

Inquiries Bill

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15 August 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: INQUIRIES AMENDMENT BILL

1. We have considered the Inquiries Bill (PCO 12870/11.0)(the 'Bill'), for consistency with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). The Bill reforms and modernises the law relating to inquiries. We understand that the Bill is likely to be considered by the Cabinet Business Committee at its meeting on Monday 18 August 2008.
2. This advice will consider the Bill of Rights Act issues of:
 - natural justice;
 - freedom of expression; and
 - the right not to be compelled to be a witness or to confess guilt.

Overall, however, we consider that the Bill appears to be consistent with the Bill of Rights Act.

Summary of the Bill

The Bill provides for three forms of inquiry: "Royal commissions", "public inquiries" and "government inquiries." The different forms would enjoy similar powers and protections but differ in their manner of appointment and reporting.

The Bill aims to reform and modernise the legal framework relating to inquiries so inquiries are more flexible, effective and efficient. The Bill sets out the powers of an inquiry, which include being able to seek out information, restrict public access to inquiries and compel people to appear before the inquiry.

Natural Justice

Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice.

Under the Bill, an inquiry does not have the power to determine the civil, criminal or disciplinary liability of any person but may make findings of fault or recommendations that further steps be taken to determine liability.[\[1\]](#)

The Bill provides that in making a decision as to the procedure or conduct of an inquiry, an inquiry must not act inconsistently with the rules of natural justice.^[2] Before making a finding that is adverse to any person, an inquiry is specifically required to give that person an opportunity to respond to the proposed finding^[3]. In addition, the Bill states that an inquiry must act independently, impartially and fairly.^[4]

Given the express acknowledgement of the role of natural justice in the procedure of an inquiry, the Bill appears to be consistent with the right to natural justice affirmed in section 27(1) of the Bill of Rights Act.

Freedom of Expression

Inquiries delve into very significant issues, both policy, such as accident compensation and MMP as well as conduct, such as the tragedy at Cave Creek and the Erebus disaster. Almost invariably, an inquiry under the Bill would generate significant community interest. Often, inquiries serve the important purposes of establishing the facts surrounding an event and holding people and organisations to account.

The Bill provides inquiries with broad powers to impose restrictions on public access to the inquiry. Under clause 14(1) an inquiry may make orders to:

- forbid publication of the whole or any part of any evidence or submissions presented to the inquiry;
- forbid publication of any rulings of the inquiry;
- restrict public access to any part or aspect of the inquiry; and
- hold the inquiry, or any part of it, in private.

Clause 20 provides inquiries with broad powers to seek information, including the power to require individuals to provide information in a form approved by the inquiry^[5]. Under clause 23 of the Bill, an inquiry has the power to require any person to attend and give evidence before the inquiry. Clause 29 provides that it is an offence to, among other things, refuse to give evidence if required to do so by an inquiry.

Section 14 of the Bill of Rights Act provides for freedom of expression in a very broad manner:

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

The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.^[6] We also note that freedom of expression should be defined widely and questions of limits on the right should generally be determined pursuant to section 5 of the Bill of Rights Act. We consider that clauses 14(1) and 20 raise prima facie issues of inconsistency with the freedom to seek, receive and impart information under the Bill of Rights Act.

Where a provision is found to be prima facie inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:

- does the provision serve an important and significant objective; and
- is there a rational and proportionate connection between that objective and the provision?

At clause 14(2), the Bill sets out criteria that the inquiry must take into account before restricting public access. Some of these criteria indicate the purpose of restricting access:

- the need for the inquiry to ascertain the facts properly;
- the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand;
- the privacy interests of any individual; and
- the administration of justice, including any person's right to a fair trial,

The powers to compel information are fundamental to the fact-finding nature of inquiries. Inquiries are inquisitorial bodies that must seek out information to assist them in answering the questions relevant to their terms or reference.

We consider the fact-finding purpose of inquiries, the criteria for ordering restrictions on access to the inquiry and the need for flexible proceedings to be important and significant objectives.

We now turn to consider whether there is a rational and proportionate connection between the power to limit public access to an inquiry or the power to compel information and the objectives set out above.

Clause 14(2)(a) requires an inquiry, before making an order restricting access to the inquiry, to balance the perceived need to restrict access and the risk of prejudice to public confidence in the proceedings of the inquiry. In addition, clause 14(2)(f) would require the inquiry to consider any countervailing interests. In our view, an inquiry would need to consider whether any limit on the freedom of expression is justified before making an order to restrict access to the inquiry.

Similarly, we consider that the powers to compel information from persons are rationally connected to the purpose of the power. In coming to this view, we note that failure to provide information will not give rise to an offence where doing so:

- is prevented by a privilege or immunity;
- would be contrary to a law or a court order; or
- would prejudice the maintenance of the law.^[7]

We also note that the very limits placed on expression in clause 14(1) could serve to protect those being compelled to provide information

We consider that any prima facie inconsistency of clause 14(1) of the Bill with s 14 of the Bill of Rights Act is justified under s 5 of that Act.

Right not to be compelled to be a witness or to confess guilt

As noted above, clause 23 of the Bill provides an inquiry with the power to require any person to attend and give evidence before the inquiry. Such persons will have immunities and privileges as if they were appearing in civil proceedings before a Court^[8]. We have considered whether section 25(d) of the Bill of Rights Act (the right not to be compelled to be a witness or to confess guilt) applies. However, section 25(d) of the Bill of Rights Act only applies in relation to criminal proceedings. An inquiry has no power to determine the civil, criminal or disciplinary liability of a person^[9]. As such, an inquiry's power to summons witnesses does not engage section 25(d) of the Bill of Rights Act.

Conclusion

In conclusion, our view is that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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Footnotes:

1. Clause 10.
 2. Clause 13(2)(a).
 3. Clause 16.
 4. Clause 9.
 5. Clause 20(a).
 6. Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) para 13.27.
 7. Clause 29(2).
 8. Clause 27.
 9. Clause 10.
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