

TASMANIA
LAW REFORM
INSTITUTE

Report on the
Commissions of Inquiry Act 1995

FINAL REPORT NO 3
AUGUST 2003

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Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by the Law Society), Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney (nominated by the Women Lawyers Association).

Copies of this report are available on the Institute's webpage:

www.law.utas.edu.au/reform

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Terms of reference and background

On the 12 March 2002 the Attorney-General requested that the Institute undertake a law reform project with the following terms of reference:

‘To examine and report on the operation of the *Commissions of Inquiry Act 1995*, and in particular to:

1. Examine the need for any extension of the powers of a Commission of Inquiry
2. Examine the practical operation of section 18 resulting from the experience in the Gilewicz Commission of Inquiry.
3. Make recommendations for any necessary legislative change.’

The Institute’s Board agreed to undertake this project on 6 June 2002. Due to the specialist nature of the project it was agreed that it was unnecessary to produce an issues paper. Instead, focused consultation was undertaken.

Acknowledgments

The Institute would like to thank the following people who commented on the draft of this report:

- Mr Simon Allston, Counsel Assisting the Gilewicz Inquiry
- Richard McCreadie, Commissioner of Police
- Mr Peter Maloney, former Director of the Office of Legislation Development and Review Department of Justice and Industrial Relations
- Mr David Gunson SC, Counsel Assisting the Gilewicz Inquiry
- Mr Tim Ellis SC, Director of Public Prosecutions

The comments provided were given full consideration and many of the suggestions have been incorporated in this report.

The Institute would also like to acknowledge and thank Michael Jackson and Jenny Rudolf for their assistance in the preparation of this report.

List of Recommendations

Recommendation 1

That, by amendment to the *Commissions of Inquiry Act 1995*, on application of a commissioner of inquiry, a magistrate be granted the power to issue a warrant to use listening devices to a commissioner where the magistrate is satisfied that the commissioner holds a reasonable belief that the use of such devices is necessary and appropriate to obtain evidence in relation to a matter relevant to the inquiry. That such power be restricted by the same restrictions as apply to the granting of such warrants to police officers under s 17(2)(a),(b),(c) and (d) and ss 19 and 21 of the *Listening Devices Act 1991* (Tas).

Recommendation 2

That subsection 18(1) be amended by replacing the word 'If' with the words 'Subject to subsection (1A), if' and by inserting the following subparagraph after subsection (1):

(1A) Subsection (1) does not apply to allegations of misconduct in relation to the giving or presentation of evidence to the Commission.

Recommendation 3

That subsection 18(1)(d) be repealed and the following subparagraph inserted:

(d) the summary of the evidence which the Commission expects to be given in relation to the allegation.

Recommendation 4

That a waiver be inserted in s 18(2) by amending it as follows:

- (a) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.
- (b) The person against whom the allegation of misconduct has been made may elect to waive the requirement in subsection (2)(a). Such an election must be made in writing by the person.

Recommendation 5

That subsection (6) be amended by replacing the first word of the section, 'A', with the words 'Where subsection (1) applies and subject to subsection (2)(b), a'.

And that the following subparagraph be inserted after s 18(6):

(7)

Despite subsection (6), a Commission may, in special circumstances, make a finding of misconduct when subsection (1) has not been complied with, provided the commission states in its report what the special circumstances were and why they justify the making of a finding of misconduct without subsection (1) having been complied with.

Part 1

Introduction and Background¹

What is a Commission of Inquiry?

‘Commission of inquiry’ and ‘royal commission’ are interchangeable terms² used to refer to a body established to inquire into and report upon particular affairs of a State which are of public concern by conducting a public inquiry. In Tasmania such commissions are established by order of the Governor.³ The *Commissions of Inquiry Act 1995* governs the functions and powers of commissions of inquiry. Once a commission of inquiry is established, it undertakes a process of extensive investigation. A written report is then made to the Governor.⁴ The report takes the form of recommendations, which ideally will resolve the problem at hand and bring an end to public controversy regarding the issue.

In the Attorney-General’s second reading speech on the Commissions of Inquiry Bill he stated that the aim of the Act was to ‘ensure that commissions of inquiry are conducted fairly, that witnesses are treated equitably, and that there are sufficient safeguards to prevent the unchecked exercise of this supreme executive power of inquiry.’⁵

Reasons for establishment

Commissions of inquiry are established to provide independent investigation of matters of public concern and to provide impartial advice on a wide range of technical and scientific matters. Typically they arise out of some kind of scandal or disaster. Commissions of inquiry are a recognized part of the process of executive government. Despite their critics, commissions of inquiry are considered to be independent of the Executive even though they are established by the Executive.

Powers of commissions of inquiry

Commissions of inquiry have important functions to perform for the public good and, as such, have wide powers available to them. A commission of inquiry is not a court of law, even though it has many similar powers and may often be presided over by a member or former member of the judiciary. An important difference between a commission of inquiry and a court is that commissions of inquiry are not bound by the normal rules of evidence.⁶ A commission, for example, may receive hearsay evidence and inform itself on any matter as it considers appropriate. A commission may carry out its ‘... functions with as little formality and technicality as is possible and hearings are to be conducted with as little emphasis on an adversarial approach as is possible’.⁷ In Tasmania the powers of commissions of inquiry are governed by the *Commissions of Inquiry Act*. This empowers a commission to hold hearings and receive written

¹ Much of the information in this part is from: Law Reform Commissioner of Tasmania *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*, Report No 70, 1993, Government Printer, Tasmania, at 15-19.

² According to Law Reform Commissioner of Tasmania, *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*, Report No 70, 1993, Government Printer, Tasmania, at 29-31, the term ‘Commission of Inquiry’ is the preferred term ‘because it is more simple, and it operates to direct people’s minds to the function of the body involved’. There is no practical difference between the two. The term ‘Royal Commission’ is simply a product of history in that it was the Governor-General for the Commonwealth or the Governor of the State that would direct a commission to take place. The term ‘royal’ confers no extra powers on the commission.

³ *Commissions of Inquiry Act 1995*, s 4.

⁴ *Ibid*, s 10.

⁵ Hansard, House of Assembly, 30 June 1995, <<http://www.parliament.tas.gov.au:8000/ISYSQuery/IRL91F6.tmp/1/doc>>

⁶ *Commissions of Inquiry Act 1995*, s 20(1).

⁷ *Balog v The Independent Commission against Corruption* (1990) 169 CLR 625 at 629.

submissions,⁸ to examine witnesses under oath⁹ and to require persons to appear before it to give evidence or produce any document or thing relevant to its inquiry.¹⁰ A commission has the power to apply for search warrants,¹¹ however, it has no general power of search and seizure. Commissions also have no power to use or to apply for a warrant to use listening devices. The question of whether these powers should be extended is addressed in Part 2 of this report.

Commissions of inquiries and civil liberties

Because of the wide powers of commissions of inquiry, concerns are raised from time to time that the interests of individual citizens may be adversely affected by the improper use of these powers. That such commissions have the potential and power to affect seriously the reputation of individuals involved in proceedings cannot be doubted. Where a commission is set up to investigate and report upon some public impropriety or alleged wrongdoing, the mere fact that a person is called before the commission may damage that person's reputation. For this reason rules of natural justice or procedural fairness have developed in the common law to safeguard the rights and interests of people who might be so affected. In Tasmania an attempt has been made to enshrine and expand upon these common law rules within certain provisions of the *Commissions of Inquiry Act*. Section 18 is perhaps the key provision. It sets out the procedure for the making of allegations and findings of misconduct. It intends to protect those against whom such allegations or findings are made by ensuring they receive notice of and an opportunity to respond to the allegations or findings. In addition it sets out minimum standards for the giving of such notice and opportunity to respond. The rules of procedural fairness and the requirements and aims of s 18 are discussed in detail in Part 3 of this report. Part 4 considers practical difficulties that have been encountered with s 18 and makes recommendations to solve these difficulties.

Recent history of commissions of inquiry in Tasmania

In 1990, a Royal Commission was established to investigate the events surrounding and to identify those who were involved in an attempt to bribe a member of parliament to cross the floor in the House of Assembly in Tasmania following the 1989 election. At that time, the legislation governing royal commissions was the *Evidence Act 1910* (Tas). At the outset of the inquiry the Royal Commissioner, the Hon WJ Carter QC, expressed concern that there was inadequate legislative support available for the efficient conduct of the Royal Commission, and he requested that amendments be made to certain provisions of the *Evidence Act*. Despite considerable public debate and controversy these amendments were passed just prior to the commencement of the Royal Commission hearings in April 1991. However in Commissioner Carter's Report he stated:

The efficient and proper management of a Royal Commission of Inquiry requires sound legislative support which is in a form which has not only been well thought out, but also which satisfies the community's concern for a proper balance between ensuring on one hand that a Royal Commission or Board of Inquiry be assisted in arriving at the truth, and on the other that there be due recognition of civil rights.

In my view the amended Evidence Act does not satisfactorily address these concerns. ...

I therefore recommend that the Tasmanian Law Reform Commissioner be given a reference which may lead to enactment of suitably framed legislation.

Such a reference was issued by the Attorney-General in March 1992. In 1993 the Law Reform Commissioner of Tasmania published the *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*. That report recommended a new Act to replace the relevant sections of the *Evidence Act 1910*.¹² As a result, in 1995 the *Commissions of Inquiry Act 1995* (Tas) ('the Act') was born.

⁸ *Ibid*, s 5(2).

⁹ *Ibid*, s 25.

¹⁰ *Ibid*, s 22(1).

¹¹ *Ibid*, s 24(1).

¹² Law Reform Commissioner of Tasmania, *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*, Report No 70, 1993, Government Printer, Tasmania, at 8, 26-29.

In February 2000, the Commission of Inquiry into the Death of Joseph Gilewicz was established, presided over by Dennis Mahoney QC. This was the first (and to date the only) commission established under the *Commissions of Inquiry Act*. In what may seem a familiar chain of events, Commissioner Mahoney and counsel assisting the Inquiry formed the view that aspects of the Act, in particular s 18, were problematic. This led to amendment of the Act by the *Commissions of Inquiry Amendment Act 2000*. In the Commissioner's final report he stated that s 18 of the Act still gave rise to considerable practical difficulties and had the potential to hinder the functions and purpose of commissions of inquiry. These practical difficulties were set out in detail in an Annexure to the final report, and it was recommended 'that attention be given to the form of this section and its amendment.'¹³ The Commissioner also stated that the Commission's lack of power to apply for a warrant to use listening devices had hindered the Commission's investigations.

Upon the establishment of the Law Reform Institute in July 2001 it was indicated to the Institute that it would be desirable for the Institute to undertake a project looking at the complaints made about the Act by the Gilewicz Report. Formal terms of reference to that effect followed in March 2002.

¹³ See D Mahoney QC, *Report of the Commission of Inquiry into the Death of Joseph Gilewicz (volume three)*, 2000, Annexure 17, at 7 <<http://www.justice.tas.gov.au/gicreports.htm>>

Part 2

Extension of powers

The usual purpose for establishing a commission of inquiry is to ascertain the truth about a fact, event or circumstance in order to restore public confidence. To arrive at the truth, more may be required than the simple power to examine a witness under oath. This part of the paper examines the current investigative powers afforded by the Act and the need for the extension of those powers.

Search and seizure

The only power that a commission of inquiry is currently afforded by the Act in relation to the obtaining of evidence is the power to examine under oath.¹⁴ There is no direct power to search for and obtain physical evidence such as documents. However, if the commission believes ‘on reasonable grounds that a document or thing that it considers relevant to its inquiry is in any place, building or vehicle, the commission may apply to a magistrate for a warrant’.¹⁵ The test that a magistrate must apply is of a low standard as the magistrate need only be satisfied that:

- (a) the document or thing referred to in the application is relevant to the Commission’s inquiry; and
- (b) there are reasonable grounds to suspect that the document or thing is in the place, building, vehicle or vessel referred to in the application.¹⁶

Any evidence that the Commission obtains under the warrant can be kept until the end of the inquiry but must then be returned to the person from whose possession or custody it was taken.¹⁷

Five other jurisdictions within Australia grant commissions of inquiry the power to enter, search and seize documents or things without the need for a warrant.¹⁸ However, whether this is necessary for commissions of inquiry in Tasmania is questionable. The need for a magistrate’s authority operates as a check on the investigative powers of the commission of inquiry to ensure the power of search and seizure is neither flaunted nor violated. It ensures that before the power can be exercised an independent judicial mind gives consideration to the circumstances of the particular case. This in turn helps to maintain public confidence in commissions of inquiry. The public will only have faith in and respect the findings of a commission if they believe that they ‘play according to the rules’. If reasonable grounds exist for the belief that a relevant document or thing exists in the place alleged then a magistrate will grant a warrant.

It is therefore not recommended that there be an extension of the existing powers of search and seizure.

Listening devices

There is no doubt that the use of listening devices may assist the investigations of some commissions of inquiry. Equally, the use of listening devices is a clear invasion of privacy that can constitute a criminal offence.¹⁹ If a person or body is to be granted the power to use such devices then that grant of power must be strictly monitored. In Tasmania this monitoring is provided by the *Listening Devices Act 1991*. The Act grants the power to a police officer, of the rank of sergeant or above, to apply to a magistrate for a warrant to use a listening device (s 17). Such a power is not granted to commissions of inquiry.

¹⁴ *Commissions of Inquiry Act 1995*, s 25.

¹⁵ *Ibid*, s 24(2).

¹⁶ *Ibid*.

¹⁷ *Ibid*, s 24(5).

¹⁸ The following Acts from other jurisdictions allow for the Commission to enter premises to search for and seize evidence; *Royal Commission Act 1902* (Cth), s 6F; *Commissions of Inquiries Act 1950* (QLD), ss 19 and 19B; *Royal Commissions Act 1917* (SA), s 10; *Royal Commission Act 1968* (WA), s 21; *Royal Commission Act 1923* (NSW), s 12.

¹⁹ *Listening Devices Act 1991*, ss 5 and 12.

During the Gilewicz Inquiry Commissioner Mahoney formed the view that it was necessary, for the Inquiry's investigations to be fully effective, to use listening devices. At that time the Government had stated its policy decision not to statutorily amend the powers of the Commission. Commissioner Mahoney therefore requested that a member of his investigative staff, who was also a highly ranked member of the federal police, be temporarily appointed as an inspector of the Tasmania Police force in order for the Commission to be able to apply for warrants to use listening devices, a power which is given to Tasmanian police officers of the rank of sergeant or above. This request was denied by the Government. The Commissioner wrote in his report that he believed that this refusal 'significantly hindered the investigators and hindered the investigations which he desired to carry out.' Commissioner Mahoney went on to say:

I am not able to determine with certainty whether, had these powers been available, the outcome of the investigations undertaken by the Commission would have been different. It may have been so.

The Gilewicz Report is not the first to claim that its functions were impaired by the lack of power to use listening devices.²⁰

Under the Queensland *Commissions of Inquiry Act 1950* the chairperson of a commission may apply to a Supreme Court judge for an approval to use a listening device.

As stated above, in Tasmania a police officer, of the rank of sergeant or above, can apply to a magistrate for a warrant to use a listening device.²¹ The Institute can see no reason why commissions of inquiry should not have the power to apply for such a warrant in the same manner. It is noted that the failure of the *Commissions of Inquiry Act* to grant commissions the power to apply for warrants to use listening devices does not appear to be deliberate. The use of listening devices is barely mentioned in the Law Reform Commissioner's report and was not referred to in the parliamentary debate of the Commissions of Inquiry Bill.

If a commission were established and a police officer from the Tasmania police force of the rank of sergeant or above were appointed to its investigative staff it would, under the current Act, be able, through that police officer, to apply for a warrant to use a listening device. It seems likely that this would often be the case with a commission of inquiry appointed to investigate a matter in relation to which the use of listening devices might be appropriate. Because the Gilewicz Inquiry was investigating Tasmanian police no such officer was appointed to its investigative staff. The powers of a Commission should not be curtailed by reason of the lack of appointment of an appropriately ranked police officer from Tasmania Police to its investigative staff. Moreover, if a Commission is investigating the police, such a power may well be important. Officers from the Australian Federal Police were also used in the Royal Commission into the Rouse bribery affair, because of the importance of bringing complete independence to that investigation.²² There is clearly no logical reason to have a commission of inquiry's power to use listening devices linked to whether or not a Tasmanian police officer forms part of its investigative team.

The Institute therefore recommends that the commissioner of a commission of inquiry be granted the power to apply to a magistrate²³ for a warrant to use a listening device. It is recommended that this power be granted by amending the *Commissions of Inquiry Act*²⁴ to provide that on application of a commissioner of inquiry, a magistrate be granted the power to issue a warrant to use listening devices to a commissioner where the magistrate is satisfied that there are reasonable grounds for the belief that that the use of such devices is necessary and appropriate to obtain evidence in relation to a matter relevant to the inquiry. The

²⁰ Wood J, *Royal Commission into the NSW Police Service*, Final Report 1997, Vol 1 at 17.

²¹ *Listening Devices Act 1991*, s 17.

²² S Allston, correspondence, 22/5/03.

²³ D Gunson SC (correspondence 2/6/03) expressed the view that it may be more appropriate for the application to be made to a Supreme Court judge. Despite some valid reasons for such applications to be made to Supreme Court judges, on balance the Institute was of the view that the applications are more appropriately heard by magistrates, primarily because they are familiar with hearing similar applications from police officers.

²⁴ Upon consideration of the views expressed by the DPP, Mr Tim Ellis SC (correspondence, 25/5/03), the Institute is of the view that it would be more appropriate to grant this power by amendment to the *Commissions of Inquiry Act* than by amendment to the *Listening Devices Act* because the granting of such warrants under the *Listening Devices Act* is limited to obtaining evidence in relation to a 'prescribed offence' (which is defined in s 16 as an indictable offence) and conceivably a commission of inquiry may be investigating matters of a much broader nature, and because of other possible territorial limitations of the *Listening Devices Act*.

Institute recommends that there should also be a provision (similar to s 17(2) of the *Listening Devices Act*) to the effect that in determining whether a warrant should be granted, a magistrate shall have regard to –

- (a) the nature of the matter said to be relevant to the inquiry;
- (b) the extent to which the privacy of any person is likely to be affected;
- (c) alternative means of obtaining the evidence or information sought to be obtained; and
- (d) the evidentiary value of any evidence sought to be obtained.

It is also recommended that the provisions in s 17(3),(4) and (5) of the *Listening Devices Act* relating to names of persons and premises etc be included within the new provision. Subsections 17(3),(4) and (5) of the *Listening Devices Act* provide as follows –

- (3) Where a warrant granted by a magistrate under this section authorizes the installation of a listening device on any premises, the magistrate shall, by the warrant –
 - (a) authorize and require the retrieval of the listening device; and
 - (b) authorize entry onto those premises for the purpose of that installation and retrieval.
- (4) A warrant granted by a magistrate under this section shall specify –
 - (a) the matter in respect of which the warrant is granted; and
 - (b) where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant; and
 - (c) the period (being a period not exceeding 60 days) during which the warrant is in force; and
 - (d) where practicable, the premises on which a listening device is to be installed, or the place at which a listening device is to be used, pursuant to the warrant; and
 - (e) any conditions subject to which premises may be entered, or a listening device may be used, pursuant to the warrant.
- (5) A warrant granted under this section may be revoked by a magistrate at any time before the expiration of the period specified in the warrant pursuant to subsection (4)(c).

The Commissioner should also be required to report to the Attorney-General about the use of listening devices pursuant to warrants. It is recommended that this be provided for by including in the *Commissions of Inquiry Act* a provision with a like effect to s 19 of the *Listening Devices Act*, which provides –

- 19. A person to whom a warrant has been granted under this Part authorizing the use of a listening device shall, within 3 months after the warrant has ceased to be in force, furnish a report, in writing, to the Attorney-General and the Chief Magistrate –
 - (a) stating whether or not a listening device was used pursuant to the warrant; and
 - (b) if a listening device was so used –
 - (i) specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device; and
 - (ii) specifying the period during which the device was used; and
 - (iii) containing particulars of any premises on which the device was installed or any place at which the device was used; and
 - (iv) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device; and
 - (v) containing particulars of any previous use of a listening device in connection with the prescribed offence in respect of which the warrant was granted.

Similarly, provision should be made in the *Commissions of Inquiry Act* requiring the destruction of irrelevant records obtained by the use of a listening device. Such provision should be similar to s 21 of the *Listening Devices Act*, which provides –

- (1) This section applies to the use of a listening device –
 - (a) pursuant to a warrant granted under Part 4; or
 - (b) in the circumstances referred to in section 5(2)(c).
- (2) A person shall, as soon as practicable after it has been made, cause to be destroyed so much of any record, whether in writing or otherwise, of any evidence or information obtained by the person by the use of a listening device to which this section applies as does not relate directly or indirectly to the commission of a prescribed offence within the meaning of Part 4.

Penalty:

Fine not exceeding 20 penalty units or imprisonment for a term not exceeding 12 months, or both.

Recommendation 1

That, by amendment to the *Commissions of Inquiry Act 1995*, on application of a commissioner of inquiry, a magistrate be granted the power to issue a warrant to use listening devices to a commissioner where the magistrate is satisfied that the commissioner holds a reasonable belief that the use of such devices is necessary and appropriate to obtain evidence in relation to a matter relevant to the inquiry. That such power be restricted by the same restrictions as apply to the granting of such warrants to police officers under s 17(2)(a),(b),(c) and (d) and ss 19 and 21 of the *Listening Devices Act 1991* (Tas).

Part 3

Procedural fairness and misconduct

Procedural fairness

As commissions of inquiry have the potential to cause injustice to individuals, there must be safeguards in place to protect personal reputations, interests and rights.²⁵ The common law provides one such safeguard by virtue of the rules of procedural fairness.

The notion of ‘procedural fairness’, or ‘natural justice’,²⁶ is best described as a ‘common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations’.²⁷ The courts have shown that they will rigorously apply these measures of fairness with the consequence that there is now a presumption that procedural fairness must be observed in the exercise of public power.²⁸ All the elements of procedural fairness apply in every circumstance. However, the degree to which they apply depends upon the circumstances of the case.²⁹ There are twelve essential elements to procedural fairness,³⁰ however for the purposes of this report, the most important elements are the opportunity to be heard and reasonable notice.

Opportunity to be heard

Pursuant to the rules of procedural fairness, it is the right of a person who stands to be affected by administrative decision-making to be given the opportunity to be heard.³¹ A party ‘should have a fair opportunity to be heard and if that opportunity is taken, the party should be fairly listened to’.³² This involves a person being able to state his or her case in such a manner so as to prevent themselves being adversely affected or to defend themselves from allegations made against them. As well as promoting justice, the right to be heard is intended to promote better decision making.³³

²⁵ Law Reform Commissioner of Tasmania, *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*, Report No 70, 1993, Government Printer, Tasmania, at 24.

²⁶ According to *Kioa v West* (1985) 159 CLR 550, Mason J at 583-84, Wilson J at 601, and Deane J at 631, the terms ‘procedural fairness’ and ‘natural justice’ are interchangeable. However, the preferred term is ‘procedural fairness’ as it is more aptly reflects its function and purpose.

²⁷ *Kioa v West* (1985) 159 CLR 550, Mason J at 584.

²⁸ See *Kioa v West* (1985) 159 CLR 550 and *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 598.

²⁹ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296. The degree to which they are applied depends upon the seriousness of the matter or how the person stands to be affected. For example a matter dealing with continuance of one’s livelihood would or personal reputation would be afforded much greater levels of procedural fairness than an application for a motor boat licence. In *Kioa v West* (1985) 159 CLR 550, Mason J held at p 584 (approving the decision in *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296) that ‘what is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting.’

³⁰ They are as follows: nature of the hearing, reasonable notice, right to be heard, representation, cross-examination, reason as to decision, hearing as to penalty, avenue of appeal, witnesses, sworn evidence, onus of proof and elimination of bias.

³¹ *Re Minister for Immigration and Multicultural Affairs and Another; Ex Parte Miah* (2001) 206 CLR 57; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487.

³² JRS Forbes, *Disciplinary Tribunals* LBC, Sydney 1990 at 96.

³³ *Lisafa Holdings Pty Ltd v Commissioner of Police & ors* (1988) 15 NSWLR 1, Kirby P at 19-20 and McHugh JA at 23.

Reasonable notice

It is a fundamental requirement of procedural fairness that those who are required to appear before a body such as a commission of inquiry be given notice of that requirement a reasonable time before they must attend. The notice should give the recipient sufficient time and information so that they may be given every opportunity to present their case in the most effective fashion,³⁴ arrange to attend the hearing or make written submissions. The following factors should be taken into account when considering what amounts to a ‘reasonable time’;

- the amount and availability of evidence that must be secured;³⁵
- the complexity of the issues;³⁶ and
- the recipient’s degree of familiarity with those issues.³⁷

These three points are not exhaustive. Despite this, emphasis should also be placed on having the matter resolved quickly and efficiently, in the interests of the institution and the individual concerned and while memories are fresh and evidence is available.

Some pieces of governing legislation or rules prescribe a minimum period of notice for all situations requiring procedural fairness.³⁸ Where this is done, those exercising the power have no discretion to grant a period of notice less than that already legislated or ruled upon and they must strictly observe the prescribed period.³⁹

Personal Reputation

In the High Court case, *Kioa v West*,⁴⁰ Mason J held that where a person may be deprived of ‘some right or interest or legitimate expectation of a benefit’⁴¹ because of an order made against them, that person should be afforded the rules of procedural fairness. The phrase ‘right or interest’ in this context is to be construed as ‘personal liberty, status, preservation of livelihood and reputation as well as personal rights and interests.’⁴² ‘Reputation’ includes personal, commercial and business reputation.⁴³ Therefore, where an individual’s personal reputation stands to be affected by an order of a decision maker, that person must be afforded procedural fairness. Even though a person’s legal rights or obligations may remain unaffected by a decision, this does not prevent the rules of procedural fairness applying.⁴⁴

The ‘Salmon Rules’

In the United Kingdom in 1966 Lord Justice Salmon, in his report, *Royal Commission on Tribunals of Inquiry*,⁴⁵ identified what are known today as the ‘cardinal’⁴⁶ principles for a fair commission of inquiry.

³⁴ *Minister for Aboriginal & Torres Strait Islander v Western Australia* (1996) 67 FCR 40.

³⁵ *Little v Minister for Land Management* (1993) 79 LGERA 374 (CA Qld), Fitzgerald P and Derrington JA at 382.

³⁶ *Lindemans Wines Pty Ltd v Woodward* (1981) 46 LGRA 14 (Land & Env Ct NSW).

³⁷ *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373.

³⁸ An example of governing legislation is the *Commissions of Inquiry Act 1995* (Tas). An example of governing rules would be the constitution of a body that has an internal tribunal or disciplinary system that has the power to affect the personal reputations, interests or rights of those appearing before it.

³⁹ *Ryan v Kings Cross RSL Club Ltd* [1972] 2 NSWLR 79. In the Supreme Court of NSW case of *Gates v Vickery* [1973] ACLC 27, 518 a domestic tribunal expelled a member after six days notice instead of the prescribed seven. An application by the tribunal for an order validating a procedural irregularity was refused. Street CJ held that the disciplinary rules should be closely observed and that there was no emergency which justified a departure from those rules.

⁴⁰ *Kioa v West* (1985) 159 CLR 550.

⁴¹ *Ibid*, at 582.

⁴² *Ibid*. The decision was subsequently approved by the High Court in *Annetts v McCann* (1990) 170 CLR 596.

⁴³ *Ainsworth v Criminal Justice Commission* (1992) 66 ALJR 271, applying *Mahon v Air New Zealand* [1984] AC 808.

⁴⁴ *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 599. Pursuant to s 19 of the *Commissions of Inquiry Act 1995*, the finding of a Commission of Inquiry will not effect the legal liability of a person.

⁴⁵ The Rt Hon Lord Justice Salmon, *Royal Commissions on Tribunals of Inquiry*, UK 1966.

⁴⁶ Law Reform Commissioner of Tasmania, *Report on the Procedural Aspects of Royal Commissions and Boards of Inquiry*, Report No 70, 1993, Government Printer, Tasmania, at 24. These principles have been described in the Tasmanian House of Assembly as ‘fundamental’ to a fair Commission of Inquiry. See Hansard, House of Assembly, 14 April 2000.

These are known as the ‘Salmon Rules’. His Lordship suggested that injustice would arise to those appearing before a commission of inquiry if the following six principles were not strictly observed.

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness, he should be informed of any allegations which were made against him and the substance of the evidence in support of them.
3. (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross examination conducted by his own solicitor or counsel any evidence which may affect him.⁴⁷

The main rationale behind these six considerations put forward by Lord Justice Salmon is the delivery of procedural fairness, in particular to those called to give evidence before such an inquiry. These rules are not in anyway binding and are only to be used as a guide.

Section 18: misconduct

The *Commissions of Inquiry Act* takes a unique approach to procedural fairness. Rather than relying on the protections that have developed under the common law, the Tasmanian Parliament saw fit, upon recommendation of the Law Reform Commissioner, to provide a statutory guarantee of procedural fairness by implementing all of the Salmon Rules in the Act.⁴⁸

Section 18 of the Act sets out the procedure for the making of allegations and findings of misconduct. It intends to protect those against whom such allegations or findings are made by ensuring they receive notice of and an opportunity to respond to the allegations or findings. In addition it sets out minimum standards for the giving of such notice and opportunity to respond.

Section 18 provides:

- (1) If a Commission is satisfied that –
 - (a) an allegation of misconduct involving a person has been or should be made in its inquiry; and
 - (b) that person should be required, or is likely to be required, to give evidence in the inquiry in relation to the allegation –the Commission must give that person notice of –
 - (c) the allegation; and
 - (d) the substance of the evidence supporting the allegation.
- (2) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.
- (3) A person who receives notice of an allegation of misconduct may respond to that allegation by doing all or any of the following:
 - (a) making oral or written submissions to the Commission;
 - (b) giving evidence to the Commission to contradict or explain the allegation or evidence, including the giving or oral evidence under examination by the person’s counsel;
 - (c) cross-examining the person making the statement constituting the allegation or evidence;

⁴⁷The Rt Hon Lord Justice Salmon, *Royal Commission on Tribunals of Inquiry*, UK 1966 at 17-18.

⁴⁸ Rule one – see s 17 of the *Commissions of Inquiry Act 1995*; Rule two – see s 18(1); Rule three (a) – see s 18(2); Rule three (b) – see s 6(1); Rule four – see s 18(3)(b); Rule five – see s 18(3)(d); Rule six – see s 18(3)(c)

- (d) calling witnesses on matters relevant to the allegation or evidence.
- (4) For the purposes of subsection (3) –
- (a) the Commission must allow the person a reasonable period in which to prepare the response; and
 - (b) the person may be represented by counsel as of right
- (5) In determining what constitutes a reasonable period for the purposes of subsections (2) and (4)(a), the Commission may have regard to the such matters as it considers relevant in the circumstances.
- (6) A commission must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section.

The Act defines the term ‘misconduct’ (s 3) as:

conduct by a person that could reasonably be considered likely to bring discredit upon that person.

As far as we are aware Tasmania is the only jurisdiction to attempt to legislatively enact, in such detail, these principles of procedural fairness.

The approach of other jurisdictions

The relevant Acts for the Commonwealth, states and territories of Australia are as follows;

- *Royal Commission Act 1902* (Cth);
- *Royal Commission Act 1923* (NSW), *Special Commissions of Inquiry Act 1983* (NSW);
- *Inquiries Act 1945* (NT);
- *Commissions of Inquiries Act 1950* (QLD);
- *Royal Commission Act 1917* (SA), s 84 *Constitution Act 1934* (SA);
- *Evidence Act 1958* (VIC), s 88B *Constitution Act 1975* (Vic); and
- *Royal Commission Act 1968* (WA).

Neither the Commonwealth Act nor the Acts of the other Australian states and territories refer to the procedure that must be observed upon an allegation of misconduct being made. The common law rules of procedural fairness would guide the commission as to what procedure should be followed upon the making of such an allegation.

Similarly, in the United Kingdom, the *Tribunals and Inquiries Act 1992* (UK) makes no reference to any such procedure, and the common law rules of procedural fairness would apply.

The New Zealand legislation does not expressly deal with allegations of misconduct. However, if a witness is required to give evidence during a commission, the *Commissions of Inquiry Act 1908* (NZ) prescribes minimum times for notice to be served prior to attendance.⁴⁹ Additionally, if a Commission is satisfied that a person’s interests are to be adversely affected, the legislation provides that person is entitled to be given an opportunity to be heard before the Commission.⁵⁰

The Tasmanian approach is based upon that taken in Canada. Section 13 of the *Inquiries Act R.S 1985*, c. I-11 (Canada) states,

No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

⁴⁹ Section 5(2)(a) of the *Commissions of Inquiry Act 1908* (NZ) states that personal service is to take place at least 24 hours before the attendance of the witness. Under s 5(2)(b) postal service must be effected at least 10 days prior to the witness being required to attend.

⁵⁰ Section 4A, *Commissions of Inquiry Act 1908* (NZ).

This provision is mirrored by legislation in various Canadian provinces.⁵¹ This approach acknowledges the importance of procedural fairness, while providing almost no detail as to how it is to be achieved. This results in flexibility, with the common law and the circumstances of the individual situation dictating how and when the notice is to be given and what will amount to a ‘full opportunity to be heard’.

Justification for the Tasmanian approach

The basic content of the original s 18 reflected the recommendation of the Law Reform Commissioner’s 1993 report, *Procedural Aspects of Royal Commissions*. No explanation was given in the 1993 Tasmanian report as to why these rules and principles should be set out in such detail.⁵² In debate on the Commissions of Inquiry Bill, it was stated by the Attorney that the provisions now in s 18 address ‘concern raised during the bribery royal commission that people could make unsubstantiated allegations without adequate opportunity for them to be rebutted.’⁵³

In the Attorney-General’s second reading speech introducing the Commissions of Inquiry Amendment Bill 2000 the express purpose of s 18 was said to be to implement the Salmon Rules with the rationale being to provide persons against whom allegations of misconduct have been made with procedural fairness.⁵⁴ This amending bill also introduced the 48-hour minimum notice requirement in s 18(2). The government’s motivation for enacting this minimum notice period could be seen to reflect its general motivation for the initial inclusion of the detailed provision. It was said to be to reassure potential witnesses that they would not be ambushed with allegations of misconduct and would be given a reasonable time to be able to respond to such allegations.⁵⁵ Peter Maloney, former Director of the Office of Legislation Development and Review, confirmed that instilling public confidence in commissions of inquiry by legislatively enacting the rules of procedural fairness was one of the main purposes of the section.⁵⁶

⁵¹ See for example s 5(2) of the *Public Inquiries Act* R.S.O. 1990. C. P-41 (Ontario, Canada), s 4(2) of the *Inquiries Act* [R.S.B.C 1996] (British Columbia, Canada) and s 13 of the *Public Inquiries Act* R.S.A cP-29 (Alberta, Canada).

⁵² The Law Reform Commissioner’s recommendations were based upon recommendations of the Ontario Law Reform Commission’s *Report on Public Inquiries*, 1992 although these recommendations were not implemented in Ontario. The Ontario report offers considerable explanation for making its recommendations. At the time of the Ontario report the *Public Inquiries Act* RSO 1990, c P 41, s 5(2) provided –

No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.

The Ontario Law Reform Commission recommended that this section be expanded ‘to those who will face serious allegations of misconduct’ in the proceedings so as to ‘recognize the prejudice that a person might suffer by being commented upon adversely in public proceedings, even though such comments might be rejected or ignored in the commission’s report.’ The Canadian common law relating to procedural fairness is quite different to that in Australia. In Australia, people in such a situation would be protected by the common law rules of procedural fairness discussed above.

⁵³ This was part of a letter written to the Mercury by the Attorney (Ronald Cornish) in response to an editorial in the Mercury (25 May) and was tendered as a document by Mr White in debate following the second reading speech of the bill, Hansard, 30 June 1995.

⁵⁴ Hansard, House of Assembly, 14 April 2000.

⁵⁵ Hansard, House of Assembly, 14 April 2000.

⁵⁶ P Maloney, Personal Communication, 21/2/2003.

Part 4

Problems with s 18 and Recommendations

The Commission of Inquiry into the Death of Joseph Gilewicz ('the Gilewicz Inquiry') was the first and to date the only commission to be established under the 1995 Act. During the Gilewicz Inquiry it became evident that there were deficiencies with s 18. This led to the introduction of the *Commissions of Inquiry Amendment Act 2000*. However, in the Commissioner's report he complained of a number of practical problems with the amended s 18.⁵⁷ The report said that s 18 is overly complicated – attempting to direct a commission in every step from the moment an allegation is made to when a final finding of misconduct is made in the commission's report. Problems with the provision were said to be exacerbated by its inflexibility. The report said that by attempting to emulate and expand upon the Salmon Rules and the rules of natural justice in such a detailed fashion the legislation makes the achievement of justice more difficult and suggested that this could frustrate the aims of an inquiry.⁵⁸

The difficulties with the section were outlined in Annexure 17 of the Gilewicz Report, by Mr Simon Allston, Crown Counsel assisting the Commission. These problems arise in four main areas:

- the term 'misconduct';
- the form of notice required under s 18(d);
- the 48-hour blanket requirement in s 18(2); and
- the operation of s 18(6), the inflexibility of which exacerbates other deficiencies of the section.

These specific problems will now be discussed.

The term 'misconduct'

The term 'misconduct' is defined in the Act as:⁵⁹

conduct by a person which could reasonably be considered likely to bring discredit upon that person.

The Gilewicz Report states that the risk that a commission might be wholly or partly frustrated by a failure to fulfill the requirements of s 18 is 'all the greater because of the width given to the term "misconduct" by s 3 of the Act.'⁶⁰ This width is said to cause two problems. First, 'allegations of misconduct' would naturally include allegations relating to the giving of evidence such as 'an assertion or claim that a witness is lying, or similar challenge, which is made in the ordinary course of testing the witness during cross examination.'⁶¹ Secondly, the Report states that it is uncertain 'whether a 'finding of misconduct' within the terms of subsection (6) includes a finding by a Commission that a witness who has given evidence before a Commission is not to be believed, or is not to be believed without corroboration, or is less reliable than the

⁵⁷ See D Mahoney QC, *Report of the Commission of Inquiry into the Death of Joseph Gilewicz (volume three)*, 2000, Annexure 17, at 3-7 <<http://www.justice.tas.gov.au/gicreports.htm>>

⁵⁸ *Ibid*, at 6-7.

⁵⁹ *Commissions of Inquiry Act 1995* s 3.

⁶⁰ *Op cit* note 57, at 3.

⁶¹ *Ibid*.

evidence of another witness, to give but three examples of conclusions drawn by a Commission in respect of the giving of evidence by a witness which have the capacity to bring discredit on that witness.’⁶²

The Institute agrees that the Act’s definition of misconduct is wide enough to include both conduct which is relevant to the subject of the inquiry and conduct of a witness during the commission, such as lying during cross-examination. It is submitted that s 18 was not intended to apply to the latter, and such an interpretation was adopted during the Gilewicz Inquiry.⁶³ If the term misconduct is taken to include witness conduct while giving evidence to the inquiry then the problems associated with the notice requirements for making an allegation of misconduct (discussed below) are particularly evident and inefficiency could abound.

Secondly, the Gilewicz Report stated:

This definition [of misconduct] is extremely wide and in practice it is difficult to determine with appropriate certainty whether a particular action will or will not fall within its ambit and accordingly whether a notice will or will not be required.

A problem of this kind arose in relation to evidence given by Mr Richard McCreadie the Commissioner of Police. He gave evidence that he had taken a course of action which resulted in evidence of misconduct by a police officer not being brought to the attention of the Coroner prior to the commencement of the Inquest into the death of Joseph Gilewicz. He said and I accepted that he did this bona fide and upon the view that what he was doing was right and in accordance with law. Against the possibility that I might come to a different conclusion it was necessary to consider whether a notice under s 18 should be given to the Commissioner. If, accepting the evidence as to his bona fide’s I concluded that what he did was not in accordance with law, it was necessary to determine whether what he had done was ‘misconduct’.

I was of the firm opinion that it was not. But I found it necessary to draw attention to the section, to record my consideration of it, and indicate what my conclusion was. It would be appropriate if the possibility of doubt in such cases were removed by an amendment of the section.

The Institute does not consider that this is a problem. The definition of misconduct in the Act is a straightforward and logical definition.⁶⁴ The situation described is an example of the correct application of the section. While it may at times be cumbersome for a commissioner and counsel, this is the price which must be paid to ensure procedural fairness to individuals.

It is not recommended that the definition of misconduct be amended. Rather, it is recommended that s 18 be amended to make it clear that its provisions do not apply to allegations or findings or misconduct relating to the giving or presentation of evidence at the inquiry. It is recommended that this be done by inserting a new subsection which states that subsection (1) does not apply to allegations of misconduct in relation to the giving or presentation of evidence to the Commission.

Recommendation 2

That subsection 18(1) be amended by replacing the word ‘If’ with the words ‘Subject to subsection (1A), if’ and by inserting the following subparagraph after subsection (1):

(1A) Subsection (1) does not apply to allegations of misconduct in relation to the giving or presentation of evidence to the Commission.

Notice of the evidence: s 18(1)(d)

Section 18(1)(d) of the Act requires that notice of an allegation of misconduct contain ‘the substance of the evidence supporting the allegation’. It was the experience of the Gilewicz Inquiry that it was often unclear what the ‘substance of the evidence’ was.⁶⁵ This creates the risk that the notice could fail the s 18(1)

⁶² *Ibid*, at 4.

⁶³ *Ibid*, at 5.

⁶⁴ The Ontario Law Reform Commission’s *Report on Public Inquiries* (1992) recommended a similar definition of misconduct: ‘any finding or conclusion that could reasonably be construed as bringing discredit on an individual’ at 216. In the Alberta Law Reform Institute’s, *Proposals for the Reform of the Public Inquired Act*, Report No 62, 1992, at 88, the Ontario Law Reform Commission’s definition was referred to by the Alberta Law Reform Institute and recommended for inclusion in a reformed *Public Inquiries Act*.

⁶⁵ *Op cit* note 57, at 5.

requirement, and that the Commission might in consequence be barred by s 18(6) from making a finding of misconduct. In addition, the use of such vague terms led to argument by counsel, resulting in the inefficient use of time and resources.

It is recommended that s 18(1)(d) require that notice be given of ‘a summary of the evidence which the Commission expects to be given in relation to the allegation’ rather than its ‘substance’. Although ‘summary of the evidence’ is a term that is open to a variety of interpretations, the advantages of the phrase are that it:

- reduces the number of proofs to be delivered, making the subsection easier to comply with;
- avoids an over supply of evidence;⁶⁶ and
- overcomes the problem that the commission may not know exactly what evidence is to be given at the point when the summary is delivered.⁶⁷
- is likely to produce a fairer result because it includes evidence which is both favourable and unfavourable.

Recommendation 3

That subsection 18(1)(d) be repealed and replaced and the following subparagraph inserted:

- (d) a summary of the evidence which the Commission expects to be given in relation to the allegation.**

48 hours notice: s 18(2)

Subsection 18(2) requires that ‘the notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation’. It is a blanket requirement that operates in every situation. This is problematic as the section has effect and will operate irrespective of the nature of the allegation, whether or not the witness knew that the allegation was to be raised and even in circumstances where the witness is capable of answering that allegation as soon as it is made. This inflexibility has the potential to produce the following two problems.

1. personal reputation

The 48-hour requirement is designed to afford procedural fairness to the witness facing any allegations of misconduct. However, this requirement can in some circumstances frustrate their ability to preserve and maintain their own personal reputation. As the Honourable Mr Ray Groom said on 14th April 2000 in parliamentary debate on the Commissions of Inquiry Amendment Bill 2000:⁶⁸

reputations can be destroyed in a very short space of time with the publicity that flows from these sorts of commissions and of course they would normally be held in public so if someone wants to attack a police officer or any other individual... then that can occur and it could be front-page headlines the next day in our newspapers.

Personal reputation is of great value in our society⁶⁹ and was a major consideration in the amendments made to the Act in 2000.⁷⁰ However, of course public allegations of misconduct during a commission are inevitable. As a consequence, the person against whom the allegation of misconduct is made has, due to the strict application of s 18(2), no means available to them to refute and defend themselves immediately after the allegation has been made in the inquiry.

⁶⁶ P Maloney, Personal Communication, 21/2/2003.

⁶⁷ S Allston, Correspondence – *Commissions of Inquiry Act 1995*, 14/2/2003.

⁶⁸ Hansard, House of Assembly, 14 April 2000.

⁶⁹ *Annetts v McCann* (1990) 170 CLR 598 as per Brennan J at p 608.

⁷⁰ See Hansard, House of Assembly, 14 April 2000.

In the opening comments in the Gilewicz Report the Commissioner stated that the Commission was not an occasion for causing harm to individuals who were innocent of wrongdoing.⁷¹ However, it is easy to envisage how the amendments made to s 18 in the spirit of procedural fairness could in fact harm rather than help those attending the Commission.⁷²

2. inefficiencies

The Gilewicz Inquiry found that inefficiencies were produced by the operation of s 18(2). If a witness were fully acquainted with the relevant evidence, knew that they were to be examined about such matters (obviously without the formal notice) and/or the matter was of miniscule importance to personal reputation, then it would be a waste of time and resources to postpone the giving of the evidence of that witness for 48 hours. This is the case *a fortiori* where the misconduct is admitted by the witness.⁷³

It was further asserted in the Gilewicz Inquiry's Report that there is an 'inability to comply with the strict terms of subsection (2) where the allegation is one which surfaces whilst the witness is giving evidence which bears on the subject-matter of the allegation'.⁷⁴

First, while it is true that unforeseen allegations may arise during a witness' evidence due to the inquisitorial nature of inquiries, lack of cooperation by witnesses, or because the allegation is made by counsel other than counsel assisting the commission,⁷⁵ such unforeseen allegations should be quite rare. Robert Armstrong QC, argues:⁷⁶

... if there has been a thorough investigation prior to the commencement of the hearing, such situations [allegations of misconduct being made for the first time during the hearing] should be the exception rather than the rule.

Secondly, the Institute does not agree that there is an inability to give the required notice in such situations. While the Commission may be able to give only a brief summary of the evidence supporting the allegation if the Commission 'is itself in the dark',⁷⁷ it is still able to give such a summary. Where the allegation surfaces during a witness' evidence that evidence can be interrupted for the minimum, or a reasonable, period and then continued. Even if the allegation is 'plain for all to see'⁷⁸ it seems reasonable to allow a witness 'alleging' their own 'misconduct' some time for reflection, taking of legal advice, ensuring the evidence is fully presented, etc, before continuing with the evidence. If the witness was alleging the misconduct of another, who may or may not be in attendance at the commission, then it may be reasonable to delay the proceedings to give that person notice of the allegation and to allow them to prepare to cross-examine the witness or lead contradictory or explanatory evidence. In other situations it may be more appropriate to continue receiving the evidence, then give notice of the allegation and the summary of the evidence supporting the allegation to the person against whom the allegation is made a reasonable period before that person is called to give evidence in relation to the allegation.

The Institute considered two ways of relieving the inflexibility of s 18(2):

- a) insert a waiver; **and/or**
- b) exclude the minimum 48-hour requirement.

⁷¹ *Op cit* note 57, at 4.

⁷² Section 14(1) deals with the control of public reporting. However, this section will be limited in its operation as the Commissions should be seen to be totally transparent and in a public hearing the damage may already have been done.

⁷³ As was the case with Mr Hanuszewicz before the Gilewicz Inquiry, *op cit* note 57, at 3.

⁷⁴ *Op cit* note 57.

⁷⁵ S Allston, correspondence, 22/5/03.

⁷⁶ R P Armstrong QC, 'The Public Inquiry: Two Suggestions for Reform' (1994) 43 *University of New Brunswick LJ* 377, at 379.

⁷⁷ S Allston, correspondence, 22/5/03.

⁷⁸ S Allston, correspondence, 22/5/03.

Insert a waiver within section 18(2)

If a person against whom an allegation of misconduct is made considers that they do not require the 48-hours notice (or whatever reasonable time is afforded to them) they should have the right to waive that notice period. During the Gilewicz Inquiry '[t]he view was taken by Counsel ... that such rights could be waived. The matter proceeded on that basis.'⁷⁹ However, Commissioner Mahoney recommended that 'it is desirable that the extent to which rights can be waived and the manner of waiver should be made clear.'⁸⁰ Providing the right of waiver will allow people to protect their personal reputation by immediately defending themselves from the allegations made against them if they choose to do so. It will also save time and resources where no time, or a time less than 48 hours, is required to respond to the allegation. In order to ensure there is adequate consideration prior to any decision to exercise such a waiver it is recommended that the waiver be made in writing.⁸¹

Recommendation 4

That a waiver be inserted in s 18(2) by amending it as follows:

- (a) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.**
- (b) The person against whom the allegation of misconduct has been made may elect to waive the requirement in subsection (2)(a). Such an election must be made in writing by the person.**

Exclude the minimum 48-hour requirement

The minimum 48-hour requirement was inserted by the amendments to the Act in 2000. The government's motivation in enacting the minimum notice period was to reassure potential witnesses that they would not be ambushed with allegations of misconduct and would be given a reasonable time to respond to such allegations.⁸² Thus, the deletion of this minimum requirement could defeat one of the main purposes of the section: instilling public confidence in the procedural fairness of commissions of inquiry.⁸³

On the other had it is easy to envisage circumstances where a person being served with notice will not require the whole 48 hours as they are well acquainted with the facts and the matter is not of a serious nature. With the great costs of commissions of inquiry, it clearly wastes resources to allow witnesses 48 hours notice when a shorter period, such as 24 hours, would be reasonable in the particular circumstances.

On balance, the Institute is of the opinion that it is not necessary to remove the minimum 48-hour notice period as it serves to instill public confidence in the fairness of inquiries by attempting to ensure that witnesses are given adequate notice of allegations of misconduct. Thorough investigations by a commission prior to the hearing so that unexpected allegations of misconduct are rarely made and the insertion of the right to waive the notice period should serve to reduce any unnecessary costs and delays caused by the minimum 48-hour period.

⁷⁹ *Op cit* note 57, at 6.

⁸⁰ *Ibid.*

⁸¹ S Allston wrote: 'I question the need for the waiver to be in writing. Waivers in the Gilewicz inquiry were usually given through Counsel, which is itself a sufficient buffer against duress. Further, the advantages and disadvantages of letting the allegation lie unanswered or incompletely answered for 48 hours will usually be very obvious indeed to the witness.' Correspondence, 22/5/03.

⁸² Hansard, House of Assembly, 14 April 2000.

⁸³ P Maloney, Personal Communication, 21/2/2003.

Findings of misconduct: s 18(6)

Section 18(6) provides:

A commissioner must not make a finding of misconduct against a person unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section.

'Finding'

The Gilewicz Report stated that 'the failure to specify what amounts to a finding for the purposes of subsection (6)⁸⁴ was a difficulty with the section, stating that there was:⁸⁵

uncertainty as to whether a "finding of misconduct" within the terms of subsection (6) includes a finding by a Commissioner that a witness who has given evidence before the Commission is not to be believed, or is not to be believed without corroboration, or is less reliable than the evidence of another witness, to give but three examples of conclusions drawn by a Commissioner in respect of the giving of evidence by a witness which have the capacity to bring discredit on that witness.

The Institute does not agree. The Institute is of the opinion that it is clear that the word 'finding' in subsection (6) was intended to refer to a finding that is contained in a commissioner's report, rather than to any other less formal finding. The problem of whether conclusions drawn by a Commissioner in respect of the giving of evidence by a witness amount to 'findings of misconduct' for the purposes of subsection (6) will be alleviated by Recommendation 2 above (removal of the notice requirement for allegations of misconduct relating to the giving or presentation of evidence).

It was also stated in the Gilewicz Report that there is

uncertainty as to whether the words "in accordance with this section" in subsection (6) relate to both the giving of notice of misconduct and the giving of an opportunity to respond to the notice, such that any failure to follow the procedural requirements in subsections (1) and (2) in relation to the giving of notice may trigger the operation of subsection (6).⁸⁶

The Institute does not agree that this matter is uncertain. First, the general words 'in accordance with this section' fall at the end of the list of two requirements (giving notice and giving an opportunity to respond to the notice) and should therefore be assumed to apply to all the things in the list. Secondly, the basic rule that an interpretation that promotes the purpose of the Act is to be preferred to one that does not⁸⁷ would support this interpretation. If the notice did not need to be given in accordance with the section then the requirements in s 18(1) and (2) would offer no protection to witnesses at all, and their inclusion would be merely directive. The use of the word 'must' in subsection (1) makes it clear that these requirements were intended to be mandatory.

The inflexibility of s 18(6)

Subsection 18(6) was found by the Gilewicz Inquiry to be inflexible, operating 'even if justice will be defeated by its operation'.⁸⁸ The Commissioner wrote in his report that the subsection will 'apply even though the failure to give notice is... accidental, inadvertent, or even [an] excusable mistake'.⁸⁹ The inflexibility of s 18(6) is counterproductive in that it creates the potential for conduct that in the eyes of the commission equates to misconduct to go unmentioned in the final report of the commission. This clearly has

⁸⁴ *Op cit* note 57, at 4.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, at 4.

⁸⁷ *Acts Interpretation Act 1931* (Tas) s 8A(1).

⁸⁸ *Op cit* note 57, at 6.

⁸⁹ *Ibid.*, at 6-7.

the potential to defeat the purposes of the Act and the holding of an inquiry. It is recommended that s 18 be amended to avoid such an outcome.

Recommendation 5

That subsection (6) be amended by replacing the first word of the section, ‘A’, with the words ‘Where subsection (1) applies and subject to subsection (2)(b), a’.

And that the following subparagraph be inserted after s 18(6):

(7)

Despite subsection (6), a Commission may, in special circumstances, make a finding of misconduct when subsection (1) has not been complied with, provided the commission states in its report what the special circumstances were and why they justify the making of a finding of misconduct without subsection (1) having been complied with.

Conclusion

The amended s 18 of the Act would read:

- (1) Subject to subsection (1A), if a Commission is satisfied that –
 - (a) an allegation of misconduct involving a person has been or should be made in its inquiry; and
 - (b) that person should be required, or is likely to be required, to give evidence in the inquiry in relation to the allegation –the Commission must give that person notice of –
 - (c) the allegation; and
 - (d) the summary of the evidence which the Commission expects to be given in relation to the allegation.
- (1A) Subsection (1) does not apply to allegations of misconduct in relation to the giving or presentation of evidence to the Commission.
- (2)
 - (a) The notice is to be given a reasonable period, to be not less than 48 hours, before the person is called to give evidence in relation to the allegation.
 - (b) The person against whom the allegation of misconduct has been made may elect to waive the requirement in subsection (2)(a). Such an election must be made in writing by the person.
- (3) A person who receives notice of an allegation of misconduct may respond to that allegation by doing all or any of the following:
 - (a) making oral or written submissions to the Commission;
 - (b) giving evidence to the Commission to contradict or explain the allegation or evidence, including the giving or oral evidence under examination by the person’s counsel;
 - (c) cross-examining the person making the statement constituting the allegation or evidence;
 - (d) calling witnesses on matters relevant to the allegation or evidence.
- (4) For the purposes of subsection (3) –
 - (a) the Commission must allow the person a reasonable period in which to prepare the response; and
 - (b) the person may be represented by counsel as of right
- (5) In determining what constitutes a reasonable period for the purposes of subsections (2)(a) and (4)(a), the Commission may have regard to such matters as it considers relevant in the circumstances.
- (6) Where subsection (1) applies and subject to subsection (2)(b), a commission must not make a finding of misconduct against a person in a report of a Commission to the Governor in respect of an inquiry unless the person has been given notice of the misconduct and an opportunity to respond to the notice in accordance with this section.
- (7) Despite subsection (6), a Commission may, in special circumstances, make a finding of misconduct when subsection (1) has not been complied with, provided the commission states in its report what the special circumstances were and why they justify the making of a finding of misconduct without subsection (1) having been complied with.

Part 5

An alternative for reform of s 18

An alternative option for reform of s 18 is to repeal the whole of s 18 and replace it with a much simpler section such as:

- (1) A finding of misconduct must not be made against a person in a report of a commission to the Governor in respect of an inquiry unless the Commission has given reasonable notice to the person against whom the allegation of misconduct has been made and the person has been allowed a reasonable opportunity to be heard.
- (2) An opportunity to be heard for the purposes of subsection (1) includes an opportunity to give evidence and to personally or by counsel –
 - (a) tender evidence;
 - (b) call witnesses;
 - (c) examine witnesses;
 - (d) cross-examine witnesses; and
 - (e) make oral or written submission.

This alternative would be similar to the Canadian approach.⁹⁰ It is a simple legislative restatement of the procedural fairness rules embodied in the Salmon Rules, compelling decision makers to provide reasonable notice and to give the person responding to an allegation a fair opportunity to do so. This would eliminate the problems associated with s 18 of the current Act. This option would provide the public with some assurance that procedures will be fair, while not hindering the operation of a commission with detailed and impractical requirements.

The simplicity of this option is attractive. It acknowledges the importance of procedural fairness, while providing almost no detail as to how it is to be achieved. This results in flexibility, with the common law and the circumstances of the individual situation dictating how and when the notice is to be given. The need for this flexibility was recently emphasized by Geoffrey Lindell in a comprehensive analysis of the Salmon principles.⁹¹

On the other hand the flexibility of the common law may offer little reassurance to the public, unlikely to be comforted by the thought of a commission, which may well be alleging misconduct against them, determining what is 'reasonable' in their case.

The Institute is of the opinion that the clear intention of Parliament in enacting the rules of procedural fairness in s 18 of the Act was to set these down in a manner accessible to the public in order to fully assure the public that commissions of inquiry would be conducted fairly. The political will to maintain this declaration of procedural fairness has already been demonstrated by the passing of the amending act in 2000. There is merit in this aim and for this reason this option is not recommended.

⁹⁰ This section is similar to the Canadian legislation, however, the Canadian legislation uses the phrase 'allowed full opportunity to be heard'. It would be wise to replace 'full' with 'reasonable' as this will reduce argument and potential litigation as to whether or not there has been a 'full opportunity to be heard'. Procedural fairness would ensure that there has been an appropriate and reasonable opportunity to be heard. An additional description of what methods a witness may employ to be heard would also be desirable. The Canadian legislation does not do this. The end effect of the section would be the same but it would be easier to comply with, making the execution of a commission of inquiry more effective.

⁹¹ G Lindell *Tribunals of Inquiry and Royal Commissions* (2002) Law and Policy Paper 22, The Federation Press in association with the Centre for International and Public Law, Faculty of Law, Australian National University, at 49.