



**POLICE INTEGRITY COMMISSION**  
**PRACTICE NOTES: HEARINGS OF THE PIC**  
**May 2008**

[1]	<b>Attendance at hearing to give evidence/produce documents .....</b>	<b>1</b>
[2]	<b>The discretion to hold public or private hearings.....</b>	<b>1</b>
[3]	<b>Failure to Attend .....</b>	<b>1</b>
	Unfitness to attend and medical evidence .....	2
[4]	<b>Appearances at a hearing .....</b>	<b>3</b>
[5]	<b>Legal representation .....</b>	<b>4</b>
[6]	<b>Joint representation and conflicts of Interest .....</b>	<b>4</b>
	Public authorities and individual officers .....	5
	Multiple clients .....	6
	A client the subject of an allegation and relevant witnesses .....	6
	Private hearings.....	6
	Instructing solicitors .....	6
	Principal solicitors .....	6
[7]	<b>Privilege in relation to giving evidence or producing documents or things at a Commission hearing .....</b>	<b>7</b>
	Limited right of legal practitioner or "other person" to claim legal professional privilege.....	7
[8]	<b>Objection to giving evidence or producing documents or things.....</b>	<b>8</b>
[9]	<b>Non-publication of evidence.....</b>	<b>10</b>
[10]	<b>Conduct before a hearing .....</b>	<b>11</b>
	The Commission is required to avoid unnecessary formality and technicality .....	11
	Hearings are not adversarial.....	11
	No person has a "case" .....	12
	Seeking "forensic" advantage .....	12
	Examination and cross-examination of witnesses .....	12
[11]	<b>Placing evidence before the Commission.....</b>	<b>12</b>
[12]	<b>The Hearing and its General Scope and Purpose.....</b>	<b>13</b>
[13]	<b>Challenge to the Commission's jurisdiction .....</b>	<b>13</b>
[14]	<b>Evidence, relevance and "admissibility" .....</b>	<b>14</b>
[15]	<b>Application of the rules of procedural fairness .....</b>	<b>15</b>
	The hearing rule.....	15
	The rule against bias .....	16

<b>[16]</b>	<b>Challenge to warrants .....</b>	<b>17</b>
<b>[17]</b>	<b>Transcript and Exhibits.....</b>	<b>17</b>
<b>[18]</b>	<b>Submission Timetables.....</b>	<b>18</b>

## **[1] Attendance at hearing to give evidence/produce documents**

1.10 The Commissioner may summon a person to appear before the Commission at a hearing in order to give evidence or to produce documents, or both.<sup>1</sup>

1.20 The person presiding at a hearing of the Commission may require a person appearing at the hearing to produce a document or other thing.<sup>2</sup>

## **[2] The discretion to hold public or private hearings**

2.10 In determining whether to hold a hearing in public or in private, or partly in public and partly in private, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.<sup>3</sup> Such a requirement involves a discretionary judgment on the part of the Commission by reference to the circumstances of the relevant investigation, confined only insofar as the context of the PIC Act may enable.<sup>4</sup>

2.20 Amongst other things, the Commission will consider and weigh the following factors:

- the stage the investigation has reached, and the relative advantages or disadvantages involved in a public or private hearing;
- any unfair harm to a person's reputation that would be likely to result from a public hearing;
- the nature of the allegations and credibility of relevant witnesses;
- the relative ability of affected persons to respond to the allegations;
- the public interest in the exposure of police corruption, or in openly resolving allegations having the potential to undermine public confidence in the police.

2.30 The Commission's decision as to whether a hearing should be public or private is necessarily made prior to the hearing. Persons appearing with leave at a public hearing may at any relevant time make application for the hearing, or a particular part of it, to be held in private. Alternatively, application may be made for a direction by the Commission suppressing the publication of evidence. Relevant considerations in relation to both kinds of application are addressed below.

## **[3] Failure to Attend**

3.10 Pursuant to s 39(1), where a person served with a summons to attend the Commission as a witness fails to attend in answer to the summons, the Commissioner may, subject to proof as to service by way of a statutory declaration, issue a warrant for the arrest of the witness.

---

<sup>1</sup> s 38(1) PIC Act

<sup>2</sup> s 38(2).

<sup>3</sup> PIC Act s 33(3)

<sup>4</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson and Gaudron JJ at 216

3.20 Irrespective of whether a summons has been issued<sup>5</sup>, or whether the time for attendance on a summons has passed<sup>6</sup>, the Commissioner may issue a warrant for the arrest of a person whose evidence "*is desired and is necessary and relevant to an investigation*", if satisfied by evidence on oath or affirmation that it is probable that the person will not attend to give evidence without being compelled to do so, or is about to or is making preparations to leave the State and the person's evidence will not be obtained if he or she departs: s 39(2).

3.30 It is an offence for a person who is summoned to attend before the Commission at a hearing to, "without reasonable excuse", fail to attend in accordance with the summons, to be sworn or make an affirmation, or to answer any question relevant to an investigation as might be put by the Commissioner or other person presiding.<sup>7</sup>

3.40 The absence of a reasonable excuse for a person's non-attendance under a summons is not a prerequisite for the exercise of the Commissioner's power pursuant to s 39 to issue a warrant for his/her arrest. It may be that, regardless of any excuse, the circumstances of an investigation require the attendance of the person before the Commission at a particular time. However, in determining whether a warrant should be issued, the Commissioner will usually consider whether the person has a reasonable excuse for their non-attendance.

3.50 What constitutes a reasonable excuse is a question to be determined by reference to the scheme and purpose of the legislation concerned.<sup>8</sup> It has been said in relation to legislative schemes similar to that under which the Commission exercises its functions that "reasonable excuse" does not mean a legal excuse, such as matters of privilege, but rather is intended to cover such things as illness or physical incapacity, or the inability to comply with a requirement to produce documents because of practical difficulties, such as their accidental loss or destruction.<sup>9</sup> Given the broad effect of the PIC Act in abrogating privileges, including the privileges against self-incrimination and legal professional privilege,<sup>10</sup> the Commission is inclined to a similar view.

#### *Unfitness to attend and medical evidence*

3.60 The failure of a person to attend a hearing of the Commission as and when required can have significant consequences for the effectiveness of the investigation concerned. Where a person claims to be unable to attend in answer to a summons due to illness, in the first instance a medical certificate should be provided to the Commission as soon as practicable. That is to say as much notice as possible should be provided to the Commission in order that it may avoid or ameliorate disruptions to its investigation and hearing.

3.70 A medical certificate (or any other document in which a medical opinion is expressed) must be authentic on its face, and state with as much precision as possible:

- (a) the nature of the person's illness;

---

<sup>5</sup> s 39(4) PIC Act

<sup>6</sup> s 39(5) PIC Act

<sup>7</sup> s 106 PIC Act

<sup>8</sup> See for example *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319.

<sup>9</sup> *Yuill* (supra); *R v Harz*; *R v Power* [1967] AC 760.

<sup>10</sup> Save and except to the limited extent to which a legal practitioner or "other person" may assert the privilege pursuant to s 40(5).

- (b) whether in the medical practitioner's opinion the illness diagnosed renders the person unfit to attend before the Commission to give evidence on the day in question, having regard to the physical and/or mental demands understood to be involved in giving evidence;
- (c) the reasons why the medical practitioner is inclined to any such opinion, including the facts upon which the opinion is based; and
- (d) when it might be expected that the person will be able to attend the hearing.

3.80 It should be remembered that a medical certificate comprises opinion evidence as to the matters stated therein. It remains for the Commission to assess the value of the opinion and whether it should be accepted as a valid excuse for the person's non-attendance. It may be assumed that the Commission will be unpersuaded by medical certificates in general and imprecise terms and will, with nothing more, compel the attendance of the person.

3.90 Legal practitioners should ensure that any member of the medical profession whose certificate is to be relied upon in seeking to excuse a person from attendance before a hearing of the Commission is fully aware of the considerable responsibility undertaken in expressing his or her opinions, and of the very real potential for the relevant facts and circumstances to be keenly examined by the Commission (an example of which can be found in the Commission's Report to Parliament on Operation Florida).<sup>11</sup>

#### **[4] Appearances at a hearing**

4.10 No person may appear at a hearing of the Commission as of right. Pursuant to s 34, the Commission has a discretionary power to authorise an appearance by a person at a hearing or a specified part of the hearing. The discretion arises for exercise once it is shown to the Commission's satisfaction that the relevant person is "*substantially and directly interested*" in the subject-matter of the hearing. Thus the person seeking leave bears the onus of establishing that sufficient grounds for the appearance exist.

4.20 In keeping with its statutory requirement to proceed without undue formality and technicality, to accept written submissions as far as is possible, and to conduct its hearings with as little emphasis on an adversarial approach as possible,<sup>12</sup> the Commission is conscious of avoiding unnecessary appearances at its hearings.

4.30 The Commission takes the view that an appearance, and the participation in the investigation that it invites, should serve a concrete and direct interest of the person concerned in or arising from the subject-matter of the hearing. Such will commonly be the case where a person wishes to protect his/her reputation by responding to allegations or adverse evidence likely to be aired during the hearing, or to ward off potentially adverse assessments or opinions in a subsequent report of the Commission. Those who otherwise may wish to assist the Commission in its investigation can usually do so by means other than an appearance at a hearing.

4.40 The Commission may require persons intending to seek leave to appear at a hearing to make a written application to the Commission prior to the hearing, identifying with as much precision and particularity as possible:

---

<sup>11</sup> See Volume 2, Part 9, "O'Toole Segment".

<sup>12</sup> s 20 PIC Act

- The nature of the interest(s) held in the hearing;
- Why such interest(s) might be said to be both "substantial" and "direct";
- How an appearance at the hearing would serve the identified substantial and direct interest(s); and

4.50 If an appearance is sought on the basis of the rules of procedural fairness, the particular interest(s) involved, and the reasons why the rules are attracted.

## **[5] Legal representation**

5.10 Legal representation of a person appearing or giving evidence at a hearing of the Commission is also by leave.<sup>13</sup>

5.20 The Commission is required to "give a reasonable opportunity" for a person giving evidence at a hearing to be legally represented.<sup>14</sup> The Commission does not consider this provision to inform the manner in which its discretion to authorise legal representation should ultimately be exercised, but rather to require it to consider any temporal or logistical difficulties on the part of a person summoned to give evidence in arranging for legal representation at the hearing. Whether an opportunity is "reasonable" will depend upon the circumstances of the particular investigation and the witness concerned.

## **[6] Joint representation and conflicts of Interest**

6.10 A hearing for the purposes of an investigation neither starts with an immutable or fully known set of facts, nor a clear view of the terrain ahead. The purpose of the hearing is to discover facts, and unexpected paths may be taken as the evidence unfolds and leads are explored. Consequently, personal interests that appear consistent prior to the commencement of a hearing may prove to be anything but some way into the hearing.

6.20 These factors pose significant problems for legal practitioners seeking to represent multiple clients at a Commission hearing, which, despite the practitioner's best intentions and professional rigour, may be incapable of avoidance.

6.30 The functions of the Commission do not include policing the lawyer-client relationship, and it expects a legal practitioner seeking leave to represent any person before a hearing to have fully considered and resolved any potential ethical difficulties.

6.40 However, the Commission may refuse or withdraw leave for a person to be represented by a particular practitioner, where, by virtue of a conflict of interest or for any other reason, the circumstances pose a potential for its investigation to be prejudiced.<sup>15</sup> The Commission may at any time reconsider the question of leave as the evidence evolves, or where any changes to the subject-matter of the hearing suggest a potential for a conflict of interest to arise. The Commission may convene a special hearing to consider relevant issues.

---

<sup>13</sup> s 35(1) PIC Act

<sup>14</sup> s 35(2) PIC Act

<sup>15</sup> See for example, *National Crime Authority v A, B, and D* (1988) 18 FCR 439; 78 ALR 707; *R v Whiting* [1994] 1 Qd. R 561; *Australian Securities Commission v Bell* (1991) 32 FCR 517.

6.50 The Commission will be reluctant to grant leave for a legal practitioner to represent multiple persons at a hearing, due to the high potential for conflicts of interest to exist or to arise. This is not because of any perceived duty or role on the part of the Commission to police the ethical responsibilities of legal practitioners, but to ensure that its investigation remains free from any potential prejudice as a result of a real or perceived conflict.

6.60 The Commission may require applications for leave to represent more than one person at a Commission hearing to be supported by written submissions addressing:

- Whether and how the legal practitioner has turned his/her mind to the potential for conflicts of interest to arise in relation to his/her clients;
- The steps that have been taken to avoid the occurrence of any such conflicts;
- Why no real or perceived prejudice would flow to the Commission's investigation as a result of the joint representation.

6.70 In its discretion, the Commission may require a legal practitioner to provide a statutory declaration to the effect that he/she is free from any conflicts of interest in relation to the intended joint representation.

6.80 Practitioners should be particularly mindful of problems associated with joint representation in the following situations.

*Public authorities and individual officers*

6.90 It may be difficult to perceive a public authority's interests as being any different from the interests of its officers performing duties in the course of their employment. This may be particularly so in relation to the authority's most senior officers. However conflicts of interest can arise in various ways.

6.100 If a public authority is to take the stance of seeking the truth and advancing the public interest, it may be necessary for it to place evidence before the Commission which is adverse to the interests of a particular officer, and indeed may show the officer to be guilty of misconduct. The officer will usually want to resist this conclusion.

6.110 There may arise conflicts between different officers and particularly between senior and more junior officers. There may be questions as to whether a problem lay in the departmental system and administration, or in the failings of particular individuals. It may be necessary for a lawyer appearing on the authority's behalf to submit that one or more of its officers, even those on its executive, should be the subject of adverse comment, or consideration for prosecutorial or disciplinary action.

6.120 Finally, the authority will have responsibility for any disciplinary proceedings against its officers arising from the inquiry, in relation to which the legal practitioner (particularly where employed "in-house") may be required to advise. In this situation there will be the clearest divergence of interests.

6.130 The Commission takes the view that a practitioner employed "in-house" by a public authority or other entity is not, by virtue of the nature of his or her retainer, entitled to represent any other client, including officers of the authority in a personal capacity.

### *Multiple clients*

6.140 Despite what is known to a legal practitioner on the basis of his/her instructions at the commencement of the hearing, he/she can never be certain that the interests of any two or more clients will never collide. Certainty can only be reached in hindsight, after all of the evidence has been gathered and the Commission has formed its assessments and opinions.

6.150 It may become necessary at any stage of the hearing to advise a client of the benefits of assisting the Commission, placing the practitioner in an immediate position of conflict in relation to another client whose interests stand to be affected by such assistance.

### *A client the subject of an allegation and relevant witnesses*

6.160 Quite apart from whether any conflict of interest can be said to arise, an appearance on behalf of a person the subject of an allegation, and one or more relevant witnesses, presents significant problems for the integrity of the Commission's investigation.

6.170 The public perception may well be that the person the subject of the allegation and relevant witnesses have banded together to prevent the Commission from getting to the truth of the allegation, or that individual witnesses may have been put under direct or indirect pressure not to speak out.

### *Private hearings*

6.180 A legal practitioner who has appeared for a client in a private hearing, and is therefore prohibited from disclosing the evidence, may find him or herself in an invidious position in acting for and advising another client who is mentioned in the evidence.

### *Instructing solicitors*

6.190 Legal firms which act for multiple clients, but instruct different counsel on their behalf, should be equally mindful of the above factors. The construction of "Chinese walls" may be an effective means of avoiding potential ethical problems in relation to legal proceedings, but will not necessarily satisfy the requirement for an investigation by the Commission to be free from real or perceived prejudice.

### *Principal solicitors*

6.200 A Principal Solicitor of a public authority may need to be mindful of who his/her client properly is. The practitioner will owe fiduciary duties to the authority as *the client*, rather than any individual officer. A practitioner representing an entity must ensure that officers of the entity are not under the misapprehension that he/she is representing them or their personal interests.<sup>16</sup>

6.210 Principal solicitors usually hold unrestricted "A1" Practising Certificates, which entitle them to act for the employing entity, free from the requirement to have indemnity insurance. The Certificate is granted on the basis of an undertaking that the practitioner will not act for any other client unless insured. Quite apart from any conflicts of interest inherent in the circumstances of joint representation on behalf of a public authority and its officers, the Commission takes the view a Principal Solicitor

---

<sup>16</sup> See Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd ed, LBC, 2001, at p 186.

holding an "A1" Practising Certificate, and any employed solicitor under his or her supervision, is not entitled to act for any officer of the authority in a personal capacity.

## **[7] Privilege in relation to giving evidence or producing documents or things at a Commission hearing**

7.10 A witness summoned to attend or appearing before the Commission at a hearing cannot refuse to answer any question or produce any document or other thing on the ground of self-incrimination, "*or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction in disclosure, or on any other ground*".<sup>17</sup>

7.20 The Commission considers the express and plenary terms of s 40(2) to exclude all forms of privilege, including legal professional privilege, save and except for one qualified exception.

### *Limited right of legal practitioner or "other person" to claim legal professional privilege*

7.30 Subsection 40(5) entitles a legal practitioner or "other person" to refuse to answer a question or to produce a document or other thing, on the basis that it would disclose a privileged lawyer-client communication for the purpose of the provision or receipt of legal services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing of the Commission.

7.40 Thus, to the extent that legal professional privilege does exist in relation to a Commission hearing, it operates only to exclude evidence of confidential communications for the purposes of the client's appearance before the Commission.

7.50 The Commission does not consider s 40(5) to entitle *the client* of a lawyer to assert legal professional privilege in refusing to answer a question etc. The provision is expressly directed to a "legal practitioner" and, although it refers also to an "other person", these words are not in the Commission's view properly read to include the client of a relevant legal practitioner. If it were the legislature's intention to allow the privilege to be claimed in its restricted fashion by the client in whom the privilege inheres, there would have been no need for the provision to refer expressly to a legal practitioner. The legal practitioner would be duty bound to claim the privilege on behalf of the client in the absence of the client's consent to disclosure, and the Commission could not rightfully subvert the privilege by requiring disclosure from the practitioner. Read in its proper context, the phrase "other person" is not indicative of the client of a legal practitioner, but rather other persons who may be privy to confidential lawyer-client communications, such as staff employed by a legal practitioner.

7.60 Similar provisions to s 40(5) may be found in other State and Commonwealth statutes that are concerned with the functions of investigative agencies. Some such provisions require as a condition precedent the provision of information by the lawyer as to the client's identity and whereabouts.<sup>18</sup> Contrary to the views of a learned author,<sup>19</sup> and consistent with judicial interpretation of similar provisions,<sup>20</sup> the

---

<sup>17</sup> s 40(2) PIC Act

<sup>18</sup> See for example s 18B(4) *New South Wales Crime Commission Act 1985*

<sup>19</sup> See Stephen Donoghue, *Royal Commissions and Permanent Commissions of Inquiry*, Reed International Books, 2001. In concluding that legal professional privilege survives the general abrogation of "any other ground of privilege" under s 18B(1) of the *New South Wales Crime Commission Act 1985*, the author reasons that s 18B(4) (which is similar but not identical to s 40(5) of the PIC Act) has the effect of expressly and generally preserving the privilege:

Commission does not consider s 40(5) to be confirmatory of an intention to preserve legal professional privilege in the face of the express and wide exclusionary terms of s 40(2). Rather, the provision appears to do precisely the opposite. By entitling the privilege to be claimed in the limited circumstances and by the limited persons described, it confirms that s 40(2) *must* exclude legal professional privilege in a more general sense.

7.70 There are powerful reasons in the public interest why a person should not be entitled to refuse to disclose information to the Commission on the basis of the privilege. Police or former police who are alleged to have engaged in corruption would be entitled to keep potentially incriminating documents and information from the inquiry, whereas they would not otherwise be entitled to refuse to claim the privilege against self-incrimination, or any other ground of privilege.

7.80 Notwithstanding legal professional privilege may be asserted by a natural person or corporation in response to a requirement under a notice pursuant to s 26 of the PIC Act, no inconsistency arises between the availability of the privilege in relation to the Commission's notice powers, and its almost complete abrogation at a hearing of the Commission. To the contrary, the respective provisions illustrate Parliament's desire to afford appropriate levels of protection for individuals under the Commission's considerable powers. Were the privilege to be unavailable in relation to the Commission's notice power, which is exercised independent of any hearing, no protections would be afforded in relation to the subsequent use to which the information might be put against the person concerned. On the other hand, the requirement for a person to answer questions or to produce documents or things at a hearing regardless of any privilege, is mitigated by the restrictions imposed by s 40(3) in relation to the subsequent use of the information against the person.

## **[8] Objection to giving evidence or producing documents or things**

8.10 Although a witness is not excused from answering any question or producing any document or other thing at a hearing, the witness may nevertheless make an

---

*"... by providing that a person is entitled to refuse to disclose a privileged communication, expressly preserves legal professional privilege. The provision must therefore take precedence over the general exclusion in the NSWCC Act 'of any other ground of privilege'"*

<sup>20</sup> *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319; *Australian Securities Commission v Dalleagles Pty Ltd & Ors* (1992) 36 FCR 350; 108 ALR 305. In *Yuill* Brennan J (at ALR 324) rejected the proposition that a provision of such a kind (there, s 308 of the *Companies (NSW) Code* as it then was) confirmed the *general preservation* of the privilege. Rather, it was confirmatory of the *general abrogation* of the privilege, and its limited preservation only insofar as a legal practitioner could be excused from being required to reveal confidential communications in certain circumstances. It is noted that in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561; [2002] HCA 49 the High Court took a different approach to that taken by the earlier Court in *Yuill*, in relation to the substantive question of whether the legislation in question excluded legal professional privilege by necessary implication. In both cases the relevant legislation contained no express abrogation of privilege. The reasoning of Brennan J in *Yuill* as to the effect of s 308 of the *Companies (NSW) Code* was neither specifically nor implicitly disapproved. Moreover, it is notable that the general application of legal professional privilege to investigative and other non-curial settings had been recognised only after the introduction of the legislation under consideration in *Yuill* (in *Baker v Campbell* (1983) 153 CLR 52). To the extent that Brennan J's reasoning might have been flawed, it was because it could not have been Parliament's intention to abrogate a privilege that did not exist at the time the legislation was enacted. However, the alternative hypothesis was that s 308 was explicable on the basis that it was intended to apply an otherwise unavailable privilege in an investigative setting in a limited way (so held Gaudron and McHugh JJ). In the case of the PIC Act, the general scope of legal professional privilege was firmly entrenched at the time of its enactment. Subsection 40(5) of the PIC Act may therefore be logically reasoned to apply legal professional privilege in a limited way, in circumstances where it is otherwise abrogated by the express and broad terms of s 40(2).

objection in relation to the evidence or production. The effect of an objection is implicit in s 40(4)(b), which holds that the protections of s 40(3) will not be invoked if the witness does not object to giving the answer or producing the document or thing. Where an objection is made, pursuant to s 40(3) the relevant answer, document or thing, once given or produced, is rendered inadmissible in evidence against the witness in any civil or criminal proceedings.<sup>21</sup>

8.20 A witness may make a general objection to the giving of evidence or the production of documents or things at a Commission hearing. In such a circumstance the Commissioner or person presiding may declare that all or any classes of answers given or documents or other things produced will be regarded as having been given or produced under objection.<sup>22</sup>

8.30 It is the practice of the Commission to warn a witness, after being sworn, of the duty to give evidence and to invite him/her to elect to make a general objection. The warning takes the following form:

*Before this hearing proceeds any further, I want you to understand that you must answer all questions that are asked of you here unless I tell you that you do not have to answer.*

*You should also understand that you are entitled to object to giving an answer. If you do object you must nevertheless give the answer but the answer you give is not admissible in evidence against you in any civil or criminal proceedings except:*

1. *[where relevant] disciplinary proceedings and proceedings under Division 1C of Part 9 of the Police Act 1990 with respect to an order under s 181D of that Act;*
2. *a prosecution for perjury should you give evidence to me that you know to be false or misleading in a material particular;*
3. *a prosecution for an offence which you may have committed or you may commit under the legislation that governs this Commission; and*
4. *proceedings for contempt under that legislation.*

*Do you understand what I have just said to you?*

*Do you wish to object now to giving all the answers that you will give during this hearing?*

*[If so]*

*I make a declaration pursuant to s 41 that all answers given by this witness will be regarded as having been given on objection by the witness.*

*[If not]*

*I do not make a declaration pursuant to s 41 but I remind you that you may still object to answering a question when it is asked.*

---

<sup>21</sup> But may be used in any disciplinary proceedings and in relation to certain decisions and proceedings under the *Police Act 1990*, including ss 173 and 181D.

<sup>22</sup> s 41 PIC Act

## [9] Non-publication of evidence

9.10 The Commission's powers to suppress the publication of evidence are contained in s 52 of the PIC Act. Amongst other things, the Commission may direct that any evidence given, or any information that might serve to identify or locate a person who has given or may be about to give evidence before the Commission, must not be published except in such manner, and to such persons, as might be specified.<sup>23</sup>

9.20 The Commission must not give a direction suppressing the publication of evidence unless satisfied that it is "*necessary or desirable in the public interest*".<sup>24</sup> An application for a non-publication direction must therefore be supported by positive grounds identifying public interest considerations making it at least desirable for the relevant evidence or information to be suppressed.

9.30 Insofar as a public hearing is concerned (where questions as to the need to make a non-publication order will usually arise), the making of a non-publication direction will involve at least a part reversal of the Commission's decision under s 33 of the PIC Act to hold a public hearing. In exercising its discretion under s 33, the Commission will usually have considered and weighed the harm to individual reputation that might be caused as a result of a public hearing, and determined the public interest to fall on the side of an open hearing.

9.40 Accordingly, with nothing more, it might be difficult to establish sufficient grounds for a non-publication direction on the basis that the applicant's reputation would be harmed in the absence of any such direction.

9.50 It is commonly submitted that relevant evidence should be suppressed, either totally or until such time as the person affected has had an opportunity to reply, as a matter of procedural fairness. However, the authorities have consistently rejected that kind of proposition. While harm to reputation usually attracts a duty to observe the rules of procedural fairness, procedural fairness does not require a public hearing to be conducted in such a way as to minimise harm to a person's reputation.<sup>25</sup> Provided a person affected is ultimately afforded an opportunity to respond to relevant allegations and evidence, questions as to the timing of the opportunity are largely for the Commission to determine according to the circumstances of the investigation.

9.60 It is also sometimes submitted that the Commission ought to make a non-publication direction on the basis of the way in which the media has reported or may report upon the public hearing, to the detriment of individual reputation. While the Commission expects that fair and accurate reporting of its hearings will occur in the media, its functions do not involve supervision of the media and it cannot sensibly conduct its inquiries according to such matters.

9.70 None of the above is to say that the Commission will not entertain an application for evidence to be suppressed on the basis of harm to a person's reputation *per se* - particularly where the subject person has become of interest in the investigation subsequent to the initial decision to hold a public hearing. Generally speaking, however, a more persuasive basis for a non-publication direction might

---

<sup>23</sup> s 52(1) PIC Act

<sup>24</sup> s 52(2) PIC Act

<sup>25</sup> *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 28; Mahoney JA at 60; *Donaldson v Wood* (unreported, NSWSC, 15/09/95) per Hunt CJ at CL.

exist where any potential harm to reputation is attended by a real and significant difficulty on the part of the affected person in adequately defending his/her reputation publicly. Amongst other things, such might be the case where:

- the nature of the evidence to be aired would make it inherently difficult for the person affected to make a rational response;
- the credibility of any relevant witness is so poor as to not warrant the public airing of allegations, or the identification of the person affected; or
- the relevant allegations are not sufficiently serious, or they do not give rise to a sufficiently important matter of public interest, so as to require their investigation in a public forum.

## **[10] Conduct before a hearing**

10.10 Hearings of the Commission are held for the purposes of an investigation, in order that the Commission may inform itself on relevant matters. Except where the rules of procedural fairness otherwise require, a hearing is not held for the purposes of indulging the private interests of persons appearing with leave. The Commission, with the assistance of Counsel Assisting, has full control of the hearing, the witnesses to be called and their order, the documents and things to be tendered, and the matters and issues to be covered in evidence.

10.20 The Commission will not tolerate behaviour at or in connection with a hearing that serves to frustrate its ability to conduct the hearing as it sees fit. It is an offence to wilfully and unreasonably obstruct the Commission,<sup>26</sup> and it will otherwise act to protect its investigation from prejudice by removing obstacles to its ability to get to the truth of a matter, or which have the appearance of such.

10.30 Persons appearing at Commission hearings, and their legal representatives, should be mindful of the following principles and requirements.

### *The Commission is required to avoid unnecessary formality and technicality*

10.40 The Commission is required to exercise its functions "*with as little formality and technicality as possible*".<sup>27</sup> It is one thing for the Commission to possess "special mechanisms"<sup>28</sup> for the detection, investigation and prevention of police misconduct, and thereby protect the public interest. However, it is another matter for the wide powers granted to the Commission to be effective. Were the Commission required to proceed with the kind of formality or technicality associated with court proceedings, it would lose its ability to conduct investigations in an efficient and timely fashion.<sup>29</sup>

### *Hearings are not adversarial*

10.50 In particular, the Commission is required to accept written submissions as far as possible and its "*hearings are to be conducted with as little emphasis on the adversarial approach as possible*".<sup>30</sup>

---

<sup>26</sup> s 104 PIC Act

<sup>27</sup> s 20(2) PIC Act

<sup>28</sup> s 3 PIC Act

<sup>29</sup> *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492; *Elders IXL Ltd v National Companies and Securities Commission (No 4)* [1987] VR 1.

<sup>30</sup> *Ibid*

*No person has a "case"*

10.60 No person appearing before a hearing of the Commission legitimately has a "case" to pursue. An inquiry is taking place, for the benefit of which a person may have information to give, or submissions to make:

10.70 Persons who are asked to assist an inquisitorial inquiry by giving evidence on matters being investigated do not have a 'case'. They have evidence to give. There may be adverse evidence that they wish to counter. They may have an interest in trying to ward off various conclusions which they fear the investigating inquiry may reach. And in preparing their evidence with all these things in mind, they may well need the assistance of legal advisers. But the conception that a witness needs to prepare a 'case' introduces an element inherent to adversarial proceedings but alien to an inquisitorial inquiry, at least at the investigative stage.<sup>31</sup>

*Seeking "forensic" advantage*

10.80 It is not legitimate for a person to seek personal advantage at a hearing, by withholding evidence from, or delaying its availability to, the Commission. Such strategies may be appropriate in the adversarial setting of court proceedings, where the parties primarily determine the matters in issue, the evidence to be adduced and the documents to be tendered, but are anathema to an effective, efficient hearing by the Commission.

*Examination and cross-examination of witnesses*

10.90 Examination or cross-examination of any witness by a person authorised to appear at a hearing or their lawyer is by leave of the Commission, and will be confined to such matters as it considers relevant.<sup>32</sup>

10.100 While the rules of procedural fairness usually require a person affected by serious allegations to examine or cross-examine relevant witnesses, the Commission may, in appropriate instances, refuse such examination or cross-examination.

10.110 In the absence of examination or cross-examination of a witness by an affected person, the requirements of procedural fairness may be met in other ways, such as by giving the person an opportunity to reply to the allegations under oath, or to make submissions before any adverse opinion is expressed in a Commission report.

**[11] Placing evidence before the Commission**

11.10 Statements or documents must not be tendered at a hearing on behalf of a person without notice and sight unseen by the Commission or Counsel Assisting.

11.20 Persons wishing to place evidence before the hearing must provide a statement of the evidence or a copy of the document to the Commission or Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the hearing, becomes known.

11.30 The Commission will thereby be in a position to determine whether the evidence should be introduced at the hearing and, if so, its timing. Except where

---

<sup>31</sup> Sir Richard Scott, "Procedures at Inquiries – The Duty to be Fair", 111 Law Quarterly Review 596 at 604.

<sup>32</sup> s 37(1) PIC Act

otherwise allowed, the evidence, if deemed relevant, will be introduced by Counsel Assisting at a time of the Commission's choosing.

11.40 Documents and statements are only tendered by Counsel Assisting. Other legal representatives have no right to directly tender documents or statements and no right to call for the production of documents.

## **[12] The Hearing and its General Scope and Purpose**

12.10 The word "hearing", as employed in the PIC Act, should not be thought to prescribe, by reference to curial proceedings, the approach or procedures to be followed. There is no issue to be decided, and the hearing is designed to discover facts that may lead to further action being taken. The word "hearing" has no significance other than to describe a process whereby the Commission may gather information and evidence, and exercise certain coercive powers, for the purposes of an investigation.<sup>33</sup>

12.20 The Commission does not conduct its hearings according to strict terms of reference, in the manner of a Royal Commission or other ad hoc commissions of inquiry.

12.30 At each hearing, the presiding official must announce the *general scope and purpose* of the hearing.<sup>34</sup> A person appearing before the Commission at a hearing is entitled to be informed of the general scope and purpose, except where the Commission is of the opinion that this would seriously prejudice the investigation concerned.<sup>35</sup>

12.40 That the general scope and purpose of a hearing need not (as the phrase itself suggests) be strictly defined and confined, is further indicated by the breadth of the Commission's powers of investigation, which extend to the conduct of an investigation *"even though no particular police officer or other person has been implicated and even though no police misconduct is suspected"*.<sup>36</sup>

## **[13] Challenge to the Commission's jurisdiction**

13.10 It will be difficult to challenge the Commission's jurisdiction to explore a particular matter at a hearing, on the basis that it is outside the general scope and purpose. A person seeking to do so will have the task of establishing that the questioning cannot, on any reasonable view, assist the formation of the Commission's views on any relevant matter.

13.20 Regardless of the perceived irrelevance of a line of questioning, it is the Commission's perceptions that determine whether questioning is legitimate. The Commission does not act beyond its jurisdiction by exploring issues that it bona fide considers may assist it, directly or indirectly, to form a view on a question of police misconduct. It is not determining issues between parties but conducting an investigation into the relevant subject matter. The Commission is not bound by the rules of evidence and may have to develop and explore leads. There is no set order in which evidence must be adduced, and the significance of any particular piece of

---

<sup>33</sup> *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296

<sup>34</sup> s 32(3) PIC Act

<sup>35</sup> s 32(4) PIC Act

<sup>36</sup> s 23(2) PIC Act

evidence, as a link in a chain of evidence, may not be apparent until all the evidence is in. Even where no such link is ultimately established, the Commission cannot properly be said to have acted outside its jurisdiction by exploring the issue. This flows from the very nature of the inquiry itself.<sup>37</sup>

13.30 The function of judicial review of the otherwise within power decisions of administrative bodies is not to substitute the court's own discretion for that which the legislature has vested in the relevant body, but to set limits on the exercise of the discretion.<sup>38</sup> In the absence of any statutory indication as to how the discretion should be exercised, the factors that should be taken into account and the weight they are to be given are for the decision maker to determine. Under the *Wednesbury* principle, the exercise of the Commission's legitimate discretions may be impugned only if "manifestly unreasonable", such that the decision is shown to be so unreasonable that no reasonable person could have come to it.<sup>39</sup> Even where the reasoning of the Commission appears illogical, that itself will not be enough.<sup>40</sup>

13.40 Where it is contended that the Commission is or would be acting beyond its jurisdiction in a particular way or matter, the person so contending should provide written submissions to the Commission. Where practicable, the issue should be raised before or outside any relevant hearing. The Commission will then be in a position to carefully consider the matter before determining whether it should proceed as planned, or make any necessary adjustments to its hearing program.

13.50 In circumstances where the Commission rejects a challenge to its powers, it may provide written reasons for its decision, either at the time of the decision or as soon as practicable thereafter.

13.60 Any subsequent judicial challenge should be considered and prosecuted expeditiously. The Commission is neither obliged to, nor will, delay the carrying out of its investigative functions on the basis of vaguely foreshadowed legal challenges.

## **[14] Evidence, relevance and "admissibility"**

14.10 The rules or practice of evidence do not bind the Commission, and it may inform itself on any matter in such manner as it thinks fit.<sup>41</sup>

14.20 The concept of relevance as it is understood and applied as a rule of evidence does little to properly inform an objection to the taking of evidence before a Commission hearing. What the Commission may look into is what it bona fide believes will assist its inquiries.<sup>42</sup> By the very nature of its functions, it is essentially empowered to conduct what might otherwise be regarded at law as an impermissible "fishing expedition", in order to uncover facts that might be informative of a question of police misconduct.<sup>43</sup> As a precept of the law of evidence, "relevance" connotes a connection between the evidence and a fact in issue for determination by a court. It is largely an inappropriate term by which to signify the required connection between

---

<sup>37</sup> *Ross v Costigan* (1982) 59 FLR 184 per Ellicot J at 200-201

<sup>38</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230

<sup>39</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Mason J at 40-41; *Attorney General v X* (2000) 49 NSWLR 653 per Spigelman CJ.

<sup>40</sup> *Hill v Green* (1999) 48 NSWLR 161 per Mason P.

<sup>41</sup> s 20(1) PIC Act

<sup>42</sup> *Ross v Costigan* (No 2) (1982) 41 ALR 337 at 351; *MF1 & Ors v National Crime Authority* (1991) 33 FCR 449; 105 ALR 1, per Jenkinson J at ALR 16

<sup>43</sup> *Lloyd v Costigan* (No 2) (1983) 53 ALR 402 at 404; *Gibson v O'Keefe* (unreported, NSWSC, 20/05/98).

evidence and an investigative process, the purpose of which is not to determine issues of fact, but to discover them.<sup>44</sup>

14.30 Likewise, it will not usually be sound to make an objection on the basis that the line of inquiry would not elicit evidence admissible in a court proceeding. An investigation by the Commission is not focussed solely on the gathering of evidence that may be admissible in a prosecution or disciplinary proceeding, nor perhaps at all. The Commission is seeking to inform itself and may do so in any manner it thinks fit. A report by the Commission may ultimately contain no opinion or recommendation that consideration should be given to the prosecution of a specified person.

14.40 Legal practitioners should be judicious in their objections at a hearing of the Commission. Generally, the Commission will not be assisted by objections predicated on the rules or practice of evidence, or concepts as to relevance, or the potential inadmissibility of the evidence in court proceedings, as applied by the courts.

14.50 Greater assistance may usually be derived from a considered submission that the question put, or matter being explored, cannot serve to assist the Commission's inquiries or the formation of relevant opinions at its conclusion. Generally speaking, objections will have more pertinence to the nature of the Commission's functions at a hearing where it is reasonably contended that:

- the subject matter of the questioning is manifestly outside the scope and purpose of the hearing;
- the witness would be unable to give a rational and helpful response to the question; or
- the line of inquiry will not prove helpful in informing the Commission on any matter relating to the functions of the Commission.

## **[15] Application of the rules of procedural fairness**

15.10 While the rules of procedural fairness may apply to a Commission investigation, they are not applicable in every case, nor in the same manner or to the same extent as in court proceedings.

### *The hearing rule*

15.20 In the broad, the hearing rule requires the Commission, before publishing a report containing assessments, opinions or recommendations adverse to the interests of a person, to provide an opportunity for the person to persuade it to a different view of the relevant evidence. In *Independent Commission Against Corruption v Chaffey* (1992) 30 NSWLR 21 per Gleeson CJ at 28 it was said:<sup>45</sup>

... an authority having power to inquire and make a report which may include adverse findings must listen fairly to such relevant evidence and rational argument against the finding as a person likely to be adversely affected may wish to put.

15.30 Within these boundaries, it has been recognised that the actual *content* of the rules will vary according to what is necessary in the circumstances of the particular

---

<sup>44</sup> *MF1 & Ors v National Crime Authority*, supra.

<sup>45</sup> Agreeing with Lord Diplock's observations in *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820.

case.<sup>46</sup> Although the need to protect the integrity or confidentiality of the investigation does not exclude the rules, it may greatly reduce their content, even to the extent of reducing them to nil in certain situations.

15.40 Thus it has been held that the rules of procedural fairness do not require a commission of inquiry to suppress the publication of evidence until such time as a person affected has had an opportunity to respond,<sup>47</sup> to conduct a hearing wholly in private,<sup>48</sup> or to proceed as if it were a court by granting all persons who might be affected by a hearing an appearance.<sup>49</sup>

#### *The rule against bias*

15.50 Similarly, while the second limb of the rules of procedural fairness - the rule against bias - is not excluded by the Commission's functions, the content and practical application of the rule will vary and may in some cases be very limited. In *Re Finance Sector Union; ex parte Illaton Pty Ltd* (1992) 66 ALJR 583 the High Court observed:<sup>50</sup>

The precise practical requirements of the principle vary from case to case. They will be influenced by the nature, function and composition of the particular tribunal. Thus, the operation of the principle in a case such as the present where it is sought to prevent a member of the Commission from participating in the determination of particular proceedings is governed by a number of considerations relating to the nature and function of the Commission, the prescribed or desirable formal qualifications and practical experience of those appointed to discharge those functions, the nature of the contests involved ...

15.60 A significantly greater degree of intervention will be permitted on the part of a presiding official in an inquisitorial hearing than might be the case in curial proceedings:<sup>51</sup>

In applying the principles different expectations of conduct will exist according to the function being performed by the person or entity who exercises the relevant public power. For example, a degree of intervention that is unacceptable in a judge may be acceptable in a commissioner. The commissioner has an inquisitorial function while the role of a judge is essentially to adjudge an adversarial contest. But the expectation that the person exercising the power will bring an impartial and unprejudiced mind to the resolution of the question to that person is not diluted.

15.70 Decision makers who are performing statutory functions may be entitled to be involved in an investigation and to make final decisions where they are authorised by statute to act in both capacities.<sup>52</sup> Accordingly, something more than the mere fact of prior involvement in an investigative decision may need to be present before a reasonable apprehension of bias can be said to be firmly established.

---

<sup>46</sup> See *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 28; *Donaldson v Wood* (unreported, SCNSW, 15/09/95) per Hunt CJ at CL.

<sup>47</sup> *Donaldson v Wood* (supra).

<sup>48</sup> *Independent Commission Against Corruption v Chaffey* (supra).

<sup>49</sup> *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

<sup>50</sup> Per Deane, Toohey and Gaudron JJ.

<sup>51</sup> See *Carruthers v Connolly* (unreported, Supreme Court of Queensland, 05/08/97) at 37.

<sup>52</sup> See *R v Howard* [1902] 2 KB 363 at 377 per Collins MR(CA).

## **[16] Challenge to warrants**

16.10 The Commission is empowered to seek the grant of search,<sup>53</sup> listening device,<sup>54</sup> or telecommunications interception<sup>55</sup> warrants for the purposes of its investigations.

16.20 Except where the Commissioner for the Police Integrity Commission exercises the power to issue a search warrant under the PIC Act,<sup>56</sup> any such warrant will have been issued on the application of the Commission by an appropriately empowered judicial officer or authorised justice.

16.30 It is neither legitimate nor appropriate for any person, in an investigation by the Commission, to seek access to a warrant and the associated application purportedly to test its validity. Not only will the challenge be purely speculative, no logical or proper purpose can be served by questioning the validity of a warrant before the Commission. The Commission does not sit in administrative review of the decisions of judicial officers or authorised justices, let alone decisions made on its own application. Once issued under the terms of the relevant statute, a warrant is valid until set aside and the only person who need be satisfied of that for the purposes of a Commission investigation is the Commission itself.

16.40 Any challenge to a Commission warrant is properly an issue for any relevant criminal proceedings initiated as a result of the investigation, in which instance the warrant will be available as a proof in the prosecution case, or otherwise directed to the Supreme Court as the appropriate forum for substantive review of the warrant.

## **[17] Transcript and Exhibits**

17.10 Generally speaking, witnesses and their legal representatives are entitled to copies of transcript and exhibits from public hearings of the Commission. Daily transcript will usually be emailed to legal representatives at the end of each public hearing day. If copies of exhibits are required the legal representative should complete the request form available on the bar table and hand same to the Commission lawyer in the Hearing Room. Unless exhibits have been marked confidential or are otherwise subject to restrictions on access then the Commission will provide legal representatives with copies of all requested exhibits as soon as practicable.

17.20 The same practice will not apply in private hearings conducted by the Commission. Because of the secrecy attaching to hearings conducted in camera, copies of transcripts and exhibits are generally not released by the Commission. Witnesses or their legal representatives may apply in writing if they wish to attend the Commission following a private hearing to view transcript or exhibits.

17.30 Non-publication orders made at private hearings may be varied by the Commission in certain circumstances, eg if the Commission determines to release transcript or exhibits to the NSW Police Force or because the material is relevant to a public hearing being conducted by the Commission. Usually the Commission will provide notice to the witness or his/her legal representative if the transcript or exhibits are to be released.

---

<sup>53</sup> s 45 PIC Act

<sup>54</sup> *Listening Devices Act 1984*

<sup>55</sup> *Telecommunications (Interception and Access) Act 1979 (Cth)*

<sup>56</sup> s 45(2) PIC Act

**[18] Submission Timetables**

18.10 The Commission will set strict timetables for the making of written submissions at the conclusion of a hearing and in appropriate cases will set a return hearing date for such purposes.

18.20 Legal practitioners must make every effort to comply with the timetable and should be under no illusion that the Commission will not treat any failure to do so most seriously.