F W Guest Memorial Lecture 1989

COMMISSIONS OF INQUIRY

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Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

It is an honour to be asked to deliver the F W Guest Memorial Lecture for 1989. Professor Guest's inaugural lecture in this university on "Freedom and Status" delivered on 4 July 1961 and reprinted in 1 Otago Law Review 265 focussed on the meeting place of law and political philosophy. For him the true question was not one of right or of freedom in the abstract, divorced from the real world, but of the complex right/duty relationship of those living in modern societies; of the relationship between citizen and citizen and citizen and the State.

Commissions of inquiry have long been part of the machinery of government. At times they have played a pivotal role in settling for the time being elements of a right/duty relationship. In his *A History of English Law* vol XIII, 270, Holdsworth remarks that the Domesday survey may be regarded as the result of the first Royal Commission of Inquiry. Then after discussing the use over the succeeding 700 years of commissions to conduct inquiries into topics connected with law and government, or on which the government required information, Holdsworth makes an important point as relevant to New Zealand of the 1980s as it was to England of the first half of the 19th century. It is that the great social and economic changes which accompanied the industrial revolution, the changes in political ideas which resulted directly or indirectly from the French Revolution, the law reforms required in part by new social and economic conditions and in part by Bentham's teaching, all stimulated inquiries by means of external commissions and committees of Parliament. Our current revolution has been of a different kind. But the ferment in ideas and the impact of economic and social change have created a similar need. The proliferation of reports of governmental inquiries in various forms is eloquent testimony to the perceived need for material of this kind to assist the functioning of government. And, as in other societies, the New Zealand Government has also often constituted commissions of inquiry to investigate major accidents or events giving rise to public concern.

Over a working career many New Zealand lawyers have gained

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considerable experience of governmental inquiries and in various capacities: as witnesses, in making submissions for interested parties or as counsel assisting, as members of commissions and, finally, in reviewing through the court processes aspects of the functioning of particular commissions. What I want to do this evening is to focus on the process of commissions, on the manner in which they work, rather than to discuss the recommendations of any particular commission or to attempt an assessment in cost benefit or other terms of the usefulness of any particular inquiry or, more broadly, of commissions of inquiry in general. Reflecting my own experience I can perhaps best do this in relation to three governmental inquiries which I have chaired: the Committee of Inquiry into Inflation Accounting which reported in 1976, the Committee of Inquiry into Solicitors Nominee Companies of 1983 and the Royal Commission on Social Policy, which reported in May 1988. However, before moving into that area I propose reviewing in a broad way various kinds of governmental inquiries outside the immediate governmental processes, and the oversight of their functions by the courts.

Forms of Inquiry

Although their purpose is to examine a particular subject closely and in a non-partisan way, inquiries and investigations take a number of forms. There are Royal Commissions, commissions constituted under the Commissions of Inquiry Act 1908, inquiries expressly provided for under particular statutes, inquiries constituted by a Minister or within a department as well as Parliamentary committees.

What tends to be overlooked in discussions of commissions of inquiry is the major role now played in New Zealand by three permanent statutory commissions established in the last dozen years; the Human Rights Commission, the Securities Commission and the Law Commission. Under section 6(1) of the Human Rights Commission Act 1977 that commission has the function of reporting to the Prime Minister from time to time on (a) any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights; (b) the desirability of the acceptance by New Zealand of any international instrument on human rights; and (c) the implications of any proposed legislation (including subordinate legislation) or proposed policy of the government which the commission considers may affect human rights.

Amongst the functions of the Securities Commission under section 10 of the Securities Act 1978 are (1) to keep under review the law relating to bodies corporate, securities, and unincorporated issuers of securities, and to recommend to the Minister any changes that it considers necessary (para b); and (2) to keep under review practices relating to securities, and to comment thereon to any appropriate body (para c). The recent major inquiries leading to the multi-volume reports of the Securities Commission on insider trading and company takeovers could well in the past have been conducted by Royal Commissions. So too the earlier major studies of nominee shareholdings in public companies and of contributory mortgages.

The Law Commission's functions and powers are even more widely expressed. Its principal functions are spaciously described in section 5(1) of the Law Commission Act 1985 as being (a) to take and keep under review in a systematic way the law of New Zealand; (b) to make recommendations for the reform and development of the law of New Zealand; (c) to advise on the review of any aspect of the law of New Zealand conducted by any government department or organisation and on proposals made as a result of the review; and (d) to advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. And its specific powers under section 6 include initiating proposals for the review, reform or development of any aspect of the law of New Zealand and receiving and considering any such proposals made or referred to it by any person; initiating, sponsoring and carrying out such studies and research as it thinks expedient for the proper discharge of its functions; publicising such parts of its work in such manner as it thinks expedient, conducting public hearings, seeking comments from the public on its proposals, and consulting with any persons or classes of persons. It is the statutory equivalent of a semi-permanent Royal Commission with a roving function which has enabled it in recent years to issue discussion papers and reports on such divergent topics as accident compensation, court structures, arbitration, company law, the interpretation of legislation, limitation defences in civil proceedings, imperial legislation in force in New Zealand, Maori fisheries and reform of personal property security law.

Clearly there are overlaps between the review and reform functions of the three commissions. What is more significant in practice is the legislative recognition of the desirability of having statutory commissions of inquiry with appropriate expertise and experience and each with a broadly defined area of responsibility.

As one would expect the Commissions of Inquiry Act 1908 provides ample scope for the constitution of commissions on a wide variety of subjects. Under section 2 a commission may be constituted to inquire into any question arising out of or concerning (a) the administration of the government; (b) the working of any existing law; (c) the necessity or expedience of any legislation; (d) the conduct of any officer in the service of the Crown; (e) any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury; or (f) any other matter of public importance. And the notes to section 2 in the 1974 statute book where the Act is reprinted list around 100 statutes and regulations providing for the appointment of commissions of inquiry or the holding of inquiries or investigations.

Of more significance than the bare listing of a wide range of subjects for inquiry are two central features of the 1908 Act. One is the conferral on commissions of inquiry under the Act of the powers which such a commission may need to perform its functions adequately. Its compulsive powers enable the commission to require the attendance of witnesses and the production of documents and to award costs. These powers are balanced by the entitlement of those involved or having an interest in the inquiry to be heard and to have the same privileges and immunities as witnesses

and counsel in courts of law. These provisions are basic to the functioning of commissions, or at least to the functioning of commissions where conduct is or may be in question. That is a point to which I shall return shortly.

The other central feature of the 1908 Act is that the constitution of the commission and the appointment of its membership are by the Governor-General by Order in Council. Once constituted that mechanism provides an appropriate distancing of the commission from the political and executive arms of government. At that point the commission has its terms of reference set in the Order in Council along with a reporting date. Certainly it may be affected by the degree of co-operation of public servants in the Ministries involved. Even so a commission constituted in that way has a substantial degree of independence both in the public perception and in reality. If then there is a certain souring of relationships in any quarter as the inquiry proceeds, a commission under the 1908 Act has the comfort of knowing that it will be able to continue the inquiry and complete its report unless the government of the day takes the very public step of obtaining another Order in Council closing it down, a step which so far as am I aware has been taken only once in the last fifty years or more.

Commissions are constituted as Royal Commissions where it is considered desirable to confer the greater prestige that the title is thought to convey. There is of course a difference in the form of the instrument of appointment and the authority under which it is issued. Royal Commissions are constituted by the Governor-General in the exercise of the Royal Prerogative pursuant to the Letters Patent to the Governor-General. The Commissions of Inquiry Act expressly applies to inquiries held under the Letters Patent (s15) and in practice warrants are expressed to be issued under the authority of both the Letters Patent and the 1908 Act.

Oversight by the Courts

In broad terms inquiries under the 1908 Act and under the Letters Patent may be divided into two categories: those which advise and those which investigate. Commissions which advise gather information and advise the government on public policy questions, including matters of governmental administration. Commissions which investigate are those which are primarily concerned to inquire into questions of conduct including major disasters and accidents. Clearly there is some overlapping but the distinction is significant.

Consider a commission in the second category, one which investigates. Where a searching inquiry is held into events or rumours which have given rise to public concern with the object of ascertaining the truth and attributing blame if blame is due, individuals may be very tarnished in the process. It is a matter of balancing the public interest in the search for truth in issues of national concern on the one hand, and the public interest in the protection of privacy and reputation on the other. That is because, while findings of commissions are in the end expressions of opinion only and do not affect the legal rights of the persons to whom they refer, nevertheless they may greatly influence public and government opinion and have a devastating effect on personal reputations. The courts perform a balancing

role in exercising as they do a review function in determining whether the commission has kept within its terms of reference and has acted throughout in accordance with any applicable principles of natural justice.

That same emphasis on fair play and the protection of individual rights is not required where the commission is performing an advisory rather than an investigative function. Individual interests are not so clearly at stake although even in the advisory area questions of individual conduct may require consideration in which case administrative law safeguards will apply. And while in an advisory type inquiry there may not be any parties as such or other bodies ready to check and challenge a commission which appears to be exceeding its powers by going outside the proper scope of its inquiry (cf *Royal Commission on Licensing* [1945] NZLR 665) or appears to be demonstrating predetermination or bias, the commission itself has a clear responsibility to ensure that it acts according to law. That is one reason why it is common to appoint lawyers to chair inquiries. Another reason, of course, is their experience in the conduct of hearings, in analysing and marshalling evidence and in writing reports.

In recent years challenges to the conduct of two Royal Commissions, the Erebus Commission and the Royal Commission on the Thomas case, have come to the Court of Appeal. In *Erebus* ([1981] 1 NZLR 618) the court divided 3:2. All the judges concluded that in making the allegations stated in paragraph 377 of the report of "a predetermined plan of deception" and that ringing phrase "an orchestrated litany of lies" the Royal Commission acted in excess of jurisdiction and contrary to natural justice. We all took the view that those allegations amounted to a charge and a finding of conspiracy on the part of the chief executive of the airline, the executive pilots and members of the navigation section to commit perjury at the inquiry, and that the order that the airline pay $150,000 costs reflected the same thinking. Where we differed was in the factual area. The majority stressed the limited role of the court: the minority reviewed the evidence before the Royal Commission in various areas and rejected the commission's findings. The minority's more intrusive approach was vindicated by the judgment of the Judicial Committee delivered by Lord Diplock ([1983] NZLR 662). In doing so the Privy Council held that there were two rules of natural justice that were germane to the appeal –

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
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> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory (671).

The Privy Council reviewed the evidence in central areas of the inquiry at some length and concluded that there had been no material of any

probative value on which to base a finding that a predetermined plan of deception ever existed.

Clearly commissions must be given reasonable freedom to control their own processes and arrive at their conclusions in their own way without an overly and overtly intrusive approach on the part of the courts. Clearly it is a matter of balancing the various public interests involved. It remains to be seen how the New Zealand courts and commissions will respond to a requirement that findings of a commission must be based on evidence which the courts will regard as being of probative value.

Like so much of the Thomas saga the challenges to the Royal Commission on the Thomas case raised some very difficult legal problems. No criminal case in recent times caused such controversy and stirred public conscience so much as the convictions of Arthur Alan Thomas for the murders of Jeanette and Harvey Crewe on 17 June 1970. Following the grant of a pardon nearly nine years after the first trial and conviction and 6½ years after the second trial and conviction a commission of inquiry was constituted to inquire into a number of questions including whether the police investigation was carried out in a proper manner. The conduct of the inquiry was challenged both before a full court of the High Court and later, and following presentation of the commission's report, before the Court of Appeal ([1982] 1 NZLR 252). We concluded that the commission had not acted in breach of the obligations of natural justice as to affording a fair hearing. The court was not satisfied that any of the challenged findings of the commission (apart from one acknowledged mistake) were based on evidence which the commission was not entitled to regard as having probative value. The weight of the evidence was a matter for the commission and not the court.

The more difficult ground of challenge was that the proceedings of the commission and its report were vitiated by predetermination on the part of the commission. The test for bias by predetermination in the case of a commission inquiring into and reporting on allegations of impropriety is whether an informed objective bystander would form an opinion that a real likelihood of bias existed. The court emphasised that, while clearly this branch of the law of natural justice seeks to ensure as far as possible true fairness, its immediate aim is no more than the modest one of trying to ensure that justice should appear to be done and, in the case of a commission appointed to inquire and advise the government considerable latitude must be allowed (277).

The three main factors relied on for the Police Association were first the commission's fixed view that Thomas was innocent, second its attitude to evidence favourable to the police and the manner in which it received such evidence, and third the report itself. The chairman of the commission was a very forthright retired Australian judge. He even went on television in the course of the inquiry broadcasting his views to the public in forceful language, describing the police actions as indecent and next day at the inquiry another commissioner characterised them as "morally wrong". The fact that the views of the law broadcast on that occasion by the chairman were wrong only made the matter worse (285). However, in the end the bias question turned wholly on the way in which the Royal Commissioners approached the evidence which they admitted. The judgment concluded

that the case was finely balanced. While holding that the police had reasonable grounds for issuing proceedings, we concluded that the case was not clear enough to justify a finding that the burden of proof of bias had been discharged.

Some readers of the judgment might regard it as an indictment of the manner in which the inquiry was conducted, others might view it as an unjustified intrusion by the courts into the proper area of responsibility of the Royal Commission, still others might characterise the result as a failure of the court system to exert adequate controls over commission processes. However, the message is clear: commissions of inquiry risk being challenged in the courts for going outside their terms of reference and for any perceived failures to meet the principles of natural justice in the conduct of inquiries.

The Functioning of Commissions

I turn now to the second part of the topic for discussion, the functioning of commissions. As Professor Twining pointed out in the Modern Law Review (vol 43, 558) in discussing the report of the Royal Commission on Legal Services in the United Kingdom, commissions of inquiry differ according to the original motives for setting them up, their status, their membership, their conception of their task, the nature of the subject-matter, their modus operandi, the speed and scale of the operation, the quantity and quality of the evidence submitted and of the research undertaken. Each report needs to be seen as an event in a process which began before the committee (or commission) was established and continues after the submission of a final report. The tasks of an ad hoc committee may include extensive investigation to collect new data, devising new solutions or responses to perceived problems, mediating or negotiating packages of proposals which balance conflicting interests, allaying public disquiet, winning acceptance for particular policies or merely taking the heat out of public debate.

Those comments have particular application to the first category of inquiries, those which advise. In purely investigative inquiries arising from a disaster or an event causing public disquiet, the conduct of the inquiry usually parallels the ordinary processes of the courts with at least the major interests being represented by counsel adducing evidence (which is subject to cross-examination) and presenting submissions. Commissions usually rely on counsel appointed to assist the commission to look after the interests of those not otherwise represented, to cross-examine in areas of particular concern to the commission and to ensure that other lines of inquiry are pursued and ventilated at the hearings rather than for the commission to descend into the public arena. Even so Professor Twining's points have some application in that situation.

So in assessing the performance of any particular commission of inquiry it is important to identify the nature of the inquiry, the social and political context in which it was instituted and operated, the manner in which the commission conducted the inquiry and the content and conclusions of its report. To highlight the diverse considerations involved in any such assessment of the differences from one inquiry to another, I turn now to

consider the three governmental inquiries I referred to earlier, the Committee of Inquiry into Inflation Accounting, the Committee of Inquiry into Solicitors Nominee Companies and the Royal Commission on Social Policy, and emphasise again that I shall be concentrating on the processes followed in the inquiry.

Inflation Accounting

The inquiry was constituted against the background of mounting concern through the Western world that conventional historical cost accounting methods had failed to provide adequate information as to the impacts of changes in costs and prices and values, of parallel inquiries in the United Kingdom and Australia and of considerable activity on the part of professional accountancy bodies in New Zealand and overseas. The establishment of the committee and its membership were announced on 22 December 1975 and it reported nine months later on 28 September 1976 in a report of some 270 pages.

It was a specialised inquiry and the other members of the committee all had particular relevant expertise: Dr D T Brash, economist and the present Governor of the Reserve Bank; Mr R P Kellaway, Chief Deputy Commissioner of Inland Revenue; Mr P S Stannard, Chartered Accountant and professional consultant and company director; and Mr H M Titter, also a Chartered Accountant and chief executive of Feltex. I had specialised in tax and commercial work. The secretariat included three very talented officials seconded from Treasury, the Reserve Bank and the Inland Revenue Department and Mr P M McCaw, a Chartered Accountant in public practice, acted as special adviser to the committee for the latter part of the inquiry. The committee advertised for submissions in newspapers and in professional and commercial publications and issued over eighty specific invitations to organisations and individuals. As a result we received some sixty submissions ranging from a few pages to book length. Because of the nature of the inquiry there were no public hearings but there were numerous discussions with various organisations and individuals on specific points of concern to the committee including meetings at which we tested our tentative thinking. The inquiry involved considerable analysis of research in New Zealand and overseas, and the current cost accounting model ultimately proposed required considerable work in developing systems for treating monetary assets and liabilities.

Solicitors Nominee Companies

The committee had its genesis in the wake of the report of the Royal Commission on Drug Trafficking. That commission was constituted in Australia and because of the international operations of some of those investigated, notably a New Zealander Terrence John Clark and his associates, the inquiry was extended to New Zealand. In its report the Australian Commission concluded that the Solicitors Nominee Company system had been used to launder drug money. Nominee companies were and are widely used as a vehicle for the advancing of clients' deposits on mortgage to borrowers and suspicions engendered by the Royal Commission's findings gave rise to public concern affecting confidence in the operation of nominee companies and solicitors' trust accounts.

It was against that background that our inquiry was instituted. Again it was an expert committee, the other two members being Mr M F Dunphy, a lawyer, and Mr R C Pope, a Chartered Accountant in public practice, both very experienced in practice and very active in the respective professional bodies, the New Zealand Law Society and the New Zealand Society of Accountants, accountants having a particular interest as auditors of lawyers' trust accounts. Because of the restricted nature of the inquiry we did all the research and analysis and writing of the report ourselves. It was important in the public interest that the inquiry be conducted publicly and be brought to a speedy conclusion. The committee had its first meeting on 6 July 1983 and reported less than three months later on 29 September 1983. The report ran to 64 pages.

At the outset submissions were sought through newspaper advertising and through direct approaches to organisations thought likely to be interested. Only nine written submissions were received but some balance was provided through the scrutiny of the functioning of nominee companies and trust accounts facilitated by major submissions from the New Zealand Police and the Securities Commission as well as the Law Society and the Society of Accountants. In view of the circumstances giving rise to the inquiry it was important that at least the major submissions be presented at public hearings and that other submissions be available to the media and others for reference. As in the case of the Inflation Accounting Inquiry the committee had many discussions with various bodies to clarify and test its thinking as the inquiry proceeded.

The inquiry required by the terms of reference was essentially information gathering and advisory in nature but some of the material tendered referred to the conduct of particular individuals and accordingly had to be accorded a degree of confidentiality and treated with sensitivity while still ensuring that the resulting recommendations and reasoning were fully canvassed at public hearings. The inquiry also raised some very interesting legal questions concerning two matters of continuing significance, the use of aliases and legal professional privilege.

Royal Commission on Social Policy

The Royal Commission on Social Policy was a very different exercise in almost every respect. The commission was required to undertake a nationwide inquiry designed to assist in setting social policy goals. There were three special features of the inquiry: (1) the nature and breadth of the inquiry; (2) the focus on public participation and consultation as crucial steps in arriving at social policy goals and assessing policies; and (3) the challenge of conducting an inquiry under the pressures of economic and social change and political involvement in social policy questions.

I shall deal with each in turn but first some bare details. The commission was constituted at the end of 1986 and the commissioners had their first meeting on 2 February 1987. The warrant required the commission to report by 30 September 1988, but in the event the report was presented five months early on 6 May 1988 for reasons I shall mention later. The report ran to five volumes and 4,000 pages, and it was followed shortly afterwards by a 60 page summary report called *Towards a Fair and Just Society.* In

the course of the inquiry the commission published a regular newsletter, a series of five discussion papers to provide a focus for submissions, followed by a set of papers on the role of the State, and working papers on income maintenance and taxation, some fifteen further discussion papers and an abstract of the 6,000 submissions received. The commissioners were engaged full-time on the inquiry, there was a substantial secretariat and over the life of the commission well over 100 persons were engaged on contract for various terms for a wide range of projects. The cost of the inquiry was over $5m.

(a) Nature and Breadth of the Inquiry

On one view social policy is concerned not only with material wellbeing but also with all those other features of living in New Zealand that contribute to the quality of life and to community relationships with each other. The warrant set the terms of reference of the commission in the broadest terms. Social welfare and social security were not mentioned as such nor specific areas such as education, health, justice and so on. Rather, the intended focus was on the kind of society we are and want to be and so was concerned with (1) assumptions, objectives, principles and criteria applying to policy developments – both the substance and the process – and from area to area; (2) establishing preferences and priorities in the use of resources; (3) questions of funding, of income maintenance and distribution and of access to and delivery of social provision in areas such as health, education, housing and the justice system; (4) the assessment and monitoring of policies and of the performance of institutions; and (5) the respective roles at each step in that process of central government, local government, the private sector, voluntary associations, the nuclear family and the extended family and individuals.

The commission was specifically directed "to inquire into the extent to which existing instruments of policy meet the needs of New Zealanders, and report on what fundamental or significant reformation or changes are necessary or desirable in existing policies, administration, institutions, or systems to secure a more fair, humanitarian, consistent, efficient, and economical social policy which will meet the changed and changing needs of New Zealand and achieve a more just society". That multiple question was then followed by an extended list of specific questions and sub questions.

The terms of reference went on to provide guidance for the commission in carrying out that inquiry. They did so in two ways. One was to identify what were described as the standards of a fair society and the foundations of our society and economy. The other was in directing the commission to consult widely and adopt procedures which encouraged people to participate, to draw on the findings of reviews and to conduct research.

The breadth of the inquiry led to wide ranging submissions and to the need for substantial research and assessment. It led to an immensely difficult problem of managing the information flow and of analysing and synthesising data from submissions and from the research programme. It also made it necessary to develop an adequate data base, to devise a work programme of manageable proportions and to think carefully about the kind of report we should finally present, a point to which I shall return.

(b) The Focus on Public Participation and Consultation

It is obvious from the subject matter that it was not intended as a specialised or technical inquiry. That was also reflected in the membership of the commission drawn as it was from a cross section of experience in the community. The other commissioners were Anne Ballin, a psychologist and deputy chair of the Hillary Commission for Recreation and Sport; Marion Bruce, a community worker and former chairman of the Wellington Hospital Board; Len Cook, the deputy government statistician who was added as sixth commissioner in October 1987 having previously had responsibility for the work programme; Mason Durie, a psychiatrist and a Maori; and Rosslyn Noonan, a trade union official. Given our different backgrounds it was necessary for all of us to read very extensively and take part in a large number of briefing sessions (over 100 in the first few months), drawing on the expertise of those knowledgeable in various fields. It was crucial too that we try to assess the values, concerns and goals New Zealanders have as a society.

It was these factors combined with the injunction in the terms of reference that led to the focus on public participation and consultation. That process was very time consuming but crucial in assisting us to a better understanding of contemporary New Zealand. Hearings were held around the country, 4,000 attending the first series and 3,000 the second. Commissioners appeared regularly on radio and television and took part in talkback shows. There was a free phone which brought in nearly 1,000 submissions. In total, 250 national organisations, hundreds of local and community organisations and groups as well as thousands of individuals made submissions. The 6,000 submissions received thus reflected the responses of hundreds of thousands of New Zealanders.

In any inquiry there is a need to recognise that the most articulate and concerned sectional interests and those who get closest to the commission have an advantage. Some commentators describe it as the risk of capture. It is that the commission may be unduly influenced by those very practised in making submissions, by the providers of services in health, education, welfare and so on, by those who see themselves as the immediate beneficiaries and so at risk from any change, by the departments of state immediately affected, and by the secretariat usually consisting of officials who through providing the paper flow and through involvement in drafting the report may have a significant influence over its form and content. The problem of capture is one which lawyers and judges are well used to facing in the adducing and assessment of evidence and the presentation of submissions in courts and tribunals. But the dimensions of the problem here were much greater. We took various steps. Perhaps the most significant was to arrange for an attitudinal survey – perhaps the most extensive social survey undertaken in New Zealand – to assist us in determining whether the views coming through in the submissions were matched in the population at large.

We also had to think carefully about the kind of report we should finally present and what process we should follow in preparing material for the report. There were several reasons why we did not present a slim statement of principle along the lines of the ILO Report *Into the 21st Century:*

Development of Social Security, although to do so would have been more in line with the length of reports that have customarily been presented in New Zealand. The first reason was the breadth of the terms of reference. The second was the emphasis which the terms of reference and the commission itself attached to the submissions and to the assessment of public attitudes. The third was a strong feeling that the supporting material and reasoning should be accessible along with the broad conclusions. This practice is now commonplace in inquiries in many other countries such as Canada and America.

The preparation of the report presented special problems. This was partly because of its scope as well as the very different backgrounds and perspectives of the commissioners. And there are several distinct reader groups for a report of this kind. There is the general public who rely essentially on reporting through the media – and there are understandable limits on the capacity of the media, operating as they do within a narrow time frame, to absorb and present material quickly. But a commission is also writing for busy ministers and other politicians; for officials who will be expected to review the detail and report to ministers over a period of many months; and for special interest groups and for academic study.

The breadth of the subject, the need to draw on submissions and the importance of providing sufficient material for officials reporting to ministers and for others wanting that detail, meant that the report had to be long and complex. How could it be made digestible to other readers bearing in mind that a Royal Commission Report cannot be released in segments? Ideally one should write several reports tailored to the respective reader groups. The summary report *Towards a Fair and Just Society* was intended as partial response to that particular problem, but unfortunately it could not be published until after the main report.

(c) The Challenges of Conducting an Inquiry Under the Pressures of Economic and Social Change and Political Involvement in Social Policy Questions

During the course of the inquiry in 1987 a stream of governmental initiatives and a series of other reviews in the social policy area took place. No commission can expect a government to go into hibernation while a commission with 18 months or two years till reporting date is pursuing its inquiries. But at times right through 1987 there was a perception ventilated in submissions and in the media that the inquiry was being pre-empted in some crucial areas; that decisions were being made before the commission's views would be known. In that situation we had to take a hard look at what we could reasonably expect to achieve. We sought to develop understandings with ministers, to make working arrangements with other inquiries and to demonstrate our independence by publicising the commission's activities and future programme. In January 1988 and because of the pace of decision making within government, we decided that we had to bring out a substantial report as quickly as we could. Our earlier plan had been to publish a series of eight sets of working papers covering major areas of inquiry for wide consideration and for testing of our preliminary thinking, before presenting the full report and the summary

report together in September. In the shortened time frame only one set of working papers on income maintenance and taxation could be produced.

Conclusions for the Future

Commissions of inquiry have a well-understood role in the machinery of government. As in the past, it is likely that they will continue to be used for two broad purposes: to provide information and advice on matters of public policy; and to investigate major disasters or events which have become matters of public concern.

It seems to me there are three features of the commission system of particular significance for the 1990s. The first stems from the oversight by the courts of the conduct of commissions. There are two interests at stake. One is the protection of those who may be adversely affected by extra-judicial inquiries of this kind. The other is the community interest in having these questions thoroughly investigated. The challenge for the future is to achieve an appropriate balancing of the various public interest considerations.

The second relates to the processes followed by commissions inquiring into matters of public policy. It will I think become standard for advisory commissions to make the widest assessment of informed opinion on the matters under inquiry. Through an extensive consultation process facilitated by issues papers, discussion papers, and working drafts they will test their thinking before presenting their final report.

The third concerns the role of permanent commissions such as the Law Commission, the Securities Commission and the Human Rights Commission. That is likely to turn largely on two factors. One is the calibre of members of commissions and their staffs. The other is the willingness of governments to have sources of advice of that kind which have a substantial degree of independence and authority.