

Hon Tracey Martin

Minister for Children

Associate Minister of Education

Minister of Internal Affairs

Minister for Seniors



23 JUL 2019

G S via FYI.org.nz
fyi-request-10603-b02d77bb@requests.fyi.org.nz

Dear G S

Request under the Official Information Act 1982

Thank you for your email of 25 June 2019 requesting the following information under the Official Information Act 1982 (the Act):

" 1. the terms of reference of any related documents you hold (such as, but not limited to, briefings and Cabinet papers) in relation to the review that must be commenced under section 36 of the Inquiries Act 2013."

Please find attached one document which falls within scope of your request.

You have the right, under section 28(3) of the Act, to seek an investigation and review of my decision by the Office of the Ombudsman. The postal address of the Office of the Ombudsman is PO Box 10152, Wellington. Alternatively, you can phone 0800 802 602 or email info@ombudsman.parliament.nz.

Thank you again for writing.

Yours sincerely

A large, stylized handwritten signature in black ink, appearing to be 'Tracey Martin'.

Hon Tracey Martin
Minister of Internal Affairs



Internal Affairs briefing

Hon Tracey Martin
Minister of Internal Affairs

Title: **Policy briefing: Review of continuing application of Commissions of Inquiry Act 1908**

Date: 20 June 2019

Key issues

Section 36 of the Inquiries Act 2013 (2013 Act) requires you, as the responsible Minister, to ensure a review of the continuing application of the Commissions of Inquiries Act 1908 (1908 Act) is commenced no later than 27 August 2018. The review must consider:

- what powers entities that continue to derive inquiry powers from the 1908 Act require to carry out their functions and duties; and
- what changes to the law are necessary to replace those inquiry powers, with a view to repealing the remaining provisions of the 1908 Act.

Our preliminary scoping work meets your statutory obligation to commence the review. We have identified two options for the future direction of the review for your consideration. In addition, a decision is required on when to progress the review considering your portfolio and other Government priorities.

Action sought

Timeframe

Scope

Approve Option A (preferred option): Review of the continued application of the Commissions of Inquiry Act 1908 to be led by the Department of Internal Affairs; **OR**
Approve Option B: Review of the continued application of the Commissions of Inquiry Act 1908 to be devolved to agencies; and

Timing

Instruct the Department to defer further work on the review at this time, and brief you again in March 2020 (preferred option); **OR**

Instruct the Department to commence work on your preferred option for the review; and

Review update

Indicate if you would like the Department a draft letter or similar, so you can update your ministerial colleagues on the steps taken to date, and/or next steps.

At your convenience

Contact for telephone discussions (if required)

Name	Position	Direct phone line	After hours phone	Suggested 1 st contact
Gina Smith	Director Policy Services	04 494 5717	027 200 6580	
Ruth Fischer-Smith	Policy Manager	04 494 0537	027 587 5425	✓

Return to	Cathy Nijman, Level 9, St Paul's Square, 45 Pipitea Street
Cohesion reference	FZVS55NRNZNU-1574178612-13
Ministerial database reference	IA201900605

Purpose

1. This briefing provides an overview of the Department of Internal Affairs' (the Department) work on your behalf on the review of the Commissions of Inquiry Act 1908 (1908 Act). Our preliminary scoping work meets your statutory obligation, set out in section 36 of the Inquiries Act 2013 (2013 Act), to commence the review by 27 August 2018.
2. We have identified two options for the future direction of the review for your consideration (**Appendix A**). In addition, a decision is required on when to progress the review considering your portfolio and other Government priorities.

Background

Law Commission review of public inquiries (2006–2008)

3. The Law Commission's review of public inquiries focused on inquiries established as Royal Commissions and other commissions established under the 1908 Act, and non-statutory Ministerial inquiries. The review excluded tribunals and other statutory entities that derive powers from the 1908 Act.
4. The Commission found the 1908 Act was (is) antiquated, with many confusing provisions. Multiple amendments, often in response to particular inquiries, had been made without regard to their wider impact. The Commission's final report included a draft Bill to reform and modernise the law relating to inquiries.¹

Inquiries Act 2013

5. The Bill giving effect to the Law Commission's recommendations was reported back from the select committee in November 2009. However, the Bill was put on hold until the Pike River and Canterbury Earthquakes Royal Commissions reported in late 2012.
6. The 2013 Act, which came into force on 27 August 2013, established a new statutory framework for public inquiries and government inquiries.² Both forms of inquiry have the same legal powers and protections. The 2013 Act incorporates lessons learnt from the two Royal Commissions, including maximising flexibility, and freeing inquiries from procedural and legislative constraints.

Commissions of Inquiry Act 1908 remains in force

7. The Law Commission noted the 1908 Act had been widely (and inconsistently) incorporated by reference in other Acts, some of which had (have) other provisions dealing with similar issues or having essentially the same purpose. Despite the resulting uncertainty and lack of transparency, the Commission rejected the option of including tribunals and statutory entities that derive powers from the 1908 Act within what is now the 2013 Act.
8. The Commission considered its recommendations, which were directed at one-off inquiries of a general nature, were not necessarily appropriate for tribunals and statutory entities exercising regulatory, disciplinary or adjudicative functions. Consequently, the Commission considered there was no option but to leave the 1908 Act in force in the interim for the approximately 66 entities that took (take) powers from that Act (see **Appendix B**).

¹ Law Commission *A New Inquiries Act* (R 102, 2008).

² Public inquiries, including Royal Commissions, deal with issues of significant public importance. Government inquiries typically relate to less complex, discrete issues that require independent investigation.

Problems arising from the continued application of the 1908 Act

9. The continued application of the 1908 Act creates uncertainty and confusion for affected entities who are unsure about how the Act applies to them. For example, the Department recently received a query from a District Licensing Authority established under the Sale and Supply of Alcohol Act 2012. And as the Law Commission noted, the status quo “renders the law inaccessible to the public, and can cause difficulty where the analogy between a tribunal or other body, and an inquiry is not clear.”³

The Minister of Internal Affairs must ensure a review of the 1908 Act is commenced within five years of the 2013 Act coming into force (ie, 27 August 2018)

10. Consistent with the Law Commission’s recommendation, section 36 of the 2013 Act requires a review of the entities that continue to derive powers from the 1908 Act. The entities include:
- one-off bodies or officers who may be given powers to inquire and report, or investigate;
 - statutory standing commissions, authorities or officers; and
 - adjudicative and disciplinary bodies.
11. The review must consider:
- what powers each entity requires to carry out its functions and duties; and
 - what changes to the law are necessary to replace any powers an entity derives from the 1908 Act with a view to that Act’s final repeal, if possible.

As a first step, the Department has reviewed the list of entities that continue to derive powers from the 1908 Act ...

12. Our preliminary scoping work meets your statutory obligation to commence the review by 27 August 2018. We have focused on updating Schedule 1 of the 2013 Act, which lists 51 Acts under which entities have been, or may be set up, and to which the 1908 Act applies (see **Appendix B**).
13. The scoping work confirms entities’ use of their inquiry powers varies widely. However, we cannot say with any certainty what powers entities use (or need), how often, why, and in what circumstances. A small number of entities (eg, the Social Security Appeals Authority and the Waitangi Tribunal) are likely to use their powers every day. Others may have never, or only rarely, used their inquiry powers. Some entities may be defunct.

... and we now seek your direction on next steps considering your portfolio and other Government priorities

14. We have identified two options for the review for your consideration:
- **Option A** (preferred option)—The Department would lead the review. In addition to reviewing the legislation we administer, we would work with other agencies to review the legislation/entities listed in **Appendix B**. **Option A** would deliver a comprehensive picture of the status quo, over time. It would provide a sound evidential basis for decisions on the future of the 1908 Act, and next steps.
 - **Option B**—Responsibility for reviewing legislation that continues to reference the 1908 Act would be devolved to individual agencies. Agencies would be encouraged to complete their part of the review in a timely manner, in line with their regulatory stewardship obligations. The Department would focus its resources on reviewing the legislation it administers.

³ Law Commission *A New Inquiries Act* (R 102, 2008) at [15.7].

15. **Appendix A** provides an overview of both options, including advantages and disadvantages.

Option A (preferred option) focuses on information and options identification.

It would—

- require greater resource commitment from the Department;
- deliver a comprehensive picture of the status quo, over time; and
- provide a sound evidential basis for decisions on the future of the 1908 Act.

We could—

- be flexible about timing to manage available resources;
- start by focusing on the legislation we administer;
- engage with other agencies at mutually agreed future date/s (to assist with their and our existing commitments); and
- develop a template for the review to assist agencies and ensure consistency.

We would—

- get a clear picture of entities' need for, and use of, inquiry powers, over time; and
- be able to make an informed recommendation on next steps, consistent with other ministerial and Government priorities.

Option B would emphasise agencies' existing regulatory stewardship obligations.

It would—

- minimise the resource commitment from the Department;
- enable agencies to establish their own timeframes, and set their own deliverables.

We would—

- share with administering agencies information gathered during the preliminary scoping work; and
- focus our efforts and resources on the legislation we administer.

It could—

- exacerbate inconsistencies relating to entities' inquiry powers; and
- result in unnecessary duplication of effort across agencies.

It would not—

- provide a clear picture of the status quo; or
- have clear deliverables or endpoint.

16. **Both options** offer flexibility in terms of timing and resource allocation, for the Department and other agencies. Work on your preferred option could start now, but the timeframe for completion could be extended to minimise the impact on the Department's and other agencies' existing work programmes.
17. Alternatively, you could indicate your preferred option but instruct the Department to defer further work at this time. In this case, we would recommend the deferral decision be reviewed in March 2020, in line with your portfolio and other Government priorities.

Rejected options: Limiting the scope of the review

18. We considered and rejected two further options as inconsistent with the minimum requirements set out in section 36 of the 2013 Act. They were: (a) limiting the review to legislation that is, or may be, spent and could be repealed; and (b) limiting the review to known "high use" entities such as the Social Security Appeals Authority and the Waitangi Tribunal.
19. First, section 36 does not provide discretion over what entities should be reviewed. Second, the gaps in our knowledge of the status quo means we cannot identify with certainty what entities could be classed as "high users" of inquiry powers, or what legislation could be repealed. Third, limiting the initial scope of the review would compromise its overarching purpose (ie, repeal of the 1908 Act, if possible).

Timeline and next steps

- 20. Given current work programme commitments, we recommend deferring further work on the review at this time. If you agree, we will brief you again in March 2020.
- 21. We can brief you further on timing and next steps following your decision on your preferred approach to the review. We can provide you with further information on the issues raised in this briefing if required.
- 22. We could also provide you with a draft letter or similar, so you can update your ministerial colleagues on the steps taken to date. Depending on your decision on timing, the letter could seek Ministers'/their agencies' support for your preferred approach to the review.

Recommendations

23. We recommend that you:

Scope—

- a) **approve Option A** (preferred option): Review of the continued application of the Commissions of Inquiry Act 1908 to be led by the Department of Internal Affairs); **OR** Yes/No
- b) **approve Option B**: Review of the continued application of the Commissions of Inquiry Act 1908 to be devolved to agencies; and Yes/No

Timing—

- c) **instruct** the Department to defer further work on the review at this time, and brief you again in March 2020 (preferred option); **OR** Yes/No
- d) **instruct** the Department to commence work on your preferred option for the review; and Yes/No

Review update—

- e) **indicate** if you would like the Department to draft a letter or similar, so you can update your ministerial colleagues on the steps taken to date, and/or next steps Yes/No

Include an amended option A form as attached - remove the disadvantages & conclusion & retitle to indicate our decision & process.

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Gina Smith
Director Policy Services

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Hon Tracey Martin
Minister of Internal Affairs

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Appendix A: Options for the review of the continuing application of the Commissions of Inquiry Act 1908

Option A: Department of Internal Affairs leads review (preferred option)

Overview—

Option A focuses on information and options identification. It would—

- deliver a comprehensive picture of the status quo; and
- provide a sound evidential basis for decisions on the future of the 1908 Act, and the best way to proceed. We would brief you at the review's conclusion, and seek your direction on next steps.

Key features—

- Starting point is the updated list of entities that continue to derive powers from the 1908 Act
- Focus is on information gathering and options identification
- We would work closely with agencies to determine:
 - entities' primary function/s (because that is not always clear)—whether an entity exercises regulatory, disciplinary, or adjudicative functions informs what powers it needs;
 - the extent to which entities use, and still require, powers derived from the 1908 Act;
 - whether their current or future legislation work plans, do (or could) include a review of entities' inquiry powers, including the repeal or replacement of provisions referencing the 1908 Act; and
 - whether any provisions referencing the 1908 are redundant and could be repealed.
- We would also complete an initial assessment of existing, alternative legislative models for providing inquiry powers that could replace (and in one case has replaced) the need for entities to derive powers from the 1908 Act.

Advantages—

- Aligns with the Law Commission's recommendation
- Consistent, whole-of-government approach
- Maximises ability to identify "quick wins" (eg, repeal of spent provisions referencing the 1908 Act)
- Would provide the evidence to inform next steps, consistent with other ministerial and Government priorities

Disadvantages—

- Greater resource requirement than Option B
- Could require some realignment of agencies existing work programmes
- May involve additional work for the Department if agencies do not prioritise the review

Conclusion—

Option A is the preferred option. It most closely aligns with the Law Commission's recommendation to complete the review "in a timely manner to determine what law changes need to be made to enable the final repeal of the 1908 Act." Option A would involve a greater resource commitment than Option B. However, the impact for the Department and agencies could be managed through early stakeholder engagement, extending the time to complete the various steps if necessary, and/or deferring the start of Option A.

Option B: Review devolved to individual agencies

Overview—

Option B would emphasise agencies' existing regulatory stewardship obligations. It would—

- minimise the resource commitment from the Department; and
- maximise agencies' ability to prioritise their contributions to the review in line with their own legislative and other priorities.

We could brief you periodically on agencies' progress, if required.

Key features—

- Starting point is the updated list of entities that continue to derive powers from the 1908 Act.
- Focus is on agency autonomy. For example, agencies would be able to—
 - decide when and how to progress the review;
 - establish their own timeframes, and set their own deliverable; and/or
 - defer further action on the review, now, or later.
- We would adopt a largely “hands-off” approach, although we could check progress with agencies periodically, and update you if required.

Advantages—

- Minimises resource commitment in the short to medium term
- Enables agencies to prioritise the review as they see fit
- We would be able to focus our efforts and resources on the legislation we administer

Disadvantages—

- May be difficult to get traction for the review
- Would not provide a clear picture of the status quo, which would limit future options
- Reduces likelihood of “quick wins”
- Agency-by-agency approach could lead to further inconsistencies relating to entities' powers
- Lack of co-ordination could see unnecessary duplication of work by individual agencies
- No clear deliverables or endpoint
- 1908 Act likely to remain in force

Conclusion—

Option B is not the preferred option. In the past 11 years, agencies have made little progress in reviewing provisions referencing the 1908 Act. In some cases (eg, Social Security Act 2018) the provisions have been re-enacted.

Option B meets the minimum section 36 requirements to “ensure the review is commenced”, but it is inconsistent with the Law Commission's recommendation to complete the review “in a timely manner to determine what law changes need to be made to enable the final repeal of the 1908 Act.”

We note Option B would not preclude a different approach being taken at a later stage (eg, if agencies make insufficient progress within a defined timeframe). However, this would require monitoring and reporting more consistent with Option A.

Appendix B: Acts under which entities have been, or may be, set up and to which Commissions of Inquiry Act 1908 applies

In updating Schedule 1 of the 2013 Act, we have identified:

- some Acts and Regulations not included previously;
- some Acts that may have been included in error (they reference the 1908 Act, but do not have provisions relating to the establishment of inquiries under the 1908 Act);
- some Acts where references to the 1908 Act may be redundant because they also reference section 6 of the 2013 Act (which provides the Act applies to Royal Commissions, public inquiries, and government inquiries);
- several Acts (including some the Department administers) where it is unclear whether the provisions relating to the 1908 Act (or the Act as a whole) are spent, and could be repealed;
- two Acts where Bills repealing references to the 1908 Act have had a second reading; and
- three Acts where the provisions relating to the establishment of tribunals deriving powers from the 1908 Act have been repealed.

Act under which commission of inquiry powers derived (Acts listed in Schedule 1 of the Inquiries Act 2013)		Section/s	Entities to which the Commissions of Inquiry Act 1908 applies	Administering Agency
1.	Gambling Act 2003	225	Gambling Commission	Internal Affairs
2.	Hutt Valley Drainage Act 1967	4(2)	Hutt Valley Drainage Board	
3.	Land Drainage Act 1908	15	Commissions appointed to advise G-G on uniting adjoining districts (in the absence of the district Boards' recommendation/s)	
		65	Commission (District Court Judge or other person/s appointed by the G-G) to advise on (re)districting and/or apportionment of costs	
4.	Local Government Act 2002	34, Sch 5(1)	Local Government Commission	
5.	Local Government (Auckland Transitional Provisions) Act 2010	138	Part 4 – First combined plan for Auckland Council	
6.	River Boards Amendment Act 1913	4	Commission appointed by Governor-General	
7.	Rotorua Borough Act 1922	10	Commission appointed by Governor-General in Council	

Act under which commission of inquiry powers derived (Acts listed in Schedule 1 of the Inquiries Act 2013)		Section/s	Entities to which the Commissions of Inquiry Act 1908 applies	Administering Agency	
8.	Taupiri Drainage and River District Act 1929	3	(Optional) Commission appointed by Governor-General to review boundaries/subdivisions of/for the Taupiri Drainage and River District	Business, Innovation & Employment	
		11	Commission to hear appeals from Taupiri Board's costs apportionment		
9.	Electricity Act 1992	147X	Electrical Workers Registration Board		
10.	Engineering Associates Act 1961	25	Engineering Associates Appeal Tribunal		
11.	Petroleum Demand Restraint Act 1981	4(2)(k)	Tribunal established by regulations may be deemed to be a commission of inquiry		
12.	Plumbers, Gasfitters, and Drainlayers Act 2006	118	Plumbers, Gasfitters and Drainlayers Board		
13.	Remuneration Authority Act 1977	25	Remuneration Authority		
14.	Broadcasting Act 1989	12	Broadcasting Standards Authority		Culture & Heritage
15.	Environment Act 1986	16(2)	Parliamentary Commissioner for the Environment		Environment
16.	Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012	Sch 2, cl 4 Sch 3, cl 5 Sch 4, cl 9	Environmental Protection Authority		
17.	Hazardous Substances and New Organisms Act 1996	3	Inquiries [by a District Court judge] into Ministry of Defence hazardous substance incidents, where not investigated under the Armed Forces Discipline Act 1971		
		61	Environmental Protection Authority		
18.	Resource Management Act 1991	41	Local Authority, Consent Authority or person given authority to conduct hearings under ss 33, 34, 34A, 117, 149J, 202		
19.	Soil Conservation and Rivers Control Act 1941	33A	Minister or Tribunal to hear matters		
		33A(2)	Tribunal appointed by Minister		
		33A(3)	Persons involved in any capacity in an inquiry		

Act under which commission of inquiry powers derived (Acts listed in Schedule 1 of the Inquiries Act 2013)		Section/s	Entities to which the Commissions of Inquiry Act 1908 applies	Administering Agency
20.	Niue Act 1966	75(2)	Commissioners able to examine witnesses	Foreign Affairs & Trade
21.	Health Practitioners Competence Assurance Act 2003	53(1)	Defn: investigation	Health
22.	Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003	101	Inquiries by district inspector	
23.	Mental Health (Compulsory Assessment and Treatment) Act 1992	95	Inquiries by district inspector	
		104	Mental Health Review Tribunal	
24.	New Zealand Public Health and Disability Act 2000	71	Commission appointed by Minister	
25.	Taxation Review Authorities Act 1994	58	Attorney-General, or A-G's appointee	Inland Revenue
26.	Charitable Trusts Act 1957	58	Attorney-General, or A-G's appointee	Justice
27.	Coroners Act 2006	5	Defn: Other investigating authority	
28.	Independent Police Conduct Authority Act 1988	23	Independent Police Conduct Authority	
29.	Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004	26	Judicial Conduct Panel—	
		26(1)	Panel in performance of conduct and duties	
		26(2)	Persons involved in any capacity in hearing or inquiry	
30.	Lawyers and Conveyancers Act 2006	47(d)	Cross-reference to hearing pursuant to 1908 Act, and entitlement to be heard	
31.	Legal Services Act 2011	7(5)(h)	Cross-reference to hearing for which civil legal aid may/may not be granted	
32.	Private Security Personnel and Private Investigators Act 2010	93(2)	Private Security Personnel Licensing Authority	
33.	Sale and Supply of Alcohol Act 2012	201	Alcohol Regulatory and Licensing Authority and territorial authority licensing committees	

Act under which commission of inquiry powers derived (Acts listed in Schedule 1 of the Inquiries Act 2013)		Section/s	Entities to which the Commissions of Inquiry Act 1908 applies	Administering Agency
34.	Secondhand Dealers and Pawnbrokers Act 2004	27	Licensing Authority	
35.	Treaty of Waitangi Act 1975	Sch 2, cl 8	Waitangi Tribunal	
36.	Cadastral Survey Act 2002	40	Cadastral Surveyors Licensing Board	Land Information NZ
37.	Land Valuation Proceedings Act 1948	19	Land Valuation Tribunal/s	
38.	Reserves and Other Lands Disposal and Public Bodies Empowering Act 1915	38	Commission appointed by Minister [of Public Works]	
39.	Reserves and Other Lands Disposal and Public Bodies Empowering Act 1917	110	Commissions appointed by Governor-General	
		129	[On recommendation of Minister of Public Works]	
40.	Reserves and Other Lands Disposal and Public Bodies Empowering Act 1920	91 108	Commissions appointed by Governor-General	
41.	Fisheries Act 1996	181	Inquiries by "tribunal" [Māori Land Court judge]	Primary Industries
		221	Investigator appointed by CE relating to complaints	
42.	Veterinarians Act 2005	48	Veterinary Council of New Zealand	
43.	Social Security Act 2018	74	Social Security Appeal Authority	Social Development
44.	Māori Reserved Land Act 1955	Sch 8, cl 12	Valuation Appeal Committee	Te Puni Kōkiri
45.	Maritime Transport Act 1994	58	Maritime NZ: Investigation of accidents, etc	Transport
		235	Maritime NZ: Investigation of discharge/escape of harmful substance	
		246	Maritime NZ: Investigation re discharge or escape of ballast water	
46.	Shipping Act 1987	5	Minister may investigate suspected unfair practices	

Act under which commission of inquiry powers derived (Acts listed in Schedule 1 of the Inquiries Act 2013)		Section/s	Entities to which the Commissions of Inquiry Act 1908 applies	Administering Agency
47.	Transport Accident Investigation Commission Act 1990	11	Transport Accident Investigation Commission	
48.	Waitara Harbour Act 1940	9(2)	Commission appointed by the Governor-General	
Legislative instrument		Clause		
49.	Co-operative Dairy Companies Income Tax Regulations 1955	11	Co-operative Dairy Companies Income Tax Appeal Authority	Inland Revenue
50.	Cooperative Milk Marketing Companies Income Tax Regulations 1960	11	Cooperative Milk Marketing Companies Income Tax Appeal Authority	
51.	Cooperative Pig Marketing Companies Income Tax Regulations 1964	11	Cooperative Pig Marketing Companies Income Tax Appeal Authority	

Released under the Official Information Act 1982