



13 May 2019

Minute 1: Procedures for Gathering Information and Evidence

Introduction

1. The Inquiries Act 2013 (the Act) provides for the Royal Commission to determine the procedures that it will follow. This minute sets out:
 - the procedure that the Royal Commission has resolved, provisionally, to follow; and,
 - the reasons for adopting this procedure.
2. The procedure set out in this minute is provisional. It reflects the circumstances as they are now. It may be necessary to revise the procedure should those circumstances change materially.

The procedure that the Royal Commission has resolved, provisionally, to follow

Overview

3. The Royal Commission will adopt an iterative and inquisitorial process involving initial meetings, meetings with affected and interested parties, formal interviews, and the taking of evidence in private. The Royal Commission will seek information and evidence held by organisations and communities, particularly Muslim communities, but also any others who may feel at risk.
4. At this stage, the Royal Commission's approach to information and evidence gathering includes the following elements:
 - Initial meetings;
 - The establishment of a Muslim Community Reference Group;
 - The collection of all relevant material held by State sector agencies;
 - Meetings with affected and interested parties;
 - Formal interviews and the taking of evidence;
 - Written submissions; and
 - Possibly, public forums.

Initial meetings

5. The Royal Commission has already held a number of initial meetings including with representatives of relevant State sector agencies. Some initial meetings have been scheduled with Muslim communities. This process is continuing.
6. Initial meetings may be sought by other individuals or organisations who have information, material or comment relevant to the Terms of Reference. Anyone who seeks an initial meeting should contact the Royal Commission through the contact details available on its website. The Chair will determine whether initial meetings will be arranged.

The establishment of a Muslim Community Reference Group

7. Work is underway towards the establishment of a Muslim Community Reference Group to ensure the Royal Commission process builds in appropriate and accessible opportunities for Muslim communities to take part in the inquiry.
8. The Muslim Community Reference Group will be advisory only, and will not have decision-making powers. The need to ensure that the Group is of manageable size may mean that it may not be fully representative. The Royal Commission will determine membership. The Terms of Reference for the Muslim Community Reference Group will be published on the Royal Commission's website.

The collection of all relevant material held by State sector agencies

9. The Royal Commission has sought information relevant to the inquiry from various State sector agencies, and responses are currently being received. The material will be analysed and, where, necessary, further requests for information will be made.

Formal interviews and the taking of evidence

10. The Chair and/or Member and/or delegated Royal Commission officers will conduct formal interviews with, and/or take sworn evidence from, those who in the Royal Commission's view are able to provide information or comment that will assist the Royal Commission to answer the Terms of Reference.
11. Interviews will be arranged, as much as possible, at dates, times, and venues that accommodate the needs of those attending. Provided notice is given in advance, any person or representative of a body or organisation may be accompanied at a formal interview or taking of evidence by counsel or a support person.
12. The Royal Commission may request or require others to attend interviews, as they consider appropriate, and may convene further interviews or seek information at any time.

Meetings with other affected or interested parties

13. In the course of its inquiry the Royal Commission will meet with affected and interested parties, particularly members of other communities who are concerned about the risk of terrorist activity.

14. A meeting may be sought by affected or interested parties who have information, material or comment relevant to the Terms of Reference. Anyone who seeks such a meeting should contact the Royal Commission through the contact details available on its website. The Chair will determine whether meetings will be arranged.

Written submissions

15. The Royal Commission will, in due course, accept written submissions. The Royal Commission will advise when the written submissions process is open, and the timeframe for lodging submissions. A facility will also be provided for information to be supplied to the Royal Commission on a confidential basis.

Public forums

16. The Royal Commission is currently considering whether part of its process for gathering information may include one or more public forums at which the views and experiences of the public will be sought and considered by the Royal Commission. Media will be entitled to attend all public forums.

The reasons for adopting this procedure

This inquiry

17. The Royal Commission is required to examine the knowledge, if any, relevant State sector agencies had of pre-attack activities of the alleged shooter; what if, anything, they did with that information; what measures could have been taken to avoid the attacks; and what measures should be taken to prevent such attacks in the future.¹

18. In order to achieve that purpose, the Royal Commission “must” inquire into amongst other things:

- Brenton Tarrant’s (the alleged shooter’s) activities before the attack, including, for example, relevant information from his time in Australia; his arrival and residence in New Zealand; his international travel; how he obtained a gun licence, weapons and ammunition; his connections with others;
- what relevant State sector agencies knew about him and his activities before the attack, what actions (if any) they took, and whether there were any additional measures they should have taken to prevent the attack;
- whether there were any impediments (including legislative impediments) to relevant State sector agencies gathering or sharing information relevant to the attack, or acting on such information;
- whether there was any inappropriate concentration of, or priority setting for, counter-terrorism resources by relevant State sector agencies prior to the attack.²

¹ See clause 5 of the Order in Council and clauses 1(2) and 2 of the Terms of Reference, being the Schedule to the Order (“Terms of Reference”).

² Terms of Reference, clause 3.

19. The Royal Commission is specifically required to report findings on a number of matters that relate to the matters in paragraph 18 above. Those can be broadly described as findings as to whether the relevant State agencies had in any relevant way failed, be that in failing to be alert to the attack, or failing to share relevant information, or anticipate or plan for the attack, or meet required standards.³ Recommendations for the future are also sought.

The legislative framework

20. The Royal Commission is governed by the Act. The statutory process is designed to “enable inquiries to be carried out effectively, efficiently, and fairly” (section 3(1)(a)).

21. Section 14 of the Act provides:

14 Regulation of inquiry procedure

(1) An inquiry may conduct its inquiry as it considers appropriate, unless otherwise specified—

- (a) by this Act; or
- (b) in the terms of reference of the inquiry.

...

(4) Without limiting subsections (1) to (3), an inquiry may determine matters such as—

- (a) whether to conduct interviews, and if so, who to interview:
- (b) whether to call witnesses, and if so, who to call:
- (c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held:
- (d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry:
- (e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions:
- (f) whether to allow or restrict cross-examination of witnesses.

22. Section 15 of the Act is also important. It provides:

15 Power to impose restrictions on access to inquiry

(1) ...

- (b) restrict public access to any part or aspect of the inquiry:
- (c) hold the inquiry, or any part of it, in private.

³ Terms of Reference, clause 4.

(2) Before making an order under subsection (1), an inquiry must take into account the following criteria:

- (a) the benefits of observing the principle of open justice; and
- (b) the risk of prejudice to public confidence in the proceedings of the inquiry; and
- (c) the need for the inquiry to ascertain the facts properly; and
- (d) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and
- (e) the privacy interests of any individual; and
- (f) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under subsection (1); and
- (g) any other countervailing interests.

(3) If the instrument that establishes an inquiry restricts any part or aspect of the inquiry from public access, the inquiry must make such orders under subsection (1) as are necessary to give effect to the restrictions.

23. Under these provisions, the procedure that the Royal Commission adopts must not be inconsistent with what is specified in the Terms of Reference. As well, the Royal Commission must have regard to the necessity to avoid unnecessary delay and cost. Beyond that, the form of the inquiry is very much a matter for the Royal Commission and there is no presumption that any particular form of procedure will be followed.

24. It will be noted that the Act specifically contemplates that an inquiry can be conducted wholly or partly in private (section 15(1)(c)) and that, where its terms of reference restrict any part or aspect of an inquiry from public access, the inquiry "must" make orders under section 15(1) to give effect to those restrictions (section 15(3)).

The relevant clauses of the Terms of Reference

25. Sections 14(1)(b) and 15(3) of the Act mean that clauses 10 to 11 of the Terms of Reference are relevant. They provide:

10 Principles of Inquiry

(1) **Subject to the need to report effectively** on the matters set out in these terms of reference, **the inquiry is directed to exercise its powers and perform its duties and report in such a way as to minimise the possibility that its processes or its report, or any part of it, is used by any individual or group** (including the individual who has been charged with offences in relation to the attack) to promote unlawful activities, or **otherwise to damage the public interest.**

(2) The matters the Inquiry is charged with investigating directly concern the operational practices of relevant state sector agencies, including intelligence and security agencies, **which are and must remain confidential in the public interest** in order to ensure public safety, to avoid prejudice to the international relations of the Government of New Zealand and the entrusting of information to the Government of New Zealand on a basis of confidence, and for the maintenance of the law.

(3) Accordingly, the inquiry must, wherever it considers it necessary to preserve such confidentiality, hold the inquiry, or any part of it, in private. The inquiry must also restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses or other persons) where it considers such steps are required -

- (a) in order to:
 - (i) protect the security or defence interests of New Zealand or the international relations of the Government of New Zealand:
 - (ii) protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation:
 - (iii) protect the identity of witnesses or other persons:
 - (iv) avoid prejudice to the maintenance of the law, including the prevention, investigation, and detection of offences:
 - (v) ensure that individual fair trial rights are protected:
 - (vi) ensure that current or future criminal, civil, disciplinary or other proceedings are not prejudiced; or
- (b) for any other reason that the inquiry considers appropriate.

(4) The Inquiry report must not disclose sensitive information (as defined in s 202(1) and (2)(a),(b) or (c) of the Intelligence and Security Act 2017).

26. Subclause (4) is included for the sake of completeness but primarily relevant for present purposes are subclauses 1, 2 and 3. The passages that are emphasised are expressed in mandatory language. They impose requirements that are “specified” in the Terms of Reference and which, accordingly, control the assessment required of the Royal Commission under sections 14(1) and 15(3) of the Act.

The need to minimise the possibility that the processes of the Royal Commission are used in a way which is contrary to the public interest

27. This is provided for in clause 10(1) of the Terms of Reference. A fully public process would provide scope for abuse of the Royal Commission’s process, albeit there would be a variety of mechanisms available that would reduce the risk of such abuse.

Classified material and information that is sensitive under the Intelligence and Security Act 2017

28. The material supplied (or to be supplied) by the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GSCB) includes material that is classified for reasons that bring it within the scope of clause 10(3)(a)(i) and (ii) of the Terms of Reference. The same is true of some information to be provided by other agencies, some of which is also covered by clause 10(3)(a)(iv) as dealing with tradecraft and capability. Given the strong directions provided by clauses 10(2) and (3), material of this kind can only practically be considered in private. This is reinforced by clause 10(4) and sections 202(1) and (2) of the Intelligence and Security Act 2017, which preclude disclosure of such material in the final report of the Royal Commission.

29. A public process focussing on the precautions that the agencies can, should and do, or alternatively cannot, take to mitigate the risk of terrorism carries the risk of providing a “how to avoid detection” manual for future potential terrorists.
30. The combined practical effect of clauses 10(2), 10(3) and 10(4) is – broadly – to prevent conducting in public a detailed inquiry into the conduct of the NZSIS and the GCSB.

Information held by other agencies

31. In relation to material and evidence provided by other State agencies including the New Zealand Police, Immigration New Zealand and the New Zealand Customs Service, the impact of the considerations just addressed may be of lesser importance. Accordingly it could be possible to conduct some hearings in public in respect of certain aspects of the conduct of those agencies without any necessary inconsistency with clause 10(2). Such hearings, however, would raise other difficulties, for instance, in terms of revealing operational tradecraft (clause 10(3)(a)(iv)) and, more significantly, prejudicing fair trial rights (clause 10(3)(a)(v)).

Fair trial rights

32. Fair trial rights are referred to specifically in section 15(2)(f) of the Act and clause 10(3)(a)(v) of the Terms of Reference. The latter requires the Royal Commission to restrict access to inquiry information to ensure individual fair trial rights are protected. In addition, clause 10(3)(a)(vi) specifically requires the Royal Commission to “ensure” that “current criminal proceedings are not prejudiced”. And, of course, section 25(a) and (b) of the New Zealand Bill of Rights Act 1990 guarantees everyone charged with an offence the “minimum rights” to a fair hearing, and to be presumed innocent until proved guilty according to law.
33. The alleged shooter has an entitlement to a fair trial, which includes a right to be tried on the basis of only the evidence that is led at trial. Public hearings before the Royal Commission that delve into matters about the alleged shooter and his activities could put this entitlement at significant risk. An order under section 15 forbidding publication of prejudicial material would mitigate, but not eliminate, these risks. And, as noted, the Terms of Reference require us to “ensure” that his fair trial rights are “protected” and to “avoid” prejudice to the criminal proceedings.
34. It would, therefore, be neither consistent with the Terms of Reference nor otherwise appropriate for the Royal Commission to conduct a public process that runs in parallel with the criminal proceedings.

Urgency/timeframes

35. The Terms of Reference require the Royal Commission to present its report to the Governor-General no later than 10 December 2019 – eight months after the commencement date. This is a relatively short period within which to produce a report covering the range of matters that are within the scope of the inquiry. The timeframe reflects the urgency with which the results of the inquiry are expected. This is specifically referred to in clause 1(3) of the Terms of Reference:

The Inquiry needs to report on these matters urgently, so Government has an independent and authoritative report on these matters to reassure the New Zealand public, including its Muslim communities, that all appropriate

measures are being taken by state sector agencies to ensure their safety and protection.

36. The urgency of the situation is also stressed in clause 11(2):

Having regard to the need to ensure that any steps to ensure public safety are taken **without delay**, ... the Inquiry is directed to consider, with **all possible urgency**, whether it should make interim recommendations.
(emphasis added)

37. Experience shows that public processes inevitably consume more time and can add significantly to the time needed to produce a report.

The benefits of open justice and risk of prejudice to public confidence if a closed process is followed

38. As noted in paragraph 22 above, section 15(2) of the Act requires the Royal Commission – before it makes an order holding the inquiry (or any part of it) in private – to take account of a number of matters. Among those are the benefits of observing open justice and the risk of prejudice to public confidence which are implicit in a closed procedure (sections 15(2)(a) and 15(2)(b)).

Overall balancing

39. Having taken account of all of these considerations, and weighed them up, the Royal Commission has decided to conduct its inquiry in the manner previously outlined.

40. In deciding to proceed in this way, the Royal Commission has also taken into account measures that can be taken to ensure that an inquiry conducted largely in private may, nonetheless, conduct itself and report in such a way as to achieve a reasonable measure of transparency. Transparency measures that can and will be taken include:

- Broad-based engagement through meetings with New Zealand's Muslim communities and other interested parties with a particular interest or concern in respect of the subject matter of the inquiry; and,
- Monthly updates on progress through the Royal Commission's website.

41. There is also the possibility of public fora if appropriate.

Issued under the authority of the Chair of the Royal Commission, Sir William Young on 13 May 2019