PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

# COMMISSIONS OF INQUIRY ACT 1908

WORKING PAPER

AUGUST 1978

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## 1. INQUIRY

1.1 The Minister of Justice has requested the Committee to carry out a review of the Commissions of Inquiry Act 1908.

1.2 Before completing its report, the Committee is circulating this working paper to interested persons and bodies for comment.

## 2. PUBLIC INQUIRIES - BACKGROUND

2.1 Public inquiries have served as a useful tool of government since the nineteenth century; see R.E. Wraith and G.B. Lamb, Public Inquiries as an Instrument of Government (Allen & Unwin), p.27. It is recognised that, following the agricultural and industrial revolutions, the state has been compelled to intervene increasingly in the affairs of its citizens. Public inquiries have therefore become a common method by which the government seeks to arrive at the balance between the public and private good.

2.2 The growing complexity of society has also given rise to inevitable conflicts; between the state and the individual, between public and private interests, and between one public authority and another. Inquiries assist in resolving some of these conflicts.

2.3 At the same time, with the growth of the activities of government, the determination of policies has assumed critical importance. Government departments and public authorities exercise wide-ranging delegated powers within the framework of broad objectives. Public inqurie have provided a

means of assisting a government to formulate policy or, if the policy is already determined, apply it in particular circumstances.

2.4 In modern times public inquiries may be particularly helpful in investigating problems involving technical or scientific considerations where the layman must depend on the advice of experts. A minister may sometimes be in a poor position to contest the answers of his technical advisers, or to evaluate or decide a technical issue when they disagree. In such circumstances, a public inquiry may be desirable. Conflicting expert opinion may then be closely examined and weighed before a recommendation or decision is made. The opportunity also exists, important in New Zealand where the public service exercises such an influential role, to obtain information and expertise from sources outside government departments.

2.5 It is now well established that commissions of inquiry are part of the "regular machinery of government". The Committee regards it as important that they have adequate powers to perform the functions entrusted to them and that, at the same time, the citizen is properly protected from the misuse of those powers.

## 3. FUNCTIONS OF A COMMISSION OF INQUIRY

3.1 A number of attempts have been made to analyse the functions of commissions of inquiry. In their book Public Inquiries as an Instrument of Government (supra) Mr Wraith and Mr Lamb perceive their basic functions at a general level to be the collection of information and the resolution of conflict. Commissions of inquiry examine broad questions of policy, obtaining and processing information for the government or the authorities who must ultimately make the decision. Others investigate particular problems which call not only for the gathering of information but also for the determination of disputes. Frequently, the functions overlap.

3.2 The same authors also classify public inquiries in terms of their objectives. They note that it could be said that there are almost as many objectives as there are types of inquiry. Nevertheless, they offered the following scheme at p.305:

> "A. Inquiries into the use of compulsory powers affecting property (e.g. compulsory purchase orders).
>
> B. Inquiries into orders limiting the use of property (e.g. refusal of planning permission).
>
> C. Inquiries into proposals requiring consent (e.g. to build a power station).
>
> D. Inquiries into administrative decisions affecting a person or body (e.g. refusal to grant a licence).
>
> E. Inquiries into schemes made by ministers, local authorities, etc. (e.g. new town, development plan).
>
> F. Inquiries into administrative schemes made by ministers or local authorities (e.g. compulsory amalgamations or boundary reorganisation).
>
> G. Inquiries to determine facts in retrospect (e.g. accidents or tribunals of inquiry."

This analysis serves to indicate the wide range of matters which fall to be considered by inquiries in the United Kingdom.

3.3 New Zealand does not have the same statutory framework but the breadth of matters which have been subject to inquiries by royal commissions and commissions of inquiry can be gauged from the following limited sample:

> Royal Commission on the Sheep Farming Industry (1947)
>
> Commission of Inquiry on the War Pensions Act and Regulations (1950)
>
> Commission of Inquiry into the Circumstances of the Prosecution of Daniella Sylvia Joan Weir (1952)
>
> Commission of Inquiry into the Conduct of the Police Force (1953)
>
> Commission of Inquiry into Tuberculin Testing of Town Milk Supply Herds (1954)

Commission of Inquiry into Fatal Accident on Board HMNZS Black Prince (1955)

Commission of Inquiry into the Fluoridation of Public Water Supplies (1956)

Royal Commission on Local Authority Finance (1957)

Commission of Inquiry into Accident at Westhaven Coal Mine (1958)

Commission of Inquiry into Arthur Barnett Fire, Dunedin (1960)

Royal Commission on State Services in New Zealand (1961)

Commission of Inquiry into Proposed Transmission of Electricity from Otahuhu to Henderson Substations (1963)

Commission of Inquiry into Riot at Auckland Prison (1965)

Commission of Inquiry into Security Service and University Attendance (1966)

Royal Commission on Workers Compensation (1966)

Commission of Inquiry into Kaimai Tunnel Disaster (1970)

Commission of Inquiry into Equal Pay (1971)

3.4 An alternative analysis has been provided by the Law Reform Commission of Canada in a comprehensive working paper relating to commissions of inquiry published in 1977 and entitled "Commissions of Inquiry - A New Act" Because it is a thorough and up-to-date report on this topic the Committee proposes to refer to it in more detail later in this working paper.

3.5 The Canadian Commission has divided inquiries into two broad types, those which advise and those which investigate. Commissions which advise are those which gather information relevant to an issue and advise the government on questions of policy. In this respect they are seen to supplement the activities of the legislature and the executive. Investigative commissions are those which address themselves primarily to the facts of a particular problem, generally one associated with the

functioning of government. The Commission notes that many inquiries both advise and investigate.

3.6 The Commission has also identified a number of supplementary functions. They are summed up at p.15 in this way:

> They bring objectivity and expertise, free from the constraints of a ... timetable, to the solution of problems. They provide an additional vehicle for the expression of public opinion. And they gather and transmit representative opinion. In general, they advise on one or both of two things - expert solutions, and public opinion.

3.7 The Committee agrees that inquiries provide a significant number of citizens with the opportunity to participate in the process of decision-making which affect their lives. In this respect, inquiries perform a useful role in the policy-making and administrative process. There is a strong public demand for even greater participation in this process. Public inquiries enable more individuals and groups to express their views and this provides public authorities with a more precise appreciation of the public's requirements and expectations.

3.8 Nor has the Committee overlooked the fact that commissions of inquiry may on occasions serve a political function. They may be used by a minister as a political weapon and not just as an administrative instrument or sanction. They may serve the purely political purpose of testing the strength of opposition to a particular project, or even as a means of dissipating that opposition; they may be used to give independent authority to a decision which the government has made or proposes to make, and, it must be acknowledged, they may at times be used to avoid or defer politically controversial decisions.

3.9 However, the fact that commissions of inquiry may be used for these political purposes does not mean that they are not a useful administrative tool in other respects. Reference to these factors highlights the importance of ensuring that the interests of the individual or affected groups are appropriately safeguarded.

3.10 Suffice to say for the moment that the Committee considers that in meeting any of the objectives referred to or in performing any of the given functions, commissions of inquiry assist the working of government. They may be used to gather, collate and order information, formulate policy and to define needed changes in the law. They may be used to determine differences which cannot be reconciled by discussion or consultation or any other means. They may be used to investigate facts and determine responsibility, or even blame, including alleged malfunctioning in central or local government. In legislating to meet the requirements of today, Parliament is able to receive informed advice. In performing its tasks, the executive's ability to obtain all the necessary facts and information is supplemented. In all, commissions of inquiry may be regarded as a valuable component in a Parliament democracy.

3.11 In this context, it is necessary to appreciate that commissions of inquiry do not fall within any one of the three recognised divisions of government: the legislature, the executive or the judiciary. They are not accountable to the electorate as is the government which sets them up; they are not part of the civil service subject to the constitutional restraints which make them theoretically subservient to ministers of the Crown; and being appointed on an ad hoc basis by the government, they lack the traditional independence of the judiciary.

3.12 These factors confirm the importance of not only considering the adequacy of the powers available to commissions of inquiry but also whether appropriate safeguards exist for the protection of the individual.

## 4. COMMISSIONS OF INQUIRY IN NEW ZEALAND

4.1 Much valuable information relating to commissions of inquiry is contained in the booklet published by the Government Printer in 1974 written and compiled by Mr E.J. Haughey, then of the Crown Law Office, and

Mr E.J.L. Fairway of the Department of Internal Affairs and entitled Royal Commissions and Commissions of Inquiry. This can be touched upon under three heads -

(1) Royal Commissions
(2) Commissions of Inquiry
(3) Committees of Inquiry

(1) Royal Commissions

4.2 Royal Commissions are appointed by the Governor-General pursuant to his Letters Patent in the name of the Sovereign. The Crown may issue commissions of this nature at common law, although whether or not the source of this power is the "prerogative" of the Crown is open to question (ibid., p.6).

4.3 Apart from statute, a royal commission has no coercive powers. It has no authority to compel the attendance of witnesses or the production of documents. This deficiency is rectified by s.15 of the Commissions of Inquiry Act 1908 which provides that the Act shall extend and apply to all inquiries held by commissions appointed by the Governor-General in Council under the Letters Patent. This is the reason why, as a matter of practice, the instrument appointing a royal commission recites that it is issued under the authority of and subject to the Act, as well as the Letters Patent.

4.4 Because they are appointed in the name of the Sovereign, royal commissions usually enjoy greater prestige than ordinary commissions established under the Act. Generally, they are presided over by a Judge of the Supreme Court or an eminent person and deal with subjects of considerable public importance. Before the Commissions of Inquiry Act was amended in 1970 to enable commissions to be set up under that Act in respect of any matter of public importance, royal commissions also served to deal with topics which fell outside the scope of the Act.

4.5 As a practical matter, therefore, there now appears to be no significant difference between the purposes for which the two types of commission may be appointed. The question arises as to whether there is any good reason for persisting with the distinction.

(2) Commissions of Inquiry

4.6 The first statutory provision for commissions of inquiry in New Zealand was the Commissioner's Powers Act 1867 which applied to boards or commissions appointed by the Governor. Commissions of inquiry were empowered to summon witnesses, examine them upon oath, pay their expenses and require the production of documents. Perjury was punishable. The powers conferred on commissions were expanded by amending legislation in 1872.

4.7 These Acts were repealed and replaced by the more comprehensive measure, the Commissioners Act 1903. For the first time, the purposes for which a commission of inquiry could be set up were specified. By an amendment in 1905, Judges appointed to act as commissioners were authorised to exercise the powers available to them as Judges of the Supreme Court.

4.8 These enactments were consolidated in the Commissions of Inquiry Act 1908 which still remains in force. Although it has been amended on a number of occasions the Act has not been the subject of a major review since that time. One of the primary purposes of this working paper is to obtain suggestions as to the ways in which the provisions of the Act can be improved or enlarged.

(3) Committees of Inquiry

4.9 Ministers not infrequently set up committees of inquiry to examine and report on a particular problem which has arisen in the area of administration for which they are responsible. Such committees seldom have a statutory basis. They lack any coercive powers as well as the protection

afforded by absolute privilege (ibid., pp. 10-11). Some committees have a statutory basis, e.g. the committee appointed under s.12 of the Trade and Industry Act 1956.

4.10 The Committee does not doubt that these committees of inquiry serve a valuable purpose. However, it is desirable that their appropriate role and use be examined and the opportunity taken to consider the adequacy of their status and powers.

## 5. INQUIRIES UNDER PARTICULAR STATUTES

5.1 Many statutory bodies or tribunals which are established under a special enactment are given the powers of a commission of inquiry under the 1908 Act. For example, by virtue of s.13(1) of the Local Government Act 1974 the provisions of the Commissions of Inquiry Act are to apply to the Local Government Commission. But this is one of many examples, the device being a common legislative practice. Indeed, Mr Haughey and Mr Fairway list at pp. 52 et seq. some 94 bodies which are vested with the powers of a commission of inquiry.

5.2 The Committee would be interested to learn the extent to which such bodies or tribunals rely upon the powers contained in the Commissions of Inquiry Act as distinct from their own empowering Act. It would also be interested to learn whether these bodies or tribunals regard the 1908 Act as being open to improvement or enlargement.

5.3 It has also been noted by the Committee that the practice of conferring the powers contained in the Commissions of Inquiry Act on such a wide variety of statutory authorities is an additional reason why the two-fold approach recommended by the Canadian Commission could give rise to difficulties in New Zealand.

## 6. SELECT COMMITTEES

6.1 Another form of inquiry frequently open to the public today is an inquiry by a parliamentary select committee. Many consider that far greater or more effective use could be made of the select committee system to assist Parliament to perform its function of reviewing the checking the government's legislation and in reviewing selective areas of government administration. However, parliamentary select committees are beyond the scope of this paper.

## 7. THE OMBUDSMAN

7.1 Reference should also be made to the Ombudsman. The Ombudsman has been appointed to inquire into particular grievances and has at times conducted wide-ranging inquiries. Since 1975 it has been open to the Prime Minister, with the consent of the Chief Ombudsman, to refer any matter other than a matter concerning a judicial proceeding, to the Ombudsman for investigation and a report. In such circumstances the Ombudsman is to first report on the matter to the Prime Minister and may thereafter make such report to Parliament as he thinks fit (s.13(5) of the Ombudsmen Act 1975). These inquiries also fall outside the ambit of this paper.

## 8. THE LAW REFORM COMMISSION OF CANADA'S REPORT

8.1 As has already been indicated, the Law Reform Commission of Canada claims that commissions of inquiry are, broadly speaking, of two types; those that advise and those that investigate. Commissions which advise address themselves to a broad view of policy and gather information relevant to that issue. Those that investigate address themselves primarily to the facts of a particular alleged problem which is generally a problem associated with the functioning of government. It is acknowledged that many inquiries both advise and investigate.

8.2 Having arrived at this classification the Commission recommends that commissions should have the form suggested by their function. "Form follows function" is the succinct way in which it makes this point. Thus, it suggests that the structure and power of commissions to advise should be broadly tailored to suit that function. Statutory provision should promote the expression and transmittal to decision-makers of relevant public opinion. Because of the nature of an advisory commission's work, the Commission believes that subpoena and "contempt" powers and corresponding safeguards for witnesses are unnecessary.

8.3 On the other hand, a more precise form is said to be required for Commissions to investigate. Their structure and powers, claim the Commission, should be strictly defined and carefully limited. While it accepts that there must be statutory provisions for the full powers necessary to discharge a mandate it believes that full and proper safeguards must be available to all those involved in the inquiry.

8.4 The Commission proposes a new statute in line with this thinking. The draft, which is included in the report, is divided into four parts, the first part dealing with inquiries to advise, the second part with inquiries to investigate, and the third part with general provisions. The final part deals with foreign commissions. What is of particular interest is the powers conferred on inquiries to advise and to investigate respectively. These may be briefly listed:

Advisory Commission

(1) A commission has a duty to accord to any person or group satisfying it that it has a real interest in the subject matter an opportunity to give evidence.

(2) A commission may pay any or all of the legal, research and other costs of any person or group giving evidence in order to promote the full expression of relevant information and opinion.

(3) The Governor in Council may, if satisfied on the application of the commission, that it cannot effectively perform its functions without one or more of the powers of an investigatory commission, confer the requisite power on it.

Investigatory Commission

(1) A commission may issue a summons or subpoena to any person requiring him to testify under oath and to produce any relevant documents.

(2) It may pay all or part of the expenses of any witnesses.

(3) It may authorise the taking of evidence at a distance.

(5) A commission may also obtain from a Judge of a Superior Court of criminal jurisdiction a search warrant and remove anything it finds relevant to the inquiry keeping it in its custody for three months.

(6) It may give persons who might be adversely affected the opportunity to give evidence and, at its discretion, to examine or cross-examine witnesses personally or by counsel.

Any person who refuses to comply with the statute or a valid requirement of an investigatory commission commits an offence and is liable to a fine not exceeding $1,000.00 or imprisonment for a term up to six months or both.

General

A number of provisions apply to both types of commission.

(1) A commission can establish and make known its rules and practice and procedure.

(2) It may engage the services of counsel and other professional, technical, clerical or other assistance.

(3) No action for defamation lies against a commissioner or commission counsel or any person who has given testimony on oath.

(4) Any person or group may be represented by counsel.

(5) All hearings are open to the public except where otherwise ordered by the commission.

(6) No report of a commission alleging misconduct by any person is to be made until reasonable notice of the allegation has been given to that person and he has had the opportunity to be heard and, at the commission's discretion, to call witnesses.

8.5 The Committee is impressed with the Canadian Report. However, at this stage it is of the view that the solution recommended by the Commission would not be appropriate in New Zealand. It does not accept the analysis which divides commissions into those which are advisory or investigatory. First, the functions of commissions are diverse and frequently overlap. They do not fit into the neat specification envisaged by the Canadian Commission. Secondly, the Committee is of the view that any system of commissions of inquiry should be flexible. A commission should be able to move from an advisory role to an investigatory function as required. Indeed, it cannot always be foreseen whether a commission will be essentially advisory or investigative in nature or what precise powers it may need to exercise. Thirdly, the Committee does not like the solution adopted by the Commission in respect of advisory commissions which must seek greater powers to perform their functions effectively. On application by the commission, those powers are conferred by Order in Council. The Committee inclines to the view that such decisions should be kept out of the political arena. Finally, the format adopted vests all of the more extensive powers, and therefore the corresponding safeguards, in investigatory commissions only. The Committee can readily envisage commissions of inquiry carrying out what is essentially an investigation which does not require all those extreme powers. Conversely, it can envisage advisory commissions in which the subject matter requires the

imposition of safeguards to protect the interests of persons who may be adversely affected by the inquiry or the commission's report.

8.6 The Committee considers that a better result could be achieved by providing adequate powers for all commissions of inquiry. The equivalent safeguards would also apply to all inquiries. The more extreme powers, such as the power to search and confiscation which the Canadian Commission would confer on investigatory commissions, would be exercised upon an application being made to that effect to a Judge of the Supreme Court, possibly in the Administrative Division. Such a system would be more flexible and more effectively protect the individual.

## 9. COMMISSIONS OF INQUIRY ACT 1908

9.1 The Committee wishes to draw attention to the various provisions of the 1908 Act and to invite comment in respect of those provisions.

9.2 Section 2 of the Act provides that a commission of inquiry may be appointed to inquire into and report upon any question arising out of or concerning the administration of the government; the working of any existing law; the necessity or expediency of any legislation; the conduct of any servant of the Crown; any serious disorder or misconduct or any other matter of public importance. It was not until 1970 that the latter provision enabling a commission to inquire into any matter of public importance was inserted in the Act.

A number of questions arise for consideration under this broad heading.

9.3 First, it has been suggested that the phrase "any matter of public importance" is too wide and permits the government of the day to establish commissions of inquiry in respect of matters which cannot suitably be dealt with in this manner. It is argued that a commission which is not accountable to the electorate, lacking in the expertise possessed by the

executive, and without the independence of the judiciary should not be entrusted with the tasks that could be handled by one or other of the recognised constitutional branches of government. Because of its appreciation of the value of commissions of inquiry as an instrument of government the Committee does not favour this view. It considers that it should be possible to safeguard the interests of individuals and affected groups without restricting the scope within which inquiries may operate. It notes that some protection for the individual was recognised by the Court of Appeal in Cock v. Attorney-General (1909) 28 NZLR 405.

9.4 Secondly, some attention should be given to the method by which the terms of reference of the commission are defined. In this regard the Salmon Commission on Tribunals of Inquiry (Cmnd 3121, 1966) referred to by Mr Haughey and Mr Fairway at p.16) stressed that the terms of reference require careful consideration and should be drawn as precisely as possible. While regarding it as essential that tribunals should not be fettered by terms of reference which are too narrowly drawn the Salmon Commission considered that the reference should confine the inquiry to the investigation of the definite matter which is causing a crisis in public confidence.

9.5 The Committee agree that a commission's terms of reference should be carefully and precisely drawn. It is important that interested persons and the public generally, as well as the commission itself, should know exactly what is involved in the inquiry. The question is whether or not this requirement should be incorporated in a statute or regulation or remain a rule of practice. In this respect the Committee would welcome comment on whether the common inclusion of a catch-all term, e.g. "And generally all such matters...", has ever occasioned any misapprehension by interested persons of the scope of a Commission.

9.6 Thirdly, there is the question of whether or not some pre-inquiry procedure should be laid down either in the Act or Regulations made under the Act. Commissions in New Zealand have tended to follow set practices

relating to pre-inquiry procedure which have generally proved satisfactory and led to little or no complaint. These practices could be formalised. The Franks Committee pointed out that persons appearing before an inquiry did not always know in sufficient detail the case they had to meet or how or why it arose. Procedural rules could therefore be provided stipulating the form of the notice of the inquiry and the minimum length of notice required for the holding of an inquiry. Guidelines by which the terms of reference are to be arrived at could be laid down. Again, rules requiring a written statement of the case which persons interested must meet or support could readily be devised. Such rules would provide a minimum standard for inquiries and generally assist in ensuring that commissions perform their administrative function more effectively.

Protection of members of the commission

9.7 Section 3 provides that so long as any member of the commission acts bona fide in the discharge of his duties no action shall lie against him in respect of anything he might report or say in the course of his duties. A statement made mala fides would not be protected. (See also Jellicoe v. Haselden (1903) 22 NZLR 343 and the Report of the Special Committee on Defamation 1977, 44-46).

9.8 The Canadian Commission has recommended a wider exemption from liability. Under the draft legislation submitted with its report no action for defamation lies against a commissioner or commission counsel, or against any person, in respect of testimony given on oath acting in "the performance of his duty". It claims that the work of the commission should not be impeded because of the fear of various participants of subsequent frivolous civil suits. Thus, because anyone adversely affected by testimony under the terms of the draft statute they recommend can come forward with his side of the story, it proposes that witnesses in an investigatory commission should have immunity. Notwithstanding this

emphatic statement the Committee's tentative view is that the requirement that the commission act in good faith should be retained, but it would be pleased to have comments on this point.

Commission's powers

9.9 Under subs. (1) of s.4, a commission of inquiry is given the powers of a Magistrate's Court in the exercise of its civil jurisdiction in respect of citing parties, summoning witnesses, administering oaths, hearing evidence, and conducting and maintaining order at the inquiry. Where, however, the commission includes a Judge of the Supreme Court as a member the powers enjoyed by it are those of a Judge of that Court (see s.13(3)).

9.10 The first point that the Committee would raise relates to the distinction between the powers of the commission with a Judge of the Supreme Court as a member and one without a Judge as a member. It believes that the distinction is anachronistic and should be abolished.

9.11 Next, the Committee considers that the powers that may be exercised by the commission should be set out in the Act itself. It should not be necessary to refer to the Magistrates Courts Act or any other enactment to ascertain the extent of the commission's authority.

9.12 Finally, the Committee thinks that consideration should be given to conferring certain additional powers on commissions of inquiry. Many of these have been recommended by the Canadian Commission. The additional powers thought appropriate by the Committee may be summarised as follows:

(1) Power to order, either of its own motion or upon application, any relevant document in the possession of any person interested in the inquiry to be produced for the inspection of any other person attending the inquiry, with power to impose terms upon the

inspection. In this last connection see the formulation in s.15(3) of the Commerce Act 1975, under which the Commerce Commission may impose "such terms and conditions as it thinks fit" and "Any terms or conditions imposed by the commission may relate not only to the supply of the information, particulars, or documents but also to the use that is made of information, particulars or documents."

(2) Power for a commission, for the purposes of an inquiry, to enter and remain within any public office or institution and to have access to and examine any of its records or papers.

(3) Power for a commission to seek a search warrant from the Supreme Court on the grounds that there is reasonable cause to believe that there is something in any place or building which will assist the commission in its inquiries. The commission should be able to retain anything delivered to it under this power for a maximum period of 3 months before being required to return it.

(4) Power to hold a hearing in camera or prohibit the publication of any evidence where the commission is satisfied that such a course is warranted in the public interest.

The Committee is anxious to receive comments on these suggested provisions.

Persons entitled to be heard at the inquiry

9.13 Section 4A provides that any person interested in an inquiry shall be entitled to appear and be heard as if he had been cited as a party where he satisfies the commission that he has an interest in the inquiry apart from any interest in common with the public. The Canadian Commission has recommended in respect of advisory commissions that any person, group or organisation should have the opportunity to give evidence if the commission

is satisfied that he or it has a "real interest in the subject matter of the commission of inquiry". Having regard to its appreciation of the role of commissions of inquiry in the administrative process, as set out above, the Committee favour a liberal requirement. It considers that both formula are acceptable.

9.14 We question whether it is appropriate in all cases to speak of "parties". The provision in question was the subject of construction by the Court of Appeal in In re Royal Commission on the State Services [1962] NZLR 96, in which Gresson P. said that where the nature of the inquiry is such that parties could not be cited, s.4A gives persons to whom it applies no rights to appear and be heard. The Committee considers that this is too restrictive. As it has been seen, generally speaking commissions advise or investigate or both and a concept to the effect that some persons can be regarded as parties is not thought appropriate. Nor is it particularly apposite in respect of inquiries relating to "matters of public importance" which are necessarily of a general nature and concerned with a broad subject matter, in respect of which the government or authority is interested in obtaining information or public opinion. In most cases the comments of the Royal Commission on State Services (1961) as to the procedures to be followed would be applicable:

> "As we view this inquiry, there are no parties. True, there are some organisations which will be more concerned than others; some on some questions, others on other questions. We will see to it that the interests of such organisations are especially kept in view. But no-one is charged before this commission. This is not a law suit. We decide no rights. We merely make recommendations."

Right to counsel

9.15 The Canadian Commission considered that it is imperative that all those appearing before a commission should have the right to be represented by counsel. The Committee invites comment on this view. Should any

exceptions be made even when a question relating to national security is involved? Apart from this the Committee considers that, generally speaking, counsel can be of assistance in formulating and presenting an argument or information and in cases where the conduct of an individual is under investigation, counsel are essential to ensure that justice is seen to be done. As Cleary J. in In re Royal Commission on the State Services (supra) has said at p.117:

> "In such an inquiry, or in one where questions of law are involved, commissioners would no doubt welcome the appearance of counsel, and one might imagine inquiries of such a character that it could not fairly be said that a party cited or person interested has been 'heard' in any proper sense of the word unless he has had the assistance of counsel."

Right to call and examine and cross-examine witnesses

9.16 The right to call and examine or cross-examine witnesses is clearly related to the right to be represented by counsel. Frequently, that right will be largely ineffective unless counsel has the ability to call witnesses and to cross-examine other witnesses. In such cases being heard is not enough; testimony which is or could be damaging to the person concerned may need to be challenged or rebutted or both. Consequently, the Committee considers that the opportunity to call and examine or cross-examine witnesses should be conferred on all persons whose interest might be adversely affected by evidence before a commission. A provision to that effect would also be in line with the recommendations of the Canadian Commission.

Summons

9.17 Section 5 covers the service of summons on a witness providing that it may be left at his usual place of abode at least 24 hours before his attendance is required. The Committee considers that in all cases a mere 24 hours notice is discourteous and that in many cases the requirement that the summons be left at such short notice at a person's place of abode is inadequate.

Protection of witnesses and counsel

9.18 Section 6 provides that every witness giving evidence pursuant to a summons and every counsel appearing before a commission shall have the same privileges and immunities as witnesses and counsel in courts of law. This would clothe witnesses and counsel with absolute privilege for the purposes of defamation. The Committee wishes to reconcile this provision with s.3 which protects members of the commission only if they act in good faith. It also considers that there is no sound ground for distinguishing between witnesses who appear on summonses and those who appear voluntarily. This matter is the subject of a report by the Committee on Defamation, Recommendations on the Law of Defamation (1977),

Witnesses allowances

9.19 Sections 7 and 8 deal with the entitlement and payment to witnesses of travelling and maintenance expenses. The recommendations of the Canadian commission are much more liberal. At an advisory commission the commission may pay all or any part of the legal, research and other costs of any person group or organisation giving evidence before it. The purpose of this is to enable the commission to promote the full expression of relevant information and opinion. In respect of an investigatory commission the commission can pay such travelling expenses of a witness as it deems reasonable and all or part of the other expenses of a witness as it deems reasonable and proper.

The Committee considers that the existing provisions of the 1908 Act need to be broadened and would be interested in receiving comments as to any deficiencies that have occurred in practice.

Non attendance of witnesses

9.20 Every witness who has been summoned to give evidence before the commission is liable to a fine of $40.00 under s.9 if he fails to appear or

to produce any document he is required to produce. The Committee believes that the monetary penalty should be increased substantially. The Canadian Commission have recommended the maximum penalty of $1,000.00 or a term of imprisonment not exceeding 6 months or both. The Committee has misgivings about vesting a commission with powers to impose a term of imprisonment and would be inclined, in the absence of any argument to the contrary, to recommend an increase in the fine only.

Reference of point of law to Supreme Court

9.21 Under s.10 a commission can refer a disputed point of law to the Supreme Court for decision. A decision of the Court is final. By virtue of subs. (3) of s.13 of the Act where a Judge is a member of the commission the question of law is to be referred to the Court of Appeal. The Committee consider that this provision also requires some reconsideration. A better procedure for settling the case with the concurrence of persons interested would seem desirable. Again, the Committee doubts that the question of law should be referred to the Court of Appeal when a Judge is a member of a commission and would think that it would be more appropriate to then refer the point to a full Court.

Costs

9.22 Section 11 provides that the Commission may order that the whole or any portion of the costs of an inquiry or of any party shall be paid by any of the parties to the inquiry or by the person or persons who procured the inquiry to be held. Section 12 provides that costs are to be enforceable in all respects as a final judgment of the Court named in the order in its civil jurisdiction. These provisions are ones which are relied upon by statutory bodies or tribunals to whom the provisions of the Commissions of Inquiry Act apply. The provisions are clearly in need of review and the Committee would be pleased to receive comments as to when and how they have been invoked and how they have worked in practice.

9.23 Section 14 provides that any three or more Judges of the Supreme Court, of whom the Chief Justice shall be one, may from time to time make rules prescribing a scale of costs payable in respect of any inquiry. The costs are subject to the approval of the Governor-General in Council. The Committee considers that this is an unusual and inappropriate method of determining a scale of costs and that costs should be fixed by regulation.

Legal aid

9.24 The Canadian Working Paper expressed the view at p.34 that legal aid should be available to those appearing before a commission of inquiry. The Committee accepts that in respect of inquiries concerning the conduct of any person, legal aid could be extended to that person. Whether or not this should be attempted within the framework of the current legislation in New Zealand is, however, an open question.

Public hearings

9.25 It would be desirable in any comprehensive legislation relating to commissions of inquiry to stipulate if and when hearings should be open to the public. As a matter of practice most inquiries are open to the public and the Committee considers that this practice should continue. The Canadian Commission has recommended an express provision providing that the hearings of a commission are to be open to the public unless the commission, of its own motion or at the request of any person, decides to hold a hearing in camera. Danger to public security, the interest in privacy respecting intimate financial or personal matters or the danger of jeopardizing the right of anyone to a fair trial are specified as illustrations of the occasions when a hearing in camera or an order restricting or prohibiting the reporting of any matter could be justified.

9.26 The Committee endorses the principle that whenever possible commissions of inquiry should operate publicly. As has been stated their

critical role in the policy-making and administrative process dictates that this should be so. Moreover, as pointed out by the Canadian Commission, one function of a public inquiry is often to allay public concern of some sort and it is desirable that a commission should be seen to be operating fairly. Closed doors or restrictions on publicity should be permitted only when such a course is clearly desirable. In the Committee's view this is a problem which can best be solved by the particular commission exercising a discretion in accordance with criteria along the lines outlined in paragraph 9.25.

Rules of Evidence

9.27 The Canadian Commission has recommended that the formal rules of evidence in judicial proceedings should not apply to the hearings of commissions of inquiry. This provision is also favoured by the Committee. A commission is not to be compared with a court of law and some flexibility in the rules is undoubtedly required. Persons who might be adversely affected by evidence can be protected by the inclusion of a provision along the lines of that suggested in the following paragraph.

Adverse evidence

9.28 The Act is silent on the subject of what is to happen when evidence in an inquiry adversely affects a person who does not have the opportunity to respond or comment on that evidence. In this respect the Canadian Commission has recommended that any witness who believes that his interests may be adversely affected by testimony given before the commission or any other person who satisfies the commission that any testimoney may affect his interests, should be given an opportunity during the inquiry to give evidence on those matters. At the commission's discretion he may call and examine or cross-examine witnesses and be represented by counsel. The commission has also recommended that no report of a commission alleging misconduct by any person should be made until reasonable notice of the allegation has been given to that person and he has had the opportunity to

be heard and, if necessary, call witnesses. The general right to counsel also applies. These recommendations appeal to the Committee as being in accord with the principles of natural justice.

Post inquiry procedure

9.29 The Committee has given consideration to the question of rules laying down the procedure to be followed after the hearing of an inquiry. Such rules would cover the possibility of further evidence being discovered which could influence the finding or recommendation of the commission and the publication of the commission's report. Once again there is some precedent for rules of this description in the United Kingdom. The Canadian commission also recommended a provision which would enable the commission to release its report to the public within 30 days after its submission to the Governor in Council unless the Governor in Council otherwise directs. The Committee also favours the automatic publication of the report, subject only to the contrary direction of the minister responsible for establishing the inquiry.

Disposal of records

9.30 The disposal of the records of a Commission after the completion of its inquiry calls for consideration. Mr Haughey and Mr Fairway have stressed on p.45 the desirability of handing the records over to the National Archives, but there is no obligation to do so. The Committee favours a mandatory requirement and provision for those records being closed for a stated period to public inspection.

Judicial control

9.31 The Committee will be considering further the question of whether or not commissions of inquiry should be subject to judicial review. Certiorari and prohibition are not normally available to impugn the actions

of a commission of inquiry as it is likely that such a body will be held to have been acting administratively and to have lacked the power to make a binding or final decision. However, recent trends in administrative law suggest that the general rule permits exceptions, particularly where the report of the commission is an integral part of a process which could result in a decision prejudicial to the rights of the individual. In such cases the Court may require the observance of the requirements of natural justice and fairness. A declaratory judgment may also be available where certiorari or prohibition would be denied.

9.32 At this stage the Committee favours the application of the Court's supervisory jurisdiction. Its thinking is summed up in the comments of the Canadian Commission at p.39:

> "From a policy point of view, it seems eminently arguable that the courts supervise commissions of inquiry to make certain that they comply with the demands of fundamental fairness. It is true that the inquiry system, designed to serve the national interest, may require some sacrifice of individual rights and interests, but such sacrifice should be kept to an absolute minimum. The law must ensure that those involved in an inquiry should be entitled to basic fairness."

However, the Committee welcomes comments on this issue before finally committing itself to a firm recommendation. It has invited Dr D.R. Mummery of the Law Faculty of the University of Auckland to prepare a research paper on this subject.

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