

## **INQUIRY INTO PROCEDURAL FAIRNESS FOR INQUIRY PARTICIPANTS**

**Organisation:** House of Representatives New Zealand

**Name:** Mr David Wilson

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10 November 2017

Hon Matthew Mason-Cox MLC  
Chair of the Privileges Committee  
Legislative Council of New South Wales  
Parliament House  
Macquarie Street  
Sydney, NSW 2000  
Australia

Dear Mr Mason-Cox

### **Submission – Inquiry into procedural fairness for inquiry petitions**

Thank you for the invitation to make a submission to the above inquiry.

The discussion paper produced by your committee covers most of the information about the New Zealand Parliament's approach to natural justice for witnesses. This submission provides some context about how these procedures were created. These procedures meet the required level of procedural fairness without being unduly onerous.

In 1994 the Finance and Expenditure Committee (FEC) was considering the Income Tax Amendment Bill. Part of the consideration of the bill included information on different tax avoidance schemes in existence, and allegations which could be highly damaging to individuals. The then Solicitor-General was worried that the committee "was an inappropriate body for an inquiry of this scope and could get out of control. If this happened there would be no constitutional protection for the rights of individuals except, it would be argued, through the court process." At the time the committee received conflicting opinions on whether the NZ Bill of Rights Act 1990 applied in respect of the House and its



committees. Section 27 of that Act requires the “observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law.”

Ultimately, the committee accepted that natural justice provisions do apply to select committee proceedings. The committee acknowledged that the “obligation to observe the principles of natural justice is one that must be addressed by the House itself so that the obligation is given adequate content.” The committee noted that “neither the House nor its committees are courts of law and elaborate rules that may be appropriate to such bodies will often be entirely inappropriate before an avowedly political body consisting of elected representatives.”

At the time, the Standing Orders contained little guidance on natural justice procedures. The FEC began to develop procedures to ensure the observance of the principles of natural justice. While the FEC was developing these procedures, a Commission of Inquiry was established to inquire into the same tax avoidance allegations that the FEC were due to consider. The FEC deferred its intended examination of the tax avoidance measures until the Commission had reported, and referred some of the submissions it had received to the Commission. The FEC presented an interim report to the House, which included the natural justice procedures it had intended to follow if it had continued to examine the tax avoidance measures.

The report recommended that the Standing Orders Committee examine these proposals as part of that committee’s regular review of Standing Orders, with a view to adopting them as a general code of practice for all committees. The Standing Orders Committee commissioned a report from Professor Philip Joseph, a legal academic regarded as a leading public law expert, to assist with its consideration of this matter. Professor Joseph advised that, while the NZ Bill of Rights Act 1990 (and, in particular, s 27) obliges the House to observe principles of natural justice, the content and application of any such rules in respect of parliamentary proceedings would be for the House itself to determine.

The Standing Orders Committee agreed with this analysis, and largely endorsed the rules suggested by the FEC. The House adopted the changes recommended by the Standing Orders Committee in February 1996. The substance of these provisions have largely remained unchanged since then, although they were reorganised in 2003 and amended to provide for allegations made in advice (as well as in evidence).

Reflecting procedural protections in this way has strengthened the select committee system, and given a level of legitimacy to their work that otherwise would be lacking. Members treat the procedures seriously and tend to err on the side of caution. On the whole, the formal



natural justice procedures are not resorted to frequently. Thousands of written submissions are received, and hundreds of hours of hearings occur without incident. There is a general expectation that chairpersons will ensure participants in parliamentary processes are treated fairly and respectfully. It is only when serious allegations are made, or proceedings arise that may seriously damage a person's reputation, that the chairperson needs to reach for the natural justice procedures.

The Privileges Committee offers further natural justice protections than other committees. Some of these additional protections are detailed in Standing Orders 403, 405, and 406. The Privileges Committee has acknowledged that it is trusted with determining allegations, some of a very serious nature. It has accepted an approach of applying a standard of proof commensurate with the seriousness of the allegation.

For example, in its September 2008 report on the "Question of privilege relating to compliance with a member's obligations under the Standing Orders dealing with pecuniary interests", the committee noted that the standard of proof required is the civil standard: on the balance of probabilities as it had the potential for making adverse findings in respect of a member. During its consideration of this matter, the committee took care to ensure that those at the centre of the question of privilege had adequate opportunity to present their evidence, and to respond to the evidence of others.

I trust that the above is helpful to your inquiry, and I wish your committee all the best for its inquiry into procedural fairness.

Please feel free to contact me if you have any questions at  
[david.wilson@parliament.govt.nz](mailto:david.wilson@parliament.govt.nz).

Yours sincerely

David Wilson  
**Clerk of the House of Representatives**  
**New Zealand**

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