

## TRANSLATION OF THE OFFICIAL PUBLICATION OF SINT MAARTEN (AB 2010, GT no. 16)

### EXPLANATORY MEMORANDUM

#### 1. General Section

According to Article 64 of the draft Constitution, Parliament has a right to conduct inquiries, to be regulated by national ordinance. The parliamentary inquiry is a parliamentary instrument of control and an instrument for determining the truth. The parliamentary inquiry can also serve to prepare the way for legislation or to investigate abuses. The main objectives are to determine the truth and to learn lessons for the future. What distinguishes a parliamentary inquiry in principle from other parliamentary investigations, such as working groups or temporary committees, is the fact that in an inquiry, a commission of inquiry has powers that extend not only to the government, but also to the public. This calls for deployment of this instrument with due care.

Article 82 of the Netherlands Antillean Constitution provides for the right of investigation (inquiry) for Parliament. The 1948 Netherlands Antillean inquiry regulation is based on the Dutch Act of 5 August 1850. An entirely new law on the parliamentary inquiry entered into force in the Netherlands in 2008. The reason was that, despite various amendments, the former Act led to many questions in practice and was regarded as open to multiple interpretations (Parliamentary Documents II 2005/06, 30 415, No. 6, pgs. 3-4). In contrast to the Netherlands Antilles, the use of the parliamentary inquiry has become very popular in the Netherlands over the past 25 years.

The new Dutch Act of 2008 on the parliamentary inquiry served as a guide for this draft. In comparison with the Netherlands Antillean regulation, the draft contains the following main points:

- the hearing of witnesses in public is laid down as a principle;
- the proportionality principle concerning the exercise of the powers granted to the commission;
- the disclosure and access to and archiving of documents;
- the powers of the commission of inquiry are expanded and clarified on a number of points;
- the position of persons required to assist in a parliamentary inquiry is clarified and improved;
- the relationship with other investigations, criminal or otherwise, is clarified.

The main changes in comparison with the existing national ordinance are:

- The hearing of witnesses in public is laid down as a principle (Article 10(1));
- The granting of powers to the commission to demand written information (Article 5);
- A general obligation to assist in an inquiry (Article 13);
- A regulation concerning preliminary interviews (Article 7);
- A regulation concerning the possibility of providing for public hearings in the absence of audio-visual recordings (Article 10(2));
- A general right to support during a parliamentary inquiry (Article 16);
- At each phase of the inquiry, rights of immunity can be invoked (Articles 18 up to and including 23);
- The introduction of two new sanctions, i.e. a court order to assist subject to penalties (Article 26) and the possibility of imposing a court to assist that can be enforced by the police (Article 26);
- A regulation on further protection of persons concerning whom information is provided in other proceedings (Articles 29 and 30);
- A clear regulation on public access to/the confidentiality of the commission archives (Articles 36 up to and including 39).

The draft has also been structured more clearly. The extensive Parliamentary Documents concerning the Dutch Act serve as an explanation of this draft; the Article by Article section briefly discusses the Dutch regulation and records the differences from the Netherlands Antillean ordinance.

In the Senate and the Second Chamber of Parliament, the Dutch government expressed objections to the power laid down in the Bill to enter locations, including residential properties, and to its failure to include the right to invoke immunity.<sup>1</sup> In the view of the Dutch government, the benefit of the power to enter locations for the establishment of the truth was not clear. This view is shared by the Administrative Board here, partly in the light of Article 31 of the draft Constitution, which provides that restrictions of traditional constitutional

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<sup>1</sup> See Parliamentary Documents I, 2006/07, 30 415C, pg. 27.

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rights, including the right of the privacy of the home in Article 7, should be necessary. This means that the power of entry has not been included in this draft. In that regard, this draft differs from the Dutch Act. There were also objections to the lack of a right of immunity for witnesses who would expose themselves or their relatives to criminal prosecution.<sup>2</sup> Nevertheless, the legislature did not opt to include such a right. The main argument for this is that in a concrete case, the establishment of the truth would be placed under pressure. Furthermore, the interests of those directly concerned are protected in other ways. A regulation is included in Articles 29 and 30 providing that in principle, statements and documents submitted on the demand of the commission cannot be used in evidence in other proceedings. Furthermore, the commission may not provide any information to other institutions. Finally, the current Netherlands Antillean national ordinance concerning the parliamentary inquiry and the draft of the country of Curacao do not include any familial immunity right or a right of non-incrimination.

Article 39 of the draft leads to a number of changes in the Criminal Code of the Netherlands Antilles, which will be adopted by the country of Sint Maarten in line with the example of the Dutch Criminal Code. According to Article 39(1) of the Charter for the Kingdom, criminal law in the Netherlands Antilles, Aruba and the Netherlands should be regulated in the same way as far as possible.

The exercise of the right of investigation (inquiry) is further regulated in Chapter 14 of the draft Rules of Order for the Parliament of Sint Maarten.

## **2. Article by Article Section**

### *Article 1*

This definition of terms is adopted from Article 1 of the Dutch 2008 Act on the parliamentary inquiry, with the exception of paragraph a, which describes the term 'Chamber'. While Article 70 of the Dutch Constitution grants both houses of Parliament the right to conduct an inquiry, jointly and individually, the country of Sint Maarten only has Parliament as a representative body. 'Document' refers not only to written documents but also to all other materials containing information, such as tapes, USB sticks, computer files, etc.

### *Article 2*

This provision concerns the institution of an inquiry and is adopted from Article 2 of the 2008 Parliamentary Inquiries Act. Although it is conceivable, in view of the size of Parliament of 15 members, that the entire Parliament could conduct a parliamentary inquiry, a decision was made that an inquiry should be conducted by a parliamentary commission. This is consistent with Article 1 of the Netherlands Antillean regulation. While that regulation provided that the commission should consist of at least one member who would also serve as the chairman and at least four other members, the Parliament of Sint Maarten is free to determine the size of a commission. There is no clear need to regulate the size of the commission by national ordinance. It does follow from Article 8(2) that a witness can only be heard if at least three members are present. In comparison with the Antillean regulation, the accuracy requirement has been scrapped, in line with the Dutch regulation, because it is up to Parliament to determine what the inquiry will concern.

### *Article 3*

Article 3 regulates that the costs of the inquiry should not be funded from the regular costs of Parliament, and is adopted from Article 3 of the Parliamentary Inquiries Act. This prevents financial arguments from playing a role in the decision on whether to conduct an inquiry. In comparison with the Dutch regulation, 'the Minister of the Interior' has been replaced by 'the Minister of General Affairs' in the first paragraph, as the country of Sint Maarten does not have a ministry of the Interior.

### *Articles 4-12*

These Articles contain the powers of the commission and are adopted from Articles 4-13 of the 2008 Parliamentary Inquiries Act, with the exception of the powers of entry.

### *Article 4*

Article 4(1) provides for the period within which the commission can perform its work. Article 4(2) includes the proportionality principle. This means that the commission may only exercise its powers if, according to

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<sup>2</sup> Parliamentary Documents I 2006/07, 30 415C, pg. 27.

the reasonable view of the commission, this is necessary for the performance of its task. Unlike Article 23(1) of the Antillean regulation, Article 4(3) provides that the powers and work of the commission are not terminated by the expiration of the parliamentary term or the dissolution of Parliament. In fact, this already follows from paragraph 1. It is included in paragraph 3 to make this clear.

#### *Article 5*

Article 5 contains the new power to require written information; this concerns information that is not yet recorded in an existing document; otherwise Article 6 applies. The power solely concerns the acquisition of factual information; the commission cannot, therefore, require persons to give advice.

#### *Article 6*

This new provision concerns the commission's power to access existing documents. Paragraph 2 provides that the commission determines the method of access. In certain cases, the commission will wish to see original documents, while in others, a copy will suffice.

#### *Article 7*

This establishes the practice of the preliminary interview, which has grown in the Netherlands. Private preliminary interviews can provide greater insight into the general problem. On the basis of a preliminary interview, the commission can decide whether or not to call a witness for a public hearing. The regulation of preliminary interviews may also be useful for parliamentary inquiries by the Parliament of the country of Sint Maarten.

#### *Articles 8 up to and including 12*

These Articles contain special provisions concerning the hearing of witnesses and experts by the commission and are adopted from Articles 9 *up to and including* 13 of the 2008 Parliamentary Inquiries Act. The provisions of Article 10(1), that a witness or expert shall be heard in a public hearing of the commission, represent a substantive difference from the Antillean regulation. This principle of public hearings relates to the interests of verifiability and transparency and to the learning effect of the inquiry.

The demands of a public hearing may be considerable for the person concerned. Provision has therefore been made for the possibility that the commission, for serious reasons, may decide that no audio-visual recordings may be made by third parties at a public hearing (Article 10(2)). The hearing is then public, but no audio-visual recordings are permitted. For serious reasons, the hearing may also be conducted in private (Article 11(1)). In view of the principle of public access, this must be a rare exception.

Article 12 regulates the taking of the oath or making of the solemn affirmation prior to a public or private hearing. This Article does not apply to preliminary interviews. The commission may decide that the hearing will not be conducted under oath, for example if a person is not adequately aware of the significance of the oath due to mental underdevelopment.

#### *Article 13*

This Article is based on Article 14 of the 2008 Parliamentary Inquiries Act, with the following difference. Article 14 of the 2008 Parliamentary Inquiries Act provides first and foremost that every Dutch citizen is required to provide all assistance that the commission requires. The term 'Dutch citizen' is derived from the Dutch Citizenship Kingdom Act. This means that Dutch citizens residing in the Netherlands Antilles and Aruba are also subject to the Dutch inquiry act. There is no need to provide that the assistance obligation also applies to all Dutch citizens in the European section of the Kingdom, partly because there are criminal sanctions for non-compliance (see Article 40). For that reason, the phrase 'every Dutch citizen' has been scrapped in this draft. In that regard, consistency has been sought with the Netherlands Antillean inquiry regulation, which is confined to persons located in the territory of the Netherlands Antilles. The notion in paragraph 2, that persons registered in the population records of Sint Maarten are deemed to be residents of Sint Maarten, is also found in Article 1 of the draft Election Ordinance.

Pursuant to this draft, as for Members of Parliament, the possibility of deploying means of coercion against ministers is explicitly ruled out (Article 28). The use of means of coercion is not appropriate within the political relations between the government and Parliament. Another difference between ministers and other persons required to provide assistance is that ministers, like Members of Parliament, cannot be prosecuted under criminal law for failure to assist an inquiry (see included in Article 40 the proposal for a new Article 198d of the Criminal Code). The possibility of criminal prosecution is not appropriate within the political relations between the government and Parliament. Only political conclusions can be drawn from the failure of a minister to assist.

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Civil servants working for a minister also hold a special position in relation to a parliamentary inquiry. This is the result of ministerial responsibility. Pursuant to Article 1(2) of the draft, the term 'civil servant' includes persons who perform work at a ministry under an employment contract. Further references to civil servants concern all persons who work for a minister. The principle in normal relations with Parliament is that civil servants do not have direct contacts with Members of Parliament regarding the performance of their duties as civil servants. It is the minister who informs Parliament, not the civil servants. This is related to the fact that civil servants work under ministerial responsibility. However, this does not mean that direct contacts between Parliament and civil servants are ruled out. The Dutch instructions concerning external contacts of national civil servants contain regulations in that regard. The principle in these is that the minister decides whether contacts are permitted on a case by case basis. The following applies for contacts between the commission of inquiry and civil servants. Pursuant to this draft, the commission of inquiry has the power to hear civil servants as witnesses or experts without the minister's prior consent. Civil servants are also required to cooperate in this. This follows from the general obligation to provide assistance, as laid down in Article 13 of the draft. Pursuant to the current Article 3(3), all civil servants are required, from the date of the first notification, to comply with the requirements of the commission that it considers necessary for the performance of its tasks. The draft does not include a specific obligation to assist for civil servants. This is not necessary in addition to the general obligation to assist included in Article 13. The fact that civil servants can be heard directly by the commission of inquiry is not counter to ministerial responsibility. After all, civil servants themselves are not answerable to Parliament for the information they provide. The oral information that a civil servant provides in a hearing is attributed to the minister. The information provided by a civil servant, to the extent that this concerns the performance of his official duties, falls entirely under the responsibility of the minister. The minister concerned can therefore be called to account by Parliament for the information that the civil servant provides. Like the minister himself, civil servants may refuse to provide information, invoking the interests of the country or the Kingdom. In such a case, the commission of inquiry can request confirmation of this invocation from the minister concerned. However, if a commission of inquiry requests written information from a civil servant or requires access to documents that the relevant civil servant possesses, pursuant to Article 15 of the draft, this is only possible via the minister concerned. In concrete terms, this means that the minister himself will provide the requested written information and/or documents, or must provide permission for this.

#### *Article 14*

Article 14 regulates that the obligation to assist an inquiry takes precedence over (statutory) confidentiality obligations. This precedence applies only to the extent that statutory grounds for immunity included in the draft cannot be invoked. The Article is adopted from Article 15 of the 2008 Parliamentary Inquiries Act.

#### *Article 15*

This Article contains a special provision for persons who work for a minister. It does not concern only persons appointed as civil servants by the ministry, but also persons who work for the relevant ministry on the basis of an employment contract (See Article 1(2)). However, this does not cover persons who work for an independent administrative body. Persons who work for a minister are not required to comply independently with a demand from the commission to provide written information or documents, at least to the extent that this concerns information relating to their position. This is entailed by the ministerial responsibility. The information or documents can only be provided to the commission of inquiry via the intermediary of the minister. The phrase 'through the intermediary of the minister' means that it is the minister who provides these documents and written information. Civil servants working under the responsibility of the minister do not, therefore, hold independent responsibility to inform the commission of inquiry in writing. A civil servant acting in that capacity may only be called as a witness or expert. Moreover, the commission of inquiry will generally contact the minister directly for access to documents or to obtain written information. If a commission of inquiry does approach civil servants, they may only provide written information via the minister. In practice, the intermediary of the minister can take different forms. For example, the minister may authorise the persons concerned to grant the commission of inquiry access to certain documents. Another form is that the minister provides the commission of inquiry with the documents or written information himself, while the civil servants perform the preparatory work. In all cases, however, the information is provided under the responsibility of the minister concerned.

#### *Article 16*

Article 16 concerns support for persons and is new in comparison with the Antillean regulation. The possibility of support concerns all contacts with the commission. To the extent that these involve a

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preliminary interview or hearing, the commission may prohibit support for serious reasons. These could include the interests of the inquiry or of the person who provides the support. The term 'serious reasons' means that support can only be refused in exceptional situations. No legal remedy is available against a refusal. This would lead to excessive juridification of inquiries. The Article is adopted from Article 17 of the 2008 Parliamentary Inquiries Act.

#### *Article 17*

This Article is also adopted from the 2008 Parliamentary Inquiries Act and regulates the remuneration of witnesses and experts and persons with whom the commission has conducted preliminary interviews. The remuneration is consistent with the remuneration received by witnesses and experts in legal proceedings.

#### *Articles 18 and 19*

Article 18 provides for the right of immunity for ministers and other persons referred to in the Article, regarding the provision of information, to the extent that this conflicts with the interests of the country or the Kingdom. The ground for immunity 'the interests of the country or the Kingdom' is directly related to Articles 63 and 107 of the draft Constitution. It is not easy to say what this refers to *in abstracto*. Article 63 provides that ministers can be invited by Parliament to attend the meeting in order to provide the required information 'to the extent that the provision of this cannot be regarded as counter to the interests of the country or of the Kingdom'. According to Article 107 of the draft Constitution, the government aims for openness in the performance of its duties, to the extent that this cannot be deemed to conflict with the interests of the country or of the Kingdom, or with other interests that justify non-disclosure. Article 11 of the draft national ordinance open government provides that information will not be provided 'to the extent that this could harm the interests of the security of the country or of the Kingdom'. Furthermore, Article 68 of the Dutch Constitution, the Dutch counterpart to Article 63, contains the interests of the state as an exception clause. In Dutch practice, the refusal to provide information with the invocation of the interests of the state occurs only in exceptional circumstances.<sup>3</sup>

The possibility of invoking the interests of the country or of the Kingdom as a ground for immunity is open to all persons who are employed by a national body. In addition to the ministries, the term 'national body' refers to the High Councils of State and all advisory boards.

To the extent that the interests of the country or of the Kingdom are invoked by a person other than a serving minister, confirmation of the invocation can be required.

Article 19 recognises the interest of the confidentiality of the Council of Ministers in order to protect the unity of government policy (Article 39(4) of the draft Constitution). The confidentiality is laid down in the Rules of Order for the Council of Ministers. In outline, this means that ministers are not required to provide information on the *discussions* conducted within the Council of Ministers. Information on decisions taken by the Council of Minister and the grounds for these must be provided to the commission of inquiry, however.

#### *Article 20*

This provision concerns a right of immunity for the discussions of institutions for which statutory confidentiality obligations apply, such as judge's chambers of a district court. The provision is more broadly-based, because the possibility of other institutions with statutory confidentiality requirements being created by national ordinance is not ruled out.

#### *Article 21*

Article 21 contains the grounds for immunity regarding business and production information and other confidential business information and competition-sensitive information. The ground for immunity exists independently of whether this information relates to a person's own company or another company. As in Article 22, this concerns a relative ground.

#### *Article 22*

In 1850, the Dutch legislature assumed that a parliamentary inquiry would only concern businesses. From that point of view, it is not surprising that the Act contained immunity only for business information, not for

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<sup>3</sup> A memorandum of 21 January 2002 from the Dutch Minister of the Interior and Kingdom Relations discusses the scope of Article 68 of the Dutch Constitution in detail. A number of aspects are mentioned that play a role in answering the question of in which cases the interests of the state prevent the provision of information or the provision of information only in confidence. The memorandum could play a role as an assessment framework in inquiries.

information concerning personal privacy. Naturally, it is also important to note that respect for personal privacy only came to be regarded as one of the foundations of our legal system in the course of the last century. In principle, parliamentary inquiries still concern business matters. This does not alter the fact that privacy-sensitive matters may also be raised in these inquiries. In order to protect the personal privacy of persons who assist in an inquiry, it is desirable that in principle, they are not required to provide privacy-sensitive information. The constitutional right to personal privacy is so fundamental that in some circumstances, it can outweigh the interest of the commission of inquiry arriving at the truth. For that reason, the draft contains a ground for immunity concerning personal privacy. The current Inquiry regulation contains no specific regulation in that regard. However, it can be assumed that in certain cases persons can also refrain from providing information concerning personal privacy by invoking Article 8 of the European Convention on Human Rights (ECHR). Like the ground concerning confidential business and production information, the ground for immunity concerning personal privacy is a relative ground for immunity: the interest of privacy must be assessed in relation to the interest of determining the truth. In certain cases, therefore, information concerning personal privacy will have to be provided to the parliamentary commission of inquiry. As soon as personal information is involved, this obligation infringes the right to protection of personal privacy laid down in Article 8 of the ECHR. However, if the infringement is consistent with the restriction clauses of these Articles, it does not lead to infringement of the right to personal privacy. Article 5(1) of the draft Constitution requires a legal basis for the infringement. This draft provides that. Article 8(2) of the ECHR provides that there must be a legitimate purpose. The infringement to be made must also be foreseeable and accessible to the public and furthermore, must be necessary in a democratic society. With regard to the accessibility of the infringement, this draft provides for sound grounds. The need for the restriction must be shown by an urgent social interest. In this case, that interest lies in the importance of determining the truth. Finally, the means chosen must be proportionate to the envisaged objective. The information must be provided only if the interest of the parliamentary commission of inquiry in determining the truth outweighs the interest of privacy. It is important to note that there are no less far-reaching means of attaining the objective. Furthermore, the means are appropriate in the given situation. Finally, it is relevant to note that the assessment will be made by the commission of inquiry in each concrete case. Moreover, this assessment can be tested in the courts, so that legal protection is assured. Article 31(1) of the draft Constitution therefore complies with the requirements of Article 8 of the ECHR.

#### *Article 23*

This Article concerns professional confidentiality. This concerns persons who hold typical positions of confidence. The obligation to preserve confidence to which the immunity right relates need not be regulated in a national ordinance, but can also arise from the nature of the position.

#### *Article 24*

Article 24 provides for the possibility that the commission will approach the courts to order a person who refuses to assist in an inquiry to provide such assistance. The competent court in the first instance is the provisional relief section of the Court of first instance. The request must be submitted as a petition. Among other things, this means that the petition procedure laid down in Title 3, Book 1 of the Code of Civil Procedure applies. Pursuant to Article 358 of the Code of Civil Procedure, an appeal against the decision of the court is possible, and an appeal to the Supreme Court can be instituted. The rules of the Code of Civil Procedure concerning the petition procedure apply, provided that this draft does not derogate from this. In the first instance, the derogation from the regular procedure is that the petition need not be signed by a prosecutor (Article 24(3)). This was chosen because in urgent situations, the involvement of a prosecutor can represent an extra step. However, it is obvious that in practice, a commission of inquiry will enlist the assistance of a prosecutor, but this is not mandatory. A further derogation concerns the fact that the draft contains a maximum term within which the court must reach a decision. In principle, this is no later than the seventh day following the receipt of the petition. However, if the commission of inquiry has requested an immediate decision, the decision must be handed down without delay (paragraph 4). The decision of the court is, after all, always enforceable with immediate effect, regardless of objections or appeals (paragraph 6). It follows from paragraph 5 that in principle, the court must honour a request to impose a court order to provide assistance. This in fact represents a reversal of the burden of proof. It is up to the defendant to prove that the petition has no legal basis. This does not alter the fact that in practice, the commission of inquiry will also be asked by the court to explain its petition for the imposition of an order to provide assistance. In view of the special character of the inquiry and the special position of the commission of inquiry, a reversal of the burden of proof is called for. The court can reject the petition in three situations. The first case concerns a situation in which the petition is not based on the law (paragraph 5(a)). This will be the case if another form of assistance is required than that which the commission is authorised to require.

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This could include a petition to order a person not to destroy documents that he possesses. The commission of inquiry is not authorised to require this assistance of an inquiry. The court must also reject the petition if the person concerned has legitimate grounds for refusal (paragraph 5(b)). This will be the case if the person concerned can successfully invoke grounds for immunity. Finally, the court must reject the petition if the commission cannot reasonably reach its view that the required assistance is necessary for the performance of its tasks (paragraph 5(c)). Obviously, if the court reaches the conclusion that this is the case, it must dismiss a petition to impose a court order to provide assistance. However, this concerns a marginal review.

#### *Article 25*

Article 25 provides for the possibility that the court, at the request of a commission of inquiry, will issue an order to provide assistance, subject to a penal sum. In that case, Part 3 of Title 5, Book 2 of the Code of Civil Procedure applies. Like the other means of coercion included in Chapter 4, the penalty is not a penal sanction. The purpose of the *astreinte* is that the person concerned will assist the commission of inquiry after all. The order can be imposed for assistance with all powers of the commission of inquiry. It is desirable that a commission of inquiry also has a more contemporary means of coercion than commitment. In certain cases, a penalty will be more effective than commitment. Furthermore, this remedy is less invasive of the privacy of the person concerned.

The fact that the relevant Articles of the Code of Civil Procedure apply means, among other things, that a non-compliant person should be granted a term in which to implement the order without having to pay the penalty. The term must be made as short as possible. Which term is desirable in a concrete case will depend on the situation. The penalty can be imposed as a lump sum or per unit of time in which the person fails to comply with the order. If the commission of inquiry needs the relevant information within a particular period of time, a lump sum is a more obvious choice than an amount per period of time. In all cases, the amount of the penalty must be in reasonable proportion to the interest in the required assistance and to the envisaged effect of imposing the penalty.

#### *Article 26*

Article 26 provides for the possibility that the commission of inquiry receives support from 'the public authorities' in exercising its powers. In concrete terms, this means that the police can provide assistance in the exercise of the powers. In principle, the possibility of enlisting the support of 'the public authorities' exists for the exercise of any of the commission's powers. It is probable that in practice, this will only be used for the commission of inquiry's authority to access documents (Article 6) and its authority to hear witnesses and experts (Article 8). It is improbable that the commission of inquiry will require police support for the provision of written information (Article 5). However, formally speaking, this is not ruled out.

#### *Article 27*

Article 27 provides for the possibility of the commitment of witnesses and experts who refuse to comply. The petition procedure laid down in the Code of Civil Procedure also applies for a request for commitment. Explicit provision has been made for the possibility that the commission of inquiry can itself keep a witness or expert in custody until the provisional relief section has handed down a decision on the commission of inquiry's petition. Pursuant to paragraph 4, this decision must be handed down within three days of the receipt of the petition. It follows from this that detention by a commission of inquiry can last no more than three days. The inclusion of the term of three days arises from Article 5 of the ECHR. This Article provides requirements for keeping a witness or expert in custody by the commission of inquiry pending a decision of the court on a petition for commitment. Article 5 of the ECHR provides that it must be possible for a court to assess any deprivation of freedom imposed by a body other than a court quickly. However, in this draft, no separate provision has been made for a witness or expert to appear before the courts during the custody by the commission of inquiry. After all, a separate provision for the expert or witness could mean that there could be other, simultaneous proceedings, alongside the proceedings instituted by the commission of inquiry. Now that provision has been made for a term for the court to decide on the commission of inquiry's petition, such a separate provision for citizens is undesirable and superfluous. Other legislation too does not contain a separate provision for the citizens, but, for example, provides for a term within which a particular body must obtain a judicial ruling. Incidentally, in practice it is probable that a commission of inquiry will contact the provisional relief section of the district court in advance if it expects a witness or expert to refuse to provide information during a hearing. This will be the case, for example, if a witness or expert is brought before the commission of inquiry with the aid of the police. In such cases, the provisional relief section will be able to hand down a decision quickly. For the brief period of custody, the commission of inquiry can call in the assistance of the police independently, if necessary. This is regulated in the second sentence of paragraph 3.

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The draft does not provide for sanctioning of the decision of the provisional relief section. Partly because decisions in civil cases in the Court of first instance are usually handed down by a judge sitting alone, a construction in which the decision of the provisional relief section must quickly be followed by a decision of the Court of first instance is unnecessarily unwieldy. For this reason, it was decided that the provisional relief section can take the decision concerning the substance of the case immediately. Naturally, the regular legal remedies of the Code of Civil Procedure are available against the decision of the provisional relief section. In principle, the court must also honour a petition for commitment (see paragraph 5). As in Article 24, therefore, a reversal of the burden of proof applies. There are two exceptions to the rule that the court must honour the commission of inquiry's petition. Firstly, the court will not order commitment if the person concerned legitimately invokes a right of immunity. In that case, he has statutory grounds to refuse to provide assistance (paragraph 4(a)). The court may also refuse to grant a commitment order if the commission cannot reasonably reach its view that commitment is necessary for the performance of its task (paragraph 4(b)). This, too, involves a marginal review.

Pursuant to paragraph 8, commitment may last for a maximum of 30 days. Pursuant to the same paragraph, however, the provisional relief section may order the termination of the commitment at any time. It is required to do so if an interest in the commitment no longer exists or if the person concerned legitimately invokes grounds for immunity. Examples of situations in which no interest in commitment exists any longer are when a witness has met his obligations or his statement is no longer necessary. The court may end the commitment at its own initiative (*ex officio*), or at the request of the commission of inquiry or at the request of the person concerned.

#### *Article 28*

The draft contains three means of coercion. Firstly, the commission of inquiry may have a witness or expert who fails to appear at a hearing brought before it via the courts, with the aid of 'the public authorities'. The use of the public authorities involves the commission obtaining the assistance of the police. The possibility of involving the public authorities is extended in the draft to the other powers of the commission of inquiry.

This means that if a person refuses access to documents or to assist in the entry to a location, the commission of inquiry can involve the police, via the courts, to ensure that it gains access to the documents or that it can enter the location after all. The commission of inquiry is also granted the authority to petition the courts to impose an order subject to a penalty. This power exists both with regard to persons who refuse to act as witnesses or experts and to persons who refuse to assist in the inquiry in other ways, for example by refusing access to documents or refusing to provide the commission with written information.

Finally, the commission is granted the authority to petition the courts to order the commitment of a non-compliant witness or expert. It is important to note that means of coercion can only be deployed with the involvement of the courts. The commission of inquiry cannot, therefore, decide independently to deploy means of coercion. A commission of inquiry must always turn to the courts if it requires persons to comply with their obligations pursuant to this draft. It is not desirable that a parliamentary commission should be able to deploy means of coercion in relation to citizens independently. Quite apart from this, the deployment of its own means of coercion could only develop within the sphere of parliamentary jurisdiction, as held by the parliaments of the United States and the United Kingdom. The draft places the authority to impose means of coercion with the provisional relief section.

It is inappropriate for a possibility to exist for Members of Parliament to deploy means of coercion against each other. Likewise, it would not be appropriate in the political relations between the government and Parliament if the commission of inquiry were able to deploy means of coercion against ministers. The draft therefore contains an explicit exemption for the deployment of means of coercion against Members of Parliament and ministers. In addition to this, it is noted here that the relationship between the government and Parliament should be no different during an inquiry than at other times. This means that Parliament could pass a vote of no confidence in a minister in the event of failure to cooperate with an inquiry.

Just as the draft contains no possibility to deploy means of coercion against Members of Parliament and ministers, it also does not provide for the possibility of criminal prosecution of Members of Parliament and ministers for failure to assist in an inquiry. This is laid down in the proposed Article 198d of the Criminal Code.

#### *Article 29*

Article 29 contains a prohibition on the use of statements and documents that a commission of inquiry obtains in relation to its inquiry in other proceedings. This ensures that the commission of inquiry obtains as much information as possible to enable it to form the most accurate possible picture of what took place. The prohibition applies solely for documents and statements provided or made on demand from the commission

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of inquiry. Information provided to the commission of inquiry voluntarily can therefore be used in other proceedings.

Article 31 provides for an exception to the prohibition on using information in other proceedings. The information obtained in an inquiry may be used in criminal proceedings concerning perjury, bribery of a witness or expert in a parliamentary inquiry or concerning the offences, referred to in Articles 198 up to and including 198c of the Criminal Code. See the notes to Article 31 for this.

#### *Article 30*

Article 30 contains a prohibition, which is in principle absolute, on the provision of information by the commission and its members to other institutions for criminal, disciplinary or civil proceedings or proceedings concerning the imposition of disciplinary measures, administrative sanctions or administrative measures. Although this is not provided explicitly, the prohibition obviously also applies for former members of a commission. The intention of also imposing the prohibition on individual members, rather than on the commission alone, is precisely to regulate that it is not possible for other institutions to obtain information from former members of a commission of inquiry after the inquiry is completed. The prohibition also means that the commission and its (former) members may not report offences and may not act as witnesses. Article 31 contains an exception to this prohibition. See the notes to that Article.

#### *Article 31*

Article 31 contains exceptions to the prohibition on the use of information obtained in a parliamentary inquiry in other proceedings, or its provision for other proceedings. The exceptions concern criminal proceedings for perjury, criminal proceedings for bribery of a witness or expert and criminal proceedings concerning one of the offences, referred to in Articles 198 up to and including 198c. These are offences that sanction non-compliance with a parliamentary inquiry. The exceptions are necessary, because otherwise no criminal proceedings for these offences would be possible. The commission of inquiry can therefore report these offences and if necessary, the members can act as witnesses.

#### *Article 32*

Pursuant to Article 32, the commission of inquiry must draw up a public report following the completion of its work, which it presents to Parliament. The presentation of the report does not rule out the possibility that it should still exercise statutory powers afterwards, for example because it wishes to investigate a particular aspect in more detail. The possibility that members of the commission will still exercise powers thereafter is a fairly theoretical situation.

#### *Article 33*

Article 33(1) concerns the closure of the inquiry after the commission of inquiry has accounted for its work to Parliament. Because far-reaching powers are granted to a commission of inquiry, it is appropriate that it should account to Parliament for the work that it has performed. The commission must state how it handled its assignment and powers.

The second paragraph concerns early closure of the inquiry. It could be said that the power of Parliament to open an inquiry already implies that Parliament can close an inquiry before it is complete. For the sake of clarity, however, this parliamentary power is explicitly included. Early termination of an inquiry automatically means that the commission of inquiry can no longer exercise any powers (Article 4(1)) and that membership of the commission of inquiry is discontinued (Article 35, initial sentence and under c). The order to close an inquiry takes effect immediately. The announcement of the order in the National Gazette pursuant to paragraph 3 has no further legal consequences.

#### *Article 34*

Article 34 makes clear that documents held by the commission of inquiry transfer by operation of law to Parliament following the closure of the inquiry. Until that time, any right to view the documents must be exercised in relation to the commission of inquiry. Thereafter, a request for access must be addressed to Parliament.

#### *Article 35*

Article 35 regulates the termination of membership of the commission of inquiry. There are four situations in which membership of the commission of inquiry ends. Sub-paragraph a provides for the situation in which membership of Parliament ends and the person concerned is not immediately re-elected as a Member of Parliament. Pursuant to this draft, only Members of Parliament may be members of a commission of inquiry. In concrete terms, this means firstly that membership of the commission of inquiry ends if a Member of

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Parliament leaves early due to dismissal, due to the loss of the requirements for membership of Parliament or the acceptance of an incompatible office. Membership of the commission also ends if the parliamentary term ends or Parliament is dissolved and the person concerned is not re-elected to Parliament. If the person concerned is re-elected immediately, his membership of the commission continues. Article 4(3) provides that an inquiry is not halted by the expiration of the parliamentary term or the dissolution of Parliament. It follows from sub-paragraph b that membership of the commission ends from the date on which a member of the commission is heard by the commission. It follows from the proposed sub-paragraph b that the membership of a commission member who is heard by the commission ends by operation of law from the date on which the hearing is conducted. A choice was made for this because this creates clarity regarding the consequences of the commission hearing one of its own members. The commission will have to consider whether it considers it so important to hear a certain commission member as a witness or expert that the person concerned must surrender their membership of the commission for this. However, only in exceptional situations will a commission wish to hear one of its own members. Perhaps superfluously, it is noted that in principle, the membership of the commission is terminated finally and is not, therefore, confined to the duration of the hearing. Formally, however, it is not ruled out that the person concerned will be reappointed as a member of the commission of inquiry. If the person concerned is a key figure, however, this is not very likely.

It follows from sub-paragraph c that membership of a commission ends on the date that the inquiry is closed. This termination in any event occurs after the commission of inquiry has accounted to Parliament for its work (Article 33(1)). However, Parliament has the power to close the inquiry early (Article 33(2)). In that case, the commission of inquiry is also dissolved.

Finally, pursuant to sub-paragraph d, a member of a commission of inquiry may be dismissed from that position. This may take place both at the request of the member concerned, for example due to the demands on time for the parliamentary party or due to private circumstances, or at the initiative of Parliament, for example due to failure to perform. It is not provided that Parliament can also dismiss a commission member at the request of the commission of inquiry itself. Naturally, this is materially possible. For the record, it is noted that the dismissal of a commission member from that position has no consequences whatsoever for his membership of Parliament. Membership of Parliament can be terminated only on the grounds laid down in the draft Constitution and the draft Ordinance on elections.

#### *Article 36*

Article 36(1) lays down the general principle that until the inquiry report is published, no-one has access to the documents held by the commission. This concerns both documents provided to the commission on demand and documents that the commission of inquiry itself has drawn up. Obviously, the first paragraph does not mean that commission members or their support staff have no access to documents held by the commission. It is not necessary to regulate this explicitly. It may be necessary to grant witnesses and experts access to documents that are provided to the commission of inquiry on its demand, for example in order for purposes of recollection. Paragraph 2 provides for this possibility. The paragraph explicitly does not provide for a right of access for witnesses or experts. It solely concerns the authorisation of the commission of inquiry to grant a certain witness or expert access to documents. In addition, it may be desirable in certain circumstances to grant external investigators access to documents, for example because a technical opinion is required. Paragraph 2 also provides for this possibility. It is noted that external investigators can in no case exercise the powers of the commission of inquiry. They can be granted access to documents however.

#### *Article 37*

Article 37 regulates unlimited access to documents for all Members of Parliament after the inquiry report has been presented to Parliament. This specific right of access concerns only the documents submitted to the commission of inquiry on its demand. However, it concerns both confidential documents and documents to which other persons also have rights of access. Where confidential documents are concerned, Members of Parliament are bound to protect the confidentiality pursuant to paragraph 2. Obviously, this confidentiality obligation remains in effect after the termination of the membership of Parliament. To the extent that this concerns documents that the commission itself has drawn up internally, the general regulation of Article 38 in conjunction with Article 39(4) applies for the access of Members of Parliament. This regulation means that the commission itself can determine whether these can be viewed by third parties or not. However, an exception applies for the confidential reports on the preliminary interviews and private hearings. In principle, these may not be viewed by anyone (first sentence of Article 39(2) and sub-paragraph e). Nevertheless, the reports on the private hearings may be viewed by Members of Parliament pursuant to Article 37(3).

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### *Articles 38 and 39*

These Articles contain a disclosure regulation for documents being held by the commission or, after the close of the inquiry, that were held by the commission. The principle is that all commission documents can be accessed by third parties after the presentation of the report. However, pursuant to Article 39, the commission of inquiry may impose restrictions on access. This system is derived from Articles 14 and 15 of the 1995 Dutch Archives Act. Consistency has also been sought with the system and the grounds for exceptions and restrictions in the draft National Ordinance open government. The right of access commences on the date following that on which the report is presented to Parliament, for as long as the documents are held by the commission of inquiry and then by Parliament. The latter means that the right of access applies until such time as the documents are transferred to the Archives or are destroyed.

The right of access implies that access is free of charge. A choice was made not to state this explicitly in the draft. The right is solely a right of access, not a right to make copies of the documents or to take cognizance of them by other means. The fact that the disclosure regulation commences on the day following that of the presentation of the inquiry report to Parliament means that the commission of inquiry must take decisions before the date of the disclosure of the report regarding whether the various documents will be disclosed. Because the commission archive may contain hundreds, if not thousands of documents, this can be a time-consuming task. However, in order to also allow parties other than the other Members of Parliament, such as the media, to check the work of the commission of inquiry, it is desirable that the right of access already commences on the day following that on which the inquiry report is presented. In view of this, commissions of inquiry could conceive of a procedure, for example of marking the different documents on receipt. It follows from Article 39(2)(e) that the reports on the preliminary interviews and private hearings may not be viewed by anyone outside the circle of the commission. To the extent that this concerns preliminary interviews, this prohibition also applies for the other Members of Parliament. The reports on private hearings may be viewed by the other Members of Parliament. A specific regulation applies for the commission of inquiry's internal documents. This concerns, in particular, internal discussion papers and reports on meetings of the commission of inquiry held behind closed doors. Pursuant to Article 39(4), the commission of inquiry may impose restrictions on the disclosure of these documents. However, this is a discretionary power of the commission of inquiry. It can also decide to declare all internal documents public. Pursuant to Article 39(3), the commission may impose restrictions on disclosure for as long as the interests of disclosure are outweighed by, among other things, relations of Sint Maarten with other organisations. In comparison with the Dutch Act, 'the Kingdom' has been added here.

Article 38(2) provides for the possibility that Parliament can grant third parties access to documents in the commission archives despite an access restriction imposed by the commission. After the inquiry has closed, it is no longer possible for the commission of inquiry itself to take decisions on any requests for access. For that reason, the power to lift a restriction is granted to Parliament. The restriction may be lifted in a general sense, or with regard to a particular applicant with a special interest in access. It is desirable that Parliament should exercise restraint in exercising this power. Pursuant to Article 39(5), the members of the commission must preserve the confidentiality of the contents of the documents that the commission marked as confidential, obviously also after the inquiry is closed.

Article 39(2)(d) of the Dutch Act refers to personal data as referred to in Chapter 2 of the Dutch Personal Data Protection Act. Now that the country of Sint Maarten is preparing a draft in that regard, for the time being, reference is not made to the relevant draft national ordinance but the reference is based on the definition of personal data in Article 1, sub-paragraph a, of the Dutch Personal Data Protection Act.

### *Article 40*

#### *Paragraph A*

This reference provides for an amendment of Article 5 of the Criminal Code concerning the application of the criminal law of Sint Maarten outside Sint Maarten.

#### *Paragraph B*

Unlike the Dutch Criminal Code, the Criminal Code of the Netherlands Antilles contains no specific offences relating to conduct in relation to parliamentary inquiries. In connection with the proposed inquiry regulation that includes new means of coercion, an expansion of the threat of penalties is necessary. This is met with the four proposed offences. The description of the offences and the grounds for the exclusion from prosecution in Article 198d are derived from Articles 192-192d of the Dutch Criminal Code.

A new Criminal Code of the Netherlands Antilles is currently in preparation. The proposed changes in this draft should be incorporated in the new Code.

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