

Mr Damian Tudehope MP
Chair
Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 200

Dear Mr Tudehope

I am pleased to enclose a copy of the guidelines issued by the Commissioners pursuant to s 31B of the ICAC Act.

Section 31B of the ICAC Act requires the Commissioners to issue guidelines relating to the conduct of public inquiries to Commission staff and counsel assisting the Commission. The guidelines are required to provide guidance on the following aspects of the conduct of public inquiries:

- a) the investigation of evidence that might exculpate affected persons,
- b) the disclosure of exculpatory and other relevant evidence to affected persons,
- c) the opportunity to cross-examine witnesses as to their credibility,
- d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- e) any other matter the Commission considers necessary to ensure procedural fairness.

The guidelines were tabled in both Houses of Parliament on 13 February 2018 and have been published on the Commission's public website.

The publication of the guidelines addresses recommendation 1 in the Committee's September 2017 report *Review of the 2014-15 and 2015-16 annual reports of the ICAC Inspector* (the Report).

Recommendations 2 and 3 in the Report are:

- 2 That the ICAC develop a formal policy for advising people subject to an ICAC investigation, at the earliest possible opportunity, where they will not be the subject of adverse findings.

- 3 That the Inspector of the ICAC and the three member Commission review the Memorandum of Understanding between the Inspector and the ICAC as soon as practicable.

With respect to recommendation 2, in March 2017 the Commission adopted the following Operations Manual procedure:

Where a public inquiry has been held, or a confidential investigation report furnished, an affected person will be made aware of the outcome of the Commission investigation as a result of the submissions and reporting processes that accompany those activities. In any other case the chief investigator will notifying an affected person in writing of the result of a Commission investigation if:

- (a) the Commission has previously communicated with the affected person about one or more of the allegations made against them ("the allegations") and the Commission has determined to:
 - (i) to take no further action in relation to all of the allegations or*
 - (ii) refer information about one or more of the allegations to another authority for any action, including disciplinary action and**
- (b) the notification to the affected person is limited to information about the result of the investigation of the allegations and*
- (c) in the case where (a)(ii) applies, after having consulted with the relevant authority, the notification to the affected person is not likely to compromise or prejudice action that may be taken by the authority in relation to the allegations or other matters referred to the authority.*

With respect to recommendation 3, I advise that a new memorandum of understanding was adopted on 2 November 2017. I understand the Inspector has provided the Committee with a copy of the new memorandum of understanding.

Yours sincerely


The Hon Peter Hall QC
Chief Commissioner

16 February 2018

INDEPENDENT COMMISSION AGAINST CORRUPTION**PUBLIC INQUIRY PROCEDURAL GUIDELINES****1. Preliminary**

- 1.1 These Procedural Guidelines ("the Guidelines") are issued in accordance with the provisions of s 31B of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") and are directed to members of the Commission's staff and counsel appointed under s 106 of the ICAC Act to assist the Commission ("Counsel Assisting").
- 1.2 In accordance with s 31B of the ICAC Act, the Guidelines provide guidance to Commission staff and Counsel Assisting on a number of aspects of the conduct of public inquiries, in particular in respect of the matters referred to in s 31B(2) (a) to (e) of the ICAC Act.
- 1.3 The manner in which the Guidelines, or any one or more of them, are implemented in respect of a particular public inquiry, and the timing of such implementation, are matters that are within the discretion of the presiding Commissioner. The presiding Commissioner will take into account the following:
- a) the efficient conduct of the public inquiry;
 - b) the effective pursuit of the Commission's functions under Part 4 of the ICAC Act;
 - c) the requirements of procedural fairness as determined by the presiding Commissioner that apply in respect of affected persons during the public inquiry in question having particular regard to the matters addressed in s 31B of the ICAC Act; and
 - d) such other matters that the presiding Commissioner considers are relevant to the public inquiry including protection of the public interest and the prevention of breaches of public trust.¹

2. Section 31B of the ICAC Act**2.1 Section 31B of the ICAC Act provides that:**

- (1) The Commissioners are to issue guidelines relating to the conduct of public inquiries of the Commission to members of staff of the Commission and counsel appointed under section 106 to assist the Commission.

¹ Section 12 of the ICAC Act.

(2) The guidelines are to provide guidance on the following aspects of the conduct of public inquiries:

- (a) the investigation of evidence that might exculpate affected persons,
- (b) the disclosure of exculpatory and other relevant evidence to affected persons,
- (c) the opportunity to cross-examine witnesses as to their credibility,
- (d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,
- (e) any other matter the Commission considers necessary to ensure procedural fairness.

(3) The Commission is to arrange for the guidelines to be tabled in both Houses of Parliament and to be published on a website maintained by the Commission.

(4) In this section:

affected person means a person against whom substantial allegations have been made in the course of or in connection with the public inquiry concerned.

2.2 The ICAC Act does not define "exculpatory evidence". For the purpose of the Guidelines, "exculpatory evidence" means credible, relevant and significant evidence that tends to establish that a person has not engaged in the corrupt conduct that is the subject of the Commission's investigation.

3. The investigation and consideration of evidence that might exculpate affected persons

3.1 A key consideration in determining what evidence to obtain during the course of an investigation is the extent to which it will enhance the ability of the Commission to establish the truth. Relevant evidence includes exculpatory evidence.

3.2 The investigation case manager is responsible for determining the most appropriate investigation strategy. The investigation strategy should include consideration of any reasonable steps that can be taken to identify and follow investigative leads which suggest that exculpatory evidence exists. Commission staff involved in the investigation should bring to the attention of the investigation case manager exculpatory evidence of which they are aware and investigative leads that suggest to them, on reasonable grounds, that exculpatory evidence may exist.

3.3 During the pre-public inquiry stage of an investigation, the investigation case manager should ensure, in consultation with the senior case lawyer assigned to the investigation, that relevant material, including exculpatory evidence, within the Commission's holdings is registered in the Commission's case management system and entered into the Commission's records management systems. Any question as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer.

- 3.4. Prior to the commencement of the public inquiry, the investigation case manager and the senior case lawyer should further consult in relation to the Commission's holdings to consider whether any material, including material that has not been registered in the Commission's case management system and entered into the Commission's records management systems, has become relevant to the Commission's investigation. This includes evidence that, as a consequence of the progress of the Commission's investigation, is exculpatory. Any question as to the relevance of material, or whether it is exculpatory, will be resolved by the senior case lawyer. In the case of material that has become relevant to the Commission's investigation, but has not been registered in the case management system and entered into the Commission's records management systems, the investigation case manager should take steps to have such material registered and entered.
- 3.5 The senior case lawyer, in consultation with the investigation case manager, is responsible for determining the material that will comprise the brief to Counsel Assisting.
- 3.6 The senior case lawyer will ensure that exculpatory evidence that has been obtained during the pre-public inquiry phase of an investigation is included in the brief of evidence for Counsel Assisting. The senior case lawyer will also bring to the attention of Counsel Assisting any exculpatory evidence that comes to his or her attention during the public inquiry, the existence of which is unknown to Counsel Assisting. In either case, Counsel Assisting will bring such evidence to the attention of the presiding Commissioner, who may direct that further investigation be undertaken.
- 3.7 During the course of a public inquiry, an affected person may seek to place exculpatory evidence before the Commission. If so, the affected person should nominate in writing a person or persons who can give the evidence. The affected person should identify in writing any documentary material that the affected person contends is exculpatory. The affected person should also provide a statement of the proposed evidence or, if that is not possible, a written proof of the evidence that the affected person believes that a witness can give. Copies of the relevant documents, statements or proofs of evidence must be provided to Counsel Assisting as soon as practicable after the existence of the evidence, or its potential relevance to the investigation, becomes known. In consultation with the presiding Commissioner, Counsel Assisting will determine whether such evidence requires further investigation by the Commission, whether any nominated person should be called to give evidence, or whether any document should be tendered.

4. The disclosure of exculpatory and other relevant evidence to affected persons

- 4.1 The Commission's duty to afford procedural fairness to an affected person requires it to provide the affected person with material that is adverse to that person and upon which the Commission may rely. The affected person should be given a reasonable opportunity to consider and respond to that material. Where the Commission's investigation includes a public inquiry, it will make available to an affected person exculpatory evidence in its possession. The timing of the disclosure of any such evidence, and the form in which disclosure will be made, are matters for the presiding Commissioner.
- 4.2 Where Counsel Assisting is aware of evidence, which is adverse to the interests of an affected person and Counsel Assisting intends to rely upon such evidence to contend that an adverse finding, or findings, against that person should be made, Counsel Assisting will ensure that the substance of that evidence is disclosed to the affected person.
- 4.3 Where Counsel Assisting intends to contend that the evidence of a witness should be preferred over that of an affected person for the purpose of the Commission making a finding about the affected person and Counsel Assisting is aware that:
- (a) the witness has made an inconsistent statement or previously given inconsistent evidence,
 - (b) the witness has been subject to an adverse finding as to credibility,
 - (c) the witness suffers, or has suffered, from any physical or mental condition that may affect the reliability of the person's evidence,
 - (d) a concession or benefit has been offered or provided to the witness to secure that person's evidence, or
 - (e) the witness has been convicted of any criminal offence or is, or has been, the subject of disciplinary proceedings relevant to the conduct of the investigation,

Counsel Assisting will disclose that information to the affected person at an appropriate time.

5. The opportunity to cross-examine witnesses as to their credibility

- 5.1 Persons that the presiding Commissioner determines have a sufficient interest may apply to cross-examine a witness during the course of a public inquiry, including as to the witness's credibility.
- 5.2 A witness may only be cross-examined with the leave of the presiding Commissioner and only in respect of a matter that the presiding Commissioner considers is relevant to the investigation.²

² Section 34(1) of the ICAC Act.

5.3 Leave will be given to cross-examine a witness as to his or her credibility where the presiding Commissioner considers that the credibility of the witness is of sufficient relevance to the investigation.

6. Access to relevant documents and a reasonable time to prepare before giving evidence

6.1 Where it is proposed to require a person to appear before the Commission at a public inquiry, the person will be given reasonable notice in order to prepare for, and participate in, the public inquiry, including to seek legal advice or arrange for legal representation. What is “reasonable notice” will depend on the particular circumstances of the case, including the individual circumstances of the person whose appearance is required, operational exigencies and the balance of convenience.

6.2 The rules of procedural fairness, as they apply to the Commission, do not require the Commission to provide a witness with access to any evidence before the witness is examined.

6.3 Where to do so would not prejudice the investigation, the Commission may provide a witness with access to relevant documents before the public inquiry or before the witness is examined. A decision as to whether relevant documents will be disclosed to a witness before the witness is required to give evidence in a public inquiry, the extent of the disclosure, and the method of disclosure will be determined by the presiding Commissioner.

6.4 Any document that is to be disclosed may be subject to the redaction of information of a private or personal nature that is not relevant to the investigation. If the information is relevant to the investigation, but its disclosure would adversely affect the privacy or reputation of a person who is not the subject of the investigation, the Commission will consider what measures should be taken to protect the privacy or reputation of that person, including whether any directions should be made under s 112 of the ICAC Act, prior to making the information available to the witness.

6.5 The Commission maintains a restricted access portal on its public website for the purpose of:

- (a) providing authorised persons (witnesses and their legal representatives and other parties deemed to have sufficient interest in the subject matter of the investigation to warrant access) with access to relevant documents, and
- (b) providing authorised persons with access to relevant documents, once a public inquiry has commenced, including documents proposed to be made exhibits.

6.6 The Commission’s restricted access portal may be used for the disclosure of relevant documents to authorised persons for the purpose of a public inquiry where, in the Commission’s opinion, the use of that website represents the best balance of efficiency and security. Otherwise, portable electronic media storage (that is, DVD or USB) may be used for the disclosure of relevant

documents to authorised persons, or the presiding Commissioner may approve the provision of physical copies of the relevant documents.

- 6.7 Where the disclosure of relevant documents to a witness prior to a public inquiry is authorised, the senior case lawyer assigned to the investigation will be responsible for making arrangements for the witness or their legal representative to have access to those documents according to the agreed method of disclosure.
- 6.8 Counsel Assisting may tender as exhibits relevant documents during the course of a public inquiry. Subject to any non-publication direction under s 112 of the ICAC Act, any person (or the legal representative of that person) having leave to appear before the Commission, or any other person who has a significant interest in the issue(s) to which the exhibit relates, is entitled to have access to the exhibit. Such access is subject to any direction made by the presiding Commissioner and will usually be provided by publishing the exhibit on the Commission's public website.
- 6.9 The presiding Commissioner may consider adjourning the evidence of a witness if satisfied it is appropriate to do so to enable the witness to have sufficient time to prepare before giving evidence, or giving further evidence, or to consider evidence placed before the public inquiry in respect of which the witness previously did not have knowledge.

7. Other considerations necessary to ensure procedural fairness

- 7.1 A person required to attend a public inquiry is entitled to be informed, before or at the time of their appearance, of the nature of the allegation or complaint being investigated and the general scope and purpose of the public inquiry.³ The Commission does not fail to provide procedural fairness merely by not providing this information at an earlier point in time than required.
- 7.2 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be set out in each summons served on a witness requiring attendance at the public inquiry.
- 7.3 The nature of the allegations under investigation, and the general scope and purpose of the public inquiry, will be announced by the presiding Commissioner at the commencement of the public inquiry and will be published on the Commission's public website. The opening address of Counsel Assisting will provide further information concerning the allegations under investigation, which may include the identity of each affected person, as known by the Commission at the time of the commencement of the public inquiry.

³ Section 30(3) and s 31(6) of the ICAC Act.

- 7.4 The Commission will seek to ensure that an affected person has a reasonable opportunity to address material, upon which the Commission may rely, which is adverse to his or her interests.
- 7.5 Counsel Assisting should bring to the attention of any affected person, either through the process of examination of the affected person or other witnesses, the tendering of documentary or other evidence in the course of the public inquiry or by way of submissions, potential adverse findings against the affected person that Counsel Assisting contends should be made by the Commission, and the substance of the evidentiary grounds for such findings.
- 7.6 If any further potential adverse findings are identified during the drafting of the investigation report that were not identified in Counsel Assisting's submissions, the Commission will notify the relevant affected person(s) of the potential adverse finding and provide the person(s) with an opportunity to make submissions in relation to the potential adverse finding.