

Taming the ‘circus’: can select committee witnesses be better protected?



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Front cover picture shows Ian Fraser and Craig Boyce at the TVNZ select committee inquiry (www.nzherald.co.nz).

Chapter 1

1.0 Introduction

In April 2006, the Privileges Committee concluded an inquiry by recommending a \$1000 fine for contempt of Parliament. This was the first time in 103 years that a fine had been recommended. The contemnor was Television New Zealand (TVNZ) and the contempt involved actions taken against a former Chief Executive who had given frank evidence to a Parliamentary select committee. Although the fine was relatively small the Privileges Committee warned in their interim report that “future breaches of privilege or contempt of this nature may incur a higher fine.”¹ Recent events overseas suggest that this was no empty threat. TVNZ was fined for a general contempt. When a contempt is more specifically directed at an individual inquiry, then the fine can become substantial. Thus two Canadian meat packing companies, with no direct government relation, recently found themselves facing fines of \$250,000 (Canadian) a day for refusing to disclose financial records to a Parliamentary committee.²

Two central issues arise from the TVNZ scenario, namely protecting against witness retaliation and fining for contempt. These issues are certainly not confined to Parliament but if witnesses such as Ian Fraser are protected outside Parliament, then it is hard to see why they should be left so very vulnerable in select committee proceedings. The answer cannot lie simply in the public function that select committees play because even in the realm of ‘public good’ a balancing exercise is often required.³ In any event, dismissing the TVNZ scenario as ‘just politics’ is incorrect; the law of Parliament is part of the law of New Zealand.⁴

The problem is not, however, only one of protecting the employee witness, it is also how to ensure that the employer is not punished for things that they would not be punished for outside Parliament. This problem is especially acute given that the

¹ Interim Report of the Privileges Committee “Question of Privilege on the action taken by TVNZ in relation to its chief executive, following evidence he gave to the Finance and Expenditure Committee” (April 2006), 9 online < www.clerk.parliament.govt.nz/Publications/CommitteeReport/ > accessed 19 April 2006

² Elliot, Ian “Canadian packers face \$250,000 a day in fines.” *Feedstuffs* 76-20 (May 17 2004) 1(2) *Expanded Academic ASAP*. Thomson Gale (online). University of Otago Library. 21 March 2006 (document number A117422628) < <http://find.galegroup.com/itx/retrieve.do?contentSet=IAC-Docume...rentPosition=3&userGroupName=otago&docId=A117422628&docType=IAC> >

³ See, for instance, the New Zealand Bill of Rights Act 1990 procedure in sections 4, 5 and 6

⁴ McGee, David *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, 2005) 613

Parliamentary contempt procedure is summary – there is no right of appeal and the opportunity to state one’s case is really quite limited. Even if one allows that the threshold for punishing contempts of Parliament might be lower, perhaps in recognition of the public function being fulfilled, this does not completely allay concerns about the contempt procedure.

The issue overlaying both these problems is the potential select committees have to disrupt important working relationships. Had Ian Fraser not already resigned, would it have been reasonable to expect that he and the Board of TVNZ pick up and carry on as if no damage had occurred to their employment relationship? Moreover, not just would it be reasonable but would it be realistic? Had the scenario occurred before any resignation had been tendered by Ian Fraser, then the parties could have taken their dispute to the Employment Relations Authority and, if necessary, to the Employment Court. Any monetary award by either body would, however, be compensatory. A fine for contempt serves no purpose other than to punish and deter – the money goes to Parliament, not Ian Fraser. There seems to be no reason therefore why Parliament could not have fined TVNZ on top of any award made by either the Employment Relations Authority or Employment Court.

Important changes occurred in 1996 when natural justice protections were introduced into the Standing Orders, which govern Parliamentary business and procedure.⁵ Technically, these additions should have diminished the problems identified earlier. The events involving TVNZ and Ian Fraser suggest that this is not the case. There seems to be three possible reasons for this.

- (1) Firstly, the provisions are inadequate and more is needed;
- (2) Secondly, what happened would have happened in other types of inquiry, and that therefore the events were inevitable;
- (3) What happened was a regrettable but acceptable price to pay for rigorous public inquiry into matters of public interest.

This paper will compare and contrast the various ways in which witnesses are protected in court, commissions of inquiry and select committees. The aim is to improve

⁵ McGee, above n 4, 119 and 289

the protections given to select committee witnesses, while minimising the risk employers' face of being summarily punished for contempt of Parliament. Whistleblower protection in both the U.S. and the U.K. will be considered as a potential solution to the problem of balancing legitimate public interest inquiry with the interests of both witnesses and their employers. Ultimately the question is whether the time has come to limit the types of inquiry select committees conduct and / or the people who select committees can summon to give evidence.

There are different stages at which the witness may need to be protected, and each will be considered in turn. A witness must not be pressured prior to giving evidence, and must feel able to give evidence without fearing the consequences. Any protection afforded to the witness continues after they have given evidence. Measures like making witness disclosures anonymous, hearing evidence in private and even blocking out names or details from reports may help to diminish the chance of retaliation.⁶

1.1 Background

The TVNZ story begins in December 2005 when Ian Fraser appeared before the Finance and Expenditure Committee as a witness. The first occasion was on the 7th December 2005 when the Committee began its annual review of TVNZ's financial and operational performance. Prior to this first appearance, Fraser had attended meetings with the Board of TVNZ where preparations were made for the financial review. The second time Fraser appeared, on the 14th December 2005, he gave evidence in the inquiry into recent "high profile performance and industrial relations issues", including his own resignation.⁷

Before this second meeting, Fraser made it clear there would be no meetings to discuss what was to be said. As he pointed out in an email to Craig Boyce, the chairman of the TVNZ Board, although he was "extremely anxious to defend the company" he didn't have a "common position with the Board on some of the matters that, in the end,

⁶ See 1.2(1), below, for measures used in courts and also section 17 of the Official Information Act 1982 (blocking or deleting identifying information)

⁷ Interim Report (PC), above n 1, 5

triggered [his] resignation”.⁸ After all, if such a common position had existed, Fraser quipped “I would still be CEO of TVNZ!”⁹ It was the comments Fraser made at this second appearance that caused the conflict between him and the Board of TVNZ.

On the 22nd of December, Fraser received a letter from Craig Boyce, which stated that his evidence had been “inappropriate” and “amounted to serious misconduct”.¹⁰ Boyce continued that it would now be unsuitable for Fraser to continue to represent TVNZ for the remainder of his notice period. From this point on, Fraser was on “garden leave”.¹¹ Fraser told the Committee what the Board’s reaction had been and this resulted in a retraction from the ‘misconduct’ claim and an apology to the Speaker. Despite this, the Speaker held there were remaining issues of privilege to be considered and she referred the matter to the Privileges Committee.

The Privileges Committee considered whether TVNZ’s actions obstructed or impeded the House in performing its functions, as this is what is required for an action to be considered a contempt of the House.¹² They concluded that the letter sent to Ian Fraser demonstrated a clear link between the Board’s disapproval of Fraser’s comments and the allegation of serious misconduct. Moreover, this link extended to the decision to remove all remaining duties from Ian Fraser. The Committee also noted that, while the Board had retracted from the serious misconduct claim, no retraction had been made for the removal of duties from Fraser. In any case, the real issue was whether the Board’s actions had the potential to deter others from giving evidence in the future.¹³

Although these issues appear political on the surface, deep down, the question of how to protect a witness, how to punish for interfering with the process of accountability, a synonym for which is liability, is a matter for the law. Admittedly, these matters are complicated by the fact that one of the most important functions select committees serve is holding the executive branch of government to account. Given the importance of this

⁸ Emails between Craig Boyce (CB) and Ian Fraser (IF), released after a request under the Official Information Act 1982 by the Hon Murray McCully MP online < www.national.org.nz > accessed 02/05/06 11.11am. Ian Fraser’s comments are taken from an email to Craig Boyce sent 12/12/05 6.40 p.m. (release number 8)

⁹ Emails between CB and IF, above n 8, email 12/12/05 6.40 p.m. (release number 8)

¹⁰ Interim report (PC), above n 1, 4

¹¹ Interim report (PC), above n 1, 5

¹² Standing Order 399, online < www.parliament.govt.nz/INR/rdonlyres/078D6043-9E03-4D87-93BA-A6BB84ACC063/6619/standingorders20095.pdf > accessed 27/09/06

¹³ Interim Report (PC), above n 1, 7

function, it is easy to find justifications for the powers that the House and select committees have; some capacity to punish ‘contempts’ is also essential. What is difficult is finding a balance between rigorous inquiry and protection of people who are, in reality, no different from you or me.

In the Ian Fraser / TVNZ scenario, the accountability function of the select committee was particularly important because the organisation under inquiry was a Crown Entity Company, with access to public funding and certain public responsibilities to fulfill. Thorough investigation was therefore essential and crucial witnesses, such as the departing Chief Executive, had to be able to appear as witnesses and give frank evidence without fearing employment related reprisals.

As the Privileges Committee noted in their interim report, the fine was meant to be a warning to “those who serve on the boards or in management” of State Owned Enterprises (SOE) and Crown agencies that “Parliament will treat with utmost seriousness any behaviour that impedes the proper process of accountability to the elected representatives of the people.”¹⁴ This is an important point. Government-affiliated organisations have obligations to Parliament and its committees. Craig Boyce is probably not alone in viewing those “bastards” in the select committee as the company’s “enemy” but, like it or not, they are an essential part of life for organisations like TVNZ.¹⁵ Indeed, it is not a question of deciding whether or not to give evidence – a refusal to attend after a request has been made may simply result in a summons.¹⁶

1.2 The comparisons: select committees, courts and commissions of inquiry

There are three key inquiry institutions being considered in this discussion. Select committees, courts and committees of inquiry all grapple, to varying extents, with how to balance the protection of witnesses with their central aim of getting to the truth of the matter at issue. Throughout the discussion, the aim is to find similarities, differences and analogies. Similarities suggest that the problem is not unique. If there are differences then

¹⁴ Interim Report (PC), above n 1, 9

¹⁵ Emails between CB and IF, above n 8, email from CB to IF 12/12/05 4.15 p.m. (release number 7)

¹⁶ Standing Order 196 (“request”) and Standing Orders 197 and 198 (“summons”), above n 12

the question is whether there are reasons for these differences. Analogies may suggest ways to improve the select committee process if possible.

(1) Courts

Court procedure is the nearest there is to a model against which to compare and contrast other instruments of inquiry. The environment in which each inquiry operates must, however, be emphasised. Court proceedings are slow and the rules that govern court procedure are designed with this in mind. The nearest analogy is with commissions of inquiry. Select committee inquiries are much more unruly, speedy and cut-throat. Courts aim at achieving justice; a select committee's aims are political.

Courts are useful for several reasons. Firstly, if courts recognise problems like witness reprisal then this suggests that the problem is of general importance. If the problem is common to both court proceedings and select committee proceedings, then the ways in which courts address the problem may be transferable or at least suggestive of ways in which improvements could be made to the select committee process. This is the second way in which Court process is important.

Courts are also important as they suggest ways in which a witness's identity may be protected both during and after the giving of evidence. Various measures are routinely employed by courts to minimise potential harm to a witness. Witness anonymity orders may be made if necessary for the safety¹⁷ of a witness (or another person) and provided that doing so is not contrary to the interests of justice.¹⁸ When such an order is made, the court may hear the evidence in private (by clearing the court) or from behind a screen¹⁹ or via a video-link.²⁰

¹⁷Safety in a criminal context means physical safety, see *R v S* (unreported) High Court, Gisborne CRI 2005-016-2100 per Harrison J 02/05/2006

¹⁸ Sections 13B and C of the Evidence Act 1908; see also Appendix 5 pp. 7, 9-10, 16 for the history of section 13 Evidence Act 1908 in the 'Review of the Operation of the Protected Disclosures Act 2000 Report to the Minister of State Services' accessed online at < <http://www.ssc.govt.nz/display/document.asp?docid=3228> >

¹⁹It has been suggested, however, that the use of screens should be restricted primarily to child witnesses: Robertson, Hon. J Bruce (consulting editor) *Adams on Criminal Law* (4th ed, Brookers, 2005) 567, 568; see also section 376 of the Crimes Act which is unaffected by the use of screens

²⁰ Section 13G of the Evidence Act 1908

Evidentiary privilege allows courts to prevent disclosure of some confidential information. Section 35 of the Evidence Amendment Act (No. 2) 1980 provides courts with a statutory power to prevent disclosure if the disclosure “would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document...the witness should not be compelled to breach.” In deciding whether to prevent disclosure or not, the court must weigh the public interest in disclosure against the public interest in preserving the confidence.²¹ Contractual relationships can come within the ambit of section 35.²²

(2) Commissions of inquiry

Commissions of inquiry may be alternatives to select committee inquiries. The question is in what circumstances. If analogies may be drawn between the two types of inquiry, then it may be possible to incorporate certain aspects of tribunal process into select committee procedure.

(3) Select committees

As discussed earlier, select committees are a crucial means of ensuring government accountability. One of the central ways this function is fulfilled is by holding inquiries into the spending of money and the value of what has been gained from this spending. ‘Ad hoc inquiries’ may also be conducted from time to time.²³ Public interest may justify the powers available to select committees but the question, as stated in the introduction, is whether it is time to reevaluate the scope of these powers.

²¹ Evidence Amendment Act (No. 2) 1980 section 35(2)(a),(b),(c); see also *Institute of Environmental Science & Research Ltd. v Tuiavii* (unreported) High Court Auckland, file number M1420-IMO1 per Williams J 28/06/02, 31[68]

²² *Institute of Environmental Science & Research Ltd.* above n 21, 22-23, 31-35: application to set-aside a witness summons on three grounds, one of which was section 35 Evidence Amendment Act (No 2) 1980, 2[1], [3]

²³ McGee, above n 4, 236 and 238-239

Chapter 2:

Punishing for Contempt

The Privileges Committee hinted that future fines for these types of contempt might be much larger than the nominal \$1000 TVNZ was fined but where does Parliament gain its authority to fine contemnors and are there any limits on this power? Is it possible that the problem lies with Parliament's ability to punish for contempt?

Parliament's penal jurisdiction empowers the House to punish for breaches of privilege, as well as for contempts of the House. It is always the Privileges Committee in New Zealand that determines whether a breach of privilege or contempt occurred, but only after a referral of the incident by the Speaker. While every breach of privilege is a contempt of the House, not every contempt will be a breach of privilege.²⁴ The sorts of actions that might be considered contempts of the House cannot be definitively listed. This is because the power to punish needs to be able to respond to new situations and this explains why no precedent is needed for an action to be a contempt.²⁵

Theoretically, Parliament's penal jurisdiction allows a contemnor to be fined and / or imprisoned. The origin of this considerable power is thought to lie in the "medieval concept of the English Parliament as primarily a court of justice."²⁶ Historically, the House of Commons sought to establish itself as a court of record for, at common law, the ability to fine or imprison for contempt rests with courts of records.²⁷

Although such claims have long been given up, the powers that go with them have not and are now enshrined in English case-law,²⁸ and impliedly accepted in English statute.²⁹ Thus, the House of Commons may imprison but not beyond the end of the Parliamentary session.³⁰ As a result of the *Sheriff of Middlesex's* case 1840 11 A. & E. 273, a court may only inquire into the legality of a contempt warrant if the grounds for committal are specified in the warrant.³¹

²⁴ Joseph, P.A. *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, 2001) 426

²⁵ See May, Erskine *Parliamentary Practice* (22nd ed, Butterworths, 1997) 108 for a general statement of what contempt is

²⁶ Erskine May, above n 25, 131

²⁷ Erskine May, above n 25, 131

²⁸ *Ashby v White* LJ (1701-05) 714

²⁹ Erskine May, above n 25, 132

³⁰ *Stockdale v Hansard* (1839) 112 ER 1112, 1156

³¹ This was followed in Australia in *R v Richards; ex p Fitzpatrick and Brown* (1955) 92 CLR 157, 162; but see, for contrast, *Re Special Reference No 1 of 1964* A.I.R. 1965, S.C. 746 in Wade, H.W.R. (editor) *Annual Survey of Commonwealth Law 1965* (Butterworths, 1966) 41-44, where the Supreme Court of India held that a general warrant for committal was examinable. At the time, the Legislative Assembly had the same powers and privileges as the House of Commons and although these could be legally defined, this had

Whether the Commons may impose a fine is rather less certain. No fines have been imposed since 1666, and indeed the ability of the Commons to fine was denied by Lord Mansfield in *R v Pitt* (1762) 97 ER 861.³² Despite select committee calls for statutory powers to fine contemnors, no action has been taken.³³

The New Zealand Parliament is empowered to take action to punish breaches of privilege and contempts by virtue of the Parliamentary Privileges Act 1865.³⁴ Although the House does have the power to imprison, this has never been used. The commitment of any person by the House is done via a warrant from the Speaker. “There can be no arrest without warrant in New Zealand without express statutory authority.”³⁵ As there is no such statutory authorisation for breaches of privilege or contempt, the Speaker’s warrant is therefore a prerequisite.³⁶

In 2005 the Clerk of the House of Representatives suggested that it was unlikely Parliament would fine a contemnor.³⁷ Fast forward, however, to 2006 and this statement has proved somewhat optimistic. Certainly, the Privileges Committee did not seem to consider it necessary to justify their decision to impose a fine.³⁸

Certain broad categories of contempt, centering around the idea of obstruction³⁹, are evident. The following, enumerated by Erskine May and cited by the Clerk of the New Zealand Parliament, are particularly relevant to the current discussion but it must be emphasised that the headings are not rules – they are simply examples and indications of the types of things that will be contempt of Parliament.

not yet been done. Despite this, the majority of the Supreme Court held that these powers and privileges had to be interpreted with regard to the “constitutional protection of personal liberty,” judicial powers to enforce “fundamental rights”, judicial integrity and “the general principle that the judges were the arbiters of the constitutionality of legislation.” (page 43). The Supreme Court did not consider that English authorities regarding examination of general warrants only, were part of the powers and privileges of the House of Commons automatically incorporated into Commonwealth legislatures which were not superior courts.

³² Erskine May, above n 25, 132 and 138

³³ Erskine May, above n 25, 138

³⁴ McGee, above n 4, 644

³⁵ McGee, above n 4, 670

³⁶ McGee, above n 4, 670

³⁷ McGee, above n 4, 671-672

³⁸ Interim Report (PC), above n 1, 9; see also sections 9 and 21 NZBORA (disproportionate punishment)

³⁹ See Standing Order 399, above n 12

(1) Misconduct

This category is extremely broad and covers things like interrupting or disturbing proceedings in either the House or a committee. Standing Order 400, which gives examples of contempts of the House, includes failing to attend after being ordered to do so, and the same if failure is after a summons has been issued; and refusing to answer questions in the House or a committee.⁴⁰

(2) Not following the Rules

This category includes premature publication of select committee findings;⁴¹ again, failure to attend the House after being summoned;⁴² and frustrating orders to produce documentary evidence.⁴³ The examples in categories one and two are similar to contempts in the face of the court – things done during the actual inquiry that frustrate it.

(3) Interfering with witnesses

Category three is particularly important as this is concerned with the obstruction of witnesses. It was under this broad category that the Privileges Committee found TVNZ had committed a contempt. “Any conduct calculated to deter prospective witnesses from giving evidence before [the] House or a committee is a contempt.”⁴⁴ Implicit in this statement is recognition of just how crucial witnesses are to the select committee process. This is further recognised in Standing Order 400(t) which provides that it may be a contempt to intimidate, prevent or hinder a witness from giving evidence in full to a select committee. This is further clarified in Standing Order 400(w) which lists as examples assaulting, threatening or disadvantaging a person as a result of evidence given.

Contempts under this category are not limited to the above examples; any act which falls under the general definition of contempt will suffice.⁴⁵ Hence the Privileges Committee was able to conclude that it was a contempt for “an employer to later penalise a person solely on the basis of evidence given” and that the actions of TVNZ could “have

⁴⁰ Standing Order 400 (r), (s) and (u), above n 12

⁴¹ Standing Order 400(p), above n 12; see also Erskine May, above n 25, 118

⁴² Standing Order 400(s), above n 12

⁴³ Erskine May, above n 25, 110-111

⁴⁴ Erskine May, above n 25, 126

⁴⁵ See also Standing Order 399, above n 12

the effect of discouraging or deterring Mr Fraser or others from giving evidence in the future”.⁴⁶ In other words, TVNZ’s retaliatory steps had a tendency to obstruct or impede the House.⁴⁷

It is easy to see why the power to punish for contempt is necessary and in many situations it is certainly justified. The main problem with contempt lies in its summary nature. There is no appeal from the decision to impose a punishment for contempt. As no precedent is needed for a finding of contempt, its potential scope is limitless. The punishment levied on the board of TVNZ, and overseas events,⁴⁸ have reinforced the continued relevance of the contempt power – it is certainly not an obsolete relic of more turbulent times.

These examples illustrate the potential enormity that contempt power entails. There is not even the comfort of knowing that these decisions can be challenged via, for instance, judicial review. This absence of review means that Parliament’s jurisdiction in this area is effectively unlimited. Although Parliament is bound by the New Zealand Bill of Rights Act and so breaches of, for instance, the natural justice requirements in section 27⁴⁹ would be justiciable, there is no easy way to bring retaliations against witnesses under the ambit of this provision.

2.2 How does Parliamentary contempt compare with contempt of court?

The power to punish for contempt is found in numerous statutes but the wording of these various contempt provisions is strikingly consistent. Slight variations are found between the different provisions, but these may generally be explained by looking at the different purposes of the court or tribunal in question.⁵⁰ Thus the Human Rights Act 1993 and the

⁴⁶ Interim Report (PC), above n 1, 7

⁴⁷ Interim Report (PC) above n 1, 7

⁴⁸ Elliot, above n 2; also Diamond, B “Special Joint Committee on Custody and Access: a threat to women’s equality rights” *Canadian Woman Studies* 19 1-2 (Spring-Summer 1999): 182-5 *Expanded Academic ASAP*. Thomson Gale (online). University of Otago Library. 21/03/06 (document number A30350707) < <http://find.galegroup.com/itx/retrieve.do?contentSet=IAC-Docume...rentPosition=16&userGroupName=otago&docId=A30350707&docType=IAC> >

⁴⁹ Above n 38 (ss 9 and 21 NZBORA)

⁵⁰ See for instance the Armed Forces Discipline Act 1971 – section 144

Habeas Corpus Act 2001 contain much shorter contempt provisions that are more expressly tailored to the specific purpose of each statute.⁵¹ For our purposes the core contempt provisions are to be found in the Crimes Act 1961, the Judicature Act 1908 and the Evidence Act 1908.

(i) Contempt under the Crimes Act 1961

Contempt of court in a criminal context is dealt with in sections 352 and 401 of the Crimes Act 1961, both of which deal with contempt in the face of the court – things like not answering a question.⁵² In both cases, the inherent power the court has to punish a witness for contempt remains.⁵³ There is a limited defence of ‘just excuse’ for failing to, for instance, answer a question.⁵⁴ ‘Just excuse’ has been interpreted broadly and requires judicial recognition of any justification that is right, fitting, fair or well founded.⁵⁵ In approving this test, the Court of Appeal also held that a refusal to answer would be justified in a commission of inquiry context so long as it did not frustrate the very purpose for which the inquiry had been set-up.⁵⁶

Anyone who commits one of the contempts listed in section 401(1) may be imprisoned for up to three months or pay a fine of up to \$1000.⁵⁷ Section 13 of the Sentencing Act 2002 provides that fines are to be the first method of punishment and so section 401(2) must be read in light of this.⁵⁸

⁵¹ For further examples see also section 29 of the Lawyers and Conveyancers Act 2006 and Rule 317A of the High Court Rules

⁵² See *R v Arradi* (2003) 173 CCC (3d) 1 (SCC) at 14-16 for discussion of the procedure to be used when the contempt is in the face of the court

⁵³ Sections 352(3) and 401(3) Crimes Act 1961

⁵⁴ Section 352 Crimes Act 1961

⁵⁵ *R v B (Direction to Jury: Ruling No. 3)* (unreported) High Court Dunedin (file number T16/91) per Williamson J 18/02/92, at 2; see also *R v Dunnill* [1998] 2 NZLR 341, at 346, 350 – ‘just excuse’ incorporates fears for a witness’ safety and *R v Atkins* [2000] 2 NZLR 46 (CA) at 54: just excuse is a “matter of judgment” determined on the facts of the case (approving *R v Dunnill*)

⁵⁶ *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA) at 289, 290; this was affirmed by the Privy Council in *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140 (PC) at 147-148 (“wide approach”)

⁵⁷ Section 401(2) Crimes Act 1961

⁵⁸ Punishment must be via a fine or imprisonment, not both: see *Solicitor-General v TV3 Network Services Ltd* (1998) 16 CRNZ 401 at 411-414 for discussion of how to determine the penalty for contempt

Witness intimidation under section 401(1)(a)⁵⁹ must either be real or there must be threatening conduct which is intended to intimidate.⁶⁰ In the latter case it is irrelevant that the witness was not in fact intimidated.⁶¹ Applying improper pressure to a witness is a contempt of court even if the aim is to uphold the law.⁶²

There is a right of appeal against a sentence for contempt of court.⁶³ There is also a right of appeal against a finding by the High Court of criminal contempt.⁶⁴ A criminal contempt requires interference with the administration of justice.⁶⁵ There is a limited right of appeal from findings of contempt in the face of the court.⁶⁶ An appeal may be made to the Court of Appeal,⁶⁷ and then the Supreme Court,⁶⁸ against a sentence for contempt in the face. In exceptional circumstances an appeal may be made directly to the Supreme Court from the High Court.⁶⁹ This right of appeal is a key difference between the contempt process in Parliament, and that of courts and commissions of inquiry.⁷⁰

Only the District Court is confined to the statutory regime – the High Court, Court of Appeal and Supreme Court all retain inherent powers⁷¹ in addition to their statutory powers.⁷² In special cases, the High Court may use its inherent powers to punish contempts of other courts such as the Family Court.⁷³

⁵⁹ This is confined to events in court but includes the time when a person is going to or coming from court – see section 401(a), (b) and (c) Crimes Act 1961; see also *A-G v Butterworth* [1963] 1 OQ 696 (CA) per Lord Denning at 721-722

⁶⁰ *R v Patrascu* [2004] 4 All ER 1066 (CA) 1070-1071

⁶¹ *R v Patrascu*, above n 60, 1070-1071

⁶² *R v McLachlan* [1998] 2 VR 55 at 66-68 – police officer committed contempt of court by pressuring a witness to tell the truth or face being charged with perjury; court will decide whether the evidence is true, not an adversary

⁶³ Section 384 Crimes Act 1961

⁶⁴ Section 384(3) Crimes Act 1961

⁶⁵ The former distinction between criminal and civil contempt has generally been disregarded: see *Witham v Holloway* (1995) 183 CLR 525; 131 ALR 401 (HCA) at 408

⁶⁶ Section 384(1),(2) Crimes Act 1961

⁶⁷ Section 384(2) Crimes Act 1961

⁶⁸ Section 384(5) Crimes Act 1961

⁶⁹ Section 384(2) and (6) Crimes Act 1961

⁷⁰ See section 13C Commissions of Inquiry Act (CIA) 1908

⁷¹ Statutory provisions are to be used wherever possible; see also *A-G v Levenson Magazine Ltd* [1979] AC 440, 449; [1979] 1 All ER 745, 749 (HL): interference with the administration of justice is the general test

⁷² A finding of contempt in the inherent jurisdiction is not a conviction: (2004) 54 NZPD 12365

⁷³ *Attorney-General v Smith* [2004] 2 NZLR 540

(ii) Contempt in the District Court and High Court

The District Courts Act 1947 also contains a contempt regime, encompassing the usual range of offences such as wilfully interrupting court proceedings.⁷⁴ A contemnor may be detained until the court rises or may be imprisoned for up to three months or fined up to \$1000 for each offence.⁷⁵ There is a right of appeal to the High Court.⁷⁶

Contempt of the High Court is administered by the Judicature Act 1908.⁷⁷ A contemnor who refuses to give evidence without just excuse may be imprisoned for a period of up to 7 days⁷⁸ and this may be repeated until the witness complies.⁷⁹ Again, the inherent jurisdiction is retained.⁸⁰ The punishment for statutory contempts is up to three months imprisonment or a fine of up to \$1000 for each contempt.⁸¹

(iii) Contempt in the Employment Relations Authority or Court

It is a contempt to assault, threaten, intimidate or wilfully insult any person including a witness while in the Authority or Court or going to or from the Authority or Court.⁸² It is also a contempt to wilfully interrupt proceedings or to disobey any order or direction wilfully and without lawful excuse.⁸³ The police may take the contemnor into custody and detain until the Authority or Court rises.⁸⁴ The Judge may sentence the contemnor to a period not exceeding 3 months or order him/her to pay a fine not exceeding \$5000 for each offence.⁸⁵

An employer who threatened retaliation might be breaching an implied term of the employment contract, namely the prohibition against discrimination directed at

⁷⁴ Section 112 District Courts Act 1947

⁷⁵ Section 112 District Courts Act 1947

⁷⁶ Section 78A District Courts Act 1947

⁷⁷ Section 56B Judicature Act 1908

⁷⁸ Section 56B(1) Judicature Act 1908

⁷⁹ Section 56B(2) Judicature Act 1908

⁸⁰ Sections 56B(3) and 56C(3) Judicature Act 1908

⁸¹ Section 56C Judicature Act 1908

⁸² Section 196 Employment Relations Act (ERA) 2000

⁸³ Section 196(1)(b) and (c) ERA 2000

⁸⁴ Section 196 ERA 2000

⁸⁵ Section 196(2)(b) ERA 2000

witnesses in employment disputes.⁸⁶ If the threats were proven then an order could be made by the Employment Tribunal⁸⁷ requiring action to be done or abstained from.⁸⁸ As deliberate threats would constitute a breach of the duty of trust and confidence, the Employment Court would also have the power to make an injunction, declaration or compliance order; or impose a penalty, fine or other sanction, as required by the circumstances.⁸⁹

It is a contempt to interfere with the course of justice either intentionally, or if the actions taken have a real risk of interfering.⁹⁰ Intimidating letters sent to witnesses, a rather more serious form of the emails sent to Ian Fraser by Craig Boyce, were said to constitute an “ill-advised attempt to close off avenues of justice” which was a breach of contract.⁹¹ The witnesses were awarded \$20,000; there were no mitigating factors.⁹² The case was referred to the Solicitor-General who could have initiated charges for contempt of court⁹³ but he concluded that, in light of the fine already imposed, no further action was needed.

Although the statute does not provide an inherent jurisdiction for the Employment Court, it seems likely that the Court does retain such a jurisdiction to punish contempts of its orders.⁹⁴ The usual range of punishments applies,⁹⁵ although fines imposed have generally been low.⁹⁶ A finding of contempt comes with a right of appeal to the Court of Appeal.⁹⁷ Appeals against a finding of contempt in the Court’s inherent jurisdiction, however, are limited to errors of law.⁹⁸

⁸⁶ *United Food & Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756 at 770; see also sections 104, 107(d) ERA 2000

⁸⁷ Now ‘Authority’ – this case was decided under the Employment Contracts Act

⁸⁸ *United Food v Talley*, above n 86, 772; see also sections 137, 138 ERA 2000

⁸⁹ *United Food v Talley*, above n 86; see also sections 139, 140 ERA 2000

⁹⁰ *Talbot v Air NZ Ltd* [1995] 1 ERNZ 609 at 618

⁹¹ *Ho v Chief of Defence Force* [2005] 1 ERNZ 93 at 121

⁹² *Ho v Chief of Defence Force*, above n 91, 118, 121

⁹³ *A-G v Butler* [1953] NZLR 944

⁹⁴ See generally *Connelly v DPP* [1964] AC 1254, 1309 per Lord Morris

⁹⁵ *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612, 616: sequestration is a recognized process for contempt in other jurisdictions, and is especially useful for contempts committed by companies; see also High Court Rules

⁹⁶ See, respectively, *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 242 (\$500) and *NZ Railways Corp Ltd v NZ Seamen’s IUOW* (1989) ERNZ Selected Cases pre-1991 353, at 373-379 (\$150,000)

⁹⁷ Section 217 ERA 2000

⁹⁸ Section 214 ERA 2000; see also *Capital Coast Health v NZ Medical Laboratory Workers Union Inc* [1995] 2 ERNZ 305 at 317-321: errors of law made by the Employment Court could be appealed

(iv) Contempt out of court – the inherent jurisdiction

Contempts completely outside of court are covered by a court’s inherent jurisdiction. The crucial point about contempt of court in the inherent jurisdiction is that it appears to be, like Parliamentary contempt, largely unconstrained.

There are three especially relevant forms of contempt out of Court to consider. Firstly, there is the “publication of material which may affect the impartiality of a current or impending trial”.⁹⁹ Secondly, there is “[c]onduct which may dissuade actual or potential litigants from reliance on their legal rights”.¹⁰⁰ Thirdly, there is the issue of reprisals against witnesses for evidence they have given.

The first two categories tend to overlap considerably, and they are relevant purely as a means of assessing whether Parliament’s reaction to the emails sent by Craig Boyce to Ian Fraser was consistent with the way in which Court’s deal with prior publication or pressure. It should be noted that witnesses are generally accorded greater protection than litigants are in this area.¹⁰¹ Furthermore, an additional distinction is drawn between actual and potential witnesses, with stricter limits being placed on approaches to actual witnesses.¹⁰²

One particular concern when considering contempts out of court may be the so-called ‘chilling effect’. In *A-G v Times Newspapers Ltd* [1974] A.C. 273, one of the issues considered by the House of Lords was whether it was a contempt of Court to pressure a party prior to litigation. ‘The Times’ published a series of articles seeking to pressure the manufacturers of ‘thalidomide’ to increase the amount of compensation offered.¹⁰³ Although their Lordships were unanimous in concluding that any pre-judgment amounted to contempt of court,¹⁰⁴ three of the Lords considered that the publication of an earlier article putting moral pressure on the manufacturers was also a

⁹⁹ *Adams on Criminal Law*, above n 93, 622

¹⁰⁰ *Adams on Criminal Law*, above n 93, 622

¹⁰¹ Arlidge, Anthony; Eady, David; Smith, A.T.H. *Arlidge, Eady & Smith On Contempt* (2nd ed, Sweet & Maxwell, 1999) 691

¹⁰² Arlidge, Eady & Smith, above n 101, 692

¹⁰³ *A-G v Times Newspapers Ltd* [1974] A.C. 273, at 274, 299(F)

¹⁰⁴ *A-G v Times*, above n 103, 299(H)-300(A),(G-H); 303(H)-304(A); 307(D-E); 310(H)-311(A); 315(A)-(B); 320(C), 322(F-H)

contempt of Court.¹⁰⁵ Lords Diplock, Morris and Simon considered that it was contempt conduct a campaign against a litigant in which they had to endure “public obloquy” intended to dissuade him/her from exercising his/her legal rights.¹⁰⁶ The court’s reaction to the articles accords with Parliament’s reaction to the emails, and this suggests that Parliament was not inventing its own standards.

The other major area of contempt out of court for this discussion is reprisals against witnesses. Where an action taken against a witness is lawful but for it being a reprisal, then the question of motive becomes important. In such a case, “an intention to punish [must be] at least partly the motive.”¹⁰⁷ This requirement had interesting consequences in a case concerning removal of offices from a member of the National Federation of Retail Newspapers.¹⁰⁸ The member had given evidence seen as opposing the interests of the Federation.¹⁰⁹ The Court found that members of the Committee who removed the offices were guilty of contempt, provided they were motivated either entirely, or in part, by the desire to punish the member for his evidence.¹¹⁰

In this case, the motive for acting was mixed,¹¹¹ but the court recognized that in some cases, there might be valid reasons for taking actions quite apart from the evidence given. If this were the case, then no contempt would be committed provided that the motivation was not, even partly, retaliation.¹¹² This is similar to the method used by the Privileges Committee, which noted it might sometimes be unrealistic to expect no consequences to arise from the giving of evidence.¹¹³ The Court found it difficult, however, to contemplate a situation where the “giving of accurate evidence on matters of fact” would ever have such an effect.¹¹⁴

Immediate dismissal following a disclosure about, for instance, an employer’s private life, might appear prima facie retaliatory but, in reality, the reason for dismissal

¹⁰⁵ *A-G v Times*, above n 103, 310(F-H); 313(A-B); 314(C) per Lords Diplock and Simon and 306(F-G), 307(A-B) per Lord Morris

¹⁰⁶ *A-G v Times*, above n 103, 310(G)

¹⁰⁷ *Arlidge, Eady & Smith*, above n 101, 688

¹⁰⁸ *A-G v Butterworth* [1963] 1 QB 696

¹⁰⁹ *A-G v Butterworth*, above n 108, 697

¹¹⁰ *A-G v Butterworth*, above n 108, 723 per Denning M.R.

¹¹¹ *A-G v Butterworth*, above n 108, 723 per Denning M.R.

¹¹² *A-G v Butterworth*, above n 108, 722-723 per Denning M.R.; 726 per Donovan L.J.

¹¹³ *Interim Report (PC)*, above n 1, 7-8

¹¹⁴ *Arlidge, Eady & Smith*, above n 101, 688

might be better understood as stemming from a breakdown in trust between the parties – from a “conclusion that the relationship between them had become intolerable as a result of the breach of confidence.”¹¹⁵

Courts will not always, however, err on the side of the person about whom the disclosures were made. People who actively seek publicity cannot complain when less complimentary information is disclosed about them by an employee.¹¹⁶ Contractual provisions may sometimes, however, prevent disclosures, provided they are valid and cover the circumstances in question.¹¹⁷ Courts will also distinguish between retaliation and professional disciplinary proceedings, provided that the disciplinary proceedings can be independently supported.¹¹⁸

If the retaliatory action was taken purely as a result of what the person said as a witness, and if retaliation was the primary motive, then it does not seem to matter whether or not there was also an intention to interfere with the administration of justice.¹¹⁹ A purposeful retaliatory action against a witness interferes with the administration of justice, whether the person inflicting the action intends it to or not.¹²⁰ The only intention needed therefore seems to be the intention to punish the witness for what he said as a witness.¹²¹ It is a moot point whether the retaliation must be made public for it to be considered a contempt of court.¹²²

The onus for proving the elements of contempt of court rests with the party alleging the contempt.¹²³ Even once the elements have been proven, punishment for the contempt will not be inflicted until it has been “shown that any contempt proved is sufficiently serious as to justify punishment”.¹²⁴ As with contempt in the face of the court, there is no specified procedure to be used when determining contempt out of

¹¹⁵ Arlidge, Eady & Smith, above n 101, 688

¹¹⁶ *Woodward v Hutchins* [1977] 2 All ER 751

¹¹⁷ *A-G v Baker* [1990] 3 All ER 257 – impending disclosure by former employee of the Royal Family

¹¹⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720-722

¹¹⁹ Arlidge, Eady & Smith, above n 101, 689

¹²⁰ Arlidge, Eady & Smith, above n 101, 689

¹²¹ Arlidge, Eady & Smith, above n 101, 690; see also *Solicitor-General v Radio Avon Ltd.* [1978] 1 NZLR 225, 232 (CA) and *Adams on Criminal Law*, above n 19, 624

¹²² Arlidge, Eady & Smith, above n 101, 690-91

¹²³ *Adams on Criminal Law*, above n 19, 624

¹²⁴ *Adams on Criminal Law*, above n 19, 624

court.¹²⁵ At a minimum, the offence should be in writing and should allow adequate notice of what is being alleged.¹²⁶ The amount of detail required depends on the circumstances.¹²⁷

(v) Quantum of fine

If a fine is imposed in the inherent jurisdiction then factors like intent become relevant when deciding on a sentence, as do things like wasted expenditure¹²⁸. The financial position of the respondent is also relevant when determining the amount to be fined, as is the nature of the contempt.¹²⁹ A balance has to be struck between setting an example and deterring similar future behaviour and imposing a “savage penalty”.¹³⁰ A serious breach by a large media organisation thus warranted a fine of \$50,000 plus costs to the applicant.¹³¹

(vi) How does this relate to Ian Fraser?

It seems that had Ian Fraser been asked purely factual questions rather than questions which sought to elicit personal opinion from him as well, then any subsequent reprisal might almost certainly be considered unjustified by a Court. Thus “Who made (salary) decisions?” rather than “Do you think the chairman should make these decisions?” would be fine. Once the questions began to creep away from being purely factual, then it becomes more difficult to immediately classify retaliatory action as unjustified – motive becomes important.

The possibility that some retaliation might not only be predictable but also inevitable was recognised by the Privileges Committee in their interim report.¹³² In many

¹²⁵ *Newman (t/a Mantella Publishing) v Modern Bookbinders Ltd* [2000] 2 All ER 814 (CA)

¹²⁶ *Newman v Modern Bookbinders*, above n 125, 821 per Sedley LJ

¹²⁷ *Newman v Modern Bookbinders*, above n 125, 821 per Sedley LJ

¹²⁸ Even though there is no ability in New Zealand to make a wasted costs order as in Australia and England: see *Solicitor-General v TV3 Network Services* (1998) CRNZ 401 at 402

¹²⁹ *Solicitor General v TV3*, above n 128, at 402, 413

¹³⁰ *Solicitor-General v TV3*, above n 128, 413

¹³¹ *Solicitor-General v TV3*, above n 128, 413, 414

¹³² Interim report (PC), above n 1, 8

of the cases considered, there was a clear distinction between retaliation and a ‘natural consequence’. The same cannot automatically be said when an employee is subjected to retaliatory action as a result of being summoned to give evidence against his employer. A breakdown in the relationship might be predictable, perhaps even inevitable, but that does not mean that it is justification for retaliatory action.

‘Motive’ is the primary way courts distinguish between an inevitable consequence and retaliation. The limitations of this test must, however, be recognized.¹³³ Intricate assessments are not possible and a general test of some minimum threshold (retaliation as the partial motive at least, for example) is the best that can be achieved.¹³⁴ If select committee inquiries are to remain a vital form of inquiry, then this is problematic. It is unduly onerous to expect that people summonsed to give valid¹³⁵ evidence to a select committee will do so and simply accept that there might be considerable employment consequences as a result of doing so, especially when such consequences would not be tolerated elsewhere. Even if compensation could have been sought via the ERA 2000, the claimant would still have to suffer humiliation¹³⁶ and job detriment and, this is the crux of the problem, all for acting on a summons s/he could not refuse.

It is extremely unlikely that Parliament will relinquish its power to punish contempt and indeed, this would be undesirable. Given the ability of other inquiry facilities to punish on very similar grounds it would also be anomalous. Better guidelines and clearer limits on the use of contempt are needed but no matter how much the contempt process is improved, the ideal situation would be to avoid these situations occurring in the first place. It is time, therefore, to look at the way that an inquiry is conducted – the mechanics of questioning, compiling reports and forming conclusions.

¹³³ *A-G v Butterworth*, above n 108, 723 per Denning M.R.

¹³⁴ *A-G v Butterworth*, above n 108, 723 per Denning M.R.

¹³⁵ See the proviso regarding the validity of evidence noted in the Interim Report (PC), above n 1, 8

¹³⁶ Although specific compensation is available for humiliation under section 123(1)(c)(i) ERA 2000 it is still a measure taken only after the humiliation has been suffered.

Chapter 3:

Conducting an Inquiry

At this stage, when the inquiry has really begun, the primary concern is with what kinds of procedural fairness rights witnesses have. Despite the incorporation of ‘natural justice’ measures, the efficacy of the provisions remains in doubt.¹³⁷ Perhaps it is at this stage, therefore, that improvements most need to be made.

As a result of the 1995 reforms, witnesses in select committee inquiries now have the right to ask to have evidence heard in private or in secret,¹³⁸ although the ultimate decision rests with the select committee.¹³⁹ Even if a request is granted, there are several limitations to this power. Private evidence becomes available to the public once the report has been tabled in the House.¹⁴⁰ Even secret evidence may be disclosed on an order of the House. In both cases, should the evidence affect a third party, then it may be disclosed in order to give effect to their rights of response.¹⁴¹ A witness has a right to be accompanied by legal counsel throughout proceedings, to consult with counsel and counsel may object to questions or raise procedural issues.¹⁴² The only stated ground for objection is irrelevance.¹⁴³ Objections on any other ground may amount to contempt.¹⁴⁴

3.1 Courts

Non-questioning counsel may object either to the actual question asked, whether because of its form or its content, or to the evidence that will be produced in answering that question.¹⁴⁵ It should be immediately apparent that there is much more room for counsel to object to questions in court, than in select committee proceedings.¹⁴⁶

In court, counsel may object to a question because its form is leading, too general, confusing or argumentative.¹⁴⁷ Counsel may also object on the grounds that the content of the question is irrelevant, speculative or that it assumes facts not in evidence.¹⁴⁸

¹³⁷ The natural justice amendments to the NZ Standing Orders were adopted as a blueprint by the House of Commons hence the focus on New Zealand – see also Joseph, above n 24, 356

¹³⁸ Standing Orders 217, 219, 220, above n 12

¹³⁹ Standing Orders 219, 220, 221, above n 12

¹⁴⁰ Standing Order 220, above n 12

¹⁴¹ Standing Order 220, above n 12

¹⁴² Standing Order 227, above n 12

¹⁴³ Standing Order 229, above n 12

¹⁴⁴ Standing Orders 230, 231, 397, above n 12

¹⁴⁵ Glissan, J.L. *Cross-examination, Practice and Procedure* (2nd ed, Butterworths, 1991) 68

¹⁴⁶ Standing Orders 226-229, above n 12

¹⁴⁷ Glissan, above n 145, 68

¹⁴⁸ Glissan, above n 145, 68

Additionally, counsel may object on traditional evidentiary grounds¹⁴⁹ if a question will produce an answer which involves inadmissible evidence. Moreover, these are just some of the main grounds for objection in court.¹⁵⁰

These differences in procedure may be partly explicable by looking at the relative importance of the proceedings in question. Court procedure, especially criminal court procedure, impacts visibly on an individual. The aim in court procedure is therefore to achieve an outcome that is fair and just to those concerned. Select committee procedure on the other hand serves an accountability function and so the aim is to achieve political truth. Given the potential for select committee inquiries to impact on witnesses, however, this distinction seems rather weak. Where an inquiry has the potential to have significant repercussions for individual witnesses, there may be persuasive grounds for extending the scope of counsel objections.

Overall it appears that a witness in court is on much stronger ground when it comes to being protected than a witness in select committee proceedings is. If similar differences also exist between courts and commissions of inquiry then this might soften the gap illustrated between select committees and courts.

3.2 Commissions of Inquiry

Anyone who is a party to the inquiry and anyone who satisfies the commission they have an interest other than the general public interest is entitled to be heard by the commission.¹⁵¹ Everyone so entitled is allowed to appear either in person or through his/her counsel or agent.¹⁵² A commission is generally open to the public but there is a discretionary power to sit in private if confidentiality is necessary for those who wish to give “secret or whistleblowing-type information”.¹⁵³ Commissions of inquiry are amenable to judicial review, both during and after the completion of the inquiry.¹⁵⁴

¹⁴⁹ Such as privilege, hearsay, prejudicial but not probative

¹⁵⁰ See 1.2(1) above

¹⁵¹ Section 4A(1) CIA 1908

¹⁵² Section 4A(3) CIA 1908

¹⁵³ Brendan Brown, QC “Legal Opinion Regarding Parties, Persons & Confidentiality (Provided to the Royal Commission on Genetic Modification)” in Fitzgerald, Roger *Setting Up and Running Commissions of Inquiry* (Department of Internal Affairs, 2005) Appendix VI, 122-123; the same would apply to those who wished to give commercially sensitive information. See also section 4 CIA

¹⁵⁴ See also *Cock v Attorney General* [1909] 2 NZLR 405 (commissions are not courts and those that purport to exercise judicial functions are illegal); modified in *Timberlands Woodpulp Ltd v Attorney-*

Things start to get really interesting, however, when the novel approaches used by many modern commissions of inquiry to try and balance the competing needs of efficiency, cost-effectiveness and procedural fairness are considered. Before considering these methods, a detour to consider the English commissions of inquiry regime is necessary. The contrast between inquiries and select committee inquiries is much sharper in England, where civil service anonymity is more respected than in New Zealand. Despite this difference, the methods used by U.K. inquiries may still be helpful when seeking to place limits on the way in which select committees conduct inquiries in New Zealand. Until recently, statutory inquiries in the U.K. were an exception rather than the norm and were not as closely confined as in New Zealand.

(a) England

The first point to note is that the situation in England is rather more complex. Three general factors can be identified to explain this complexity. Firstly, the House of Commons is considerably larger than the House of Representatives; secondly, the English Parliamentary system is bicameral; and thirdly, the statutory regime created for tribunals of inquiry had, until recently, fallen into disuse. As in New Zealand however, the choice of inquiry is roughly between a voluntary, non-statutory tribunal or a powerful, coercive, statutory tribunal.

(i) The Inquiries Act 2005 (UK)

The current regime for statutory inquiries is found in the Inquiries Act 2005. In comparison to its underused predecessor,¹⁵⁵ the Tribunals of Inquiry (Evidence) Act 1921 (“Tribunals Act 1921”), this represents a more comprehensive statutory regime covering

General [1934] NZLR 270; *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368; *Erebus Royal Commission*; *Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618. Judicial review includes errors of law in a commission’s report: *Peters v Davison* (1998) 18 NZTC 14,027 (CA)

¹⁵⁵ Only 24 inquiries have been established under the Tribunals Act 1921 since it was enacted, see Chris Sear, “Investigatory Inquiries and the Inquiries Act 2005” Standard Note: SN/PC/2599 28/06/05 Parliament and Constitution Centre (UK), Part A – Introduction, 3

both the establishment of inquiries and also the procedure to be used.¹⁵⁶ The Inquiries Act 2005 moves the immediate decision for establishing an inquiry away from Parliament to ministers.¹⁵⁷ One of the key features of the Tribunals Act 1921 was that the agreement of both Houses of Parliament was necessary.¹⁵⁸ Under the Inquiries Act 2005, Parliament must simply be informed as soon as reasonably practical.¹⁵⁹ When the minister does inform Parliament s/he must include three things, firstly the name of the chairman of the inquiry; secondly, the number of any other proposed tribunal members; and thirdly, the inquiry's terms of reference.¹⁶⁰

Procedural or conduct related decisions must be made by paying attention to the need to act fairly as well as the need to avoid unnecessary costs.¹⁶¹ Beyond this rather general guideline and subject to procedural rules formulated by the Lord Chancellor,¹⁶² the chairman remains free to determine the procedure of the inquiry.¹⁶³ To some extent, the Inquiries Rules 2006 seek to address one of the primary criticisms of the Tribunals Act 1921, namely that it contained no procedural fairness protections for those involved in an inquiry.¹⁶⁴ Under the Tribunals Act 1921, the tribunal had the power either to allow or refuse legal representation.¹⁶⁵ Under the Inquiries Rules 2006, those giving oral or producing documentary evidence are allowed legal representation.¹⁶⁶ The chairman continues, however, to have considerable control over the extent of legal representation.¹⁶⁷ Only counsel for 'core participants'¹⁶⁸ may give opening and closing statements.¹⁶⁹

¹⁵⁶ SN/PC/2599, above n 155, 5

¹⁵⁷ Section 1(1) Inquiries Act 2005

¹⁵⁸ Section 1(1) Tribunals Act 1921

¹⁵⁹ Section 6(1) Inquiries Act 2005

¹⁶⁰ Section 6(2),(4) Inquiries Act 2005

¹⁶¹ Section 17(3) Inquiries Act 2005

¹⁶² Section 41(1),(3) Inquiries Act 2005; these have now been enacted and came into force on 1st August 2006, see the Inquiries Rules 2006 (UK) accessed 07/10/06 online at < http://www.bailii.org/uk/legis/num_reg/2006/20001838.html >

¹⁶³ Section 17(1) Inquiries Act 2005

¹⁶⁴ Inquiries under the Tribunals Act 1921 were even compared to the Star Chamber: Keeton, G.W. *Trial by Tribunal: a study of the development and functioning of the tribunal of inquiry* (Museum Press, c1960) 225; see also Keeton, 13-15 on the Budget Leak inquiry 1936

¹⁶⁵ Section 2(b) Tribunals Act 1921

¹⁶⁶ Rule 6 Inquiries Rules 2006, above n 162

¹⁶⁷ Rule 10 Inquiries Rules 2006, above n 162

¹⁶⁸ A person is a core participant if they have played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates; if they have a significant interest in an important aspect

Under the Tribunals Act 1921, an inquiry was open to the public unless the subject matter of either the inquiry or the evidence warranted closed proceedings.¹⁷⁰ This had both advantages and disadvantages. Sir Ronald Waterhouse, the chairman of an inquiry into child abuse in North Wales, found himself having to address concerns about the openness of the inquiry. He noted that

“‘We are not a jury. Our duty is to inquire, and our procedure will be inquisitorial rather than adversarial – subject to the important clarification that any person against whom criticism or allegations are made will have a full opportunity to answer.’ The inquiry was essentially...public... Witnesses who complained of abuse could be granted anonymity if they wished, and Sir Ronald appealed to the media...[to allow witnesses to give their evidence] ‘as far as possible without fear or unnecessary embarrassment and that the evidence should be untainted...by offers of reward on the one hand or fear of publicity on the other.’”¹⁷¹

The openness of an inquiry conducted under the Tribunals Act 1921 could, however, be an advantage when seeking to prevent a perceived government cover-up.¹⁷² The presumption of openness did not, however, mean that the media had a free-rein – there was a clear line between legitimate reporting and harassing those involved in the inquiry.¹⁷³

A slightly modified presumption of openness remains in the Inquiries Act 2005. Members of the public are allowed access to the inquiry and to view evidence given to the inquiry.¹⁷⁴ Media groups wishing to broadcast the proceedings must seek prior approval.¹⁷⁵ Restrictions on public access may be imposed on either the actual inquiry or on the disclosure of evidence.¹⁷⁶ The grounds¹⁷⁷ to be considered when deciding whether

of the matters to which the inquiry relates; or if they may be subject to explicit or significant criticism during the inquiry proceedings or in the report: Rule 5, Inquiries Rules 2006, above n 162

¹⁶⁹ Rule 11, Inquiries Rules 2006, above n 162

¹⁷⁰ Section 2(a) Tribunals Act 1921

¹⁷¹ Winetrobe, p. 25, 26

¹⁷² See the events surrounding the creation of the Shipman Inquiry, in SN/PC/2599, above n 155, 8-9

¹⁷³ See Winetrobe p. 124 and his discussion of the inquiry into the Dunblane Massacre

¹⁷⁴ Section 18(1) Inquiries Act 2005

¹⁷⁵ Section 18(2) Inquiries Act 2005

¹⁷⁶ Section 19(1) Inquiries Act 2005

to restrict access include allaying public concern; avoiding or reducing harm or damage¹⁷⁸; and, ensuring confidentiality. When making such a decision, the need to avoid delay and additional cost must be considered.¹⁷⁹ Harm or damage includes damage caused by disclosure of sensitive commercial information.¹⁸⁰

A tribunal established under the Tribunals Act 1921 had the same powers, rights and privileges as the High Court.¹⁸¹ Natural justice provisions therefore applied to tribunals established under the Tribunals Act 1921 because of the coercive powers such inquiries had.¹⁸² Tribunals were also subject to the Human Rights Act 1998 (UK).¹⁸³ An inquiry established under the Inquiries Act 2005 has similar powers. The chairman can require the production of evidence,¹⁸⁴ although no one is required to if they would not in domestic court proceedings.¹⁸⁵

Interestingly, the chairman must now supply the minister with a report of the factual findings and recommendations of the inquiry, and before this is made, the chairman may submit an “interim report” to the minister.¹⁸⁶ When the report is published, information may be withheld for various reasons.¹⁸⁷ Among the most important for witnesses are reducing risk of harm or damage and protecting confidentiality agreements. The report must be given to Parliament.¹⁸⁸

In contrast to the Tribunals Act 1921, a comprehensive offences section has also been included.¹⁸⁹ Under the Tribunals Act 1921, an alleged contempt was simply referred to the High Court for determination.¹⁹⁰ The process was therefore entirely court-like – a defence statement could be made, witnesses could be heard and punishment was imposed

¹⁷⁷ Section 19(4) Inquiries Act 2005

¹⁷⁸ See the definition in section 19(5) Inquiries Act 2005

¹⁷⁹ Section 19(4) Inquiries Act 2005

¹⁸⁰ Section 19(5) Inquiries Act 2005

¹⁸¹ Section 1(1) Tribunals Act 1921; High Court must be read as Court of Session in Scotland

¹⁸² *Re Erebus Royal Commission Air New Zealand Ltd. v Mahon (No 2)* [1981] 1 NZLR 618 at 627-629 per Woodhouse P and 664-665 per Cooke J; upheld by the Privy Council in *Mahon v Air New Zealand* [1984] 1 A.C. 808 (PC) (*Mount Erebus Case*) at 820-821 (the rules of natural justice) and 838

¹⁸³ *Lord Saville of Newdigate v Widgery Soldiers* [2001] EWCA Civ 2048

¹⁸⁴ Section 21 Inquiries Act 2005

¹⁸⁵ Section 22(1) Inquiries Act 2005; public interest immunity applies as in civil court proceedings: section 22(2) Inquiries Act 2005

¹⁸⁶ Section 24 and 24(3) Inquiries Act 2005

¹⁸⁷ Section 25(5) Inquiries Act 2005

¹⁸⁸ Section 26 Inquiries Act 2005

¹⁸⁹ Section 35 Inquiries Act 2005

¹⁹⁰ Section 1(2) Tribunals Act 1921

as if the offence had been contempt of court.¹⁹¹ This separation of the body against who the alleged contempt was committed and the body who determined whether a contempt had in fact been committed was important. It provided a much better alternative to the Parliamentary contempt procedure in New Zealand where, although a differently constituted body¹⁹² determines whether an offence has been committed, the pervasive suspicion that Parliament will place political point scoring above all else remains. Although the High Court still administers the offences in the Inquiries Act 2005,¹⁹³ the overlap between court and inquiry process is now less literal than previously.¹⁹⁴

Under the Inquiries Act 2005, monetary awards may be made to witnesses and this includes the payment of legal representation.¹⁹⁵ To satisfy this provision, a witness must have, in the chairman's opinion, a "particular interest in the proceedings or outcome of the inquiry as to justify such an award."¹⁹⁶

The final matter of importance is that the Inquiries Act 2005 now expressly provides a time limit in which judicial review must be applied for.¹⁹⁷ The decision to apply must be taken within 14 days of the relevant decision being made by the minister or the inquiry.¹⁹⁸ Decisions which only became apparent when the report is published, however, are not covered.¹⁹⁹

(ii) The Salmon Principles

The repealing of the Tribunals Act 1921 and the enactment of the Inquiries Act 2005 was a response to the criticism of both inquiries held under the Tribunals Act 1921 and also

¹⁹¹ Section (2)(a),(b),(c) Tribunals Act 1921

¹⁹² The Privileges Committee is established by the House at the start of each Parliament. Membership includes senior figures and is often chaired by the Attorney-General: McGee, above n 4, 666. During the TVNZ contempt inquiry, the Privileges Committee consisted of Simon Power (chairperson), Gerry Brownlee, Hon Lianne Dalziel, Hon Peter Dunne, Russell Fairbrother, Hone Harawira, Rodney Hide, Dr Wayne Mapp, Rt Hon Winston Peters, Metiria Turei, Hon Paul Swain, Hon Murray McCully (replacing Lindsay Tisch) and Maryan Street (replacing Hon Dr Michael Cullen, the shareholding minister of TVNZ): see Interim Report (PC), above n 1, 10 (Appendix A)

¹⁹³ Section 36(1),(2),(3) Inquiries Act 2005

¹⁹⁴ It is also less literal than under the CIA 1908

¹⁹⁵ Section 40 Inquiries Act 2005; see also Rules 19-34 Inquiries Rules 2006, above n 162

¹⁹⁶ Section 40(3) Inquiries Act 2005; see also Rules 19-34 Inquiries Rules 2006, above n 162

¹⁹⁷ Section 38 Inquiries Act 2005

¹⁹⁸ Section 38(1) Inquiries Act 2005

¹⁹⁹ Section 38(3) Inquiries Act 2005

those held outside the Act. Criticism of the Tribunals Act 1921 began barely a decade after it was enacted, with references to the Star Chamber.²⁰⁰ The main thrust of such criticism was the lack of procedural protections in the Tribunals Act 1921.²⁰¹

This criticism culminated in 1966 in the creation of the Salmon Commission, whose job was to consider whether inquiries held under the Tribunals Act 1921 should be abandoned.²⁰² The Commission's conclusion was that despite the problems encountered with inquiries held under the Tribunals Act 1921, they were the only suitable method of investigation for matters of "vital public importance".²⁰³ The Salmon Commission is perhaps most famous, however, for its formulation of a series of principles to be used when conducting an inquiry under the Tribunals Act 1921. There were six so-called 'cardinal' principles.²⁰⁴

- (1) No involvement in an inquiry until the Tribunal is satisfied that there are circumstances which affect him and which the Tribunal intends to investigate.
- (2) Before any person could be called as a witness, they needed to be notified of any allegations against them and given a general synopsis of the supporting evidence.
- (3) Free legal assistance to all witnesses called before an inquiry.
- (4) A witness should have the opportunity to be examined by his own lawyer and to state his case at the inquiry.

²⁰⁰ Keeton, above n 164, 225

²⁰¹ Keeton, above n 164, 13-15 (the 'Budget Leak Inquiry')

²⁰² *Royal Commission on Tribunals of Inquiry* (1966), chaired by Lord Justice Salmon

²⁰³ Lindell, Geoffrey *Tribunals of Inquiry and Royal Commissions - Law and Policy Paper 22* (The Federation Press in association with the Centre for International and Public Law, Faculty of Law, Australian National University, 2002) 19

²⁰⁴ Fitzgerald, Roger *Setting Up and Running Commissions of Inquiry*, above n 153, 116 (Appendix V) (for a list of the Salmon Principles)

(5) Any material a witness wished to be produced at any inquiry should, “if reasonably practicable, be heard.”²⁰⁵

(6) A witness should have an opportunity to cross-examine any evidence which affected him.

Of these principles, it is the third that has been most contentious. The aim was to clarify when a commission should exercise its discretion under the Tribunals Act 1921.²⁰⁶ In 1973 the Government released a White Paper in which it agreed with the third principle but in doing so, they emphasised that “the right to such representation should be qualified.”²⁰⁷ This meant that a tribunal retained a discretion as to what the representation should cover, and who should get it.²⁰⁸

Despite this, and with the exception of the Crown Agents Inquiry of 1982,²⁰⁹ these principles were widely accepted until the early 1990s. Although Parliament never formally adopted them, at the time of their initial formulation, the Heath Government “expressed its substantial agreement with the recommendations”.²¹⁰ Moreover, the English Court of Appeal even went as far as to suggest that “because of the needs of fairness many of the recommendations of the Salmon Commission are now conventionally adopted, not only by statutory tribunals, but other kinds of inquiry including departmental inquiries.”²¹¹ It was the Scott Inquiry into the ‘Arms for Iraq Affair’ that marked the most serious questioning of the appropriateness of the Salmon principles for inquiries.

(iii) The Scott Inquiry– the demise of the Salmon Principles?

It must be emphasised that the Scott Inquiry was not established under the Tribunals Act 1921. The inquiry was voluntary and had no coercive powers. Given the nature of the

²⁰⁵ Lindell, above n 203, 56

²⁰⁶ Section 2(b) of the Tribunals Act 1921

²⁰⁷ Lindell, above n 203, 50

²⁰⁸ Lindell, above n 203, 51

²⁰⁹ Winetrobe, B.K. “Inquiries After Scott: The Return of the Tribunal of Inquiry” P.L. 1997, 21

²¹⁰ Lindell, above n 203, 41

²¹¹ *R v Lord Saville; Ex parte A* [1999] 4 All ER 860 at 872 [38]

inquiry, however, there was thought to be little risk that any requests given by Sir Richard Scott would not be complied with – the bulk of the witnesses were ministers and officials.²¹² The Government had given an express assurance in Parliament that they would convert the inquiry into a statutory one if Sir Richard Scott found himself unable to get satisfactory attendance or answers.²¹³

Scott argued that the Salmon principles ought not to apply because they failed to satisfy what he identified as being the three principal objectives of an inquiry. These objectives were:

“(1) the need to be fair and seen to be fair to those whose interests, reputations or fortunes may be adversely affected;

(2) the need for proceedings to be conducted with efficiency and as much expedition is practicable; and

(3) the need for the costs of the proceedings to be kept within reasonable bounds.”²¹⁴

Scott anticipated the potential for conflict between these principles and insisted that the first objective had primacy.²¹⁵

Scott’s reformulation of the first Salmon principle removed any kind of restriction on how a person might become involved in an inquiry. Involvement would now depend on relevance. However, this is, potentially, an extremely broad criterion for determining involvement. Scott also felt that the first Salmon principle did not exclude preliminary questioning of a potential witness.²¹⁶ In other words it applies only once the inquiry has determined that the person has “relevant information to give to the tribunal.”²¹⁷

²¹² Winetrobe, above n 209, 25

²¹³ Winetrobe, above n 209, 22

²¹⁴ Lindell, above n 203, 42

²¹⁵ Lindell, above n 203, 43

²¹⁶ Lindell, above n 203, 44

²¹⁷ Lindell, above n 203, 45

Sir Richard Scott was even more critical of the second Salmon principle, arguing that the language used by the Salmon Commission, especially words like “allegations”, conjured up images of an adversarial proceeding.²¹⁸ Scott felt this was inappropriate given that the proceedings he was overseeing were essentially inquisitorial. With this in mind, Scott felt that it was enough that “adequate notice should be given to witnesses on the matters in respect of which they will be asked questions.”²¹⁹ He emphasised that rarely will concrete allegations exist at the outset of an inquiry. During the Scott inquiry, witnesses were allowed to read the draft report and could then provide further evidence or an additional comment in response to any damaging allegations.²²⁰

This approach was later criticised by the Council on Tribunals as being unduly time-consuming.²²¹ The Council also felt that it was necessary to emphasise the important concern that lay behind the second Salmon principle. To this end, the Council stated that where fresh allegations or evidence emerged about a witness, they should be recalled and, unless confidentiality was essential, a witness should also be informed of who had made the allegations against them.²²²

During the Scott Inquiry, 170 witnesses gave evidence during 500 hours of hearing.²²³ Scott developed a novel way of allowing legal assistance while also seeking to keep lawyer involvement in the inquiry to a minimum. Written evidence was the preferred form of evidence and, as a result, witnesses were sent a questionnaire to fill out before attending at the inquiry. Witnesses were encouraged to seek legal assistance in filling out the questionnaires.²²⁴

In contrast, however, legal assistance was actively discouraged when a witness was giving oral evidence to the inquiry. “Sir Richard’s concern was that the conclusion of his report would have been postponed by a number of years if the ‘full panoply of legal representation’ had been granted.”²²⁵ One of the most notable critics of this approach was

²¹⁸ Lindell, above n 203, 46-47

²¹⁹ Lindell, above n 203, 47

²²⁰ Lindell, above n 203, 47

²²¹ Lindell, above n 203, 48

²²² Lindell, above n 203, 48; this was also recognised by the Privy Council in *Mahon v Air New Zealand*, above n 182, 820-821

²²³ Lindell, above n 203, 53

²²⁴ Lindell, above n 203, 52 ; it is rumoured that Baroness Thatcher’s was 76 pages long, see Lindell at 52, fn 177

²²⁵ Lindell, above n 203, 52

Lord Howe of Aberavon, himself a witness in the inquiry, who argued that in denying witnesses the opportunity of legal representation during oral questioning, Sir Richard Scott had disregarded the importance of the third Salmon principle.²²⁶

While some commentators dismissed Lord Howe's criticism as being akin to sore-loser mentality, others saw it as a "sincere expression of dis-ease, albeit very belated, about safeguarding the rights of individuals whose conduct is under inquisitorial scrutiny, by way of legal representation."²²⁷ The approach taken by Sir Richard Scott may have been the one most likely to ensure a relatively speedy inquiry but it did little to encourage a genuine appearance of fairness to those appearing as witness. Indeed, collective legal representation would probably have sufficed, seeing as most of the witnesses were either ministers or officials.²²⁸

Little needs to be said about principles four, five and six. In short, Sir Richard Scott did not consider it appropriate that these adversarial principles be incorporated into inquisitorial proceedings.²²⁹ This fits with the emphasis in the Scott Inquiry on written, rather than oral, evidence and the need to maximize efficiency while minimising costs.²³⁰

The effect of the Scott Inquiry was felt not only within academic circles but also within Parliament itself.²³¹ One of the key points considered by the Liaison Committee in 2003 concerned the openness given to Sir Richard Scott and whether this could be incorporated into select committee proceedings.²³² The problem was that, although the Government agreed to a new degree of access, they qualified it by saying that civil servants appeared on behalf of Ministers and under their directions, and that the committees were not to be used as disciplinary tribunals.²³³

²²⁶ Lindell, above n 203, 52-53

²²⁷ Blom-Cooper, L "Witnesses and the Scott Inquiry" P.L. 1994, SPR, 1-3, 1

²²⁸ Blom-Cooper, above n 227, 2; the principle of collective representation for "core participants" with similar interests and similar evidence has now been recognised in Rule 7(1), (2) of the Inquiry Rules 2006, see above n

²²⁹ Lindell, above n 203, 57

²³⁰ Lindell, above n 203, 57

²³¹ Changes were made to the Osmotherly Rules as a result, see Gay, Oonagh "The Osmotherly Rules" Standard Note: SN/PC/2671 (Parliament and Constitution Centre UK) 04/09/2005

²³² See the 1997 version of the Osmotherly Rules, discussed in chapter 4 and also SN/PC/2671, above n 231, 7

²³³ The limits of these qualifications were graphically illustrated during the questioning of Dr Kelly by the Foreign Affairs Committee in July 2003 (Iraqi WMD), see SN/PC/2671, above n 231, 7-9

For the purposes of this paper, the interest in all this lies in the very fact that the Government clearly saw procedures adopted in non-statutory inquiries as being applicable to Parliamentary inquiries. This is an excellent example of an overlap in the way the two forms of inquiries operate.

The Scott inquiry highlighted the problems of accommodating adversarial protections in an inquisitorial framework while keeping some control on the duration and cost of the inquiry. The question is whether the Inquiries Act 2005 will really make much difference. Time and cost cannot be truly controlled without serious limitations being placed on the types of procedural protections given to those involved. Limiting procedural protections to, for instance, those with the most potential for damage is one way of attempting to control cost and time but identifying just who those most in danger are is simply another difficult hurdle to be overcome. Public discomfort at the use of these types of inquiry for quasi-disciplinary proceedings is understandable and if inquiries are to continue to conduct these types of inquiry, then the full range of procedural protections need to be offered, regardless of the financial and / or temporal repercussions.

3.3 What happens if an allegation is made about you during an inquiry?

The focus up to this point has been on a witness's rights during an inquiry. The rights of those against whom allegations are made during the inquiry must not, however, be forgotten. In court, the conduct of lawyers is regulated by the Rules of Professional Conduct for Barristers and Solicitors²³⁴ and, for example, Rule 7.04 which requires that lawyers make all reasonable efforts to ensure that legal processes do not cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation. Expert witnesses asked to give evidence must now sign a Code of Conduct,²³⁵ and they must confine their evidence to their area of expertise.²³⁶ It must not be forgotten that a neutral judge oversees the proceedings.

²³⁴ As published by the New Zealand Law Society, 7th Edition

²³⁵ As provided in the 4th Schedule of the High Court Rules

²³⁶ See the proposals in the Evidence Bill 2005, no. 256-1, cl 22

(i) Rights of response in the Standing Orders

In select committee proceedings the nearest one gets to having a neutral over-seer is the chairman but ultimately, s/he remains potentially partisan. Evidence that contains an allegation that may seriously damage a person's reputation can be heard in private²³⁷ and the person whom the allegations concern may be invited to be present. A copy of evidence containing allegations of the nature described will be given to the person concerned, unless the evidence is secret. Allegations that meet the 'serious damage to reputation test' attract specific procedures and these apply even when the evidence is being heard in secret.²³⁸

In the first instance, evidence that is not directly relevant to the proceedings will be excluded if it has the potential to cause serious damage.²³⁹ If this is possible then there will be no need for a right of reply, as the potential to cause serious damage will no longer exist. If, however, the material is relevant or cannot be excluded, then a right of reply will be offered.²⁴⁰ This includes the option of asking that the committee hear from more witnesses to support your submission.²⁴¹ A further facet of the right to response is the ability to have access to personal information held by a select committee. If the information held has the potential to seriously damage a person's reputation, then the select committee may release it.²⁴² Material containing serious allegations will be given to a witness prior to attending a select committee hearing.²⁴³

(ii) Commissions of Inquiry

It is a mandatory requirement that any person who can satisfy the commission that evidence given during the inquiry "may adversely affect his interests" be given an

²³⁷ Standing Order 235, above n 12

²³⁸ Standing Order 238, see also 236 and 239, above n 12

²³⁹ Standing Order 234, above n 12

²⁴⁰ Standing Order 223, above n 12

²⁴¹ Standing Order 223, above n 12

²⁴² Standing Order 236, above n 12

²⁴³ Standing Order 221, above n 12

opportunity to be heard.²⁴⁴ Everyone entitled to be heard is allowed to appear either in person or through his/her counsel or agent.²⁴⁵

(iii) The Official Information Act 1982

There are other areas where the need for disclosure is balanced with the need for confidentiality, most notably under the Official Information Act 1982 (“the OIA”). There are various reasons for withholding official information, including protecting the privacy of natural persons.²⁴⁶ When deciding whether to disclose or not, the Ombudsman must balance the need for open government and disclosure with the need to protect a person’s privacy. This could, for instance, involve writing a report of events without including any identifying information.²⁴⁷ The steps taken by the Ombudsman when acting under the OIA 1982 to balance disclosure with confidentiality could be incorporated into select committee procedure. Doing so would minimise the risk of retaliation while giving effect to the natural justice rights of the person whom the allegations concern.

²⁴⁴ Section 4A(2) CIA 1908

²⁴⁵ Section 4A(3) CIA 1908

²⁴⁶ Section 9(2)(a) OIA 1982

²⁴⁷ See, for instance, Case No. W45650 13th Compendium of Case Notes of the Ombudsman

Chapter 4:

Witnesses

If the protections given to witnesses are to be truly improved then it is necessary to see whether greater protections can be offered from the very beginning. Perhaps one way of protecting witnesses would be by limiting who can be called in the first place, or in what context they can be called.

4.1 Background

Both the ability to summons witness attendance and the ability to punish unjustified non-attendance are common features of all the inquiries under consideration. The question is what procedural fairness measures attach prior to attendance as a witness and do the institutions differ in the measures they give to prospective witnesses?

When a witness is summonsed to attend in court, they must be told when and where to attend, as well as what, if any, documentary evidence to bring with them.²⁴⁸ A witness summons must usually also explain that the witness is entitled to claim expenses and must also state that there is a penalty for failing to attend.²⁴⁹

This compares favourably with the procedure that committees of inquiry are required to use, as laid down in the CIA. A commission established under the CIA has the power to summons a witness to attend the inquiry.²⁵⁰ A summons to attend as a witness in an inquiry acts as the trigger for three specific offences in section 9(1) of the CIA. These are failing to attend, refusing to be sworn, give evidence or answer a question and failing to produce documentary evidence.²⁵¹

Select committees can also summons witness attendance. The powers and functions of select committees in New Zealand are contained in non-statutory Standing Orders. “A select committee possesses no authority except that which it derives by delegation from the House.”²⁵² Thus, although the Standing Orders contemplate circumstances when a witness may have to be summoned, it is the Speaker and not the

²⁴⁸ See for instance sections 28 and 29 of the Chartered Professional Engineers of New Zealand Act 2002

²⁴⁹ See the Chartered Professional Engineers of New Zealand Act 2002, above n 248

²⁵⁰ Section 4D CIA; see also section 5(1) and (2)

²⁵¹ Section 9(1)(a)-(c); see also sections 9(4), 7(2) CIA 1908

²⁵² Erskine May, above n 25, 627

committee itself, who orders such a summons.²⁵³ The House of Representatives inherited general and wide-ranging powers to call for evidence from the House of Commons.²⁵⁴ The importance of these powers is implicit in the ability of the House to charge a person with contempt for failing to comply with such a summons.²⁵⁵

Before the stage of summoning witnesses is reached, however, there is the question firstly of defining the scope of the inquiry and secondly, of deciding who to call as a witness. Courts are limited by what the offence is or what the allegations are. Deciding who to call will generally follow from the nature of the alleged offence. Thus in a criminal investigation a witness may be called on to identify the accused and this identification may take place at various stages.²⁵⁶ In some disciplinary proceedings the District Court may authorise the issuing of summons to a witness if satisfied that the evidence of the witness is or may be material to the hearing and that a summons is necessary to compel attendance.²⁵⁷

Select committees in New Zealand and departmentally related select committees in the House of Commons, now have the power to initiate their own inquiries.²⁵⁸ The scope of an inquiry is confined to the subject area that the committee operates in.²⁵⁹

In New Zealand, tribunals of inquiry are tightly constrained by the CIA, which applies to “all inquiries held by the Governor General in Council under any Act or Letters Patent”.²⁶⁰ Section two lays down six categories of things which a commission established under the CIA may inquire into, and these are interesting for there seems to be some overlap in what a tribunal of inquiry may look into and the kinds of things a select committee may consider. It seems possible that at least five of the six categories in section two could be investigated by either a tribunal of inquiry or a select committee.

²⁵³ Standing Order 198; unless the select committee has the power to do so (such as the Privileges Committee): see Standing Order 197, although the Speaker’s signature is still required in the latter case, above n 12; see also McGee, above n 4, 429-430

²⁵⁴ Section 242 Legislature Act 1908 gives the House of Representatives the same powers as the House of Commons but the powers themselves are only obliquely referred to and do not, therefore, have statutory force. See also Erskine May, above n 25, 633

²⁵⁵ Standing Order 397, above n 12

²⁵⁶ See section 344C Crimes Act 1961 and also, for instance, *R v Kerr* (unreported) CA 293/03, 27/11/03; *R v Howard* [1987] 1 NZLR 347

²⁵⁷ Section 28 Chartered Professional Engineers of New Zealand Act 2002

²⁵⁸ McGee, above n 4, 210

²⁵⁹ Erskine May, above n 25, 633

²⁶⁰ Section 15 CIA

Yet, if this is the case, then what makes some things a matter for select committee inquiry and others a matter for inquiry by a tribunal of inquiry?

Perhaps the answer lies most naturally, if somewhat superficially, in the length of inquiry. Select committee inquiries are short, sharp and politically motivated. Both monetary and ad-hoc inquiries need to be completed relatively quickly, certainly from the Government's point of view, in order to allow minimal political fall-out and, if necessary, speedy remedying of whatever the problem may be. Inherent in the matters listed in section two of the CIA must be the fact that by the time something becomes a matter for a tribunal of inquiry, it has reached a level of public concern that means only a thorough, wide-ranging inquiry will satisfy.²⁶¹

4.2 Who can be called to give evidence?

Once a select committee has decided to conduct an inquiry, the next question is who to call as witnesses. Any person, except a Member of the House of Commons,²⁶² may be summonsed to attend and give evidence before a select committee.²⁶³ A Member of the House of Commons, including Ministers, may be asked to attend and, should they refuse, an order for attendance may be made by the House.²⁶⁴ Only the House²⁶⁵ or the Committee on Standards and Privileges (England)²⁶⁶ may compel attendance of a Member of Parliament.

Any person includes public servants who “frequently represent the Executive and support the Government, in terms of its accountability to Parliament through [select]

²⁶¹ One need only consider some of the things that have been inquired into by a commission of inquiry, established under the CIA: *Royal Commission to Inquire Into and Report Upon the Crash on Mount Erebus, Antarctica, of a DC-10 Aircraft operated by Air New Zealand Limited* (reported 1981), *Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast* (reported 1995), and *Royal Commission on Genetic Modification* (2000). For a complete list of inquiries 1947-2000 see, above n 153, 141-149, Appendix XI

²⁶² This includes Ministers

²⁶³ Standing Order 198, above n 12

²⁶⁴ No Minister has refused an order to attend : Erskine May, above n 25, 648

²⁶⁵ McGee, above n 4, 429-430; see also Erskine May, above n 25, 648

²⁶⁶ Erskine May, above n 25, 648, fn 2

committees. Their primary responsibility remains to their Minister when they appear before select committees.”²⁶⁷

In New Zealand the State Services Commission produces guidelines for civil servants called to attend a select committee. These guidelines emphasise that it is the Minister’s responsibility to justify Government policy, and to decide whether to release information to select committees. Crucially, it is also up to the Minister to determine what their public servant(s) should say when giving evidence before a select committee. Public servants “should...try to anticipate any lines of questioning the committee may follow.”²⁶⁸

(i) The Osmotherly Rules – England

The guidelines produced by the State Services Commission are very similar to the ‘Osmotherly Rules’, which govern civil servant appearance as witnesses in Britain. Although these Rules have existed in some form or another since 1980, Parliament has never formally accepted them.²⁶⁹

The 2005 version of the Rules reflects the relatively new principle of open government, as enacted in the Freedom of Information Act 2000.²⁷⁰ This is parallel to a similar, although more pervasive, presumption in New Zealand.²⁷¹ The changes made in 1997 were, however, the most significant, in part as a response to the Scott inquiry.²⁷² In contrast to the process used in select committee hearings, Lord Scott was told that any civil servant he wanted to give evidence would do so but on their own behalf, not on that of their Minister.²⁷³ The subsequent Public Service Committee Report (July 1996) concluded that although widespread changes to the Osmotherly rules were not needed, “a

²⁶⁷ “Public Servants and Select Committees – Guidelines” < <http://www.ssc.govt.nz> > (State Services Commission, 2005) paragraph 2

²⁶⁸ SSC Guidelines, above n 267, paragraph 17

²⁶⁹ SN/PC/2671, above n 231, 1

²⁷⁰ SN/PC/2671, above n 231, 2

²⁷¹ See the Official Information Act 1982

²⁷² See chapter 3, above

²⁷³ SN/PC/2671, above n 231, 8

change to indicate a presumption that Ministers will agree to requests from Select Committees that Chief Executives should give evidence” was desirable.²⁷⁴

The Committee also controversially suggested that Ministers might accept the possibility of personal criticism of named civil servants. In cases where a request specified a named individual to attend, the Minister could discuss the ambit of official evidence with the committee. The possibility of procedures similar to those employed by the Scott inquiry was also mooted²⁷⁵; however, Government response to this suggestion was unenthusiastic. While the Government accepted change was needed, they considered that the proposed amendments interfered with accepted notions of accountability. The ultimate result was a compromise, with the general statement of principle reading:

“Similarly, Ministers should require civil servants who give evidence before Parliamentary Committees on their behalf and under their directions to be as helpful as possible in providing accurate and truthful and full information *in accordance with [their] duties and responsibilities*” (emphasis added).

Further changes were needed in the aftermath of the Hutton inquiry and it is now accepted in England that ‘special advisers’ may be summoned to give evidence. It is possible that the 2005 version of the Rules paves the way for written information being supplied to select committees however, this is not explicitly stated.²⁷⁶ Furthermore, an important warning was added to paragraphs relating to the conduct of individual officers. Paragraph 75 now states that

“...Departments should adhere to the principle that disciplinary and employment matters are a matter of confidence and trust (extending in law beyond the end of employment). In such circumstances, public disclosure may damage an individual’s reputation without that individual having the same “natural justice” right of response which is recognised by other forms of tribunal or inquiry. Any public information should therefore be cast as far as possible in ways which do

²⁷⁴ SN/PC/2671, above n 231, 6-7

²⁷⁵ See chapter 3, above

²⁷⁶ SN/PC/2671, above n 231, 13

not reveal individual or identifiable details...[in other words] in closed session and on an understanding of confidentiality.”²⁷⁷

(ii) Can the SSC guidelines or Osmotherly Rules be extended beyond the civil service/Minister context?

These rules work well, and are suited to, inquiries where the primary concern is policy. In such a case, the Minister is the most suitable person to explain and justify government policy. The case is quite different when what is being scrutinised is the spending of government money, as in the TVNZ scenario. In such an instance, the select committee would naturally want to hear evidence from the Chief Executive (Fraser).

The TVNZ scenario is further complicated when one considers Ian Fraser’s remoteness from government. It is the Board who are government appointed and thus accountable to government. Ian Fraser, on the other hand, was employed by the board. This level of extraction from government should prompt concerns about how such an essentially contractual relationship between an employer and employee could come out undamaged after hostile Parliamentary intervention.

There are no separate rules to govern a situation like the one that arose with TVNZ, but the State Owned Enterprise (SOE) legislation may help. The State Owned Enterprises Act 1986 provides a system of accountability whereby it is the board who are accountable to the shareholding Minister.²⁷⁸

TVNZ is a Crown Entity Company.²⁷⁹ The board are the governing body and it is the board members who are collectively and individually accountable to Ministers.²⁸⁰ The shareholding Minister may order a review of the operations and performance of the Crown Entity at any time.²⁸¹ Before doing so however, the Minister must consult with Entity about the nature and purpose of the review and consider any submissions from the

²⁷⁷ SN/PC/2671, above n 231, 12

²⁷⁸ Section 5, State Owned Enterprises Act 1986; see also Part 3 State Owned Enterprises Act 1986. Consider also the duties of a departmental chief executive detailed in Part 3 of the State Sector Act 1988.

²⁷⁹ See Schedule 2 of the Crown Entities Act 2004

²⁸⁰ Section 86 Crown Entities Act 2004 (CEA)

²⁸¹ Section 132 CEA 2004

Entity.²⁸² The Entity in turn must “take all reasonable steps to cooperate with the review.”²⁸³ This suggests a principle of openness for any government questioning of the Crown Entity and this makes sense, given the chain of accountability identified earlier.

The Act is silent, however, as regards process when the questioning emanates from Parliament. This is problematic as it is in such circumstances that one could most easily foresee difficulties arising. For a start, it is not too difficult to suppose that when a review is being conducted by the shareholding Minister, it is the board that will be the central focus of questions. It is, in the end, the board who are directly accountable to the Minister. Further, a Minister’s questioning is confined to the operation or performance of the Entity²⁸⁴, whereas Parliament may ask what it wants.²⁸⁵ In the latter case, the board may not be the most logical focus. After all, the legislation states that it is the chief executive with whom most employer responsibilities rest and so Parliament may wish to get to the chief executive as a more direct means of undercutting the board.

The question is whether this matters. A greater degree of openness and accountability for Crown Entities is justifiable considering their nature and funding.²⁸⁶ It would be difficult to countenance constraining Parliamentary inquiry into important public organisations such as TVNZ. Of course, in the TVNZ scenario, the chief executive was willing to speak. Arguably, the relationship between Fraser and the board had already broken down. An unwilling chief executive could be seen as being in even more danger of incurring retaliatory actions should he be compelled to answer questions that threatened the trust between him and his employer. The problem is that the Standing Orders, as they are currently configured, do not provide a substitute for the SSC guidelines or Osmotherly Rules; can other forms of inquiry help?

²⁸² Section 132(3)(a),(b) CEA 2004

²⁸³ Section 132(4) CEA 2004

²⁸⁴ Section 132 CEA 2004

²⁸⁵ Subject to the requirement of relevance

²⁸⁶ When considering the application of the OIA 1982 to public servants, the Ombudsman has required a greater degree of openness: see the cases in the 13th Compendium of Case Notes of the Ombudsman

4.3 Commissions of Inquiry

Both select committee inquiries and tribunals of inquiry are distinct from courts in that they are, at least nominally, inquisitorial in nature. There is no contest between conflicting parties at either inquiry. The outcome – obtaining the truth – is considered more important than the process through which this outcome is achieved.

A commission of inquiry has the same powers as the District Court does in its civil jurisdiction.²⁸⁷ This includes the powers that the District Court has in conducting and maintaining order.²⁸⁸ The first point to note is that court rules of admissibility do not apply to commissions of inquiry. This accords with the primarily inquisitorial nature of a commission of inquiry and means a commission “may receive...any statement, document, information, or matter that in its opinion may assist it...”.²⁸⁹ A commission may allow a witness to provide written evidence, which may then be verified by oath.²⁹⁰

A commission may order that evidence be supplied to any person appearing in the inquiry on “such terms and conditions as it thinks fit in respect of such supply and the use that is to be made” of the evidence.²⁹¹ The powers a commission has are subject to an important proviso, namely that every person asked to give evidence of any type has the same privileges as a witness in court.²⁹²

One of the main features of commissions of inquiry in New Zealand is that, while select committees tint the inquisitorial nature of their inquiries through the natural justice provisions in the Standing Orders, commissions borrow quite openly from court process and in doing so, become a rather odd fusion of adversary and inquisitorial procedure.²⁹³ This gives the distinct impression that select committees actively strive to set themselves apart from courts.

²⁸⁷ Section 4 CIA 1908

²⁸⁸ Section 4 CIA 1908

²⁸⁹ Section 4B(1) CIA 1908

²⁹⁰ Section 4B(3) CIA 1908

²⁹¹ Sections 4C(3) and 4C(1)(c) CIA 1908

²⁹² Section 4C(4) CIA 1908

²⁹³ Although as some have pointed an increasing tendency for Courts themselves to be a mix of the Anglo-Saxon adversary and European inquisitorial process then perhaps the fusion in tribunals of inquiry is not so unique. See for example, Simon Mount “The adversarial system – is it alive and well?” *Criminal Law Symposium*, NZLS (3 Nov 2000) 4-14

Chapter 5:
Is whistleblower protection
the answer?

Whistleblowing represents the link in this discussion between procedural fairness during the inquiry and punishment for things done during, or after, the inquiry process. Whistleblowing shares many of the problems outlined but increasingly, these problems are being dealt with in specific and comprehensive statutes. There is considerable overlap between the ways in which retaliation is dealt with by inquiries and whistleblower legislation - motive and the veracity of evidence are crucial factors in both areas. It may be, therefore, that this is the area which provides a potential solution to our problems.

“Whistle-blowing protections emerge from a deceptively simple idea: civil servants or employees who speak out in the public interest should be protected from retribution or negative repercussions for doing so.”²⁹⁴ It addresses two key points. Firstly, when is protection appropriate, and secondly, what process should be used to protect? The evidence that may trigger a select committee inquiry is often similar to the evidence a whistleblower might give. Ian Fraser’s account of over-bearing authority and squabbling over the control of money is not dissimilar to some famous instances of whistleblowing.

The retribution Ian Fraser suffered had more symbolic importance than real impact on his life. In a different fact scenario, however, where an employment relationship is expected to continue, the effects are likely to be much more considerable. This is the case with whistleblowers as well – some may have little regard for the personal outcome of their disclosure, while others may decide the potential consequences are too great.²⁹⁵ A vital difference between the whistleblower and the select committee witness, however, is that the whistleblower who concludes the cost of disclosing is too great may choose to remain silent. A reluctant select committee witness has no choice – s/he will be summonsed to, in effect, forcibly disclose. One might expect, therefore, that the protections for select committee witnesses would be at least on par with those for whistleblowers.

²⁹⁴ Lorne Sossin “Speaking the Truth to Power? The Search for Bureaucratic Independence in Canada.” (2005) 55 Univ. of Toronto L.J. 1, 32

²⁹⁵ Louise Taylor “One more unto the breach...” (2002) NZLJ July 225 at 225-226

New Zealand has whistleblower legislation, in the form of the Protected Disclosures Act 2000.²⁹⁶ Section 17(1) of the Protected Disclosures Act 2000, however, simply provides that retaliatory action may give rise to a personal grievance²⁹⁷ and is to be dealt with via section 103(1) of the Employment Relations Act 2000 (“PDA 2000”).²⁹⁸ The paucity of New Zealand jurisprudence²⁹⁹ in this area, combined with the questionable efficacy of the PDA 2000,³⁰⁰ means that, for the purposes of this paper, the focus is on the U.S. and U.K.

6.1 The United States

A. Background

Until recently, whistleblowing law for private employees in the U.S. was extremely inconsistent. Two virtually identical disclosures would be protected in one state, but not another.³⁰¹ Public employees were protected by the Whistleblower Protection Act 1989 (“WPA”). This was supplemented by the Notification and Federal Employee Anti-discrimination and Retaliation Act 2002 (“No FEAR”³⁰²), which gave the first suggestion that the “U.S. Congress...is prepared to impose sanctions against retaliators.”³⁰³ In 2002, private corporate employees also gained a new piece of legislation, the Sarbanes-Oxley Act 2002 (“S-O”).³⁰⁴

The WPA provides relatively broad protection for government employees who disclose violations of “law, rule or regulation,” or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health

²⁹⁶ The consensus seems to be, however, that the Act does not live up to its potential – see the ‘Review of the Operation of the Protected Disclosures Act 2000 Report to the Minister of State Services’ published by the State Services Commission (2003) accessed online

< <http://www.ssc.govt.nz/display/document.asp?docid=3228> > 09/10/06

²⁹⁷ It may also give rise to a victimization complaint which can be heard by the Human Rights Tribunal

²⁹⁸ John Skinnon and John McDermott “Protected Disclosures” (2001) NZLJ April 94 at 94-95

²⁹⁹ See for instance Ghan Gunasekara “Whistle-blowers and the Ombudsman” (2002) NZLJ Feb. 11 at 11

³⁰⁰ Paul Roth “Employment Law: Whistleblower Legislation” [2000] NZLR at 321

³⁰¹ See the discussion of Sherron Watkins and Cynthia Cooper in Miriam A Cherry “Whistling in the dark? Corporate Fraud, Whistleblowers, and the implications of the Sarbanes-Oxley Act for employment law.” (2004) 79 Wash. L. Rev. 1029, 1035-1042

³⁰² Wood Borak, S. “The Legacy of “Deep Throat”: The Disclosure Process of the Whistleblower Protection Act Amendments of 1995 and the No FEAR Act of 2002.” (2005) 59 U. Miami L. Rev. 617

³⁰³ Callahan, E.S., Dworkin, T.M., Lewis, D. “Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest.” (2004) 44 Va. J. Int’l L. 879, 900

³⁰⁴ The aim was to encourage whistle-blowers like Sherron Watkins (Enron) and Cynthia Cooper (WorldCom) to speak-out about corporate and securities fraud without suffering retaliatory action

or safety.”³⁰⁵ Other federal and state legislation protecting whistleblowers offer varying levels of protection, often as a corollary of a specific public policy (such as, for example, clean drinking water).³⁰⁶ Some states only provide protection for public employees.³⁰⁷

Despite the absence of a gravity requirement in many of the U.S. statutes, the courts have often inferred a “substantiality” requirement for disclosures before allowing recovery.³⁰⁸ Most statutes also require that the whistleblower acts in good faith when disclosing and this implies that “a whistleblower must have reasonable grounds to believe that the information reported is accurate.”³⁰⁹ This implicit requirement was also recognised by the Privileges Committee which noted that the protection of parliamentary privilege might not extend to cover “witnesses who attempt to use privilege to their own advantage or to make allegations they cannot or will not substantiate.”³¹⁰ Those U.S. statutes that financially reward whistleblowing only provide rewards if the “information divulged leads to a conviction or a recovery.”³¹¹

Generally speaking, in both the U.S. and the U.K., retaliation against whistleblowers is considered a “private, not public, wrong”³¹² and thus criminal sanctions are not usually imposed. Both No FEAR and S-O represent a shift away from this understanding.³¹³ Until No FEAR came into force, awards for retaliation by government agencies were paid out of a general “judgment” fund, rather than by the specific agency itself.³¹⁴ This failed to make the culpable agency accept responsibility for its actions.³¹⁵ As a result of No FEAR, “federal agencies are [now] responsible for paying judgments, awards and settlements out of their own budgets.”³¹⁶ No FEAR also requires agencies to report the number of whistleblower retaliation cases dealt with each year, how much

³⁰⁵ Callahan, Dworkin and Lewis, above n303, 885-886

³⁰⁶ Callahan, Dworkin and Lewis, above n 303, 887

³⁰⁷ Callahan, Dworkin and Lewis, above n 303, 886

³⁰⁸ Callahan, Dworkin and Lewis, above n 303, 888

³⁰⁹ Callahan, Dworkin and Lewis, above n 303, 898

³¹⁰ Interim Report (PC), above n 1, 8; see also David McGee’s discussion of the matter on the Midday Report www.nationalradio.co.nz (20 July 12 p.m.) (N.B. audio expires 7 days after broadcast)

³¹¹ Callahan, Dworkin and Lewis, above n 303, 898

³¹² Callahan, Dworkin and Lewis, above n 303, 899

³¹³ Callahan, Dworkin and Lewis, above n 303, 900

³¹⁴ Wood Borak S., above n 302, 651

³¹⁵ Wood Borak, S., above n 303, 651-652

³¹⁶ Callahan, Dworkin and Lewis, above n 303, 900

money has been paid out and how many members of staff have been disciplined as a result of retaliatory action.³¹⁷

Under S-O, whistleblowers from publicly traded companies have a private right of action against their employer for retaliatory actions, the outcome of which may be a criminal conviction.³¹⁸ This may be undermined, however, by a judicial presumption in favour of mandatory arbitration for employment-related disputes.³¹⁹

B. Establishing and recovering for retaliation

(i). Under the Sarbanes-Oxley Act

A publicly traded company cannot discriminate against an employee who engages in protected whistleblowing activity.³²⁰ Two forms of whistleblowing are protected. The first type covers the making of an internal report to a supervisor who has institutional investigatory powers.³²¹ “The Act, therefore, does not protect an employee who confers with a peer, or discusses an accounting impropriety with a subordinate internally.”³²² The second type allows an employee to make an external disclosure of fraud or other corporate violation to a government agency, such as the Securities and Exchange Commission or to disclose information that discloses shareholder fraud.³²³

Any breach by the whistleblower’s employer entitles him/her to “all relief necessary to make the employee whole”, which includes reinstatement at the same level, back pay plus interest, litigation and lawyer costs.³²⁴ Punitive damages are not mentioned, although these are generally recoverable in tort law.³²⁵ The new criminal offences created³²⁶ seem

³¹⁷ Callahan, Dworkin and Lewis, above n 303, 900

³¹⁸ Sarbanes-Oxley Act 2002 has been codified and all references are to the US Code; Title 18 U.S.C.S section 1513: the maximum criminal penalty for retaliation against whistle-blowers is 10 years imprisonment

³¹⁹ *Boss v Saloman Smith Barney, Inc.* 263F. Supp. 2d. 684 (S.Y.N.Y. 2003); see also Cherry, above n 301, 1081-1084

³²⁰ 18 U.S.C.S. 1514A

³²¹ 18 U.S.C.S. 1514A(a)(1)(C)

³²² Cherry, above n 301, 1065

³²³ 18 U.S.C.S. 1514A(a)(1) and (2)

³²⁴ 18 U.S.C.S. 1514A(c)

³²⁵ Callahan, Dworkin and Lewis, above n 303, 901

³²⁶ 18 U.S.C.S. 1513

to apply to all employees³²⁷ and although the scope of these new offences remains unclear, theoretically, they “criminalizes many actions that [would previously] have been wholly civil tort matters”.³²⁸

Before any investigation into the alleged retaliation will be commenced, the employee must establish that s/he has a “prima facie” case showing that the protected behaviour was “a contributing factor”.³²⁹ This is analogous to the balancing process employed by both the Privileges Committee and courts, and this indicates a general recognition that not all forms of action after a disclosure will be reprisal.³³⁰ A prima facie case must show that the complainant engaged in protected activity or conduct; that the employer knew or suspected³³¹ that the activity or conduct was protected; that detriment was suffered; and that the circumstances tend to show the protected activity was a contributing factor³³² to the detrimental action.³³³

(ii). Under the Whistleblower Protection Act and the No FEAR Act

While public employees are often better protected than private employees are (or were, post S-O)³³⁴, public employees still have to demonstrate that the action taken against them was retaliatory – and this can be incredibly difficult.³³⁵ The problem facing public employees is that while private employees “can go to court to fight for retaliation...government whistle-blowers are stuck with administrative remedies.”³³⁶ The WPA creates a complicated system of internal administrative vehicles for dealing with whistleblowers; the strongest point of the system being the creation of a Special Counsel

³²⁷ Rather than being confined to publicly traded companies – see Cherry, above n 301, 1068

³²⁸ Cherry, above n 301, 1068

³²⁹ Code of Federal Regulations, Title 29 – Labor, Subtitle B, Chapter XVII, Part 1980, Subpart A, 104(b)

³³⁰ Fed. Reg. 1980.104(2)(c)

³³¹ This can be either active or constructive knowledge: Fed. Reg. 1980.104(b)(1)(ii)

³³² See also Fed. Reg. 1980.104(b)(2)

³³³ Fed. Reg. 1980.104(b)(1)(i)-(iv)

³³⁴ Cherry, above n 301, 1049-1050

³³⁵ Fleischer-Black, M., “A season for whistle-blowers (Department of Justice prosecutors and investigators sue for whistleblower retaliation).” *American Lawyer* 26.4 (April 2004) accessed online 10th May 2006 at Thomson Gale < <http://find.galegroup.com/itx/informark.do?&contentSet=IAC-Documents&type=retrieve&tabID=T002> > (Document number A114831419)

³³⁶ Fleischer-Black M., above n 335, 2

to deal with claims of retaliation.³³⁷ Although the way in which retaliation is dealt with has been somewhat ameliorated by the changes resulting from the enactment of No FEAR, the system remains internalized and arguably this means the potential for silencing whistleblower disclosures remains.³³⁸

2. The United Kingdom

In 1999, the Public Interest Disclosure Act 1998 came into force. It inserted a new part IV(a) into the Employment Rights Act 1996. Protected disclosure is defined widely and an employee need only show a reasonable belief that the specified behaviour is occurring.³³⁹ Retaliatory action against those who make protected disclosures is prohibited and employees who allege such action may take their complaints to an employment tribunal.³⁴⁰

Establishing and recovering for retaliation

When a claim is brought before the Employment Tribunal (ET), it must first decide whether a protected disclosure has been made and then whether the disclosure caused the alleged reprisal.³⁴¹ This process would involve the hearing of evidence.³⁴² The protected disclosure needs to be the “core reason for the detriment.”³⁴³ Disciplinary action taken after a protected disclosure may be a legitimate response to, for instance, a “perceived breach of confidentiality of [a] secret manufacturing process.”³⁴⁴ This echoes the court approach we saw earlier.

³³⁷ Wood Borak S., above n 302, 634-641

³³⁸ See also Zack, Marni M., “Public Employee Free Speech: The policy reasons for rejecting a per se rule precluding speech rights.” *46 B.C.L. Rev* 893, 916 for the importance of public employee disclosures

³³⁹ Section 43B(1) Employment Rights Act 1996 (UK)

³⁴⁰ Lewis, David “The Public Interest Disclosure Act 1998” *27 Industrial Law Journal* 325, 328-329

³⁴¹ *ALM Medical Services Ltd v Bladon* [2002] EWCA Civ 1085 Case No. A1/2001/124/&B, Vice Chancellor Mummery LJ and Rix LJ, *BAILII*, (on line) accessed 11/10/06 paragraph [17]

³⁴² *ALM v Bladon*, above n 341, [19]

³⁴³ *Aspinall v MSI Mech Forge* (2002, EAT/891/01) see the ‘Public Concern At Work’ (PCAW) website for case summaries < http://www.pcaw.co.uk/policy_pub/case_summaries.html > accessed 08/09/06

³⁴⁴ *Aspinall v MSI Mech Forge* at PCAW, above n 341

Although the Employment Rights Act is also silent as to gravity³⁴⁵, some employment tribunals in the U.K. have denied recovery to whistleblowers whose claims were adjudged to be insubstantial.³⁴⁶ It is not necessary, however, for the allegations of a whistleblower to be factually correct provided that the employee was “reasonably mistaken”.³⁴⁷

The quantum of damages awarded for reprisal varies depending on the nature of the reprisal. A significant award of £805,000 was made to a claimant who raised concerns about breaches of both the U.S. and Australian stock exchange by a London-based company.³⁴⁸ The chairman “threw his digital diary...and threatened to destroy” the whistleblower.³⁴⁹ At the opposite end of the scale is an award of \$1000 to a casual worker who was offered less work than previously after she made a protected disclosure.³⁵⁰

³⁴⁵ Callahan, Dworkin and Lewis, above n 303, 885

³⁴⁶ See, for example, *Bright v Harrow & Hillingdon NHS Trust* (2000)

³⁴⁷ *Darnton v University of Surrey* (2002, EAT/882/01)

³⁴⁸ *Sterlite Industries (India) Ltd v Bhatia* [2003] UKEAT 194_02_2703 Appeal No. EAT/194/02/MAA EAT/195/02 BAILII (online) accessed 11/10/06

³⁴⁹ This is subject to reconsideration by the Employment Tribunal: *Sterlite Industries v Bhatia*, above n 348

³⁵⁰ *Almond v Alphabet Children's Services* (2001)

Conclusion

The tensions discussed throughout this paper are not confined to select committee inquiries. Whenever a body is charged with inquiring into the truth of a matter, witnesses will be needed and protecting them is not always easy or justifiable. Although a select committee is not a court, this does not justify a complete absence of adequate protections against witness retaliation. While it may be enough to justify limitations on some more truly adversarial features, a balance needs to be struck. Thus it is suggested that the use of counsel in select committee proceedings should remain as it is currently – allowed, but only to a certain extent. This is premised, however, on the adoption of measures outlined below.

Increasing the protections available to witnesses is essential if select committee inquiries are to be truly effective. Ian Fraser emailed Craig Boyce saying he “always [thought the inquiry was] going to be a useless exercise – [but] now it’s likely to be toxic as well.”³⁵¹ Select committees are an important means of accountability. Although they will invariably have an element of the “circus” about them,³⁵² the aim should be to leave this to proceedings in Parliament when the report is tabled for Government response. Enhancing the way select committee inquiries are perceived should mean that those requested to appear are more willing to help the inquiry.

While there are a variety of measures that could be incorporated into select committee inquiries to improve the status of witnesses and also, it is to be hoped, reduce the need for findings of contempt for witness retaliation, one must be realistic when assessing what can be done. The closest to an ideal, but unrealistic, solution for these problems might be removing these sorts of inquiries from the select committee arena altogether.³⁵³ Recommending such a solution would simply raise more issues than it would purport to solve.³⁵⁴

The next best solution, therefore, is to limit either the people who can be called or, better still, the types of questions that can be asked. This would not be entirely without

³⁵¹ Emails IF to CB, above n 8, 25/11/05 1.42 p.m.

³⁵² Emails IF to CB, above n 8, 25/11/05 1.42 p.m.

³⁵³ Diana Woodhouse, a special adviser to the Public Administration Committee (SN/PC/2599, above n 155, 4), considers that the use of judicial inquiries, although problematic, is preferable to the use of select committees: “Matrix Churchill: a case study in judicial inquiries.” *Parliamentary Affairs* v. 48, n. 1 (Jan 1995) 24

³⁵⁴ Such as, to name just two examples, who / where such inquiries would be conducted and how to define which types of inquiry to remove

precedent, either. After all, the aim of documents like the State Sector Commission Guidelines or the Osmotherly Rules is to define the scope of questioning for civil service employees. It would not be too much of a stretch to do the same for more remote government employees such as Ian Fraser. Moreover, what is envisaged is a limit on the types of questions asked in oral evidence, alongside increased use of written evidence.³⁵⁵ This would allow select committees to operate, largely, as they do now.

It is suggested that oral questioning should be limited to purely factual questions. This is consistent with the tentative line drawn by courts between fact and opinion, and would make the rather difficult question of ‘motive’ easier to elucidate.³⁵⁶ The select committee could then prepare a list of more opinion based questions and give this to the witness to complete. While completing this ‘questionnaire’, the witness could seek legal advice and indeed, if possible, it is suggested that it be a requirement for anonymity that the witness be prepared to complete this as if it were an affidavit.³⁵⁷ This would ensure, as required by whistleblowing legislation, that protection is only given to those witnesses whose evidence is reasonably believed to be accurate, serious and not motivated by grudge or personal issues. Anonymity could always be waived.

Although guaranteeing anonymity impacts on the natural justice rights of the person whom the allegations concern, in the limited context outlined above, it is consistent with a greater public interest. Again, this is consistent with the approach taken by the Ombudsman when deciding whether/how to release information subject to the OIA 1982. Such an approach would not prevent a factual outline of the allegations being prepared so that the person concerned can consider them and make a response.

If measures such as these were incorporated into select committee procedure then it is to be hoped that the need to punish for witness retaliation would be minimised. The continuing availability of the contempt power is, however, desirable. In the first place, the ability to punish for contempt is found across the board in the inquiry types considered. Punishment for retaliation is consistent with courts, commissions of inquiry, and also with the whistleblowing legislation considered. In fact, given the recent trend in

³⁵⁵ With thanks to Sir Richard Scott; McGee, above n 4, 281 (oral evidence no longer considered the preferred form)

³⁵⁶ *A-G v Butterworth*, above n 108

³⁵⁷ The written evidence could alternatively be sworn on oath – see Standing Order 231, above n 12

the U.S. to move towards criminalization of retaliation against whistleblowers, it is arguable that such an approach would not be unjustified in the realm of inquiries. Wider publication of the contempt powers, which has no doubt been one of the desirable results of the TVNZ scenario,³⁵⁸ would also serve as a deterrent to potential contemnors.

Although the balancing test used by Privileges Committee was similar to that required in whistleblower legislation and used by courts, it is suggested that clearer guidelines on the factors that will lead to a finding of contempt for retaliation are needed. Something like what is required to demonstrate a prima facie case under the Sarbanes-Oxley Act 2002 would be appropriate.

Perhaps the ideal solution would be to remove the determination of contempt to a non-Parliamentary body, preferably a court.³⁵⁹ The risk of partisanship in the Privileges Committee, even if purely illusory, combined with the lack of an appeal process taints what is actually a justifiable and desirable means of punishment. Given that removal is extremely unlikely, it is suggested that such procedures should be amenable to judicial review.³⁶⁰ In the case of relatively small fines, this will be unnecessary; but, if the amount is to increase, as seen overseas and threatened by the Privileges Committee, then it is a desirable final protection for those involved.

While the ability to punish for retaliation must be balanced with the fact that damage to employment relationships will sometimes be unavoidable, the aim of the measures outlined above is to ensure that this inevitability argument is the exception, rather than the norm. If select committees are to maintain their coercive powers, as is suggested, then they must use them with caution and with recognition of the very real damage they can cause.

³⁵⁸ Jagose, Pheroze and Sims, Leile “Talkin’ about a revolution”: Can employers prevent employees’ public criticism?” (23/02/06) accessed 12/07/06 online at < www.chapmantripp.co.nz/resource_library/published_article.asp?id=4420 >

³⁵⁹ S A de Smith *Constitutional and Administrative Law* (5th ed, Penguin, 1985) 342-343, “the unhappy combination of uncodified contempts, an unsatisfactory procedure for investigating allegations of contempt, and the insistence of the House that it must have the first and last word...irrespective of the impact of its decisions on the interests of members of the public, suggests that the House ought to relinquish its jurisdiction...to the courts, as it has [for] disputed election results.” See also McGee, above n 4, 613: aspects of parliamentary privilege may become justiciable but a court will not allow relief if it directly attacks a parliamentary privilege.

³⁶⁰ *Re Special Reference No 1 of 1964* A.I.R. 1965, S.C. 746, above n 30; Commissions of Inquiry are reviewable, . The rights contained in the New Zealand Bill of Rights Act 1990, such as those against arbitrary detention and disproportionate punishment, also lend support to this proposal.

In the end, while select committee inquiries are important, they are not so vital so as to justify seeming insouciance about the potential effects of witness involvement. Government employees may have to accept the inevitability of select committee inquiries but that does not mean that they should be virtually unprotected from retaliation. It is inconsistent to expect such witnesses to willingly incur heavy personal and employment costs for the 'sake of the nation'. While there "can be no greater contempt than to intimidate a witness before he gives his evidence or to victimise him afterwards for having given it",³⁶¹ culpability currently lies with both the contemnor and also with Parliament for failing to adequately protect those they summons. The ultimate aim of the measures suggested is to ensure that select committee witnesses, like Ian Fraser, are not left having to tolerate things which other, equally valuable witnesses and whistleblowers would not have to.

³⁶¹ *A-G v Butterworth*, above n 108, per Denning M.R. at 719

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