



INDEPENDENT COMMISSION AGAINST CORRUPTION

**REPORT ON WITNESSES  
FOR THE COMMITTEE ON THE  
INDEPENDENT COMMISSION AGAINST CORRUPTION  
(PARLIAMENTARY JOINT COMMITTEE)**

**DECEMBER 1989**

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## 1. Introduction

The Commissioner of the Independent Commission Against Corruption ("the Commission") appeared before the Committee on the Independent Commission Against Corruption on 17 October. One of the matters discussed was witnesses, their rights and the Commission's power over them. It was suggested that this might be made the subject of a report, to which the Commissioner agreed. By letter dated 31 October the Committee conveyed to the Commissioner the resolution passed by it, in these terms:

"That the Commissioner's view be sought, in a report, upon the Commission power over, and protection afforded to, witnesses."

and formally requested such a report.

## 2. Commission Powers Directly Affecting Witnesses

The Independent Commission Against Corruption Act 1988 ("the Act") contains a number of provisions that directly affect witnesses, either because that is their express purpose, or because that is a necessary consequence of their operation. This part briefly describes those provisions, which are set out in the order in which they appear in the Act.

### Public Versus Private Hearings

Section 31 of the Act provides that a hearing of the Commission must be held in public unless the Commission directs that it be held in private. This election may only be made if the Commission is satisfied that it is desirable to do so for reasons connected with the subject-matter of the investigation or the nature of the evidence to be given.

The way that section 31 has been applied by the Commission is considered in greater detail in part 4. Naturally this aspect of the Commission's activities exposes witnesses to publicity which may cause them concern.

### Legal Representation

Section 33(1)(a) provides that the Commission may authorise a person giving evidence at a hearing to be represented by a legal practitioner. Section 33(2) provides that the Commission is required to give a reasonable opportunity for a person giving evidence at a hearing to be legally represented.

### Summons to Attend and Produce Documents

Section 35 provides that the Commissioner (or an Assistant Commissioner by delegation) may summon a person to appear before the Commission at a hearing to give evidence, to produce documents, or both. There is no stipulation as to what information a summons must contain. This means that the Commission could simply require a person to attend at a stipulated time and place, without explanation as to what the matter concerns: the information required to be provided at law is quite limited.

The Commission has taken the view that the requirement contained in section 30(3), to announce at every hearing its general scope and purpose, ought to be observed in spirit, by including similar information in the body of each summons.

Section 35(2) provides that the person presiding at a hearing before the Commission may require a person appearing at the hearing to produce a document or other thing. This is basically an oral summons, and permits documents referred to in evidence to be obtained quickly.

### Arrest of a Witness

Section 36 provides that if a witness fails to attend the Commission, the Commissioner (and only the Commissioner) may, upon proof by statutory declaration of the service of a summons, issue a warrant for the arrest of that witness.

The Commissioner may also issue a warrant for the arrest of a witness if he is satisfied, by evidence on oath, that it is probable that the witness will not attend without compulsion, or is making preparations to leave the State. This power cannot be exercised unless the evidence of the witness is necessary and relevant to an investigation by the Commission.

### Sworn Evidence and the Compulsion to Answer Questions

Section 37 provides that a witness cannot:

- . refuse to be sworn or make an affirmation (section 37(1)(a));
- . refuse to answer any question relevant to an investigation put to the witness by the person presiding at a hearing (section 37(1)(b)), even if the answer may tend to incriminate the witness (section 37(2)); or
- . refuse to produce documents required to be produced by the person presiding or by a summons for production (section 37(1)(c)), even if the document may tend to incriminate the witness (section 37(2)).

The removal of the privilege against self incrimination is balanced by section 37(3), which provides that an answer made or document produced by a witness is not admissible against the witness in any civil, criminal or disciplinary proceedings, except as provided by section 37.

Section 37(4) provides that:

- . answers and documents are admissible in proceedings for an offence or contempt under the ICAC Act;
- . an answer or document is not admissible in civil, criminal or disciplinary proceedings if the witness has given the answer or produced the document under objection; and
- . documents conferring rights or liabilities are admissible in civil proceedings.

To have the protection under section 37, a witness must object before giving each answer or producing each document, unless the person presiding at a hearing makes a declaration under section 38 that all or any class of documents or answers will be regarded as having been given or produced on objection.

The policy reasons for having and exercising a power to compel witnesses to give or produce self incriminatory evidence are discussed in part 4 of this report.

Section 37(5) provides a limited form of legal professional privilege only in relation to legal professional services provided in relation to the appearance or reasonably anticipated appearance of a person at a Commission hearing.

#### Attendance of Prisoners before the Commission

Section 39 provides that the Commissioner (or an Assistant Commissioner by delegation) may, by order in writing, direct the governor of the prison where the prisoner is in custody, to have the prisoner produced at a hearing. This power is similar to that vested in judges and magistrates by section 44 of the Prisons Act 1952.

#### Indemnities

Section 49(1) provides that the Commission may recommend to the Attorney General that a person be granted an indemnity from prosecution. Indemnities are granted pursuant to section 13 of the Criminal Procedure Act 1986.

Section 49(1) does not add anything to the position that would exist without it, except perhaps to make it clear that there is no administrative need for recommendations to be made via the Director of Public Prosecutions.

### Undertakings

Section 49(2) provides that the Commission may recommend to the Attorney General that a person be given an undertaking that an answer, statement or disclosure in a proceeding before the Commission will not be used in evidence against the person. Undertakings are given pursuant to section 14 of the Criminal Procedure Act 1986.

Section 49(3) provides that an undertaking made under section 14 of the Criminal Procedure Act applies in relation to proceedings before the Commission in the same way that it applies to proceedings for an offence. This means that evidence given at a Commission hearing cannot be used against the person in any civil or criminal proceedings (other than proceedings for giving false evidence).

An undertaking is of less value to a witness than the protection of an objection under section 37 (or a direction under section 38). This is because an undertaking is limited to protection from civil or criminal proceedings, whereas evidence given under objection may not be used in civil, criminal or disciplinary proceedings.

### Witness Protection and Expenses

Section 50 provides that the Commission may make such arrangements as are necessary to avoid prejudice to the safety of a witness, or to protect a witness from intimidation or harassment. This is discussed in some detail in part 7 of this report.

Section 51 provides that the Commission must pay witnesses the expenses of their attendance before the Commission. The Commission's approach is that this obligation extends to expenses incidental to an appearance at a hearing, eg. reimbursement for the loss of time due to conferences with Commission staff in preparation for a hearing.

The Commission provides witnesses with information about their entitlements, together with a claim form.

Witnesses may also apply to the Attorney General for legal and financial assistance in respect of their attendance before the Commission: section 52. This is limited to cases of hardship, or where the circumstances of the case are of such a special nature that the application should be granted.

In addition to the statutory provisions, the Premier is understood to have approved the Government meeting the cost of legal representation for certain public officials in their capacity as witnesses or persons who are substantially and directly interested in the subject matter of a Commission hearing.

### Suppression of Publication

Section 112 provides that the Commission may make a direction forbidding publication of evidence, information that might enable a person who has given evidence to be identified, or the fact that any person has given evidence at a hearing. In practice this is generally coupled with the summons to give evidence containing a non-disclosure stipulation pursuant to section 114.

It is an offence to contravene a section 112 direction, or disclose information about a witness summons that contains such a stipulation.

### Parliamentary Privilege

Section 122 provides that nothing in the Act affects Parliamentary privilege.

## **3. Conduct of Interviews**

Not all people interviewed are or become witnesses. However for convenience the term "witness" is used to refer to any person being interviewed.

### Arranging Interviews

Interviews are usually arranged by telephone. Interviews are conducted at Commission premises or elsewhere having regard to the nature of the information the witness has and the convenience of both the witness and Commission officers.

### Recording Interviews

The Commission prefers interviews to be electronically recorded, especially if there is some doubt as to the likely value of the information as evidence. In order to conserve resources, many recorded interviews are not transcribed.

Statements and records of interview are sometimes taken in written form.

### Cautioning Witnesses

If a witness is believed to have committed an offence, the usual practice is for the witness to be cautioned. Under New South Wales law, the absence of a caution does not automatically



render a statement inadmissible. However, the absence of a caution does mean that admission into evidence is subject to the court's discretion.

#### Copies of Statements

The Commission's policy is that witnesses are entitled to a copy of any statement they have made, except where the Commission believes that providing a copy of a statement might in some way adversely affect an investigation.

#### Confidentiality

Wherever possible, the wishes of a person interviewed concerning confidentiality are observed. Obviously this cannot be absolute and certainly cannot override the Commission's statutory obligations.

#### Reluctant Witnesses

Sometimes an individual will have information of high importance and value but a reluctance to convey it, either at all or without protection. Two methods are available to resolve such a situation.

One depends upon convening a hearing at which the witness is encouraged to give evidence under objection - section 38 of the ICAC Act. If the evidence would warn off others it will be taken in a private sitting.

The alternative is to take a statement without caution, and on the basis that it will not be used in evidence against the witness - Crimes Act 1900, section 410. That may be followed by an application to the Attorney General for indemnification.

#### Legal Representatives and Interviews

The practice of the Commission has always been to permit legal representation for witnesses whenever it has been sought for hearings. On occasions, legal representatives have also been present at interviews, or have been consulted and given an opportunity to advise their client before an interview.

### **4. Conduct of Hearings**

#### Published Procedures

The procedures of the Commission for the conduct of public hearing were published as Appendix II to the Commission's first Annual Report.

### Scope and Purpose

As noted above, section 30(3) requires the person presiding at a Commission hearing to announce the general scope and purpose of the hearing.

The Commission has adopted a practice of using a document to record the general scope and purpose of an investigation as the means of formally recording the commencement of an investigation. This approach has a number of advantages. First, it imposes a discipline on the organisation of an investigation, so that all Commission officers know what the investigation is about and have some guide as to what is, and is not, relevant.

Secondly, the "scope and purpose" is incorporated into search warrants, notices to produce a statement of information (section 21), notices to produce documents (section 22) and notices of authorisation to enter public premises (section 23). This helps those affected to know what is happening, and to put the information contained in those documents about their legal rights and obligations in a context.

Thirdly, the scope and purpose document in relation to the investigation forms the basis for the scope and purpose of a hearing. As noted above, the scope and purpose of a hearing is included in all summonses. The only real limit on questions that can be put to witnesses at a hearing is that they must be relevant (section 37(1)(b)). Advance notice of what is relevant and of what the Commission is investigating is designed to prevent the Commission simply bringing witnesses in and asking them questions at large.

### Public Versus Private Hearings

As noted above, section 31(4) provides that a hearing of the Commission must be held in public unless the Commission directs that it be held in private, on statutory grounds. The report of the Commission on the investigation relating to the Park Plaza site, which was tabled in Parliament on 10 October 1989, contained the following statement concerning the choice between public and private hearings (pp. 15-16):

"As a general rule Commission hearings are held in public. It will be helpful to state the more important reasons for that being so.

1. The ICAC Act so provides - section 31(1). That would be a sufficient reason, standing alone. However those that follow would generate the same general rule, even if the Commission had an unfettered discretion.
2. Although not a court of law, the Commission is required to act in a fair and just manner, and to reach important conclusions. These things are

best done in the open, with the fact or possibility of public scrutiny. Any person inclined to act in a bullying or irrational manner would always wish to do so behind closed doors. And nobody will never err in respects such as these.

3. The Commission is required by its Act to regard the protection of the public interest as a paramount concern - section 12. The work it does is for the public, it must be prepared to give an account of itself to the public, and to perform its tasks openly will be conducive to that end.
4. In particular matters it may be quite essential that the public should know a particular matter is under investigation so individuals can come forward with information. Each of the two public hearings conducted to date has proved the truth of that observation.
5. Finally, one of the functions of the Commission is that of public education, and publicity generated by open hearings can be of benefit in convincing the people generally that public sector corruption is a social evil which ought not be tolerated."

Private hearings are sometimes convened to aid an investigation prior to or in parallel with a public hearing. This can enable sensitive evidence to be taken before it becomes public knowledge. A private hearing can also be used to reduce the risk of evidence being destroyed before it is seized or otherwise obtained, or of witnesses being interfered with before they can be offered some form of protection by the Commission.

The Commission does not treat section 31 as automatically requiring public hearings. Of the 16 investigations undertaken or now current, one was completed without a hearing at all, one was completed with a private hearing leading to a public report and publication of the transcript and the exhibits, another while not complete is likely to finish up being dealt with in that way (evidence having been taken in private hearings on two occasions) and six either presently involve or have involved public hearings.

Whenever it is unclear whether hearings should be held in public or in private, or when somebody wishes to make submissions in that regard, a hearing will be convened for that purpose. That has happened on two principal occasions to date, and the outcomes were one private hearing and one public hearing. The former was the Park Plaza matter, and the reasons are contained in the report to Parliament.

The latter was the investigation into present and former police officers (Lauer, Strong, Moeller, Dunn and Shepard). The reasons for deciding that the hearing should proceed in public were published, and they form part of the recent report.

### Legal Representation

The Commission encourages witnesses to be legally represented at hearings. To ensure that this is effective, the Commission has adopted a practice of including references to the right to seek legal advice in summonses.

An important category of likely witnesses are those persons who are considered by the Commission to be substantially and directly interested in the subject matter of a hearing. Where such persons are able to be identified at an early stage, they are advised in writing of the scope and purpose of the hearing, their likely status as persons directly and substantially affected, and their right to apply to appear at the hearing and to seek leave to be legally represented.

In addition to writing to all persons thought to be directly and substantially interested in the subject matter of a hearing, the Commission advertises the intention to hold a public hearing in the major daily newspapers. Hearings are usually structured so that an initial date is set to take applications from those who wish to appear at the hearing, and to set a timetable for the taking of evidence, usually scheduled to commence several weeks later.

### Taking of Evidence

Section 17(1) provides that the Commission is not bound by the rules or procedures of evidence. The Commission uses those court methods for dealing with evidence that are logical and permit an orderly disposition of matters before the Commission. Documentary evidence is still tendered and numbered and oral evidence is still by way of question and answer.

The main difference from an evidentiary point of view is not as many people suppose - that there is an surfeit of hearsay and unsubstantiated rumour - but rather that the answers to some important questions are not admissible against the witness in other proceedings because the answer is given subject to an objection. Some streamlining is possible: for example if there is no room for doubt as to the authenticity of a document it will be admitted without proof of its chain of control, or worrying about whether it is an original or a copy.

The approach of the Commission is to consider a request by any person to call evidence which may assist the Commission in the conduct of the investigation to which the hearing relates.

### Incriminating Evidence

Probably the most controversial Commission power is that which compels the answering of questions or production of documents at a hearing, even if the answer or document may tend to incriminate the witness. The justification for this power is that the over-riding purpose of the Commission is discovering and disclosing what has happened, rather than producing a brief of evidence for prosecution.

The power to compel the giving or producing of incriminatory evidence is qualified in two important respects. First, as noted in part 2 above, a witness can give or produce the evidence under objection and thereby render it inadmissible against him or her.

Secondly, the power may only be used in a hearing in the course of a Commission investigation. The Commission's jurisdiction is limited to matters involving allegations of corrupt conduct. This means that the matter must be serious enough to possibly constitute or involve a criminal offence, a disciplinary offence, or reasonable grounds for terminating the services of a public official.

The alternative to having such a power is to have an organisation less capable of carrying out its functions. It should be noted in this regard that such a power is always vested in Royal Commissions which are chaired or conducted by a judge of the Supreme Court, which it may fairly be said have less ambitious objectives than the Commission is given by its Act. Royal Commissions are usually of a relatively narrow focus, with no responsibility to follow recommendations through to fruition.

The legal position with incriminating evidence in terms of objection and privilege is detailed in part 2 above. In practice, resort is made sparingly to the option of using section 38 to declare that all answers to questions are given under objection. The declaration is not simply granted on request - a basis must usually be found in the particular case.

In some instances, the declaration is made at an early stage if the process of continuous objections will otherwise simply bog down the hearing, if a declaration is not made.

### Procedure

Section 17(2) requires the Commission to exercise its functions with as little formality and technicality as possible, and with an emphasis on written submissions and avoidance of an adversarial approach.

The appearance of Commission hearings is not very different from court hearings. There is a bench and a bar table, and the usual courtesies of interaction between lawyers, witnesses and the person presiding are observed.

From a witness's point of view, the main difference between Commission hearings and ordinary court proceedings is that often the questioning of witnesses by or on behalf of the Commission is in a leading form, akin to cross examination in the courts. This is consistent with a direct approach designed to get to the essence of a matter as quickly as possible.

As well as counsel assisting the Commission, legal representatives of those appearing at a hearing and of a witness are given an opportunity to ask the witness questions, although the Commission is able to curtail questioning when it does not appear to be advancing the purpose of the investigation.

The Commission will encourage the practice of using written submissions whenever possible.

#### Submissions

At the conclusion of evidence, the Commission usually announces the matters which it considers must be determined, and invites submissions from all persons considered to have been substantially and directly interested. This invitation is given in accordance with the principles of natural justice. Also of relevance is the requirement in section 74(5), in relation to persons substantially and directly interested, that the Commission make a statement of its findings as to whether there is evidence warranting consideration of prosecution, disciplinary action or action to dismiss a public official.

#### Publication Suppression Orders

As noted in part 2 of this report, section 112 enables the Commission to direct that evidence, the identity of a witness, or the fact that evidence has been given, be suppressed.

There are a number of areas where a suppression order is likely to be necessary. First, where a private hearing needs to be kept secret to maintain the integrity of an investigation; secondly, to protect a witness; and thirdly, in order to protect a person other than the witness.

#### Transcripts and Exhibits

The evidence at Commission hearings is recorded and transcribed. Transcripts of public hearings are available to anyone who wants a copy at a cost of \$1 per page up to a maximum of \$50 per day. This will need to be increased by 50% as the price presently charged is falling far short of the level necessary to recover costs.

Arrangements are generally made with persons appearing at a hearing, or their legal representatives, for the inspection of exhibits. Where practical, copies may be provided.

## 5. Offences

The following are those offences which have particular application to witnesses. There are also offences in relation to destroying or tampering with evidence, which are of more general application.

These offences are prosecuted in the courts in the ordinary way. The decision to prosecute and the conduct of any prosecution rest with the Director of Public Prosecutions. The Commission will refer a brief of evidence to the DPP if that course is appropriate.

### False Statements and Disruption

Section 80(c) creates offences of wilfully making a false statement to mislead the Commission in the exercise of functions under the Act and disrupting a hearing before the Commission. The penalty is a \$5,000 fine and/or twelve months imprisonment.

### Failure to Attend etc.

Section 86 creates offences for failing, without reasonable excuse, to attend in answer to a summons; to be sworn or make an affirmation; to answer a question put by the person presiding at a hearing; or to produce a document. The penalty is a \$5,000 fine and/or twelve months imprisonment.

### False Evidence

Section 87 creates an offence of knowingly giving false or misleading evidence. The penalty is a \$20,000 fine and/or five years imprisonment.

### Activities Adversely Affecting Witnesses

Section 89(a) creates an offence of procuring false testimony by a witness at a Commission hearing. The penalty is a \$20,000 fine and/or five years imprisonment.

Section 90 creates offences relating to any involvement with an attempt, by any means, to have a witness give false testimony or withhold true testimony. The penalty is a \$20,000 fine and/or five years imprisonment.

Section 91(a) creates offences relating to deceiving a witness with intent to affect testimony. The penalty is a \$20,000 fine and/or five years imprisonment.

### Injury to Witnesses

Section 92(1) creates an offence of preventing a witness who has been summonsed from attending the Commission to give evidence or producing anything in evidence pursuant to a summons. The penalty is a \$20,000 fine and/or five years imprisonment.

Section 93(a) creates an offence of causing injury to a witness by reason of the witness having appeared as a witness or for giving any evidence before the Commission. Injury is defined to include violence, punishment, damage, loss or disadvantage. The penalty is a \$20,000 fine and/or five years imprisonment. This provision is designed to prevent intimidation of witnesses. The Commission will be very ready to see it invoked if necessary.

### Dismissal from Employment

Section 94(1)(a) creates an offence of dismissing or prejudicing an employee by reason of the employee having appeared or having given evidence before the Commission. Once it has been shown that an employee has been dismissed or prejudiced, the onus is on the employer to show that there was some other reason for taking that action. The penalty is a \$20,000 fine and/or five years imprisonment.

## **6. Contempt**

Part 10 of the Act deals with contempt. Contempt involves interference with the conduct of a hearing or a significant derogation from the authority of the Commission. Conduct would generally need to be serious, or persistent and unrepentant, before contempt proceedings would be justified.

Some grounds for contempt proceedings cover the same areas as the offence provisions above, eg. failing to attend in answer to a summons, failing to produce a document in answer to a summons, refusing to be sworn/affirmed.

Other grounds for contempt proceedings include threatening or insulting the Commissioner, an Assistant Commissioner, a legal representative or a witness, misbehaving, interrupting proceedings or publishing in contravention of a suppression order.

Proceedings for contempt are commenced by the Commissioner (or by delegation, an Assistant Commissioner) certifying the contempt to the Supreme Court. The Supreme Court is then required to inquire into the alleged contempt, and if satisfied that a person is guilty of contempt, punish the person as if it were contempt of the Supreme Court.



## 7. Witness Protection

### Options

There are a number of options for the Commission in relation to witness protection, namely the Commission providing its own witness protection or making use of the Federal or State police facilities.

Witness protection can operate at different levels of security and therefore cost. At the lowest end, witnesses can be escorted to the hearing at which they will be giving evidence and provided with contact telephone numbers to call at any time of the day or night should a problem arise. This level of protection is appropriate in circumstances where the level or nature of risk is low and where that level of protection is sufficient to deter those who may have an interest in dissuading a witness from giving evidence.

At the next level, a witness is moved to a different location either permanently or for a given period of time. The witness is able to live a normal life provided he or she stays away from those areas where there is a risk of injury.

The highest level is high security 24 hour guard.

A witness may graduate up or down the scale according to the situation.

### Experience to Date

The Commission has had a number of situations where the safety or well-being of witnesses has been at issue. In one case, that of an indemnified witness, Stephen Roy Lennon, use is being made of the New South Wales witness protection programme. In other cases arrangements have been made to secretly see people wishing to convey information to the Commission.

### Likely Future Needs

It is difficult to predict at this stage what the needs of the Commission will be. The Commission will not be setting up its own specialist witness protection unit unless that is absolutely necessary. The key reasons are duplication and expense. It is likely that the Commission's needs can be met by use of existing State and Federal facilities on a cost recovery or shared basis.

The development of a national witness protection programme, including such matters as the legal creation of new identities, is proceeding slowly. There is a need for this process to accelerate.