COMMISSIONS OF INQUIRY

PRESENTED TO THE MINISTER OF JUSTICE
MAY 1980

THIRTEENTH REPORT OF THE
PUBLIC AND ADMINISTRATIVE
LAW REFORM COMMITTEE

WELLINGTON
NEW ZEALAND

PUBLIC AND ADMINISTRATIVE LAW

REFORM COMMITTEE

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PART 1

INTRODUCTION

1. The Minister requested the Committee to carry out a review of the Commissions of Inquiry Act 1908, which has not been the subject of a major review since it was enacted. We prepared a Working Paper in August 1978. It was circulated to interested persons, tribunals, statutory bodies and various government departments for comment. Many helpful submissions were received and these have been considered by the Committee.

2. The Act recognises that the Government may arrange for the appointment of either a Royal Commission or a Commission of Inquiry. We have discussed in Part IV the desirability of maintaining the distinction between these two forms of inquiry. Because we are divided in our views, we have not included a recommendation on this question in our Report. A decision by Government will need to be taken before instructions are given concerning the draft Bill.

3. Many statutes creating administrative tribunals with powers of decision following a hearing deem the tribunals to be Commissions of Inquiry under the Commissions of Inquiry Act, thereby making those provisions or some of them applicable to the tribunal. It might be seen as advantageous for the relevant powers to be conferred by the principal Act without recourse to the Commissions of Inquiry Act. We do not rule out the possibility that at a later date a general Tribunals Act may be found to be desirable. This possibility was left open in our Sixth Report on the adoption of a code of procedure for administrative tribunals.

4. We found the Working Paper of the Law Reform Commission of Canada published in 1977 entitled Commissions of Inquiry - A New Act useful in preparing this Report. Detailed reference is made to the Canadian Working Paper in Part VI. We were also assisted by an LL.B. (Hons) dissertation on aspects of royal commissions and commissions of inquiry prepared by Ms S.G.M. Glazebrook of Auckland.

5. In Part VII we undertake a detailed review of the Commissions of Inquiry Act and suggest a number of amendments.

A draft bill to give effect to our recommendations appears at the end of this report.

6. Our Report is divided into eight parts:-

Part I	:	Introduction (paras 1-6)
Part II	:	Public Inquiries - background (paras 7-11).
Part III	:	Functions of a commission of inquiry (paras 12-23).
Part IV	:	Commissions of inquiry in New Zealand (paras 24-33).
Part V	:	Other Inquiries (34-41).
		Select committees (para 40).
		The Ombudsmen (para 41).
Part VI	:	The Law Reform Commission of Canada's Working Paper (paras 42-48).
Part VII	:	Commissions of Inquiry Act 1908 (paras 49-85).

Part VIII : Judicial control (paras 86-96).

In view of the re constitution of the Supreme Court as the High Court, and of the Magistrates' Courts as District Courts, as from 1 April 1980, we have used the new nomenclature throughout our report and the draft Bill.

PART II

PUBLIC INQUIRIES - BACKGROUND

7. 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 become a common method by which the government seeks to arrive at the balance between the public and private good.

8. 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.

9. 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 power within the framework of broad objectives. Public inquiries have provided a means of assisting a government to formulate policy or, if the policy is already determined, apply it in particular circumstances.

10. 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 to obtain information and expertise from sources outside government departments. This is significant in New Zealand where the public service exercises such an influential role.

11. It is now well established that commissions of inquiry are part of the regular machinery of government. We regard 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.

PART III

FUNCTIONS OF A COMMISSION OF INQUIRY

12. 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 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.

13. The same authors also classify public inquiries in terms of their objectives. They note that it would be said that there are almost as many objectives as there are types of inquiry. Nevertheless they offer 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.

14. 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).

15. An alternative analysis has been provided by the Law Reform Commission of Canada in the working paper already referred to. Because it is a thorough and up-to-date report on this topic we propose to refer to it in more detail later in this Report.

16. 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. Investigative commissions are those which address themselves primarily to the facts of a particular problem. Many inquiries both advise and investigate.

17. 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."

18. We agree that inquiries provide a significant number of citizens with the opportunity to participate in the process of decision-making which affects their lives. In these respects, 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.

19. Nor have we overlooked the fact that commissions of inquiry may on occasions serve a political function. 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.

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

21. Suffice to say for the moment that we consider 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 task, 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 Parliamentary democracy.

22. 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. Commissions are not accountable to the electorate as is the government which sets them up; they are not part of the State Services so as to be subject to constitutional restraints making them theoretically subservient to ministers of the Crown; and being appointed on an ad hoc basis by the government, they lack the traditional independence and strict procedural safeguards of the courts.

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

PART IV

COMMISSIONS OF INQUIRY IN NEW ZEALAND

24. 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.L. Fairway of the Department of Internal Affairs. It is entitled Royal Commissions and Commissions of Inquiry. This information can be touched upon under three heads -

(1) Royal Commissions

(2) Commissions of Inquiry

(3) Committees of Inquiry

(1) Royal Commissions

25. 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).

26. 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. Its members and the witnesses who appeared before a royal commission did not have the protection accorded by the Commissions of Inquiry Act. The deficiency is rectified by s.15 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.

27. 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 High Court or some other 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.

28. 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. It is questionable whether there is any good reason for persisting with the distinction.

A case for abolishing royal commissions could be made out. But if this were done, there might be some who would be reluctant to accept appointment to a commission of inquiry. It would be unfortunate if the services of specially qualified persons were denied to the inquiry. We have also weighed the consideration that the assignment of a question to a royal commission for inquiry may be seen by the public as an indication of the importance of that question.

Some of us doubt that there would be difficulties in securing the services of eminent persons once the distinction was abolished. We are concerned that the elevation of some commissions implicitly downgrades others. We believe that a report should be judged by its contents and on its own merits and not by reference to the status of the commission responsible for it.

(2) <u>Commissions of Inquiry</u>

29. The first statutory provision for commissions of inquiry in New Zealand was the Commissioners 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.

30. 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.

31. These enactments were consolidated in the Commissions of Inquiry Act 1908 of today. Although it has been amended on a number of occasions the Act has never been the subject of a major review. One of the primary purposes of our Working Paper was to obtain suggestions as to the ways in which the provisions of the Act could be improved.

(3) <u>Committees of Inquiry</u>

32. 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 sometimes do not have a statutory basis. One committee which does, for example, is a committee appointed under s.12 of the Trade and Industry Act 1956. They may lack any coercive powers as well as the protection afforded by absolute privilege (ibid., pp.10-11).

33. We do not doubt that these committees of inquiry serve a valuable purpose, offering as they do the advantages of flexibility and informality.

PART V

OTHER INQUIRIES

34. 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 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.

35. However, in practice it appears that the tribunals and bodies to which the Commissions of Inquiry Act applies make little use of the provisions of the Act. In fact, often the powers of a commission have been expanded upon in the principal legislation.

36. As an illustration, the Taxation Review Authority relies on the detailed provisions of s.33(2) of the Inland Revenue Department Act 1974 in respect of summoning witnesses, production of books or documents and the power to do any other act preliminary or incidental to the hearing of the matter in hand. The powers conferred on the Authority by the Commissions of Inquiry Act are ancillary to those in the Act constituting the Authority.

37. Another illustration is afforded by the Social Security Act 1964 which establishes the Social Security Appeal Authority by s.12A. The provisions of s.12M of the principal Act relating to the hearing and determination of appeals by the Authority considerably expand those conferred by s.4(1) of the Commissions of Inquiry Act.

38. Furthermore, it should be noted that despite their availability the powers of a commission of inquiry are often not appropriate to all of the tribunal's functions. For example, the Indecent Publications Tribunal has never invoked the power to award costs under s.11 of the Commissions of Inquiry Act. It is highly unlikely that this would ever be invoked in the particular circumstances of that tribunal.

39. We note here 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. Reference should be made to para. 3 of this Report.

Select Committees

40. 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 checking the government's legislation and in reviewing selective areas of government administration. However, parliamentary select committees are beyond the scope of this paper.

The Ombudsmen

41. Reference should also be made to the Ombudsmen. The Ombudsmen have been appointed to inquire into particular grievances and have 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 an Ombudsman for investigation and a report. In such circumstances the Ombudsman must 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.

PART VI

THE LAW REFORM COMMISSION OF CANADA'S WORKING PAPER

42. 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. In this respect they are seen to supplement the activities of the legislature and the executive. 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. The Commission acknowledges that many inquiries both advise and investigate.

43. 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.

44. On the other hand, a more precise form is said to be required for Commissions to investigate. The Commission claims that powers 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.

45. The Commission proposes a new statute in line with this thinking. The draft, which is included in the Working Paper, 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. The powers conferred on inquiries to advise and to investigate respectively are of particular interest. These may be briefly listed:-

<u>Advisory Commission</u>

(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.

<u>Investigatory Commission</u>

(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.

(4) 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.

(5) 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.

46. We found the Canadian Working Paper interesting. At this stage we are of the view that the solution recommended by the Commission would not be appropriate in New Zealand. We do not accept the analysis which divides commissions into two district categories, those which are advisory and those which are investigatory. We are also unable to accept all of the consequences of the distinction.

47. First, the functions of commissions are diverse and frequently overlap. They do not fit into the neat classification envisaged by the Canadian Commission. Secondly, we are 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, we do not like the solution adopted by the Canadian 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. We incline to the view that if such decisions are to be taken in the course of the inquiry they 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. We can readily envisage commissions of inquiry carrying out what is essentially an investigation which does not require those extreme powers or, at least, all of them. Conversely, we 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.

48. We consider 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 seize which the Canadian Commission would confer on investigatory commissions, are not seen as necessary provided adequate powers of examination and inspection are conferred on members of all commissions.

PART VII

COMMISSIONS OF INQUIRY ACT 1908

49. We now turn to discuss in detail the provisions of the 1908 Act.

Terms of Reference

50. 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 disaster or accident or any other matter of public importance. It was not until 1970 that the last 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.

51. 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. Bearing in mind the wide powers which may be exercised, some have 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 our appreciation of the value of commissions of inquiry as an instrument of

government we do not favour this view. We consider that it should be possible to safeguard the interests of individuals and affected groups without restricting the scope within which inquiries may operate. We note that the need for some protection for the individual was emphasized by the Court of Appeal in Cock v. Attorney-General (1909) 28 N.Z.L.R. 405. (see further, Part VIII).

52. Secondly, some attention should be given to the method by which the terms of reference of a 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.

53. We 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. However, we consider a catch-all term is often desirable to ensure that related matters, often unforeseen, can be the subject of submissions and consideration, after due notice by the commission.

54. The determination of the terms of reference of a commission is a matter for the Government. We accept that terms of reference are carefully drawn, usually with the assistance of the Crown Law Office. Therefore, we believe a requirement that a commission's terms of reference should be precisely drawn need not be incorporated in a statute or regulation, but can remain a rule of practice.

Pre-inquiry Procedure

55. There is a related question of whether or not some pre-inquiry procedure should be laid down either in the Act or in 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. We have considered whether these practices should be formalised.

56. The Franks Committee's Report on Administrative Tribunals and Inquiries Cmnd 218 (1957), at para. 71, 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 if necessary be provided stipulating the form of the notice of the inquiry and the minimum length of notice required for the holding of an inquiry. In addition, 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 functions more effectively.

57. However, we believe that there is no need to formalise pre-inquiry procedures. Experience has shown that commissions of inquiry are able to determine their own procedure. But, to assist commissions of inquiry in determining their procedure, we urge the preparation of a handbook, including guidelines for procedure. Such a handbook would facilitate the standardisation of procedures where it is appropriate and would also ensure that all necessary steps have been taken by a commission. Furthermore, we recommend that the Haughey/Fairway booklet be brought up to date.

Protection of members of the commission

58. 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 for anything he might report or say in the course of his dutes. A statement made mala fides would not be protected. (See also Jellicoe v. Haselden (1903) 22 N.Z.L.R. 343 and the Report of the Special Committee on Defamation 1977, 44-46).

59. The Canadian Commission has recommended a wider exemption from liability. Under the draft legislation submitted with its Working Paper, 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 in 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 which they recommend can come forward with his side of the story, the Commission proposes that witnesses in an investigatory commission should have immunity.

60. Notwithstanding this emphatic statement, our view is that the requirement that the commission members must act in good faith in order to be protected should be retained. Further, we believe that the distinction between the immunity granted to Judges who sit on commissions of inquiry by s.13 (1) and the qualified privilege granted to other commission members by s.3 cannot be justified. We recommend that s.3 be adopted as the model for the new provision.

Commission's powers

61. Under section 4(1), a commission of inquiry is given the powers of a District 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 High Court as a member the powers enjoyed by it are those of a Judge of the Court (see s.13(3)). Under s.4(1), a commission may punish for contempt committed in the face of the commission, but if a High Court Judge is a member the power may be wider and not be confined to contempt committed in the face of the court. The distinction and the uncertainty should be ended.

62. In relation to other powers of commissions there is a distinction between the powers of the commission with a Judge of the High Court as a member and one without such a Judge as a member. We believe that the distinction is anachronistic and should be abolished.

63. Next, we consider 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 District Courts Act or any other enactment to ascertain the extent of the commission's authority.

64. Finally, we think that certain additional powers should be conferred on commissions of inquiry. Many of these have been recommended by the Canadian Commission. The additional powers which we think are appropriate 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, reference may be made to 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 the information, particulars or documents").

(2) Power for a commission, for the purposes of an inquiry, to inspect and examine any books, documents or papers. This power would enable the commission to identify written material the production of which could be enforced by subpoena.

(3) In addition to the present offences of refusing to attend or to testify before a commission or to produce books papers or documents to it should also be an offence to obstruct a commission hearing, or to use insulting words towards the commission or a commissioner, whether at a hearing or not, or to obstruct a commission in its investigations, or to fail to comply with lawful orders or requirements of the commission.

(4) The inherent 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 should be made explicit. We stress that the power envisaged here is one that should not ultimately be left with the Government.

Persons entitled to be heard at the inquiry

65. 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 our appreciation of the role of commissions of inquiry in the administrative process, as set out above, we strongly favour a liberal requirement. We consider that both formulas are acceptable.

66. We question whether it is appropriate in all cases to speak of "parties". The provision in question was interpreted by the Court of Appeal In re Royal Commission on the State Services (1962) N.Z.L.R. 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 right to appear and be heard. We consider that this is too restrictive. As 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 apply:

> "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."

67. Therefore, we consider that the last twelve words of s.4A viz. "...as if he had been cited as a party to the inquiry" should be omitted.

Right to counsel

68. The Canadian Commission considered that it is imperative that all those appearing before a commission should have the right to be represented by counsel. All those who made submissions to us on this question endorsed the right to counsel. At present, with most tribunals, representation is provided for expressly or in practice. The question arises whether any exception should be

made when matters relating to national security are involved. We are of the view that in such cases persons appearing before a commission are as much, if not more, in need of representation by counsel. We believe 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 done and is seen to be done. As Cleary J. said in In re Royal Commission on the State Services (supra) 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."

Summons

69. Section 5 covers the service of a 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. We regard this period as insufficient and recommend that 10 days notice be given.

Protection of witnesses and counsel

70. 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 gives witnesses who are summoned, and counsel, absolute privilege for the purposes of defamation. We believe there is no sound ground for distinguishing between witnesses who appear on summonses and those who appear voluntarily. We recommend the deletion from s.6 of the words "in pursuance of any such summons" so that all witnesses have the same privileges and immunities as witnesses in courts of law. This matter is the subject of a report by the Committee on Defamation, Recommendations on the Law of Defamation (1977) pp 44-46.

Witnesses' allowances

71. Sections 7 and 8 deal with the entitlement and payment to witnesses of travelling and maintenance expenses. Only those attending pursuant to a summons are entitled to be paid travelling and maintenance expenses. These expenses are payable from public funds if prior authority has been obtained by the commission. The consent of the Minister of Internal Affairs is required. Otherwise they are payable by the person requiring the evidence. The recommendations of the Canadian Commission are much more liberal. An advisory 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 it deems reasonable and proper. We recommend payment of fees, allowances and travelling expenses to those witnesses who give evidence pursuant to a summons. These should be payable out of public funds where the commission has summoned the witness of its own motion.

72. We consider that by and large persons or groups with sufficient interest to appear before a commission should bear their own costs. This can be said to follow from the fact that they have a direct interest in the subject matter of the inquiry. In some cases, however, a person or group could adduce evidence or make submissions of considerable value or importance which clearly promotes the public interest. The costs which would otherwise fall on the commission may even be reduced. We therefore favour a power whereby the commission could order that all or part of the legal, research and other costs of any person or group giving evidence before it could be met from public funds. We envisage that such payments would be rare. The power would be restricted to those cases where the evidence or submissions furthered the purposes of the inquiry to an exceptional extent.

Non-attendance of witnesses

73. Every witness who has been summoned to give evidence before the commission is liable under s.9 to a fine of $40.00 if he fails to appear or to produce any document he is required to produce. We believe that the monetary penalty should be increased substantially. The Canadian Commission has recommended a maximum penalty of $1,000.00 or a term of imprisonment not exceeding 6 months or both. We have misgivings about the imposition of a term of imprisonment and recommend an increase in the fine only.

Reference of point of law to High Court

74. Under s.10 a commission can refer a disputed point of law to the High Court for decision. A decision of the Court is final. By virtue of subs.(3) of s.13 of the Act, where a Judge of the High Court is a member of the Commission the question of law is to be referred to the Court of Appeal. We recommend that the case to be stated be settled by the commission after consultation with such persons as are seen as having a special interest. When a Judge of the High Court is a member of the Commission, the case should be referred to a Full Court. Provision should be made for the making of an application to the High Court for the resolution of a question of law if the Commission should refuse to state a case.

Costs

75. 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. In the past, the powers contained in ss.11 and 12 have rarely been invoked. Indeed, in the case of many tribunals to which the 1908 Act has been applied, the power is expressly

excluded (for example, s.33 of the Inland Revenue Department Act 1974 and s.8 of the New Zealand Ports Authority Act 1968). We recommend that the power to award costs should be retained and that the order be enforceable in the District Court named by the Commission.

76. Under s.14, as modified by s.5 of the Judicature Amendment Act 1930, rules prescribing a scale of costs payable in respect of any inquiry may be made by the Governor-General in Council on the recommendation of the Rules Committee. So far as we know, the only scale of costs was made in 1903 (New Zealand Gazette, 11 February 1904), by two judges under the Commissioners Act 1903. Section 14 should be redrafted to provide for the scale to be fixed by rules made under the Judicature Act.

Legal aid

77. The Canadian working paper expressed the view at p.34 that legal aid should be available to those appearing before a commission of inquiry. In the general run of commissions of inquiry there will be little need for legal aid to be available. However, we accept that in respect of inquiries concerning the conduct of any person, thereby placing him in the position of a defendant, legal aid should be extended to that person. We recognise that this may not be able to be done within the framework of the current legislation in New Zealand.

Public hearings

78. 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 we consider 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 jeopardising 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.

79. We endorse 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 our 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 78.

Rules of evidence

80. The Canadian Commission has recommended that the formal rules of evidence in judicial proceedings should not apply to the hearings of commissions of inquiry. We also favour this provision which declares the position at common law. 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

81. The Act is silent as to 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 testimony may affect his interests, should be given an opportunity during the inquiry to give evidence on those matters and, at the commission's discretion, he should also be given an opportunity to call and examine or cross-examine witnesses.

82. The Canadian 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, at the commission's discretion, to call witnesses. The recommendations summarized in this and the preceding paragraph appeal to us as being in accord with natural justice and we recommend the enactment of similar provisions in the New Zealand legislation.

Post inquiry procedure

83. We have 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 a 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 directed.

84. In New Zealand, the report of a commission is published unless otherwise stipulated by the Minister when the commission was appointed. This practice should become law. The publication of the report should be automatic after presentation to the Governor-General, subject only to the terms of reference setting up the inquiry specifying otherwise. We envisage that this restriction would be included in the terms of reference only in exceptional circumstances. It is not in the public interest for a Minister to decide that an unwelcome report should not be published.

Disposal of records

85. 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 of their booklet, the desirability of handing the records over to the National Archives.

There is no obligation to do so. We favour a mandatory requirement that the records of a commission, other than private property or papers, documents and records relating to the private affairs of any person, be handed to the Chief Archivist, but the commission should be empowered to direct in its report that the records should be closed to public inspection for a period set by it or that access to them should be restricted.

PART VIII

JUDICIAL CONTROL

86. We have considered at some length the question whether or not commissions of inquiry should be subject to judicial review. At our invitation Dr D. R. Mummery of the Law Faculty of the University of Auckland prepared a research paper on this subject. It has been of considerable help to us and many of the references which follow have been taken from that paper. This is especially so in respect of our review of the position in the United Kingdom and the cases relating to commissions of inquiry which have been decided in New Zealand, Australia and Canada.

87. In England, the Tribunals of Inquiry (Evidence) Act 1921 under which the more sensitive inquiries are typically conducted, requires that both Houses of Parliament must pass resolutions sanctioning the investigation. A royal commission lacks (apart from statute) authority to compel evidence and, in England, is typically reserved for matters of broad economic, social and organisational concern. It is possibly because of these constitutional safeguards and limitations, at least in part, that there appears to be a dearth of cases in the United Kingdom in which judicial review has been sought against tribunals of these kinds.

88. In New Zealand, in contrast (as in Australia and Canada), power to compel evidence was statutorily acquired for commissions of inquiry decades ago. Judicial review has been sought in a few reported cases, including applications for prohibition. In Cock v. Attorney-General (supra) the Court of Appeal unanimously ordered prohibition of the proceedings of a commission appointed under the Commissions of Inquiry Act on the ground that the effect of the warrant (which authorised an inquiry into whether or not bribery had been committed by members of a licensing committee) was to "put to answer" certain individuals on a charge triable and punishable under the criminal law. This was contrary to the

Statute 42 Edw. III, c.3, which enacts that no one shall be put to answer for a crime or criminal offence unless in the manner prescribed by law, and the statute 16 Car. I, c.10, which abolished the Court of Star Chamber and declared all courts but the ordinary courts of justice illegal. Both statutes were held to be in force in New Zealand.

89. It appears to have been assumed that prohibition was appropriate. Without discussing the point directly, the Court placed weight, inter alia, on the Commission's statutory power to award costs against "any of the parties to the inquiry, or...all or any of the persons who have procured the inquiry to be held". This led the Court to the conclusion, already in effect reached on another ground, that the Commission had been "set up (as) a new Court". (ibid). This assisted the Court to grant prohibition.

90. In Timberlands Woodpulp Ltd v. Attorney-General (1934) N.Z.L.R. 270, the Full Court unanimously declined an application for a writ of prohibition against a commission appointed to inquire into tendencies and developments in relation to the promotion, financial methods, control and operation of companies seeking to raise capital and loan funds in New Zealand. The Full Court assumed that counsel for the applicant and the Court itself in Cock's case had acted correctly in employing prohibition rather than "injunction or some (other) writ", and that the Court of Appeal "must have held that the Commission was a Court or body invested with a judicial function" (p. 285). Examining a dictum of Holt C.J. in Chambers v. Jennings (1702) 2 Salk 553, 91 E.R. 469, to the effect that "a prohibition would lie to a pretended Court" (p. 286), more recent authority (including the well-known dictum of Atkin L.J. in R v. Electricity Commissioners (1924) 1 K.B. 171), the provision in the Commissions of Inquiry Act for the awarding of costs, and the decision in Cock's case, the Full Court affirmed that the question whether or not prohibition would lie depended on whether there were "parties who are liable to be cited".

91. If there were parties then any such party, to use the words of the Court in Cock's case, would be "in peril of costs"; and to that extent at all events the Commission could be said to be possessed of a judicial function. If it were necessary to "justify" the issue of the writ of prohibition in Cock's case, the Full Court said, "we think it may be justified on this ground" (p.291). On the other hand if the inquiry was of such a nature as not to admit of "parties" then the Commission had no power to order costs; could impose no legal obligation on anyone; and had no legal authority, in the words of the Atkin dictum, to "determine questions affecting the rights of subjects". Nor could its report affect any such private rights. Such a Commission exercised no judicial function and its inquiry was not a judicial inquiry. This being the case, prohibition was denied.

92. Ex parte Walker (1924) 24 S.R. N.S.W. 604 is an Australian case. The applicant had sought prohibition to prevent a commission of inquiry from investigating, in the words of Street A.C.J., "whether he has been guilty of any criminal offence punishable by law" in the context of alleged corruption in his dealings as a Sydney municipal councillor. The Supreme Court of New South Wales declined the writ, inter alia, on the ground that the Commission was acting otherwise than judicially within the meaning of Atkin L.J.'s dictum in the Electricity Commissioners case (supra).

93. Another case is a decision of the Trial Division of the Federal Court in Canada, "B" v. Commission of Inquiry on Department of Manpower and Immigration (1975) F.C. 602, 60 D.L.R. (3d) 339. Citing Canadian authority which included at least one case purporting to rely on Lord Atkin's dictum, the Court declined to prohibit a commission of inquiry from making a finding against the applicants, against whom misconduct had been alleged. The Court held that:

> "... since the duties and functions of the Commission are merely to report, it is not exercising a judicial or quasi-judicial function and, therefore, prohibition will not lie against the Commission, notwithstanding the fact that the right of the applicant to his reputation might well be seriously affected by the report and notwithstanding the fact that . . . (the statute empowering the Commission) includes a statutory right to be heard . . ."

The Court also declined a request for relief by way of declaration.

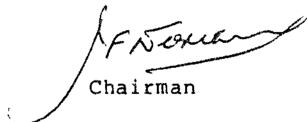
94. In an earlier case, Landreville v. The Queen (1973) F.C. 1223, 41 D.L.R. (3d) 574, the Trial Division had held that, the Commission in question having no power to make a decision and its report having no legal effect, certiorari did not lie to quash the report; but that the Court had jurisdiction to make a declaration "which, though devoid of any legal effect, would, from a practical point of view, serve some useful purpose".

95. The conclusion evidently reached by the Court of Appeal in Cock's case, as discussed and explained by the Full Court in the Timberlands case, is binding on the High Court and would probably carry great weight in the Court of Appeal. We are of the view that an application for review in terms of the Judicature Amendment Act 1972, s.4, should be available. If an amendment is made to the Commissions of Inquiry Act so as to eliminate "parties", as we have suggested, it might be thought to leave the matter at large. It is possible that the effect of the Judicature Amendment Acts of 1972 and 1977, together with the increasing emphasis on the common law of an obligation to be fair, as distinct from the obligation to act judicially, may have already brought the conduct of a commission of inquiry within the High Court's powers of review.

96. In our view, the High Court should have jurisdiction to ensure that commissions of inquiry keep within their authority and comply with natural justice or act fairly. We recognise that most commissions of inquiry lack the power to make a final binding decision. More often than not the report of the commission is merely a part, though an important part, of a process leading to a decision by Government which may materially affect the rights of an individual or group. It is, we believe, essential that the investigation by the commission be just and fair. It should be competent for an aggrieved person or one who fears that his rights or interests may be neglected by a commission to challenge in the High Court the legality of what has been done or is proposed to be done. The challenge would need to be made before the commission delivered its report and became functus officio.

The supervisory jurisdiction of the High Court in respect of commissions can be confirmed by an appropriate legislative provision.

for and on behalf of the Committee



March 1980 Chairman

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DRAFT

COMMISSIONS OF INQUIRY BILL

EXPLANATORY NOTE

This Bill gives effect to recommendations made by the Public and Administrative Law Reform Committee. It replaces, in a substantially redrafted form and with a number of amendments and new provisions, the Commissions of Inquiry Act 1908 and its amendments.

The main changes made in the law are as follows:

(1) The present distinction between the immunity against action given by s.13(1) of the 1908 Act to a Commission of which a Judge of the High Court is a member, and the qualified privilege given to other Commissions, is abolished. Instead, the qualified privilege given to those other Commissions will apply to all, so that a Commissioner will be protected against action for anything he may report or say in the course of the inquiry, so long as he acts in good faith (clause 3):

(2) In addition to those now entitled to be heard, anyone whose interests may be adversely affected by evidence given before a Commission, and anyone against whom an allegation of misconduct is proposed to be made in the Commission's report, will be entitled to be heard (clause 4):

(3) Anyone entitled to be heard may appear in person or by his counsel or agent, and may adduce evidence, and may, at the Commission's discretion, cross-examine witnesses (clause 4):

(4) Although as a general rule hearings will be held in public, the Commission may in proper cases hold private hearings (clause 6):

(5) The Commission will be free to receive evidence not admissible in a Court of law (clause 7):

(6) The powers of the Commission to summon witnesses, administer oaths, and generally to conduct the hearing, are set out instead of being conferred by reference to those of a District Court; and additional powers are given to inspect documents and require the production of information (clauses 6 to 9):

(7) The proceedings of the Commission will be subject to judicial review (clause 14):

(8) The records of the Commission are to be deposited in the National Archives and treated as public archives (clause 18).

Clause 1 relates to the Short Title and commencement of the new Act, which is to come into force on the 1st of ... 19..

Clause 2 re-enacts s.2 of the 1908 Act, under which a person or persons may be appointed by Order-in-Council to be a Commission to inquire into and report on any of the matters specified in paragraphs (a) to (f) of the clause.

Clause 3 re-enacts s.3 of the 1908 Act. It protects every member of the Commission from action against him for anything he may report or say in the course of the inquiry, so long as he acts in good faith in the discharge of his duties. Section 13 of the 1908 Act, which gives the powers, privileges, and immunities of a Judge of the High Court to a Commission of which such a Judge is a member, is not re-enacted.

Clause 4 replaces s.4A of the 1908 Act. At present, anyone who satisfies the Commission that he has an interest apart from an interest in common with the public is entitled to appear and be heard "as if he had been cited as a party to the inquiry". In subclause (1) of this clause the entitlement is re-enacted, but the quoted words are not. Similar references to "parties" have been omitted from some other clauses of the Bill, on the grounds that the citation of parties is neither necessary nor appropriate in the case of the usual Commission of Inquiry, whose function is not to make decisions but to make recommendations.

Subclause (2) is new. A person who satisfies the Commission that evidence given before it may adversely affect his interests must be given an opportunity to be heard.

Subclause (3) is new. The Commission is not to make an allegation of misconduct by any person until he has had reasonable notice of the allegation and has had an opportunity to be heard.

Subclause (4) is new. Every person entitled to be heard may appear in person or by his counsel or agent.

Subclause (5) is new. A person entitled to be heard may give evidence and call and examine witnesses, and, at the Commission's discretion, cross-examine witnesses.

Clause 5 replaces s.6 of the 1908 Act. At present, although counsel has the same privileges and immunities as if he were in a Court of law, a witness does not unless he attends pursuant to a summons issued by the Commission. This clause omits the reference to a summons. Every witness, counsel, agent, or other person appearing will have the same privileges and immunities as witnesses and counsel in Courts of law.

Clause 6: Except for subclause (4), this clause is new.

Subclause (1): As a general rule, hearings are to be held in public.

Subclause (2): Having regard to the interests of any person and to the public interest, the Commission may hold a hearing in private, prohibit the publication of reports of any part of its proceedings, or prohibit the publication of documents that have been produced.

Subclause (3): The Commission may deliberate in private on any decision or question.

Subclause (4) re-enacts s.4(2) of the 1908 Act, as to the manner of exercising the powers to summon witnesses and do other incidental acts.

Subclause (5): This provides for the signature of documents on behalf of the Commission.

Subclause (6): Subject to the new Act, the Commission may regulate its own procedure.

Clause 7 deals with evidence.

Subclause (1) is new. The Commission may receive as evidence any statement or matter that may assist it to deal effectively with the subject of the inquiry.

Subclause (2) replaces part of s.4(1) of the 1908 Act. The Commission may take evidence on oath.

Subclause (3) is new. The Commission may permit a witness to give evidence by tendering a written statement.

Clause 8 is new. The Commission or a person authorised by it may inspect and examine books and documents, require their production for examination, and require the furnishing of information. It may also order that any information or documents furnished or produced to it shall be supplied to any person on such terms and conditions as it thinks fit.

The clause is based on ss.12 and 15(3) of the Commerce Act 1975.

Clause 9 replaces part of s.4(1) of the 1908 Act. It gives power to issue summonses requiring the attendance of witnesses and the production of books, papers, documents, records, or things relevant to the inquiry.

Clause 10 replaces s.5 of the 1908 Act, as to the service of a witness summons.

Subclause (1)(c) is new. It allows service by registered letter.

Subclause (2): At present a summons must be served at least 24 hours before the witness's attendance is required. This subclause alters the period to 10 days.

Clause 11: Subclause (1) replaces, in redrafted form, s.7 of the 1908 Act. Where a witness attends pursuant to a summons he is entitled to the prescribed allowances. The existing proviso, under which persons prosecuting a claim before a Commission are not entitled to be paid, is not re-enacted.

Subclause (2) is new. The appropriate allowances and travelling expenses are to be paid or tendered to the witness on service of the summons.

Clause 12 replaces s.8 of the 1908 Act. At present, where the Commission has obtained the authority of the Minister of Internal Affairs for summoning a witness, his expenses are paid by the Minister of Finance out of the Consolidated Account. In every other case the person requiring the evidence of a witness must pay.

Subclause (1) of this clause omits the provision for obtaining the Minister's consent. It provides instead that where the Commission has summoned a witness of its own motion the witnesses' allowances are to be paid out of money appropriated by Parliament for the purposes of the inquiry.

Subclauses (2) and (3): In every other case the person requiring the evidence of a witness must pay.

Clause 13 re-enacts, with amendments, s.10 of the 1908 Act (as modified by s.13(3)), under which the Commission may state a special case for the High Court on a question of law.

Subclause (2) alters the procedure for stating the case. At present the case to be stated is drawn up by the parties (if any) to the inquiry; but if the parties do not agree, or if there are no parties, the form of the case is to be settled by the Commission. Under this subclause the case to be stated will be settled by the Commission after consultation with such persons as in its opinion have a special interest in the question.

Subclause (3) amends the present law by allowing the Commission to adjourn the inquiry as to any particular matter (instead of the whole inquiry) where a question of law is before the Court.

Subclause (4) is new. If on application the Commission refuses to refer the question to the High Court the applicant may apply to that court for an order determining the question.

Subclause (5) is new. If the question is referred, or if on an application for an order the court is of opinion that the application should be granted, it is to determine the question.

Subclause (6) is new. Where a question or application is before the Court it may make an interim order adjourning the inquiry or any part of it until the question or application is determined.

Subclause (7): At present, by virtue of s.13(3) of the 1908 Act, where a Judge of the High Court is a member of the Commission the reference of a question of law is to be to the Court of Appeal instead of the High Court. Under this subclause, however, it is to be to a Full Court; that is, to such number of Judges of the High Court, being not less than 3, as the Chief Justice may determine.

Clause 14 is new. It provides that an application for judicial review in respect of the inquiry may be made to and dealt with by the High court under Part I of the Judicature Amendment Act 1972. That Part is to apply as if the inquiry were the exercise of a statutory power of decision within the meaning of that Part and were a matter in respect of which the High Court would have jurisdiction to grant relief by way of any of the proceedings referred to in s.4(1) of that Act (i.e. proceedings for mandamus, prohibition, certiorari, declaration, or injunction).

Clause 15 deals with costs. At present, under s.11 of the 1908 Act, the Commission may order that the whole or any part of the costs "of the inquiry" or of any party to it shall be paid by any party or by all or any of the persons who have procured the inquiry to be held; but an order may be made only against a person who has been cited as a party, or authorised to appear and be heard, or summoned to attend and give evidence.

Subclause (1) of this clause does not re-enact the references to the costs "of the inquiry" or to persons summoned to attend and give evidence. It provides instead that the Commission may order that the whole or any part of the costs of a person appearing or being heard under clause 4 shall be paid by any of the persons appearing or being heard, or by all or any of the persons who have procured the inquiry to be held.

Subclause (2) is new. Before an order is made against any person he is to be given an opportunity to be heard on the question of costs.

Subclause (3) re-enacts s.12(2) of the 1908 Act, with minor drafting alterations.

Subclause (4) is new. If the Commission is satisfied that any submission made or evidence given by any person has furthered the purposes of the inquiry to an exceptional extent, it may order that there be paid to him the whole or part of any legal, research, and other costs incurred in the preparation of the submission or evidence. Costs so ordered to be paid will be paid out of money appropriated by Parliament for the purposes of the inquiry.

Clause 16 replaces s.12(1) and (3) of the 1908 Act. At present an order for costs may be filed in the office of the High Court where the amount exceeds $200, or a District Court where it does not; and it is then enforceable as a final judgment of that court. Under this clause all orders will be enforceable in a named District Court, when filed there.

Clause 17 re-enacts s.14 of the 1908 Act, as modified by s.5 of the Judicature Amendment Act 1930. Rules may be made by the Rules Committee fixing a scale of costs.

Clause 18 is new. When the Commission has made its report all papers and records officially made or received by it in connection with the inquiry are to be transferred to the Chief Archivist and deposited in the National Archives. This will not apply to a person's private property. Also, the Commission may direct that any specified material that discloses information relating to a person's private affairs is not to be so transferred, or that any particular material is to be deposited subject to such conditions as to access or otherwise as it thinks fit. Subject to any such direction, things that are deposited are to be treated as public archives under the Archives Act 1957. Those that are not may be returned to the persons from whom they were received, and if not so returned shall be destroyed or disposed of as the Commission or its Chairman directs.

Clause 19 specifies offences. Subclause (1) re-enacts, with drafting amendments, s.9 of the 1908 Act. A person commits an offence who, after being summoned, without lawful excuse fails to attend, refuses to be sworn or to give evidence, or to answer questions, or fails to produce books, papers, records, or things as required by the summons.

Subclause (2) is new. It makes it an offence to wilfully interrupt or obstruct a hearing; to wilfully use insulting or

false and defamatory words towards the Commission or a member of it; to wilfully obstruct or hinder an inspection of documents or things under clause 8; or without lawful excuse to contravene orders or requirements of the Commission under clauses 6 and 8.

Subclause (3): The penalty for an offence is increased from a maximum of $40 to a maximum of $1,000.

Clause 20 re-enacts s.15 of the 1908 Act, under which the Act extends to inquiries held by Royal Commissions or Commissions appointed under other legislation.

Clause 21 is a transitional clause. Inquiries begun and not completed under the 1908 Act may be continued and completed under the new Act; but where a question of law has already been referred to the Court, or an order for costs has already been filed, they are to be dealt with under the 1908 Act.

Clause 22 repeals the enactments specified in the Schedule to the Bill.

COMMISSIONS OF INQUIRY

ANALYSIS

Title

1. Short Title and commencement

2. Appointment of Commissions of Inquiry

3. Protection of members

4. Persons entitled to be heard

5. Protection of persons appearing

6. Proceedings of Commission

7. Evidence

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Schedule

A BILL INTITULED

AN ACT to make better provision in respect of Commissions of Inquiry, and to consolidate and amend the Commissions of Inquiry Act 1908 and its amendments

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement - (1) This Act may be cited as the Commissions of Inquiry Act 19 .

(2) This Act shall come into force on the 1st day of 19 .

2. Appointment of Commissions of Inquiry - The Governor-General may from time to time, by Order-in-Council, appoint any person or persons to be a Commission to inquire into and report on 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.

Cf. 1908, No. 25, s.2; 1958, No. 58, s.2(1); 1970, No. 53, s.2

3. Protection of members - So long as any member of any such Commission acts in good faith in the discharge of his duties, no action shall lie against him for anything he may report or say in the course of the inquiry.

Cf. 1908, No. 25, ss.3, 13(1), (3)

4. Persons entitled to be heard - (1) Any person shall, if he satisfies the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry.

(2) Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.

(3) The Commission shall not make a report alleging misconduct by any person until reasonable notice of the proposed allegation has been given to him and he has had an opportunity to be heard in respect of it.

(4) Every person entitled to be heard under this Act may appear in person or by his counsel or agent.

(5) Every person entitled to be heard under this section may -

(a) Give evidence and call and examine witnesses; and

(b) At the Commission's discretion, cross-examine witnesses.

Cf. 1908, No. 25, s.4A; 1958, No. 58, s.3(1)

5. Protection of persons appearing - 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.

Cf. 1908, No. 25, s.6

6. Proceedings of Commission - (1) Except as provided in this section, every hearing of the Commission for the purposes of the inquiry shall be held in public.

(2) If the Commission is of opinion that it is proper to do so having regard to the interests of any person and to the public interest, it may, of its own motion or on the application of any person, -

(a) Hold a hearing or any part of a hearing in private:

(b) Make an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(c) Make an order prohibiting the publication of the whole or any part of any books, papers, documents, or records produced at any hearing.

(3) The Commission may in any case deliberate in private as to its decision on any matter or as to any question arising in the course of the inquiry.

(4) For the purposes of this Act, the power to issue summonses requiring the attendance of witnesses or the production of books, papers, documents, records, or things, or to do any other act preliminary or incidental to the hearing of any matter by the Commission, may be exercised by the Commission or its Chairman, or by an officer of the Commission purporting to act by direction or with the authority of the Commission or its Chairman.

(5) Any order, direction, certificate, or document issued by the Commission may be signed on its behalf by the Chairman or by an officer of the Commission.

(6) Subject to this Act, the Commission may regulate its procedure in such manner as it thinks fit.

Cf. 1908, No. 25, s.4(2)

7. <u>Evidence</u> - (1) The Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law.

(2) The Commission may take evidence on oath, and for that purpose a member or officer of the Commission may administer an oath.

(3) The Commission may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Commission thinks fit, verifying it by oath.

Cf. 1908, No. 25, ss.4(1), 13(1), (3); 1968, No. 73, s.2

8. <u>Powers of investigation</u> - (1) For the purposes of the inquiry the Commission or any person authorised by it in writing to do so may -

(a) Inspect and examine any books, papers, documents, records, or things:

(b) Require any person to produce for examination any books, papers, documents, records, or things in his possession or under his control, and to allow copies of or extracts from any such books, papers, documents, or records to be made:

(c) Require any person to furnish, in a form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such books, papers, documents, or records as aforesaid.

(2) The Commission may, if it thinks fit, require that any written information or particulars or any copies or extracts furnished under this section shall be verified by statutory declaration or otherwise as the Commission may require.

(3) For the purposes of the inquiry the Commission may of its own motion, or on application, order that any information or particulars, or a copy of the whole or any part of any book, paper, document, or record, furnished or produced to it be supplied to any person appearing before the Commission, and in the order impose such terms and conditions as it thinks fit in respect of such supply and of the use that is to be made of the information, particulars, or copy.

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

Cf. 1908, No. 25, ss.4(1), 13(3); 1968, No. 73, s.2

10. Service of summons - (1) A summons to a witness may be served -

(a) By delivering it to the person summoned; or

(b) By leaving it at his usual place of abode; or

(c) By posting it by registered letter addressed to him at his usual place of abode.

(2) The summons shall be served at least 10 days before the date on which the attendance of the witness is required. If it is posted by registered letter it shall be deemed for the purposes of this subsection to have been served at the time when the letter would be delivered in the ordinary course of post.

Cf. 1908, No. 25, s.5

11. Witnesses' allowances - (1) Every witness attending the inquiry to give evidence pursuant to a summons shall be entitled to be paid witnesses' fees, allowances, and travelling expenses according to the scales for the time being prescribed by regulations made under the Summary Proceedings Act 1957, and those regulations shall apply accordingly.

(2) On the service of the summons, or at some other reasonable time before the date on which the witness is required to attend, there shall be paid or tendered to him the estimated amount of the allowances and travelling expenses to which he is entitled according to the prescribed scales.

Cf. 1908, No. 25, s.7

12. Payment of witnesses' allowances - (1) Where the Commission has summoned a witness of its own motion the amounts of his fees, allowances, and travelling expenses shall be payable out of money appropriated by Parliament for the purposes of the inquiry.

(2) In every other case the person requiring the evidence of a witness shall be liable for payment of those amounts.

(3) On making application for the issue of a witness summons the person requiring the evidence of the witness shall deposit with the Commission such sum as the Commission thinks sufficient; and the said amounts shall be paid out of the sum so deposited.

Cf. 1908, No. 25, s.8

13. Reference of question of law to High Court - (1) The Commission may, of its own motion or on application, refer any disputed question of law arising in the course of the inquiry to the High Court for decision.

(2) The question shall be in the form of a special case to be settled by the Commission after consultation with such persons as in its opinion have a special interest in the question.

(3) Subject to any order of the High Court under this section, if the Commission refers the question to the Court, or if an application is made to the Court under subsection (4) of this section, the Commission may either conclude the inquiry subject to the Court's decision or, at any stage of the inquiry, adjourn it, in respect of all or any of the matters before the Commission, until after that decision has been given.

(4) If the Commission refuses an application for the reference of the question to the High Court, the applicant may apply to that Court for an order determining the question.

(5) If the question is referred to the Court by the Commission, or if on application made under subsection (4) of this section the Court is of the opinion that the application should be granted, the Court shall determine the question.

(6) Where any question or application is before the Court under this section the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant or of any other person, make an interim order directing that the inquiry be adjourned in respect of all or any of the matters before the Commission until the question or application has been determined by the Court.

(7) If a Judge of the High Court is a member of the Commission, any question of law or application before the Court under this section shall be dealt with by such number of Judges of the Court, being not less than 3, as the Chief Justice may determine.

(8) The decision of the High Court on any question or application before it under this section shall be final and binding on all persons having any interest in the inquiry, and on the Commission.

Cf. 1908, No. 25, ss.10, 13(3)

14. Judicial review of proceedings of Commission - (1) An application for review may be made and relief granted under Part I of the Judicature Amendment Act 1972 in respect of an inquiry under this Act.

(2) For the purposes of this section Part I of the Judicature Amendment Act 1972 shall apply as if the inquiry were the exercise of a statutory power of decision within the meaning of that Part and were a matter in respect of which the High Court would have jurisdiction to grant relief in any of the proceedings referred to in section 4(1) of that Act.

15. Costs - (1) On the hearing of an inquiry the Commission may order that the whole or any part of the costs of any person appearing or being heard at the inquiry by virtue of section 4 of this Act shall be paid by any of the persons appearing or being heard, or by all or any of the persons who have procured the inquiry to be held.

(2) The Commission shall not make an order for the payment of costs by any person until he has had an opportunity to be heard on the question whether the order should be made.

(3) Every order for costs shall name a District Court in which the order may, if necessary, be enforced.

(4) If the Commission is satisfied that any submission made or evidence given by any person has furthered the purposes of the inquiry to an exceptional extent, it may in its discretion, whether or not it makes an order under subsection (1) of this section, direct that there shall be paid to the person the whole or any part of any legal, research, or other costs incurred by him in the preparation of the submission or evidence. Costs so directed to be paid shall be paid out of money appropriated by Parliament for the purposes of the inquiry.

Cf. 1908, No. 25, ss.11, 12(2); 1958, No. 58, s.3(2)

16. Enforcement of order for costs - (1) For the purpose of enforcing an order for costs made under this Act, the person to whom the costs are payable may file a duplicate of the order in the office of the District Court named in the order.

(2) When so filed the order shall be enforceable in all respects as a final judgment of that Court in its civil jurisdiction.

Cf. 1908, No. 25, s.12(1)

17. Scale of costs - Rules, not inconsistent with this Act, may from time to time be made, in the manner prescribed by the Judicature Act 1908, prescribing a scale of costs payable in respect of inquiries under this Act.

Cf. 1908, No. 25, s.14

18. Disposal of records - (1) Subject to this section, as soon as practicable after the Commission has made its report all papers, documents, or records that were officially made or received by the Commission or any officer of the Commission in the course of or in connection with the inquiry shall be transferred to the custody of the Chief Archivist and shall be deposited in the National Archives established under the Archives Act 1957.

(2) Subsection (1) of this section shall not apply to anything that is the private property of any person.

(3) The Commission may in its discretion, having regard to the interests of any person and to the public interest -

(a) Direct that any specified paper, document, or record that discloses any information relating to the private affairs of any person shall not be transferred or deposited under subsection (1) of this section:

(b) Direct that any specified paper, document, or record shall be deposited subject to such conditions as to access or otherwise as it thinks fit.

(4) For the purposes of the Archives Act 1957 -

(a) All papers, documents, or records so deposited shall be deemed to be public archives and, subject to any direction given under subsection (3) of this section, shall be dealt with in accordance with that Act:

(b) The office of the Commission shall be deemed to be a Government office under the control of the administrative head of the department by which secretarial services were provided for the Commission.

(5) Any papers, documents, records, or things not deposited under subsection (1) of this section may be returned to the persons from whom they were received, and if not so returned shall be destroyed or otherwise disposed of in such manner as the Commission or its Chairman directs.

19. Offences - (1) Every person commits an offence who, after being summoned to attend to give evidence before the Commission or to produce to it any books, papers, documents, records, or things, without lawful excuse -

(a) Fails to attend in accordance with the summons; or

(b) Refuses to be sworn or to give evidence, or having been sworn refuses to answer any question that he is lawfully required by the Commission or any member of it to answer concerning the subject of the inquiry; or

(c) Fails to produce any such paper, document, record, or thing.

(2) Every person commits an offence who -

(a) Wilfully interrupts or obstructs any hearing of the Commission or otherwise misbehaves at a hearing; or

(b) By writing or speech, wilfully uses any insulting words towards the Commission or any member of it, or uses words that are false and defamatory of it or of him, whether at a hearing or not; or

(c) Without lawful excuse, acts in contravention of any order made by the Commission under section 6(2)(b) or (c) of this Act; or

(d) Wilfully obstructs or hinders the Commission or any member of it or any authorised person in any inspection or examination of books, papers, documents, records, or things pursuant to section 8(1)(a) of this Act; or

(e) Without lawful excuse, fails to comply with any requirement of the Commission or any authorised person made under section 8(1)(b) or (c) of this Act; or

(f) Without lawful excuse, acts in contravention of or fails to comply with any order made by the Commission under section 8(3) of this Act or any term or condition of the order.

(3) Every person who commits an offence against this section is liable on summary conviction to a fine not exceeding $1,000.

(4) No person summoned to attend the inquiry shall be convicted of an offence against subsection (1) of this section unless at the time of the service of the summons, or at some other reasonable time before the date on which he was required to attend, there was made to him a payment or tender of a sum in respect of his allowances and travelling expenses in accordance with section 11(2) of this Act.

Cf. 1908, No. 25, s.9; 1967, No. 62, s.2

20. Extent of Act - This Act shall extend and apply to all inquiries held by Commissioners appointed by the Governor-General or the Governor-General in Council under any Act or under the Letters Patent constituting the office of Governor-General.

Cf. 1908, No. 25, s.15

21. Transitional provisions - (1) Except as provided in this section, every inquiry begun under the Commissions of Inquiry Act 1908 before the date of the commencement of this Act and not completed before that date may be continued and completed in accordance with this Act.

(2) Where before the commencement of this Act a Commission has referred a disputed point of law to the High Court or the Court of Appeal by way of special case under section 10 of the Commissions of Inquiry Act 1908 the special case shall be dealt with as if this Act had not been passed.

(3) Where before the commencement of this Act an order for costs made by a Commission has been filed under section 12 of the Commissions of Inquiry Act 1908 the order shall be enforceable as if this Act had not been passed.

22. Repeals - The enactments specified in the Schedule to this Act are hereby repealed.

SCHEDULE

Section 22(1)

ENACTMENTS REPEALED

1908, No. 25 - The Commissions of Inquiry Act 1908. (Reprinted 1974, Vol. 3, p.2267.)

1930, No. 14 - The Judicature Amendment Act 1930: So much of the Schedule as relates to the Commissions of Inquiry Act 1908. (1957 Reprint, Vol. 6, p.739.)

1958, No. 58 - The Commissions of Inquiry Amendment Act 1958. (Reprinted 1974, Vol. 3, p.2278.)

1967, No. 62 - The Commissions of Inquiry Amendment Act 1967. (Reprinted 1974, Vol. 3, p.2279.)

1968, No. 73 - The Commissions of Inquiry Amendment Act 1968. (Reprinted 1974, Vol. 3, p.2279.)

1970, No. 53 - The Commissions of Inquiry Amendment Act 1970. (Reprinted 1970, Vol. 3, p.2280.)

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