

# **SAMOA**

## **LAW REFORM COMMISSION**

COMMISSIONS OF INQUIRY 1964

**Issues Paper IP 05/09**

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## **Preface**

This is a law reform project which reviews the Commissions of Inquiry Act 1964 (“COI Act”). The Samoa Law Reform Commission (“SLRC”) is mandated to carry out a review of the COI Act. The recommendations put forth by SLRC will pave the way for changes to the current law.

In getting to this point, it is important to consider similar Acts in other jurisdictions, with the ultimate aim of the resultant legislation assisting the work of members of a Commission of Inquiry (“members of the Commission”) in Samoa.

We emphasize that we are not committed to the views indicated and any provisional conclusions should not be taken as precluding further consideration of the issues.

We are grateful for the assistance of the following people, Maiava Iulai Toma, (Ombudsman), Rebecca Wendt, (Former Assistant Attorney General, Civil Division) and Peter Bednall, (Principal State Solicitor, Attorney General’s Office) who provided comments during the preliminary consultation stage of this paper.

We emphasize however that the views expressed in this paper are those of SLRC and not necessarily those of the people who have helped us.

Submissions or comments on this paper should be sent by the 19<sup>th</sup> of March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to [lawreform@ag.gov.ws](mailto:lawreform@ag.gov.ws).

## **Introduction**

This Issues Paper considers the current law and practice relating to the COI Act. The paper discusses issues raised during preliminary consultations with the relevant stakeholders. It also looks at relevant laws from comparable jurisdictions such as New Zealand and Australia (by reference to Tasmania). The choice of comparable jurisdictions was made based on suggestions tendered in preliminary consultations with the relevant stakeholders.

*The content of the issues paper will be as follows:*

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### **1) INTRODUCTION – COMMISSIONS OF INQUIRY ACT 1964**

The COI Act repealed the Commissions of Inquiry Ordinance 1960. The COI Act provides for the appointment of members of a Commission of Inquiry and its powers. It also provides legal guidance for the protection of COI witnesses and the expenses and allowances which they are entitled to. It also provides for the protection of members of the Commission.

One of the rationale for enacting the COI Act resulted from Parliament Debates regarding this Act which called for a distinction between the role of the Police in carrying out investigations for accidents and that of investigations made by members of the Commission. This is stipulated under Section 4 (e) of the COI Act which states that members of the Commission may inquire into and report to Cabinet upon any questions arising out of or concerning any disaster or accident (whether due to natural causes or otherwise) in which any citizen or ordinary resident of Samoa was killed or injured or was or might have been exposed to risk of death or injury. The Honourable Fiame Mataafa clarified, that investigations by the Police differ in that they only investigate matters which have resulted from obvious causes. The members of the Commission investigate accidents which have resulted from hazards, arising out of a storm, or where people are killed or left in distress.

## **2) CURRENT LAW AND PRACTICE**

### *2.1) Who can be appointed as a member of a Commission of Inquiry?*

- **Samoa**

The members of a Commission of Inquiry in Samoa are appointed by the Head of State on the advice of Cabinet.<sup>1</sup> This is provided under Section 4 of the COI Act.

- **New Zealand**

The relevant legislation that governs the work of Commissions of Inquiry in New Zealand is the Commissions of Inquiry Act 1908 (“NZ Act”). The NZ Act sets out that a Commission of Inquiry is appointed by the Governor General by Order in Council. The New Zealand Law Commission (NZLC) whilst reviewing this Act in 2008 proposed that appointment of members of a Commission should be changed according to the type of inquiry that will be established. This will be discussed later in this paper.

- **Tasmania (Australia)**

A Commission of Inquiry in Tasmania refers to a body established to inquire into and report upon particular affairs of the State which are of public concern. In Tasmania, such

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<sup>1</sup> Commissions of Inquiry Act 1964 (Samoa).

Commissions are established by order of the Governor General. The Commissions of Inquiry Act 1995 (“Tasmania Act”) governs the functions and powers of a Commission of Inquiry.

A Commission of Inquiry is established under section 4 of the Tasmania Act. The establishment of this Commission is ordered by the Governor where he or she may by order:

- i) direct that an Inquiry be made into a matter;*
- ii) establish a Commission to conduct and report on that inquiry;*
- iii) appoint one or more persons as members of that Commission;*
- iv) fix a date for the delivery of the Commission’s report; and*
- v) provide for any other matter in relation to the inquiry, the Commission or the Commission’s report as the Governor thinks fit.*

The Governor may also appoint a member of a Commission as its President.

- **Analysis**

Members of a Commission in Samoa are appointed by the Head of State on the advice of the Cabinet. New Zealand and Tasmania employ the same mode of appointing members of a Commission in the sense that members are appointed by the Governor by Order in Council. A minor distinction in regards to the appointment made by these two jurisdictions relates to the fact that in Tasmania, the Governor may appoint a member of a Commission as its President. This is not the case in New Zealand and Samoa. The Samoa COI Act is silent as to who should be appointed as President or Chairperson. This is perhaps an issue that should be taken into consideration for potential reform.

The New Zealand Law Commission (NZLC) in 2008 reviewed its Commissions of Inquiry Act 1908. One of the recommendations of this review is to have two new forms of inquiry:

- i) public inquiry; and*
- ii) government inquiry.*

These inquiries should be established differently and observe different modes of appointment of its members. “Public inquiries should be appointed by the Governor-General by Order in Council. They should report to the Governor-General and their reports should be tabled in

Parliament.<sup>2</sup> Government inquiries should be appointed by a Minister and should report accordingly to that Minister.

The Tasmania Act provides that the Governor may by Order fix a date for the delivery of the Commission's report. The Samoa COI Act does not address this issue, except to say that the Commission has to report to Cabinet with no fixed date for delivery of the report.

<b>Questions:</b>	<ol style="list-style-type: none"><li>1. <i>Should appointment of members extend to include the appointment of a Chairperson of a Commission of Inquiry by the Head of State on the advice of the Cabinet?</i></li><li>2. <i>Should the Act provide that the Head of State may issue an order to fix a date for the delivery of the Commission's report to Cabinet?</i></li></ol>
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2.2) What are the powers of a Commission of Inquiry?

- **Samoa**

In accordance with the COI Act, members of the Commission in Samoa have been vested with the power, to hold the inquiry either partly in public or partly in private. It is also empowered to prohibit the publication of the names of a witness or witnesses and to prohibit the publication of any report or account of the evidence given at the inquiry whether it was heard in public or in private. The members of the Commission also have the power to admit evidence which appears relevant for the purpose of the inquiry regardless of its admissibility in a Court of law.

The members of the Commission are also given the power and status similar to that of a Judge for the purpose of conducting its inquiries. The type of work which it could carry out under this power includes citing parties interested to the inquiry, summoning witnesses, administering oaths, hearing evidence and conducting and maintaining order at the inquiry.

Section 16 also grants members of the Commission the power to award costs. It can make an order requiring any party to the inquiry to pay either wholly or partly the costs of the inquiry. A proviso to this section excludes an order issued against people who were not cited as parties to

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<sup>2</sup> Law Reform Commission Report (New Zealand), "A New Inquiries Act", May 2008, p14.

the inquiry but were authorized by members of the Commission to appear and be heard at the inquiry.

- **New Zealand**

The members of a Commission of Inquiry in New Zealand (“the Commissions in NZ”) are empowered by the NZ Act to have the powers of a District Court in the exercise of its civil jurisdiction. This is in respect of matters such as the citing of the parties and conducting and maintaining order at the inquiry.

In the course of investigations, the Commissions in NZ have the power to inspect and examine any papers, documents, records or things relevant to the inquiry. It also has the power to require any person to produce for examination any papers, document, records or things in that person’s possession. The Commissions in NZ require any person to furnish, in a form approved by or acceptable to the Commission any information or particulars it requires. In addition, Commissions in NZ are also vested with the power to order costs relating to an inquiry. The Commissions under this power could order that all or any of the parties to an inquiry shall partly or wholly pay for the costs of the inquiry. This order shall not include people who were not cited as parties to an inquiry. A review of the New Zealand Act questioned the application of the power of the Commission to award costs. The recommendation proposed indicated that this power is appropriate and should only be applied if a person has unduly lengthened, obstructed or added undue cost to an inquiry. The review also emphasized that inquirers should retain the ability to deter such action by recourse to a cost order.

The Commissions in NZ are also empowered to issue in writing a summons requiring any person to attend at the time and place specified in the summons for the purpose of giving evidence for an inquiry. This power is to be exercised by the Commission or its Chairman or by a person of the Commission in NZ directed to act under the authority of the Commission or its Chairman.

- **Tasmania Australia**

The main function of the Commission is to conduct an inquiry into the matter in respect of which it is established and report to the Governor on that Inquiry. In performing its function, the Commission may:

- i) *hold Hearings;*
- ii) *receive written submissions; and*
- iii) *exercise all or any of the powers conferred on it by the Commissions of Inquiry Act 1995.*

In relation to the conduct of inquiries, the Commission has the power to:

- i) *control its proceedings;*
- ii) *maintain order at any hearing or other proceeding conducted by the Commission; and*
- iii) *request the Commissioner of Police to assist it in maintaining order at a hearing or other proceeding conducted by it.*

### **Analysis**

One of the similarities that surfaced following a comparative analysis of the powers conferred on members of the Commission in Samoa, New Zealand and Tasmania relates to the power to control its proceedings. This is in respect to maintaining order at the inquiry. Another similarity that arose from this analysis is in relation to the power to award costs in an inquiry. Samoa and New Zealand have taken the same approach in respect of exercising this power, that is, the Commission upon hearing an inquiry may order that the whole costs or part of it could be paid by any of the parties to an inquiry. Such orders do not apply to persons who have been summoned to attend and give evidence at an inquiry and those who have satisfied the Commission of their interest in the inquiry. The Tasmanian Act does not provide any stipulation in this regard.

The NZ Act grants the Commission the power to issue summons requiring a person to attend an inquiry to give evidence. This power is also vested on members of the Commission in Samoa but is narrower in application. The Samoa Act does not provide the mode by which such summons could be issued. The NZ Act clearly states that the Commission may of its own motion, or on application, issue in writing a summons requiring persons to attend. The Samoa Act only states that the Commission shall for the purpose of the inquiry have the power and status of a Judge of the Court in respect of summoning witnesses. This is one of the issues that

should be taken into consideration for reform since it will allow the members of the Commission to regulate issuance of summons in an effective manner.

In terms of the admissibility of evidence, the Samoa COI Act grants members of the Commission the power to admit evidence that it deems admissible. Similarly this is found in the NZ Act but in a wider context. The distinction is that in New Zealand, members of the Commission may take evidence on oath which is to be administered by a member or officer of the Commission. It further allows the Commission to permit a person appearing as a witness to give evidence by tendering a written statement which should be verified if the need arises.

The NZLC in its report (*A New Inquiries Act*) addressed the need by a new Act to abrogate the privilege asserted against self incrimination in civil proceedings in place of an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence. “Witnesses and people appearing before inquiries should no longer be able to refuse to disclose documentation or information in reliance on the privilege against self-incrimination”.<sup>3</sup> It was also recommended in this report that a new power be vested with inquirers to inspect privileged or confidential documents to ascertain whether or not the documents should be disclosed.

The Tasmania Act establishes that the Commission is not bound by any rule of law which relates to evidence in judicial proceedings. The Commission could refuse to receive evidence on an allegation of misconduct unless the alleged person has received notice of the allegation and had responded to such allegation by making oral submissions to the Commission. One of the issues that arise in this regard pertains to the use of evidence which incriminates witnesses. The scope of admitting evidence in Samoa is limited and vague in application. The Samoa Act empowers members of the Commission to admit any evidence which is relevant in an inquiry which is unlike the Tasmanian Act which specifically provides that the Commission could refuse to receive evidence on an allegation of misconduct unless prior notice has been given to the alleged person. This is perhaps an issue for consideration.

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<sup>3</sup> Commission Report (New Zealand), *“A New Inquiries Act”*, 2008, p25.

<b>Questions:</b>	<p>3. <i>Should the Commissions of Inquiry Act in Samoa have a separate provision vesting the members of the Commission with the power to issue summons following the New Zealand approach?</i></p> <p>4. <i>Should there be more stringent rules in place to govern the admissibility of evidence tendered before the Commission to replace the general approach under the Commissions of Inquiry Act?</i></p> <p>5. <i>Should the privilege against self incrimination be specifically abrogated in the Commissions of Inquiry Act?</i></p> <p>6. <i>Should the Act provide that the Commission could refuse to receive evidence of an allegation of misconduct unless the alleged person has been notified of the allegation?</i></p>
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2.3) What are matters subject to the investigative jurisdiction of the Commission?

• **Samoa**

Members of the Commission in Samoa are responsible to inquire into and report to Cabinet upon any question concerning the following matters:

- i) *administration of government;*
- ii) *working of any existing law;*
- iii) *necessity or expediency of any legislation;*
- iv) *the conduct of any employee of the Government; or*
- v) *Any disaster or accident (either caused by natural causes or otherwise) in which any citizen or ordinary resident of Samoa was killed or injured or was or might have been exposed to risk of death or injury.<sup>4</sup>*

The Commission in dealing with inquiries has the discretion to refer any point of law arising in the course of an inquiry to the Courts for a decision. In such an event the outcome of such inquiries are subject to the pending decision of the Court or could be adjourned until a decision has been given. The Court's decision in any of these proceedings is deemed final and binding on all the parties to the inquiry as well as on members of the Commission. Where a Judge has

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<sup>4</sup> Commissions of Inquiry Act (Samoa) (1964).

been appointed to sit as a member of the Commission to conduct an inquiry, questions of law arising out of this inquiry are referred to the jurisdiction of the Court of Appeal.

- **New Zealand**

The NZ Act clearly states the matters which are subject to the investigative jurisdiction of the Commission. These matters should concern or relate to:

- i) *the administration of Government;*
- ii) *the working of any existing law;*
- iii) *necessity of expediency of any legislation;*
- iv) *the conduct of any officer in the service of the Crown;*
- v) *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; and*
- vi) *any other matter of public importance.*

- **Tasmania Australia**

The Tasmania Act provides that matters that are of public interest are subject to the jurisdiction of an appointed Commission of Inquiry.

### **Analysis**

It is noted that the investigative jurisdictions of Commissions of Inquiry in NZ and Samoa are similar in that they are established to investigate matters of the same nature. The Commission in Tasmania also deals with investigation of matters in the public interest which is also similar to investigations handled by New Zealand and Samoa Commissions.

One other issue that surfaced in the report by NZLC relates to emphasizing in the new Act that inquirers are not to determine civil, criminal or disciplinary liability. However this should not prevent inquiries from making findings of fault or making recommendations that further steps be taken to determine liability. The Commission also proposed that a new Act should give inquiries an express power to postpone or temporarily suspend the inquiry in circumstances where the investigation or person interested in the investigation would likely be prejudiced. This power should be exercised subject to prior consultation with the government.

<b>Questions:</b>	<p>7. <i>Should our Act stipulate that inquirers are not to determine civil, criminal or disciplinary liability?</i></p> <p>8. <i>Should we reform our Act to give inquirers an express power to postpone or temporarily suspend the inquiry if an investigation or person interested in the investigation would likely be prejudiced?</i></p> <p>9. <i>Should the investigative jurisdiction of a Commission of Inquiry in Samoa be limited or extended?</i></p>
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2.4) Persons Entitled to be Heard

- **Samoa**

In Samoa any other person who shows an interest in the inquiry other than the parties to the inquiry is entitled to appear and be heard at the inquiry.

- **New Zealand**

The NZ Act allows any person who is a party to the inquiry or satisfies the Commission that he has an interest in the inquiry to be heard at the inquiry. The interest this person has shall be an interest not common to that of the public.

It further permits a person who satisfies the Commission that any evidence given before it may adversely affect his/her interests to be heard during the inquiry in respect of the matter to which the evidence relates. The people who have been given the opportunity to be heard can appear in person or by their counsel or agent.

- **Tasmania Australia**

Section 17 of the Tasmania Act provides the requirements that have to be met before a person is investigated by the Commission. This requirement provides that the Commission must not commence an investigation of a person or their actions unless it is satisfied that there are matters involving that person. The Commission should also take heed that the arising circumstances are relevant to its investigation.

## Analysis

Samoa adopts the same approach in this regard to the one adopted in the NZ Act. The approach undertaken by Tasmania differs in that the Commission should be satisfied of the matters involving that person and should consider the relevancy of the circumstances to an investigation before commencing an inquiry.

<b>Questions:</b>	<p>10. <i>Should Samoa limit persons entitled to be heard to persons having an interest not common to that of the public?</i></p> <p>11. <i>Should there be a requirement in the Act that the Commission should be satisfied of matters involving a person before an investigation is carried out?</i></p> <p>12. <i>Should the Act also provide that the Commission has to consider the relevancy of the circumstances before commencing an inquiry?</i></p>
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### 2.5) Service of Summons

- **Samoa**

The Samoa Act provides for the procedure of serving summons on witnesses in that it should be served personally on the witness. Alternatively the summons could be left at the person's usual place of residence at least 24 hours before his or her attendance is required.

- **New Zealand**

The NZ Act provides the ways by which summons can be served on witnesses required for an inquiry. It can be served on witnesses either by delivering it to the person summoned or by posting it by a registered letter addressed to the person summoned at his or her usual place of residence.

The Act directs that summons served directly to the person summoned should be served at least 24 hours before the witness attends the inquiry. Summons delivered by post should be served at least 10 days before the date on which the witness is required to appear before the Commission.

- **Tasmania Australia**

The Tasmania Act enables the Commission to serve a notice on a person it requires to appear before it either to give evidence or produce a document or thing in that person's possession which is relevant to the inquiry.

### **Analysis**

New Zealand and Samoa have adopted the same means of issuing summons on witnesses to appear to give evidence in an inquiry. Tasmania differs in this regard since it issues notices to people involved for the purpose of giving evidence.

The difference observed though is that the NZ Act provides that summons could be mailed by post alternately to issuing it personally whereas in Samoa a summons can be left at a person's house in place of personal service. This is not an issue of concern since Samoa is a small country where postal service of summons is not a preferable mode of serving documents.

#### 2.6) Protection of Witnesses and Counsel

- **Samoa**

In Samoa witnesses who attend to give evidence whether by means of a summons being served or not are given the same privileges and immunities granted to witnesses in courts of law. This protection is also enjoyed by counsels who appear before the Commission in the course of an inquiry.

- **New Zealand**

The same protection is granted to witnesses appearing before a Commission of Inquiry in New Zealand. This is stipulated under section 6 of the Act which provides "Every witness giving evidence, and every counsel or agent or other person appearing before the Commission, shall have the same privileges and immunities as witnesses and counsels in Courts of law."

The NZLC recommended that a new Inquiries Act should oversee that inquirers are protected by the same immunity enjoyed by witnesses. It also proposed that members of an inquiry should not be liable for anything it may report, say, do or fail to do in the exercise or intended exercise of its functions unless the inquirer had acted in bad faith.

- **Tasmania Australia**

The protection of the Commission is clearly stated in the Act. It states that members of the Commission have the same protection and immunity as a judge of the Supreme Court. A person assisting the Commission as counsel has the same protection and immunity as counsel appearing before the Supreme Court and a witness who appears before a Commission has the same protection and immunity as a witness appearing before the Supreme Court.

**Analysis**

The NZ Act and Samoa COI Act grant similar privileges and immunities to witnesses and counsels who appear before its Commission. Such privileges and immunities are similar to those granted to witnesses and counsels in courts of law. Tasmania takes the same approach but has extended its laws to provide for immunity and privileges to be granted to members of the Commission of Inquiry which is similar to that granted to a Judge of the Supreme Court. The Samoa COI Act does not specifically extend immunity and privileges enjoyed by witnesses and counsels on members of a Commission. It merely states that members of a Commission are given the power and status similar to that of a Judge. This should be taken into consideration for reform.

<b>Questions:</b>	<i>13. Should our Act be reformed to follow the approach that the members who form up the Commissions of Inquiry should be granted the same immunity and privileges due to a Judge of the Supreme Court?</i>
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2.7) Witnesses' Expenses and Allowances

- **Samoa**

Section 10 of the Samoa COI Act, states that witnesses who are summoned to give evidence before the Commission are entitled to be paid travelling expenses and maintenance allowance. Such rates are fixed by the Registrar of the Court. The proviso to this section stipulates that a person prosecuting any claim before the Commission is not entitled to be paid any money.

The COI Act provides in section 11 (1) and (2), two instances in which witnesses' allowances can be paid. One is payment by the government out of Treasury Funds by the Minister of

Finance. This type of payment requires the Registrar of the Courts to fix appropriate rates for allowances and expenses, after receipt of prior certification by the Chairperson of the Commission. A witness entitled under this payment scheme is one who has been summoned by the Minister of Justice. The COI Act does not stipulate that the Minister of Justice is vested with the power to issue summons so perhaps this is an area for review.

People requiring witnesses to appear before the Commission to give evidence bear the expenses and allowances due to these witnesses. In such instances a deposit of the amount deemed sufficient by the Registrar should be made to the Commission, and payment of these fees will be made primarily out of this deposit.

The Act requires the Minister of Finance to pay out of Treasury Funds, fees and travelling expenses reasonably incurred by that member in respect of his or her attendance at meetings of the Commission. The Act also requires fees and traveling expenses to be paid to the Chairperson of a Commission and any other member of the Commission who is not a salaried employee of the Government. The sums to be paid to these people are those approved by Cabinet in respect of each day or part of the day of his or her attendance at meetings of the Commission.

- **New Zealand**

The NZ Act also has provisions which stipulate the allowances to be paid to a witness summoned by the Commission to give evidence in an inquiry. These provisions stipulate that a witness is entitled to be paid witnesses' fees, allowances and traveling expenses according to the scales for the time being prescribed by regulations. The Commission or the Chairman shall fix an amount to be paid to witnesses who have been served with a summons according to the prescribed scales and on the basis that the witness attends at the time and place specified in the summons. These monies could be paid either in the form of vouchers or tickets with the consent of the witness. These allowances, fees and expenses should be paid by the Minister of Finance out of the Consolidated Account.

People that require witnesses to give evidence in an inquiry should personally pay for those witnesses' fees, allowances and expenses. A deposit should be made with the Commission on

making an application for the issue of a summons. This deposit will be used to pay for such witnesses' fees, expenses and allowances. This system is similar to the one used in Samoa.

- **Tasmania Australia**

Witnesses are entitled to be paid allowances for meals, travel and accommodation under the Tasmania Act. The Act stipulates that the Commissioner is entitled to be paid such remunerations and allowances as the Governor may determine. The costs and expenses of the Commission are also covered in the Tasmanian Act. It allows the costs and expenses of the Commission incurred in connection with the conduct of an inquiry to be paid from the Consolidated Fund.

### **Analysis**

Samoa and New Zealand have similar provisions in regard to payment of allowances due to witnesses summoned to give evidence in an inquiry. The Tasmania Act also provides for allowances for witnesses with additional costs allocated for food. The Tasmania Act also addresses remunerations and allowances due to members of the Commission. Provisions stipulating remunerations due to members of a Commission are not covered in the New Zealand and Samoa COI Act. The Samoa COI Act only enables payment of allowances to members of the Commission on the premise that they are not salaried employees of the Government.

<b>Questions:</b>	<p><i>14. Should the Act state that the Minister of Justice has the power to issue summons?</i></p> <p><i>15. Should the Act specify that all members of the Commission are to be paid remuneration, or an allowance whilst carrying out an investigation into a matter, regardless of whether they are salaried employees of the government?</i></p>
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## 2.8) Types of Offences and Fines

- **Samoa**

Section 12 of the Samoa COI Act specifies three instances in which a witness can be fined for failing to appear before the Commission after being issued a summons. Firstly a witness is fined if he or she fails to appear before the Commission according to the exigency of the summons. A witness is also fined if he or she refuses to be sworn, give evidence or answer questions put to him or her by the Commission.

Lastly a witness can be fined if he or she fails to produce any books, papers, writings or documents. The fine imposed on witnesses for non compliance with these requirements is five (5) penalty units. The proviso to this section highlights that a person is not liable for such fine if he or she had been summoned without being paid traveling expenses approved by the Registrar of the Courts.

- **New Zealand**

A person commits an offence under the NZ Act if he or she receives a summons and fails to attend in accordance with the summons. It is also an offence under the NZ Act to refuse to be sworn, or to give evidence, or after having been sworn, refuse to give an answer to a question. Failure to produce any paper, document, record or thing required by the Commission also constitutes an offence under the Act.

The Act also provides that a person who obstructs the Commission or any authorized member of it to inspect or examine papers, documents or records or things for the purpose of an inquiry commits an offence. A person must show sufficient cause to substantiate the failure to produce for examination, any papers, documents, records or things in his or her possession which the Commission requires for an inquiry. This failure constitutes an offence under this Act and carries a penalty not exceeding \$1000.00 upon conviction.

No person is convicted for any of these offences if at the time which the summons was served, no money payment had been given to the person summoned as per the requirement under section 7(2) of the Act. The Samoa COI Act does not stipulate any offences in this regard and this is one issue that a new Act needs to address.

The NZLC has proposed several recommendations for additional offences in a new Act. These offences are as follows:

- i) intentionally and without lawful excuse failing to attend the inquiry in accordance with the notice of summons;*
- ii) intentionally and without lawful excuse refusing to be sworn and give evidence;*
- iii) intentionally and without lawful excuse failing to produce any document or thing required by an order of the inquiry;*
- iv) intentionally and without lawful excuse destroying evidence, or obstructing or hindering any person authorized to examine, copy or make a representation of a document or thing required by an order of an inquiry;*
- v) intentionally and without lawful excuse failing to comply with a procedural order or direction of an inquiry (including breaches or non-publication orders);*
- vi) intentionally disrupting the proceedings of an inquiry;*
- vii) intentionally preventing a witness from giving evidence or threatening or seeking to influence a witness before an inquiry;*
- viii) intentionally providing false or misleading information to an inquiry; and*
- ix) Intentionally threatening or intimidating an inquiry or a member of office of an inquiry.*

The NZLC also clarified that the new Act should define “without lawful excuse” as failure to comply with an inquiry’s orders and directions may be excused where:

- i) compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel before an inquiry under the new Act;*
- ii) compliance would be prevented by an enactment, rule of law or order of a court that prohibits or restricts disclosure of the document, any information or thing;  
or*
- iii) compliance would likely prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution or punishment of offences and the right to a fair trial.*

- **Tasmania Australia**

The Tasmania Act provides the offences which a person appearing before a Commission may face. These include, contempt of a Commission where a person may be held liable for contempt in the event that he/she refuses to give or produce evidence, if he/she refuses to be sworn or make an affirmation, if he/she refuses to answer a question put forth by the Commission or Commissioner in a matter in which the Commission is making an inquiry and if he/she refuses to answer a question properly put by an officer of the Commission or by a witness or counsel authorized to appear for a witness. Other offences that are covered in the Act include:

- i) *a person preventing or intentionally trying to prevent a person who is required by a Commission to appear before it from attending as a witness or producing any document or thing to the Commission;*
- ii) *a person must not use, cause, inflict or procure any violence, punishment, damage, loss or disadvantage to another person for or on account of:*
  - *that other person having given evidence before a Commission or having produced or surrendered any document or thing to a Commission.*
- iii) *an employer must not dismiss an employee from employment or prejudice an employee in employment for or on account of that employee having given evidence or produced or surrendered any document or thing to the commission;*
- iv) *in any proceedings for an offence that involves the employer, the employer must be able to prove on the balance of probabilities that the employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than a reason specified in relation to assisting the Commission.*

### **Analysis**

The NZ and Tasmania Acts provide for offences to penalize persons who fail to comply with some of the requirements proposed by the Commission. These requirements include refusal by witnesses to be sworn or give evidence subsequent to having being sworn, and refusal to answer a question put forth by the Commission. These acts under the Tasmanian Act amount to contempt of the Commission. The approach established in the Samoa COI Act differs in that it

does not provide offending for these types of acts but only provides fines as a means of penalizing.

<b>Questions:</b>	<p>16. <i>Should the Act be reformed to provide offences instead of fines for contravening these requirements?</i></p> <p>17. <i>Should the Act provide provisions which address offences in relation to contempt of the Commission?</i></p>
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## **2) SUMMARY**

This issues paper has addressed various issues which concerns the work of Commissions of Inquiry in Samoa. These issues included a discussion on the appointment of members of the Commission, powers of the members of the Commission, the scope of the investigative jurisdiction of the Commission, and people entitled to be heard before the Commission. This issues paper also discussed the process of serving summons on witnesses, protection of witnesses, counsels and members, and expenses and allowances due to witnesses. Lastly the types of offences and fines imposed for non compliance with the requirements of the Commission is also discussed in the content of this issues paper.

Given that many questions have been posed, the Commission will make its recommendations for reform once it has received all submissions from stakeholders. The recommendations of the Commission will be independent of all stakeholders and will form the basis of its final report to Cabinet.

## **3) SUMMARY OF QUESTIONS**

1. *Should appointment of members extend to include the appointment of a Chairperson of a Commission of Inquiry by the Head of State on the advice of the Cabinet?*
2. *Should the Act provide that the Head of State may issue an order to fix a date for the delivery of the Commission's report?*
3. *Should the Commissions of Inquiry Act in Samoa have a separate provision vesting the members of the Commission with the power to issue summons following the New Zealand approach?*

4. *Should there be more stringent rules in place to govern the admissibility of evidence tendered before the Commission to replace the general approach under the Commissions of Inquiry Act?*
5. *Should the privilege against self incrimination be specifically abrogated in Commissions of Inquiry Act?*
6. *Should the Act provide that the Commission could refuse to receive evidence of an allegation of misconduct unless the alleged person has been notified of the allegation?*
7. *Should our Act stipulate that inquirers are not to determine civil, criminal or disciplinary liability?*
8. *Should we reform our Act to give inquirers an express power to postpone or temporarily suspend the inquiry if an investigation or person interested in the investigation would likely be prejudiced?*
9. *Should the investigative jurisdiction of a Commission of Inquiry in Samoa be limited or extended?*
10. *Should Samoa limit persons entitled to be heard to persons having an interest not common to that of the public?*
11. *Should there be a requirement in the Act that the Commission should be satisfied of matters involving a person before an investigation is carried out?*
12. *Should the Act also provide that the Commission has to consider the relevancy of the circumstances before commencing an inquiry?*
13. *Should our Act be reformed to follow the approach that the members who form up the Commissions of Inquiry should be granted the same immunity and privileges due to a Judge of the Supreme Court?*
14. *Should the Act state that the Minister of Justice has the power to issue summons?*
15. *Should the Act specify that all members of the Commission are to be paid remuneration, or an allowance whilst carrying out an investigation into a matter, regardless of whether they are salaried employees of the government?*

*16. Should the Act provide that members of the Commission are entitled to be paid remuneration regardless of whether they are salaried employees of the government or not?*

*17. Should the Act be reformed to provide offences instead of fines for contravening these requirements?*

*18. Should the Act provide provisions which address offences in relation to contempt of the Commission?*

#### **4) CALL FOR RESPONSES**

There are a total of eighteen (18) questions for consideration and response. It is not necessary however to respond to all questions. It is preferred that responses be in writing.

Responses on this paper should be sent by the 19<sup>th</sup> March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to [lawreform@ag.gov.ws](mailto:lawreform@ag.gov.ws).