulfils a policy role of promoting "the needs and interests of all families to government and the wider community", and undertakes research and produces reports accordingly.

105 Among the Commission's functions are to "report to and advise the Minister, when requested by the Minister, on any matter relating to the implementation of the national mental health strategy specified by the Minister in the request". Powers provision repealed (Mental Health Commission Act 1998, s 8 – The Commission has all such powers as are reasonably necessary or expedient to enable it to carry out its functions.)

106 Investigated instead by a court of inquiry under s 325 of the Shipping and Seamen Act 1952.

107 Clokie and Robinson, above n 29, 22.

involvement in the Iraq war, that will call for such a unique, independent and public investigation (see paragraph 40, above). Recent law reform reviews of the roles in inquiries in the United Kingdom, Ireland, Australia and Canada have all supported the continuation of such bodies.[108]

Q1. What are the purposes of public inquiries? Are there any we have not identified above?

Q2. Is there still a place for formal inquiries with coercive powers?

Q3. What are the most significant factors in the trend away from the appointment of commissions of inquiry? Are there factors not identified above?

Is there a need for royal commissions?

94. With the exception of their manner of creation and perhaps their status, there is little difference between commissions of inquiry and royal commissions. There has been no discernable distinction in terms of their subject matter. Generally it is considered that royal commissions are reserved for the most serious matters of public importance, although, arguably this is not entirely borne out by a survey of the list of inquiries over the last 30 years (for example, both the Cave Creek and "Wine-box" inquiries were commissions of inquiry). While most royal commissions in the past 30 years have considered solely policy issues, three arose as fact-finding bodies (Arthur Allan Thomas,[109] Erebus, and the Royal Commission on Drug Trafficking).[110]

95. A difference between the two types of inquiry is that there appears to be no restriction under the prerogative powers on the types of issues for which royal commissions may be appointed. This difference is, however, illusory as s 2 of the 1908 Act, as well as providing for inquiries into government conduct, policy and disasters, has since 1970 allowed for inquiries into "(f) any other matter of public importance."

96. The extent to which the s 2 restrictions apply to royal commissions established under the Letters Patent was considered, but not determined, in *Thomas*.[111] As every royal commission in the last 30 years has been expressed to have been created under both the Letters Patent and under the 1908 Act, it is likely to be the case that s 2 does indeed apply to those commissions.

108 See Law Reform Commission of Ireland *Public Inquiries Including Tribunals of Inquiry: Report 73* (Law Reform Commission of Ireland, Dublin, 2005); 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* (1992); Ontario Law Reform Commission *Report on Public Inquiries* (1992); Law Reform Commission of Canada *Advisory and Investigatory Commissions: Report 13* (1979).

109 Taylor, above n 18.

110 Stewart, above n 19.

111 [1982] 1 NZLR 252 at 261.

97. There is an argument that the distinction between commissions of inquiry and royal commissions adds unnecessary complexity. On the one hand, 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."[112] 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".[113]

98. On the other hand, 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. The question has therefore been asked on a number of occasions[114] whether the distinction should be retained, if only for reasons of the rationalisation and modernisation of the law.

Q4. Is there any need for the distinction between commissions of inquiry and royal commissions?

Should inquiries be able to inquire into, or make determinations on, matters of conduct?

99. Are inquiries the best arenas for inquiring into matters of conduct, and where should the line be drawn between inquiring into conduct; determining blame; or indeed making findings of criminal or civil liability? Is it appropriate that inquiries should fill what is essentially a judicial function?

100. The New Zealand Court of Appeal in Cock v Attorney-General[115] concluded that where in effect the sole object of an inquiry was to ascertain whether individuals had committed specified offences, the inquiry was outside the scope of the 1908 Act (as it was then worded). It acknowledged, however, 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. In *Fitzgerald v Commission of Inquiry into Marginal Lands Board*[116] 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."

112 Alberta Law Reform Institute, above n 108, 15.

113 Rt Hon Sir Ivor Richardson, "Commissions of Inquiry" (1989) 7 Otago Law Review 1 at 4.

114 See, for example, Alan C Simpson "Commission of Inquiry and the Policy Process" in Stephen Levine *Politics in New Zealand* (George Allen & Unwin, Auckland, 1978), 24; Mervyn Probine, CB *Administrative Arrangements for Setting up and Conducting Royal Commissions and Commissions of Inquiry* (Wellington, 1989).

115 [1909] NZLR 405 (CA).

116 [1980] 2 NZLR 368 at 375 (HC).

101. However, the position is now less clear. The Court of Appeal in *Re Royal Commission on Thomas Case*[117] concluded that the addition of paragraph (f) to s 2 of the 1908 Act meant that commissions of inquiry could inquire into the commission of an offence. The Court in *Thomas* weighed the competing interests of safeguarding the rights and reputation of individuals and that of public inquiry into issues of national concern, and concluded that there were occasions when the first must give way to the second.[118] The result was that the Thomas commission, which had as one of its main objects to establish whether there had been any "impropriety" in relation to a spent shotgun cartridge which it had been alleged had been "planted" by the police, was a valid inquiry under the 1908 Act.

102. Chen suggests that a way of reconciling the approaches taken in these cases is to:

> "… 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."[119]

103. The courts in New Zealand have emphasised that inquiries are not courts of law, nor administrative tribunals.[120] They do not have the power of determination, and their recommendations and findings bind no one. The corollary is that inquiries do not come with all the protections of a court hearing. In court, a person charged with an offence cannot be called upon to give evidence, whereas witnesses before a commission can be called and examined, and if they refuse to be sworn and to answer they can be liable to a penalty.[121] In general, and in particular since the Erebus commission, New Zealand inquiries have been reticent to make findings which could be seen as establishing guilt. Many of those we have consulted have been critical of inquiries being held into matters of conduct at all.

104. Australian inquiries have not been as reticent. Australian courts have consistently held[122] 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. The

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117 [1982] 1 NZLR 252 (CA).

118 [1982] 1 NZLR 252 at 266.

119 Chen, above n 61, para 44.

120 See, for example, *Peters v Davison* [1999] 2 NZLR 164 at 181 (CA).

121 Unlike comparable Australian statutes, the 1908 Act does not expressly provide against the privilege against self-incrimination. See, Royal Commissions Act 1902 (Cth), s 6A, Royal Commissions Act 1991 (ACT), s 24, Special Commissions of Inquiry Act 1983 (NSW), s 23, Commissions of Inquiry Act 1950 (Qld), s 14(1A), Commissions of Inquiry Act 1995 (Tas), s 26. However, it appears that the privilege applies to commissions of inquiry under ss 4C(4) ("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") and 6 ("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") of the 1908 Act.

122 *Clough v Leahy* (1904) 63 CLR 73 (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).

only restriction is that they must do so without interfering with the administration of justice.[123] In *McGuinness v Attorney-General*[124] 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.[125]

105. These issues are not confined to commissions of inquiry. Select committees have investigated issues of conduct, but such inquiries are particularly problematic because of their highly politicised nature and because of questions as to the adequacy of their natural justice requirements.[126] Ministerial and other informal inquiries can raise similar difficulties and have even fewer natural justice protections.

106. We suggest that the use of select committees and ministerial inquiries to investigate matters of conduct should be kept to a minimum. However, inquiries under the 1908 Act do operate with some express statutory protections, and those protections have been strengthened by case law resulting from the Erebus royal commission.[127] Are those protections adequate for conduct inquiries?

107. Another issue to take into account is the very real problem of an inquiry prejudicing ongoing or later prosecutions. The fact that a conduct issue is serious enough to prompt a public inquiry may often mean it is serious enough to warrant criminal investigation and charges. The present Commission of Inquiry into Police Conduct is an example of the difficulties that can be faced by an inquiry where the initial terms of reference would have impacted on the criminality of individuals, and where there has been the potential for prejudice. Commissions of inquiry have no power to adjourn their inquiries and are reliant on the executive to suspend them or vary their terms of reference. By comparison, coroners do have such a power.[128] A power akin to that of coroners may be appropriate for inquiries.

108. While we consider it is clear that inquiries cannot make determinations of civil and criminal liability, there is still a question whether they should inquire into conduct, and ascribe blame. By way of comparison, s 4 of the Transport Accident Investigation Commission Act 1990, provides that:

123 See (1904) 63 CLR 73 at 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.

124 (1940) 63 CLR 73 (HC).

125 See (1940) 63 CLR 73 at 84. The Court drew on the fact that since 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* (1982) 56 ALJR 506 at 515.

126 While the Standing Orders have been amended to take account of natural justice principles, Chen asserts that the "quality of due process accorded when media are present is sometimes less than optimal". See Chen, above n 61.

127 See *Re Erebus Royal Commission: Air New Zealand Ltd v Mahon* [1983] NZLR 662 at 671. The Privy Council held that: "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."

128 Coroners Act 2006, s 69

> 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.

109. Similarly, the Coroners Act 2006 states that coroners are not to determine civil, criminal, or disciplinary liability.[129] A similar protection could be considered for new commissions of inquiry legislation.

Q5. Should inquiries be used for inquiring into, or determining issues of, conduct?

Q6. Given the conflicting approaches in the New Zealand case law described above, should the degree to which inquiries can investigate such issues be clearly set out in a statute?

Q7. Should commissioners have a power not to commence or to adjourn their inquiries where prosecutions are pending, as do coroners?

Should different categories of inquiry be given different powers?

Advisory v investigatory inquiries

110. In 1979, the Canadian Law Reform Commission[130] recommended that overarching legislation should treat the two categories of "investigatory inquiries" and "advisory inquiries" differently. It recommended giving different powers to commissions according to their functions and argued that this would more clearly define their powers. The Commission noted that this proposal resulted in the greatest divergence of opinion in its consultations, but concluded that form should follow function. Unlike investigatory inquiries, inquiries designated as advisory were not to have the power to issue summonses, or to take evidence on oath. However, an advisory inquiry was to be able to apply to the Governor-General to have those powers if necessary to effectively perform its functions. These proposals have not been implemented.

Quasi-judicial v administrative inquiries

111. A variation could be that inquiries be given different powers depending on whether they are categorised as acting "judicially" or "purely administratively".[131] Canadian courts have determined that this categorisation is of "paramount importance" in determining "what common law principles of natural justice are applicable…"[132] They have considered that if there is no issue to be determined between parties by a commission, its function is purely administrative.[133] On this basis, the Court

129 Coroners Act 2006, s 4(1)(e)(i).

130 Law Reform Commission of Canada, above n 108.

131 MacDonald, above n 13, 378.

132 See *Re Copeland and McDonald et al* (1978) 88 DLR (3d) 724 at 730. See also, *Callahan v Newfoundland (Minister of Social Services) et al* 113 Nfld & PEIR 1; and MacDonald, above n 13, 376.

133 *Re Copeland and McDonald* (1978) 88 DLR (3d) 724. The applicant in *Copeland* was only indirectly affected by the inquiry – had the inquiry been directly investigating his behaviour, it would likely have been categorised differently. The judge distinguished the decision in *Saulnier v Quebec Police Commission* (1975) 57 DLR (3d) 545 on this basis.

in *Re Copeland and McDonald* concluded that there was no basis for challenge on the grounds of bias since there was no "issue" for the commissioners to be biased towards. An inquiry that merely "investigated, inquired, reported facts and advised" was not a quasi-judicial body. In another case, the court held that a "commission … which is not performing a judicial or quasi-judicial function, is not liable to direct control by the courts in any way".[134] The reasoning of the Court in *Copeland*, based on the Commission's absence of a power of final decision, is debateable, but perhaps some restriction on the use of powers by and application of natural justice rules to inquiries could be based on this distinction. Thus, where an inquiry was performing a function more akin to a "judicial" one – as in conduct inquiries, different rules could apply.

Is it possible, or desirable, to treat categories of inquiry differently?

112. We note the view expressed by the New Zealand Public and Administrative Law Reform Committee, which reported on Commissions of Inquiry in 1980, that the neat classification advocated by the Canadian Commission is not workable. And it is clear from the list of inquiries in appendix 1 that many 1908 Act inquiries have involved both investigatory and advisory functions. However, there is a danger that inquiries with coercive powers could resort to the use of those powers too readily. One way of limiting their use is to restrict the use of powers to only certain types of inquiry, as the Canadian Commission sought to do.

113. At present there is no middle ground for general inquiries between those under the 1908 Act and ministerial inquiries. While the latter have the benefit of being accompanied by less fanfare and fewer "bells and whistles" and thus (it is assumed) cost less and take less time than commissions of inquiry, in many respects they are the poor cousin of inquiries under the 1908 Act. We think there is value in investigating whether a middle ground between these formal and ministerial inquiries can be found; or a way of making sure that the powers of each inquiry are adequate, but only go so far as needed in the particular case.[135]

114. Possible options might be:

    A A statute establishing two or more categories of public inquiry, with the powers and/or procedures clearly defined for each category. This approach could either mirror that of the Canadian Law Reform Commission, noted above, or could be made along the lines of the quasi-judicial/administrative distinction discussed in paragraph 110.

    B A statute with a smorgasbord of powers, procedures, immunities, which can be applied to each inquiry according to its perceived needs and functions. This could be done at the same time that terms of reference are drawn up, or later. The powers could be applied for by the chairperson to the minister, or some other body.

134 *Re B and Commission of Inquiry Re Department of Manpower and Immigration et al* (1975) 60 DLR (3d) 339 at 349. And see MacDonald, above n 48, 381.

135 See, for example, Janet Ransley "The Powers of Royal Commissions and Controls Over Them" in P Weller *Royal Commissions and The Making of Public Policy* (Macmillan Education, Australia, 1994).

Although we share the reservations of the Public and Administrative Law Reform Committee about an approach that involves ministerial involvement during the course of an inquiry, thus bringing it inside the political arena,[136] there may nevertheless be some advantages in identifying a mechanism by which commissioners can seek additional powers. An alternative would be for the courts to have a role in authorising the use of additional powers, as they do now for interception warrants.[137] In some Australian jurisdictions inquiries can apply to the court to exercise powers of search and seizure.[138] The disadvantage of this approach, however, could be that it would encourage inquiry participants to seek judicial intervention.

C A statute setting out a comprehensive framework for all inquiries set up by ministers. To an extent, this has been achieved by the new United Kingdom Inquiries Act 2005, which has replaced the Tribunals of Inquiry (Evidence) Act 1921, and all other statutory provisions which enabled ministers to establish inquiries.[139] The statute treats all inquiries in the same way and gives to all of them the powers to summons witnesses, examine on oath and require the production of evidence (ss 17(2), 21). It should be noted however that the Act has come under widespread criticism for the degree to which ministers can intervene in the inquiry process.[140]

Q8. Should there be a mechanism for giving some categories of inquiry more powers than others?

Q9. What are the benefits and drawbacks of the three options set out above?

Policy inquiries

115. There is a question whether the powers that accompany an inquiry under the 1908 Act are required and indeed desirable for a policy inquiry. It is rare for a person to be compelled to give evidence to such an inquiry. Nevertheless, occasions have arisen where an expert witness will not volunteer themselves to give evidence for employment reasons, or where there are restrictions on revealing commercially sensitive information but where it is very much in the interests of the inquiry that the person is heard. A summons may be appropriate in such circumstances.

136 Public and Administrative Law Reform Committee *Commissions of Inquiry* (Report 13, Wellington, 1980), 19.

137 See Crimes Act 1961, s 312B.

138 The 1902 Federal Act provides that, where the Letters Patent have stated that s 4 of the Act applies, the commission can apply to court for search warrants in relation to "matters into which the relevant Commission is inquiring". In Tasmania an inquiry can apply to a Magistrate for a warrant: see Commissions of Inquiry Act 1995 (Tas), s 24. In Western Australia, the terms of reference of an inquiry can state that search and seizure powers apply: see Royal Commissions Act 1968 (WA), s 18.

139 Including, for example, inquiries under the Road and Rail Traffic Act 1933, the Mental Health Act 1959, the Police Acts 1996 and 1997 and the Protection of Children Act 1999.

140 See K Thirlwall QC "Why the Rush?" (2005) Legal Week; "Judges reveal anger over curbs on power" *The Guardian*, 26 April 2005; Amnesty International Public Statement "The Inquiries Bill – the Wrong Answer" (22 March 2005), see < http://web.amnesty.org/library/print/ENGEUR450082005 > (last accessed 31 July 2006).

Q10. Should policy inquiries continue to have powers to compel witnesses and examine them on oath, and to require the production of documentation?

Should there be limits on the power to establish an inquiry?

116. The only statutory limit on the power to establish a commission of inquiry is found in s 2 of the 1908 Act.

117. It is necessary to consider whether the six categories in s 2 are the appropriate ones, or whether new legislation should be more or less restrictive about the matters for which commissions of inquiry can be established. Paragraphs (a) and (d), relating to "the administration of the Government" and "the conduct of any officer in the service of the Crown" are directly concerned with the activities of the executive. Paragraphs (b) and (c) concerning "the working of any existing law" and "the necessity or expediency of any legislation" impact on legislative matters. Paragraph (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") is an obvious area for inquiries, although many such events may now be covered by a specialist agency.

118. As noted above,[141] the addition of paragraph (f) ("any other matter of public importance ") in 1970 had the effect of significantly broadening the areas that an inquiry could consider, and was relied upon by the Court of Appeal to validate the inquiry into the conviction of Arthur Allan Thomas.[142] There is an argument that paragraph (f) in fact renders the other 5 categories irrelevant, since it, presumably, includes all of those matters. On the other hand, a list such as the one found in s 2 can be useful in directing ministers to the sorts of matters that are appropriate for commissions of inquiry. However, limitations such as those in s 2 are not frequently repeated in other jurisdictions.[143]

Q11. Are the criteria in s 2 the appropriate? It is better to enumerate all the matters for which inquiries can be established? Or should there be no statutory restriction on the power to appoint formal inquiries with coercive powers?

119. With the exception of s 2 of the 1908 Act, there is little guidance or principle around the decision to establish an inquiry, or informing what type of inquiry to use in a given set of circumstances.[144] What makes an issue serious enough

141 See footnote 3.

142 [1982] 1 NZLR 252 at 267.

143 The United Kingdom Inquiries Act 2005, provides "a Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that – (a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred." At a federal level in Australia, commissions can be established into "any matter … which is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth." Royal Commissions Act 1902 (Cth), s 1. There are no comparable restrictions in the relevant Australian state legislation.

144 The Department of Internal Affairs has published a booklet *Setting up and Running Commissions of Inquiry* (2001), but its focus is on what takes place after the decision to establish an inquiry has been taken.

for a commission of inquiry or royal commission to be established? Should some State Services Commission inquiries have been escalated to commissions of inquiry? Or would some commissions of inquiry or ministerial inquiries have been better performed by the State Services Commission? What matters influenced the decisions to hold a royal commission into the Erebus disaster, a commission of inquiry into the Abbotsford landslip and a court of inquiry into the Wahine disaster? What matters should be looked at by an existing specialist body, if one exists?

120. At present, the choice comes down to political expediency. Similarly, decisions about the inquiry's timing and resources will be influenced primarily by political concerns. Ultimately, the decision will depend on the extent to which government wants to:

- persuade the public that something is actively happening;
- react to public, media or political pressure on an issue;
- tackle a problem that was too hard, problematic or controversial for the government to solve.

121. This approach means is that ill-informed or hasty decisions can be made. While inquiries may sometimes be seen as quick fix (by government and others calling for one) we have noted above that in reality they often take far longer than expected and cost considerably more than originally budgeted (see appendix 4).

122. We consider that a decision to appoint an inquiry should be as fully informed as possible. Should there therefore be restrictions on when an inquiry can be held, and more direction surrounding the decision-making process to establish an inquiry? Options are that:

- Statutory rules could be introduced about which sort of inquiry should be held in which circumstances.
- Non-statutory guidelines could be drawn up indicating the issues that should be considered, and the steps gone through, before an inquiry should be established.
- Legislation could require that the person appointing the inquiry is satisfied that the need for an inquiry cannot be better achieved by another mechanism.
- There could be a statutory requirement for consultation with, for example, the Department of Prime Minister and Cabinet, the Cabinet Office, Parliamentary Counsel, the State Services Commissioner, or the Solicitor-General on an inquiry's establishment and terms of reference.
- There could be a statutory requirement that the decision to hold an inquiry should be voted on by all, or a committee, of Parliament. This was the case under the United Kingdom's Tribunals of Inquiry (Evidence) Act 1921. However it should be noted that this form of inquiry was rarely used, and the statutory requirement has now been abandoned.[145]

145 The Act required the approval of both houses before a Tribunal of Inquiry could be held under the auspices of the Act.

Q12. Is it possible to identify principles on which the decision to appoint an inquiry should be based?

Q13. Is it desirable that such principles should be expressed in legislation or guidelines?

Q14. Should the principles or requirements differ for different types of inquiries?

Q15. What factors should be relevant in a decision to hold an inquiry?

How can inquiries be made more "fruitful"?

123. At the start of this paper we set out the following quote:

> "If public inquiries are to be known by their fruits, and if their proper fruits are reforms and improvements in law and practice, there is probably not a great deal to be said for them."[146]

124 A question arises as to how successful inquiries have been in "adding value" in the sense of having their recommendations effectively implemented. This is difficult to measure, since there may be many reasons why an inquiry's recommendations are not implemented. Dame Silvia Cartwright's cervical cancer inquiry was successful in resulting in the creation of the Health and Disability Commissioner and a number of other significant reforms.[147] Not all of her recommendations were adopted, however, and a further inquiry relating to cervical cancer was held in 2001.[148] Also, a 1988 inquiry into "procedures in certain psychiatric hospitals" listed the numerous previous inquiries into the same issues since the early 1970s whose recommendations had not been adopted.[149]

125. One option to make inquiries more "fruitful" is that commissions could require a formal government response to their recommendations, as is the case with Law Commission and Waitangi Tribunal reports.[150] This alone does not guarantee implementation, nor would it suggest that commissions of inquiry inevitably make the "right" recommendations. As Rhodes comments, however, as a minimum an inquiry's report should present all the evidence, thus enabling others to make their own assessment of the way forward.[151] Arguably, the investment in terms of time, experience and public resources devoted to inquiries justifies a formal and considered government response. At present, political pressure may be the only tool to ensure a report and its recommendations are given serious consideration.

146 Sedley, above n 1.

147 Cartwright, above n 23. On the implementation of the recommendations, see Sandra Coney (ed) *Unfinished Business, What happened to the Cartwright Report?* (Women's Health Action, Auckland, 1993).

148 Duffy, above n 23.

149 Judge K Mason *Report of the Committee of Inquiry into procedures used in certain Psychiatric Hospitals in relation to Admission, Discharge or release on leave of certain classes of patients* (1998).

150 See, for example, Scott Prasser "Public Inquiries: Their Use and Abuse" (1992) 68(9) Current Affairs Bulletin 4.

151 Rhodes, above n 41, 205.

126. 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, and they have no role in campaigning or overseeing the implementation of their recommendations. A formal government response could be one way of lessening the chance of good inquiry work being placed on the shelf, provided that such a response is adequately considered and resourced. Alternatively, it could be that a parliamentary select committee be required to respond.

> Q16. Should government, or a parliamentary select committee, be required to respond to a commission of inquiry's report?

What factors contribute to the independence of an inquiry, and should any be expressed in statute?

127. The question as to whether inquiries should be independent is not as straightforward as it might seem. While the public clamour is generally strongly in favour of an "independent" inquiry, it is nearly impossible for an inquiry to "divorce itself from the main current of contemporary political sentiment".[152] 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 involve engagement with government agencies.

128. But, independence from government is also an advantage. In policy inquiries there may be a concern that creativity and novel approaches to ideas will be stymied by too close an engagement with the government policy machinery. As a minimum, an inquiry's independence should be made clear, rather than simply inferred. One option could be for new legislation to state that inquirers have a duty to act independently in the exercise of their functions, powers and duties. This would mirror a provision relating to the Auditor-General in the Public Audit Act 2001.[153]

> Q17. Should there be a provision in new legislation that states that inquirers have a duty to act independently in the exercise of their functions, powers and duties?

129. Secondly, where the responsibility lies for releasing an inquiry report can have an impact on independence. At present there is no clear guideline or protocol as to where this responsibility lies, and while our impression is that most 1908 Act inquiries have released the report themselves, this has not always been the case. The situation may be different for ministerial inquiries which, as we noted above, are more in the form of direct advice to a minister and therefore it may be entirely apt that the decision whether or not to report is a ministerial one.

152 Clokie and Robinson, above n 29, 141.

153 Section 9.

130. We wonder whether either the statute should state that "every inquiry report should be tabled in the House of Representatives", or the terms of reference establishing an inquiry should state where responsibility for reporting lies. At a minimum, should the terms of reference state whether the final report is to be made public or not?

Q18. Should a new statute either:

- state that "every inquiry report should be tabled in the House of Representatives"; or
- require that where responsibility lies for releasing a report, or whether the report is to be made public or not, be set out in an inquiry's terms of reference?

Q19. What other factors contribute to the independence of an inquiry, and should any of them be expressed in statute?

Appendix 1

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 Māori 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

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 (1979)	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	Yes
Commission of Inquiry into the Freight Forwarding Industry [1980] IV AJHR H 2	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	Sir Ivor Richardson (Ann Ballin, Marion Bruce, Lyn Cook, Mason Durie, Rosslyn Noonan)	Yes
Royal Commission on Genetic Modification (2001)	-	14	-	Rt Hon Sir Thomas Eichelbaum (Jean Fleming, Jacqueline Allan, Richard Randerson)	Yes

INQUIRIES INTO CONDUCT - PURE CONDUCT

INQUIRY	PROPOSED DURATION (MONTHS)	DURATION (MONTHS)	NUMBER OF EXTENSIONS	CHAIR (AND MEMBERS)	CHAIR WITH LEGAL OR JUDICIAL 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 - CONDUCT AND POLICY INQUIRIES

INQUIRY	PROPOSED DURATION (MONTHS)	DURATION (MONTHS)	NUMBER OF EXTENSIONS	CHAIR (AND MEMBERS)	CHAIR WITH LEGAL OR JUDICIAL EXPERTISE
Commission of Inquiry into Alleged Breach 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
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 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
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

INQUIRY	PROPOSED DURATION (MONTHS)	DURATION (MONTHS)	NUMBER OF EXTENSIONS	CHAIR (AND MEMBERS)	CHAIR WITH LEGAL OR JUDICIAL EXPERTISE
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 (ongoing)	8	?	3	Dame Margaret Bazley	No

Appendix 2

Select Committee, Auditor-General and State Services Commissioner Inquiries

SELECT COMMITTEE INQUIRIES (SINCE 2002)

INQUIRY	SELECT COMMITTEE
2006	
Inquiry into the 2005 General Election	Justice and Electoral Committee
Inquiry into the Review of the Radio New Zealand Charter	Commerce Committee
2005	
Inquiry to Review New Zealand's Existing Constitutional Arrangements	Constitutional Arrangements Committee
Inquiry into setting of National Certificate of Educational Achievement examination questions	Education and Science Committee
Inquiry into New Zealand's role of international human rights in foreign policy	Foreign affairs, Defence and Trade Committee
Review of Standing Orders	Standing Orders Committee
Investigation and complaint about civil court fees regulations 2004	Regulations Review Committee
2004	
Financial review inquiry into Te Wananga o Aotearoa	Education and Science Committee
Inquiry into teacher education	Education and Science Committee
Inquiry into the New Zealand electricity industry	Commerce Committee
Inquiry into the alleged accidental release of genetically engineered sweet corn plants in 2000 and the subsequent action taken	Local Government and Environment Committee
Inquiry into the exposure of New Zealand defence personnel to Agent Orange and other defoliant chemicals during the Vietnam War and any health effects of that exposure	Health Committee
Inquiry into hospital-acquired infection	Health Committee
Inquiry into decile funding in New Zealand State and integrated schools	Education and Science Committee

2003	
Inquiry into the proposal to establish a trans-Tasman agency to regulate therapeutic products and Petition 2002/2 of Sue Kedgley and 30,457 others	Health Committee
Inquiry into the administration and management of the scampi fishery	Primary Production Committee
Inquiry into the Crown Forestry Rental Trust	Maori Affairs Committee
Inquiry into the public health strategies relating to cannabis use and the most appropriate legal status and five related petitions (1999/37, 1999/114, 1999/122, 1999/157, and 1999/173)	Health Committee
Inquiry into the Weathertightness of Buildings in New Zealand	Government Administration Committee
Inquiry into the operation of the Films, Videos, and Publications Classification Act 1993 and related issues	Government Administration Committee
2002	
Inquiry into the implementation of the National Certificate of Educational Achievement	Education and Science Committee
Inquiry into the adverse effects on women as a result of treatment by Dr Graham Parry	Health Committee

CONTROLLER AND AUDITOR-GENERAL INQUIRY REPORTS (SINCE 1990)

2006
Inquiry into certain allegations about Housing New Zealand Corporation
Inquiry into funding arrangements for Green Party liaison roles
2005
Inquiry into the Ministry of Health's contracting with Allen and Clarke Policy and Regulatory Specialists Limited
Inquiry into certain aspects of Te Wānanga o Aotearoa
Inquiry into the sale of Paraparaumu Aerodrome by the Ministry of Transport
Cambridge High School's management of conflicts of interest in relation to Cambridge International College (NZ) Limited
Electricity Commission: Contracting with service providers
2004
Christchurch Polytechnic Institute of Technology's management of conflicts of interest regarding the Computing Offered On-Line (COOL) programme
NZ On Air's funding of NZ Idol: Letter to Deborah Coddington MP
Inquiry into the Ministry of Education's monitoring of scholarships administered by the Māori Education Trust
Working for Families Communications Strategy
2003
Inquiry into Expenses Incurred by Dr Ross Armstrong as Chairperson of Three Public Entities
Ministry of Health: What Further Progress Has Been Made To Implement the Recommendations of the Cervical Screening Inquiry?
Inquiry into Public Funding of Organisations Associated with Donna Awatere Huata MP
Auckland Region Passenger Rail Service Report
Independent Review Of Westland District Council's Economic Development Loan Processes

Auckland Regional Council 2003-04 Rates
Industry New Zealand – Business Growth Fund Grant to The Warehouse
ACT Parliamentary Party Wellington Out-Of-Parliament Offices
Report on the disposal of 17 Kelly Street by the Institute of Environmental Science and Research Limited
2002
Department of Conservation: Administration of the Conservation Services Programme
Certain Matters Arising from Allegations of Impropriety at Transend Worldwide Limited
Severance Payments in the Public Sector
Taupo District Council – Funding of the Interim Establishment Board and the Lake Taupo Development Trust
Ministry of Health: Progress in Implementing the Recommendations of the Cervical Screening Inquiry
2001
Ministry of Defence: Acquisition of Light Armoured Vehicles and Light Operational Vehicles
Thames Coromandel District Council: Asset Registers and Other Matters
Parliamentary Salaries, Allowances and Other Entitlements
Thames Coromandel District Council: Actions Relating to a Sewerage Scheme for Cooks Beach and Ferry Landing
Members of Parliament: Accommodation Allowances for Living in Wellington
2000
Airways Corporation of New Zealand Limited: Review of Certain Matters Concerning the National Air Traffic Services (UK) Consortium
1999
Inquiry into the Chartering of Aircraft by the Department of Work and Income
New Zealand Tourism Board Inquiry
Auckland City Council: Management of the Britomart Project
1998
Compliance With The Code for Business Development Boards 1995
1997
Follow-up Inquiry into Financial Management by Te Mangai Paho
1995
Report on Financial Management by Te Mangai Paho
1994
Report on Expenditure on the Base Commander's Residence at RNZAF Ohakea
1993
Report on the Health Reforms Information Programme
Report on the Police Tender for Body Armour
1991
The Relationship between the Government and Logos Public Relations Ltd in Connection with the 1991 Budget
Audit of the Decision to Upgrade the Wellington City Council Abattoir
The Losses of the Wellington City Council Abattoir 1987 to 1991
1990
Report on the Parliamentary Postal Privilege
Report to Wellington City Council and Wellington Regional Council on their Involvement with NZ SESQUI 1990 Festival

STATE SERVICES COMMISSIONER INQUIRIES (SINCE 1990)

DATE	INQUIRY	CONDUCTED BY	JUDICIAL OR LEGAL EXPERTISE
2006			
	State Services Commission Inquiry into Disclosure of Classified Information About the Government's Telecommunications Stocktake Review to Telecom	David Shanks	Yes
	Report of the State Services Commissioner into the Cost Escalation in the Regional Prisons Development Project	Price Waterhouse Coopers	
2005			
	Report on the Performance of the New Zealand Qualifications Authority in the Delivery of Secondary School Qualifications	Doug Martin	No
	Review of the Ministry of Health's Response to Parliamentary Questions	Malcolm Inglis	
	Report on the 2004 Scholarship to the Deputy State Services Commissioner	Doug Martin	No
2004			
	Inquiry Report into the Department of Corrections' handling of the Canterbury Emergency Response Unit	Ailsa Duffy QC	Yes
	Report for the State Services Commissioner of an Inquiry into Fisheries Management of the Scampi Industry	Helen Cull QC (chair), David Smyth	Yes
	Report for the State Services Commissioner on Inquiry Into Actions of Employees of the Immigration Service and the Parliamentary Service	Christopher Toogood QC	Yes
2003			
	Report for State Services Commissioner on Civil Aviation Authority Policies Procedures and Practices Relating to Conflicts of Interest and Conduct of Special Purpose Inspections and Investigations	Douglas White QC	Yes
	Review of Te Puni Kokiri	Tony Hartevelt	No
2002			
2001			
	Review of the Performance of the Defence Force in Relation to Expected Standards of Behaviour, and in Particular the Leaking and Inappropriate Use of Information by Defence Force Personnel	Douglas White QC, Graham Ansell	Yes
	Review of Processes Concerning Adverse Medical Events	Helen Cull QC	Yes

Appendix 3

Ministerial Inquiries since 1990

THIS LIST IS INCOMPLETE. WE WOULD APPRECIATE REFERENCES TO ANY INQUIRIES OMITTED.

DATE	INQUIRY	CHAIR AND MEMBERS	JUDICIAL OR LEGAL EXPERTISE	HOW ESTABLISHED?
2006				
	Report to the Prime Minister upon Inquiry into Matters Relating to Taito Phillip Field	N W Ingram QC	Yes	Established by Prime Minister, no statutory basis
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 (Retired High Court Judge)	Yes	Established by Minister of Defence, no statutory basis
2004				
	Report into the Handling of Ron Burrow's Phone Call	Ailsa Duffy QC	Yes	Established by Minister of Child Youth and Family, no statutory basis
	Inquiry into matters relating to Te Whanau o Waipareira Trust and Hon John Tamihere	Douglas White QC	Yes	Established by Acting Prime Minister, no statutory basis
2003				
	Ministerial Inquiry into the Management of Certain Hazardous Substances in Workplaces	Dennis Clifford	Yes	Established by Minister of Labour, no statutory basis
2002				
2001				
	Inquiry into the disciplinary processes of the NZ Fire Service	Helen Cull QC	Yes	Established by the NZ Fire Service, no statutory basis
	Review of Processes Concerning Adverse Medical Events	Helen Cull QC	Yes	Established by Minister of Health, no statutory basis
	Ministerial Inquiry into the Peter Ellis Case	Sir Thomas Eichelbaum	Yes	Established by Minister of Justice, no statutory basis

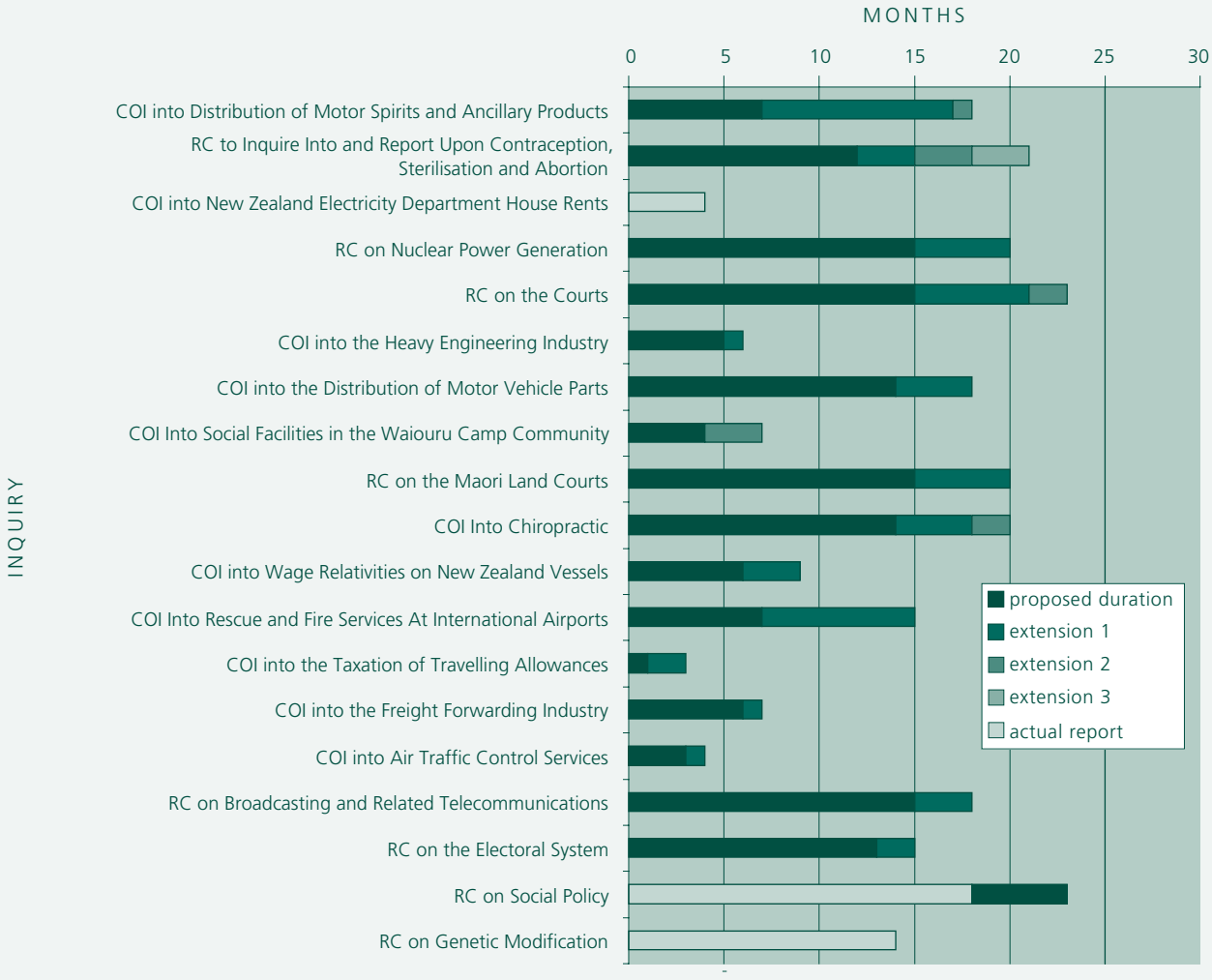
DATE	INQUIRY	CHAIR AND MEMBERS	JUDICIAL OR LEGAL EXPERTISE	HOW ESTABLISHED?
Ministerial Review into Tax		Robert McLeod, David Patterson, Shirley Jones, Srikanta Chatterjee, Edward Sieper	No	Established by Minister of Revenue, no statutory basis
2000				
Ministerial Inquiry into the Electricity Industry		Hon David Caygill, Dr Susan Wakefield, Stephen Kelly	No	Established by Minister of Energy, no statutory basis
Ministerial Inquiry into INCIS (Initially a Commission of Inquiry)		Dr Francis Small	No	Established by Minister of Justice, no statutory basis
Ministerial Inquiry into Telecommunications		Hugh Fletcher, Allan Asher, Cathie Harrison	No	Established by Minister of Communications, no statutory basis
Ministerial Inquiry into Tranz Rail Occupational Safety and Health		Bill Wilson QC	Yes	Minister of Labour, in consultation with Minister of Transport, no statutory basis
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, no statutory basis
1999				
Report on DNA Anomalies		Sir Thomas Eichelbaum, Prof John Scott	Yes	Established by Minister of Justice, no statutory basis
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, no statutory basis
1998				
Joint Ministerial Inquiry into Lake Waikaremoana		J K Guthrie and J E Paki		Established by Minister of Maori Affairs and Minister of Conservation, no statutory basis
Ministerial Inquiry into the Auckland Power Supply Failure		Hugh Rennie QC, Keith Turner, Don Sollitt	Yes	Established by Minister of Energy, no statutory basis
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, no statutory basis
1997				
Report on DNA Anomalies		Sir Thomas Eichelbaum, Prof John Scott	Yes	Established by Minister of Justice, no statutory basis
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, no statutory basis
1996				

DATE	INQUIRY	CHAIR AND MEMBERS	JUDICIAL OR LEGAL EXPERTISE	HOW ESTABLISHED?
1995				
1994				
Organisational Review of the Inland Revenue Department		Sir Ivor Richardson	Yes	Established by the Minister of Revenue, no statutory basis
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, no statutory basis
1992				
Inquiry into Matters Relating to the Safety of Blood Products in New Zealand		Ailsa Duffy QC	Yes	Established by the Minister of Health, no statutory basis
1991				
Committee of inquiry into the death at Carrington Hospital of a Patient, Manihera Mansel Watene and Other Related Matters		J A Laurenson	Yes	Committee of inquiry into the death at Carrington Hospital of a Patient, Manihera Mansel Watene and Other Related Matters
1990				

Appendix 4

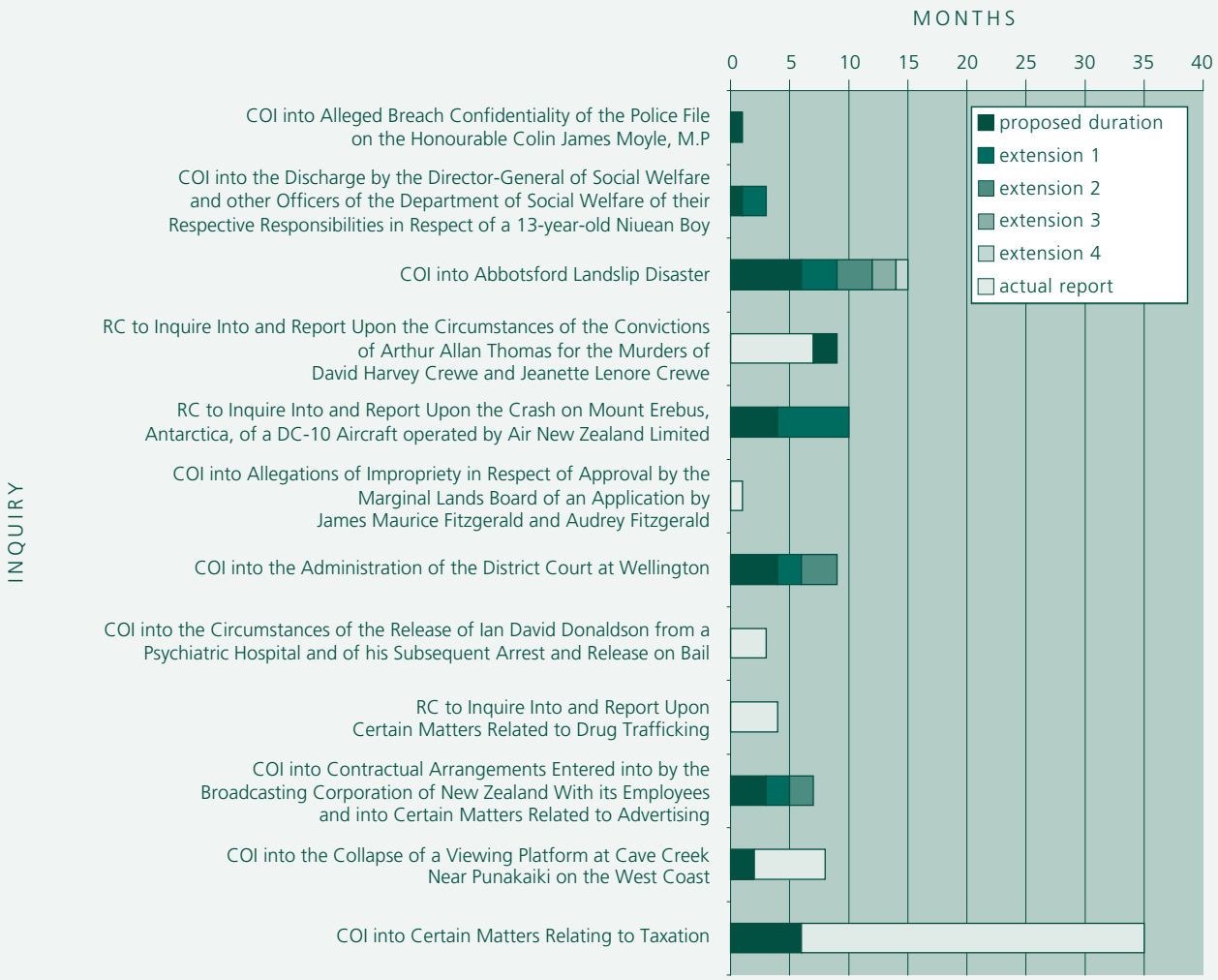
Duration of Royal Commissions and Commissions of Inquiry

DURATION OF ROYAL COMMISSIONS AND COMMISSIONS OF INQUIRY (POLICY)



Average length: 13 months. Average overrun: 4 months.

DURATION OF ROYAL COMMISSIONS AND COMMISSIONS OF INQUIRY (CONDUCT)



Average length: 8 months. Average overrun: 5 months.

Appendix 5

List of cases concerning Royal Commissions and Commissions of Inquiry

Peters v Davison [1999] 3 NZLR 744 (HC), [1999] 2 NZLR 164 (CA)

KPMG Peat Marwick and Others v Davison [1996] 2 NZLR 319

Brannigan v Sir Ronald Davison [1997] 1 NZLR 140

Fay, Richwhite & Co Ltd v Davison [1995] 1 NZLR 517 (CA)

Badger v Whangarei Refinery Expansion Commission of Inquiry [1985] 2 NZLR 688

Thompson v Commission of Inquiry into Administration of District Court at Wellington [1983] NZLR 98 (HC)

Re Royal Commission on Thomas Case [1982] 1 NZLR 252 (CA)

Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2) [1981] 1 NZLR 618 (CA),
Re Erebus Royal Commission: Air New Zealand Ltd v Mahon [1983] NZLR 662 (PC)

Fitzgerald v Commission of Inquiry into Marginal Lands Board [1980] 2 NZLR 368 (HC)

In re Marginal Lands Board Commission of Inquiry into Fitzgerald Loan [1980] 2 NZLR 395 (HC)

In re the Royal Commission of the State Services [1962] NZLR 96 (CA)

In re Royal Commission of Licensing [1945] NZLR 665 (CA)

King v Frazer [1945] NZLR 297 (SC)

Timberlands Woodpulp Ltd v Attorney-General [1934] NZLR 271 (SC)

Pilkington v Platts and Others [1925] NZLR 864 (SC and CA)

In re Manawatu Gorge Road and Bridges [1917] NZLR 36 (SC)

In re Otara River Bridge [1916] GLR 38

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

Whangarei Co-operative Bacon-Curing and Meat Co v Whangarei Meat Supply Co (1912) 31 NZL 1923 (SC)

In re Waipawa, Waipukurau, and Dannevirke Counties (1909) 29 NZLR 836 (SC)

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

Hughes v Hanna (1909) 29 NZLR 16

Jellicoe v Haselden [1902] 22 NZLR 357 (SC)

Appendix 6

Selected other investigatory bodies with coercive powers

BODY/ LEGISLATION	SUMMONS WITNESSES/ REQUIRE DOCUMENTATION/ EXAMINE ON OATH	IMMUNITIES/ PRIVILEGES	SEARCH/ SEIZURE POWERS	EVIDENCE	PUBLIC/ PRIVATE	NATURAL JUSTICE	OTHER POWERS?
Select Committees Legislature Act 1908, Standing Orders	Summons – only if power been delegated to them by Parliament (only Privileges Committee at present). No committee has power to compel attendance of MPs. But all committees can ask House or Speaker for a witness summons. Can examine on oath (s 252 Legislature Act 1908) but only Parliament itself can force MPs to give evidence on oath.	Witnesses immune from prosecution (s 253(5) LA), unless perjury (s 252 LA). Crown organisations cannot rely upon privilege against self-incrimination (Crown Organisations (Criminal Liability) Act 2002, s 10(1)(d)(ii)).		Evidence not admissible in court (s 253(4), LA).	Generally public but can hear evidence in private/ secret (SOs 219,220).	Rules of natural justice apply (1993-1996 AJHR I 18A). Committee can expunge allegations from record of proceedings (SO 237). Must be reasonable opportunity to respond in writing or orally to adverse allegation that may seriously damage reputation (SO 239). Committee can be asked to hear favourable witnesses (SO 239(1)(b)). Persons can request access to personal information held by committee (SO 236(1)). Material containing serious allegations to be given to person concerned (SO 235(2)). MP can be excluded from committee for apparent bias (SOs 233, 234, and 164-167, 400(f)).	Where a person sworn and examined as a witness who refuses to answer a question on grounds of self-incrimination, the Committee can make a report to the House, which can pass a resolution that the witness shall give full evidence. Then the witness must answer accordingly. (S 253(1), LA).

BODY/ LEGISLATION	SUMMONS WITNESSES/ REQUIRE DOCUMENTA-TION/ EXAMINE ON OATH	IMMUNITIES/ PRIVILEGES	SEARCH/ SEIZURE POWERS	EVIDENCE	PUBLIC/ PRIVATE	NATURAL JUSTICE	OTHER POWERS?
						Person subject to adverse finding that may seriously damage reputation must be informed and given a reasonable opportunity to respond. Committee must take response into account (SO 247). See also SOs 240(1), 400(p) re. confidentiality of committee draft reports.	
Ombudsmen Ombudsmen Act 1975	Power to summons witnesses, documentation & examine on oath (s 19).	Same privileges as in Court (s 19(5)). Witnesses immune from prosecution by reason of compliance with the Act (s 19(7)). Ombudsmen immune from civil or criminal proceedings (s 26).	Powers of entry and inspection (s 27).	Evidence not admissible in Court (s 19(6)).	Conducted in private (s 18(2)).	In the case of adverse comment, the person must be given an opportunity to be heard (s 22(7)).	Can refuse to investigate complaint (s 17) or refer other bodies (ss 17A, 17B, 17C). If Department or organisation takes no action, the Ombudsman, after considering any comments made by any organisation affected, may send a copy of the report and recommendations to the Prime Minister / report to the House (s 22(4)). Ombudsman may require the publication of a summary of any of its reports. In doing so must, as far as practicable, incorporate comments from organisation in question (s 23). Proceedings can only be judicially reviewed for want of jurisdiction (s 25).

BODY/ LEGISLATION	SUMMONS WITNESSES/ REQUIRE DOCUMENTATION/ EXAMINE ON OATH	IMMUNITIES/ PRIVILEGES	SEARCH/ SEIZURE POWERS	EVIDENCE	PUBLIC/ PRIVATE	NATURAL JUSTICE	OTHER POWERS?
Auditor-General Public Audit Act 2001	Can require public entity or any other person to produce docs, provide information or explanation (s 25). Can examine on oath (s 26).	A-G and employees protected for liability (s 41) unless they exercise powers in bad faith (s 41(2)). Privilege against self-incrimination does not apply (s 31).	Can examine/ audit bank account with DCJ's warrant (s 27). Can enter public entity's premises and copy documentation as of right and private person's premises with warrant (s 29).				Duty to act independently in the exercise of functions, powers and duties (s 9). Not allowed to hold any other office while A-G (s 8).
Commerce Commission Commerce Act 1986	Can require provision of information and to appear before the Commission to give evidence (s 98). Can examine on oath (s 99).	No witness immunities set out in Act. Proceedings are privileged (s 106).	Powers of search and seizure with DCJ's warrant (ss 98A, 98B(d)).				Can exercise powers notwithstanding that proceedings have been instituted in Court (s 98G). Can state a case to High Court (s 100A).
Securities Commission Securities Act 1978	Can summons witnesses to give evidence and provide information (s 69D). Can examine on oath (s 69C).	No civil or criminal proceedings lie against Commission for anything it does or fails to do in exercise or intended exercise of its functions, unless it acted in bad faith or without reasonable care (s 28(1)). Person exercising Commission's powers immune unless act in bad faith (s 68F). Witness and counsel same privileges as in court (s 69S). No privilege against self-incrimination (s 69T).	Qualified power to inspect documents (ss 67 and 68).	Evidence can be received that is inadmissible in Court of law (s 69B).	Can hear in private but certain hearings must be in public (s 69M). Commission has the power to make confidentiality orders (s 69N).		Person aggrieved by use of powers can appeal to court (s 68G). Certain individuals have a right to be represented in certain circumstances (s 69L). Can state a case to High Court (s 100A) (s 69O). Right of appeal on question of law (69P).

BODY/ LEGISLATION	SUMMONS WITNESSES/ REQUIRE DOCUMENTA-TION/ EXAMINE ON OATH	IMMUNITIES/ PRIVILEGES	SEARCH/ SEIZURE POWERS	EVIDENCE	PUBLIC/ PRIVATE	NATURAL JUSTICE	OTHER POWERS?
Human Rights Commission Human Rights Act 1993	Can apply to DCJ for order for person to produce information or give evidence (s 126A). Can examine those people on oath (s 127(2)).	Usual witness and commissioner privileges apply (ss 128, 130).					
Inspector-General of Intelligence and Security Inspector-General of Intelligence and Security Act 1996	May require production of evidence and summons witnesses (s 23). Can examine on oath (ss 19(3), 23).	Usual witness protections apply (s 23). Inquiries are privileged (s 24).	Access to all relevant security records (s 20(1)) and power of entry (s 21).	Any form of evidence is admissible (ss 19(5), 22).	Inquiries to be conducted in private (s 19(6). Can hear evidence in private (s 22). Except with the written consent the Minister, no account of inquiry shall be published in any newspaper or other document or broadcast or otherwise distributed or disclosed, unless the account is confined to certain limited matters (s 29(1)).	No adverse comment unless opportunity to be heard (s 19(7).	Can refuse to inquire into a complaint (s 17). Complainants have a right to representation and to have other persons testify (s 19(4)). Proceedings only reviewable for want of jurisdiction (s 19(9)). No publication of report without consent of the Minister (s 29(1)). I-G may report to Minister on compliance by an intelligence and security agency with I-G's recommendations and on adequacy of any remedial or preventative measures taken (ss 25(1), (3), (5)).

BODY/ LEGISLATION	SUMMONS WITNESSES/ REQUIRE DOCUMENTATION/ EXAMINE ON OATH	IMMUNITIES/ PRIVILEGES	SEARCH/ SEIZURE POWERS	EVIDENCE	PUBLIC/ PRIVATE	NATURAL JUSTICE	OTHER POWERS?
Privacy Commissioner Privacy Act 1993	Can demand production of certain types of information from any agency (ss 21 and 22). Summons witnesses (s 91). Can examine on oath (s 91).	Usual immunities and privileges apply (ss 94, 96).			Investigations under Part 8 of Act to be conducted in private (s 90(1)). Not necessary for Commissioner to hold hearings (s 90(2)).	No adverse comment unless opportunity to be heard (s 120). Investigated person has power to make written submission (s 73(b)(ii)).	Duty to act independently (s 13(1A)). Can refuse to investigate (s 71) or refer to other bodies (ss 72, 72A, 72B). No person entitled as of right to be heard (s 90(2)) (subject to investigated person's power to make written submission (s 73(b)(ii)). Commissioner may regulate procedure as thinks fit (s 90(3)).
Children's Commissioner Children's Commissioner Act 2003	Can require production of evidence and summons witnesses if: believes it necessary on reasonable grounds; and person has failed to comply with previous request; and believes on reasonable grounds, that it is not reasonably practicable to obtain the information from another source; or it is necessary to obtain the information to verify or refute information obtained from another source (s 20).	Usual immunities and privileges apply (s 27).				No adverse comment unless opportunity to be heard (s 25).	Duty to act independently (s 12(2)). If any matter is the subject of proceedings before a court or a tribunal, Commissioner may not commence or continue an investigation into the matter until proceedings are finally determined (s 18(2)). Can refer matters to other statutory officers (s 19(4)). Power to apply to Court for access to a court record (s 24). Power to regulate procedure for investigations in anyway seen fit (s 26).

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