The "*Erebus* ground" of natural justice

Gillian Coumbe QC, Auckland

explores the duty to warn of the risk of adverse findings

The infamous phrases "orchestrated litany of lies" and "pre-determined plan of deception", published nearly 34 years ago in the report of the Royal Commission of Inquiry into the Mt Erebus tragedy, still reverberate. The Commission found that a number of senior Air New Zealand personnel had, in effect, conspired to commit perjury. These findings unleashed a media and political uproar, and ruined reputations and careers. Yet the findings were ultimately held by the Privy Council in *In re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662 to have been made unlawfully, in violation of two fundamental principles of natural justice. First, they were unsupported by any probative evidence. Secondly, they were made without giving the so-called conspirators any warning of the findings or opportunity to respond.

An inquisitorial process such as a public inquiry, investigation or inquest may not, of itself, determine any question of legal liability. But, as the *Erebus* case vividly illustrates, an adverse finding may greatly influence public opinion and have a devastating effect on the personal or business reputations of those traduced. It may also prompt the initiation of civil, disciplinary or criminal proceedings. The procedural protection offered by the principles of natural justice is therefore an important safeguard.

There have recently been a number of high profile inquiries and investigations in New Zealand, including, for example:

- the Royal Commissions of Inquiry into the Pike River coal mining disaster and the Christchurch earthquakes;
- the Kitteridge review of compliance at the Government Communications Security Bureau, and the Henry inquiry into the leak of the Kitteridge report;
- the Rebstock investigation into the leak of Cabinet Committee papers relating to the Ministry of Foreign Affairs;
- the government inquiry into the Fonterra contamination incident; and
- the Ernst and Young inquiry into the use of Auckland Council resources by the Mayoral Office.

Numerous tribunals conduct hearings of an inquisitorial nature. In addition, investigations in the commercial sphere by regulators such as the Commerce Commission are a continual occurrence. The decisions of coronial inquiries are challenged in the courts with surprising frequency. It is therefore timely to explore the duty to warn of the risk of adverse findings — the "*Erebus* ground". This article discusses, first, the nature and origin of the duty, secondly, what constitutes an "adverse finding" and thirdly, the content of the duty at common law and in certain statutory contexts, including the new Inquiries Act 2013 and the Coroners Act 2006. The question whether the *Erebus* ground has any place in purely adversarial proceedings is more controversial and will be considered in a further article.

NATURE AND ORIGIN OF THE DUTY

It is well established that the common law principles of natural justice, now affirmed in s 27(1) of the New Zealand Bill of Rights Act 1990, apply to inquisitorial proceedings, including inquiries and investigations, that may affect a person's rights, expectations or interests. An elementary requirement is that before being condemned a person must have fair notice of the case against them and a fair opportunity to respond. This embraces a number of obligations, including:

- *duty to give reasonable advance notice of the hearing.* As well as the date, time and place of any hearing, sufficient particulars of the nature and subject matter of the proceeding must be given. In *Carroll v Coroner's Court at Auckland* [2013] NZAR 650 the applicants ("Good Samaritans" who came to the aid of a young woman, Iraena Asher, the night she disappeared at Piha Beach) had been summoned to give evidence on the second day of the inquest. No other prior notice was given. They were unaware that police had already, in reports to the Coroner, criticised their conduct in not calling emergency services. Winkelmann J held (at [56]–[58]) that the applicants should have been given notice of the time, date and place of the inquest under s 23 of the Coroners Act 1988 (now s 81 of the Coroner's Act 2006). Natural justice also required notice that their conduct would likely be called into question at the hearing. This would have enabled them to make informed decisions about whether to attend and be represented.
- *duty to disclose material that is relevant, credible and significant.* This includes adverse as well as exculpatory material. Typically it includes evidential material, and copies of reports of outside bodies or experts. Sometimes it may be enough if the person is informed of the gravamen or substance of the content. In *A v Attorney-General* [2013] 3 NZLR 630 (CA) the fairness of the Rebstock investigation into leaked Cabinet Committee papers was challenged. The Court of Appeal considered that in the circumstances natural justice did not require the investigator to provide the appellant, the suspected leaker, with verbatim copies of forensic reports and technical source data relating to the scanning of the papers. The provision of summaries and extracts was sufficient. The appellant was entitled

to enough information to respond, not to "second guess" the investigation or to embark on a "fishing expedition". By contrast, in *Secretary for Justice v Simes* [2012] NZAR 1044 the Court of Appeal held that a failure to disclose written negative comments about the respondent was a serious breach of natural justice.

- *duty to warn of the risk of an adverse finding*. Before making a finding adverse to a person's interests the decision-maker must be satisfied that reasonable notice of the relevant allegation, and a reasonable opportunity to respond, has been given. There must be no ambush. It is sometimes described as a duty to inform of proposed findings. That overstates it. As will be discussed further below, there is no general common law obligation to warn of tentative conclusions in respect of an allegation, still less to disclose draft findings, although fairness, or statute, may sometimes require this. Rather, the obligation is to warn of the risk of an adverse finding, by ensuring that the allegation is plainly put, as the High Court recently confirmed in *Dow v Royal Commission on the Pike River Coal Mine Tragedy* [2012] NZHC 2404.

These common law obligations may overlap, or telescope into each other. The degree of disclosure made under the first two may narrow or expand what is required to fulfil the third. They may be excluded or modified by, or may supplement, the governing statutory framework. The third is the focus of this article.

In New Zealand the duty to warn of the risk of an adverse finding in an inquisitorial context can be traced back to *In Re Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (CA). Cleary J stressed (at 117) that parties must be given "a fair opportunity to present their submissions, adduce evidence and meet prejudicial matter". Later, in *Re Erebus Royal Commission* [1981] NZLR 618 (CA), Woodhouse P stated (at 628) that Cleary J's expression "prejudicial matter" was to be read broadly as including the unformulated allegations of organised perjury that had evolved in the mind of the Erebus Commission but had not been raised in evidence or submissions. As Cooke J said (at 666), natural justice required that the allegation "be stated plainly and put plainly to those accused". On appeal to the Privy Council, Lord Diplock's classic exposition of the duty then followed, at 671:

> ...any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

Lord Diplock added that a determination whether there had been a breach of this obligation called for an examination as "to what extent allegations of conspiracy were put" to those accused. In *Khalon v Attorney-General* [1996] 1 NZLR 458 (HC), Fisher J stressed the key elements of surprise and prejudice. He said (at 466) that a party "should normally be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted", and that the converse will generally be true "if the risk of an adverse finding was always foreseeable".

In some overseas statutory contexts the duty to warn of adverse findings has been codified in prescriptive, inflexible and burdensome notice requirements. In New Zealand, the preferred approach of the legislature, evident, for example, in s 14 of the Inquiries Act 2013, has been to prescribe only minimum statutory safeguards, and to allow the common law natural justice principles to inform and supplement those, consistently with the statutory scheme. As will be discussed below, the common law principles in this area are robust and flexible. They allow a fair and careful balancing of the protection of individual interests, and the public interest in forthright, effective decision-making and efficient processes.

AN "ADVERSE FINDING"?

The term "adverse finding" is not a term of legal art. The courts have not attempted a comprehensive definition. Nor does any statute expressly define the term. It perhaps falls into the category of "you know it when you see it". Frequently it is obvious that a statement is adverse: the inference that a director knew of the falsity of a statement in company documents in *Maxwell v Department of Trade and Industry* [1974] QB 523 (CA); the recommendation that the appellant be excluded from the Queensland gaming industry in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (HCA); the finding of intentional plagiarism in *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010; and the suggestion that an overseas developer had bribed public officials in *Hoffmann v Commissioner of Inquiry and the Governor (Turks and Caicos Islands)* [2012] UKPC 17. Sometimes it is less clear.

The cases concerning adverse findings have mainly involved statements that are a criticism or condemnation of a person's character, credibility or conduct. That is the sense in which the term is used in this article. Such a finding may be express, or it may be a matter of inference or impression. Robertson J, in *Campbell v Mason* [1990] 2 NZLR 577 (HC), observed (at 584) that inferential phrases may be "just as potent" as express criticisms. The finding must also be adverse to the person's interests. Usually this will follow from the making of a criticism and its publication, unless the criticism is insignificant. A person's interests are not limited to status, liberty, livelihood or property but extend to personal or business reputation. As the Supreme Court of Canada stated in *Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440 at [55], "For most, a good reputation is their most highly prized attribute".

Criminal or civil liability

To be regarded as "adverse" a comment need not be framed so as to appear to determine any question of civil, criminal or disciplinary liability: *Annetts v McCann* (1990) 17 CLR 597 (HCA), Brennan J, p 608. Indeed, often an inquiry or investigation will not have power to make a finding of legal liability, as distinct from a finding of blame: see, for example, s 11(1) of the Inquiries Act 2013 and s 57(1) of the Coroner's Act 2006.

Comment assessed in context

Whether a comment is adverse is to be judged by reading the comment in context — both the immediate semantic context and the report as a whole. The question then is an objective one: how would an ordinary and reasonable reader regard the comment. A statement that appears innocuous when read

in isolation may be regarded as a criticism when read in context, as in *Re the State Coroner; ex parte Minister for Health* [2009] WASCA 165 (at [70] & [71]). Conversely, a comment that, on its own, seems negative may be viewed more favourably in context: *Leadbeater v Osborne* HC Auckland M2010/89, 15 May 1991, Anderson J, at 3.

In *Erebus* the Privy Council considered (at 677) that a group of passages in the Commission's report were "redolent of suspicion" that an Air New Zealand executive pilot had taken documents from the wreckage of the aircraft in order to conceal their existence from any official investigation. The failure to put this allegation to him was a clear breach of natural justice, which was not cured by an additional two sentences containing a "grudging verdict" that the allegation was not proven.

Decision-maker's characterisation of comment

The decision-maker's own characterisation of the statement is not determinative. In the *Carroll* case the Coroner, having found that the applicants' decision not to call police "was a contributing factor" in the young woman's death, went on to say, "Now this comment is not a criticism of them or their actions. It is simply an acknowledgement that there was an opportunity that was missed by people with the best of intentions, acting in what they considered to be Iraena's best interests". His report also included numerous laudatory remarks. The applicants' actions "epitomised those of a Good Samaritan"; the applicants were to be "very strongly commended for taking Iraena into their care"; and they "felt the need to respect Iraena's wishes not to involve the Police". However, Winkelmann J considered (at [45]) that "no matter how the Coroner sought to characterise his own comments", they were, when placed within the context of his overall discussion of the applicants' conduct, adverse. No amount of praise could remove the sting of the finding.

Hindsight

A comment that is made purely with the benefit of hindsight is less likely to be regarded as adverse. As Winkelmann J observed in the *Carroll* case, "It is possible to conceive of a hindsight comment being made without implying that the decision was the wrong one at the time" (at [46]). Her Honour considered whether the Coroner's comment that it would have been "better" if the applicants had called police should be understood as made solely in hindsight. However, she concluded that the overall tenor of the finding was that the applicants had made the wrong decision in light of information they had available to them at the time.

Adverse credibility findings

A finding against a person's credibility as a witness in the proceeding — that is, a conclusion that a person has not given truthful or reliable testimony — may usually be categorised as adverse. It reflects negatively on the person, and may be damaging to their reputation or career.

However, individual witnesses commonly face the possibility that their evidence may be disbelieved. An adverse credibility finding is therefore in a different category from other adverse findings which involve something more, such as misconduct. As Woodhouse P pointed out in *Erebus* (at 650), the phrases "orchestrated litany of lies" and "predetermined plan of deception" are "unlikely phrases to associate with the mere credibility of witnesses". They went further and amounted to an allegation of organised perjury. In *Khalon v Attorney-General*, Fisher J suggested that, in the context of an oral hearing, an adverse credibility finding will not normally require a warning, for two reasons. First, credibility will usually be in issue in an oral hearing, so the risk of an adverse finding on credibility will be foreseeable. "Everyone should be taken to know that when they give evidence the tribunal may not believe them and may say so". Secondly, there will usually be little that the affected party can do to stave off an adverse credibility finding, with or without prior warning, especially if the finding is based on "demeanour, inconsistencies and general propensities demonstrated during the hearing". The key elements of surprise and potential prejudice will not therefore be present. Fisher J's comments have been approved in subsequent decisions, including: *T v Refugee Status Appeals Authority* [2004] NZAR 552 at [13] and *M v Refugee Status Appeals Authority* HC Auckland, 17 September 2010 at [30].

This is not an inflexible rule, however, as Fisher J recognised. *Khalon* was an immigration case and it was fundamental to the Authority's function to decide whether a refugee's version of events ought to be accepted. Credibility is "at the forefront" of cases of that nature. But there may be other situations where credibility is not so squarely in issue, and where with adequate notice it might be possible to rebut any adverse inference. And of course, none of this affects the obligation to give a person fair notice of adverse material, including contradictory evidence given by others.

CONTENT OF THE DUTY

As the Court of Appeal emphasised recently in *A v Attorney-General* (at [61]), the rules of natural justice vary from case to case depending on the nature and subject-matter of the proceeding, the seriousness of the allegation, the statutory framework in which the decision-maker is acting, and whether the report will or is likely to become public. This flexibility applies to the *Erebus* ground. What it requires in practice depends on the particular circumstances.

Several issues that have arisen before the courts are: whether the duty requires an explicit or formal warning; whether notice of proposed adverse findings (tentative conclusions) must be given; and whether there is an obligation to provide a draft finding or the draft report. The provision of a draft seems to have become more common, and it is increasingly expected by participants in an inquiry or investigation. That is not necessarily always a good thing.

Explicit or formal warning

The common law does not impose a general obligation to provide an explicit or formal warning. Before making an adverse finding the decision-maker must be satisfied, taking a "broad view" overall, that the allegation has been plainly raised during the proceeding (so that the affected person reasonably appreciates the risk of being criticised), and a fair chance given to respond. Again, the key elements are surprise and potential prejudice. Notice of the allegation may be given in various ways as the proceeding unfolds, including through terms of reference, issue statements, access to evidence and reports, questioning of witnesses (orally or in writing), and submissions: *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA), pp 271, 272; *Szwarcbord v Attorney-General* [2002] ACTSC 46 (at [17]). Whether the

person is represented by counsel is also relevant. In the end, the question is whether, looking at the process in the round, the person has been fairly treated.

Notice may be express or implied, as long as the real point or sting of the allegation is reasonably apparent. In the *Maxwell* case, for example, it had been put "fairly and squarely" to Mr Maxwell in the course of the investigation that a statement in a company offer document was false. The investigators did not, in terms, put it to him that he knew it was false, but that was clearly implied from their questions. The English Court of Appeal observed that Mr Maxwell was an intelligent and commercially experienced witness. The relevance and point of every question did not have to be spelt out to him. Similarly, in *Dainford Ltd v Independent Commission Against Corruption* (1990) 20 ALD 23, the NSW Court of Appeal observed (at 235), in response to the appellant's contention that he could not understand the basis of assisting counsel's submission that it would be open to the Commission to make a finding of bribery: "The Commission might well say, as Dr Johnson once did, 'Sir, I have shown you an argument but I am not obliged to find you an understanding'". In the case of a less sophisticated or unrepresented witness a more fulsome explanation of an allegation will be required.

If, on this "broad view" approach, an allegation has been dealt with fairly and squarely, the decision-maker need not take the further step of a formal warning. In the *Thomas* case the Court of Appeal held that all of the challenged findings had been fairly foreshadowed in the terms of reference and overall conduct of the hearing. Nothing more was required. The Commission had done all that fairness demanded. Ronald Young J endorsed this approach in *Pike River* (at [115]):

> Where a participant against whom adverse comment is anticipated has been made aware of the complaints against their conduct which might be the subject of adverse comment and has had the chance to respond during the inquiry nothing further would be required of the Commission.

Sometimes the risk of an adverse finding will be foreseeable from the very nature of the proceeding: for example, the kind of adverse credibility finding in *Khalon v Attorney-General* discussed above. If so, then again nothing more will be required.

Where, however, there is reason to doubt that a person is aware of the risk of an adverse finding, then the decision-maker may need to give more explicit or formal notice of the criticism and invite response: *Pike River* (at [116]). That assessment may sometimes be made at a late stage, for example, when the decision-maker has gone away after the hearing to consider the evidence. Even late notice, and a sufficient chance of rebuttal, can repair earlier procedural shortcomings (*Hoffmann* at [57]).

The procedures adopted by the Commission in the Pike River inquiry were intended to ensure that all participants who might ultimately be the subject of adverse comment were fairly informed of the allegations against them, and had a chance to respond during the hearings:

- the Commission conducted oral hearings, grouped into phases. In the course of the hearings the Commission issued a number of practice notes and minutes recording the procedures that were to be followed;
- counsel for the Commission identified the important issues at each phase and during closing submissions
- all participants were given access to witness statements and documents as those materials were filed. Counsel for the Commission was first to question each witness, illustrating the concerns of the Commission and ensuring that participants knew what they had to face;
- the applicants were able to participate fully at the hearings and were represented by counsel throughout.

The Commission also issued a minute recording that if, despite the above safeguards, the Commission considered that someone "had not had an opportunity to meet a criticism, and an adverse finding was contemplated", the Commission would write to that person to advise of the "intended finding" and the evidence relied upon to support it. The letter would invite a response within a defined timeframe. This was a backstop only. If the Commission considered that sufficient notice of the criticism had been given during the hearing no adverse finding letter would be sent. Ronald Young J regarded this overall process as conspicuously fair.

What constitutes a fair chance to respond also depends on the particular circumstances. It may range from a mere opportunity to make written submissions at one extreme, as in *Bell v VUW* (at [195]–[196]), to the reconvening of an oral hearing at the other, as in *Erebus* (Woodhouse P, at 628) and *Landreville v The Queen* (1977) 75 DLR (3d) 380 (FCC). One of the issues in *Pike River* was whether the hearings should have been reconvened. The Commission received further evidence after the hearings had ended, and he applicants were concerned that the additional material might give rise to adverse findings. They requested the reconvening of the hearings and cross-examination and recall of witnesses. The Commission announced that leave would be granted to file reply evidence and/or final submissions, and only then would the Commission decide whether a reconvened hearing was necessary. In addition, the process for sending adverse finding letters would extend to findings based on the new evidence. The applicants disputed the fairness of this procedure and chose not to file any reply evidence or submissions. The Commission then decided not to reconvene the hearing. The applicants challenged that decision. Ronald Young J held that the process complied with natural justice. A fair opportunity had been given to respond, especially as the relevant new evidence did not address new topics.

This aspect of *Pike River* underlines that a person who elects not to take advantage of an opportunity to respond takes a calculated risk, and may have to live with the consequences. This also occurred in the *Beno* case, where the applicant chose not to exercise his right to make closing submissions, and in *Hoffmann*, where the Privy Council ruled (at [66]) that the appellant had effectively declined a reasonable opportunity to give oral evidence.

Notice of proposed adverse comments

There is no general common law obligation to disclose proposed findings: *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock, at 369; *Ansett Transport Industries Ltd v Minister for Aviation* (1987) 72 ALR 469 (FCA), Lockhart J at 499; *Khalon v Attorney-General*, Fisher J at 464. The obligation is to warn of prejudicial allegations (from which the risk of an adverse finding will usually be apparent) not to warn of preliminary conclusions. This is more than a mere semantic distinction, and is consistent with the approach in *Erebus*. In *A v Attorney-General*, the *Erebus* ground was said by the

Court of Appeal (at [58], [59]) to "provide a person against whom an allegation is made an adequate opportunity to respond". That accurately states it. Justice demands sufficient notice of what is alleged, not what the decision-maker is proposing to conclude.

As with other aspects of natural justice, however, fairness may occasionally demand more. Or the decision-maker may find it expedient to give notice in terms of tentative findings (as in the *Pike River* adverse finding letters), especially if the notice is given at a late stage, after the hearing. Or questions of confidentiality may favour that process. Whilst it may seem fairer for a decision-maker to seek a response to a criticism, especially one affecting reputation, *before* reaching a preliminary conclusion, the courts have not regarded this as being a objectionable in an inquisitorial context. In *National Companies & Securities Commission v News Corporation Ltd* (1984) 156 CLR 295 (HCA) Gibbs CJ, in response to a submission that an opportunity for rebuttal should occur before the Commission formed a preliminary view, dismissed any suggestion of prejudgment, stating (at [18]) that "minds may remain open and impartial" although a tentative conclusion has been reached.

This may not always hold true, however, especially where the notice of a proposed finding is the first mention of the criticism. Reputation is important, as is the right to be heard before it is tarnished. It is preferable, where possible, that the focus — both of decision-makers and participants' counsel — is on ensuring that fairness is accorded during the oral or written hearing, before tentative findings are reached. That means putting the points to the witnesses as and when they come up. It is one thing to respond to an allegation; it is another to persuade a decision-maker why a tentative conclusion should not be adhered to. Adverse finding letters should not become a substitute for rigorously fair processes throughout an inquiry, as opposed to being an additional, precautionary backstop in cases of doubt (as in *Pike River*) or perhaps a second opportunity to respond to a significant criticism that has already been made known during the hearing. Where such letters are used it may be preferable to frame the criticism as an allegation, or a finding that "may be open to the decision-maker", rather than as a proposed finding.

Legislative obligations

Some legislative regimes go beyond what the common law would demand, and require notice of "proposed" adverse findings in all cases. Section 58(3) of the Coroners Act 2006 provides:

> The coroner must not comment adversely on a living person, corporation sole, body corporate, or unincorporated body without—
>
> (a) taking all reasonable steps to notify the person, corporation, or body of the proposed comment; and
>
> (b) giving the person, corporation, or body a reasonable opportunity to be heard, either personally or by counsel, in relation to the proposed comment.

The predecessor of s 58(3), s 15(2)(b) of the Coroners Act 1988, was in similar terms and was considered by the High Court in *Carroll*. Winkelmann J interpreted s 15(2)(b) as requiring, in effect, that the coroner notify the affected person in explicit terms that an adverse comment is proposed, and what the comment is. In that case, therefore, the Coroner was "obliged to notify the applicants that he proposed to find that their decision not to contact the Police was a contributing factor in Iraena's death" (at [70]). Thus, under these provisions notice of proposed conclusions is needed in all cases. As stated, this goes further than the more flexible approach of the common law. The form of the notice, and what constitutes a reasonable response, is, however, left to be determined by natural justice principles.

The Standing Orders of the House of Representatives impose on select committees an obligation to inform a person of any adverse findings they have "determined to make", and to give a reasonable opportunity to respond, before a report is presented to the House (SO 243(1)). Other "adverse comment" provisions give less direction, simply requiring that the decision-maker must not make such a finding unless the person has had "an opportunity to be heard" or "a reasonable opportunity to be heard". This largely preserves the common law flexibility. Examples include s 138 of the Human Rights Act 1993, s 67 of the Health and Disability Commissioner Act 1994, s 120 of the Privacy Act 1993, s 25 of the Children's Commissioner Act 2003, s 214 of the Lawyers and Conveyancers Act 2006, s 31 of the Independent Police Conduct Authority Act 1988, s 5(6) of the Shipping Act 1987, s 22(7) of the Ombudsmen Act 1975, and ss 30(2) and 38(6) of the Local Government Official Information and Meetings Act 1987.

Draft findings

There is no general natural justice obligation to provide a copy of draft adverse findings or of the draft report: *In re Pergamon Press Ltd* [1971] 388 (CA); *Maxwell v Department of Trade and Industry* above; *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA), at 16, 22; *Dainford v ICAC* above. This must follow from the principle that there is no requirement to give notice of proposed conclusions.

In *Pike River* the applicants challenged the Commission's refusal to provide them with a draft copy of its report. They contended that they needed to see the draft report in order to respond adequately to any adverse findings. The High Court held that there was no obligation to do so. The Commission had proposed a different method of ensuring compliance with natural justice, through its minutes, practice notes, issues statements, questioning of witnesses and submissions, and the further precaution of a formal adverse finding letter in cases of doubt.

Again, it will depend on the circumstances. In *Carroll* the High Court acknowledged that in fulfilling the obligation under s 15(2)(b) of the Coroners Act 1988 (now s 58(3) of the 2006 Act) to give notice of proposed findings there was no express requirement to provide a draft copy of the coroner's report. The requirement was to provide "reasonable notice". That was determined by reference to natural justice principles. Winkelmann J held that in that case fairness did require the provision of draft findings, because of the "unsatisfactory procedure" up to that point (at [73]). These failings compounded one upon another and impacted on what s 15(2)(b) required:

- the applicants were not notified before the hearing that that their own conduct had been criticised by police and would likely be called into question at the inquest. They accordingly had insufficient information to decide whether to engage counsel or exercise their rights to attend the hearing;

- they were not present on the first day of the hearing and did not have the opportunity to hear the police evidence, or to challenge it by cross-examination; and
- immediately prior to giving evidence on the second hearing day they were reassured that they did not need to be legally represented and would be warned if adverse comment was proposed and given an opportunity to respond. That did not occur.

Thus, while as a general rule, a draft will not need to be provided, occasionally fairness will require it, as in *Carroll*. And, as with adverse finding letters, some decision-makers may find it expedient to provide a copy of draft adverse findings or the draft report. That has become more common. The draft Rebstock report was provided to the suspected leaker of the Cabinet Committee papers for comment. The draft Ernst and Young report was provided to the Auckland Mayoral Office. A few royal commissions of inquiry have provided draft reports, for example the Royal Commission of Inquiry into Police Conduct (the Beazley Inquiry). Some coroners do so (as in *Solicitor-General v Coroner at Kaitaia* HC Wellington CP258/01, 13 March 2003), although there is no uniform practice to that effect. Even where a common practice exists, that does not convert it into a legal obligation. However, where a decision-maker announces that draft findings or adverse finding letters will be provided, and this is known by the affected person, a legitimate expectation may arise that this procedure will be observed (*Muin v Refugee Review Tribunal* (2002) 190 ALR 601 (HCA)).

The provision of draft adverse findings or of the draft report may raise further issues. For example:

- if a person has already fairly been confronted with the criticism during the hearing, then providing a draft finding will expand the hearing obligation. They will be entitled to respond again, having a second crack of the whip. Whilst eminently fair to those criticised, this may unnecessarily protract the process and increase expense. It will also provide added opportunity for judicial review proceedings seeking interim orders restricting the content or publication of the report;
- it may create additional procedural fairness concerns: for example, if the draft is distributed to some, but not to others who later claim to be affected by the finding; or if there are unsignalled changes to the draft finding in the final report. These kinds of problems arose in *Welgas Holdings Ltd v Commerce Commission* [1990] 1 NZLR 484 and *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601, although those cases did not involve adverse findings in the sense used in this article.
- draft findings may be over-used as a safety net, leading to less vigilance about requiring allegations to be addressed upfront during the hearing as they arise, before the decision-maker has reached preliminary conclusions. For those whose reputations are at stake, draft findings should preferably not be the first notice of a criticism.

The new Inquiries Act

The Inquiries Bill, first introduced into the House in September 2008, contained a highly prescriptive provision relating to adverse findings. This arose from the Law Commission's recommendation in its Report 102, "A New Inquiries Act", May 2008, at 71. Clause 17 of the Bill provided:

> **17. Application of principles of natural justice**
> An inquiry must not, in its report, make any finding that is adverse to any person (whether a natural person or a body corporate), unless the inquiry has—
> (a) taken all reasonable steps to—
> (i) give that person reasonable notice of the intention to make the finding; and
> (ii) disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based; and
> (iii) give that person a reasonable opportunity to respond to the proposed finding; and
> (b) properly considered any response given under paragraph (a)(iii).

The Bill was amended by a Supplementary Order Paper dated 20 August 2013, days before it was enacted. Clause 17 was deleted, and clause 14 was modified to address adverse findings. Section 14 of the Act now 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.
> (2) In making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must—
> (a) comply with the principles of natural justice; and
> (b) have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.
> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—
> (a) is aware of the matters on which the proposed finding is based; and
> (b) has had an opportunity, at any time during the course of the inquiry, to respond to those matters.
> ....

This was a late save. Section 14(3) is more closely aligned with the common law obligation to warn of the risk of adverse findings. The wording of subsections (3)(a) and (b) reflect the common law position that before making an adverse finding the decision-maker must be satisfied whether, considered overall, the person has had sufficient notice of the material on which it is based (which must include the critical allegation) and an opportunity to respond during the course of the inquiry. If so then, as the Court emphasised in *Pike River*, there would be no need to do anything more. The decision-maker is not required to inform the person of the proposed finding itself, again reflecting the common law. This is preferable to the earlier version in clause 17. Clause 17 went too far. It required notice of the "intention to make

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covered by the accident compensation legislation. In other words, it is necessary to establish the causal link.

Fibromyalgia is considered by some medical experts to be multifactorial in its origins containing a heavy psychological component. In other words there are a number of factors which may cause or contribute to the onset of the condition. This is fully supported by the research which states that it involves genetic, neurobiological and environmental factors (Wikipedia). Each of these may cause or contribute to the onset of fibromyalgia. The important point is that environmental factors are significant. This includes work activities. Indeed in *Waitemata* a study known as the Anderson study was referred to. This established that the incidence of a regional pain syndrome could be linked with certain occupations. There was a close response link established and consequently and it was accepted that a pain syndrome could arise in certain groups without there being any discrete injury (at [29]) What it is necessary to establish under the accident compensation legislation was that there was a causal link between, say, the work-place activity and the onset of chronic pain syndrome. The causal link must be established on the balance of probabilities (*ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340). Medical experts need to be reminded of this when they are asked to provide a medical opinion. The balance of probabilities is a subtle test which must be carefully applied. It then needs to be asked whether the pain is associated with any particular event or work-place activity. If the answer is affirmative, the next question is whether there is any non-workplace activity or other factor(s) which could also have contributed to the condition. Should no relevant non-workplace activities be identified and there is a relevant workplace activity the issue then becomes whether it is connected to the painful parts of the body which are exhibiting the syndrome. If there is such a connection it can be said that on the balance of probabilities the person contracted chronic pain syndrome as a result of work related gradual process. This is applying the framework which is set out in s 30 — work related gradual process — of the current legislation. The focus is on the event or the repetitive activity and its connection with the pain.

CONCLUSIONS

The underlying philosophy of the Accident Compensation scheme would fully support people such as Mrs Teen and Mitchell to receive accident compensation cover. Under section 3 of the current legislation it is stated that the purpose of the Act is to reinforce the social contract represented in the first accident compensation scheme.

Both Teen and Mitchell were unable to work because of the chronic pain. This, it is argued, was caused by work place activity. Consequently they should be entitled to accident compensation. This would provide them with the right to treatment to address the pain syndrome. It would also provide them with access to vocational rehabilitation to enable them to return to the work force. While this is occurring they should receive weekly compensation to meet their regular commitments. To deny them such cover is unfair and is in complete contradiction to the purpose of the scheme. This is being justified by narrow interpretative approaches to what is already an inadequate definition of physical injury. The courts were provided with the opportunity of providing an appropriate definition of physical injury but they declined such a challenge. It has been argued that the chronic pain syndrome conditions do meet a fair definition of physical injury when applying a "generous unniggardly" interpretation of personal injury by accident. When clarifying the appropriate definition of physical injury it is important to be mindful of the underlying purposes of the scheme. The definition should accord with the purpose of the legislation. The approach to physical injury that has been proposed in this paper would, it is argued, allow people like Teen and Mitchell to be receive accident compensation cover. Consequently it is in accord with the purpose of the legislation. To deny people cover means that they are not able to receive the benefits of the accident compensation scheme which they have financially contributed, despite the fact that they have a condition brought about by an accident covered by the legislation. This is an unjust outcome. It is submitted that the Supreme Court decision in *Allenby* provides the opportunity for the reconsideration of the issue of what amounts to a physical injury. It is to be hoped that such an opportunity will be effectively used. ❐

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the finding", the "content of the finding" and the "reasons". That would, in effect, have necessitated the provision of draft findings or the draft report, or, at the very least, a formal, explicit notice of the intended finding, in every case. There would have been no flexibility. These concerns appear to have driven the change to the Bill (Cabinet Economic Growth and Infrastructure Committee Minute EGI Min (13) 13/3).

Section 14(3) imposes only minimum express obligations. But the common law rules of natural justice will operate flexibly to supplement the statutory procedure and tailor the degree of notice to the particular circumstances. Sometimes fairness will demand more than s 14(3) expressly requires, such as formal notice or, occasionally, the provision of draft findings, as discussed above.

CONCLUSION

The *Erebus* case dramatically illustrates how an unfair procedure can derail an inquisitorial process. The unfortunate aftermath of that inquiry has heightened awareness of the duty to warn of the risk of an adverse finding. It has significantly influenced the conduct of inquiries and other inquisitorial proceedings, both in New Zealand and overseas. However, the content and operation of the duty should not be refashioned, either by statute or by the courts, into one that is unduly prescriptive, rigid or burdensome. The High Court's approach in the *Pike River* case, which influenced the late amendment to clause 14 and the discarding of cl 17 of the Inquiries Bill, is a timely reminder of the flexibility and robustness of the common law natural justice principles. ❐