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# BILLS DIGEST

Digest No. 1678

## Inquiries Bill 2008

<b>Date of Introduction:</b>	29 September 2008
<b>Portfolio:</b>	Internal Affairs
<b>Select Committee:</b>	As at 07 April, 1st Reading not held.
<p><b>Published: 07 April 2009</b></p> <p>Prepared by <b>John McSoriley</b> BA LL.B, Barrister</p> <p>Legislative Analyst</p> <p>P: (04) 471-9626 (Ext. 9626)</p> <p>F: (04) 471-1250</p>	<p>Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.</p> <p>Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.</p>

## Purpose

The aim of this Bill is to reform and modernise the law relating to inquiries, by:

- providing for the establishment of both public and government inquiries to inquire into matters of public importance; and
- recognising and providing for Royal commissions appointed under the Royal prerogative; and
- enabling public inquiries, government inquiries, and Royal commissions to be carried out effectively, efficiently, and fairly<sup>1</sup>.

## Background

### Law Commission Report 102

The Law Commission, in its report, "A new Inquiries Act"<sup>2</sup> identified three broad problems with the existing inquiry structure as follows:

<sup>1</sup> Inquiries Bill, 2008 No 283-1, Explanatory note, General policy statement, pp. 1 and 2.

<sup>2</sup> Law Commission, Report 102, "[A New Inquiries Act](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_127_402_A%20New%20Inquiries%20Act%20NZLC%20R102.pdf)", New Zealand Law Commission, Wellington, 2008. ([http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_127\\_402\\_A%20New%20Inquiries%20Act%20NZLC%20R102.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_127_402_A%20New%20Inquiries%20Act%20NZLC%20R102.pdf)) (retrieved 07 April 2008 at 10.52am).

- " ... the 1908 Act is antiquated and has been amended many times, sometimes in response to one-off situations. Many of its provisions are confusing and some place constraints on procedure that add time and money to inquiries, without necessarily enhancing their effectiveness. A complete re-examination of the Act is therefore long overdue"<sup>3</sup>;
- " ... [R]oyal commissions and commissions of inquiry are costly. They tend to adopt legalistic procedures and have become constrained by the culture that has developed around them. As a result, the 1908 Act is used infrequently. Changes in both the law and culture are required to enable inquiries to be as effective and efficient as possible so that their use is not deterred"<sup>4</sup>;
- " ... [N]on-statutory ministerial inquiries appear to be increasingly preferred but take place outside a statutory framework. They are often seen as a quick and cost-effective way to have an independent investigation, but do not have any coercive powers, instead relying solely on witness cooperation. They offer no immunities for those taking part; and there is a lack of clarity around how other protections such as judicial review and the Official Information Act 1982 apply to them. Ministers need to be provided with a form of statutory inquiry that they can use for both the less complex, discrete issues requiring investigation, as well as those of greater breadth and complexity"<sup>5</sup>.

The Law Commission proposed that the 1908 Act be replaced by a new Inquiries Act which would maximise flexibility and free inquiries from "the procedural constraints and traditions that [had] dogged commissions". It would provide for two forms of inquiry.:

- " 'Public inquiries' should take over the ground previously inhabited by commissions of inquiry and royal commissions";
- " 'Government inquiries' will differ by being simpler and quicker to establish. They will be appointed by and report directly to a Minister. They should deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquiry".

The Law Commission recommended that:

- both forms of inquiry should enjoy the same legal powers and protections, differing only in their manner of appointment and completion;
- the adversarial concepts of "parties" and "persons entitled to be heard" should be removed from the Act and the automatic provisions that give these participants a right "to appear and be heard" should be abandoned in favour of "more flexible provisions which accord with natural justice". Other "anachronisms of the 1908 Act", including the "complicated provisions relating to contempt and differing powers depending on the status of individual inquirers" should also be removed;
- "Inquirers" should have enhanced powers to conduct inquiries as they see fit and the rules surrounding public access to inquiries should be clarified<sup>6</sup>.

## The Bill

"The purpose of this Bill is therefore to reform and modernise the law relating to inquiries, by:

- providing for the establishment of both public and government inquiries to inquire into matters of public importance; and
- recognising and providing for Royal commissions appointed under the Royal prerogative; and

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<sup>3</sup> Ibid., p. 13.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., pp. 13-19.

- enabling public inquiries, government inquiries, and Royal commissions to be carried out effectively, efficiently, and fairly.

"The Bill would repeal section 2 of the 1908 Act which provides for the appointment of commissions of inquiry, and section 15 which relates to Royal commissions. However, it would leave the remaining provisions of the 1908 Act in force for the time being. Over the years, the 1908 Act has been used as a means of giving inquisitorial powers to many other statutory bodies, (for example, the Waitangi Tribunal). It is intended that a review will take place of all the bodies that take powers from the 1908 Act to determine what law changes need to be made to enable the final repeal the Commission of Inquiry Act 1908"<sup>7</sup>.

## Main Provisions

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### Purpose

The Bill provides that its purpose is to reform and modernise the law relating to inquiries, by:

- "providing for the establishment of both public and government inquiries to inquire into matters of public importance";
- "recognising and providing for Royal commissions established under the Royal prerogative"; and
- "enabling those inquiries to be carried out effectively, efficiently, and fairly" (*Part 1, Clause 3(1)*).

### Three forms of inquiry

The Bill provides for three forms of inquiry:

- a Royal commission established under the Letters Patent constituting the office of Governor-General;
- a public inquiry established by the Governor-General by Order in Council to inquire into a matter of public importance;
- a government inquiry established by a Minister of the Crown by notice in the Gazette to inquire into a matter of public importance.

The Bill provides for the matters to be specified in the instrument establishing an inquiry, specifies the circumstances when the Governor-General or the appointing Minister may remove a member of an inquiry from office and sets out the options to address a vacancy in the membership of an inquiry, which are that the appropriate Minister or appointing Minister may require the inquiry to continue, or a replacement member may be appointed, or the inquiry may be terminated (*Part 2, Clauses 6-9*).

### Duties, powers, immunities, and privileges

The Bill requires an inquiry and each of its members to act independently, impartially, and fairly and provides that an inquiry has no power to determine the civil, criminal, or disciplinary liability of any person. An inquiry is not, however, prevented from making findings of fault or recommendations that further steps be taken to determine liability (*Part 3, Clauses 10 and 11*).

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<sup>7</sup> Inquiries Bill, 2008 No 283-1, Explanatory note, General policy statement, p. 2.

## Reporting requirements

The Bill requires an inquiry to prepare and present a final report to the Governor-General, in the case of a public inquiry or to the appointing Minister, in the case of a government inquiry (*Part 3, Clause 12*).

## Counsel assisting

The Bill provides that the Solicitor-General may appoint counsel to assist or advise an inquiry (*Part 3, Clause 13*).

## Procedure

The Bill provides that an inquiry may conduct its inquiry as it considers appropriate unless otherwise specified by this Bill or in the terms of reference of the inquiry. Without limiting the freedom of an inquiry to set its own procedure, the Bill lists the matters which may be determined by the inquiry including:

- whether to call witnesses, and if so, who to call;
- whether to hold hearings;
- whether to receive oral or written evidence or submissions;
- the manner and form of evidence or submissions;
- whether to allow or restrict cross-examination of witnesses.

However, the Bill provides for an inquiry to designate any person to be a core participant in the inquiry and therefore to have the right to give evidence and make submissions to the inquiry.

The Bill also provides that an inquiry must not act inconsistently with the rules of natural justice (and, in particular, an inquiry must observe the rules of natural justice before making an adverse finding against any person in its report). An inquiry must have regard to the need to avoid unnecessary delay or cost. An inquiry may forbid the publication of certain matters, restrict public access to the inquiry, or hold the inquiry in private. Criteria that an inquiry must take into account in deciding whether to make an order forbidding such publication are listed, and the Bill also specifies the circumstances in which an inquiry may be postponed or temporarily suspended. An inquiry may issue a witness summons requiring a person to attend and give evidence before the inquiry and the Bill specifies how a witness summons is to be served on the person concerned. Persons summoned to attend an inquiry as witnesses are entitled to be paid for their reasonable costs and travelling expenses, at a level determined by the inquiry. The Bill confers immunity on an inquiry and its members from liability for anything done in performing the duties of the inquiry, unless done in bad faith, and confers on witnesses participating in an inquiry the same immunities and privileges as if they were appearing in civil proceedings (*Part 3, Clauses 14-18 and 24-28*).

## Legal assistance

The Bill provides for an inquiry to recommend to the chief executive of the relevant department (i.e. the Department of Internal Affairs or "another department of State, if the other department is appointed, under the terms of reference for the inquiry, to be responsible for administrative matters relating to the inquiry") to grant funding for legal assistance to specified persons required or wishing to appear before an inquiry or who have an interest in the inquiry (*Part 3, Clause 19 and Part 1, Clause 4, definition of "relevant department"*).

## Evidence

The Bill provides that an inquiry may receive any evidence that, in its opinion, may assist it to deal effectively with the subject of the inquiry, whether or not the evidence would be admissible in a court of law. An inquiry may also take evidence on oath or affirmation, and for that purpose an oath or

affirmation may be administered by any member of the inquiry and an inquiry may permit a witness to give evidence by any means, including by written or electronic means, and require the witness to verify the evidence by oath or affirmation. An inquiry may require the production of documents or the provision of information and may order the disclosure to any person participating in the inquiry of any specified document, information, or thing that another person has produced before the inquiry (*Part 3, Clauses 20-23*).

### Inquiry and costs and contempt procedure in High Court

The Bill provides that an inquiry may make an order awarding costs against a person if satisfied that the person has unduly lengthened or obstructed the inquiry or added undue cost to the inquiry. The Solicitor-General, on his or her own initiative or at the request of an inquiry, may commence proceedings in the High Court for contempt of an inquiry and that Court may make any orders that it considers necessary and just to enable the inquiry to fulfil its purpose (*Part 4, Clauses 29 and 32*).

### Offences and penalties

The Bill provides for the following offences, carrying a maximum fine, on summary conviction, of \$10,000:

- failing to attend the inquiry in accordance with the notice of summons (*Clause 30(1)(a)*);
- refusing to be sworn or to affirm and give evidence (*Clause 30(1)(b)*);
- failing to produce any document or thing required by order of the inquiry (*Clause 30(1)(c)*);
- destroying evidence or obstructing or hindering any person authorised to examine, copy, or make a representation of a document or thing required by order of an inquiry (*Clause 30(1)(d)*);
- failing to comply with a procedural order or direction of an inquiry, including an order made under Clause 15(1) (headed: "power to impose restrictions on access to inquiry") (*Clause 30(1)(e)*);
- disrupting the proceedings of an inquiry (*Clause 30(1)(f)*);
- preventing a witness from giving evidence or threatening or seeking to influence a witness before an inquiry (*Clause 30(1)(g)*);
- providing false or misleading information to an inquiry (*Clause 30(1)(h)*);
- threatening or intimidating an inquiry, a member of an inquiry, or an officer of an inquiry (*Clause 30(1)(i)*).

The Bill provides, however, that a person does not commit an offence under Clause 30(1)(a) to (e) (described above) if:

- compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel, were that person giving evidence or acting as counsel in civil proceedings before a court; or
- compliance is prevented by an enactment, rule of law, or order of a court prohibiting or restricting disclosure, or the manner of disclosure, of any document, information, or thing; or
- compliance would be likely to prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences, including the right to a fair trial (*Part 4, Clauses 30 and 31*).

## Inquiry may state case to High Court

The Bill provides an ability for an inquiry to state a case to the High Court on any question of law arising in any matter before the inquiry (*Part 4, Clause 35*).

## Commission of Inquiry Act 1908 to continue to apply in certain circumstances

The Bill continues the application of the Commission of Inquiry Act 1908:

- to any commission of inquiry or Royal commission appointed under that Act that is in progress at the commencement of the Bill; and
- to any entity that is or may be established under an enactment enacted before the commencement of the Bill and that derives its powers from that Act (*Part 4, Clause 39 and Schedule 1 ("Acts under which entities have been, or may be, set up and to which Commission of Inquiry Act 1908 applies") and Schedule 2 ("Consequential amendments to other enactments")*).

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