PRACTICAL ASPECTS OF ACTING FOR PERSONS DEALING WITH INVESTIGATIVE BODIES SUCH AS THE INDEPENDENT COMMISSION AGAINST CORRUPTION AND POLICE INTEGRITY COMMISSION

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INTRODUCTION

If you receive instructions from a client who is to have a significant involvement with the Independent Commission Against Corruption ("**ICAC**") or the Police Integrity Commission ("**PIC**") you need to approach your task in a totally different way then you would normal litigation.

There will be no charge sheet, no particulars, no statement of facts and no brief. You have no right to appear and your client has few rights. Your client usually will be refused access to the statements or private evidence of any accuser prior to giving evidence.

The legislature has determined that, for the very important purpose of eliminating corruption in the NSW Police and generally in the public sector, that rights we hold dear such as the right to silence, legal professional privilege and freedom of communication will be abrogated.

One sometimes comes to the view that those associated with the inquiry have come to a firm view as to your clients involvement in wrongdoing and that if the wrongdoing they suspect cannot be established they will try to establish some other wrongdoing that they can find eg perjury.

Many inquiries are not true inquiries in that they are in reality the presentation of allegations and evidence not admissible in a criminal court for the purpose of attracting as much media attention as possible and where all real investigation has taken place prior to the public hearings.

These organisations need to be perceived by the public to be achieving success in rooting out corruption in order to justify their continued existence and substantial budgets.

It should be said that many inquiries are of course vitally important and are conducted by all concerned in a proper, fair and economic manner. My concern is that the conduct of inquiries in this manner is dependent as much on the approach and good sense of the individuals involved rather than on enforceable legal rules.

In this paper when I refer to the Commission I am referring generically to the PIC and the ICAC. It should be noted that whilst the ICAC Act and the PIC Act have many mirror provisions there are significant differences in the legislation and the practice of the respective bodies.

OBTAINING INSTRUCTIONS

The reality is that no person is likely to survive a substantial inquiry without at least some damage to their reputation.

Make yourself fully aware of the extended definition of "corrupt conduct" in the ICAC Act ss8-9 and "police misconduct" in the PIC Act s5.

You can assume that if ICAC or PIC has gone to the trouble to summons or serve notices upon your client they have targeted some person as being corrupt if not your client.

Instructions should be sought as to any matter they may have been involved in or know about that may be the subject of interest by the Commission. This will generally elicit what the inquiry is about and what risk, if any, your client is exposed to. There should be an outline of the nature of the inquiry in the summons albeit in very general terms.

The consequences of perjury should be fully explained and the ramifications of *Aristodemou* (Unreported CCA 30 June 1994) emphasised. The words of Carruthers J in his judgment at page 4:

> *"Any person who commits an offence of perjury or false swearing in the course of judicial proceedings such as a Royal Commission or an ICAC Inquiry should do so in the clear understanding that if his offence is detected he will go to gaol except in very particular circumstances"*

should be brought forcefully to the client's attention.

CONFLICT OF INTEREST

If, for example, you come to a view that the inquiry may relate to litigation that you were involved in you need to consider whether you may become a witness and whether you can continue to act in the matter. Potential conflict with other clients should be carefully considered in a situation where you will not be given a witness list and other than the very brief outline given in the Scope and Purpose statement no outline of the matters alleged against your client and no right to particulars (*Donaldson v Wood and Anor* unreported NSWSC Hunt CL 15.9.95). You should be aware that legal professional privilege, except in relation to the actual appearance at the Commission, does not apply.

RIGHT OF APPEARANCE

You have no right to appear for a client and if the Commission believes there is a possible conflict of interest or that your acting for two witnesses to the inquiry

may prejudice the inquiry, they may grant leave to your client to be represented on the basis that the client be represented by another solicitor, eg *NCA v A, B, and D* [(1988) 18 FLR 439.

Address your mind to these issues prior to seeking leave and be ready to address any possible issues such as prior personal or professional relationship with a witness or potential witness.

LEGAL PROFESSIONAL PRIVILEGE

You should be aware of the specific provisions in relation to legal professional privilege in the ICAC Act ss 24, 25 and 37 and PIC Act ss 27, 29 and 40. The effect of these provisions is that no privilege exists other than that arising from instructions obtained and advice given for the purpose of the client's appearance at the Commission. However, if notices are served pursuant to s 21 or s22 or powers to enter and inspect premises exercised pursuant to s 23 you can approach the ICAC to set aside the notice on the basis that the notices impinge upon legal professional privilege.

Because of the complexity of these provisions I extract the relevant provisions in the ICAC Act in detail:

"24 Privilege as regards information, documents etc

(1) This section applies where, under section 21 or 22, the Commission requires any person:

(a) to produce any statement of information, or

(b) to produce any document or other thing.

(2) The Commission shall set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.

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25 Privilege as regards entry on public premises

(1) This section applies to the powers of entry, inspection and copying conferred by section 23.

(2) The powers shall not be exercised if it appears to the Commissioner or authorised officer that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist inspection of the premises or production of the document or other thing and it does not appear to the Commissioner or authorised officer that the person consents to the inspection or production.

37 Privilege as regards answers, documents etc

(1) A witness summoned to attend or appearing before the Commission at a hearing is not entitled to refuse:

(a) to be sworn or to make an affirmation, or

(b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a hearing, or

(c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.

A witness summoned to attend or appearing before the Commission at a hearing is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

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(5) Where:

(a) a legal practitioner or other person is required to answer a question or produce a document or other thing at a hearing before the Commission, and

(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between a legal practitioner (in his or her capacity as a legal practitioner) and a person <u>for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a hearing before the Commission(</u> emphasis added) the legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

Mirror provisions s 27, 29, and 40 exist in the PIC Act. In the Malta inquiry the then Commissioner of the PIC His Honour Judge Urquhart QC made a detailed ruling on privilege rejecting a claim for privilege by the NSW Police over notes of conferences with its employed legal officers and private counsel.

The PIC has issued a practice note asserting that legal professional privilege cannot be claimed by a witness other than the lawyer or person employed in the lawyer's office. That is, the clients themselves cannot claim the privilege. This is in my view wrong in law see for example *ICAC v Cripps* (NSW Supreme Court Unreported Sully J 9 August 1996).

<u>INFORMAL APPROACHES</u>

A client may be approached to take part in an interview with Commission Officers. Participation is totally voluntary on the client's part. This is on occasions not clearly explained to clients by investigators. It should be noted that charges are often recommended against a client who is alleged to have made a wilfully false statement to an investigator or mislead or attempts to mislead a Commission Officer at the interview pursuant to Section 80(c) of the ICAC Act. For an example of such a recommendation see the ICAC report " A

major investigation into corruption in the former State Rail Authority of New South Wales" June 1998 pp 76-79 and p91-92 and also *DPP V Green* [2002] NSWSC 594.

If, after discussing the matter with the client, you are comfortable that the client is not at risk and is no more than a witness and the client wishes to cooperate arrangements can be made to attend an interview.

On some occasions, Commission lawyers or investigators may advise that the client is only a witness and is at no risk. If this advice is given, it should be placed on the record at the interview or by confirmatory letter.

If you are of the view that there is an allegation against your client, my view is that there is little or no benefit and many dangers to the client in taking part in the interview. Unless the client is intending to admit their wrongdoing and seek an indemnity or some other benefit by assisting the Commission I would usually advise against it. The client is likely to be cross-examined if called to give evidence upon the contents of their interview. It is unlikely that agreeing to be interviewed will enable the client to escape being called.

If an allegation is made against your client and they nevertheless wish to be interviewed, the client should be advised that they should only be interviewed under the inducement that anything they say will not be used against them in criminal or civil proceedings. A typical inducement given is as follows:

> "*any answers you provide to me in response to those questions, or any document or other items produced by you to me shall not be used in evidence against you in any criminal, civil or disciplinary proceedings other than proceedings which may be brought against you in the event that any material you provide to me in the course of this interview is false to your knowledge."*

THE INTERVIEW

If a client wishes to have a lawyer, or for that matter any other person present, they may do so as the interview is entirely voluntary. Clients should be advised that they may terminate or suspend the interview at any stage if they wish to if, for example, they are concerned as to the nature of the questioning.

The interview will normally take place in the Commission's premises. On occasions, it will take place at a goal, client's house or a motel. The client should be advised that the interview will be unlike any interview they may have experienced before. Generally allegations will not be put to them nor are they advised who is making allegations against them. If it is alleged that they are corrupt they will be expected to attend and admit to their corruption and volunteer the detail of it with limited prompting as to the matters of interest to the Commission.

At the end of the interview, the client may be told that they are not to discuss the contents of the interview with any one. There is no statutory basis for this direction. Some time after the interview, the client may be asked to sign either

a witness statement or a statutory declaration. This should be carefully checked before the client signs it. This is also voluntary.

Clients attending PIC interviews will not be provided with a copy of the interview or tape. They and their legal representative will generally be permitted to attend at the PIC and to read a transcript of the interview. If your client wishes to ensure that they have a copy of the interview this should be made a condition of being interviewed. The ICAC however seems as a matter of course to provide a copy of the tape of the interview.

NOTICE TO PRODUCE A STATEMENT OF INFORMATION

ICAC Act Section 21
PIC Act Section 25

Clients who are "public officials" or "former public officials" are likely to receive notice to produce a statement of information, either financial or incident related, as described in the relevant legislation.

The response to these documents needs to be carefully prepared having regard to the consequences of making false statements in the response.

It should be noted that the response can and should generally be produced under objection thus ensuring that the response cannot be used against your client in criminal, civil and perhaps disciplinary proceedings. The protection varies from the ICAC Act to the PIC Act. In both the PIC and ICAC the answers can, subject to usual rules of admissibility, be used in the prosecution of your client for offences under the PIC or ICAC such as giving false evidence at the Inquiry or destroying documents subject to a notice to produce.

It is generally preferable that the client prepares the detailed response, and that the lawyer add a written objection in appropriate terms addressing the terms of the relevant section, assist in the use of appropriate wording and ensure that all questions are understood clearly and on your instructions truthfully answered. Again there is no need or duty to volunteer information that is not requested. Of course if the client wishes to do so they clearly can and on occasions it will assist their position to do this.

The usual terms of the objection are as follows:

"This statement is produced unwillingly and under objection pursuant to Section 26(2) of the ICAC Act" or "Section 28 (2) of the Police Integrity Commission Act".

Unless specifically instructed by the client, it is difficult to see any reason why this objection should not be used. It should be noted, that legal professional and other privileges may be able to be claimed in responding to such notices. An application can be made to the Commissioner to set aside the notice.

The document should not be prepared as in a Police Statement, and does not need to be signed or witnessed. The lawyer may generally produce the

statement or documents on behalf of client. This should not be done unless the client has adopted the document by signing it and a signed copy is retained in your file. There is no legal obligation for the client to sign the document.

The client can of course deliver it personally. The danger in this course is that investigators sometimes seek to discuss matters with your client when the documents are produced.

When the response is delivered, a receipt should be obtained. The receipt should note that the objection was taken particularly in regard to documents produced. If practical a copy should be retained of all documents produced.

The client should be made clearly aware of the non-disclosure provisions set out in the notice and the relevant Act and the consequences of breaching these requirements. A common issue that arises is whether for example the client police officer can disclose the existence of the notice and its contents to their employer the NSW Police.

Without the consent of the Commission it can only be disclosed for the purpose of obtaining information to assist in preparation of the response. If the notice is subject to the confidentiality provisions and disclosure might prejudice the inquiry neither its existence nor contents can be disclosed other than for the purpose of obtaining legal advice or complying with the notice. Reference should be had to the practice notes of the Commissions.

NOTICES TO PRODUCE DOCUMENTS

The Commission has the power to require all persons to produce documents. These may be financial documents or documents such as notebooks, files etc.

It is my view that if a client receives such a notice, they are only required to produce documents in their possession and control. They need not produce documents that are not theirs, but their employers for example and are not in their possession. This is not a universally accepted view. On many occasions it will be in the clients interest to produce all relevant documents even if they are not strictly required to. It is a matter of judgment and instructions.

Documents produced pursuant to these notices should be listed in detail and if possible photocopied.

Return of documents should be sought as soon as possible. Some documents such as passports and current chequebooks, should be sought to be returned immediately after photocopying. It is often very difficult to obtain the prompt return of documents from investigative bodies. Perhaps the easiest recourse in this situation is a complaint to the relevant Inspector of the Commission.

Care should be taken that all documents are accounted for by way of receipts when they are delivered to the Commission and when they are returned to the client.

Clients should not incur expense in complying with the notice eg bank fees. The costs are often substantial and in my view there is no obligation on a witness to incur the expense of bank fees and accountancy fees to produce documents not immediately in your clients possession or produce information not immediately available. My practice is to write to the Commission advising of the existence and location of the documents and inviting the Commission to exercise its statutory powers to obtain the documents.

Decisions to issue notices must be bona fide and for the purposes of the Commission's investigation, however, they do not depend on the existence of prior probative material justifying their issue. The documents can only be retained for a period necessary for the purposes of the inquiry (*Mannah v State Drug Crime Commission (*13 NSWLR 28), *Ghani v Jones* (1970 1 QB 693), *Island Way Pty Ltd v Redmond* (1990) 1 Qd R 431)
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As Wood J as he then was said at page 41 in *Mannah*:

> "*There is a danger of a body such as the defendant adopting standard summonses or notices for the production of documents, without regard to the individual case in respect of which the demand is issued. Equally there is a danger of the request being cast too widely in its terms, that is with insufficient precision as to the person or property to which the relevant item related or the period encompassed, to permit the recipient to know with certainty what is required. Where it can be seen that a particular summons or notice transgresses in this regard, then, it will be open for the recipient to raise that point when called before the Commission.*"

SUMMONS TO APPEAR AND GIVE EVIDENCE

A client's most important contact with the Commission will be if they are summonsed to appear. The summons may very well be served on very short notice sometimes a matter of hours.

If the summons is to a private hearing the client should be advised not to discuss the summons or even the fact that they have received the summons with anyone. They may well be asked in evidence whether they have discussed with any person the fact that they have received a Summons. If they have previously received a statutory notice they may be asked if they discussed this with anyone.

The summons is issued pursuant to the relevant legislation and service may be effected in accordance with the relevant provision of that act.

Instructions should be obtained to try and ascertain their position, ie. whether they are merely a witness, or likely to be the subject of adverse material. You should make contact with the person nominated on the summons as contact person. If your client is not the subject of adverse allegations the Commission

may be able to allay their fears. The summons should contain an outline of the nature and scope of the investigation.

Leave to appear should be sought prior to your client being called. As discussed earlier leave may be granted on conditions. This should be discussed with Counsel Assisting the Commission prior to the client's appearance.

Service can be accepted on behalf of clients, subject to their instructions.

Special care should be taken in regard to interstate clients before accepting service, and regard had to the provisions of s76 of *the Service and Execution of Process Act Cth* ('**SEP Act'**), that authorises service of Commission, summonses interstate. There is currently a challenge to the constitutionality of s76 of the SEP Act before the High Court (*Dalton V NSW Crime Commission* [2004] NSWCA 454). In the NSW Court of Appeal it was held by two to one with Mason PA dissenting that there was no constitutional bar to service of summons to appear before the Crime Commission The High Court granted special leave to appeal on 16 June 2005.

In my view, what is clear is that there is no power provided by the SEP Act to serve notices to produce statements of information on persons outside the State of New South Wales.

The client remains bound by the summons until formally discharged by the Commissioner, or the Inquiry is completed.

LETTER OF ADVERSE EVIDENCE

The client's first contact with the Commission may be a letter of adverse notice advising that material adverse to them is to be led.

This is intended to comply with rules of natural justice so as to give a person the opportunity to seek leave to be represented, and ask questions of witnesses, etc. It may be the only particulars they will receive.

In *Aristodemou v Temby and the ICAC* (*NSWCA* Unreported Grove SCJ 14 December 1989) the proposition that a witness before being examined was entitled to particulars of allegations and or access to any material in ICAC's possession touching upon his involvement in corrupt conduct eg listening device product was rejected.

In a similar decision of *Morgan and Wanless v ICAC (*NSWSC Unreported 31 October 1995) Sperling J declined to intervene to require the ICAC to provide a witness with access to his own private evidence and that of his chief accuser before he was recalled publicly. See also *Donaldson and Wood* op cit an unsuccessful application arising from the Royal Commission into the Police Service for details of allegations to be provided before the witness was called.

The letter may not require the client to do anything if they wish to take that course. In many cases this is the best approach. In other situations it will be in

the clients interest to aggressively challenge the allegation. This may of course lead to the client being called. This is generally a course best avoided if the view is formed that the client will ultimately face charges either criminal or disciplinary.

ASSISTING THE COMMISSION

In the course of receiving instructions or during an inquiry the client may admit that they have been involved in misconduct, and wish to "assist the Commission".

In the first instance, contact Counsel Assisting or the instructing solicitor, and advise that the client wishes to speak to them. An interview on an induced basis may then be arranged.

Negotiations may need to take place in relation to indemnities, resignation, protection, code names, letters of comfort etc.

The fact that a client has taken this course must of course be dealt with in a highly confidential manner.

They may well have to deal with taxation consequences and forfeiture applications by bodies such as the Crimes Commission including for example the client's superannuation benefits.

These clients are under considerable stress and may need to be referred to organisations such as NSW Police Psychology Unit or advised to seek medical assistance. It is strongly suggested that any negotiations with the Commission, or others in relation to these matters, be committed to writing at the earliest possible time.

HEARING

It is not intended in this paper to provide a detailed guide to Commission hearings. Many usual rules of advocacy have no application, and can in fact lead to disastrous results. The approach taken is a matter of instructions and judgment.

It may well be that the approach decided is a minimalist approach. The view may well be taken that any cross examination may only make the situation worse opening up a whole new area of enquiry.

SCOPE AND PURPOSE STATEMENT

At the commencement of the hearing the Commissioner will generally outline in very broad terms the scope and purpose of the hearing. This will often also be disclosed in the summons to appear issued to witnesses. Counsel Assisting will generally at the commencement of the inquiry outline the nature of evidence it is expected will be led.

SEEKING LEAVE

Leave should only be sought if necessary. Why attract media attention to your client before it is necessary? Clearly, leave must be sought when:

- The Commissioner invites all persons seeking leave in the bracket to so do
- The client is called
- A witness affecting the client is called
- Access is sought to a document or there is a need to make an application eg suppression order

Leave will normally only be granted if the Commission is of the view that the client is substantially and directly interested in any subject matter of the hearing or alternatively the client is called as a witness. It should not be assumed that leave will be granted. The lawyer should be prepared to argue the basis upon which it is sought. You should be familiar with the relevant statutory provisions. Leave may be granted on terms.

THE OBJECTION

The procedure when your client is called is that they are sworn and then the Commissioner explains the objection to them. If they take the objection, it is considered to be a general objection to all questions asked of them.

The practice of both the ICAC and PIC Commissioners is to give persons the option to give evidence under objection and if persons wish to avail themselves of this right make an appropriate order without argument or comment.

I advise all clients to take the objection, as I can see no advantage, other than the dubious one of appearances for not taking it.

OBJECTING TO EVIDENCE

The rules of evidence do not apply to the Commission nor does the Evidence Act.

Objections to evidence are likely to only be successful on the grounds such as:

- That the question is misleading, unfair or does not state the evidence correctly
- That the evidence is of minimal evidentiary value as being hearsay etc whilst extremely damaging to the client's reputation (this is more likely to find a successful application for suppression)
- That the questions trespass upon a matter which is the subject of a pending trial against the witness
- That the question is outside the terms of reference of the inquiry

SUPPRESSION ORDERS

One of your main roles will be to seek, where appropriate, to suppress publication of evidence that may unfairly damage your client's reputation, endanger a person's safety, exacerbate illness or prejudice a fair trial.

This application is more likely to be successful if the evidence is hearsay or of limited value and peripheral to the inquiry. There is a statutory presumption that hearings and evidence will be available for publication unless the Commissioner is positively satisfied that it is in the public interest that the evidence be not published.

If seeking a suppression or non-publication order, it is advisable to carefully draft the proposed order that will be sought prior to making the application. See for example *Frick v Nationwide News* Unreported NSW Supreme Court 11 September 2001 Simpson J.

IN-CAMERA HEARINGS

In-Camera hearings may take place either at the request of a witness or by the Commission on its own motion.

The reasons for such hearings include:

- Operational needs of the Commission
- Need to protect a persons right to a fair trial
- Need to test the reliability of evidence before releasing it publicly
- Need to protect the identity of a witness

It should be remembered, that the evidence from in-camera hearings may be released at a later date. Great care must be taken with any documents or information from an in-camera hearing, as unauthorised release of this material is likely to constitute contempt of the Commission and/or an offence under the Commission's Act.

It has been common practice at the ICAC to call all major witnesses in private and then recall them in public, without the witness or their lawyer having access to their private transcript, in order to establish inconsistencies in their version of events.

CALLING OF THE WITNESS

Counsel Assisting calls all witnesses and leads evidence from them. The Commissioner may of course ask questions of the witness. Other parties who are affected by the witness's evidence may then, by leave, ask questions of the witness. In the Commission, after all persons with leave ask questions, the witness's legal representative, if they have leave, may ask questions again with leave. Counsel Assisting may then ask final questions of the witness.

These practices may vary with individual Commissioners.

Unless the Commission goes into private hearing all members of the public may remain and hear other witnesses' evidence. Sometimes a Commissioner will ask a witness to leave the hearing room during the evidence of others. There is no power in my view to require this without closing the court. The PIC seems, in my view incorrectly, to take a different view.

BROWN AND DUNN

Most Commissioners take the view that these principles do not apply and discourage cross-examination directed to putting your clients case to a witness. However, at the start of the inquiry you should inquire of the Commissioner as to their attitude. This can be done by an approach to Counsel Assisting or preferably when you commence your first Cross Examination by placing it on the record. It is arguable that Brown and Dunn principles can have no application to the inquiry process where there are no parties to a proceeding and witnesses can and often are recalled.

CROSS-EXAMINATION

Cross-examination in this forum can be extremely difficult for a number of reasons specific to the inquisitorial process. Initially the Commissioner may ask you what topics you wish to cross-examine upon and how this will "assist the investigation". There is no automatic right to cross-examine.

Witnesses are called often with no notice being given to you about the matters that are to be led from them.

You may be refused access, for "operational " reasons, to vital documents such as a witness's prior statement to Commission investigators. Counsel Assisting may have an obligation pursuant to the Bar Rules to present evidence of any prior inconsistent statements known to them.

You should seek access to these documents and if this is refused an undertaking sought that counsel assisting will lead from a witness evidence of any prior inconsistent statements. Witnesses should be cross-examined to get on the record when? where? and to whom? they have made previous statements about the matters they are giving evidence about.

A recent decision of the New South Court Appeal *Musumeci and The Attorney General for New South Wales ([2003] 57 NSWLR 193)* may be of assistance in arguing for the right to access to documents before commencing cross-examination. It was however a case relating to the Coroner's Court.

PLAYING OF TAPES AND TRANSCRIPTS

Often your client will be called into the witness box and asked to give a version of events and then have a tape or more usually parts of a tape played to them and then asked about the truth of the version they have previously given.

At this point you can play a significant role unless the tapes clearly and unequivocally contradict your client's evidence in which case your client is in some difficulty and there is little you can do.

Often I find that the transcript of the tape is wrong and wrong on crucial points. You must listen carefully to the tape as it is played and insist that if there is doubt then your client have ample opportunity to listen to and confirm the accuracy of the transcript. There may well be issues of translation.

Clients may be asked to comment on other person's conversations and asked to explain why things may be said about them. This is in my view an unfair practice and one that should be objected to.

TELEPHONE INTERCEPTS AND SURVEILLANCE

All clients should be made aware of the use by Commissions of these investigative tools.

TENDER OF DOCUMENTS

The only person who can tender documents is Counsel Assisting. If it is sought to tender a document, it should be provided to Counsel Assisting who, in his/her discretion, may tender it. (See PIC procedural guidelines).

CALLING EVIDENCE

The practice varies between Commissions and Commissioners. As it is an inquiry you have no right to call evidence. Some Commissioners require you to provide a copy of a statement by your proposed witness and they then advise that counsel assisting will or will not call the witness.

You should think carefully before calling evidence particularly if there is the possibility of criminal charges being brought against your client. The same sorts of issues that you consider in calling evidence at committals need to be considered. On most occasions that I have seen persons adversely affected by the evidence call evidence to rebut allegations it has not assisted the witness's position.

EXHIBITS

At the PIC a document when tendered becomes an exhibit. It will have been firstly bar-coded, then scanned onto the hearing system. It can be viewed electronically on the Exhibits Data Base at the bar table.

Exhibits if public exhibits can also be obtained in hard copy, upon application, as hard copy from the PIC.

ADMISSIBILITY OF EVIDENCE

Issues have arisen as to the use that may be made of evidence given at the ICAC, PIC or the Royal Commission into the Police Service in subsequent litigation involving the witness.

These issues have arisen in two situations;

(a) It is sought to tender transcript of a person's ICAC or Royal Commission evidence against their interest in disciplinary or sentence proceedings. (*Hartmann, Waddell, Bayeh, Hood*)

(b) It is sought to tender a person's ICAC or Royal Commission evidence against their interest in a prosecution against them for an offence under the ICAC Act or Royal Commissions Act (*Persson, Attallah, Alderman, Eade, Brown v Heagney*).

(a) Use in subsequent disciplinary and sentence proceedings

In *Hartmann V Commissioner of Police*([1997] 91 A Crim R 141) a decision on the admissibility before the Government and Related Appeal Tribunal in disciplinary proceedings of evidence given under objection at the Police Royal Commission it was held that Section 17 of the Royal Commissions Act 1923 ,prohibiting the use of evidence given under objection in "any civil or criminal proceedings", should be given a "liberal interpretation" and that the evidence was not admissible.

However, contrary to this decision in *Taylor v Public Relations Institute of Australia* (22 ALD 526) Rolfe J held that the Council of the Public Relations Institute could take into account criticism of the plaintiff's evidence in an ICAC report in determining to expel him from the Institute even though the evidence itself was given under objection and could not be used against him. This decision is in conflict with the principles espoused by the Court of Appeal in the later decision in *Hartmann*.

In *Regina V Anthony Hood* (91 A.Crim R 526*)* it was held that in sentence proceedings against a former police officer, the accused having pleaded guilty and giving evidence on sentence could be cross examined by the Crown on evidence given by him under objection at the Police Royal Commission provided the questions went only to his credit and only if they did not disclose any offence. As the questions asked by the Crown in this case went both to credit and also tended to incriminate the accused of an offence namely perjury before the Royal Commission they were not admissible.

In *Waddell v Commissioner of Police* ([2000] NSWADT 144 it was held by the Administrative Decisions Tribunal that the Commissioner of Police could not rely upon the evidence given under objection by Mr Waddell at the ICAC in a hearing of his appeal to the Tribunal against refusal of Security Industry

Licences. See also *The Taxpayer v The Commissioner of Taxation* (No NT 95/8 AAT No11407)

In Bayeh V State Government of New South Wales ([1999] 108 A.Crim R 364*)* it was held that evidence given at the Royal Commission into the Police Service and the ICAC by Mr Bayeh under objection was not admissible at a Parole Board Hearing. However, once the evidence was introduced by the person who had the benefit of the protection it was available for all purposes including adverse findings against Mr Bayeh. Similarly in *Regina V Bayeh* ([1999] NSWCCA 82) material introduced by Mr Bayeh for one purpose at his sentence proceedings could be used generally and adversely to him.

(b) Use in subsequent prosecutions for giving false evidence:

In *DPP v Persson* (NSWSC James SCJ unreported 16 April 1996) , a judgment on a stated case, it was held that whilst Section 37 of the ICAC Act abolishes the privilege against self-incrimination it does not expressly abolish or even refer to the voluntariness rule. Accordingly it was open to the magistrate to reject admission of an offence against the ICAC Act contained within a transcript of ICAC hearings on the basis of a breach of the voluntariness rules. Serious doubt has been cast on the authority of Persson by a subsequent Supreme Court decision in *DPP v Alderman* ([1998] 45 NSWLR 526)

In *DPP v Attallah* ([2001] NSWCA 171) The Court of Appeal in overturning a decision of Justice Bergin held that it was not unfair under section 90 of the Evidence Act to allow the admission of evidence obtained under compulsion at an ICAC hearing in a subsequent prosecution for giving false evidence by reason solely of it being obtained under compulsion as the manner and purpose of obtaining this evidence was sanctioned by parliament.

Brown V Heagney and others (NSWSC McInerney SCJ 27 April 1994) was an application for prohibition by a police officer convicted for perjury on the basis of admissions made at an ICAC hearing after receiving an indication from Commission officers that if he admitted to having lied on the previous occasion he gave evidence and gave full and truthful evidence the ICAC would recommend that he not be prosecuted for perjury.

It was open to the magistrate to find that the inducement given by a person conceded to be a person in authority did not lead to the evidence being excluded under s410 of the Crimes Act.

In *Director General of the Department of Environment and Conservation V Suzanne Ryan* ([2004] NSWIRComm) the full bench of the Industrial Commission in Court Session upheld a finding by the judge at first instance that the Director General of the Department of Environment and Conservation had erred in taking into account an ICAC Report, protected by s 37(3) of the ICAC Act), in determining to charge Ms Ryan with breaches of discipline under the Public Sector Management Act 1988.

In *Wood V Norman Beves* ([1997] 137 FLR 436) the NSW Court of Appeal held that in a prosecution of Mr Beves for contempt of the Police Royal Commission the product of telephone intercepts lawfully obtained was not admissible as "contempt" of the Royal Commission was not an exempt proceeding for the purpose of s5B (a) of the Telecommunications (Interception) Act 1979 (Cth.)

STATUTORY DECLARATION

If the client, who has not been called, or having been called wants to add further material, they may be able to do so by way of Statutory Declaration.

WITNESS EXPENSES

The relevant acts provides for payment of witness expenses. You should note the specific provisions in the SEP Act in relation to payment of expenses for interstate witnesses.

TRANSCRIPT

At the PIC real time transcript, the current day's transcript and exhibits are available at the Bar table through the Commission computers. If instructed to appear at the PIC you should ensure that you are familiar with the technology before your appearance.

SUBMISSIONS

If it is proposed to make an adverse finding is to be made against the client, or allegations against them referred to the DPP or other body, the client should be invited by the Commission to make submissions through their representative as to why this should not occur. This will nearly always be done in writing and then a day fixed for supplementary oral submissions.

It is generally accepted by the Commissioners of the ICAC and the PIC that the standard to be applied if adverse findings are to be made against persons is that laid down in *Briggenshaw and Brigginshaw* ([1938] 60 CLR 336 at 362.

> *"The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgement if the question was whether some act had been done involving grave moral delinquency."*

PROCEDURAL GUIDELINES

The PIC has published procedural guidelines relating to hearings. The PIC guidelines are on the Commission's web site. The ICAC publishes a document "Information for Witnesses" which is available on their website .

REMEDIES

The ICAC is subject to Judicial review although the nature of its function places limits on the degree to which the superior courts can and will intervene.

The Superior Courts of Common Law have always asserted authority to determine the proper jurisdiction of the inferior courts and gradually there has developed a system whereby they supervise the activities of the inferior courts through the prerogative writs.

The writs can be used when there is for example an allegation that the person or body sought to be restrained has:

(a) Acted outside its enabling power (usually a statute).
(b) Failed to exercise a power that it has an obligation to exercise.
(c) So denied natural justice or procedural fairness that there has been no real exercise of power.

The prerogative writs of certiorari and prohibition are available against any body or tribunal that has legal authority to determine questions affecting the rights of subjects and having the duty to act judicially.

It must be remembered that the ICAC does not exercise judicial power and thus there are limits on what remedies are available for example certiorari is not available but a declaration is.

In *Greiner and Moore v ICAC* ([1992] 28 NSWLR 125) whilst the Court of Appeal held that certiorari was not available to the plaintiffs as ICAC did no more than report to parliament, to protect the plaintiff's reputation, ICAC having acted contrary to law, a declaration would be granted.

Annetts and another v McCann and others ((1990) 170 CLR 596) *and Ainsworth v Criminal Justice Commission* ([1992] 175 CLR 564 are important cases in relation to the application of natural justice principles to inquiries.

The only right affected by the ICAC is ones right to reputation. These cases are authority for the proposition that today this right has been established as an "interest which should not be damaged by an statutory inquiry unless the person whose reputation is likely to be affected has a full and fair opportunity to show why the finding should not be made."(Brennan J in *Annetts* at 186)

In *ICAC v Chaffey and others (30 NSWLR 21)* the plaintiffs in the original proceedings before Cole J successfully challenged a decision by the ICAC to hold proceedings in public.

In an inquiry before the ICAC four police officers were accused by Neddy Smith of corrupt conduct. It was known in advance that he would not identify other criminal associates to permit the allegations to be properly tested. The ICAC determined to hear the proceedings in public.

On appeal the Court of Appeal held by majority that whilst ICAC must be procedurally fair in its conduct of hearings this did not mean that a party is to be protected from all harm. The Commission had exercised its discretion pursuant to Section 31 (1) of the ICAC Act in a manner reasonably open to it. Kirby P in a dissenting judgement held that there had been procedural unfairness and a declaration should be granted.

The position in challenging decisions by the PIC is unclear as there are no decided cases to date and the PIC does not make findings of "corrupt conduct" only recommendations that named persons be considered by the DPP for prosecution or by the Commissioner of Police for dismissal or disciplinary action. We await the decision in *Shaw v PIC.*

In relation to the PIC and now the ICAC there exists the availability of complaint to the respective Inspector. If you have a complaint about the conduct of the PIC or ICAC the Inspectors has power to deal with complaints about abuse of power, impropriety and other forms of misconduct on the part of the Commission or it's officers. The Inspectors have significant powers to assist them in such investigations.

FUNDING FOR LEGAL ASSISTANCE

Both the ICAC Act s 52 and the PIC Act s 43 make provision for funding to be provided to persons appearing before the Commission:

"ICAC ACT S52 Legal and financial assistance for witness

(1) A witness who is appearing or about to appear before the Commission may apply to the Attorney General for legal or financial assistance.

(2) The Attorney General may approve the provision of legal or financial assistance to the applicant if of the opinion that this is appropriate, having regard to any one or more of the following:

(a) the prospect of hardship to the witness if assistance is declined,

(b) the significance of the evidence that the witness is giving or appears likely to give,

(c) any other matter relating to the public interest.

(3) On giving the approval, the Attorney General may authorise the provision to the witness of legal or financial assistance determined by the Attorney General in respect of the witness's appearance before the Commission. The assistance is to be provided out of money provided by Parliament for the purpose.

(4) The assistance may be provided unconditionally or subject to conditions determined by the Attorney General.

(5) The Attorney General may delegate one or more of his or her functions under this section to the Director-General of the Attorney General's Department.

A mirror provision section 43 appears in the PIC Act. Applications for assistance pursuant to these sections should be forwarded to the Legal Representation Office, which makes recommendations to the Director General of the Attorney General's Department as to provision of assistance. Applications should address all the matters in paragraph (2)."

Apart from this statutory assistance funding may be provided on an ex gratia basis particularly for "public officials".

It has been determined by the High Court in *Canellis v Elkins([1994] 181 CLR 309* that the rules of procedural fairness do not extend to a requirement that legal representation be provided to a witness at an inquiry and further that *Dietrich* principles do not apply to protect the interests of a witness at an inquiry.

The assistance provided by the Legal Representation Office does not extend to proceedings outside the Commission. Thus this office cannot assist in dismissal proceedings, criminal charges, disciplinary charges and defamation actions.

Assistance for challenges to the Commission's actions may be provided through the Attorney-Generals Department. Persons seeking assistance in such proceedings should contact The Director Community Relations Attorney Generals Department. Persons charged with contempt arising from proceedings before the Commissions are not eligible for assistance from the Legal Representation Office once the matter reaches the Supreme Court. If unable to afford representation, an application can be made to the Legal Aid Commission for assistance.

ICAC Amendment Act 2005

This Act has not yet been proclaimed. It makes a number of significant changes.

- An Independent Inspector similar to the Inspector of the PIC has been established and Mr Graham Kelly has been appointed to this position. (s57)

- Public hearings of the Commission become " public inquiries"(s31) and private hearings become "compulsory examinations."(s30)

- The power of the Commission to refer to the Supreme Court contempts of the Commission is restricted and the procedures for punishing such contempts clarified. (ss98 to 100)

- Offences of threatening counsel assisting the Commission or legal practitioners or witnesses appearing before the Commission are created. (s93(1))

- Responsibility for the investigation of allegations of misconduct against civilian employees of NSW Police is transferred to the Police Integrity Commission. See Section 4(3A) of PIC Act.

The views expressed in the paper are not necessarily the views of the Legal Representation Office.