

**ICAC Committee public hearing to examine the report of the ICAC
Inspector regarding Operation Hale**

ICAC response

to

ICAC Committee questions in letter dated 15 January 2016

- 1. Is there a document or a manual of practice and procedure governing the manner in which private and public hearings are conducted by the ICAC? If so, please provide a copy to the Committee prior to 4 February 2016.**

The Commission's Operations Manual sets out procedures for the exercise of the Commission's statutory powers. The Operations Manual is updated to reflect changes in legislation, technology and practices. All changes to the Operations Manual must be approved by the Commission's Executive Management Group.

Between 7 September 2009 and 1 July 2015 Operations Manual Procedure 5 (Procedure 5) was operative. Procedure 5 set out procedures for the conduct of public inquiries and compulsory examinations.

From 1 July 2015 Operations Manual Policy and Procedure IP03 (Policy and Procedure IP03) replaced Procedure 5.

A copy of Procedure 5 is at **TAB 1**. A copy of Policy and Procedure IP03 is at **TAB 2**.

- 2. Is there a policy document evidencing the rights and obligations of witnesses and persons of interest which has been adopted by the ICAC? If so, please provide the Committee with a copy prior to 4 February 2016.**

The rights and obligations of witnesses appearing before the Commission are addressed in the *Independent Commission Against Corruption Act 1988* (the ICAC Act). See in particular Division 3 of Part 4 of the ICAC Act which deals with compulsory examinations and public inquiries, section 50 which deals with protection of witnesses, section 51 which provides for reimbursement of witness expenses, section 52 which makes provision for application to be made for legal or financial assistance, Part 9 which sets out various offences and Part 10 which deals with contempt.

Operations Manual Procedure 5 (TAB 1) and Policy and Procedure IP03 (TAB 2) also contain relevant information in relation to persons who are summonsed to attend public inquiries and compulsory examinations.

The Commission has published standard directions for public inquiries. These directions deal with, inter alia, legal representation of those authorized to appear, the calling of witnesses, the examination and cross-examination of witnesses, the procedure for placing before the Commission other evidence a party considers to be relevant, the procedure for an affected person to adduce mitigatory evidence the procedure for dealing with certain documents proposed to be placed before the public inquiry, suppression orders, publication of and access to evidence, submissions, and liaison with the Commission.

A copy of the standard directions for public inquiries is at **TAB 3**.

When a witness is served with a summons requiring the witness to attend and give evidence at a compulsory examination or public inquiry the witness is also provided with an *Information for Witnesses* brochure. This sets out information about the summons, legal representation, the giving of evidence, protections afforded to witnesses and information about reimbursement of expenses. A copy of the standard directions for public inquiries is reproduced in the brochure.

A copy of the *Information for Witnesses* brochure is at **TAB 4**.

- 3. What is the process adopted by the ICAC for the purpose of issuing search warrants? Has this process ever been reduced to writing? If so, please provide a copy no later than 4 February 2016.**

The Commission's procedure for obtaining and executing search warrants is set out in Procedure 9 of the Commission's Operations Manual.

A copy of Procedure 9 is at **TAB 5**.

- 4. Other than those rules which apply to all public servants, is there Code of Conduct which applies to employees engaged by the ICAC? If so, please provide the Committee with a copy prior to 4 February 2016.**

All Commission officers are subject to the Commission's code of conduct. The code of conduct is reviewed annually by the Commission's executive.

A copy of the Commission's code of conduct is at **TAB 6**.

- 5. In making a determination to issue a suppression order, what considerations are taken into account and is there any document evidencing the practice of the ICAC in deciding whether to make a suppression order? If so, please provide to the Committee prior to 4 February 2016.**

Section 112 of the ICAC Act allows for a direction to be given that:

- a) any evidence given before the Commission, or
- b) the contents of any document, or a description of any thing, produced to the Commission or seized under a search warrant issued under the ICAC Act, or
- c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located,
or

d) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry, or

e) any written submissions received by the Commission (including, but not limited to, submissions made by Counsel assisting the Commission),

shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

Section 112 (1A) of the ICAC Act provides that the Commission is not to give a direction under section 112 unless satisfied that the direction is necessary or desirable in the public interest.

Considerations relevant to the public interest require an assessment, in all the circumstances, of the balance between the public interest in information being disclosed and the public interest in information not being disclosed. Relevant considerations will include, but are not limited to:

- the extent to which disclosure might prejudice or compromise an investigation
- whether disclosure might identify a confidential source of information
- whether disclosure might prejudice the safety of a witness or any other person
- the extent to which any disclosure might pose a risk to national security or the security of a community
- whether the information is commercially confidential
- whether the information is personally sensitive
- whether disclosure might involve serious financial or property loss
- risk the fair trial of a person for an offence (see s 18(2) of the ICAC Act).

Section 18 of Procedure 5 of the Operations Manual (TAB 1) and section 4.9 of Policy and Procedure IP03 (TAB 2) deal with section 112 directions. Paragraphs 27, 28, 29, 30 and 33 of the standard directions for public inquiries (TAB 3) also deal with section 112 directions.

6. **Is there a practice adopted by the ICAC for the purpose of dealing with complaints, including complaints about leaking to the media, against the ICAC? Is this procedure in writing? If so, please provide a copy to the Committee prior to 4 February 2016.**

One of the principal functions of the ICAC Inspector is to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of officers of the Commission (section 57B(1)(b) of the ICAC Act). The Inspector has power to investigate the conduct of Commission officers and to investigate and access complaints about Commission officers (section 57C of the ICAC Act).

Section 5 of the memorandum of understanding (MOU) between the Commission and the ICAC Inspector makes specific provision for the Commission to notify the ICAC Inspector of matters that come to the Commission's attention which involve conduct of a Commission officer that comes within the principal functions of the ICAC Inspector. Accordingly, the Inspector is notified of all complaints received by the Commission or any circumstances which come to the Commission's attention involving the possible misconduct of Commission officers. The ICAC Inspector then determines whether he will deal directly with the matter or whether the Commission should deal with the matter. If the ICAC Inspector decides the matter should be dealt with by the Commission, the Commission keeps the ICAC Inspector informed of its actions and the conclusions reached by the Commission as a result of its investigation.

Allegations of misconduct against Commission officers dealt with by the Commission are managed in accordance with Commission Policy 64: Unsatisfactory Performance, Misconduct & Serious Offences (Policy 64).

A copy of the MOU is at **TAB 7**. A copy of Policy 64 is at **TAB 8**.

7. **Please advise the amount expended by the ICAC on legal fees in pursuing the case of ICAC v Cunneen.**

There were three court cases involving Ms Cunneen in 2014 and 2015. They are:

1. Supreme Court proceedings in *Cunneen and Ors v ICAC* [2014] NSWSC 1571 (the Supreme Court proceedings)
2. Court of Appeal proceedings in *Cunneen v ICAC* [2014] NSWCA 421 (the Court of Appeal proceedings)
3. High Court proceedings in *ICAC v Cunneen* [2015] HCA 14 (the High Court proceedings)

It is not clear whether the question is limited to the High Court proceedings (the only case in which the Commission was the applicant) or whether it is meant to encompass the entirety of the litigation. For the sake of completeness the Commission will answer with respect to all three cases.

The Commission's legal fees (being the fees charged by the Crown Solicitor's Office which acted for the Commission, counsels fees and court fees) in each of these proceedings were met by the Treasury Managed Fund (TMF).

The TMF has advised that the following legal fees incurred by the Commission have been paid:

1. The Supreme Court Proceedings - \$32,498.60 incl GST
2. The Court of Appeal proceedings - \$37,657.50 incl GST
3. The High Court proceedings – \$113,144.73 incl GST.

The **Supreme Court proceedings** were commenced against the Commission on 4 November 2014 by Ms Cunneen, Stephen Wyllie and Ms Tilley filing a summons seeking a declaration that the Commission was exceeding its jurisdiction in conducting the Operation Hale investigation. The plaintiffs also sought a declaration that the Commission's decision to hold a public inquiry into the allegations was invalid and a nullity and an order restraining the Commission from conducting a public inquiry. It was appropriate that the Commission defended these proceedings.

The case was heard before Hoeben CJ at CL on 5, 6 and 7 November 2014. On 10 November 2014 his Honour dismissed the plaintiffs' summons.

The **Court of Appeal proceedings** were commenced by the plaintiffs seeking leave to appeal the decision of the Supreme Court. The Commission did not oppose leave to appeal. It was appropriate that the Commission defended these proceedings.

The case was heard before Bathurst CJ, Basten and Ward JJA on 18 November 2014 and judgement delivered on 5 December 2014.

On the jurisdictional issue, Basten and Ward JJA allowed the appeal on the basis that the Commission's power under s 8(2) of the ICAC Act to investigate conduct that "could adversely affect ... the exercise of official functions by any public official" should be construed as being limited to conduct that "has the capacity to compromise the integrity of public administration" such that the conduct has the potential to "lead a public official into dishonest, partial or otherwise corrupt conduct" (Basten JA) or conduct which has "the potential to cause... 'corruption' in the exercise by the public official of his or her functions" or which "could have [an] adverse outcome when viewed from a public corruption perspective" (Ward JA).

In dissent, Bathurst CJ held that the appropriate approach to s 8(2) was to "focus on the words of the section." Applying that approach, his Honour held that the allegation in Operation Hale fell within s 8(2) of the ICAC Act with the result that it was within the power of the Commission to investigate, and conduct a public inquiry into, the allegation.

The majority decision in the Court of Appeal proceedings had far ranging implications for the Commission extending well beyond Operation Hale. The decision affected the Commission's jurisdiction in general. It affected past investigations and the Commission's ability to conduct future investigations where the conduct under investigation could adversely affect the exercise of official functions but not involve any wrongdoing on the part of a public official. A number of past corrupt conduct findings were directly affected by the majority decision.

The majority decision also affected then current investigations being undertaken by the Commission, including (but not limited to) operations Credo and Spicer. At this stage judicial opinion had been divided – two judges (Basten and Ward JJA) had favoured a narrow interpretation of s 8(2) while two judges (Bathurst CJ and Hoeben CJ at CL) had favoured a wider interpretation. Given the effect of the Court of Appeal decision on the Commission's jurisdiction it would be necessary for the NSW Government to consider whether there should be a legislative response to that decision and if so the nature of that response. It was however appropriate that any judicial review proceedings be exhausted before taking steps to seek any legislative response.

In all of these circumstances it was necessary and appropriate that the Commission seek leave to appeal to the High Court so that there could be a final judicial determination of the Commission's jurisdiction under s 8(2) of the ICAC Act.

The High Court proceedings were heard by the High Court (French CJ, Hayne, Kiefel, Nettle, and Gageler JJ) on 4 March 2015 and judgement delivered on 15 April 2015. By majority judgment the Commission's appeal was dismissed.

OPERATIONS MANUAL

PROCEDURE NO. 5

**PROCEDURES FOR CONDUCT OF PUBLIC INQUIRIES AND
COMPULSORY EXAMINATIONS**

APPROVED: 7 SEPTEMBER 2009

UPDATED: 2 DECEMBER 2010

PROCEDURES FOR CONDUCT OF PUBLIC INQUIRIES AND COMPULSORY EXAMINATIONS

01 GENERAL

The Commission may conduct a Public Inquiry or a Compulsory Examination for the purposes of its investigations if it is satisfied it is in the public interest to do so. A Compulsory Examination must be conducted in private. A Public Inquiry is conducted in public but the Commission may determine to hold part of the inquiry in private if it considers it to be in the public interest to do so.

The primary purpose of a Public Inquiry or Compulsory Examination is to assist the investigation process by ascertaining factual evidence of what actually occurred.

They also have a wider purpose in examining how corrupt conduct occurred with a view to identifying any systems weaknesses which may lead to recommendations for change. Such material can play an important part in the Commission's corruption prevention work.

02 PROCEEDING TO COMPULSORY EXAMINATION OR PUBLIC INQUIRY

Generally, the decision whether an investigation should proceed to Compulsory Examination or Public Inquiry will be made by the Commissioner.

Where an Assistant Commissioner has been appointed to conduct a particular investigation he or she may decide to conduct a Compulsory Examination.

An Assistant Commissioner may determine to conduct a Public Inquiry only with the concurrence of the Commissioner unless the Commissioner might have a conflict of interest in relation to the matter (s.31(3)).

Recommendations to conduct a Compulsory Examination or Public Inquiry can be made through the SIG or by minute to the Commissioner or Deputy Commissioner from the Case Lawyer submitted through the Executive Director, Legal and after consultation with the relevant investigation team members.

Once approval is given to conduct a Compulsory Examination or a Public Inquiry, the Case Officer should ensure the matter is staged as an Investigation (unless, in the case of a compulsory examination, the SIG has determined the matter remain categorised as a preliminary investigation).

03 CRITERIA

In determining whether to take evidence in public or private the Commission is obliged to observe the rules of natural justice (see *ICAC v Chaffey (1993) 30 NSWLR 21*). However, the discretion is exercisable by the Commission and the Supreme Court is not authorised to substitute its decision for that of the Commission (see *ICAC v Chaffey*).

It is the practice for commissions of inquiry (such as the Commission) to take evidence in public unless special circumstances exist (see *Toohy v Lewer* 1979 1 NSWLR 673, 682).

Criteria for determining to conduct a Compulsory Examination in preference to a Public Inquiry or whether any part of a Public Inquiry should be conducted in private may include:

- Maintaining the integrity of the investigation (it may be prejudicial to the investigation to publicly divulge the fact the Commission is conducting an investigation, to identify the witnesses or make known the extent of evidence obtained);
- Protection of reputation from anticipated but untested or unverified evidence;
- Whether information is being sought at a preliminary stage to define the issues for investigation and determining whether further investigative effort is required;
- The need to protect the identity of a witness or an informant;
- The requirements of s.18(2) of the Act which requires that where there are proceedings for an indictable offence conducted by or on behalf of the Crown, in order to ensure that the accused's right to a fair trial is not prejudiced, the Commission must, to the extent it thinks necessary, ensure that, as far as practicable, the investigation is conducted in private during the currency of the proceedings;
- Any application made by, or on behalf of, those appearing before the Commission that it is in the public interest for the evidence to be taken in private; and
- Whether the hearing involves closing submissions. Section 31(2) of the Act provides that the Commission may decide to hear closing submissions in private.

In determining whether to conduct a Public Inquiry, s.31 of the ICAC Act requires the Commission to consider the following:

- The benefit of exposing to the public, and making it aware, of corrupt conduct (s.31(2)(a)),
- The seriousness of the allegation or complaint being investigated (s.31(2)(b)),
- Any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry) (s.31(2)(c)),
- Whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned (s.31(2)(d)).

Criteria for determining to hold a Public Inquiry may include:

- The allegations involve serious or systemic corrupt conduct;

- It is desirable to widely expose any corrupt conduct or systems failures;
- The allegations are already in the public domain and a Public Inquiry would provide a transparent mechanism for public officials and others to be publicly accountable for their actions;
- Public exposure of issues are likely to provide those subject to false accusations or innuendo an opportunity to clear their names;
- Public exposure will educate the public about serious corruption or systemic issues;
- Public exposure will be an important deterrent to similar corrupt conduct by others. If people know their conduct may be subject to public exposure they may be less likely to engage in corrupt activity;
- Public exposure is likely to encourage others to come forward with information relevant to the investigation;
- Public exposure of failed or inadequate systems is necessary to encourage public agencies to actively engage in reform and/or to establish public understanding of why change is necessary; and
- The desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

04 HEARING PLAN

The Case Lawyer will prepare a Hearing Plan (in the approved format) prior to arranging for a compulsory examination and prior to all public inquiries.

The Hearing Plan should identify the instances of alleged corrupt conduct and details of how each witness is relevant to that conduct. It should also identify any contentious issues.

In preparing the Hearing Plan the Case Lawyer is to consult with the Case Investigator and, if applicable, relevant Chief Investigator and any CP officer assigned to the investigation to ensure that all relevant investigation and CP issues are covered in the Hearing Plan. Where Counsel Assisting has been engaged he/she should also be consulted.

The Hearing Plan is to be submitted to the presiding Commissioner through the Executive Director, Legal for approval.

Once approved, a copy of the Hearing Plan is to be provided to the Associate and the original is to be filed with Property.

05 RISK MANAGEMENT

The risk management processes identified in the Commission's Hearing Security Risk Assessment & Planning Guidelines ("the Guidelines") are to be complied with at all times.

A Hearing Security Report is to be prepared for each Compulsory Examination and Public Inquiry where any risk is identified by the Case Lawyer and updated on a daily basis.

06 BRIEF OF EVIDENCE FOR PRESIDING COMMISSIONER

It is the responsibility of the Case Lawyer to provide the presiding Commissioner with a brief of evidence, including observations. Where documents are to be tendered, the brief should include a paginated binder, with tabs if appropriate, containing all relevant documents. Briefs should be provided to the presiding Commissioner prior to the pre-hearing meeting.

07 PRE-HEARING MEETING

The purpose of the pre-hearing meeting is to discuss the conduct of the hearing.

The Case Lawyer is to arrange a pre-hearing meeting with the presiding Commissioner for any Compulsory Examination. The pre-hearing meeting should be conducted one week prior to the Compulsory Examination.

Where a public inquiry is to be held, the Case Lawyer is to arrange a pre-hearing meeting with the presiding Commissioner, the Case Officer, relevant Chief Investigator, CP Principal Officer, Investigations, CP officer, the Executive Directors, ID, Legal and CP and Counsel Assisting. The pre-hearing meeting should be conducted at least two weeks prior to the public inquiry. Where possible, it should be conducted earlier so that the list of witnesses to be called, and the order in which they are to be called, can be settled prior to the issuing of summonses and the relevant evidentiary and corruption prevention issues to be dealt with in the Public Inquiry can be finalised.

08 DOCUMENTS

Where a number of documents are likely to be tendered, they should be placed in a binder in relevant sequence, behind tabs if appropriate, and all pages should be paginated. The binder of documents can be tendered as one item thereby avoiding separate tenders of documents. Sufficient copies should be available for the witness and lawyers appearing at the hearing. Any particular documents, the early disclosure of which might prejudice the investigation, should not be included in the binder.

If only one or two documents are likely to be tendered in a Compulsory Examination, then it is not necessary to compile a binder of documents.

09 INTERNAL NOTIFICATION

It is the responsibility of the Case Lawyer to advise the Associate assigned to the matter of the dates set aside for the taking of evidence so that a notice to relevant staff can be prepared and circulated and transcription personnel notified.

10 SCOPE & PURPOSE/NATURE OF ALLEGATION OR COMPLAINT

A person required to attend a Public Inquiry or Compulsory Examination is entitled to be informed, before or at the commencement of the Public Inquiry or Compulsory

Examination, about the nature of the allegations or complaint being investigated (ss.31(6) & 31(3) of the Act).

In addition, a person appearing at a Public Inquiry is also entitled to be informed of the general scope and purpose of the inquiry either before or at the commencement of the Public Inquiry.

The Case Lawyer is responsible, in consultation with the Team Chief Investigator, for preparing a draft of the nature of the allegations or complaint being investigated and any general scope and purpose of the inquiry. These should be included in the Hearing Plan.

The Case Lawyer should, in consultation with the Team Chief Investigator, consider whether this information should be provided to the witness prior to his/her attendance at the Commission (i.e. in the summons) or whether there are sound operational reasons for withholding such information until the person's appearance. Advice on this matter is to be provided by the Case Lawyer to the presiding Commissioner through the Executive Director, Legal.

As a general rule, the scope and purpose of a Public Inquiry will be expressed as:

The general scope and purpose of this Public Inquiry is to gather evidence relevant to the allegation(s) being investigated for the purposes of determining the matters referred to in section 13(2) of the ICAC Act.

11 SUMMONSING WITNESSES

The Case Lawyer should confer with Counsel Assisting and the presiding Commissioner as to the appropriate order of witnesses.

In the case of a Public Inquiry, witnesses should be notified of the date of the public inquiry at least three weeks prior to the commencement of the Public Inquiry.

12 EARLY PROVISION OF DOCUMENTS

In the case of a Public Inquiry, consideration should be given to whether any documents, including witness statements, should be provided to witnesses prior to the commencement of the Public Inquiry. The purpose of doing this is to save time at the Public Inquiry.

The Case Lawyer should consult with the Case Officer, relevant Chief Investigator, CP officer, and Counsel Assisting to identify what, if any documents can be provided. These documents should be identified in the Hearing Plan submitted to the presiding Commissioner for approval.

13 PREPARATION OF OPENING ADDRESS

Counsel Assisting will be required to prepare an opening address for the commencement of any Public Inquiry.

The opening address should be typed and provided to the Case Lawyer for distribution to the Executive Director, Legal and Commissioner (and any Assistant Commissioner who will preside at the Public Inquiry) at least two working days prior to the commencement of the Public Inquiry. Copies should also be provided to the Executive Director, ID and, if any corruption prevention issues are to be dealt with in the Public Inquiry, to the Executive Director, CP for confirmation of accuracy of any CP issues.

14 GENERAL PROCEDURE

The following standard procedures are to be followed in the conduct of a Public Inquiry or Compulsory Examination:

14.1 Commencement

- a) In the case of a Public Inquiry, the presiding Commissioner should announce that fact followed by the allegations being investigated and the scope and purpose of the Public Inquiry,
- b) If evidence is to be taken by way of Compulsory Examination, then the presiding Commissioner should announce that fact, the allegations being investigated, and, if necessary, make a direction as to who may be present,
- c) In the case of a Compulsory Examination, a s.112 order should be made,
- d) If this is the first day of a Public Inquiry, Counsel Assisting should give his/her opening address,
- e) Appearances are then called (the Commission has a discretion whether to authorise any appearance or appearance by a legal representative of any person who is substantially and directly interested in any subject matter of a hearing),
- f) The witness is then sworn or affirmed,
- g) If not previously advised, the witness should be told the nature of the allegations or complaint being investigated,
- h) If legally represented, the legal representative should be asked if he/she has explained to the witness his/her rights and obligations under the ICAC Act and in particular ss.37 & 38 of the Act,
- i) If the witness is not legally represented, or the legal representative has not fully explained these rights and obligations, then the Presiding Commissioner should make the explanation to the witness,
- j) It is generally the practice where a witness asks for a s.38 declaration that one is given. Any such declaration should be read onto the transcript.
- k) Counsel Assisting then commences questioning the witness. If appropriate examination of the witness by other persons/legal representatives and any lawyer representing the witness may be allowed by the presiding Commissioner.

14.2 Taking Evidence

Section 17 of the ICAC Act provides that the Commission is not bound by the rules or practice of evidence and may inform itself on any matter in such manner as the Commission considers appropriate. However, procedural fairness requires that a decision to make an adverse finding must be based on material that tends logically to show the existence of facts consistent with the finding: *Mahon v Air New Zealand Ltd (1984) AC 808*. Hearsay and other legally inadmissible material will generally only be received to the extent that it appears to the presiding Commissioner that it may further the investigation for the purposes of which the hearing is being held.

In the case of witnesses who have provided statements or records of interview to the Commission, such statements or records of interview may, at the discretion of the presiding Commissioner, be tendered in lieu of examination-in-chief. The Commission may also accept a signed statement from persons not called as witnesses, or other informal proof, in relation to matters it considers not to be contentious.

The Commission will not permit a Public Inquiry to become a vehicle for the purveying of gossip, rumour or speculation. Questions must not be asked of, or propositions put to, a witness without justification on the basis of, or instructions given to, the person asking the question.

The Commission will not necessarily hear all evidence about a person before it takes evidence from that person, although a person the subject of adverse evidence must be given the opportunity to respond to that evidence.

14.3 Exhibits

Generally, documents shown to a witness or referred to in evidence should be tendered as an exhibit.

Great care needs to be taken when dealing with exhibits. In some cases highly personal documents such as diaries, videos, personal letters, material disclosing personal details and financial statements may be made exhibits. In each case a considered judgment must be made as to whether a suppression order should be made.

Financial documents obtained from the **Australian Taxation Office** pursuant to a request under s.3E of the *Taxation Administration Act 1953* should not be made public exhibits. If it is necessary to refer to information obtained from the Australian Taxation Office that should be done in private and there should be a non-publication order made in respect of that material. It should also be noted that such information cannot be used in a prosecution except for a tax-related offence.

There is also a restriction upon publishing a person's Tax File Number, no matter how obtained. If a person's taxation documents are being tendered as an exhibit the Case Lawyer must ensure that the Tax File Number is deleted.

There are similar restrictions on publishing some information obtained from the **Australian Securities and Investments Commission (ASIC)**.

Caution needs to be exercised when dealing with the product of **telecommunications interception**. The Case Lawyer should ensure any such material is admissible under the provisions of the *Telecommunications (Interception and Access) Act 1979*.

The *Telecommunications (Interception and Access)(New South Wales) Act* requires records to be kept of each time that a "restricted record" is given in evidence. The Case Lawyer should maintain a record of any such use for provision to the Product Management Officer, Surveillance and Technical Unit.

Caution also needs to be exercised when dealing with the product of a **surveillance device**. The Case Lawyer should ensure any use of such material complies with the *Surveillance Devices Act 2007*.

When a recorded conversation is played the conversation is not transcribed for inclusion in the hearing transcript. The transcript of the conversation may be tendered as an exhibit.

Any request for public access to exhibits should be referred to the Case Lawyer.

14.4 Procedural fairness

The Commission is obliged to observe the requirements of procedural fairness, following from the possibility that a hearing may result in an adverse report and consequent harm to the reputation of persons: *Glynn v ICAC (1999) 20 ALD 214*. Reputation is an interest attracting the protection of the rules of natural justice: *Ainsworth v Criminal Justice Commission (1991) 106 ALR 11*.

Although there is no provision for an appeal in the Act, the Commission, as a statutory tribunal, is subject to the supervision of the *Supreme Court: Greiner & Moore v ICAC (1992) 28 NSWLR 125*.

A person against whom allegations have been made or against whom an adverse finding may be made is entitled to the opportunity to respond to those allegations or that potential adverse finding before the relevant decision making power is exercised: *Ainsworth v Criminal Justice Commission (1992) 175 CLR 564* and *Mahon v Air New Zealand Ltd*. What is required on the part of the Commission in order to afford procedural fairness in this context depends on the particular circumstances of the case; for instance, where a serious allegation is made in public the Commission will endeavour to afford the person against whom the allegation is made an early opportunity to respond.

The Commission must ensure that all affected persons are, in the proper course, fully informed of the details of the evidence received upon which an adverse finding might be made and be given the right to test that evidence.

It is a matter for the Commission to determine when it will receive into evidence any material or information (see *Morgan & Wanless v ICAC (unreported Supreme Court of NSW, 31 October 1995)*).

14.5 The onus of proof

Commission functions do not extend to the making of determinations of legal rights and duties. As a hearing is for the purposes of an investigation no question of onus of proof arises.

15 **MEDIA**

Any media enquiries are to be directed to the Manager, Communications & Media.

The Manager, Communications & Media is responsible for liaising with the Case Lawyer to ensure the accuracy of any information provided to the media concerning events in a Public Inquiry. The Manager, Communications & Media should check with the Case Lawyer before providing copies of any Public Inquiry exhibit to the media to ensure that there is no restriction on provision of the exhibit.

16 **POST HEARING DAY BRIEFINGS**

At the conclusion of each day's evidence it is useful for an informal briefing to be conducted involving the presiding Commissioner, Counsel Assisting, the Case Lawyer, the Case Officer and Case CP officer. This should be organised by the Case Lawyer.

The purpose of the briefing is to identify any issues arising out of the day's evidence that need to be addressed, identify how they will be addressed, and to confirm or establish strategies and arrangements for subsequent days.

17 **CLOSING SUBMISSIONS**

Counsel Assisting is required to make closing submissions on evidence given in a Public Inquiry. Depending on whether it is intended to publish a report on evidence given in Compulsory Examination, submissions may also be required in relation to such evidence.

It is a matter for the presiding Commissioner as to whether submissions are made orally, in writing or both, as appropriate to the circumstances of the investigation. Submissions may be taken in private.

It is the responsibility of the Case Lawyer to ensure that copies of written submissions are provided to all affected persons and, in the case of oral submissions, all affected persons are advised of the time and date of such submissions.

When supplying persons with a copy of written submissions, the Case Lawyer should advise whether or not a non-publication order has been made in respect of the submissions.

18 **SUPPRESSION ORDERS**

18.1 Making Directions

Section 112 of the Act provides for the making of non-publication directions. Such directions can only be made if the Commissioner making the direction is satisfied that the direction is necessary or desirable in the public interest.

The issues relevant to the public interest in such circumstances include the safety of informants, law enforcement methods, natural justice considerations, commercial secrets, sensitive personal information, possible defamation and preserving the

operational integrity of an investigation. These must be balanced against the public interest in ensuring public access to and scrutiny of the Commission's role and methods.

18.2 Recording Directions

If a section 112 direction is made during a hearing the Associate will record it in the Associate's book and later on the suppression order database. The direction will also appear in the transcript of the day. The Associate will advise the Transcript Clerk (in Records Unit) on the same day that an order has been made in case copies of affected transcript are required. More details about the role of the Associate are in the Associate's manual.

If exhibits are suppressed during a hearing the Associate will mark the cover sheet of the exhibit.

If a direction is made during a Public Inquiry the Manager, Communications & Media will advise all media representatives present of the terms of any direction to ensure that they do not inadvertently breach the direction.

The Case Lawyer should, as far as is practical, advise anyone who was present in the hearing room when the relevant evidence was given but who left before a suppression order was made, that the order was made.

18.3 Reviewing Directions

At the end of each hearing day the Associate should provide the Case Lawyer with a printout of the relevant suppression order database.

It is the responsibility of the Case Lawyer to check the accuracy and currency of the Suppression Order Database at the conclusion of each hearing day and to arrange for any suppressed evidence to be deleted from the public version of the transcript.

At the conclusion of the investigation, the Case Lawyer should review all outstanding suppression orders and wherever possible have them lifted or their duration prescribed by the Commissioner. In reviewing the transcript for directions that need to be varied or lifted the Case Lawyer should check whether any exhibits are affected. If so the exhibit should be mentioned specifically in any variation.

18.4 Varying Directions

A direction to vary a suppression order is simply a further direction under s 112 and may be made in order to change the terms of the original order or to lift it entirely.

Variations may be made either during or after hearings and should be regarded in the same way as any other s 112 direction. In addition however the Case Lawyer should consider whether submissions should be sought from those affected by the suppression order before it is varied, particularly if it is proposed to lift the order.

Variations to orders made under s 112 after hearings have finished will be formal documents printed on letterhead and signed by the Commissioner. A draft direction

and covering minute setting out the reason for the variation is to be prepared by the Case Lawyer and submitted to the Commissioner through the Executive Director, Legal.

If directions are varied the Case Lawyer must arrange for the publicly available transcript to reflect the further orders.

There is a direction in force under section 51 of the *State Records Act 1998* in relation to transcripts subject to section 112 directions. This provides that such records remain closed to public access for 75 years after creation of the record unless the record is made public earlier.

19 **TRANSCRIPT**

Subject to any suppression orders, Public Inquiry transcript is published on the Commission's website: www.icac.nsw.gov.au.

Witnesses and their legal representatives will usually access transcript from the website. If requested, a witness is entitled to one free hard copy of his or her evidence. Persons adversely named may, upon request, receive one free hard copy of all relevant transcript. This is subject to any contrary restraints indicated by the investigation.

Hard copy Public Inquiry transcript is available to members of the public, including the media, upon payment of \$1.10 per page.

Compulsory Examination transcripts are not publicly available. It will be a matter for the presiding Commissioner to determine if and when a witness or his/her lawyer should be provided with a copy of the transcript of his/her evidence.

20 **POST PUBLIC INQUIRY MEETING**

At the conclusion of evidence in the Public Inquiry, a meeting is held involving the presiding Commissioner, Counsel Assisting, the Case Lawyer, the Case Officer and Case CP officer. This should be organised by the Case Lawyer, and should generally occur on the last day of the Public Inquiry.

The purpose of the meeting is to discuss the issues to be dealt with in Counsel Assisting's submissions, identify the criminal offences for which briefs of evidence should be completed, and discuss the preparation of the draft public report.

Compulsory Examinations and Public Inquiries

1. Purpose

The purpose of this policy and procedure is to outline the requirements for the planning and conduct of compulsory examinations and public inquiries pursuant to the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), including summoning witnesses, engaging and briefing counsel assisting and assistant commissioners, issuing arrest warrants and dealing with contempt of the Commission.

This policy and procedure deals with the following matters:

1. Purpose.....	1
2. Application	3
3. Policy	3
4. Procedure	3
4.1 General considerations	3
4.1.1 Who may decide to conduct a compulsory examination or public inquiry	3
4.1.2 Who may conduct a compulsory examination or public inquiry	4
4.1.3 Criteria for exercising the power to summons a witness.....	4
4.1.4 Criteria for determining whether to conduct an examination in private or public	5
4.1.5 The requirement for procedural fairness.....	6
4.1.6 Appropriate notice to be given to a person summonsed	7
4.2 Procedure for the issue of a s 35 summons (and a s 39 order).....	7
4.2.1 General procedure	7
4.2.2 Summoning members of parliament.....	9
4.2.3 Summoning inmates held in New South Wales (a s39 order)	9
4.2.4 Administrative requirements following the issue of s 35 summons or s 39 order	9
4.3 Serving a s 35 summons (or a s 39 order)	10
4.3.1 Service generally.....	10
4.3.2 Service on an inmate of a correctional centre	11
4.3.3 Obtaining leave to serve a summons interstate	12
4.4 Variations and Extensions of time for attendance or production of documents	14
4.5 Procedure for the issue of a s 36 arrest warrant	15

4.5.1	General procedure	15
4.5.2	What a s 36 arrest warrant authorises.....	17
4.5.3	Obtaining an order to execute a s 36 arrest warrant interstate	17
4.5.4	Executing a s 36 arrest warrant.....	18
4.6	Engagement of Assistant Commissioners and counsel assisting	19
4.6.1	Assistant commissioners	19
4.6.2	Counsel assisting	21
4.6.3	Payment of fees.....	21
4.7	Hearing preparation	22
4.7.1	The hearing brief	22
4.7.2	Initial briefing, pre-hearing and other planning meetings	22
4.7.3	Witness liaison.....	23
4.7.4	Use of the Commission’s restricted website:.....	24
4.7.5	Hearing security and risk management plans	24
4.7.6	Hearing transcripts and record management for Commission Hearings.....	24
4.7.7	The opening address for a public inquiry	24
4.7.8	Pre-inquiry media and public notices.....	25
4.7.9	Internal notification of public inquiry or compulsory examination	26
4.7.10	Testing of electronic equipment	26
4.8	The general conduct of a public inquiry or compulsory examination.....	26
4.8.1	Public inquiry standard directions.....	26
4.8.2	General procedure	27
4.8.3	Provision of documents.....	27
4.8.4	Exhibits	28
4.8.5	Claims of privilege	29
4.8.6	Communication and investigation management.....	29
4.8.7	Media and public access to public inquiry evidence	29
4.8.8	Closing submissions.....	30
4.9	Section 112 directions (suppression orders).....	31
4.9.1	Making or varying a s112 direction during a hearing.....	32
4.9.2	Making or varying a s 112 direction after a hearing has concluded	32
4.10	Procedures for dealing with contempt	33
4.10.1	General considerations	33

4.10.2	Conduct constituting both contempt and an offence.....	33
4.10.3	General procedure	34
5.	Definitions	40
6.	Forms.....	40
7.	Related policies and procedures	41
8.	Administration.....	41

2. Application

This policy and procedure applies to all Commission staff members.

3. Policy

The Commission policy and standards for the use of its coercive hearing powers, the planning and conduct of compulsory examinations and public inquiries is set out in Part 3, s 3.6 and Part 4, s 4.1.4 of the General Investigation Standards and Procedure.

4. Procedure

4.1 General considerations

The Commission may conduct a compulsory examination or public inquiry for the purpose of an investigation if it is satisfied that it is in the public interest to do so.¹ For that purpose, s 35 of the ICAC Act provides that a person may be summonsed (“a s 35 summons”) to appear before the Commission at the time and place named in the summons to give evidence and/or produce such documents or other things referred to in the summons.²

The decision to conduct a compulsory examination is an ordinary decision³ made in the course of the investigation process. The decision to conduct a public inquiry is a key decision for the purpose of s 3.5.3 of the General Investigations Standards and Procedures.

The Commission’s public inquiry schedule and priorities are generally managed through the deliberations of the Strategic Investigation Group in accordance with policy and procedure *IM01 Investigation Management*.

4.1.1 Who may decide to conduct a compulsory examination or public inquiry

The decision whether to conduct a compulsory examination or public inquiry is made by the Commissioner. The Deputy Commissioner may also decide whether to conduct a compulsory

¹ S 30(1) & s 31(1) ICAC Act

² S 35(1) ICAC Act

³ As distinct from a *key decision* referred to in s 3.5.3 of the General Investigations Standards and Procedures.

examination⁴ or where an Assistant Commissioner has been appointed to conduct a particular investigation, he or she may decide to conduct a compulsory examination.⁵

The Deputy Commissioner⁶ may decide whether to conduct a public inquiry but only with the concurrence of the Commissioner. However, the Commissioner's concurrence is not required if the Commissioner would or might have a conflict of interest.⁷

4.1.2 Who may conduct a compulsory examination or public inquiry

The Commissioner may conduct a compulsory examination or public inquiry or may decide that an assistant commissioner should conduct a compulsory examination or public inquiry.⁸

It is Commission policy that for any particular investigation, the same presiding Commissioner should, as far as possible, conduct all compulsory examinations and any public inquiry for that investigation. Where scheduling difficulties arise, the presiding Commissioner for an investigation should be consulted if it is proposed that a hearing be re-scheduled before another presiding Commissioner.

4.1.3 Criteria for exercising the power to summons a witness

The primary purpose of a compulsory examination or public inquiry is to assist the investigation process by obtaining evidence about the facts of the matter. There is also a broader purpose of investigating and identifying any system weaknesses which may lead to recommendations for change.

There are two essential conditions for the exercise of the Commission's power to summon a witness and take evidence from them or require they produce a document or thing:

- The power must be exercised *for the purpose of a Commission investigation*⁹ conducted under the ICAC Act.¹⁰ The power may not be exercised for the purpose of another function of the Commission or, for example, in respect of an investigation that has concluded (unless the Commission decides to re-open an investigation). An investigation is concluded once the Commission discontinues the investigation or the Commission has furnished a report on the investigation to an appropriate authority.¹¹
- *It must be in the public interest* to conduct the examination or public inquiry.

In considering whether to summons a witness, the matters to be taken into account include:

- whether there are alternative, less intrusive or onerous methods (as the case may be) of obtaining the information and evidence

⁴ As a delegate of the Commissioner under s107(5) – see Delegations Manual Policy 73, Appendix C, Part B

⁵ Generally, Assistant Commissioners appointed to conduct specific investigations are given such a delegation upon their appointment.

⁶ As an Assistant Commissioner appointed under the ICAC Act

⁷ S 31(3) ICAC Act

⁸ S 30(2) and 31(4) ICAC Act

⁹ Including a preliminary investigation (s 20A ICAC Act).

¹⁰ See S 3 and ss 13(1) and (2) ICAC Act

¹¹ For example, under Part 8 or s14 of the ICAC Act

- the effect on the work and lives of persons and entities who must comply with the Commission's requirement
- to enable a person to obtain protection against civil or criminal proceedings arising from his or her evidence or a thing he or she may produce under the summons
- to overcome an objection, privilege or legal impediment a person might otherwise be under or might claim with respect to the evidence, document or thing to be provided
- whether the exercise of the power is a justifiable use of public resources having regard to the seriousness of the matter or issues for determination and the likelihood that the exercise of the power would assist that determination.

4.1.4 Criteria for determining whether to conduct an examination in private or public

General considerations:

A compulsory examination must be conducted in private.¹² In determining whether to conduct a private examination of a witness, relevant considerations include:

- the need to protect the reputation of a person from untested or unverified evidence
- the need to test or prove the evidence of the witness
- the timing of the examination having regard to the stage of the investigation and the extent to which the evidence likely to be obtained by the examination will require further investigation
- whether a public examination may prejudice the investigation, for example by alerting the public to the Commission's interest in the relevant subject matter, identifying a witness or making known the extent of the evidence obtained by the Commission
- the need to protect the identity of a witness to ensure their health or safety
- the requirements of s 18(2) of the ICAC Act which provide that where proceedings for an indictable offence are conducted by or on behalf of the Crown, the Commission must to the extent to which it is necessary to do so, ensure the accused's right to a fair trial is not prejudiced by ensuring as far as is practicable, the investigation is conducted in private during the currency of the proceedings.¹³

Public inquiries:

A public inquiry is held in public but the Commission may determine to hold part of the inquiry in private if it considers that to do so is in the public interest.¹⁴ Also, if the Commission conducts a public inquiry, it may decide to hear closing submissions in private.¹⁵ However, under the Commission's standard directions for public inquiries, submissions must be in writing and are not published.

¹² S 30(5) ICAC Act

¹³ See exceptions in s 18(2) and also see further *Lee v The Queen* (2014) 308 ALR 252; *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *X7 v R* [2014] NSWCA 273

¹⁴ S 31 (8) - (9) ICAC Act

¹⁵ S 31(10) ICAC Act

In determining whether or not it is in the public interest to conduct a public inquiry, the Commission must consider the following:¹⁶

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct
- (b) the seriousness of the allegation or complaint being investigated
- (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry)
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Considerations relevant to be above criteria include:

- whether public exposure would be likely to:
 - educate the public about serious corruption or systemic failures and issues
 - encourage others to come forward with information relevant to the investigation
 - encourage public agencies to engage in reform and/or establish public understanding of why change is necessary
- the seriousness and nature of the conduct alleged, for example:
 - whether the conduct involves a criminal offence/s
 - the seniority or standing of the public official/s involved
 - the level of sophistication, organisation and planning
 - the number of persons involved and whether the alleged conduct is systemic
- whether the allegations are already in the public domain and the public inquiry would:
 - provide a transparent mechanism for public officials and others to be publically accountable for their actions
 - enable persons the subject of the allegations, including false accusations or innuendo, an opportunity to provide an account
- the desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

4.1.5 The requirement for procedural fairness

A person required to attend a public inquiry or compulsory examination is entitled to be informed, before or at the time of their appearance or the commencement of their examination, of the nature of the allegation or complaint being investigated, and in the case of a public inquiry, the general scope and purpose of the public inquiry.¹⁷ The Commission does not fail to provide procedural fairness merely by not providing this information at an earlier point in time than it is required.¹⁸

The Commission is required to afford procedural fairness in determining:

- an objection to the requirement to appear or produce documents, or
- whether the examination of a witness should take place in private or public.

¹⁶ S 31(2) ICAC Act

¹⁷ S 30(3) and s31(6) ICAC Act

¹⁸ See *A v ICAC* [2014] NSWCA 414

The appropriate time for a person to object to the appearance or requirement to produce documents is after the Commission has complied with the requirement to inform the person of the nature of the allegation or complaint being investigated. A decision by the Commission to overrule any objection may only be challenged on judicial review grounds.¹⁹ Similarly, the decision to conduct an examination in private or public is a discretion exercisable by the Commission and if challenged, the Supreme Court is not able to substitute its own decision.²⁰

If, prior to the issue of a summons, an affected party has made a submission or has indicated an intention to make a submission about the requirement to produce any document, whether an examination should take place at all or if so, in public or private, then the details of that submission or proposed submission must be included in the application to issue the summons.

In practice, an affected party will not have an opportunity to be heard on the matter before a summons has been issued. If the decision to hold a hearing in public or private is challenged by an affected party, the Commission will hear and determine the matter at a convenient time before or at the commencement of the examination of the relevant witness or the time specified for the requirement to produce a document or thing.

4.1.6 Appropriate notice to be given to a person summonsed

Where it is proposed to require a person to appear before the Commission, whether for the purpose of a compulsory examination or a public inquiry, it is Commission policy that the person be given reasonable notice of the requirement to appear in order to arrange or re-arrange their personal affairs and if necessary, seek legal advice or arrange legal representation.

What is "reasonable notice" will depend on the individual circumstances of the person whose appearance is required, the nature of requirement, operational exigencies and the balance of convenience.

Unless there are special circumstances, persons required to attend the Commission for a compulsory examination should be served with a s 35 summons a minimum of five (5) working days prior to the date of their required attendance. Persons required to attend the Commission for a public inquiry should be served with a s 35 summons a minimum of ten (10) working days prior to the date of their required attendance.

4.2 Procedure for the issue of a s 35 summons (and a s 39 order)

4.2.1 General procedure

It is a fundamental requirement that the reason for the exercise of the power to issue a s 35 summons and the actual exercise of the power is legally sound and able to withstand scrutiny. For these purposes, both the basis for issuing the summons and the summons itself must be in writing.

¹⁹ See *A v ICAC* [2014] NSWCA 414

²⁰ See *ICAC v Chaffey* (1993) 30 NSWLR 21

The decision to seek the issue of a s 35 summons is an ordinary decision²¹ made in the course of the investigation process and recorded in the Commission's case management system (MOCCA). MOCCA should also be used to manage tasking and responsibilities for giving effect to the decision, including who will prepare the hearing plan and summons and if appropriate and necessary, who will contact the witness or their legal representative to discuss a convenient time and date for the examination to take place. The case lawyer will contact the Commissioner's executive officer or in that person's absence, the Commissioner's hearing associate to ascertain an appropriate date for the hearing. Pending later advice confirming that the summons has been issued, the executive officer or hearing associate, as the case may be, will enter a tentative appointment for the hearing in the hearing calendar.

The case lawyer seeking the issue of a s 35 summons is to prepare a hearing plan and draft summons in the approved form. The hearing plan must address:

- date, time and nature of the proposed hearing and who will be involved
- witness details and legal representative if the latter is known
- the nature of the allegations or complaint under investigation
- whether the allegations will appear on the summons and if not, when the witness will be advised of the allegations
- in the case of a public inquiry the general scope and purpose of the inquiry²²
- a short statement of the facts under investigation
- how the proposed examination will assist the investigation
- details of any document or thing required to be produced and the reasons for its production and whether or not the documents may be produced by post
- why it is in the public interest to conduct the hearing or produce a document or thing
- the justification for conducting the hearing in private or public, as the case may be, including details of any known submission or proposed submission by an affected party about whether a hearing should take place in public or private
- estimated cost of the hearing (e.g. transcription, interpreter and counsel assisting fees).

Where more than one s 35 summons is sought only one hearing plan is required, provided the hearing plan refers to each of the summonses sought and in respect of each, the criteria above are addressed.

The hearing plan and proposed summons are to be submitted by the case lawyer to the issuing Commissioner through the Executive Director Legal.

Procedure in urgent circumstances

A s 35 summons may be submitted by a case lawyer for consideration by the issuing Commissioner without a hearing plan but only in circumstances of exceptional urgency. Whether the circumstances of urgency justify a departure from the general procedure is a matter for the issuing Commissioner.

²¹ As distinct from a *key decision* referred to in s 3.5.3 of the General Investigations Standards and Procedures.

²² S 30(3) and s 31(6) of the ICAC Act provides respectively, that a person required to attend a compulsory examination or public inquiry, is entitled to be informed, before or at the commencement of their examination, of the nature of the allegation or complaint being investigated. Also for a public inquiry, the person is entitled to be informed of the general scope and purpose of the public inquiry before or at the time the person is required to appear.

Where the issue of a s 35 summons is sought without any accompanying hearing plan, the case lawyer is to inform the issuing Commissioner of all relevant information the hearing plan would otherwise have addressed. Where the summons is issued, the case lawyer must submit the hearing plan to the issuing Commissioner within one working day.

4.2.2 Summonsing members of parliament

Generally, members of parliament are compellable to attend a compulsory examination or public inquiry. However the Commission would be in contempt of Parliament if it sought to compel the attendance of a member of parliament on a day on which Parliament was sitting or if a summons is served in the precincts of Parliament.²³

4.2.3 Summonsing inmates held in New South Wales (a s39 order)²⁴

If a s 35 summons requires the attendance of an inmate of a NSW correctional centre, an order of the Commissioner is required to be served on the person in charge of the correctional centre where the witness is held, requiring that person to have the inmate produced at the time and place specified in the order.²⁵

The case lawyer seeking the issue of a s 35 summons for an inmate is to also prepare a draft s39 order. The draft s39 order must accompany the s 35 hearing plan and draft summons when it is presented for the consideration of the issuing Commissioner.

4.2.4 Administrative requirements following the issue of s 35 summons or s 39 order

Where a s 35 summons or s 39 order has been issued the case lawyer is to:

- provide a copy of the hearing plan to the hearing associate
- immediately thereafter lodge the application, hearing plan and summons and/or order with Property Services for registration in accordance with s 4.3.3 of policy and procedure IP12- *Property Management*.
- via email, advise the Commissioner's executive officer or in the absence of that person, the hearing associate, of the date and time of the hearing, the name of the witness and whether the examination is to be held in private or public.

Upon receipt of information about the proposed hearing, the executive officer or hearing associate as the case may be, will enter the above mentioned details of the hearing into the relevant hearing room calendar as an appointment, and include in the appointment schedule:

- chief investigator
- case lawyer
- hearing associate
- Commissioner, Deputy Commissioner (and Assistant Commissioner, if applicable)
- Executive Directors Investigation, Legal and Corruption Prevention

²³ <http://www.parliament.nsw.gov.au/>

²⁴ For the service of a summons on a prisoner held in another state or territory, see requirements under s 4.3.3 below.

²⁵ The order is sufficient lawful authority for the person in charge of the correctional centre to produce or have the inmate produced – see s 39(2) ICAC Act.

- Senior Client Support Officer and Systems & Network Support Officer
- Manager Communications and Media (in the case of a public inquiry).

The Executive Director Legal is responsible for arranging and booking transcription services for a hearing and will advise the hearing associate of the relevant arrangements. Once engaged, the hearing associate is responsible for any subsequent liaison with transcription staff in connection with the conduct of the hearing.²⁶

If required, the Executive Director Legal is responsible for approving the engagement of an interpreter. Once approved, the hearing associate is responsible for arranging and booking the interpreter and for any subsequent liaison with the interpreter in connection with the conduct of the hearing.²⁷ An interpreter required for a compulsory examination must undergo security vetting in accordance with the Commission's corporate policies and procedures on the engagement of contractors. It is not necessary for an interpreter required for a public inquiry to undergo security vetting.

4.3 Serving a s 35 summons (or a s 39 order)

4.3.1 Service generally

The case officer is responsible for the service or arranging for the service of the s 35 summons or s 39 order. By virtue of s 108 of the ICAC Act service of a summons or order may be effected:

- (a) *on a natural person:*
 - (i) *by delivering it to the person personally, or*
 - (ii) *by leaving it at, or by sending it by pre-paid post to, the residential or business address of the person last known to the person serving the document, or*
- (b) *on a body corporate – by leaving it at, or by sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate,*

It is Commission policy that it is preferable to personally serve a natural person to whom the summons or order is addressed. Exceptions to this policy include:

- service on a person's legal representative, but only if the representative has confirmed that he or she has instructions from their client to accept service
- service via email, but only if:
 - service via email is appropriate having regard to whether the summons is confidential and the number and identity of persons who may have access to the email account proposed to be used by the addressee, and
 - the person has confirmed via email that they are willing to accept service via that method and service is to be effected via reply to the email consent.

If personal service is not possible, the case lawyer is to approve the method of service and make a case note of that approval in the Commission's case management system under the "Activities" tab for the relevant matter.

²⁶ See further, work instruction *IP03-B Hearing Associate Duties and Responsibilities*.

²⁷ See further, work instruction *IP03-B Hearing Associate Duties and Responsibilities*.

Where under these procedures, a third party (for example, a police officer) is used by the Commission to effect personal service of a summons:

- the third party must be approved by the relevant chief investigator
- the third party must be able to effect service within an appropriate time frame
- the third party must be explicitly made aware of any secrecy requirements pertaining to the issue and content of the summons and its service
- a case note(s) must be made in the Commission's case management system under the "Activities" section for the relevant matter of the approval to use the third party, the reasons and any communications with the third party concerning the matter.

The following documents²⁸ must be provided with the original s 35 summons:

- the Commission's *Information for Witnesses* brochure,²⁹ and
- the Legal Representation Office pamphlet
- for a public inquiry, a letter in the approved form, either:
 - a public inquiry summons cover letter for an affected person
 - a public inquiry summons cover letter for a witness.

If leave has been given to serve the summons interstate,³⁰ the following documents must also be served with the original s 35 summons:

- the original sealed order granting leave to serve the summons (and if applicable the s 79 order³¹)
- if appropriate, a cheque or voucher to cover the expenses determined to be reasonably incurred by the person served with the summons in complying with the summons,³² and
- an explanatory covering letter in the approved form, addressed to the person to be served with the summons.

Upon service of the summons, the Commission officer responsible for service is to ensure that the following documents are endorsed as to the particulars of service and lodged for registration with Property Services in accordance with Operations Manual policy and procedure, *IP12 Property Management*:

- a copy of the original s 35 summons
- if applicable, a copy of the sealed order granting leave to serve the summons interstate (and if applicable, the s 79 order).

4.3.2 Service on an inmate of a correctional centre

Consideration should be given to when and how an inmate is to be served with a s 35 summons. It may be appropriate to serve the inmate with the summons after his or her arrival to give evidence. It also may be appropriate that after personal service, the summons is returned to

²⁸ These documents may be printed from the Commission's intranet.

²⁹ <http://www.icac.nsw.gov.au/investigations/information-for-people-involved-in-investigations>

³⁰ See s 4.3.3 below as to the procedure for obtaining leave to serve a summons interstate. Also note, by virtue of s 58(2) of the SEPA, service of the summons interstate is to be effected in the same way as service of the summons in the place of issue.

³¹ Required for service interstate in respect of a prisoner. See further s 4.3.3.

³² See further below under s 4.3.3 as to the requirements to pay reasonable expenses

the Commission and held on the inmate's behalf rather than the inmate taking the summons back to the correctional centre.³³

If an inmate is to be served prior to his or her attendance at the Commission then:

- where the correctional centre is within 100 klms of the Commission, a Commission officer should serve the summons
- where the correctional centre is further than 100 klms of the Commission, an appropriate third party³⁴ may be used to serve the summons.

4.3.3 Obtaining leave to serve a summons interstate

A s 35 summons may only be served interstate with the leave of the Supreme Court pursuant to s 76(1) of the *Service and Execution of Process Act 1992 (Cth)* ("the SEPA").

The Supreme Court may grant leave for interstate service only if satisfied that:

- (a) the evidence likely to be given by the person to whom the summons is addressed, or a document or thing specified in the summons, is relevant to the performance by the Commission of the investigation function concerned; and
- (b) if the evidence, document or thing may constitute or contain evidence that relates to matters of state,³⁵ then it is in the public interest that the evidence be given or the document be produced.³⁶

If the summons is addressed to an inmate, s 79 of the SEPA provides that the Supreme Court may also issue and order that the inmate be produced at the time and place required by the summons ("a s 79 order"). The s 79 order must be addressed to the custodian, for the time being, of the prisoner.

In granting the leave to serve the summons or issuing a s 79 order, the Court may impose a condition that the summons not be served after a specified day or make the summons or order subject to any other condition the court deems appropriate.³⁷

The application for leave:

The procedure for making an application to the Supreme Court for leave to serve a summons under s 76 SEPA is set out under Part 71A of the Supreme Court Rules 1970.

An application for leave under s 76(1) SEPA is to be commenced by way of summons in the Common Law Division of the Court. Proceedings are heard ex parte by the Common Law Duty Judge.

³³ If a summons is held at the Commission on a prisoner's behalf it is to be delivered to Property Services where it will be filed on the relevant formal powers file with the documents relating to the issue and service of that summons.

³⁴ See requirements for the use of a third party to serve a summons in s 4.3.1 of this work instruction.

³⁵ See s 3 SEPA for the definition of "matters of state" – it essentially refers to matters that would be subject to public interest immunity. See further requirements where the order or leave to serve involves a summons to obtain evidence constituting or containing evidence relating to "matters of state".

³⁶ see s 76(2) SEPA

³⁷ S 76(3) SEPA and s 79(3) SEPA

If a summons is required to be served interstate, the case lawyer is to prepare, in the approved form:

- a draft summons to commence an application under s 76(1) SEPA
- an affidavit in support of the application, addressing the criteria in s 76(2) SEPA
- a draft order under s 76(3) SEPA
- if applicable, a draft s 79 order

Where more than one summons is required to be served interstate, a separate order must be obtained for each summons, however several orders may be sought in the one application (i.e. initiating summons) and the one affidavit in support, as long as the affidavit refers to each of the orders sought and in respect of each, the criteria in s 76(2) SEPA is addressed.

The Executive Director Legal must approve the documentation and if satisfied, will sign the summons. The case lawyer is responsible for arranging an appointment with, and appearing before the Duty Judge. Appointments may be arranged by contacting the Duty Judge's Associate.³⁸

Prior to attending Court, the case lawyer must make a copy of the original summons and affidavit in support. The case lawyer will need to attend the chambers of the Duty Judge with:

- the original summons and affidavit
- two copies of the draft of each order sought

Procedure where the leave is granted:

Where an order under s 76(3) SEPA (and if applicable, a s 79 order) has been issued, the case lawyer is to take the original of the summons, supporting affidavit, the order and a copy of the order and file them in the Supreme Court Registry, Sydney.³⁹

The Supreme Court Registry will:

- retain the original summons and affidavit in support on the court file, and
- retain one copy of the order on the Court file and return the remaining sealed copy of the order ("the sealed copy") to the case lawyer.

The case lawyer is to make a copy of the sealed copy of the order and lodge it for registration, with the copies of the original summons and affidavit in support, with Property Services in accordance with Operations Manual policy and procedure, *IP12 Property Management*.

Procedure where the leave is not granted:

Where the application for an order under s 76(3) has been unsuccessful, the case lawyer is to report that fact to the Executive Director Legal and the reasons given by the judge.

³⁸ The Duty Judge roster can be found by checking the NSW Supreme Court list at http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2_courtlists.html

³⁹ Note: No fees are specified in the *Civil Procedure Regulation 2005* for an initiating process which relates to the issue of a summons to be served outside the State under the SEPA.

The case lawyer is to make a note in the Commission's case management system under the relevant "Authority Source" entry for the summons, noting that leave was not granted for the service of the summons interstate.

Requirement to pay reasonable expenses – s 60 SEPA

The service of an interstate summons is only effective if, at the time of service or a reasonable time before compliance with the summons is required, expenses sufficient to meet the reasonable expenses of complying with the summons are paid or tendered to the person to whom the summons is addressed.

Reasonable expenses will need to be determined on a case by case basis however the Commission's *Information for Witnesses* brochure sets out the type of expenses a witness may claim. If practicable and not prejudicial to the investigation, the person or entity to be served with the summons should be contacted by the summons applicant prior to service, at which time, expenses should be discussed.

In the case of a summons not requiring personal attendance, meeting the person's reasonable expenses will usually involve forwarding an amount to cover postage costs (certified mail). The Executive Director Legal must decide the amount the Commission will pay the person or entity served for any claim for "collation" or "finding" expenses. The amount payable will be determined by the quantity of documents required to be produced and the level of skill of the person involved in the collation or finding if the involvement of such a person is reasonably required.

4.4 Variations and Extensions of time for attendance or production of documents

The case lawyer is the primary contact for a person under summons or their legal representative who:

- is seeking a change of date or extension of time for their attendance or production of documents
- is seeking clarification of the requirements under the summons, or
- has any other question about, or difficulty concerning compliance with the summons.

Accordingly, all inquiries to the Commission concerning such matters should be referred to the case lawyer for attention.

Subject to the procedure set out below⁴⁰ for changes in the order and appearances of witnesses at a public inquiry, only the issuer of a summons or the Commissioner may approve a variation to the requirements under the summons.

Where a variation has been approved or, for any other reason,⁴¹ a hearing date has been cancelled, or re-scheduled, the case lawyer must ensure, as soon as reasonably practicable that:

- a note of the following is entered under the "notes" tab against the relevant authority source entry for the summons in MOCCA:

⁴⁰ See ss 4.7 and 4.8.

⁴¹ Including for example, the person is no longer required or has failed to appear.

- a record of the variation, or cancellation or re-scheduling of the appearance date
- (if applicable) who approved the variation or other change and the reason for it
- whether, and if so how, the summons recipient has been notified of the variation or change
- if relevant, details of any variation or other change are notified or confirmed in writing⁴² to the person under summons or their legal representative
- the Executive Director Legal, the investigation case officer, CP case officer and counsel assisting (if any) are advised of the variation or other change
- where an appearance date has been vacated for any reason and/or a different appearance date has been set, information about the change of date is provided to the Executive Director Legal, the executive officer and hearing associate, so that they may amend the hearing appointment in the electronic hearing room calendar, send out an update to persons scheduled under the appointment and cancel or rearrange transcription services.

4.5 Procedure for the issue of a s 36 arrest warrant

If a person served with a summons to attend a hearing fails to attend the Commissioner may, upon proof by statutory declaration of the service of the summons, issue a warrant for the arrest of the person (a "s 36 arrest warrant").⁴³

Also, if the Commissioner is satisfied by sworn evidence⁴⁴ that it is probable that a person whose evidence is desired, necessary and relevant to an investigation under the ICAC Act, will not attend the Commission to give evidence unless compelled to do so or, is about to, or is making preparations to leave the State and the person's evidence will not be obtained by the Commission if the person departs, the Commissioner may issue a s 36 arrest warrant for the arrest of the person.⁴⁵

The power to issue a s 36 arrest warrant is not delegable so the warrant can only be issued by the Commissioner.⁴⁶ Also, a s 36 warrant may be issued before or after the issue of a s 35 summons, or if the summons has been issued, before the time for the appearance of the person has passed.⁴⁷

4.5.1 General procedure

If a person fails to appear at a hearing, and the Commissioner is presiding, the Commissioner may, in the context of the hearing, take sworn oral evidence from one or more Commission officers, as to the proof of service of the summons and any other information of relevance to consideration of the issue of the s 36 warrant. The evidence and decision to issue the s 36 warrant will be recorded as part of the official transcript of the hearing.

⁴² "in writing" means by way of letter or email.

⁴³ S 36(1) ICAC Act

⁴⁴ The Commissioner is authorised to administer the oath or affirmation for the purpose of the requirement that the application to issue the warrant be sworn - S 36(3) ICAC Act

⁴⁵ S 36(2) ICAC Act

⁴⁶ S 107 ICAC Act

⁴⁷ S 36(4) & (5) ICAC Act

In any other case, a commission officer who seeks the issue of a s36 arrest warrant ("the applicant") is to prepare, in consultation with the case lawyer (if not the applicant), an affidavit in the approved form in support of the issue of the warrant. The affidavit is to address the following:

- the full name and position of the applicant
- the nature of the allegations or complaint under investigation
- in the case of a public inquiry, the general scope and purpose of the hearing
- whether a s 35 summons has been issued, and if so, particulars of the issue
- if issued, whether the s 35 summons has been served and if so, particulars of the service or alternatively the reason for service not being effected
- if the person has failed to appear at the hearing, details relevant to that failure
- if the time for the appearance has not yet passed:
 - why the person's appearance is desired, necessary and relevant to the investigation, and
 - the grounds for believing it is probable that the person will not attend the Commission unless compelled to do so, or
 - the information suggesting the person is about to leave the state and why their evidence will not be obtained by the Commission if that occurs.

The Executive Director Legal is to review the draft affidavit before it is sworn.

Where the Commissioner has decided to issue or, is to be requested to issue a s 36 arrest warrant, the case lawyer, under the supervision of the Executive Director Legal, is to prepare a draft warrant in the approved form.

A s 36 arrest warrant may be executed by any member of the NSW Police Force or by any person to whom it is addressed. It is Commission policy that a s 36 arrest warrant be addressed only to "Officers, members and special members" of the Australian Federal Police and the NSW Police Force and any other relevant state or territory police force.

If the sworn evidence supporting the issue of the warrant was obtained and recorded by the Commissioner during a hearing, the draft warrant may be referred to the Commissioner for consideration via the Executive Director Legal. Otherwise, the case lawyer is to make an appointment with the Commissioner for the purpose of considering the draft warrant and supporting affidavit. The case officer, chief investigator and Executive Director Legal should be advised of the appointment so that they may consider whether or not to attend.

The case lawyer is to make a copy of the warrant and lodge it for registration, with the hearing transcript or affidavit in support (as the case may be), with Property Services in accordance with Operations Manual policy and procedure, *IP12 Property Management*. The original warrant is to be provided to the relevant chief investigator.

4.5.2 What a s 36 arrest warrant authorises

A s 36 warrant for the arrest of a person in NSW authorises the arrest of the witness and him or her being promptly brought before the Commission and detained in a prison or elsewhere for that purpose until released by order of the Commissioner.⁴⁸

A person⁴⁹ named in a s 36 arrest warrant who is not present in NSW (“an interstate person”), may only be apprehended under the warrant if:

- the warrant was issued because of non-compliance with a summons for which leave was given under s 76 SEPA to serve the summons interstate, or
- the Supreme Court of NSW has made an order authorising the apprehension of the person named in the warrant.⁵⁰

If the Supreme Court makes an order, when executed interstate, the arrest warrant requires the person to be taken before a magistrate in the State of apprehension and an order made, subject to any specified conditions, that:

- the person either be remanded on bail on condition that the person appear at such time and place in NSW as the Magistrate specifies, or
- the person be taken into custody or otherwise as the magistrate specifies, to a specified place in NSW.⁵¹

The warrant does not need to be produced at the time the person is apprehended, but it must be produced at the time of appearance before the Magistrate.⁵²

4.5.3 Obtaining an order to execute a s 36 arrest warrant interstate

The Supreme Court may only make an order apprehending an interstate person if it is satisfied that:

- (a) the evidence likely to be given by the person, or a document or thing specified in the warrant, is relevant to the performance by the tribunal of the investigative function, and
- (b) if the evidence, document or thing may constitute or contain evidence that relates to matters of state⁵³—it is in the public interest that the evidence be given or the document or thing be produced.⁵⁴

In granting the order, the court may impose specified conditions.⁵⁵

⁴⁸ S 36(6) ICAC Act

⁴⁹ Note, a warrant cannot be executed on an interstate person who is in prison – s 82(2) SEPA.

⁵⁰ S 92(1) SEPA

⁵¹ S 83(8) SEPA

⁵² As to this and other conditions and procedures for the appearance of the person interstate, see s 83 SEPA

⁵³ See s 3 SEPA for the definition of “matters of state” – it essentially refers to matters that would be subject to public interest immunity. See further requirements where the order or leave to serve involves a warrant to obtain evidence constituting or containing evidence relating to “matters of state”.

⁵⁴ S 93(3) SEPA

⁵⁵ S 93(4) SEPA

The procedure for making an application to the Supreme Court for an order under s 93(1) SEPA to execute a s 36 arrest warrant interstate is set out under Part 71A of the Supreme Court Rules 1970.

An application for an order under s 93(1) SEPA is to be commenced by way of summons in the Common Law Division of the Court and proceedings are heard ex parte by the Common Law Duty Judge.

If a warrant is required to be executed interstate, the case lawyer is to prepare, in the approved form:

- a draft summons to commence an application under s 93(1) SEPA
- an affidavit in support of the application, addressing the criteria in s 93(1) SEPA
- a draft order under s 93(1)SEPA

The Executive Director Legal must approve the documentation and if satisfied, will sign the summons. The case lawyer is responsible for arranging an appointment with, and appearing before the Duty Judge.

Prior to attending Court, the case lawyer must make a copy of the original summons and affidavit in support.

Where an order under s 93(3) SEPA has been issued, the case lawyer is to take the original of the summons, supporting affidavit, the order and a copy of the order and file them in the Supreme Court Registry, Sydney.⁵⁶

The Supreme Court Registry will:

- retain the original summons and affidavit in support on the court file, and
- seal copies of the order, retain one copy of the order on the Court file and return the remaining copy of the order ("the sealed copy") to the case lawyer.

The case lawyer is to make a copy of the sealed copy of the order and lodge it for registration, with the copies of the original summons and affidavit in support, with Property Services in accordance with Operations Manual policy and procedure, *IP12 Property Management*. The original order is to be provided to the chief investigator.

Where the application for an order under s 76(3) has been unsuccessful, the case lawyer is to report that fact to the Executive Director Legal and the reasons given by the judge.

The case lawyer is to make a note in the Commission's case management system under the relevant "Authority Source" entry for the summons, noting that leave was not granted for the service of the summons interstate.

4.5.4 Executing a s 36 arrest warrant

The relevant chief investigator is responsible for attending to arrangements for the execution of a s 36 arrest warrant. For that purpose, the chief investigator is to arrange for the execution of

⁵⁶ Note: No fees are specified in the *Civil Procedure Regulation 2005* for an initiating process which relates to the issue of a warrant to be served outside the State under the SEPA.

the warrant by contacting the senior law enforcement officer in charge of the law enforcement station nearest the last known location of the subject person. For example, the police station nearest the person's residence, or the Australian Federal Police at a particular airport, if it is believed the person may be imminently transiting through that location.

If the location of the subject person is unknown and cannot be ascertained after reasonable inquiries, the chief investigator is to make arrangements for:

- the warrant to be registered or recorded on relevant law enforcement systems, and
- a PACE⁵⁷ Alert for the relevant person to be registered on the Australian Customs and Border Protection Services PACE system.

Where a s 36 arrest warrant has been executed, the relevant chief investigator must ensure, as soon as reasonably practicable that:

- a record of the details of execution and if applicable, appearance(s) of the person before any court in connection with the execution of the warrant, is entered in the appropriate fields and under the "notes" tab against the relevant authority source entry for the warrant in MOCCA
- the case lawyer, CP case officer and counsel assisting (if any), the presiding Commissioner and the Commissioner (if different) are advised of the execution of the warrant
- information about the person's next appearance date before the Commission and any subsequently scheduled date, is provided to the executive officer and hearing associate, so that they may amend the hearing appointment in the electronic hearing room calendar, send out an update to persons scheduled under the appointment and cancel or rearrange transcription services.

4.6 Engagement of Assistant Commissioners and counsel assisting

4.6.1 Assistant commissioners

Appointment:

Where the Commissioner concurs, an Assistant Commissioner may be appointed by the Governor to assist the Commissioner as the Commissioner requires.⁵⁸

If the Commissioner considers that it is necessary to appoint an Assistant Commissioner for the purpose of an investigation, the Commissioner will, in consultation with the Executive Director Legal, identify eligible persons to be approached.

The Executive Director Legal will then contact the agreed persons to ascertain their availability, ability to take on the role of Assistant Commissioner in respect of the particular investigation, and preparedness to accept the remuneration determined by the Governor for the position of Assistant Commissioner.⁵⁹ The Executive Director Legal should also request a copy of the person's brief curriculum vitae (CV).

⁵⁷ Passenger Analysis, Clearance Evaluation

⁵⁸ s 6 ICAC Act

⁵⁹ The daily rate is usually that paid to acting judges of the NSW Supreme Court (half day rates are paid if the Assistant Commissioner has worked a half day or less).

If the person has agreed to act as an Assistant Commissioner, the Executive Director Legal will prepare a letter to the Premier for the Commissioner's signature, seeking and concurring with the appointment of that person as an Assistant Commissioner including:

- a brief outline of the matter for which the person will be responsible as Assistant Commissioner
- the period for which the appointment is sought
- details of the relevant experience and background of the person (a copy of the CV should be included).

The Executive Director Legal is to send the original signed letter to the NSW Premier and a copy of the letter to the General Counsel, Department of Premier and Cabinet.

Once the appointment has been made, the Commission will be sent a copy of the relevant Executive Council minute recording the appointment. The Executive Director Legal, will then:

- notify the Assistant Commissioner of his/her appointment
- notify the security and risk management officer of the appointment so that appropriate arrangements may be made for the Assistant Commissioner to be provided access to the Commission's premises
- furnish a copy of the instrument of appointment to the finance manager
- provide the finance manager with an estimate of the costs likely to be incurred by the engagement of the Assistant Commissioner for each financial year in which the Assistant Commissioner is engaged.

Once appointed the Executive Director Legal will provide the Assistant Commissioner with:

- a copy of the Assistant Commissioner's Manual which sets out the general powers and responsibilities of the office, and
- a copy of the instrument of delegation of powers signed by the Commissioner (see further below).

Delegation:

An Assistant Commissioner may be delegated any functions of the Commission or the Commissioner,⁶⁰ except those functions mentioned in s 107(4) of the ICAC Act, namely:

- the power of delegation conferred by s 107 of the ICAC Act
- the function of making a report under the Act
- the power of the Commissioner to issue a warrant for the arrest of a person under s 36 or s 100 of the Act
- the power of the Commissioner to issue search warrants under s 40 of the Act
- the power of the Commissioner to certify a matter referred to in s 111(4)(c)

However any of the above functions may be delegated to an Assistant Commissioner if the Commissioner is of the opinion that there would or might be a conflict of interest or that it would be in the interests of justice to do so.⁶¹

⁶⁰ S 107 ICAC Act.

⁶¹ S 107(6) ICAC Act

Where an Assistant Commissioner has been appointed, the Executive Director Legal will liaise with the Commissioner as to the functions that should be delegated to the Assistant Commissioner. The Executive Director Legal will then prepare a written instrument of delegation for signing by the Commissioner and once signed, the original notice of delegation will be returned to the Executive Director Legal for filing. The Executive Director Legal will provide a copy to the Assistant Commissioner.

4.6.2 Counsel assisting

As a general rule the case lawyer for a compulsory examination will be counsel assisting for any compulsory examination unless the Commissioner determines that it is more appropriate to engage external counsel.

If the Commissioner considers that it is necessary to appoint counsel assisting from the private bar for the purpose of an investigation, the Commissioner will, in consultation with the Executive Director Legal and if applicable, the relevant Assistant Commissioner, identify suitable persons to be approached and determine the professional fees to be offered.

The Executive Director Legal will then contact the agreed persons to ascertain their availability, ability to undertake the role of counsel assisting in respect of the particular investigation, and preparedness to accept the professional fees offered by the Commission.

Once the engagement of counsel assisting has been confirmed, the Executive Director Legal will write to counsel assisting:

- providing a brief outline of the matter for which counsel has been engaged
- providing the likely number and dates of hearings
- confirming the daily, half daily and hourly rate for professional fees
- the name of the Commission lawyer who will have carriage of the matter, and
- the name of the presiding Commissioner.

The Executive Director Legal, will then:

- notify the security and risk management officer of the engagement so that appropriate arrangements may be made for counsel assisting to be provided access to the Commission's premises
- furnish a copy of the letter of engagement to the finance manager and human resources systems and payroll administrator.

4.6.3 Payment of fees

Any necessary travel and associated expenses for an Assistant Commissioner or counsel assisting will be arranged by the hearing associate in accordance with the procedures set out in *IP03-B Hearing Associate Duties and Responsibilities*, unless the Commission has agreed that these expenses will be incurred directly on a reimbursement basis.

Assistant Commissioners are required to submit records of time spent working as Assistant Commissioners, travel and associated expenses (if by agreement with the Commission, these were incurred directly). Counsel assisting will submit an invoice to the Commission for professional fees. Such records and invoices are to be provided to the Executive Director Legal

for approval of payment, after the case lawyer has confirmed the dates and times (and any other expenses) claimed are correct.

It is the responsibility of the Executive Director Legal to ensure records or invoices for time spent and expenses incurred by an Assistant Commissioner or counsel assisting, are submitted to the Commission for payment in a timely manner and in any event, within 30 days of the end of the financial year in which the relevant work has been undertaken.

4.7 Hearing preparation

4.7.1 The hearing brief

Once the presiding Commissioner and counsel assisting (if not the case lawyer) for a hearing has been confirmed, it is the responsibility of the case lawyer to provide the presiding Commissioner and counsel assisting with a copy of the hearing brief. The case lawyer is also responsible for ensuring the hearing brief for the presiding Commissioner and counsel assisting is updated from time to time as the investigation progresses.

The case lawyer should aim to ensure the brief for a hearing is made available to the presiding Commissioner and counsel assisting:

- for a compulsory examination, at least one week prior to the relevant examination(s) for which the brief has been prepared
- for a public inquiry, at least four weeks prior to the commencement of the inquiry.

Hearing briefs are to be prepared in accordance with the procedure set out in *IP03-C Hearing Briefs*.

4.7.2 Initial briefing, pre-hearing and other planning meetings

The case lawyer is the primary Commission contact for the presiding Commissioner and counsel assisting concerning the conduct of the hearing.

An initial briefing for a newly engaged presiding Commissioner or counsel assisting is to be arranged by the case lawyer for the purpose of discussing and confirming the general strategies for the investigation. The initial briefing is to include the relevant chief investigator, case investigator and corruption prevention (CP) officer involved in the matter (if assigned). The case lawyer is to notify the executive directors of, ID, Legal and CP of the proposed initial briefing in each case so they can decide whether or not to attend.

At least one week prior to the conduct of a compulsory examination the case lawyer should ascertain whether the presiding Commissioner requires a pre-hearing meeting to discuss the conduct of the compulsory examination. Where a meeting is required, the case lawyer will arrange the pre-hearing meeting with the presiding Commissioner, counsel assisting (if not the case lawyer), the case investigator and relevant corruption prevention officer (if assigned). The case officer is to notify the relevant chief investigator of the meeting so he/she can decide whether or not to attend.

At least two weeks prior to the commencement of a public inquiry the case lawyer should arrange a pre-inquiry meeting with the presiding Commissioner to discuss:

- the general conduct and strategy of the inquiry, including the relevant evidentiary and corruption prevention issues to be dealt with
- the witnesses to be called
- the order in which those witnesses are to be called
- witness statements and documents to be tendered (and the manner of tender)
- the extent and timing (if any) of pre-inquiry disclosure of statements and documents to affected parties
- the method of disclosure of relevant statements and exhibits to affected parties, both pre-inquiry and during the inquiry, including for example, whether the Commission's restricted website portal⁶² should be used.

The case lawyer should ensure counsel assisting (if not the case lawyer), the case investigator, the relevant corruption prevention officer (if assigned) and the Manager Communications and Media are included in the pre-inquiry meeting. The case officer is to notify the relevant chief investigator and executive directors ID, Legal and CP of the pre-inquiry meeting so those persons can decide whether or not to attend.

In the period leading up to a hearing date, it is likely that additional planning meetings will be necessary, particularly for a public inquiry. The case lawyer is to ensure that unless the Commissioner or Deputy Commissioner has otherwise decided, the investigation and CP case officers are included in those meetings.

The case lawyer is responsible for recording in MOCCA,⁶³ details of the initial briefing for the presiding Commissioner and counsel assisting, the fact of any pre-hearing and any subsequent hearing planning meetings including the date, time and location of the meeting, persons present and any decisions of substance made during those meetings.

4.7.3 Witness liaison

The case lawyer is the primary Commission contact for persons who have been summonsed to attend a hearing at the Commission and their legal representatives. The case lawyer is responsible for liaising with persons summonsed to attend the hearing or their legal representative, as to the date and time of their appearance or whether their appearance is ultimately required at all.

If a witness under summons to a hearing is no longer required, the case lawyer is to ensure a record of that decision, the identity of the person who made the decision and the reason for the decision, is entered under the "notes" tab against the relevant authority source entry for the summons in MOCCA.

Where the disclosure of documents to a witness prior to a public inquiry is required, the case lawyer is responsible for making arrangements for the delivery of those documents to the witness or their legal representative according to the agreed method of disclosure.⁶⁴

⁶² See s 4.7.4 as to requirements for the use of the Commission's restricted website portal

⁶³ under the "Activities" tab for the matter.

⁶⁴

4.7.4 Use of the Commission's restricted website:

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

- 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 any pre-inquiry (public) disclosure material, and
- once a public inquiry has commenced, providing authorised persons with access to relevant material, including that material proposed to be made an exhibit, lists of proposed witnesses and documents marked for identification.

The Commission's restricted website should be used for the disclosure of documents to authorised persons for the purpose of a public inquiry where the use of the website represents the best balance of efficiency and security.

Procedures and responsibilities for the management of the Commission's restricted website are set out in work instruction *IP03-D Use of the Commission's public and restricted website for Commission hearings*.

4.7.5 Hearing security and risk management plans

Procedures and responsibilities for the security and risk management of hearings held by the Commission are set out in work instruction *IP03-A Security and risk management for Commission hearings*.

4.7.6 Hearing transcripts and record management for Commission Hearings

Procedures and responsibilities for the management of Commission's hearing transcripts and exhibits is set out in *IP03-E Management of Commission hearing transcripts and exhibits*.

Procedures and responsibilities for the maintenance of hearing records such as appearance information, witness and exhibit lists and suppression orders are set out in *IP03-B Hearing Associate Duties and Responsibilities*.

4.7.7 The opening address for a public inquiry

Counsel assisting is required to prepare a typed opening address for a public inquiry.

Unless determined at the pre-inquiry meeting that the opening address will be available at an earlier time, the opening address is to be provided to the case lawyer at least two working days prior to the commencement of the public inquiry. The case lawyer will then distribute the opening for comment and confirmation of accuracy to:

- the Executive Director Legal
- the Commissioner
- the presiding Commissioner (if not the Commissioner)
- the Deputy Commissioner
- the Executive Director ID
- the Executive Director CP (if corruption prevention issues are being dealt with)
- the Manager Communications and Media (for a light edit)

The Commissioner, or in the Commissioner's absence, the Deputy Commissioner, must approve the opening address for a public inquiry. If the presiding Commissioner is a person other than the Commissioner or Deputy Commissioner, the presiding Commissioner must also approve the opening address.

4.7.8 Pre-inquiry media and public notices

Media releases:

Public inquiries are announced via a public notice on the Commission's website, and a media statement is also issued as soon as possible after witnesses have received their summonses.

If approved by the Commissioner or Deputy Commissioner, a paid notice may be placed in relevant newspapers. Media alerts and witness lists are also distributed to journalists and news directors a few days prior to the commencement of the public inquiry.

The case lawyer is responsible for providing the Manager Communications and Media with the statement of the nature of the allegations being investigated and the scope and purpose of the public inquiry as soon as possible after these have been settled.

All final media releases, and other public communications about the inquiry are to be approved by the Commissioner and/or Deputy Commissioner via the Executive Director Legal and, where the content concerns corruption prevention issues, the Executive Director CP.

The Commission's public website:

Prior to the Commencement of a public inquiry, the Manager Communications and Media will create an investigation page on the Commission's public website for the purpose of facilitating public access to the following information about the public inquiry:

- public inquiry transcripts
- public notices, media releases and fact sheets
- witness lists
- exhibits
- special hearing directions (if applicable)

Procedures and responsibilities for the management of the Commission's public website before and during a public inquiry are set out in work instruction *IP03-D Use of the Commission's public and restricted website for Commission hearings*.

Pre-inquiry media briefing:

The Manager Communications & Media will conduct a short logistical briefing for journalists and news crews immediately prior to the start of all public inquiries to outline the ICAC media guidelines for public inquiries⁶⁵ and explain other information relevant to the conduct of public inquiries.

⁶⁵ See attachment to ICAC Media Policy (No.3).

4.7.9 Internal notification of public inquiry or compulsory examination

At least one working day before the commencement of a hearing, the hearing associate will notify Commission staff via email that a hearing will take place, including:

- the nature of the hearing (compulsory examination or public inquiry)
- file number and investigation name (if any)
- the hearing room that will be used
- the period the hearing room will be in use
- the names of the presiding Commissioner, the case lawyer and counsel assisting (if not the case lawyer)

The Manager Communications and Media will ensure that all Commission staff are notified by email of any public inquiry announcement. This is done as soon as possible after the media release has been distributed to the media.

4.7.10 Testing of electronic equipment

The Senior Client Support Officer and Systems and Network Support Officer are responsible for ensuring that:

- all electronic and associated equipment in the relevant commission hearing room is tested and in good working order prior to the commencement of a hearing, and
- that appropriate and timely support is available to attend to any technical and performance issues with the equipment that may arise during a hearing.

4.8 The general conduct of a public inquiry or compulsory examination

4.8.1 Public inquiry standard directions

The Commission has issued standard directions (“standard directions”) which apply to the conduct of its public inquiries and these are available to the public via the Commission’s public website. These directions deal with such matters as:

- sitting times
- authorisation to appear
- legal representation
- the conduct of the public inquiry with reference to:
 - the evidence of witnesses
 - documentary evidence
- suppression orders
- publication of, and access to evidence
- submissions
- liaison with the Commission

The Commission will not ordinarily hold a pre-inquiry directions hearing, unless special circumstances of the particular matter require.

This section (4.7) is to be read in conjunction with the Commission’s Standard Directions for Public Inquiries and, for any particular matter, any other directions made before or during a public inquiry in relation to that matter.

4.8.2 General procedure

The general procedure to be followed in conducting a public inquiry or compulsory examination is set out in s 5.9 of the *Manual for Assistant Commissioners*.⁶⁶

See also standard directions.

4.8.3 Provision of documents

The pre-hearing disclosure of documents for a compulsory examination is exceptional and no pre-hearing disclosure of documents must occur without the express agreement of the presiding Commissioner.

A decision as to whether statements or documents will be disclosed pre-public inquiry and the method of disclosure should be determined during the pre-inquiry meeting with the presiding Commissioner.

In determining the statements and documents that should be disclosed prior to a public inquiry or determining how that information is to be used in a compulsory examination or public inquiry the following considerations apply:

Telecommunications Interception material:

Lawfully obtained information and interception warrant information⁶⁷ must never be disclosed prior to a hearing. Lawfully obtained information and interception warrant information must never be played in, or introduced into a hearing unless expressly approved by the presiding Commissioner.

Surveillance audio and video recordings

Surveillance audio and video product is not to be introduced into a public inquiry unless approved by the Executive Director ID, in consultation with the Executive Director Legal. Where there is disagreement on this issue, the matter is to be referred to the Commissioner. A primary consideration in determining the issue is the preservation and protection of law enforcement methodology, the safety and security of Commission staff and members of the public.

Statements, interview and compulsory examination transcripts

Compulsory examination transcripts or statements and transcripts/audio of interviews taken by investigators from significant witnesses will not as a matter of course be made available to witnesses prior to a hearing. The question of access to such material will be determined on a case by case basis, depending on the needs of the investigation and (particularly in the case of a compulsory examination) is subject to any necessary variation of a non-publication order. Release of any of this material must be approved by the presiding Commissioner.

⁶⁶ The *Manual for Assistant Commissioners* is available via the Commission's intranet

⁶⁷ See definitions of these terms in *IP15 – Telecommunications Interception and Access*

Legislative restrictions on the publication of information

Legislative restrictions on the publication of information must be considered. For example, a tax file number however obtained, may not be published.⁶⁸ The case lawyer is responsible for ensuring the requirements of any legislative restrictions on publication of information are met.

Private and personal information

Great care needs to be taken in dealing with documents containing private and personal information such as diaries, videos, personal letters, material disclosing personal identification and financial information. If this material is irrelevant to the inquiry, it should be redacted from the tender copy prior to the public inquiry. Otherwise, consideration should be given to identifying the information or the class of information in respect of which a non-publication order should be made prior to or at the time the information is used or tendered as an exhibit in the hearing.

See also standard directions on the provision of documents.

4.8.4 Exhibits

Generally, documents shown to witnesses or referred to in evidence should be tendered as an exhibit. Otherwise the document should be marked for identification.

It is Commission policy that original property items are not to be tendered as exhibits in Commission hearings. On occasion, it may be essential to show a witness an original property item, for example, to identify an original document, handwriting or something else on the document, where a copy of the document is unsuitable for that purpose. However, only a copy or duplicate of an original property item is to be used for tendering or marking purposes.

A witness in a Commission hearing must never be requested to mark or alter an original property item.⁶⁹

A document or other thing as produced by a witness under a s 35 summons, whether specifically required by the summons or otherwise,⁷⁰ is an original property item and not a hearing exhibit. This is the case even where the item is produced in the course of a hearing.⁷¹

When a recorded conversation is played during a hearing, the conversation will not be transcribed but the transcript of the conversation and a copy of the audio recording should be tendered as an exhibit.

Procedures with respect to the recording and custody of hearing exhibits are dealt with in *IP03-B Hearing Associate Duties and Responsibilities*.

⁶⁸ For further guidance, see also Operations Manual policy and procedure *IP08 – Authorised Collections*.

⁶⁹ See further s 4.9.1 *IP12 Property Management*

⁷⁰ For example, because the document or thing was volunteered by the witness or it was produced because of a direction by the presiding Commissioner under s 35(2) of the ICAC Act.

⁷¹ See further s 4.9.1 *IP12 Property Management*

4.8.5 Claims of privilege

If a witness is required to give evidence or produce a document or thing under a s 35 summons or a direction of the presiding Commissioner under s 35(2) of the ICAC Act, the only claim of privilege available to the witness is legal professional privilege in relation to the witness' appearance before the Commission. That is, a witness is not required to answer a question or produce a document or other thing at, or during a hearing, if the answer to the question would disclose, or the document or other thing contains, a legally privileged communication in relation to the appearance, or reasonably anticipated appearance, of the person at the hearing.⁷²

If a claim of privilege is made, it will be adjudicated by the presiding Commissioner.

4.8.6 Communication and investigation management

At the conclusion of a compulsory examination or at the end of each day's evidence in a public inquiry, it is useful for an informal briefing to be conducted involving the presiding Commissioner, counsel assisting, the case lawyer (if not counsel assisting), the investigation case officer and the CP case officer. This briefing should be arranged by the case lawyer for the purpose of:

- identifying any issues arising from the day's evidence that need to be addressed
- deciding how those issues will be addressed, and
- confirming or establishing strategies for subsequent examinations or hearing days.

Key decisions⁷³ about the conduct of the investigation should not be made without consultation with the Commission's operational executive, where those decisions may have resourcing impacts.⁷⁴

The case lawyer is responsible for ensuring key decisions arising from a hearing or public inquiry are documented in MOCCA.⁷⁵

4.8.7 Media and public access to public inquiry evidence

Subject to any suppression order, it is Commission policy to provide public access, via the Commission's public website, to public inquiry transcripts and exhibits. Procedures and responsibilities for the management of the Commission's public website during a public inquiry are set out in work instruction *IP03-D Use of the Commission's public and restricted website for Commission hearings*.

Witnesses and their legal representatives, members of the public and media are generally required to access public inquiry transcripts and exhibits from the Commission's public website. The following exceptions apply, subject to any relevant suppression order or other direction of the presiding Commissioner:

⁷² s 37(5) ICAC Act.

⁷³ See s 3.5.3 of the *General Investigations Standards and Procedures* and definition in s5 of this policy and procedure.

⁷⁴ The Commissioner, Deputy Commissioner and executive directors ID, Legal and CP.

⁷⁵ See requirement as to the documentation of key decision as required by s 3.5.2 of the *General Investigations Standards and Procedures*.

- if requested, a witness who is unable to access the Commission's website, is entitled to one free hard copy of the transcript of his or her evidence
- if requested, a person adversely named who is unable to access the Commission's website, is entitled to one free hard copy of all relevant transcript
- if a person has a significant interest in a document that has been tendered as an exhibit (and access has not already been provided pre-inquiry or examination and the person is unable to access the Commission's website), the person is entitled to a hard copy of that document if requested
- members of the media may, via the Manager Communications and Media, have access to and be provided with a copy of a document that has been tendered as an exhibit but only under the conditions set out in the Standard Directions for Public Inquiries and any other relevant direction or variation of the standard directions by the presiding Commissioner.

All public access (including media access) to Commission transcripts or exhibits, must be approved by the case lawyer.

In order to assist the Manager Communications and Media to ensure the accurate and timely reporting of public inquiries, the case lawyer is to:

- include the Manager Communications and Media in public inquiry planning, for media purposes
- provide the Manager Communications and Media with accurate (and correctly spelt) witness lists and names of legal representatives
- brief and update the Manager Communications and Media on the inquiry, schedule of witnesses, exhibits and suppression orders
- provide copies or extracts of suppression orders to the Manager Communications and Media at the earliest opportunity.

If a suppression order is made during a public inquiry, the Manager Media and Communications will advise all media representatives present of the terms of any direction to ensure that the direction is not inadvertently breached.

See also standard direction on media and public access to public inquiry evidence.

4.8.8 Closing submissions

As soon as practicable after the conclusion of evidence in a public inquiry, the case lawyer is to arrange a meeting to discuss the issues to be dealt with in counsel assisting's submissions, including potential findings, s 74A(2) statements and relevant corruption prevention issues. The presiding Commissioner, counsel assisting, the investigation case officer and CP case officer are to be included in the meeting.

Within five working days of the receipt of final submissions, the case lawyer will arrange a meeting with the Commissioner who presided at the public inquiry, Executive Director Legal and the team chief investigator to identify offences for the DPP prosecution briefs.

In preparing for this meeting, the case lawyer will liaise with the chief investigator to identify the extent to which the Commission has (or is reasonably likely to be able to obtain) admissible

evidence to support prosecution of each of the offences identified in the submissions of counsel assisting.

The purpose of the meeting with the presiding Commissioner is to identify the offences for which DPP briefs of evidence are to be prepared. In undertaking this task regard is to be had to:

- the offences recommended in the submissions of counsel assisting;
- the availability of admissible evidence sufficient to prove the elements of each offence, and
- any discretionary considerations mitigating against prosecution.

On the day that the offences are identified, the case lawyer will send an email to the chief investigator, copied to the Executive Director Legal, confirming the offences for which briefs of evidence are to be prepared.

Any additional offences identified during the preparation of the investigation report are to be discussed with the relevant chief investigator, Executive Director Legal and the presiding Commissioner to determine whether briefs of evidence should be prepared. If it is determined to prepare additional briefs of evidence, the case lawyer will send an email to the chief investigator, copied to the Executive Director Legal, confirming the additional offences.

If any offences are identified that are not referred to in the submissions of counsel assisting, the case lawyer will prepare correspondence to relevant affected persons to go out under the name of the Solicitor to the Commission informing them that the Commission is considering including those offences in its s 74A(2) statement and providing them with an opportunity to make submissions on that issue.⁷⁶

The case lawyer is responsible for ensuring that:

- all written submissions are saved or scanned into Part 2 of the investigation TRIM file using the Commission's standard file naming convention. Submissions received in hard copy are also to be placed on the physical file
- copies of all written submissions and in the case of oral submissions, a transcript of those submissions, are provided to all affected persons, and
- the Commissioner, Deputy and presiding Commissioner (if applicable), counsel assisting, Executive Director Legal and the relevant chief investigator are provided with a copy of the submissions.

See also standard directions on closing submissions.

4.9 Section 112 directions (suppression orders)

Section 112 of the ICAC Act gives the Commission the power to make directions prohibiting evidence and other information and submissions from being published otherwise than as specified by the Commission (a s 112 direction) if the Commission is satisfied that it is necessary

⁷⁶ When preparing the s 74A(2) statement for the investigation report, the case lawyer is to include only those offences for which it has been agreed that briefs of evidence are to be prepared.

or desirable in the public interest.⁷⁷ It is an offence to make a publication in contravention of a s 112 direction.⁷⁸

Directions are usually made in relation to the evidence given in compulsory examinations. However directions can also be made in relation to evidence given in a public inquiry.

A s 112 direction may be varied either during a hearing or after a hearing has concluded to change the terms of the original direction or lift it entirely.

4.9.1 Making or varying a s112 direction during a hearing

When a s 112 direction is made or varied it should be read onto the record by the presiding Commissioner including that the direction or variation is necessary or desirable in the public interest.⁷⁹

The case lawyer should, as far as is practical, advise anyone who is present in the hearing room when the relevant evidence was given but who left the hearing room before a suppression order was made, that the order was made.

Procedures with respect to the recording and filing of s112 directions made during a hearing are dealt with in *IP03-B Hearing Associate Duties and Responsibilities*.

At the end of each day of a public inquiry, the case lawyer is to check the accuracy and currency of the details of the s112 directions recorded against the day's transcript session in MOCCA. The case lawyer should then arrange for any suppressed information to be redacted from the relevant transcript or exhibit to which the order refers prior to authorising its publication on the Commission's public website.

At the conclusion of an investigation, the case lawyer should review all outstanding suppression orders and wherever possible have the orders lifted or their duration prescribed by the Commissioner. In reviewing the transcript for directions that need to be varied or lifted, the case lawyer should check whether any exhibits are affected. If so the exhibit should be mentioned specifically in any variation.

4.9.2 Making or varying a s 112 direction after a hearing has concluded

All variations of s 112 directions after a hearing has concluded must be in writing, in the approved form⁸⁰ and submitted to the Commissioner for consideration by the case lawyer, via the Executive Director Legal.

Where a variation of a s 112 direction is sought after a hearing has concluded because of a request or requirement to provide or disseminate information to a third party, then the

⁷⁷ S 112(1A) ICAC Act

⁷⁸ S 112(2) ICAC Act. However note that there is a direction in force under s51 of the State Records Act 1998 providing that transcripts the subject of a s112 direction remain closed to public access for 75 years after the creation of the record unless the record is made public earlier.

⁷⁹ A comprehensive list of public interest considerations is set out in s 4.4 of *IM05 Disseminations, Requests and Requirements to Produce Information*

⁸⁰ See form of s112 direction under *IM05 Disseminations, Requests and Requirements to Produce Information*

procedure set out in *IM05 Disseminations, Requests and Requirements to Produce Information* is to be followed.

Where a s 112 direction or variation to a s 112 direction is made after a hearing has concluded, the Commission officer responsible for seeking the direction or variation must ensure that details of the s 112 direction or variation are recorded against the relevant transcript session in MOCCA and the original direction in writing is placed on the associates s 112 directions file for the matter. The case lawyer must also ensure the publicly available transcript reflects any further direction or variation.

4.10 Procedures for dealing with contempt

4.10.1 General considerations

Part 10 of the ICAC Act sets out how contempt of the Commission may be dealt with.

Conduct that may constitute contempt of the Commission is set out in s 98 of the Act and is described as "contempt in the face or hearing of the Commission". The offence is committed where a person, without reasonable excuse:⁸¹

- a) fails to attend in compliance with a summons that has been served upon them
- b) fails to appear and report him or herself before the Commission after having been released under s 36(6) of the Act on such a condition
- c) fails to produce any document or thing the person is required to produce in compliance with a summons that has been served upon them
- d) refuses to be sworn or refuses or fails to answer any question put to the them by the presiding Commissioner⁸²
- e) wilfully threatens or insults the presiding Commissioner, counsel assisting, an officer of the Commission, a witness or a legal representative authorised to appear before the Commission.
- f) misbehaves before the Commission, and
- g) interrupts or obstructs the proceedings of the Commission.

4.10.2 Conduct constituting both contempt and an offence

Some of the forms of conduct which constitute contempt may also be punishable as specific offences under the Act. Section 101 of the Act provides that an act or omission that is punishable as an offence and contempt may be punished as either, but not both.

The following criteria should to be taken into account when determining whether to deal with an act or omission described in s 98 of the Act as contempt or an offence:

- Where the conduct amounts to a refusal to be sworn or affirmed, refusal to answer a question or refusal to produce documents or other things, and the answer or documents is/are considered vital to the investigation, the contempt powers should be used rather than prosecution for a specific offence.

⁸¹ See s 99(6) ICAC Act.

⁸² See *Smith v The Queen* (1991) 25 NSWLR 1; *DPP v Chidiac* (1991) 25 NSWLR 372

Pursuing a prosecution for contempt has the advantage that the objective of punishment is to coerce the contemnor to comply with his/her legal obligation and answer the question or produce the documents or other things, as required. This objective cannot be achieved with punishment of the conduct as a specific statutory offence.⁸³

- If the conduct in question has severely prejudiced and may in the future prejudice investigations if allowed to persist, punishment for contempt may be a more appropriate sanction than punishment for a specific offence.
- Where the contemnor's deliberate and contumacious refusal to comply is motivated by their recognition of the importance of the answers or documents to the investigation prosecuting a contempt rather than a prosecution for a specific offence may be preferable. This is so even where the contemnor asserts that they will continue to refuse to answer questions.⁸⁴
- If a contempt prosecution is likely to be able to be finalised much more quickly than a prosecution for a specific offence, then consideration should be given to prosecuting a contempt.

Where a person engages in conduct which may be punishable as contempt or a specific offence counsel assisting should be prepared to make submissions as to which avenue of punishment (if any) is the most appropriate, having regard to the above criteria and the purposes and objectives of the investigation.

4.10.3 General procedure

Where the conduct constituting contempt of the Commission occurs in the actual course of a hearing, the presiding Commissioner will determine the proposed course of action in dealing with that conduct. Otherwise, when such conduct occurs, the case lawyer is to advise the Executive Director Legal of the circumstances as soon as possible. The Executive Director Legal will then discuss the matter with the presiding Commissioner and the Commissioner (if not the presiding Commissioner) to determine the appropriate course of action.

The following general procedure is to be followed where there is a decision to take action in relation to contempt.

STEP 1 – Establishing the contempt

The refusal or failure of a witness to answer a question does not constitute contempt unless the question has been put by the presiding Commissioner.

⁸³ See generally, *The Hon Justice JRT Wood v Staunton* (unreported, Supreme Court of NSW, Dunford J, 8 June 1995) and *The Hon Justice JRT Wood v Galea* (unreported, Supreme Court of NSW, Hunt CJ at CL, 24 April 1997).

⁸⁴ *The Hon Justice JRT Wood v Staunton* (No 5) (unreported, Supreme Court of NSW, Dunford J, 28 March 1996).

In circumstances where a witness has refused or failed to answer a question put by counsel the presiding Commissioner must require the witness to answer the question. In so doing, the witness should be informed that they are not entitled to refuse to answer any question relevant to an investigation put to the witness by the presiding Commissioner. The offence will occur if and when the witness persists in his or her refusal or failure to answer the question in respect of which the requirement to answer has been issued.

A refusal or failure to answer may be manifested by the witness simply declining to answer. Alternatively, it may occur by the giving of an answer which is capable of being judged to be no real answer but, in substance, a refusal to answer.⁸⁵

The question as to whether the purported answer is in reality a refusal must be assessed by reference to what the presiding Commissioner has seen and heard while the witness is in the witness box and nothing else. The presiding Commissioner is not entitled to embark on a trial of fact to determine the falsity of the answers nor to have resort to evidence given in that or some other case nor to knowledge otherwise in his/her possession. The question is not whether the witness has answered falsely but whether the witness has evinced an intention to leave a question or questions unanswered.⁸⁶

*The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can properly be called an answer to the question.*⁸⁷

In *Keeley v Brooking*,⁸⁸ the judge drew the inference from what he heard and saw in a case where the witness persistently claimed not to remember in a parrot-like fashion. In that case, Mason and Aickin JJ said:

Testimony false and evasive on its face is the equivalent of refusing to testify at all

....

Reynolds JA in *Thelander v Woodward and the Attorney-General (NSW)* referred to the following passage from *United States v Appel*⁸⁹ as “[t]he clearest statement of principle on this particular aspect”:

If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort to answer the questions at all.

⁸⁵ *Coward v Stapleton* (1953) 90 CLR 573.

⁸⁶ *Thelander v Woodward and the Attorney-General (NSW)* [1981] 1 NSWLR 644 at 652, citing approvingly *Coward v Stapleton* (1953) 90 CLR 573 at 578, 579; *Keeley v Brooking* (1979) 143 CLR 162.

⁸⁷ *Coward v Stapleton* (1953) 90 CLR 573 at 578.

⁸⁸ (1979) 143 CLR 162.

⁸⁹ 211 F 495 at 496 (Per Learned Hand J).

STEP 2 – Warning

If the offender has not previously engaged in the contemptuous conduct, consideration should be given to the issue of a warning. The power to issue a warning is not prescribed by the Act. It is, nevertheless, clear that the power to deal with a person for contempt is at the discretion of the presiding Commissioner. The warning might contain the following words:

I must warn you that your conduct, namely, (describe conduct) may constitute a contempt of this Commission within the meaning of s.98 of the ICAC Act. If you persist in this form of behaviour I may order that you be taken before the Supreme Court to be dealt with for contempt.

Expulsion: If the offender is not a witness and refuses to heed a warning, the offender may be expelled. The power to eject a person from the Commission's premises derives from a breach of terms of an implied licence by virtue of which the person is permitted to enter the Commission's premises in the first instance.

Short adjournment: If the alleged offender is a witness or other person for whom a legal representative has been authorised to appear, it may be appropriate for the hearing to be adjourned for a short period of time and/or for the witness to be stood down in order that the offender can be given appropriate legal advice and consider his or her position. The relevant chief investigator should be notified of the potential need to take the offender into custody and arrangements made for the Commission's Special Constables to attend the hearing room for that purpose.

STEP 3 – Issue of a s 100(1) summons

If not already present at a compulsory examination or public inquiry where the alleged contempt has been committed the alleged offender should be summonsed to show cause as to why he or she should not be dealt with under s 99 for contempt. The summons should inform the alleged offender of the nature of the conduct which constitutes the alleged contempt. It should also annex information drawing attention to the existence of the Legal Representation Office which may provide free legal advice in certain circumstances.

STEP 4 – Offender taken directly into custody

In the case of any alleged contempt of the Commission, the Commissioner may summon the offender to appear before the Commission to show-cause why the offender should not be dealt with for contempt under s 99 of the ICAC Act.⁹⁰

However, if the conduct involves contempt in the actual course of a Commission hearing, a summons need not be issued before calling on the offender to show-cause why they should not be dealt with under s 99 of the ICAC Act for contempt.⁹¹

After advising the offender of the details of the alleged contempt, the alleged offender can be taken directly into custody in a correctional facility or elsewhere by a member of the

⁹⁰ S 99(1) and 99(1A) ICAC Act.

⁹¹ S 99(3) ICAC Act.

Police Force. Generally this option should only be adopted where the offender has ignored a warning and persists in the contemptuous conduct and the conduct is sufficiently serious as to constitute an immediate threat to the administration of the Commission and a present confrontation to the progress of a compulsory examination or public inquiry.

Where a show-cause summons is required, the general procedure for obtaining and executing a s 35 summons outlined in ss 4.2 and 4.3 of this policy and procedure, applies with necessary modification.

STEP 5 – Invite a response to show cause

Upon the return of a show-cause summons (or otherwise, if the offender is present) the Commissioner should call upon the alleged offender to show cause as to why they should not be dealt with for contempt under s 99 of the ICAC Act.

Failure to appear: If an offender fails to appear in obedience to a show-cause summons, the Commissioner may issue a warrant for the arrest of the offender (a s 100(4) “Warrant to Arrest”) to bring the offender before the Commission. In such a case, the general procedure for obtaining and executing a s36 arrest warrant outlined in s 4.5 of this policy and procedure, applies with necessary modification. Once the warrant is registered in Property Services, the case lawyer is to consult with the relevant chief investigator in relation to the execution of the warrant.

Rules of natural justice: The rules of natural justice require that an alleged contemnor be informed of the nature of criticism or allegations against them⁹² and then given “a fair opportunity for correcting or contradicting what is said against him”.⁹³ Generally speaking, the rules also require that the alleged offender be give adequate time to respond to a notice of adverse allegations or criticism and that a request for an adjournment should be acceded to if time to prepare the response would otherwise be inadequate.⁹⁴ However, in the case of contempt in the actual course of a hearing of the Commission, where the alleged offender is at fault and their actions were deliberate, refusal of an adjournment is less likely to constitute a denial of natural justice,⁹⁵ particularly where the contempt is contumacious. At common law, the rules of natural justice do not grant a witness automatic entitlement to legal representation⁹⁶ though there is arguably a presumption in favour of permitting an alleged contemnor an opportunity to get legal advice.⁹⁷

⁹² If a s 100(1) summons is issued, s 100(1A) ICAC Act also requires the summons set out the details of the alleged contempt.

⁹³ *In re Pergamon Press Ltd* [1971] 1 Ch 388 at 400, per Lord Denning MR.

⁹⁴ *McGibbon v Linkenbach* (1996) 41 ALD 219 at 226-227. See also *Cucu v District Court (NSW)* (1994) 73 A Crim R 240 (CA) in which a refusal of an adjournment in the Estreats Court was held to have constituted a denial of procedural fairness amounting to a jurisdictional error: *Kopuz v District Court (NSW)* (1992) 28 NSWLR 232 at 245; 62 A Crim R 337 at 349-350.

⁹⁵ M Aronson & B Dyer, *Judicial Review of Administrative Action*, (1996), LBC Information Services, 571.

⁹⁶ *National Crime Authority v A, B and D* (1988) 78 ALR 707. By contrast, it clearly is proper to afford an accused an adjournment for the purpose of securing legal representation: *Dietrich v The Queen* (1992) 177 CLR 292; 64 A Crim R 176.

⁹⁷ *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459 at 480 (per Hope AJA); *Police Integrity Commission Act 1996* s 35(2).

Cannot compel response: If the alleged offender does not wish to avail him or herself of this opportunity to show-cause, that is entirely a matter for the offender. The question as to whether the offender should be referred to the Supreme Court must then be determined on the basis of other available evidence.

Mode of responding to call: If the alleged offender does wish to show-cause, this can be done in several ways. There is no specific requirement for the offender's submissions (if any) to be placed into evidence. Indeed, testing of the substance and veracity of the alleged offender's submissions in response to the call to show cause is inappropriate.⁹⁸ If the alleged offender is legally represented, the submissions may be made on the offender's behalf from the bar table. If the alleged offender is not legally represented or otherwise desires to present his or her own submissions and the alleged offender is under summons, this may be done from the witness box, though no cross-examination should be permitted. In the unlikely event that the alleged offender is not under summons at the time that the call to show cause is issued and the alleged offender has waived the opportunity to seek legal representation, the alleged offender should be provided with the opportunity to make the submissions either in evidence or as an unsworn statement.⁹⁹

STEP 6 – Determining if cause is made out

Whether cause is made out or not is a matter for the presiding Commissioner. Cause will be made out if the offender establishes that there was a reasonable excuse for the act or omission constituting the alleged contemptuous conduct. Assuming that the offender does not offer a reasonable excuse, the decision as to whether cause is made out must be adjudged according to standards set by the rules of natural justice. In particular, the decision, though containing an element of subjectivity, must be reasonable.¹⁰⁰ A decision will be unreasonable within the meaning of the *Wednesbury* principle¹⁰¹ if it is extreme, irrational (in the sense that it defies logic) or unprincipled (in the sense that it violates moral standards or fundamental legal or human rights values).

Cause made out: If the presiding Commissioner is satisfied that the offender's conduct was not such that the offender should be punished in accordance with s 99 of the ICAC Act, the offender should be released from custody.

Cause not made out: If the presiding Commissioner is satisfied that the offender should be dealt with for contempt, the presiding Commissioner should make a declaration to this effect and, if appropriate, direct the preparation of a Warrant to Arrest pursuant to s 100(4)¹⁰² and also direct preparation of a contempt of the Commission Certificate pursuant to s 99(2) of the ICAC Act.

⁹⁸ *Registrar of the Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459.

⁹⁹ *Fraser v The Queen* [1984] 3 NSWLR 212 at 229 (per Kirby P and McHugh JA).

¹⁰⁰ *Liversidge v Anderson* [1942] AC 206. See also *George v Rockett* (1990) 170 CLR 104 at 112.

¹⁰¹ [1948] 1 KB 223.

¹⁰² Note: an arrest warrant may only be issued by the Commissioner and the power is non-delegable.

STEP 7 – Preparation of a contempt of the Commission certificate

The Commissioner may present to the Supreme Court a contempt of the Commission certificate in which the Commissioner sets out the facts that constitute the alleged contempt. The certificate is prima facie evidence of the matters certified.¹⁰³

The case lawyer will prepare the Certificate and refer it to the presiding Commissioner for signing via the Executive Director Legal.

STEP 8 – Issue and execution of warrant to arrest

Section 100(4) suggests that a warrant to arrest will not be effective unless it is issued “while the offender is before the Commission”. The warrant must be accompanied by the contempt of the Commission certificate.¹⁰⁴

A case lawyer who anticipates that a witness is likely to be hostile or uncooperative should have a “Warrant to Arrest” prepared in relation to the witness before the witness is called. This saves time in the event that a determination is made for the offender to be dealt with for contempt.

If a warrant is issued, once it has been registered in Property Services, the case lawyer is to consult with the relevant chief investigator in relation to the execution of the warrant. The warrant is sufficient authority to detain the offender in a prison or elsewhere, pending the offender being brought forthwith before the Supreme Court.¹⁰⁵ The special constables attached to the Commission are available to assist with the detention of the offender until NSW Police are able to assist with bringing the offender before the Supreme Court.

At any time before the offender is brought before the Supreme Court, the Commissioner may revoke the warrant. The Commissioner may also order that the offender be released on condition that they appear before the Supreme Court¹⁰⁶ and may impose any other condition on the offender’s release, including one or more conditions for the purpose of securing the appearance of the offender before the Supreme Court, for example:

- provision of sureties by the offender
- surrender of any passport held by the offender
- that the offender be required to reside at a particular location
- personal and regular reporting by the offender to the Commission.¹⁰⁷

The Commissioner may at any time before the offender appears before the Supreme Court, amend, revoke or add to those conditions.¹⁰⁸

STEP 9 – Notify Crown Solicitor’s office

¹⁰³ S 99(2) and s 99(4) ICAC Act

¹⁰⁴ S 100(6) ICAC Act

¹⁰⁵ S 100(5) ICAC Act

¹⁰⁶ S 100A(2) ICAC Act

¹⁰⁷ S 100A(3) ICAC Act

¹⁰⁸ S 100A(4) ICAC Act

The Executive Director Legal will advise the Assistant Crown Solicitor (Criminal Law), Crown Solicitor's Office (CSO) and place the CSO on notice that the Commission proposes to instruct the CSO to act on its behalf to commence contempt proceedings in the Supreme Court against the offender pursuant to s 99 of the ICAC Act.

STEP 10 – Initiation of contempt proceedings in the Supreme Court

The CSO will initiate proceedings for contempt in the Supreme Court on behalf of the Commission. This will occur by way of summons.

5. Definitions

Investigation plan	includes the operational, corruption prevention and hearing plan
Key decision	With respect to an investigation, is a decision made in the course of the investigation where it is necessary to alter or confirm one or more of the significant conditions of the investigation plan. A key decision includes for example, a decision that results in a change to: <ul style="list-style-type: none"> • the scope and purpose of the investigation • the investigation outputs, milestones and timeframes • resources needed to complete the investigation objectives.

6. Forms

Document reference	Document name
Q:\Templates\...\IP03-01	S 35 Summons to appear and give evidence
Q:\Templates\...\IP03-02	S 35 Summons to appear and produce documents
Q:\Templates\...\IP03-03	S 35 Summons to appear, give evidence and produce documents
Q:\Templates\...\IP03-04	S 39 Order to produce a prisoner (s 39 ICAC Act)
Q:\Templates\...\IP03-05	S 35(4A) Summons to appear and produce documents (LPP)
Q:\Templates\...\IP03-06	Hearing plan
Q:\Templates\...\IP03-07	Summons to commence an application under s 76(1) SEPA
Q:\Templates\...\IP03-08	Affidavit in support of an application under s 76(1) SEPA
Q:\Templates\...\IP03-09	Order under s 76(1) SEPA
Q:\Templates\...\IP03-10	Order under s79 SEPA
Q:\Templates\...\IP03-11	Cover letter - summons served interstate

Q:\Templates\...\IP03-12	Cover letter – public inquiry summons for affected person
Q:\Templates\...\IP03-13	Cover letter – public inquiry summons for a witness (not an affected person)
Q:\Templates\...\IP03-14	Affidavit in support of the issue of a s 36 arrest warrant
Q:\Templates\...\IP03-15	S 36 arrest warrant
Q:\Templates\...\IP03-16	S 99 contempt of the Commission certificate
Q:\Templates\...\IP03-17	S 100(2) Warrant to Arrest (show-cause)
Q:\Templates\...\IP03-18	S 100(4) Warrant to Arrest (Supreme Court)

7. Related policies and procedures

- WI-IP03-A Security and risk management for Commission hearings
- WI-IP03-B Hearing Associate Duties and Responsibilities
- WI-IP03-C Hearing Briefs
- WI-IP03-D Use of the public and restricted website for Commission hearings
- WI-IP03-E Management of Commission hearing transcripts and exhibits
- IP12 – Property Management
- WI-IP12–A Property Administration and Record Keeping
- Policy No. 73 ICAC Delegations Manual

8. Administration

Document Title: Compulsory examinations and public inquiries
 Issued: 1 July 2015
 Approved by: Executive Management Group
 Suggested review date: 1 July 2017
 Revised:
 Policy/Procedure No: IP03 Compulsory Examinations and Public Inquiries
 Directory: A12/0102 D10339830

INDEPENDENT COMMISSION AGAINST CORRUPTION

STANDARD DIRECTIONS FOR PUBLIC INQUIRIES

OCTOBER 2014

The following directions apply to the conduct of a public inquiry by the Independent Commission Against Corruption (the Commission).

Sitting times

1. The Commission ordinarily sits from Monday to Friday each week. Usual hearing hours are from 10:00am to 4:00pm, with a luncheon adjournment from 1:00pm to 2:00pm.

Authorisation to appear

2. The Commission may authorise a person to appear at a public inquiry or a specified part of a public inquiry if it is shown to the satisfaction of the Commission that the person is substantially and directly interested. Authorisation can be granted subject to conditions.
3. The Commission may withdraw authorisation to appear or make the authorisation subject to altered or additional conditions, at any time.
4. Authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Commission subject to the Commission's control and to such extent as the Commission considers appropriate.

Legal representation

5. The Commission may authorise a person giving evidence at the public inquiry to be legally represented.
6. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The Commission will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:
 - a. It could be demonstrated that there is some reasonable purpose for seeking representation of that kind;
 - b. The most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated;

- c. All of the lawyers involved give an undertaking, through the most senior lawyer, to inform the Commission immediately upon recognising that a conflict of interest has arisen.

Conduct of the public inquiry – witnesses

7. Subject to the control of the Commission, counsel assisting will determine which witnesses are called and the order in which those witnesses are called and examined. It may be necessary to call some witnesses to give evidence on more than one occasion.
8. The Commission may decide to receive the evidence of a witness orally or by statement. The Commission will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
9. Persons required to give evidence will be provided with appropriate notice of the time the Commission will call upon their summons to attend and give evidence. Witnesses with a particular period of unavailability are required to give notice of that unavailability to the Commission at the earliest possible opportunity.
10. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
11. All witnesses will be called to give evidence by counsel assisting, and then examined by counsel assisting. If there is more than one counsel assisting the Commission there may be circumstances in which the witnesses might be examined by more than one of the counsel assisting the Commission. The witness may then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest to do so. The witness may then be examined by his or her own legal representative. Counsel assisting may re-examine. Duplication and repetition must be avoided.
12. In determining whether a person has sufficient interest to cross-examine a witness, the Commission may call upon the cross-examiner to:
 - a. Identify the purpose of the cross-examination,
 - b. Set out the issues to be canvassed,
 - c. State whether a contrary affirmative case is to be made, and if so the details of that case.
13. The Commission may:
 - a. Limit the particular topics or issues upon which a party can examine or cross-examine;
 - b. Impose time limits upon examination or cross examination.

14. Save as set out in paragraphs 15 to 18 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.
15. If the Commission is to be invited to disbelieve a witness, the material grounds upon which it is said that the evidence should be disbelieved should be put to the witness so that the witness may have an opportunity to offer an explanation.
16. The Commission expects that, where it is contended that deliberately false evidence has been given, or that there has been a mistake on the part of the witness on a significant issue, the grounds of such contention will be put.
17. What is stated in paragraphs 15 and 16 above is not intended to mean that:
 - (a) Mere inconsistencies and unimportant differences in the evidence should be raised.
 - (b) Once the grounds for disbelieving a witness have been put by one party, other parties need to put them again.
 - (c) The grounds for disbelieving a witness need to be put where the Commission is on notice from statements made during the public inquiry by or on behalf of a party, or that party's evidence, or from the general way in which the party has conducted its previous questioning, or some similar source, that the witness's evidence is under challenge on those grounds.
18. Once a witness has been cross-examined on a particular issue no further cross-examination on that issue will be allowed unless the person wishing to cross-examine the witness on that issue can demonstrate the proposed cross-examination differs to a significant degree from the cross-examination that has taken place.
19. Any person wishing to have evidence of a witness or witnesses placed before the public inquiry must notify the Commission of the name of the witness, and provide a signed statement containing their expected evidence. Commission staff may interview the witness, and take further statements if necessary. Counsel assisting will decide whether or not to call the witness. An application may be made directly to the presiding Commissioner to call the witness only after the above procedure has been completed, and counsel assisting has refused to call the witness.
20. Leave may be granted to any affected person (under s 74(3) of the *Independent Commission Against Corruption Act*) to adduce mitigatory evidence bearing upon the exercise by the Commission of its powers under s 74A(2) of the Act. Any affected person wishing to adduce such evidence should apply for leave prior to the close of evidence at the public inquiry.

Conduct of the public inquiry – documents

21. Subject to the control of the Commission, counsel assisting will determine which documents are tendered, and the time at which they will be tendered.
22. A copy of any document proposed to be put to a witness must be provided to counsel assisting as soon as possible after a decision is made to use the document and in all cases prior to its intended use.
23. Prior to the commencement of the public inquiry, the Commission may provide those persons it considers to be substantially and directly interested in the subject matter of the public inquiry with confidential electronic access to certain documents likely to be tendered as exhibits in the public inquiry. This will be done on a case by case basis by the Commission. As a general rule, the Commission will not otherwise make documents or other material available in advance of the public inquiry.
24. One of the purposes of providing this access is to enable persons to identify whether any application should be made for a suppression order in relation to any document or any part of a document.
25. Copies of these documents will not otherwise be provided to any party. Additional documents may be tendered by counsel assisting during the course of the public inquiry. Where such additional documents are tendered, the Commission will provide a party with a copy of the relevant document where the party has a significant interest in the issues to which each document relates.
26. Any person wishing to have a document placed before the public inquiry must notify the Commission by providing a copy of the document. Commission staff may require the production of other documents. Counsel assisting will decide whether or not to tender any document. An application may be made directly to the presiding Commissioner to tender a document only after the above procedure has been completed, and counsel assisting has refused to tender the document.

Suppression orders

27. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
28. Parties granted confidential electronic access to documents should notify the Commission lawyer with carriage of the matter of any application for a suppression order in relation to any document or part of a document. Such notification is to be in writing and must be made as soon as possible. The application should clearly identify the material sought to be suppressed and the public interest grounds on which the material should be suppressed.

29. The presiding Commissioner will determine whether or not to hear oral submissions in support of such written applications.
30. Those making such written applications for suppression orders will be advised once the applications have been determined.

Publication of, and access to, evidence.

31. In respect of all evidence, oral and documentary, the following ruling will apply until vacated either generally or in respect of particular evidence:
 - a. the testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence;
 - b. any person (or the legal representative of that person) having leave to appear before the Commission will have access to any book, document or writing tendered in evidence for the purpose only of appearance before the Commission and subject to any other direction made by the Commission;
 - c. for the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station, online publication or television channel may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by counsel assisting, subject to the condition that:
 - i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
 - ii. any part of the contents thereof indicated by counsel assisting as unsuitable for publication must not be published without the leave of the Commission. Such leave can be sought, for example, if there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor to the Commission.

Submissions

32. Unless otherwise ordered, at the conclusion of the evidence oral submissions will not be allowed but orders will be made for the making of written submissions. The Commission may limit the particular topics or issues which may be addressed, and impose time or page limits on submissions. Ordinarily, orders will be made requiring

counsel assisting to provide written submissions within 14 days of the close of evidence and all other parties to provide their written submissions 14 days thereafter.

33. Unless otherwise ordered, all written submissions are subject to a suppression order under s112 of the *Independent Commission Against Corruption Act* that the submissions not be published or communicated to anyone except the Commission, the parties involved in the public inquiry and their legal representatives, or by Commission officers for statutory purposes or pursuant to further order of the Commission.

Liaison with the Commission

34. Any contact with the Commission made necessary by these directions, or other enquiries in respect of the conduct of the public inquiry, should be made through the Commission lawyer with carriage of the relevant investigation to which the public inquiry relates.



I·C·A·C

**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**INFORMATION
FOR WITNESSES**

November 2014

WHAT IS THE ICAC?

The NSW Independent Commission Against Corruption (ICAC) was established in March 1989 by an Act of the NSW Parliament. Its role is to expose and minimise corruption affecting the NSW public sector through investigation, corruption prevention, and education.

The ICAC may investigate any circumstance that it believes may involve or may lead to "corrupt conduct" as defined in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988* (the ICAC Act). The ICAC has broad powers to enable it to gather evidence and to get to the truth. This includes the power to take evidence from a witness in public (a "public inquiry") or in private (a "compulsory examination"). The ICAC may decide to hold part of a public inquiry in private if doing so is in the public interest.

ABOUT YOUR SUMMONS

You have received a summons to appear at the ICAC to give evidence. The summons will specify if you will be giving evidence in a public inquiry or a compulsory examination. The summons may also require you to produce documents.

Please read the summons carefully. You must do everything your summons asks you to do. There may be serious penalties if you do not do what is required.

The summons tells you the time and date you must attend at the ICAC. The summons will generally set out information concerning the matter being investigated for which your evidence is required.

The summons will indicate if there are any restrictions on disclosing to anyone that you have received the summons. You may be committing an offence under the ICAC Act if you fail to comply with any such restriction.

You will be committing an offence if you fail to attend at the time and date specified in the summons without reasonable excuse. A warrant for your arrest may be issued. It is also an offence to fail to produce any documents or other things required to be produced by the summons without reasonable excuse.

If you have any questions about the summons or attending the Commission to give evidence please contact the ICAC officer named in the summons, or your lawyer.

LEGAL REPRESENTATION

If you think you need legal advice or legal representation you can contact a lawyer, or you may obtain free legal advice from the **Legal Representation Office** (LRO). The LRO may also be able to provide a lawyer to represent you.

The LRO provides independent legal advice, assistance and representation to witnesses at the ICAC and other investigative agencies.

The LRO can be contacted by telephone on 02 8093 5520 or visit www.lro.lawlink.nsw.gov.au.

Witnesses at ICAC public inquiries and compulsory examinations are generally allowed to be represented by a lawyer. On some occasions the Commission may refuse to allow a particular lawyer to appear, where to do so may prejudice the investigation or give rise to a conflict of interest.

If you want to be represented by a lawyer you must make your own arrangements, and do so in time for the day of your appearance. Your lawyer should attend with you on that day.

PRE-HEARING PROVISION OF DOCUMENTS

The ICAC does not make available to a witness documents proposed to be put to the witness in a compulsory examination prior to that compulsory examination.

Prior to the commencement of a public inquiry, the ICAC may provide those persons it considers to be substantially and directly interested in the subject matter of the public inquiry with confidential electronic access to certain documents likely to be tendered as exhibits in the public inquiry. This will be done on a case-by-case basis by the ICAC. As a general rule, the ICAC will not otherwise make documents or other material available in advance of the public inquiry.

Application for access to the restricted website should be made on the approved application form. A copy of the application form may be obtained by contacting the person nominated on page 2 of your summons.

WHEN YOU GIVE EVIDENCE

Public inquiries and compulsory examinations are conducted and presided over by the Commissioner or an Assistant Commissioner.

The person presiding should be addressed as "Commissioner" whether s/he is the Commissioner or an Assistant Commissioner.

You can give your evidence on oath or affirmation.

As a witness you will be asked questions by a lawyer assisting the ICAC, referred to as "counsel assisting" or "counsel assisting the Commission". You might also be asked questions by lawyers appearing for other people involved in the investigation.

You must answer questions or produce documents when required. If you believe that answering any question or producing any document may be incriminating, you may object. If you object to answering a question or producing a document, you must still answer the question or produce the document, however, the evidence cannot then be used against you in any subsequent criminal or civil proceedings, except in relation to prosecutions

for offences under the ICAC Act. Evidence given by a public official may be used in disciplinary proceedings against that public official where the ICAC has made a finding in a report under section 74 of the ICAC Act that the public official has engaged, or has attempted to engage, in corrupt conduct.

If you think this situation applies to you, then you should speak with your lawyer. If you do not have a lawyer representing or advising you, then the presiding Commissioner will explain to you your right to object and the effect of such an objection.

A diagram (Form 4) is attached to help you familiarise yourself with the layout of the ICAC's public hearing room.

PROCEDURES FOR TAKING OF EVIDENCE

The ICAC is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.

When the ICAC is aware that evidence will be given, in public, of corrupt conduct by a person, the ICAC will endeavour, where practicable and where it will not prejudice the investigation, to inform the person in advance. The person may then choose to attend and hear the evidence, or obtain a transcript of evidence.

Where a serious allegation is made about a person in evidence in a public inquiry, the ICAC will try to give the person an early opportunity to respond, subject to the seriousness of the allegation and the circumstances of the investigation. Such response may be by evidence, in writing, or other means, as appropriate.

The ICAC may not necessarily wait until all evidence about a person has been heard before it takes evidence from that person. A witness may also be called to give evidence more than once during a hearing. However, anyone against whom substantial allegations are made will be given an opportunity to respond to all the relevant evidence.

The ICAC may make orders prohibiting publication of evidence, generally, or temporarily, or in specified circumstances, where the ICAC is satisfied that the direction is necessary or desirable in the public interest. Such orders are most often used in relation to compulsory examinations or to avoid prejudice to current criminal proceedings. Orders may be made for reasons including, but not limited to, the following:

- to protect the reputation of a person adversely named in evidence
- to prevent publication of an allegation pending a response by the subject of the allegation
- to protect the safety or welfare of a person
- to protect minors
- to protect trade secrets or law enforcement procedures

- for national security reasons.

PUBLIC INQUIRIES

Public inquiries are publicly promoted and are open to members of the public and the media. The following directions apply to the conduct of a public inquiry by the ICAC (“the Commission”).

Sitting times

1. The Commission ordinarily sits from Monday to Friday each week. Usual hearing hours are from 10:00am to 4:00pm, with a luncheon adjournment from 1:00pm to 2:00pm.

Authorisation to appear

2. The Commission may authorise a person to appear at a public inquiry or a specified part of a public inquiry if it is shown to the satisfaction of the Commission that the person is substantially and directly interested. Authorisation can be granted subject to conditions.
3. The Commission may withdraw authorisation to appear or make the authorisation subject to altered or additional conditions, at any time.
4. Authorisation to appear entitles the person to whom it is granted to participate in the proceedings of the Commission subject to the Commission’s control and to such extent as the Commission considers appropriate.

Legal representation

5. The Commission may authorise a person giving evidence at the public inquiry to be legally represented.
6. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The Commission will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:
 - a. it could be demonstrated that there is some reasonable purpose for seeking representation of that kind
 - b. the most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated
 - c. all of the lawyers involved give an undertaking, through the most senior lawyer, to inform the Commission immediately upon recognising that a conflict of interest has arisen.

Conduct of the public inquiry – witnesses

7. Subject to the control of the Commission, counsel assisting will determine which witnesses are called and the order in which those witnesses are called and examined. It may be necessary to call some witnesses to give evidence on more than one occasion.
8. The Commission may decide to receive the evidence of a witness orally or by statement. The Commission will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
9. Persons required to give evidence will be provided with appropriate notice of the time the Commission will call upon their summons to attend and give evidence. Witnesses with a particular period of unavailability are required to give notice of that unavailability to the Commission at the earliest possible opportunity.
10. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
11. All witnesses will be called to give evidence by counsel assisting, and then examined by counsel assisting. If there is more than one counsel assisting the Commission there may be circumstances in which the witnesses might be examined by more than one of the counsel assisting the Commission. The witness may then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest to do so. The witness may then be examined by his or her own legal representative. Counsel assisting may re-examine. Duplication and repetition must be avoided.
12. In determining whether a person has sufficient interest to cross-examine a witness, the Commission may call upon the cross-examiner to:
 - a. identify the purpose of the cross-examination
 - b. set out the issues to be canvassed
 - c. state whether a contrary affirmative case is to be made, and if so the details of that case.
13. The Commission may:
 - a. limit the particular topics or issues upon which a party can examine or cross-examine
 - b. impose time limits upon examination or cross examination.
14. Save as set out in paragraphs 15 to 18 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.

15. If the Commission is to be invited to disbelieve a witness, the material grounds upon which it is said that the evidence should be disbelieved should be put to the witness so that the witness may have an opportunity to offer an explanation.
16. The Commission expects that, where it is contended that deliberately false evidence has been given, or that there has been a mistake on the part of the witness on a significant issue, the grounds of such contention will be put.
17. What is stated in paragraphs 15 and 16 above is not intended to mean that:
 - a. Mere inconsistencies and unimportant differences in the evidence should be raised.
 - b. Once the grounds for disbelieving a witness have been put by one party, other parties need to put them again.
 - c. The grounds for disbelieving a witness need to be put where the Commission is on notice from statements made during the public inquiry by or on behalf of a party, or that party's evidence, or from the general way in which the party has conducted its previous questioning, or some similar source, that the witness's evidence is under challenge on those grounds.
18. Once a witness has been cross-examined on a particular issue no further cross-examination on that issue will be allowed unless the person wishing to cross-examine the witness on that issue can demonstrate the proposed cross-examination differs to a significant degree from the cross-examination that has taken place.
19. Any person wishing to have evidence of a witness or witnesses placed before the public inquiry must notify the Commission of the name of the witness, and provide a signed statement containing their expected evidence. Commission staff may interview the witness, and take further statements if necessary. Counsel assisting will decide whether or not to call the witness. An application may be made directly to the presiding Commissioner to call the witness only after the above procedure has been completed, and counsel assisting has refused to call the witness.
20. Leave may be granted to any affected person (under s 74(3) of the ICAC Act) to adduce mitigatory evidence bearing upon the exercise by the Commission of its powers under s 74A(2) of the Act. Any affected person wishing to adduce such evidence should apply for leave prior to the close of evidence at the public inquiry.

Conduct of the public inquiry – documents

21. Subject to the control of the Commission, counsel assisting will determine which documents are tendered, and the time at which they will be tendered.
22. A copy of any document proposed to be put to a witness must be provided to counsel assisting as soon as possible after a decision is made to use the document and in all cases prior to its intended use.
23. Prior to the commencement of the public inquiry, the Commission may provide those persons it considers to be substantially and directly interested in the subject matter of the public inquiry with confidential electronic access to certain documents likely to be tendered as exhibits in the public inquiry. This will be done on a case-by-case basis by the Commission. As a general rule, the Commission will not otherwise make documents or other material available in advance of the public inquiry.
24. One of the purposes of providing this access is to enable persons to identify whether any application should be made for a suppression order in relation to any document or any part of a document.
25. Copies of these documents will not otherwise be provided to any party. Additional documents may be tendered by counsel assisting during the course of the public inquiry. Where such additional documents are tendered, the Commission will provide a party with a copy of the relevant document where the party has a significant interest in the issues to which each document relates.
26. Any person wishing to have a document placed before the public inquiry must notify the Commission by providing a copy of the document. Commission staff may require the production of other documents. Counsel assisting will decide whether or not to tender any document. An application may be made directly to the presiding Commissioner to tender a document only after the above procedure has been completed, and counsel assisting has refused to tender the document.

Suppression orders

27. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
28. Parties granted confidential electronic access to documents should notify the Commission lawyer with carriage of the matter of any application for a suppression order in relation to any document or part of a document. Such notification is to be in writing and must be made as soon as possible. The application should clearly identify the material sought to be suppressed and the public interest grounds on which the material should be suppressed.

29. The presiding Commissioner will determine whether or not to hear oral submissions in support of such written applications.
30. Those making such written applications for suppression orders will be advised once the applications have been determined.

Publication of, and access to, evidence

31. In respect of all evidence, oral and documentary, the following ruling will apply until vacated either generally or in respect of particular evidence:
 - a. the testimony of any witness before the Commission may be published unless an order is made prohibiting the publication of particular evidence
 - b. any person (or the legal representative of that person) having leave to appear before the Commission will have access to any book, document or writing tendered in evidence for the purpose only of appearance before the Commission and subject to any other direction made by the Commission;
 - c. for the purpose of and to the extent necessary for the public reporting of the proceedings of the Commission, any authorised representative of a newspaper, magazine, radio station, online publication or television channel may inspect and take extracts from any book, document or writing tendered in evidence after it has been notified as available for inspection by counsel assisting, subject to the condition that:
 - i. it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
 - ii. any part of the contents thereof indicated by counsel assisting as unsuitable for publication must not be published without the leave of the Commission. Such leave can be sought, for example, if there is a restriction which is believed to obstruct proper reporting of any matter of significance. Any application for leave should be made in writing, in the first instance, to the Solicitor to the Commission.

Submissions

32. Unless otherwise ordered, at the conclusion of the evidence oral submissions will not be allowed but orders will be made for the making of written submissions. The Commission may limit the particular topics or issues which may be addressed, and impose time or page limits on submissions. Ordinarily, orders will be made requiring counsel assisting to provide written submissions within 14 days of the close of evidence and all other parties to provide their written submissions 14 days thereafter.

33. Unless otherwise ordered, all written submissions are subject to a suppression order under s112 of the *Independent Commission Against Corruption Act* that the submissions not be published or communicated to anyone except the Commission, the parties involved in the public inquiry and their legal representatives, or by Commission officers for statutory purposes or pursuant to further order of the Commission.

Liaison with the Commission

34. Any contact with the Commission made necessary by these directions, or other enquiries in respect of the conduct of the public inquiry, should be made through the Commission lawyer with carriage of the relevant investigation to which the public inquiry relates.

COMPULSORY EXAMINATIONS

Compulsory examinations are generally similar to public inquiries, except that:

- they are not publicly promoted
- members of the public, or classes of people, or individuals may be excluded from being present
- orders prohibiting publication of some or all of the evidence are made. Those present in the compulsory examination cannot talk to others about the compulsory examination, their evidence, or the fact that a compulsory examination has occurred, save that witnesses can talk with their legal representative.

These orders can be lifted or varied by further direction of the ICAC where the ICAC is satisfied that the further direction is necessary or desirable in the public interest. You may apply to the ICAC to have these orders lifted or varied on public interest grounds.

RECORDING YOUR EVIDENCE

Your evidence will be electronically recorded and a written transcript made from the recording.

Public inquiry transcript will be published on the ICAC's website – www.icac.nsw.gov.au – and can be accessed from that site. If you require a hard copy of the transcript you should complete the “Request for Hard Copy Transcript of Evidence” (Form 3) provided. The transcript of your evidence will then be sent to the address you have given or arrangements made for you to collect the transcript, **unless the evidence is subject to an order suppressing its publication.**

In the case of compulsory examinations the Commission does not give a witness access to their transcript of evidence.

WHAT HAPPENS AFTER I GIVE EVIDENCE?

After you have given evidence you will be advised by the presiding Commissioner whether it is necessary for you to return to give further evidence. If it is, you will be given a further time and date on which to attend.

If you are the subject of allegations of corrupt conduct, you or your lawyer will be given the opportunity to see what evidence is being given about you and, if appropriate, to examine the witness or witnesses who give such evidence.

It is the practice of the ICAC for submissions to be prepared by counsel assisting the ICAC when public inquiries have been held. These submissions set out any possible adverse findings that might be available against individuals. If there is any possibility that an adverse finding might be made against you, a copy of these submissions will be provided to you or your lawyers. You will be given an opportunity to make submissions in response.

ICAC REPORTS

After all public inquiries and sometimes after compulsory examinations, the ICAC prepares reports which are provided to Parliament and made public by the Presiding Officers.

Once a report is made public it is published on the Commission's website: www.icac.nsw.gov.au. If you are the subject of adverse findings, arrangements will be made to notify you of the likely date the report will be made public.

YOUR PROTECTION

It is an offence under the ICAC Act for anyone to dismiss a witness from employment or cause them injury or loss as a result of their assisting the ICAC.

If necessary, the ICAC will protect you from intimidation, harassment or threats to your safety.

Such situations rarely occur, but if you have any concerns about these issues please contact the ICAC officer named in the summons or the Solicitor to the Commission.

EXPENSES

As a witness you are entitled to reimbursement of reasonable expenses.

Loss of Income

You may claim for reimbursement for the loss of wages, salary or income for the time spent in hearings. The claim form must be signed by your employer when you claim reimbursement of wages or salary. If you are self-employed,

you must provide details of the methods used to calculate your loss of income, and you may be required to provide evidence of the actual loss.

Please complete Form 1 "Claim for Witness Expenses".

Fares

The ICAC will pay for your reasonable costs in getting to and from its premises on days that you are asked or required to attend to give evidence. This includes bus, train, ferry or taxi fares, and an allowance for kilometres travelled if your own vehicle is used. The ICAC will pay for travel by taxi in the inner metropolitan area. Receipts must be submitted for taxi fares claimed.

For country and interstate witnesses, the ICAC will normally arrange for travel by air. This can be arranged for you by phoning the ICAC officer named in your summons. Reimbursement for transport to and from the airport and between accommodation and the ICAC is the same as for local travel.

Please complete Form 2 "Claim for Witness Travel Expenses".

Meals

You are eligible to be reimbursed for reasonable costs of meals if your appearance at the ICAC, or related travel, prevent you from having the meal at home or making normal arrangements. The ICAC does not pay for alcohol.

Please complete Form 2 "Claim for Witness Travel Expenses".

Accommodation

The ICAC will arrange accommodation (including breakfast and, if appropriate, an evening meal) for country or interstate witnesses if an overnight stay is necessary. If you choose to make other arrangements, reimbursement will not exceed normal accommodation costs and will be subject to the presentation of receipts.

Please complete Form 2 "Claim for Witness Travel Expenses".

Submission of claims

Claims should be sent to:

The Independent Commission Against Corruption
GPO Box 500
SYDNEY NSW 2001
Telephone: 02 8281 5999 Fax: 02 9264 5364

CLAIM FOR WITNESS EXPENSES

NAME:

ADDRESS:

POSTCODE:

DAYTIME CONTACT NO.

ATTENDANCE DETAILS:	DATE(S)	TIME ARRIVED	TIME DEPARTED
.....
.....
.....

LOSS OF INCOME – EMPLOYED PEOPLE

EMPLOYER'S NAME:

EMPLOYER'S ADDRESS:

TOTAL LOSS OF WAGES CLAIMED: \$

INCOME (GROSS) PER ANNUM: \$

EMPLOYER'S CERTIFICATE

I certify that
(witness's name)

Will have wages/salary deducted from the time s/he is absent by reason of being a witness for the Independent Commission Against Corruption for the periods indicated above.

OR

Will be paid wages/salary for the time s/he is absent by reason of being a witness for the Independent Commission Against Corruption for the periods indicated above.

SIGNATURE OF EMPLOYER:

NAME AND TITLE:

DATED:

Payment direct to my employer is / is not authorised

LOSS OF INCOME – SELF EMPLOYED PEOPLE

I certify that I have lost actual income amounting to \$..... in connection with assistance given by me to the Independent Commission Against Corruption. This amount is calculated as follows:

.....
.....

Please note that you may be asked to verify your claim for actual lost income

SIGNATURE:

BUSINESS NAME:

DATED:

IMPORTANT PLEASE NOTE:

If payment is made direct to you for loss of income, this amount must be included in your next tax return.

CLAIM FOR WITNESS TRAVEL EXPENSES

NAME:

ADDRESS:

POSTCODE:

DAYTIME CONTACT NO.

CLAIM FOR TRAVEL:	TRAIN	\$
<i>(attach receipts and/or tickets)</i>	BUS	\$
	TAXI	\$
	OTHER:	\$
	PRIVATE VEHICLE: km	Engine Capacity
	<i>(please state kilometres travelled / engine capacity)</i>	

CLAIM FOR MEALS:	DATE	TIME	
<i>(attach receipts)</i>	\$
	\$
	\$
	\$
	\$
	\$
	\$
	\$

OTHER EXPENSES	DESCRIPTION	
<i>(attach receipts)</i>	\$
	\$
	\$
	\$

TOTAL AMOUNT CLAIMED: \$

I certify that the above particulars are true and correct.

SIGNATURE:

DATED:

REQUEST FOR HARD COPY OF TRANSCRIPT OF EVIDENCE

In the case of a public inquiry the transcript of evidence will usually be published on the ICAC's website – *www.icac.nsw.gov.au* – and can be accessed from the website. If you require a hard copy of the transcript you should complete this form. It is ICAC policy that, if requested, each witness may receive one free hard copy of the public inquiry transcript of their evidence. Any additional copies are charged at a set rate of \$1.10 per page.

This free hard copy transcript will be sent to your nominated address. Alternatively, you can make arrangements to collect the transcript from our office. However, if the transcript of the evidence is affected by an order restricting the publication it will ordinarily not be supplied.

THERE IS NO NEED TO COMPLETE THIS FORM IF YOU ARE HAPPY TO ACCESS YOUR TRANSCRIPT THROUGH THE ICAC WEBSITE.

If you complete this form please give it to the ICAC receptionist who will pass it on to the relevant ICAC officer.

NAME:

ADDRESS:

POSTCODE:

DAYTIME CONTACT NO.

OPERATION NAME:

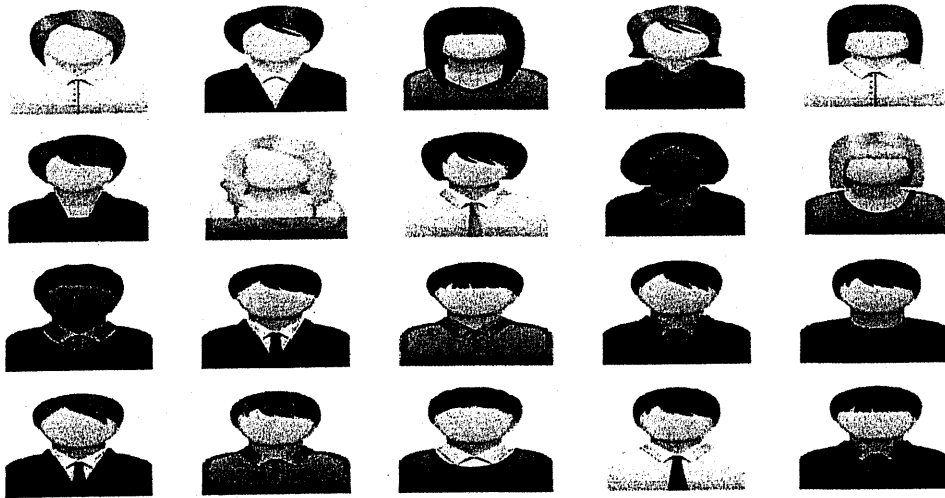
DATE OF INQUIRY:

MY REQUIREMENTS ARE: *(please tick)*

I want the free hard copy transcript of my public inquiry evidence sent to the address below *(please state if different to address listed above) and include the name of the addressee if different to your own name).*

OR

I want the free copy to be held at the ICAC reception desk for collection.



PUBLIC GALLERY

Other Legal Representative

BAR TABLE 2

Other Legal Representatives

Counsel Assisting ICAC

Instructing ICAC Staff

BAR TABLE 1

Transcript Sound Monitor

Associate

Witness

ICAC Commissioner

ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION

NEW SOUTH WALES

Level 7, 255 Elizabeth Street
Sydney NSW 2000 Australia

Postal Address: GPO Box 500
Sydney NSW 2001 Australia

T: 02 8281 5999

1800 463 909 (toll free for callers outside metropolitan Sydney)

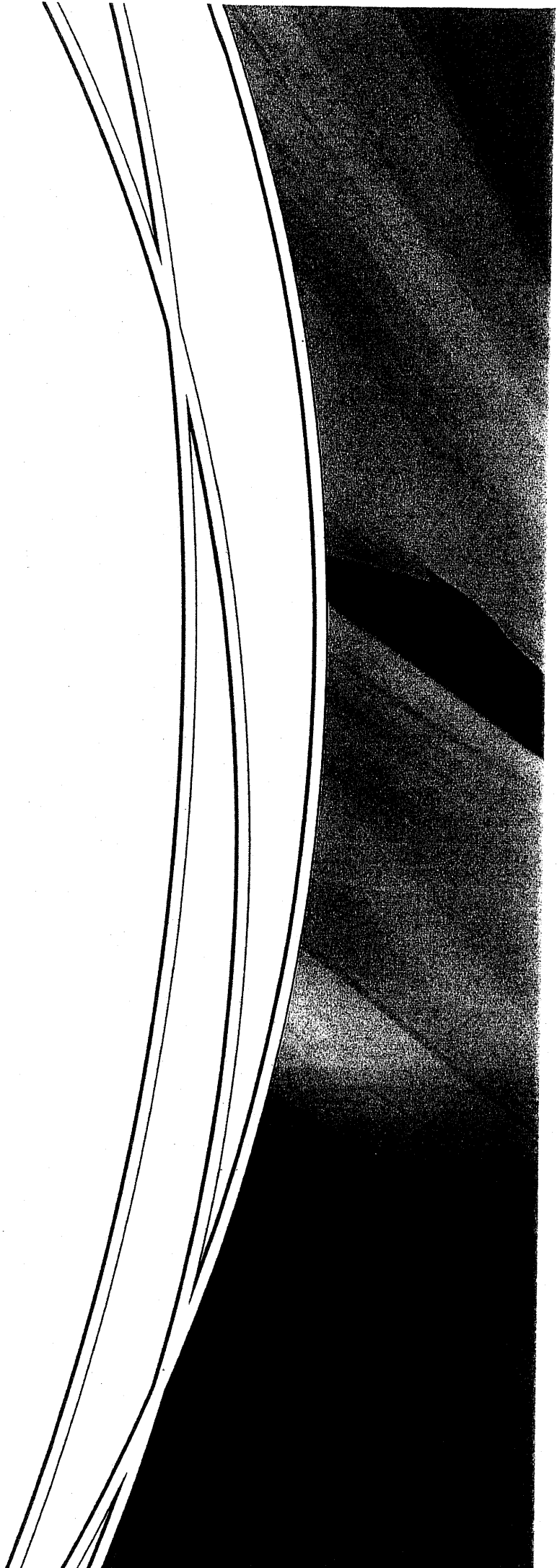
F: 02 9264 5364

TTY: 02 8281 5773 (for hearing-impaired callers only)

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business Hours: 9 am - 5 pm Monday to Friday



OPERATIONS MANUAL

PROCEDURE NO. 9

**PROCEDURES FOR OBTAINING AND EXECUTING
SEARCH WARRANTS**

APPROVED: 22 JULY 2009
REVIEWED: 28 MAY 2010
REVIEWED: 2 DECEMBER 2010

PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

01 GENERAL

1.1 Search warrants issued in New South Wales

Division 4, Part 5 of the ICAC Act and Division 4, Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (Except ss.69-73) apply to Commission search warrants.

Section 40 (4) of the ICAC Act provides for an officer of the Commission to make application to an authorised officer (as defined in the *Law Enforcement (Powers and Responsibilities) Act 2002*) or the Commissioner for a search warrant.

It is Commission policy that warrants be sought from authorised officers, and not the Commissioner.

1.2 Extra-territorial search warrants

The ICAC is enabled to make an application for extra-territorial search warrants under several interstate statutes:

VIC	<i>Crimes Act 1958</i>
ACT	<i>Crimes Act 1900</i>
WA	<i>Criminal Investigation (Extra-territorial Offences) Act 1987</i>
SA	<i>Criminal Investigation (Extra-territorial Offences) Act 1984</i>
TAS	<i>Criminal Investigation (Extra-territorial Offences) Act 1987</i>
NT	<i>Criminal Investigation (Extra-territorial Offences) Act 1985</i>
QLD	<i>Police Powers and Responsibilities Act 2000</i>

Assistance may be sought in obtaining interstate warrants from the Fraud Squad State Crime Command of the NSW Police. The Fraud Squad has template documents for use in making these applications and these can be readily adapted to suit an ICAC application. In addition, NSW Police has liaison officers in each of the above jurisdictions.

1.3 General warrants are invalid

A general warrant is bad at law. A warrant that purports to permit an unqualified search is likely to be struck down by a court as a general warrant. Evidence obtained under the purported authority of such warrants is obtained unlawfully. Courts insist on a high degree of specificity in a warrant not only in respect of the things for which the search is to be conducted, but also specificity in relation to the place from which the things are to be seized and the times within which the search and seizure may take place.

An example is a case in which search warrants obtained by the Royal Commission into the NSW Police Force failed on their face to indicate any connection with a matter under investigation by the Royal Commission and so failed to delimit the scope of the search. As a consequence the warrants were held to be invalid, as general warrants: see *MacGibbon & Anor v Warner & Ors*; *MacGibbon & Anor v Ventura & Ors*; *MacGibbon & Anor v O'Connor & Ors* (1997) 98 A Crim R 450.

02 APPLYING FOR A WARRANT

The applicant for a search warrant must have reasonable grounds for believing that:

- i) a thing is on the premises or will be within 72 hours; and
- ii) the thing is connected with a matter that is being investigated under the *ICAC Act*.

Reasonable belief is more than an idle wondering whether it exists or not. Reasonable belief requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

2.1 Drafting and Approval

The Case Officer may use the Case Officer's Checklist at Appendix B as an aid to ensure all steps required by this Procedure are taken. Use of this checklist is not mandatory.

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.
2. The Case Officer will submit a minute to the Executive Director, ID seeking authorisation to apply for a search warrant. The minute should set out why the application will be sought, the premises to be searched, resources to be used, and timeframes. The Executive Director ID will record authorisation on the Authorisation Checklist (Appendix A) attached to the minute.
3. The Chief Investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In the case of a search warrant to be executed on a parliamentary office approval must be obtained from the Commissioner or Deputy Commissioner.
4. The Case Officer is responsible for drafting the search warrant application using the legal macro¹. A separate application must be prepared for each warrant sought. The application must address:

¹ It is important to put all relevant information before the issuing officer, who must make a decision based upon reasonable grounds. The person making the application should have a thorough knowledge of the facts to support the information provided.

- the authority of the applicant to make an application for a warrant;
- the grounds on which the warrant is sought;
- the address and description of the premises;²
- a description of the thing being searched for and if known its location;³ and
- if a previous application was made and refused, the details of that application and its refusal and additional information that justifies the issue of a warrant.

If it is proposed to execute the warrant between 9:00pm and 6:00am, the application should address why this is necessary.

The issuing officer is also required to consider:

- the reliability of the information;
 - the nature and source of the information (see informers); and
 - whether there is sufficient connection between the thing(s) sought and the matter under investigation.
5. The Case Officer is responsible for ensuring that all information contained in the application is true and correct and all relevant matters are disclosed.
 6. The Case Officer will also draft the warrant⁴, Occupier's Notice and if needed, the cl.11 Certificate, using the legal macros.

It is an offence to give false or misleading information to an authorised officer.

Some common law cases have stated that there is a strict duty of disclosure of material facts by the applicant seeking the warrant. The facts may be ones that may (or may not) have affected the exercise of the authorised officer's discretion to issue the warrant. To avoid a warrant being struck down, it is sensible to include all material facts (in favour or against the issue of a warrant).

² **'Premises'**: *includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof.*

More than the address should be given. It should include a description of the premises, street number, unit number office location, any outbuilding, for example, garage, shed, granny flat and the common property, if applicable. It is advisable to conduct a visual sighting of the premises before conducting the search to ensure that there are no complicating factors.

If vehicles at the premises are to be searched, the warrant should say so and include details of vehicle make, colour, registration number, and owner, if known.

³ The warrant must identify:

- (i) the relevant documents or things believed to be on the premises; and
- (ii) state that these documents or things are connected with the matter under investigation.

The matter that is being investigated needs to be specified in the warrant. The reason is to let the occupier of the premises know the scope and purpose of the search, and also to set the bounds to the area of the search which the execution of the warrant will involve as part of the investigation.

⁴ In order to retain the greatest flexibility in operations a number of Commission officers should be named as authorised to execute each particular warrant.

7. The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief Investigator (who will satisfy him/herself of the relevance of the information upon which the application is based), to the Case Lawyer for review and settling.⁵ The Case Lawyer is to ensure the documents comply with the relevant provisions of the ICAC Act and *Law Enforcement (Powers and Responsibilities) Act 2002* and Regulation and is to identify any policy or other issues which the Case Lawyer believes should be brought to the attention of the Executive Director, Legal, that may affect approval. In the case of a search warrant to be executed on a parliamentary office the Case Lawyer should ensure as far as possible that the documents described in the warrant are not likely to be subject to parliamentary privilege.
8. The draft documentation and Authorisation Checklist will be referred to the Executive Director, Legal, for approval, both as to the documentation and the making of the application.
9. If the Executive Director, Legal, does not approve the documentation it is to be returned to the Case Lawyer for appropriate amendment. If the Executive Director, Legal, does not approve the making of the application he/she will discuss with the Executive Director, ID, and the Commissioner or Assistant Commissioner responsible for the investigation to resolve the issue.
10. If approved, the documentation is to be returned to the Case Lawyer who will provide it and the Authorisation Checklist to the Case Officer for submission to the Senior Property Officer for numbering. The Senior Property Officer will return the original warrant to the Case Officer and retain a copy. The Authorisation Checklist will be retained with the other records by the Senior Property Officer.
11. The Case Officer will then arrange for swearing and issue. A copy of the original signed application including the authorised officer's record of the application is to be obtained for Commission records.
12. Where the search warrant affects premises occupied by a public authority as defined in the *ICAC Act*, consideration shall be given as to whether any prior liaison should take place with a public official. Prior liaison shall not occur without the express approval of the Executive Director, ID.
13. If it is necessary to obtain a search warrant after normal business hours an appointment can be made at the Parramatta Local Court "Extended Registry". The Registry should be contacted in advance to make an appointment. Its contact numbers are 8688 1443 and 8688 1730.

⁵ It is important all documents contain identical descriptions of the premises and of the documents and other things to be searched for. This can most readily be achieved by copying that material from the application into each of the other documents.

03 **SEARCH WARRANT APPLICATION BY TELEPHONE**

Section 61 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides for an application to be made by telephone, radio, telex or other communication device where the warrant is required urgently and where it is not practicable for the application to be made in person.

Section 61(3) provides that an application must be made by facsimile if the facilities to do so are readily available.

The approval of a Chief Investigator is a pre-requisite to an application for the issue of a search warrant by telephone (or facsimile).

Where a Search Warrant is issued upon application made by telephone, the issuing officer will advise the terms of the warrant and the date and time it was approved. The Case Officer must then ensure that a written warrant is completed in those terms.

Although s.46 of the ICAC Act does not distinguish between telephone warrants and others it is unlikely that an issuing officer would allow more than 24 hours for the execution of a warrant obtained by telephone application.

04 **DISCLOSING IDENTITY OF INFORMANT**

The identity of a registered informant on whose information the application for a warrant is based, should if possible be omitted from the application. If such information is relied upon it should be indicated in the application that the information is from a registered informant. Consideration should also be given to whether there are any operational reasons why the identity of any other person who has supplied information should not be disclosed.

In each case before attending the authorised officer the Case Officer will discuss these issues with the Team Chief Investigator and a decision made whether or not to disclose the identity if pressed to do so by the issuing officer.

Where a decision is taken not to disclose identity and the issuing officer insists on knowing the application is to be withdrawn. The matter is to be reported to the Executive Director, ID and the Executive Director, Legal, so that consideration can be given to taking further action.

05 **PREVENTING INSPECTION OF DOCUMENTS**

The court is required to keep copies of the application for the warrant and the Occupier's Notice, together with the report to the authorised officer on execution of the warrant. The original search warrant is attached to that report. Generally, these documents are available for inspection by the occupier or by any other person on his behalf (Clause 10, *Law Enforcement (Powers and Responsibilities) Regulation 2005*).

Clause 10 permits an issuing officer to issue a certificate to the effect that the issuing officer is satisfied that:

- (a) such a document or part of such a document contains matter:
 - (i) that could disclose a person's identity, and
 - (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or
- (b) a document or part of a document contains matter that, if disclosed, may seriously compromise the investigation of any matter.

If the issuing officer is so satisfied, then the document or part of the document to which the certificate relates is not to be made available for inspection.

06 COVERT SEARCH WARRANT

Section 47 of the *Law Enforcement (Powers & Responsibilities) Act 2002* makes specific provision for the granting of a covert search warrant. However, s.46C of that Act limits the class of persons who can apply for a covert search warrant to certain authorised police officers, certain officers of the Police Integrity Commission and certain officers of the NSW Crime Commission.

Commission officers are not authorised under the Act to apply for a covert search warrant and therefore the Commission cannot make use of the covert search warrant provisions.

07 BRIEFING

The officer allocated the responsibility for the execution of a Search Warrant/s (Search Team Leader) shall be accountable to the Commission for the conduct of the search. Responsibility for the entire operation rests with the relevant Chief Investigator. The Search Team Leader shall, in consultation with the Chief Investigator:

- (a) assess the number of personnel required to undertake the roles of searchers video operator and exhibits officer;
- (b) ensure Team members are skilled in the operation of equipment to be used and that such equipment is in working order, ready for immediate use, and that sufficient consumables, such as batteries, are carried;
- (c) assess the need for equipment which will be required to accompany the search team, including but not limited to stills, camera, video camera, tripod/monopod, notebooks, torches, disposable overalls, a sharps container, property seizure sheets, cardboard boxes, various sizes of cipseal and paper bags, frangible seals to secure seized property, white cotton and disposable latex gloves, and equipment to gain access to the premises if force is likely to be required;
- (d) establish the search team/s under his/her personal direction; prepare Operational Orders, conduct a formal briefing session with the search team and Case Lawyer

(which will include delivering the Operational Orders), on the proposed execution of the warrant, ensure that each search team member reads and understands the authority of the warrant and is aware of his/her role and any identified potential risks together with treatments to minimise those risks. The Executive Director, ID shall be advised beforehand of the briefing session and attend if he/she considers it appropriate or necessary;

- (e) arrange for the search team/s to physically study the address and precise premises to be searched and be aware of the address and detail, i.e. whether brick or fibro house, office building, etc, and of special landmarks or peculiarities which readily identify them. It may be useful to use the Surveillance & Technical Unit to conduct a pre-search survey of the premises to obtain up to date video/pictures and to identify any potential risks such as uncontrolled animals and any potential barriers affecting entry such as security gates, grilles, lookouts and CCTV. The search team/s must be fully aware of the exact location and description of the premises to be searched, including entrances and other accesses to ensure that only the premises mentioned in the Warrant are entered.

The Exhibits Officer is responsible for:

- (a) making themselves aware of the property control procedure as it applies to Exhibit Officers as set out in Procedure 28 (Registration, Control and Disposal of Property);
- (b) the composition, care and control of the search kits - including ensuring that the search kit contains adequate consumables for the search;
- (c) maintaining the seizure records in the field including:
 - (i) Property Seizure Sheets (Appendix 'D');
 - (ii) General Receipts (Appendix 'C');
- (d) control of seized or volunteered property until such time as it is registered with Property.

The Case Lawyer is responsible for providing advice on any legal issues relating to the proposed execution of the warrant.

08 EXECUTION OF WARRANT

Under s.46 of the ICAC Act a search warrant ceases to have effect:

- (i) one month after issue; or
- (ii) if it is withdrawn by the person who issued it ; or
- (iii) when it is executed

whichever first occurs.

The Search Warrant authorises any person named in the Warrant to:

- (a) enter the premises, and
- (b) search the premises for documents or other things connected with any matter that is being investigated under the *ICAC Act*, and
- (c) seize any such documents or other things found in or on the premises and deliver them to the Commission.

A member of the Police Force, or a designated “senior Commission investigator”, named in and executing a search warrant may search a person found in or on the premises whom the member of the Police Force or “senior Commission investigator” reasonably suspects of having a document or other thing mentioned in the warrant. This power does not extend to Special Constables.

8.1 Person(s) named in the warrant must execute the warrant

At least one of the persons named in the warrant must attend and remain at the premises to be searched at the time the warrant is executed. In *Hartnett & Ors v State of New South Wales* (SC unrep 31.3.99) warrants were held not lawfully executed because the only person named in the warrants did not attend any of the premises to be searched at the time the warrants were executed. The officer was, instead, co-ordinating the operation from a command post and was not physically involved in any of the searches.

8.2 Times between which warrant can be executed

Search warrants issued under the ICAC Act can only be executed between 6:00 am and 9:00 pm and cannot be executed outside of those hours unless the warrant expressly authorises that the warrant may be executed outside of those hours.

When proposing the execution of a search warrant, officers should be conscious of the presence of young children on the premises. The potential for young children to become distressed should be considered. In appropriate cases the Search Team Leader should suggest to the parents that they explain to the children what is happening. If the presence of young children is considered a particular risk to the execution of the warrant the Executive Director, ID should be consulted.

A search conducted under a warrant which does not authorise an out-of-hours search is unauthorised by the warrant and evidence obtained out-of-hours is obtained unlawfully. In *Myers Stores Limited v Soo* (1991 2 VR 597) police officers who executed a warrant between 6:00 am and 9:00 pm, but continued to search after 9:00 pm without any express authority on the warrant, were held to have conducted an unlawful search **as regards that part of the search conducted after 9:00 pm**. This decision was applied by the NSW District Court in *Winter v Fuchs* (June 99) in similar circumstances.

8.3 Entry Announcement

Searches must not be conducted of unoccupied premises unless exceptional circumstances exist. If it is known that the premises will be unoccupied this fact must be made known to the authorised Justice at the time of application.

Pursuant to s68 of the *Law Enforcement (Powers and Responsibilities) Act 2002* one of the persons executing a warrant must announce that they are authorised to search the premises and provide the occupier with an opportunity to allow entry onto the premises.

This requirement need not be complied with if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the warranted is not frustrated. In such circumstances, reasonable force may be used to gain entry.

Upon access being gained to the premises mentioned in the Warrant, the Search Team Leader shall:

- (i) identify the search team as members of the Independent Commission Against Corruption;
- (ii) read and explain the Search Warrant to the occupier and produce it for inspection if requested (**NOTE: The Search Team Leader must retain possession of the Search Warrant**);
- (iii) serve occupier with the Occupier's Notice. If the occupier is not present, the notice must be served as soon as practicable after executing the warrant;
- (iv) invite the co-operation of the occupier; and
- (v) execute the warrant.

8.4 Service of the Occupier's Notice

A person executing a warrant is required, on entry onto the premises or as soon as practicable after entry onto the premises, to serve the Occupier's Notice on the person who appears to be the occupier and who is over 18 years of age (s.67 LEPR).

If no such person is present the Occupier's Notice must be served on the occupier within 48 hours after executing the warrant (s.67(4) LEPR).

If an Occupier's Notice cannot be practicably served within these time limits, the eligible issuing officer who issued the warrant may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the Occupier's Notice to the attention of the occupier. Such an order may direct that the Occupier's Notice be taken to have been served on the

occupier on the happening of a specified event or on the expiry of a specified time.

In *Black v Breen* (unreported, SCNSW, 27 October 2000) His Honour Ireland AJ held that the failure of the police officers to hand to the plaintiff a complete Occupier's Notice meant that the execution of the warrant was contrary to law. In that case the first page of the notice had been given to the occupier but not the second page.

8.5 Execution

In executing the warrant ICAC officers must:

- (i) use the minimum amount of force, where force is required;
- (ii) cause the least amount of damage necessary in the course of the search and entry;
- (iii) not unduly restrict the movement of occupants of searched premises, unless they are hindering the search;
- (iv) wear the approved ICAC identification jacket unless exempted by the Chief Investigator (such exemption only to be given in exceptional circumstances);
- (v) if not wearing an ICAC identification jacket, display prominently the ICAC official identification badge during the execution;
- (vi) only break open receptacles in the premises if reasonably necessary for the purpose of the search; and
- (vii) use such assistants as considered necessary.

It is the responsibility of the Search Team Leader to ensure strict compliance with the property seizure procedure. If property is volunteered then it is to be receipted using the form of receipt at Appendix 'C'. If property is seized then it is to be receipted using the form of the Property Seizure Sheet at Appendix 'D'.

In most cases it will be useful for a rough sketch of the floor plan to be drawn on the reverse side of the property seizure sheet and notations made as to where the relevant property was found. The interior of the premises should be photographed or video recorded, particularly the areas where the documents or other things were found.

Video recording of the entry and search is to occur without exception. This will afford reliable evidence of evidentiary items being located on the premises as well it may afford some protection from false allegations of misconduct or inappropriate behaviour by search team members.

Consent is not required for video recording.

Consent should be sought to sound record any conversations. The person(s) whose conversations will be recorded should be asked if they object to their conversation being recorded. It is an offence under the *Surveillance Devices Act 2007* to record a conversation without consent.

If, during the course of the search, any person agrees to a formal interview they should be told that the questions together with their responses will be electronically recorded. The accepted reasons on whether or not to administer the criminal caution apply. It is considered prudent to always warn the person of the consequences that could follow from knowingly providing false or misleading information.

8.6 Operation of Electronic Equipment

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to bring onto premises and operate any electronic and other equipment reasonably necessary to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant. The operation of equipment already at the premises to examine a thing is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

The Chief Investigator will determine what equipment should be used.

8.7 Removal for Inspection

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to remove a thing found on the premises to another place for up to seven working days for examination to determine whether it is or contains a thing that may be seized under the warrant;

- if the occupier of the premises consents, OR
- it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, AND
- there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

If a thing is moved to another place for examination the officer who issued the search warrant may extend the period of removal for additional periods not exceeding seven working days at any one time.

Where an item is removed the person executing the warrant must advise the occupier that the occupier may make submissions to the issuing officer and must give the occupier a reasonable opportunity to do so.

The Search Team Leader will determine whether any items are to be removed from the premises for the purpose of examination.

8.8 Access to and Downloading of Data

Section 75B of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to operate equipment at the premises being searched to access data (including data held at other premises) if that person believes on reasonable grounds that the data might be data that could be seized under the warrant. The equipment can be used to put any data that could be seized in documentary form so that it may be seized in that form.

The person executing or assisting in the execution of the warrant may;

- copy any accessed data to a disk, tape or other data storage device brought to the premises (or, with the consent of the occupier, copy the data onto such a storage device already at the premises) and
- take the storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.

The operation of equipment already at the premises to access data is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or data.

Any data obtained under section 75B that is not data that could be seized under the warrant must be removed from the Commission's data holdings and any other reproduction destroyed.

8.9 When is a Warrant Executed?

A warrant is executed when the search is completed and those authorised under the warrant have left the premises. It is not possible to execute a warrant with multiple entries, searches and seizures during the period that the warrant remains in force. A person cannot be denied access to any part of their property, so rooms etc cannot be locked up.

Where the Search Team Leader has executed a Search Warrant and is satisfied that the documents and things described in the warrant:

- (a) have been located and seized, or

(b) are not on the premises

he/she shall terminate the search.

If at any stage the search team leave the premises, there is no right of re-entry.

8.10 Rights of Occupier

The occupier of premises has the following rights:

- to see a copy of the warrant;
- to be present during the search and observe, provided they do not impede it. **(NOTE: There is no power for the investigators to require a person to remain on the premises, unless they have been arrested);**
- to be given a receipt for things seized;
- to request a copy of any document seized or any other thing that can be readily copied;
- to receive the occupiers notice.

09 EXECUTION ON LAWYER'S OFFICE

In executing a warrant on a lawyer's office care must be taken regarding any claim for legal professional privilege. Documents covered by legal professional privilege cannot be made the subject of a search warrant (*Baker v Campbell* (1983) 153 CLR 52).

Legal professional privilege attaches to communications only if the communication is for the dominant purpose of a lawyer providing legal advice or services for the purpose of existing or contemplated legal proceedings or obtaining legal advice. It does not protect:

- (a) documents prepared for other purposes, even if they are held for the purposes of legal proceedings or obtaining advice; eg title deeds, trust account records, business records, or photocopies of any unprivileged document,
- (b) communications made for a criminal purpose,
- (c) documents concerning the identity of a client or the fact of their attendance at their solicitor's office.

Guidelines for the execution of search warrants on legal offices have been agreed between the NSW Police Force and the NSW Law Society. These guidelines (with some minor modifications) are set out below and must be followed by Commission officers executing a search warrant on a lawyer's office.

1. Upon attendance at the premises of the lawyer or Law Society, the Search Team Leader should explain the purposes of the search and invite the lawyer or Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of an offence the Search Team Leader should say so.

Identification of all members of the search team should be provided.

2. If no lawyer, or representative of the Law Society, is in attendance at the premises then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the Search Team Leader or Chief Investigator in his/her discretion considers reasonable in all the circumstances to enable any lawyer or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.
3. The lawyer or Law Society should be provided with a copy of the search warrant in addition to being shown the original warrant, if production thereof is demanded by them.
4. A reasonable time should be allowed to the lawyer to enable him or her to consult with his or her client(s) or to the Law Society to enable it to consult with the legal representatives of the persons to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his or her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.
5. Having informed his or her client(s) of the position or the Law Society having informed the legal representatives of the persons to whose affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his or her client's/clients' instructions or the instructions of the legal representatives of the persons to whose affairs the documents relate, co-operate in locating all documents which may be within the warrant.
6. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:
 - (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the Search Team Leader as potentially within the warrant, the Search Team Leader should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents. If the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to

the Search Team Leader grounds upon which the claim is made and in whose name the claim is made.

b) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines set out below. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

7. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the Search Team Leader be placed by the lawyer and/or his or her staff, or the Law Society and/or its representatives, in a container which shall then be sealed. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the Search Team Leader and at the expense of the lawyer or Law Society before they are placed in the container.
8. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.
9. That list and the container in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the Search Team Leader, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his or her client(s) or the Law Society on behalf of the persons to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the clerk of the magistrate who issued the warrant or other independent party agreed upon by the lawyer or Law Society and the Search Team Leader (referred to below as the "third party") pending resolution of the disputed claims.
10. The list and the container in which the documents have been sealed shall then be signed by the Search Team Leader and the lawyer or a representative of the Law Society.
11. The Search Team Leader and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.
12. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the Search Team Leader or his agent or the third party or his or her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client or clients on whose behalf the lawyer asserted the privilege, or from the person or persons on whose behalf the claim has been made by the Law Society,

then no further steps shall be taken in relation to the execution of the warrant until either:

- (i) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
 - (ii) proceedings to establish the privilege have failed; or
 - (iii) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.
13. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third party into the possession of the registrar of the court in which the said proceedings have been commenced. The documents shall be held by the registrar pending the order of the court.
14. Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him or her as to the happening of those matters and shall request him or her, by consent, to release into the possession of the Search Team Leader all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him or her should be released, those documents.
15. In those cases where the lawyer or Law Society refuses to give co-operation, the Search Team Leader should politely but firmly advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant. The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the Search Team Leader considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

10 EXECUTION ON PARLIAMENTARY OFFICE

In executing a warrant on the office of a Member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any document which falls within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee.

Parliamentary privilege belongs to the Parliament as a whole, not individual members.

This procedure is based on the protocol recommended by the Legislative Council Privileges Committee in February 2006 (Report 33).

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.
5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer

with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.
16. Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.
17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

11 **SEARCH OF PERSONS**

11.1 **Personal Search Power**

Section 41(2) of the *ICAC Act* provides that a member of the Police Force, or a "senior Commission investigator", named in and executing a search warrant, may

search a person found in or on the premises who is reasonably suspected of having a document or other thing mentioned in the warrant.

Commission investigators who have received training in searching persons will be designated by the Commissioner as "senior Commission investigators" pursuant to s.41(3) of the Act. That fact will be endorsed on the back of their identification certificates.

11.2 Guidelines for Personal Searches

Any person should be asked if they have any items on their person before a search is commenced. Only **Frisk** and **Ordinary** searches should be performed.

'Frisk search': means a search of a person or of articles in the possession of a person that may include:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

'Ordinary search': means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove their overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items.

If a Senior Commission investigator believes that a **Strip** search is necessary approval should be obtained from the Executive Director, ID.

'Strip search': means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her garments for examination; and
- (b) an examination of the person's body (but not of the person's body cavities).

The search is to be conducted by a person of the same sex as the person to be searched. The search should be conducted in private with another person of the same sex as a witness to the search. If a witness of the same sex is not available within the search team then an independent witness should be arranged. Arrangements should be made through the Chief Investigator.

Persons under the age of 18 should not be searched without the approval of the Executive Director, ID. Wherever possible parents should be present during any such search.

The following details must be entered in the 'Search of Persons Register' held by the Executive Director, ID:

- (a) Full name of person searched
- (b) Date of birth of person searched
- (c) Sex of person searched
- (d) Date of search
- (e) Time of search (Start/Finish)
- (f) Place where search was conducted
- (g) Category/ies of search conducted
- (h) Name of investigator conducting search
- (i) Name of witness (contact details if an independent witness)
- (j) Reason for search (including reason for change of search category, if required)
- (k) Warrant Number
- (l) Description of any property located

12 SEIZURE – SPECIAL PROVISIONS

If, during the execution of the warrant a document or other thing is found that would be admissible in a prosecution for an indictable offence against the law of the Commonwealth, a State or Territory, the officer executing the warrant may seize the document or other thing if he/she believes on reasonable grounds that seizure is necessary to prevent its concealment, loss, mutilation or destruction or its use in committing such an offence (s.47, ICAC Act). The document or other thing does not have to be seized via the warrant.

13 DAMAGE TO PROPERTY

Where damage is caused to any property on the premises during the execution of a Search Warrant, the Search Team Leader shall cause:

- a note to be made of the location and extent of the damage;
- if necessary prepare a plan of and/or photograph the damage;
- make an official record of the circumstances as soon as practicable;
- arrange for the attendance of a senior Commission officer not connected with the execution of the Warrant to note and record details of the damage; and

- arrange for the premises to be secured if the occupants are not present.

The Executive Director, Legal is to be notified of any damage and provided with a copy of the report.

14 **RECEIPT OF PROPERTY AT COMMISSION**

The Exhibits Officer shall be responsible for the conveyance to the Commission of any documents or other property seized as a result of the execution of the Search Warrant until such time that it is registered with Property. The property and the property seizure sheets (and/or property receipt) shall be deposited with Property for recording. In the event that a Property Officer is unavailable because of short notice, lateness of the hour, i.e. night time, weekends etc, the property shall be securely stored and transferred to Property as soon as practicable. It must be possible to authenticate the chain of custody of property at all times.

15 **RETURN OF SEIZED DOCUMENTS**

Seized documents should be photocopied and either the original or a copy returned to the owner in accordance with the Commission's property procedures. An occupier requiring the prompt return of particular documents which are said to be vital to the conduct of the business/company shall be accommodated subject to the return not hindering the investigation. At the first opportunity following the execution of a search warrant, the Case Officer shall consult with the Case Lawyer and relevant members of the investigation team to cull the documents. Where there is any doubt as to the correctness of returning a document or providing a copy, the Case Officer shall confer with the Executive Director, ID.

16 **REPORT TO ISSUING OFFICER**

Irrespective of whether or not the warrant is executed the Case Officer will, in consultation with the Case Lawyer and using the Legal macro, prepare and forward to the issuing officer a written report stating whether or not the warrant was executed and, if it was, setting out the matters required by s.74 of the *Law Enforcement (Powers and Responsibilities) Act 2002* within ten days after the execution of the Warrant or the expiry date of the Warrant whichever first occurs. Copies of the Property Seizure sheets must accompany the Report to the issuing officer.

17 **DEBRIEF**

As soon as practicable following the execution of a Search Warrant, the Case Officer shall convene a debriefing session attended by the search team, the Team Chief Investigator, Case Lawyer, and any other personnel the Team Chief Investigator considers appropriate. The purpose of the debrief is to identify what went well as well as identify and if practicable suggest remedies for any sub-optimal performance caused by equipment, personnel, command & control, policy & procedure or legislation.

18 **FILING WITH PROPERTY**

The Case Officer is to ensure that copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer form are filed in Property.

The Case Officer will be responsible for providing the Senior Property Officer with the details required to be recorded on the Formal Powers data base.

AUTHORISATION CHECKLIST

THIS FORM MUST ACCOMPANY EACH STAGE OF THE APPLICATION

Item	Name & Date	Signature
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate.		
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to and approved by Executive Director, Legal.		

**ONCE COMPLETED THIS CHECKLIST MUST BE FILED WITH PROPERTY AND
RETAINED WITH THE RELEVANT SEARCH WARRANT DOCUMENTATION**

WARRANT HOLDER'S CHECKLIST

WARRANT HOLDER

NAME	POSITION

PREMISES SEARCHED

ADDRESS	SUBURB

DESCRIPTION OF PREMISES:

INDEPENDENT OFFICER

NAME	POSITION	LOCATION	CONTACT NUMBER

EXECUTION

TIME OF ENTRY	DATE
TIME OF DEPARTURE	DATE

OCCUPIERS NOTICE: Served Yes/No

NAME	DOB	POSITION

OTHER PERSONS ON THE PREMISES AT TIME OF EXECUTION

NAME	POSITION	ORGANISATION

VEHICLES PRESENT AT LOCATION:

REG NO.	STATE	DESCRIPTION	SEARCHED
			YES/NO
			YES/NO
			YES/NO

MEMBERS OF SEARCH TEAM/PERSONS ASSISTING COMMISSION OFFICERS

NAME	POSITION

Item
Case Officer consults with Case Lawyer whether sufficient legal basis for search warrant
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate
Case Officer has identified all resources (people/equipment, non ICAC personnel, police, and computer forensic officers) necessary to conduct the search and has obtained approval to use those resources. All equipment needs to be checked to ensure it is in a serviceable condition
Case Officer prepares the draft Application, Warrant, Occupier's Notice and, if required, cl.11 Certificate and submits to Chief Investigator for review
Operations Adviser to liaise with NSW Police re any police assistance required
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to Case Lawyer (through the Chief Investigator) who reviews and settles documentation
Case Lawyer provides all documents to Director of Legal for review and approval
Originals of all documents and Authorisation Checklist submitted to Property Manager for registration.
Case Officer makes an appointment with authorised officer, then attends court and swears the warrant. A copy of the application should be requested from the issuing officer once their notations have been included and it has been sworn. This copy is to be provided to the Property Manager
Nominated officer to prepare Operational Orders and Chief Investigator (or nominee) briefs search teams on the proposed execution and their roles
Report to issuing officer completed by Case Officer in consultation with Case Lawyer. Copy given to Senior Property Officer
Case Officer ensures copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer forms are filed in Property.

INDEPENDENT COMMISSION AGAINST CORRUPTION

RECEIPT

PROPERTY RECEIVED BY: _____

AN OFFICER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ON _____

ON THIS DATE, PROPERTY AS LISTED HEREUNDER/

DESCRIBED IN ATTACHMENT

WAS RECEIVED FROM _____ OF

SIGNED: _____

TITLE: _____

DATE: _____

PROPERTY SEIZURE SHEET

OPERATION: _____

ADDRESS: _____

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Name/Signature - Occupier

Name/Signature - Property Officer

Date: _____

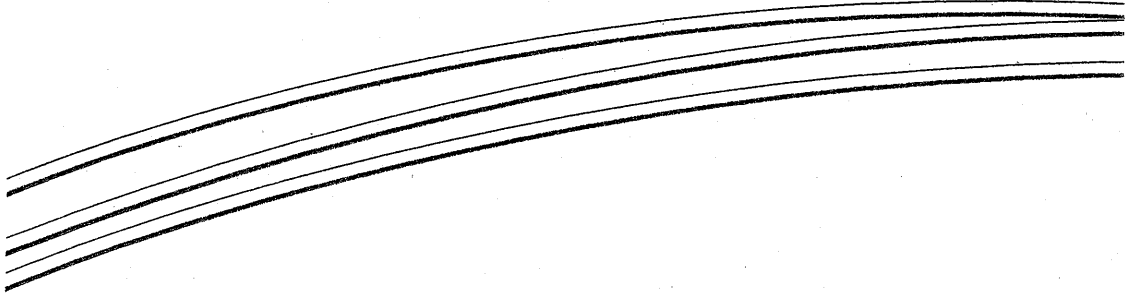


I·C·A·C

**INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**ICAC CODE OF
CONDUCT**

MAY 2015



This publication is available on the Commission's website www.icac.nsw.gov.au and is available in other formats for the vision-impaired upon request. Please advise of format needed, for example large print or as an ASCII file.

ISBN 978 1 921688 32 4

© May 2015 – Copyright in this work is held by the Independent Commission Against Corruption. Division 3 of the *Copyright Act 1968* (Cwth) recognises that limited further use of this material can occur for the purposes of "fair dealing", for example study, research or criticism, etc. However if you wish to make use of this material other than as permitted by the Copyright Act, please write to the Commission at GPO Box 500 Sydney NSW 2001.

Level 7, 255 Elizabeth Street
Sydney, NSW, Australia 2000

Postal Address: GPO Box 500,
Sydney, NSW, Australia 2001

T: 02 8281 5999

1800 463 909 (toll free for callers outside metropolitan Sydney)

TTY: 02 8281 5773 (for hearing-impaired callers only)

F: 02 9264 5364

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business Hours: 9.00 am - 5.00 pm Monday to Friday



Contents

1. Introduction by the Commissioner	2
2. Our conduct as Commission officers	4
2.1 Our employment	4
2.2 Ethical behaviour and decision-making	5
2.3 Conflicts of interest	5
2.4 Gifts, benefits, bribes or favours	6
2.5 Use of public resources	7
2.6 Political, community and personal activities	7
2.7 Outside employment or other activities	8
2.8 If we leave the Commission	9
3. Our workplace	10
3.1 A workplace free of discrimination, harassment and bullying	10
3.2 A workplace that is safe and secure	10
4. Our obligations regarding Commission information	11
4.1 Using and protecting confidential information	11
4.2 Making public comment on the Commission's work	12
4.3 Intellectual property	13
5. Unacceptable conduct	14
6. Accountability and reporting	15
6.1 Misconduct	15
6.2 Corrupt conduct, maladministration, waste or government information breach within the Commission	16
6.3 Reporting unacceptable behaviour outside the Commission	17
6.4 Breaches of the <i>Code of Conduct</i>	18
7. Applicable legislation	18



1. Introduction by the Commissioner

The Independent Commission Against Corruption (ICAC) plays an important role in strengthening the integrity of the public sector in NSW.

In investigating and working to minimise corrupt conduct, the Commission continually updates its skills, resources and systems to respond to and anticipate new and emerging forms of conduct.

The Commission was established to tackle corruption in the NSW public sector. It has three principal functions: investigation, corruption prevention and

public education. These functions can be properly and effectively carried out only if every officer acts in accordance with their public duty, and the trust placed in them by the community.

This *Code of Conduct* sets out the principles we are expected to uphold, and prescribes specific conduct in areas considered central to the exercise of the Commission's functions.

The code applies to all employees of the Commission and other persons engaged to do work for the Commission. (Where the code says "Commission officers", this includes other persons engaged to do work for the Commission).

Any one of us may be faced with ethical dilemmas in both our working and personal lives. The Commission's *Code of Conduct* has been developed to guide us in making decisions and in determining an appropriate course of action that is supported by our values (see box on page 3). We are committed to certain fundamental values in all our interactions with public sector agencies, contractors, other organisations, individuals and our staff.

As individuals, we are responsible for our own actions. In the event that any of us becomes aware of, or witnesses, unsatisfactory actions by other Commission employees or persons engaged by the Commission, each of us

is obliged to report that to a senior staff member or to the Solicitor to the Commission.

Breaches of the code, or any of the principles and guidelines that it describes, may lead to the Commission taking disciplinary action.

If you are unsure of any aspect of this code, consult your manager, an executive director, or the manager human resources and administration.

Yours sincerely



The Hon Megan Latham
Commissioner

Our values

Advance the public interest.

Act ethically and with integrity.

Be fair, impartial and accountable.

Strive for excellence.

Be tenacious and professional in pursuing our aim.

Respect each other and appropriately support each other with an emphasis on teamwork.

Preserve the ICAC's independence.

2. Our conduct as Commission officers

The name and powers of the Commission must be used with restraint, and with an awareness of their potential effect on individuals. These powers must never be used to gain personal advantage or pursue personal issues.

2.1 Our employment

By accepting employment or engagement with the Commissioner of the ICAC, we are obliged to be aware of and comply with this *Code of Conduct* and undertake to:

- engage in personal or professional conduct that will uphold the reputation of the Commission
- abide by the secrecy and confidentiality provisions of the *Independent Commission Against Corruption Act 1988* (the ICAC Act)
- in accordance with Commission policies and regulations, fully and openly disclose to the Commission personal particulars and financial or other interests. Any significant changes to those interests should be disclosed.

We must be continually alert to our individual employment obligations to ensure we are acting ethically, responsibly and productively.

We are committed to certain fundamental values in all our interactions with public sector agencies, other organisations, contractors, individuals and our staff.

2.2 Ethical behaviour and decision-making

We are obliged to meet the same standards of ethical behaviour and accountability that the Commission promotes in its dealings with other government organisations.

We should:

- treat members of the public, officers of the Commission and other public officials with respect, courtesy, honesty and fairness, and have proper regard for their interests, rights, safety, health and welfare
- ensure that our work habits, behaviour and personal and professional relationships at the workplace contribute to a harmonious and productive work environment
- perform our work honestly, diligently and with commitment
- make decisions in a fair and timely manner, giving due attention to relevant information, legislation and Commission policies and procedures
- respect diversity of thought, experience and skill
- observe common courtesies and etiquette in terms of day-to-day relationships
- comply with lawful or reasonable instructions given by an authorised colleague.

2.3 Conflicts of interest

The work of the Commission must not be compromised or affected by any personal interest.

A conflict of interest arises when our public duty conflicts with a private interest that we may have. The public interest must come first on all such occasions.

Conflicts of interest, or the perception that they have arisen, can do great damage to the reputation of the Commission and its staff.

We can all have real, potential or perceived conflicts of interest. These can be financial or non-financial. It is our responsibility to ensure that the situation is properly managed, including by reporting it to our manager and advising our manager of any changes to that situation.

We must check our *Declaration of Interests* at regular intervals, and make amendments to reflect any changes in our interests as they occur.

If in doubt, seek advice from your manager, the security and risk management officer, the manager human resources and administration, or an executive director. For more information, refer to our Conflicts of Interest Policy.

2.4 Gifts, benefits, bribes or favours

We should never create the impression that the Commission, or any of its officers, is being influenced by any person or organisation.

As Commission officers, we may be offered gifts, benefits, travel, hospitality or other inducements during the course of our work. The acceptance of gifts and other benefits has the potential to compromise our position by creating a sense of obligation in the receiver and therefore can undermine our impartiality. It may also affect the public perception of the integrity and independence of the Commission and its officers.

We should never solicit any money, gift or benefit and should never accept any offer of money. To do so may constitute bribery. Bribery is soliciting, receiving or offering any undue reward. A reward can encompass anything of value and is not limited to money or tangible goods. The provision of services may amount to a reward. If we are offered a bribe or reward, we should report it to the Solicitor to the Commission.

There are some circumstances when to refuse a gift would be perceived as rude or offensive.

We must exercise sound judgment when deciding whether or not to accept a gift or other benefit. Officers should ensure that the *Gifts and Benefits Declaration* is completed and submitted. If unsure, seek advice from your manager and consult our Gifts and Benefits Policy.

2.5 Use of public resources

Public resources must be used efficiently and effectively.

The resources we use at work, including our time, are publicly funded. These resources include—but are not limited to—facilities, computers, printers, photocopiers, motor vehicles, the internet, mobile telephones, credit and fuel cards, and people. Because these resources are publicly-funded, our use of them needs to be efficient and appropriate.

It is our obligation and responsibility to use publicly-funded resources in accordance with government legislation and policy. Limited private use of the Commission's resources may be permitted in some cases. However, our private use of the Commission's resources, including our time, should be short, infrequent, and should not interfere with Commission work.

Further guidance about managing our use of the Commission's resources can be found in our Phone Policy, Private Use of Commission Property Policy, Use of Commission Vehicle Policy, Electronic Mail Policy and Procedures, External Systems Access Policy, Internet Access Policy, and Cab Charge Procedures Policy.

2.6 Political, community and personal activities

As individuals, we have the right to participate in political and community activities and to pursue personal interests, provided we do so in a private capacity and do not allow a conflict of interest to arise with our position at the Commission.

We must ensure that any participation in party political activities does not conflict with our primary duty to advance the public interest in a politically neutral manner while undertaking our Commission duties.

We must also be aware that involvement in, or association with, a political party may limit or prevent our involvement in particular Commission investigations and projects. This is because the Commission can be required

to deal with matters that are politically controversial and sensitive.

In participating in any political, community and personal activity we must ensure that:

- any comment we make or discussion we have does not cast doubt on our ability or willingness to implement Commission policies and guidelines objectively
- we do not engage in private political activities in the work environment
- we do not use Commission resources to assist us in our political, community or personal activities
- we do not use information obtained through our work at the Commission to assist our political, community or personal activities, or make such information known to any other person
- we do not misrepresent the position of the Commission on any issue.

It is our obligation to ensure that any involvement in political, community or personal activities is understood to represent our personal views as a private citizen. It is also our responsibility to ensure that our manager is made aware of any political association that may affect, or be perceived to affect, a matter that we encounter in our day-to-day work.

2.7 Outside employment or other activities

Outside employment refers to a situation where a person works for a public agency but also engages in paid or unpaid work for another organisation (private or public) or voluntary work. It includes operating a private business and providing paid consultancy services as well as partnerships and directorships of companies.

Employees must carefully consider whether their employment with the organisation offering them outside employment may adversely affect the performance of their Commission duties and responsibilities, the reputation of the Commission, or may give rise to a conflict of interest.

Prior to engaging in any outside employment or other professional activity we should each seek advice from our manager. We must not make any commitment, nor engage in outside employment, until formal approval has been given by the Commissioner.

The Commission takes a very strong view on outside employment and only in exceptional circumstances would it support an application for outside employment.

For further details regarding outside employment, and how to apply for approval, refer to our Outside Employment Policy.

The Outside Employment Policy also makes reference to the obligations of contractors, consultants and agency staff to formally advise the Commission of any outside employment undertaken while engaged at the Commission.

2.8 If we leave the Commission

We have an obligation to carry out our work professionally, impartially, with integrity and in the best interests of the Commission.

If we intend to accept a position with another organisation, we should advise our executive director as soon as possible so that any conflict or potential conflict of interest can be managed.

When we leave the Commission, in accordance with the ICAC Act, we should respect the confidentiality of information that we have come across in our work and the Commission's intellectual property rights over material produced by the Commission, including material produced by us while at the Commission.

When we cease duty with the Commission, we cannot take any Commission resources such as manuals, documents, materials or other information or equipment, unless authorised. These items are the property of the Commission.

Being a former employee of the Commission does not entitle a person to favourable treatment or access to confidential information.

3. Our workplace

We should treat everyone with respect.

3.1 A workplace free of discrimination, harassment and bullying

We are required to deal with individuals and organisations fairly, properly and with integrity, as well as recognise that each individual has rights as a citizen.

Discrimination and partiality, either within the Commission or in dealings with people and organisations outside the Commission, are unacceptable.

We are all obliged not to harass, bully or discriminate against our colleagues or members of the public on the grounds of gender, marital status, pregnancy, age, race, ethnic or national origin, disability, carer responsibilities, transgender, religious beliefs, sexual orientation, medical conditions, political and trade union affiliations.

We should take all necessary steps to prevent and deal with harassment, bullying and discrimination in our work environment and to report it if it occurs.

For more information refer to our Bullying and Harassment Prevention Policy, the Equal Employment Opportunity Policy and the *Anti-Discrimination Act 1977*.

3.2 A workplace that is safe and secure

Safety

We are expected to understand our responsibilities and obligations under work health and safety (WHS) legislation. We should be proactive in ensuring that our workplace is safe and secure for everyone, including identifying, assessing and reporting safety risks and hazards.

For more information refer to our WHS Policy, Workplace Injury and Management Policy, and Workers Compensation Policy.

We have an obligation to ensure that personal use of alcohol or other drugs does not affect our performance or safety, or the performance or safety of others. Inappropriate consumption of alcohol or other drugs may adversely affect the image of the Commission.

For more information, refer to our Managing Alcohol and Other Drugs Policy.

Security

We have obligations to keep our workplace secure by being aware of, and reporting, suspicious visitors and unusual events. It is important that we are familiar with our security policies and procedures.

For more information, refer to our Anti Tail-Gating Procedure, and Security Passes and Cards Policy.

4. Our obligations regarding Commission information

The security of information and protection of persons working, or dealing, with the Commission must be assured.

4.1 Using and protecting confidential information

Commission work involves access to confidential information. We must not disclose any information that we acquire during the course of our work except in the exercise of the Commission's functions. To do so may be an offence under section 111 of the ICAC Act.

We are obliged to ensure that we deal with information appropriately and use it only for the purposes of the Commission's work. Information may be disclosed in accordance with the Commission's Security of Sensitive Material Policy, or if the Commissioner certifies that it is necessary in the public interest to do so.

We should also exercise caution and sound judgment in discussing such information with other Commission officers. Normally, information should be limited to those who need it to conduct their duties, or who can assist us to carry out our work because of their expertise.

We should remember that former Commission employees are not given favourable treatment or access to confidential information.

Improper use of information could result in harm to another person, interfere with the integrity of an investigation or otherwise reduce the effectiveness of the Commission. We must not use information to gain a personal or commercial advantage for ourselves or another person.

Commission files and other confidential documents and information are not to be removed from the premises except in accordance with the Commission's security policies and procedures. If in doubt as to how to manage or secure sensitive material, consult our Security of Sensitive Material Policy or your manager.


4.2 Making public comment on the Commission's work

Only officers authorised by the Commissioner can make official public comment about the Commission.

The unauthorised or improper release of information to the media may compromise an investigation, adversely affect the reputation or safety of individuals, or undermine public confidence in the Commission.

In general, Commission officers are not authorised to make official public comment about the Commission. It is Commission policy that any media enquiries must be immediately referred to the manager communications and media.

We are able to discuss Commission work that is already in the public domain, such as published reports and discussion papers, annual reports, public relations material, transcripts of public hearings, media releases and public addresses.



We should ensure that others are aware that we are only discussing material that is in the public domain, to avoid the perception that we may be telling people something that is confidential. This is a good rule to observe, for example, when talking to family, friends or acquaintances, when on public transport, in social settings, or at a café, party or pub.

If uncertain as to whether information is in the public domain, consult the manager communications and media or your manager.

For more information, refer to our Policy and Practice in relation to the Media.

4.3 Intellectual property

We should respect the Commission's intellectual property rights over material it produces.

Anything we develop, invent or create, either alone or in collaboration with others in the course of our employment or engagement with the Commission, remains the intellectual property of the Commission.

On occasion, it may be in the public interest for the Commission to share its intellectual property with other agencies, but this must be authorised by the Commissioner.

If we leave the Commission, we should respect the Commission's intellectual property rights over its material.

For more information, refer to our Intellectual Property Management Policy.

5. Unacceptable conduct

Unacceptable conduct is conduct that is unethical, unfair, unlawful or corrupt, or involves maladministration or serious and substantial waste.

It is critical that, as Commission officers, we practise the conduct we expect of others. The integrity and public image of the Commission could be seriously compromised if any of us engage in conduct that is corrupt, unlawful, unethical or unfair.

The Commission will not tolerate any officer engaging in misconduct, corrupt conduct, maladministration, serious and substantial waste of public resources or government information breach.

Misconduct may involve deliberate acts or acts that contravene the ICAC Act, the *Code of Conduct*, or other Commission policies. Misconduct refers to many different factual situations that are considered under legislation or by the Commission to be unethical, unfair or unlawful.

Misconduct includes, but is not limited to, acts of carelessness, neglect, deceit, bullying, discrimination, harassment, or the misuse of position or information arising from a conflict of interest, as well as taking reprisal action against someone for making a public interest disclosure (see section 6.2 of this code). Misconduct can include conduct that happened while an officer was not on duty, or before an officer was appointed to his or her position.

Corrupt conduct occurs when a public official uses or attempts to use his or her position for personal advantage or to improperly favour others. As public officials, Commission officers have specific powers, functions and knowledge because of the positions we hold. Corrupt conduct can also occur when a member of the public influences, or attempts to influence, a public official to use his or her position for a purpose other than the benefit of the public.

Serious and substantial waste refers to uneconomical, inefficient or ineffective use of resources resulting in loss or waste of public funds and resources. Serious and substantial waste might be systemic (for example, where there is a pattern of waste that might be low-level or involve large quantities) or it might be absolute (for example, where \$200,000 is spent on supplies never used).

Maladministration includes action—or *lack of action*—of a serious nature by a public official that is:

- against the law
- unreasonable, unjust, oppressive or discriminatory or
- based wholly or partly on improper motives.

Government information breach

For more information on these definitions, refer to the *Ombudsman Act 1974*, the *Public Finance and Audit Act 1983*, the *ICAC Act*, the *Public Interest Disclosures Act 1994* (the *PID Act*) and the *Government Information (Public Access) (GIPA) Act 2009*.

6. Accountability and reporting

We are required to comply with the principles and guidance in the Commission's *Code of Conduct*.

If we suspect or become aware of conduct inside the Commission that is unethical, unfair, unlawful or corrupt, or which involves maladministration or serious and substantial waste, we should promptly report it to our manager, the Solicitor to the Commission or the Commissioner.

6.1 Misconduct

If we become aware of conduct that is unethical, unfair or unlawful, such as bullying, harassment, or involving a breach of this code, we should report it to our manager or to the Solicitor to the Commission. If the matter concerns the Solicitor to the Commission, it should be made known to the Commissioner directly.

For further information, refer to our policy on Procedures Relating to the Handling of Complaints of Misconduct Against Staff.

6.2 Corrupt conduct, maladministration, waste or government information breach within the Commission

If we become aware of conduct that may involve corrupt conduct, maladministration, a breach of GIPA legislation or serious and substantial waste, we should promptly report it. The PID Act will generally be applicable to complaints made by officers about such conduct to a manager, the Solicitor to the Commission, the Commissioner or to the Inspector of the ICAC.

We should report such conduct that we suspect or encounter in the course of our duties. We should also make a report if we suspect that another Commission officer is engaged in corrupt conduct, even if that corrupt conduct is *unrelated* to the officer's duties at the Commission.


Public interest disclosures

Under the PID Act, a public interest disclosure is a voluntary report by a public official about corrupt conduct, maladministration, a GIPA breach or local government pecuniary interest breach, or serious and substantial waste within the NSW public sector. The PID Act acknowledges the difficulty we may face when making a report about another public official.

The PID Act provides certain protections against reprisals for employees who report such matters and makes it an offence for detrimental action to be taken against a person for making a public interest disclosure. The PID Act applies to complaints made about the actions of public officials from other agencies as well as those involving the agency by which the public official is employed.

Internal reports by staff that fall within the PID Act will be treated as a "public interest disclosure" and handled in accordance with the Commission's Reporting of Public Interest Disclosures by Commission Officers Policy.

We can make a public interest disclosure in the knowledge that it is an offence to take detrimental action against a person in reprisal for making such a disclosure. If we believe that we have been detrimentally treated for having made a public interest disclosure, we should report this directly to the Commissioner.



The internal investigation of complaints against staff is the responsibility of the Solicitor to the Commission, who advises the Commissioner. Internal investigations are ordinarily conducted by a member of the executive, and a report submitted to the Commissioner for consideration of appropriate action. In the case of more serious or difficult investigations, outside assistance may be engaged.

Some staff may prefer to make a complaint to someone outside the Commission. Complaints involving corrupt conduct, maladministration or serious and substantial waste on the part of Commission officers may be made to the Inspector of the ICAC. The Inspector is an investigating authority for the purposes of the PID Act and has jurisdiction to investigate such complaints.

The Auditor General does have power to investigate allegations of serious and substantial waste. An allegation by a Commission officer to the Auditor General, however, is not a public interest disclosure under the PID Act. To be a public interest disclosure, it must be made to the Inspector of the ICAC.

6.3 Reporting unacceptable behaviour outside the Commission

The nature of our work means that from time-to-time we may become aware of suspected corrupt conduct that has not been otherwise reported. As Commission officers, it is our responsibility to lead by example in reporting suspected corrupt conduct.

For example, we may personally observe a public official engage in a suspect act, a friend may tell us something because we are a Commission employee, or someone may seek to enlist us into an improper arrangement during the course of conducting government business.

Although we are not obliged to report corrupt conduct that we may suspect or encounter by the general public *outside* the course of our duties, we are encouraged to do so. We should make such reports in writing to our manager or to the Solicitor to the Commission.

6.4 Breaches of the Code of Conduct

By accepting a position or engagement with the Commission we have agreed to abide by this *Code of Conduct*.

Breaches of the code or any of the principles and guidelines that it describes, may lead to the Commission taking disciplinary action. Disciplinary action may include counselling, official notification of unsatisfactory performance, dismissal, prosecution, and a number of other measures described in our Misconduct, Unsatisfactory Performance and Serious Offences Policy.

7. Applicable legislation

- *Anti-Discrimination Act 1977*
- *Crimes Act 1900*
- *Independent Commission Against Corruption Act 1988*
- *Work Health and Safety Act 2011* and Regulation 2011
- *Privacy and Personal Information Protection Act 1998*
- *Public Interest Disclosures Act 1994*
- *Public Finance and Audit Act 1983* and Regulation 2010

Refer to the ICAC intranet for the relevant Commission policies.

When we are faced with an ethical dilemma, we should ask ourselves the following questions:

- Is it legal?
- Is it consistent with Commission values, principles and policies?
- Do I think it's the right thing to do?
- What will be the consequences for my colleagues, the Commission and me?
- What will be the consequences for other parties?
- Can I justify my actions?
- What would be the reaction of my family and friends if they were to find out?
- What would happen if my conduct became front page news?

If you are unsure of the answer or what to do, speak to your manager or a more senior Commission officer.



INDEPENDENT COMMISSION
AGAINST CORRUPTION

Level 7, 255 Elizabeth Street
Sydney, NSW, Australia 2000

Postal Address: GPO Box 500,
Sydney, NSW, Australia 2001

T: 02 8281 5999

1800 463 909 (toll free for callers outside
metropolitan Sydney)

F: 02 9264 5364

TTY: 02 8281 5773 (for hearing-impaired callers only)

E: icac@icac.nsw.gov.au

www.icac.nsw.gov.au

Business Hours: 9.00 am - 5.00 pm Monday to Friday

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE INDEPENDENT COMMISSION AGAINST CORRUPTION
AND
THE INSPECTOR OF THE
INDEPENDENT COMMISSION AGAINST CORRUPTION

This Memorandum of Understanding ("MOU") is made on this day the 29th of MAY 2015 between the Independent Commission Against Corruption ("the Commission") and the Inspector of the Independent Commission Against Corruption ("the Inspector").

1. BACKGROUND

- 1.1 The Inspector's role was created by the provision of the *Independent Commission Against Corruption (Amendment) Act 2005* which inserted Part 5A into the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). The relevant provisions commenced operation on 1 July 2005.
- 1.2 The principal functions of the Inspector are set out in section 57B of the ICAC Act provide as follows;
 1. *The principal functions of the Inspector are:*
 - a) *To audit the operations of the Commission for the purpose of monitoring Compliance with the law of the State, and*
 - b) *To deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
 - c) *To deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*
 - d) *To assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*
 2. *The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.*
 3. *The Inspector is not subject to the Commission in any respect.*
 4. *For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:*

- a) *contrary to law, or*
- b) *unreasonable, unjust, oppressive or improperly discriminatory, or*
- c) *based wholly or partly on improper motives.*

1.3 Section 57C of the ICAC Act sets out the powers of the Inspector and provides as follows;

The Inspector:

- a) *may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and*
- b) *is entitled to full access to the records of the Commission and to take or have copies made of any of them, and*
- c) *may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and*
- d) *may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and*
- e) *may investigate and assess complaints about the Commission or officers of the Commission, and*
- f) *may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and*
- g) *may recommend disciplinary action or criminal prosecution against officers of the Commission.*

2. PURPOSE

- 2.1 To set out arrangements for liaison between the Commission and the Inspector concerning referral of matters, exchange of information and points of contact between both agencies.

3. INTENT

- 3.1 The Commission undertakes to co-operate fully and frankly with the Inspector and his staff in order to assist the discharge of the Inspector's functions under the ICAC Act.

4. LIAISON

- 4.1 The primary point of liaison will be between the Inspector and the Commissioner or their respective nominated delegates.

- 4.2 The Inspector and the Commissioner agree to meet periodically, to discuss relevant issues and raise any matters touching on the Inspector's functions and the conduct of the Commission. Both the Inspector and the Commissioner will keep their own short notes of these meetings.
- 4.3 If the Inspector or his staff need information or material or to inquire of the Commission regarding a complaint or other matter touching on the conduct of the Commissioner, this will be referred to the Deputy Commissioner in the first instance. In the absence of the Deputy Commissioner, such inquiry will be directed to the Solicitor for the Commission.
- 4.4 For any other matters arising from the Inspector's functions, general inquiries, or requests for information and material etc, liaison shall occur between the Inspector's staff and the Deputy Commissioner. In the absence of the Deputy Commissioner, such inquiry will be directed by the Inspector's staff to the Solicitor for the Commission.
- 4.5 Where the Inspector and/or his staff wish to interview any of the Executive Directors of the Commission in connection with a complaint, the Commissioner will be notified wherever possible.
- 4.6 Where the Inspector and/or his staff wish to interview any staff of the Commission in connection with a complaint, the Deputy Commissioner will be advised wherever possible.
- 4.7 The Commission acknowledges however, there may be occasions where the Inspector and his duly authorized staff may need to act unilaterally without prior notification as outlined in paragraphs 4.5 and 4.6.
- 4.8 Written correspondence from the Commission to the Inspector will be addressed to the Inspector and marked "Private and Confidential" c/-;

Office of the Inspector of the Independent Commission Against
Corruption
GPO Box 5341
SYDNEY NSW 2001

Or by email to oiicac_executive@oiicac.nsw.gov.au

Or such other address as the Inspector may advise.

5. NOTIFICATION OF COMPLAINTS OF MISCONDUCT BY THE COMMISSION TO THE INSPECTOR

- 5.1 The Commission will notify the Inspector of matters which come to its attention which involves conduct of an officer of the Commission that comes within the principal functions of the Inspector.

- 5.2 Unless urgent and requiring immediate attention, in which case oral communication will be provided to the Inspector as soon as possible to be subsequently confirmed in writing, all such matters will be communicated to the Inspector by way of written notification.
- 5.3 Notification of matters referred to in paragraph 5.1 will also be reported by way of schedule to be provided at the meeting between the Inspector and the Commissioner as referred to in paragraph 4.2. The schedule will briefly set out the relevant information as available and known to the Commission including any action of the Commission itself has taken to deal with the complaint.
- 5.4 The Commission will make information concerning the Inspector's role and function publicly available to complainants. This includes:
- a) having appropriate information about the Inspector and links to the Inspector's website on the ICAC webpage;
 - b) where determination is made not to investigate a complaint, further advise the complainants of the basis upon which they may be able to pursue a complaint with the Inspector and provide the Inspector's contact details.
- 5.5 Furthermore, where requested, Commission officers will provide any persons with the contact details for the Inspector as per the address details in paragraph 4.8 and/or the Office of the Inspector's general telephone number of (02) 9228 5260.

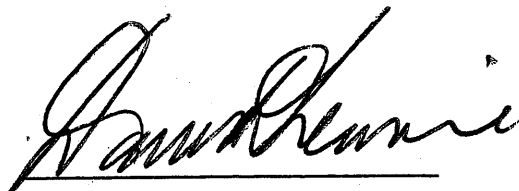
6. REVIEW

- 6.1 This MOU may be reviewed at any stage the request of either party but in any event shall be reviewed no later than 24 months from the date of the MOU.



The Hon. Megan Latham
Commissioner of the ICAC

29/5/15



The Hon. David Levine AO RFD QC
Inspector of the ICAC

29/5/15

**UNSATISFACTORY PERFORMANCE
MISCONDUCT
SERIOUS OFFENCES
POLICY**

Contents

1.	POLICY STATEMENT.....	2
2.	PRINCIPLES	3
3.	DEFINITIONS	3
4.	DISCLOSURE OF ADVERSE FINDINGS	5
5.	EXTERNAL NOTIFICATION	6
6.	ALTERNATIVE DUTIES OR SUSPENSION OF OFFICER FROM DUTY	6
6.1	Alternative Duties	6
6.2.	Suspension options	6
6.3	Salary accrual whilst on suspension	7
6.4	Salary entitlement if no disciplinary action taken or found not.....	7
6.5	Substantive position of suspended officer	7
7.	MISCONDUCT OCCURRING WHERE OFFICER NOT ON DUTY OR PRIOR TO APPOINTMENT AS OFFICER OF THE COMMISSION	7
8.	EFFECT OF RESIGNATION OR RETIREMENT ON DISCIPLINARY PROCESS	8
9.	DISCIPLINARY OPTIONS	8
9.1	Probation - annulment of appointment.....	8
9.2	A caution or reprimand	8
9.3	Reduction of the officer's salary or demotion to a lower position in the Commission.....	9
9.4	Directing the officer to resign from the Commission within a specified time.....	9
9.5	Dismissal from the Commission	9
10.	REMEDIAL ACTION OPTIONS	9
10.1	Referral to relevant policies.....	9
10.2	Mentoring	9
10.3	Staff rotation	9
10.4	Issuing a warning	10
10.5	Implementing a Performance Improvement Plan.....	10
10.6	Training and development	10
10.7	Monitoring the officer's conduct or performance.....	10
10.8	Transferring at current pay rate	10
10.9	Counselling – informal and formal.....	10
11.	RELATED POLICIES AND LEGISLATION	11
12.	REVIEW.....	11
13.	APPENDICES	11

Subject: Unsatisfactory Performance, Misconduct and Serious Offences
No: 64
Issued: May 2000
Revised: January 2007
Maintained by: Human Resources and Administration
Directory: i:\icac_crp\pol_proc\policy\pol.

1. POLICY STATEMENT

Given the nature of ICAC's work it is essential that Commission officers maintain high standards of conduct and performance. The Commission's primary objectives in relation to the management of conduct and work-related performance are to:

- maintain appropriate standards of conduct and work-related performance in the Commission;
- protect and enhance the integrity and reputation of the Commission; and
- ensure the public interest is protected.

Attached to this policy are separate procedural guidelines for dealing with allegations of unsatisfactory performance (Appendix A), misconduct (Appendix B) and serious offences (Appendix C).

Once an allegation or complaint has been classified as amounting to either an allegation of misconduct or a serious offence, according to the definitions found in clause 3 of this policy, reference should be made to guidelines B and C respectively.

In dealing with instances of unsatisfactory performance reference must first be made to the ICAC's "Performance Management Policy" (No. 71). The process for taking disciplinary action as a means of managing unsatisfactory performance should only be used where remedial action has proved ineffective and performance is still unsatisfactory.

The Commissioner makes determinations under this Policy and review of those determinations is limited by Section 104 of the ICAC Act.

This policy is based on the principles set out in the NSW Government Guidelines on the Management of Conduct and Performance in regards to public sector employment.

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: i:\icac_crp\pol_proc\policy\pol.064 File A03/0214

2. PRINCIPLES

The management of conduct and work-related performance in the ICAC will be guided by the following principles:

- The application of a transparent and fair approach to managing issues relating to employee conduct and unsatisfactory staff performance.
- Recognition of the need for procedural fairness.
- Discipline or review processes applied consistently without bias and with each case considered upon its merits.
- Employees being given the opportunity to be heard in relation to allegations made against them and, if substantiated, any proposed action to be taken.
- The use of remedial action as an alternative to formal disciplinary action.
- The processes described in this policy relating to misconduct and serious offences should be properly documented and those documents should be forwarded to the Executive Director, Legal for retention.
- Advice regarding the disciplinary process can be obtained from the ICAC's PSA representative or if you are a member of another association/union, from its representative or any other legal representative. You can also get advice from the Human Resources and Administration Section at any time during the process.

3. DEFINITIONS

Disciplinary options - action/penalties that can be taken in relation to an officer.

Disciplinary process - the process by which allegations of misconduct, serious offence or unsatisfactory performance are dealt with as a disciplinary matter.

Documentation in relation to agreed goals, targets and tasks - all relevant written documentation including performance agreements, position descriptions and any other documentation.

Manager/supervisor - person responsible for the day-to-day supervisory function in relation to the officer.

Misconduct – includes, but is not limited to, the following:

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

- Conduct justifying taking disciplinary action, including contraventions of the ICAC Act, Code of Conduct, Bullying and Harassment Prevention Policy, EEO and Discrimination Policy or other related policies.
- Taking detrimental action against a person which is substantially in reprisal for the person making a protected disclosure within the meaning of the *Public Interest Disclosures Act 1994* (the PID Act) (NSW), (see ICAC Policy No 44 in relation to protected disclosures).
- Taking any action against another person that is substantially in reprisal for an internal disclosure made by that officer.

Performance Issues - attendance (punctuality, being at work); work the officer does (output, quality, accuracy, timeliness); job related behaviours (interpersonal relations, conduct).

Procedural fairness - is a safeguard applying to an individual whose rights or interests are, or could be, affected.

Remedial action - an alternative to disciplinary action. Options that may be available depending on the circumstances to deal with an allegation of misconduct, serious offence or unsatisfactory performance as a remedial matter.

Remedial process - the process by which allegations are dealt with as a remedial matter.

Serious offence - an offence punishable by imprisonment for 12 months or more and includes any offence wheresoever committed provided that, had it been committed in NSW, it would have been punishable by imprisonment of 12 months or more. In deciding whether an offence is a serious offence or not consideration is given to the period of imprisonment provided by the offence and not to the actual sentence imposed by the court or the fact that notwithstanding that the offence is found proven against the officer a conviction is not recorded.

Unsatisfactory Performance - occurs when there is no reasonable or satisfactory reason for continued unsatisfactory performance, and includes, but is not limited to:

- Agreed goals and targets consistent with any relevant written documentation, including performance agreements; work procedures; and position descriptions not achieved within a reasonable or agreed time.
- Set tasks and accountabilities consistent with any relevant written documentation including operational procedures, performance agreements or position descriptions which are not performed, or not performed within a reasonable or agreed time, or not performed to the required or agreed standard.

- Identified skills specified in the position description are not demonstrated within a reasonable or agreed time.
- Work Performance - the sum total of an officer's input (work effort, attitude, skills) and output (consequences, end product or results). Performance includes what, when and how it was done.

4. DISCLOSURE OF ADVERSE FINDINGS

Where following a disciplinary process adverse findings are made against an officer, whether current or former, the Commission may, in appropriate circumstances, provide information about the nature of those adverse findings to public and private sector agencies seeking references from the Commission about that officer's suitability for employment.

The Commission takes the view that information about adverse findings following a disciplinary process is "personal information" within the meaning of the Privacy and Personal Information Protection Act 1998 (PIIP Act) and that the information protection principles set out in the PIIP Act would generally apply to the Commission in terms of its use and disclosure of such information.

However, the Commission is satisfied that by virtue of section 4(3)(j) of the PIIP Act where any adverse findings are made against an officer, whether current or former, the Commission may provide information about the nature of those adverse findings to public sector agencies seeking references from the Commission about that officer's suitability for appointment or employment as a public sector official.

In respect of similar requests made by prospective private sector employers, the Commission notes that section 18(1)(b) of the PIIP Act provides that:

A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:....

(b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body...

The Commission takes the view that in accordance with section 18(1)(b) of the PIIP Act, the inclusion in this clause of the policy of disclosing adverse findings in response to requests for employment references from public or private sector employers should be taken as putting officers of the Commission on notice that they have been made aware that this is the policy of the Commission.

All requests for employment references of the kind described in this clause should be referred to the Executive Director, Legal for his/her consideration and response.

5. EXTERNAL NOTIFICATION

The Commissioner must notify specified external agencies and departments of allegations and disciplinary processes taken in relation to certain behaviour, incidents and conduct.

External agencies may include, but are not limited to:

- Commission for Children and Young People
- Department of Community Services
- New South Wales Police

The Commission will also notify the Inspector of the ICAC (referred to in Part 5A of the ICAC Act) of "complaints of abuse of power, impropriety and other forms of misconduct", and "conduct amounting to maladministration", on the part of officers. The Inspector's functions in relation to such matters are set out in sections 57B and 57C of the ICAC Act.

6. ALTERNATIVE DUTIES OR SUSPENSION OF OFFICER FROM DUTY

6.1 Alternative Duties

In relation to allegations of misconduct including misconduct amounting to a serious offence, decisions are to be based on the facts, nature and seriousness of the matter in the context of the officer's position. The first consideration should be, is it appropriate for the officer to continue in their usual duties. If the decision is that it is inappropriate, the first option is to place the employee on alternative duties.

Ministerial Memorandum 94-35 (copy attached) sets out the circumstances in which suspension with pay or without pay is appropriate and advises public sector agencies that priority should continue to be given to the option of placing employees facing criminal charges or disciplinary proceedings on alternative duties.

6.2. Suspension options

See Ministerial Memorandum 94-35 (copy attached).

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

The Commissioner may suspend an officer from duty with or without pay if:

- an allegation that the officer has engaged in misconduct is being dealt with as a disciplinary matter; or
- an officer is charged with having committed a serious offence.
- Any action taken to suspend an officer with or without pay will be proportionate to the alleged misconduct and the evidence immediately available to the Commissioner. Suspension is not one of the penalty options available as a disciplinary action but it is a protective measure while the disciplinary process is being undertaken, or, while the criminal charge is being heard. All decisions in relation to suspension should be reviewed at least every 30 days. Officers suspended will have access to the Commission's offices, both physically and by remote, suspended.

6.3 Salary accrual whilst on suspension

An officer suspended without pay will accrue salary during the period of suspension. If it is decided to take disciplinary action or the person is convicted of the offence concerned, the withheld salary is, unless any law provides otherwise or the Commissioner directs otherwise, forfeited to the State.

6.4 Salary entitlement if no disciplinary action taken or found not guilty

If no disciplinary action is taken against the officer, or the officer is found not guilty in relation to the criminal matter, the officer will be paid the salary, and, where applicable, any allowance that may have been withheld.

6.5 Substantive position of suspended officer

The position of an officer shall not be permanently filled whilst they are on suspension.

7. MISCONDUCT OCCURRING WHERE OFFICER NOT ON DUTY OR PRIOR TO APPOINTMENT AS OFFICER OF THE COMMISSION

Misconduct may relate to an incident or conduct that happened while the officer was not on duty or before the officer was appointed to his or her position. In determining whether such conduct should be dealt with as a disciplinary matter the Commissioner will have regard to the Commission's Code of Conduct and the primary objectives of this policy set out in clause 1. For example the Commissioner may consider the seriousness of the conduct and:

- Whether there is a relevant connection between the conduct and the officer's position and duties.

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

- The context of the incident.
- The “age” of the incident or offence.
- The officer’s employment record and history.
- Whether remedial action is more appropriate.
- Whether there are other options that might be applied such as referral to the ICAC’s Employee Assistance Program, alcohol and drug rehabilitation or anger management counselling.

8. EFFECT OF RESIGNATION OR RETIREMENT ON DISCIPLINARY PROCESS

If an officer under investigation resigns or retires before the completion of a disciplinary investigation, those inquiries will normally continue until completed. This may allow the Commission to resolve any outstanding systemic issues arising from the complaint or investigation, finalise inquiries relating to any allegations affecting other officers arising from the same or a related complaint and place the Commission in a position to properly advise any person seeking an employment reference about the former officer.

In the event of resignation or retirement, a former officer should still be given an opportunity to respond to the allegations and have that response fully considered prior to the completion of the disciplinary process and informed of the outcome.

9. DISCIPLINARY OPTIONS

9.1 Probation - annulment of appointment

It is important to be clear in the letter of offer of appointment to specify any probationary period and advise that at the end of the period, subject to performance and conduct, the appointment may be confirmed, annulled or the probationary period extended.

It is also important to ensure that obligations towards probationary officers are met and regular reviews and feedback are provided and recorded throughout the probation period.

9.2 A caution or reprimand

All cautions and reprimands should where practicable be given face to face and at that meeting be confirmed in writing in the presence of an appropriate witness. The caution or reprimand should clearly state:

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
 Issued: May 2000
 Revised: March 2007, December 2013
 Policy No: 64
 Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

- the standard of performance/conduct that is required within a given timeframe
- the possible consequences of a repetition of the conduct or behaviour.

9.3 Reduction of the officer's salary or demotion to a lower position in the Commission

This may be relevant in some disciplinary cases, including those that arise from continued unsatisfactory performance, where remedial action has not resulted in improved performance. Such action must be done in consultation with all affected parties, including the manager of the area that may be affected by the action. A demotion may be permanent or for a particular period.

9.4 Directing the officer to resign from the Commission within a specified time

This option should only be considered where a decision has been made that the officer should no longer be employed by the Commission. This means that should the officer not resign, termination is the only alternative.

9.5 Dismissal from the Commission

Dismissal should be regarded as the most serious option that is available.

10. REMEDIAL ACTION OPTIONS

10.1 Referral to relevant policies

Sometimes unsatisfactory performance can be due to unfamiliarity with relevant policy. In such a case referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the officer to reach the expected standard of performance.

10.2 Mentoring

Mentoring can enable peer assistance and support to be provided. It is important that the mentor understands the nature of the issue to be addressed and that they are to be a role model in relation to the areas of concern.

10.3 Staff rotation

This option may assist the officer to better understand the nature of the work undertaken by the Commission and expose the officer to different processes. It may assist in improving performance by developing such understanding or by enabling the officer to learn from other employees in the Commission.

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
 Issued: May 2000
 Revised: March 2007, December 2013
 Policy No: 64
 Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

10.4 Issuing a warning

Any warning needs to be specific about the conduct or performance that is not satisfactory and be clear as to what expectations there are in relation to ongoing conduct and performance. It should also indicate what assistance could be provided to the officer to enable him/her to meet the proper standard.

10.5 Implementing a Performance Improvement Plan

The plan must be tailored to meet the needs of the officer and the Commission. Where a Performance Improvement Plan is proposed, there should be discussion between the relevant parties with joint agreement being reached where possible. The officer may identify their needs at any time and/or the Commissioner may indicate those areas that require improvement. (Refer to policy 71).

10.6 Training and development

Training and development should be a usual part of managing employees to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be relevant to the area of performance targeted, may be competency based, have agreed performance related outcomes, and enable an opportunity to practice the skills and knowledge before performance is assessed.

10.7 Monitoring the officer's conduct or performance

This process enables on-going monitoring and feedback to the officer as part of a performance improvement strategy. The process should be transparent with feedback being a key aspect to the process. Monitoring performance may highlight areas requiring development or training.

10.8 Transferring at current pay rate

This is particularly relevant when there are reasons to believe that the issue is related to the officer's present work environment or that the work is outside the officer's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the officer a fresh start by moving them to a new environment. The officer must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The Commissioner should be satisfied the employee has no valid reason for refusing the transfer.

10.9 Counselling – informal and formal

Performance: Informal counselling should be part of the daily supervision and enables an early response to unsatisfactory performance. Informal counselling, as a feedback mechanism, provides an opportunity for a manager and an officer to discuss and resolve performance and conduct issues.

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_procl\policy\pol.064 File A03/0214

Formal counselling would normally be required in situations where unsatisfactory performance continues or where it is beyond the scope of informal counselling.

Conduct: Counselling may also be used in relation to conduct matters where it is considered inappropriate to deal with it as a disciplinary matter.

11. RELATED POLICIES AND LEGISLATION

- Privacy and Personal Information Protection Act 1998
- ICAC Act 1988
- ICAC Code of Conduct
- ICAC Performance Management Policy
- ICAC Award
- Industrial Relations Act (New South Wales)
- Workplace Relations Act (Commonwealth)
- Protected Disclosures Policy
- Procedures Relating to the Handling of Complaints of Misconduct Against Staff Policy
- Bullying and Harassment Prevention Policy
- Work Related Grievance Handling Policy
- Employee Assistance Program Policy
- Ministerial Memorandum 94-35 – Suspension of Public Employees from Duty
- EEO and Discrimination Prevention Policy
- Managing Alcohol and Other Drugs Policy
- Delegations Manual Policy

12. REVIEW

To be reviewed at a time to be determined by the Commissioner.

13. APPENDICES

Appendix A: Procedural Guidelines and sample letters - Unsatisfactory Performance

Appendix B: Procedural Guidelines and sample letters - Misconduct

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

Appendix C: Procedural Guidelines and sample letters - Serious Offences

Document Title: Unsatisfactory Performance, Misconduct & Serious Offences
Issued: May 2000
Revised: March 2007, December 2013
Policy No: 64
Directory: I:\icac_crp\pol_proc\policy\pol.064 File A03/0214

APPENDIX B

**PROCEDURAL GUIDELINES
MISCONDUCT**

1. INTRODUCTION

These procedural guidelines are for the purpose of dealing with allegations of misconduct as a disciplinary matter and the taking of disciplinary action against an officer for misconduct. The guidelines also set out the process related to taking remedial action instead of disciplinary action where appropriate and reasonable to do so.

2. ALTERNATIVE DUTIES OR SUSPENSION OF OFFICERS FROM DUTY

In accordance with Section 5 of the Policy, where the Commissioner has determined that an officer should be either transferred to alternate duties, or suspended with or without pay until the allegation of misconduct has been dealt with, the officer is to be formally advised (**sample letter 1**) All decisions in relation to suspension should be reviewed at least every 30 days.

3. FIVE STAGES IN THE PROCESS

The process may comprise 5 stages:

1. Referral of complaint;
2. Determination of an appropriate course of action regarding an allegation of Misconduct;
3. Formal investigation;
4. Initial decision stage; and
5. Implementation of final decision.

4. TIMEFRAMES

A disciplinary or remedial process should be taken without delay. It is in the interest of all concerned to have the matter resolved in a timely and expeditious fashion.

As a guide only, uncomplicated matters should generally be concluded 4 – 5 weeks from the date the Commissioner received the initial allegation.

If the investigation has not been finalised within 6 weeks from receipt of the allegation, the Commissioner is to formally advise the officer (**sample letter 10**), the stage the disciplinary process has reached and the anticipated date for conclusion of this stage. This formal advice will also outline the reasons for any delays to date or anticipated delays. Similar advice is to be sent each

subsequent 6 weeks after the first advice until the process is finalised (sample letter 11).

5. STAGE ONE

5.1 Referral of Complaints

Any person, including a Commission officer, who wishes to make a complaint that a Commission officer or person closely associated with the Commission, such as a counsel assisting or a consultant, has engaged in misconduct is encouraged to do so, preferably in writing to the Executive Director, Legal.

If a Commission officer receives an oral complaint alleging misconduct, he or she must forward it, in writing, to the Executive Director, Legal.

The Executive Director, Legal, will advise the Commissioner of the complaint and recommend an appropriate course of action.

5.2 Complaints against the Commissioner and other executive staff

Any person wishing to make a complaint about the Commissioner should forward it, in writing, to the Deputy Commissioner.

If the complaint is against the Deputy Commissioner and/or any other executive officer of the Commission it should be made in writing and forwarded to the Commissioner.

Where the complaint is forwarded to the Commissioner, Deputy Commissioner, or Executive Director Legal, in the circumstances described in this clause, he or she will assess the complaint and take appropriate action.

6. STAGE TWO

6.1 Determination of an appropriate course of action regarding an allegation of misconduct

Where an allegation of misconduct is referred to the Commissioner that an officer may have engaged in misconduct, the Commissioner may decide based on the recommendation of the Executive Director Legal, and on the information available:

- to conduct a preliminary or formal investigation;
- to take remedial action;
- to take no further action in relation to the allegation or incident;
- to dismiss the allegation; or
- to both dismiss the allegation and decide to take no further action against the individual but take general management action to ensure a similar incident does not occur in the future.

In deciding what action to take the Commissioner may give consideration to such matters as:

- whether or not it is an isolated incident;
- the seriousness of the incident;
- the circumstances surrounding the incident;
- the employment history of the officer;
- the status of and position held by the officer;
- the exercise of formal investigative powers;
- the reputation of the Commission; and
- the impact on the Commission and staff.

6.2 Preliminary investigation

It is not mandatory to have a preliminary investigation. However, the Commissioner may appoint a delegate to undertake a preliminary investigation. This task is limited to obtaining sufficient information to allow the Commissioner to determine what course of action to take and may, in appropriate circumstances, involve interviewing the officer at the outset of inquiries.

If the officer, the subject of the allegation, is to be interviewed as part of a preliminary investigation, the procedures set out in clauses 7.7.1 and 7.7.2 of these guidelines should be complied with **and** he or she must be:

- given at least 24 hours notice of the interview, advice about the nature and purpose of the interview and the names and titles of the officers conducting the interview;
- advised how to locate these procedural guidelines; and
- given information about the allegations to be canvassed at the interview. If the matter concerns a Protected Disclosure the identity of the person who made the disclosure is only to be disclosed if in accordance with ss22 (b) and (c) of the Protected Disclosures Act 1994.

In addition, the officer is also to be advised, prior to the interview, that:

- the allegation, if treated as a disciplinary matter may, if proven, result in disciplinary action with the severest penalty being dismissal; and
- anything said at the interview may be taken into consideration by the Commissioner in determining whether or not the officer has engaged in misconduct.

At the conclusion of the preliminary investigation the delegate will prepare a report to the Commissioner on the information found. The Commissioner will advise the officer whether remedial action (**sample letter 12**), a formal investigation or no further action is to occur.

If it is decided to take remedial action, the officer may elect to place his or her comments in relation to the facts and/or the remedial action on their personnel file.

7. STAGE THREE

7.1 Formal Investigation

Where it is decided to conduct a formal investigation, the Commissioner will appoint a suitable person to prepare an investigation report in relation to the allegations (**sample letter 2**).

The investigation will be conducted by persons who:

- understand the investigation process;
- have no direct involvement in the matter; and
- are not biased or perceived to be biased because of some personal interest in the matter by reason of personal involvement or friendship with the officer or other persons involved in the alleged misconduct.

In serious matters, consideration should be given to retaining the services of a suitably experienced and qualified person external to the Commission.

Where a Commission investigation needs to be deferred as the result of an investigation by external authorities, such as NSW Ombudsman or the Police, the officer may:

- continue working;
- be moved to another position; or
- suspended with or without pay.

The action taken, if any, will depend upon the particular circumstances.

Any delays arising from the involvement of external authorities are to be appropriately recorded and monitored by the Executive Director, Legal.

All stages of dealing with the allegation as a disciplinary matter should continue unless requested by the external authority to not proceed. If all stages are not completed and the officer is charged criminally it is usually appropriate to await the outcome of the court proceedings.

An investigation of the allegation shall not involve the following:

- A formal hearing, involving legal representation of the parties; and
- Calling witnesses for examination or cross-examination.

7.2 Notice of Commencement of a Disciplinary Process

Subject to the paragraph below, once the Commissioner decides that the alleged misconduct is to be the subject of a formal investigation (ie, to be

treated as a disciplinary matter), the officer will be given written notification in the terms set out in **sample letter 4**.

Where the Commissioner is reasonably concerned that the nature of the allegation or circumstances surrounding the matter may lead to the destruction of evidence, harassment or victimization of suspected complainants it may be appropriate that the allegation/s is not provided to the officer at first instance.

7.3 Investigative Powers

Any investigation conducted into alleged misconduct shall, where relevant, include:

- a review of any documents;
- inspection of the workplace or site of incident;
- interviewing all relevant persons, including the officer, connected with the allegation or incident; and
- taking statements from the officer or other relevant person.

Obtaining an account from a person under investigation

A person under investigation should be given the opportunity to respond to the allegation. He or she may do so by either participating in an interview and/or by providing written submissions or a written statement in response to the allegations.

A person under investigation does not have to answer questions or produce any document that may incriminate him/her in a criminal offence or any other misconduct that may result in a disciplinary penalty.

However, if the officer under investigation is in a position to (and able to) explain or contradict evidence that to his or her knowledge must be true or untrue, and which calls for an explanation or denial, but fails to do so, doubts held about the reliability of that evidence may more easily be discounted by the investigator.

If a person wishes to make a statement confessing to a criminal offence a caution should be given.

An interview with a person under investigation should be stopped if the person being investigated asks for it to be stopped. This should be documented.

Any decision made by an officer not to participate in an interview about the allegation/s should be documented by the investigator. The failure of the officer to attend an interview will not prevent the continuation of the investigation and the person under investigation should be formally advised that the process will continue.

Interviewing other Commission officers

During an investigation other persons may need to be interviewed, including Commission officers. Generally speaking, employees have an obligation to truthfully answer questions about employment related matters, and this may include questions about the misconduct of others (particularly if those questions relate to officers directly under their supervision).

The ICAC Code of Conduct imposes a duty on all officers to report any instances of corrupt conduct, maladministration or serious and substantial waste at the Commission.

Searching persons and their possessions

An investigator cannot search a person under investigation or anything in their possession or under their control (personal belongings, clothing, bags etc) without their permission. A search of the person without permission is, strictly speaking, an assault.

An investigator who is also a current serving member of NSW Police may have the power to conduct such a search where he or she entertain a reasonable suspicion of any of the circumstances set out in s.21 of the ***Law Enforcement (Powers and Responsibilities) Act 2002***.

An investigator may search the workspace of a person under investigation (desk, drawers, lockers etc). However, if possible the person under investigation should be present during the search or given an opportunity to nominate a person to be present in their absence. Alternatively, the person under investigation should be asked to give permission for the search to take place in their absence.

Results of the search should be recorded by the investigator.

7.4 Non-disclosure

Confidential information obtained during the investigation shall not be disclosed except for the purpose of the investigation or any action arising from the investigation, or for the purpose of obtaining union and/or legal advice. This is to protect the integrity of the process and the privacy rights of the persons concerned.

Similarly, all witnesses, including the officer who is the subject of the investigation and his/her representative, should be advised that they should not discuss the matter with any person other than the investigator or their own legal representative or a union representative.

7.5 Conducting interviews

Interviews are an essential part of preparing an investigation report.

The following publications are of assistance to persons undertaking internal investigations and are particularly helpful in relation to collecting material and conducting interviews:

- Internal Investigations – an ICAC publication that is available on the Commission's web-site
- Investigation of Complaints – a publication of the NSW Ombudsman.

Other people (including Commission officers) may also need to be interviewed as part of the investigation process (see **sample letter 3**). Other persons involved in the matter should be advised that the information they provide (including any statement or transcript of any interview) may be disclosed to the person who is the subject of the investigation.

7.6 Interviewing the subject officer

During the investigation stage the officer is to be given an opportunity to respond to the allegations.

Where it is decided to interview the officer, he or she should be provided with a letter in the terms set out in **sample letter 5**. The letter must:

- specify in detail the issue/s alleged to enable an accurate response; and
- give such relevant information that will fairly enable the officer to respond- this might include the date, time, location, and details of the alleged incident.

Where the officer requests an extension of time, the investigator may agree to any extension of time which is reasonable, having regard to the overall circumstances of the case and the need to ensure procedural fairness.

7.7 Procedure for interviews

7.7.1 General

- Interviews with the officer the subject of allegation/s may be sound recorded but only with the knowledge and permission of the person being interviewed. If the interview is recorded it must be transcribed and a copy given to the officer.
- The interviews will be conducted in private.
- The investigators have the responsibility to be fair, courteous and impartial.

7.7.2 Commencing the interview

The investigator must:

- Advise the officer that the interview will be recorded (if appropriate) and the method that will be used. Sound recording may be suspended temporarily and replaced by note taking if particular circumstances warrant such and it has been requested by the officer.
- Advise the officer of the purpose of the interview.
- Advise the officer/observer that if they have chosen to have an observer present, that the role is that of witness or adviser and not of advocate, and that their presence is a safeguard against unfair practices.
- Advise the officer/observer that if they wish to have a private discussion they should request a halt to proceedings.
- Advise the officer that he/she will have an opportunity to fully respond to the questions asked and to provide comments with respect to relevant issues, which includes giving their version of the events in question.
- Advise the officer that it is in their best interest to answer questions and have their version of events recorded.

7.7.3 During the Interview

The investigator must:

- Put each allegation/incident to the officer and invite him/her to respond.
- Interview the person in relation to his/her response or other matters in relation to the allegation.
- Avoid accusatory or intimidatory language or tone of voice.
- Avoid making comments about the answer given.
- Not indicate personal views or opinions or those of other people.
- Ask the officer if there is anything else they wish to say.

7.7.4 Concluding the interview

Investigators should not indicate that any view has been formed.

Investigators must advise the officer:

- When a copy of the record of interview with the investigator will be available for their consideration.
- That following the completion of the investigation an investigation report containing preliminary findings will be provided to the Commissioner. Should the report contain preliminary findings adverse to the officer and/or adverse comments made by the investigator about the conduct of the officer, a copy of the report together with all relevant statements and transcripts of interview (subject to any legislative or confidentiality requirements precluding disclosure) including, if possible, a sound recording of any interview undertaken with the officer will be provided to him/her;

- That in circumstances where a report is provided to him/her and within 7 days of its receipt, he/she is entitled (although not required) to forward written submissions to the Commissioner, concerning matters relevant to the preliminary adverse findings or comments outlined in the report;
- A decision will be made by the Commissioner based on the facts and available information contained in the report and any submissions received from the officer;
- That the officer will be notified in writing of the outcome and where misconduct is established, the proposed action to be taken; and
- That the officer will be given an opportunity to make written submissions to the Commissioner in relation to any proposed disciplinary action before it is implemented – the submission may also include comments on matters referred to in the report and, if applicable, on the opinion of the Commissioner that the officer has engaged in misconduct. Also if desired the officer may, prior to a decision on penalty, request an interview with the Commissioner accompanied by a representative (but not a legal practitioner).

7.7.5 Obligations post interview

Following interview, the investigator/s must:

- Prepare the record of interview/statements as soon as possible;
- Provide the officer and other witnesses with a copy of their record of interview and invite them to read and sign all copies;
- Any issues about the content of the record of interview/statement should be discussed and resolved between the parties. The record of interview/statement should be altered to reflect the agreed changes; and
- If the record of interview/statement is not agreed to and if the issues cannot be resolved, the officer or witness should be asked to submit a statement outlining their reasons for not signing the record of interview/statement. The investigators should also record their reasons for not agreeing to requested changes. These reports must be included in the report.

7.7.6 Victimization or harassment

If a witness informs the investigator that they are being victimised or harassed by the officer who is the subject of a misconduct investigation, the investigator should:

- Inform the witness that they are not required to speak to the officer and that the alleged victimisation/harassment should be reported to the Commissioner;
- Not attempt to inquire into any such allegation because it is a separate allegation and requires independent consideration; and
- Report the allegation in writing to the Commissioner, or other senior officer delegated to such a role, so that the complaint can be dealt with.

7.7.7 The Investigation report

The investigation report shall:

- Consolidate all the material gathered during the investigation process.
- Detail the allegation/s involving the officer.
- Outline the investigation process followed.
- In relation to each allegation, set out the investigator's preliminary view on the relevant facts as to whether, on the balance of probabilities the person has engaged in the alleged conduct, referring to material upon which the view is based.
- If appropriate, set out the investigator's view on whether the matter should not continue to be treated as a disciplinary matter, including any comment on systemic or operational matters that need to be addressed.
- Include all relevant attachments, such as correspondence with the officer, details of interviews, witness statements.
- Be signed by the investigator/s.

The Commissioner will be provided with a copy of the report by the investigator.

7.7.8 Written submissions from subject officer

The officer the subject of the misconduct investigation must also be provided with a copy of the report together with all relevant attachments (subject to any legislative or confidentiality requirements precluding disclosure) in circumstances where the report contains preliminary findings adverse to the officer and/or adverse comments made by the investigator about the conduct of the officer (**see sample letter 13**).

In circumstances where a report is provided to the officer and within 7 days of its receipt, the officer may provide written submissions to the Commissioner concerning matters relevant to the preliminary adverse findings and/or adverse comments outlined in the report. The Commissioner has the discretion to extend the time in which written submissions may be provided; having regard to the nature of the investigation, but such submissions must be provided in a timely manner.

7.7.9 Further inquiries following receipt of the Investigation report

The Commissioner may decide to have a further inquiry for any reason including matters raised by the officer who is the subject of the allegation or the investigator.

However, if any further inquiry results in further allegations of misconduct, and the Commissioner decides these allegations are to be treated as a disciplinary matter, the steps outlined above are to apply.

8. STAGE FOUR

8.1 Initial Decision Stage

8.1.1 Opinion of whether misconduct has occurred

In forming an opinion as to whether the officer has engaged in misconduct, the Commissioner may only take into account those matters disclosed in the investigation report and any submissions received from the officer. The Commissioner may seek external specialist advice prior to forming an opinion but any final opinion must be the responsibility of the Commissioner.

If the Commissioner is of the opinion that an officer has engaged in misconduct, then consideration is given to appropriate disciplinary action or other actions.

Matters outside the investigation report such as employment records, previous warnings and disciplinary matters may be taken into account in relation to deciding whether disciplinary action is appropriate and if so what action should be taken.

8.1.2 Misconduct allegation/s not proven or dismissed

If the Commissioner has determined that the allegation/s of misconduct are not proven or that misconduct has not occurred, the officer must be notified in writing of that opinion (**sample letter 6**). The materials in relation to the matter including the investigation report, are to be removed from any records or files held as to the individual officer (personnel files) but will be retained by the Executive Director, Legal.

8.2 Misconduct allegation/s proven – remedial action

If the Commissioner is of the opinion the officer has engaged in misconduct and that remedial action is appropriate, the officer must be notified in writing of that opinion with details of the misconduct and the remedial action to be taken (**sample letter 7**).

8.3 Misconduct allegation/s proven – no further action

If the Commissioner is of the opinion the officer has engaged in misconduct and that no further action is to be taken given the facts of the particular case, the officer must be notified in writing of that opinion with details of the misconduct and the decision to take no further action (**sample letter 7**).

8.4 Misconduct allegation/s proven – disciplinary action

If the Commissioner is of the opinion that an officer has engaged in misconduct **AND** that disciplinary action may be appropriate, the officer must be advised in writing of that opinion and of the disciplinary action being considered, including the severest penalty under consideration (**sample letter**

8). The purpose of the notification is to afford the officer an opportunity to make a submission in relation to the disciplinary action being considered. The written notification is to be in the terms of **sample letter 8**.

9. STAGE FIVE

9.1 Implementation of Final Decision

The Commissioner, having considered any submission made by the officer in respect to the disciplinary action being considered and having had an interview if requested, shall make a final decision. A final decision may consist of disciplinary action, remedial action or no further action. The officer shall then be advised in writing of the final decision and its date of effect. The notification is to be the terms of **sample letter 9**.

MISCONDUCT

Sample letter 1

**Letter to officer confirming transfer to alternate duties OR
suspension**

Dear

FULL NAME, OFFICER'S TITLE, POSITION AND GRADE
NOTIFICATION OF TRANSFER TO ALTERNATE DUTIES OR
SUSPENSION FROM DUTIES –

Refer to any previous letters if applicable.

I have decided it is inappropriate for you to continue with your usual duties.
Pending the outcome of the investigation I place you on alternate duties
(specify duties)

OR

I have decided to suspend you from duty with full pay/ without pay effective
from (date) until the allegation of misconduct has been dealt with.

The decision to suspend you will be reviewed in 30 days time. Any enquiries
in relation to this matter should be referred to (name) on
.....(telephone)

(Signed)

(Title)

(Date)

MISCONDUCT
Sample letter 2

Letter to Investigator/s to undertake investigation into allegation of misconduct

Dear

I confirm that you are to undertake an investigation and prepare an investigation report in relation to an allegation of misconduct made against, an officer of the Commission.

The details of the allegation of misconduct are:
Specify details of alleged misconduct as known at this time:

The investigation is to be conducted in accordance with the Procedural Guidelines for Dealing with Misconduct as a Disciplinary Matter (copy attached).

The investigation report you prepare shall:

- a. consolidate all the material gathered during the investigation process.
- b. detail the allegation involving the officer.
- c. outline the investigation process followed.
- d. in relation to the allegation, set out your preliminary view on the relevant facts as to whether, on the balance of probabilities the person has engaged in the alleged conduct, referring to material upon which the view is based.
- e. if appropriate, express a view on whether the matter should not continue to be treated as a disciplinary matter, including any comment on systemic or operational matters that need to be addressed.
- f. include all relevant attachments, such as correspondence with the officer, disciplinary and other interviews, witness statements.
- g. be signed by the investigator/s.

You should be aware that the Procedural Guidelines require the disciplinary process to be completed in a timely and expeditious fashion. This includes the investigation and preparation of the investigation report.

You are to provide me with a copy of the report by (specify date). If you expect your investigation into this matter to take longer than (date as specified above), you need to advise me on (4 weeks from date of this letter) of your progress to date, any anticipated delays which may affect completion of the investigation, and the date you expect to complete the investigation.

Information concerning the nature and extent of some of the more commonly used investigative powers that are available to you during the course of your

investigation can be found at paragraph 7.2 of the Procedural Guidelines regarding Misconduct (appendix B of this policy).

(Signed) _____

(Title) _____

(Date) _____

**MISCONDUCT
Sample letter 3**

**Letter from investigator calling people for interview (other than
officer subject of the allegation of misconduct)**

Dear

I have been asked by the Commissioner, Independent Commission Against Corruption, to investigate and prepare an investigation report into an allegation that (name of officer) may have engaged in misconduct.

I would like to interview you as a part of this investigation process. The interview will be at

(time) on(date) at (venue).

If the investigator chooses to sound record the interview then letter should also include:

I propose to sound record the interview and a copy of your interview will be provided to you. If you have any enquiries in relation to this matter, please contact me on

(Signed) _____

(Date) _____

Note At beginning of interview investigator is to inform officer that information provided during the interview may be disclosed to the person the subject of the investigation.

MISCONDUCT
Sample letter 4

Letter to officer the subject of the allegation of misconduct – advice re allegation and that it will be treated as a disciplinary matter

Dear

I have received an allegation that you may have engaged in misconduct. The alleged misconduct is as follows:

Specify the details of the allegation as known at the time

I have decided to deal with this allegation as a disciplinary matter. I have requested (name of the investigator) to undertake an investigation into the allegation and prepare an investigation report on these matters. (attach copy of letter). (name of investigator) will interview you as part of the investigation process and give you an opportunity to respond to the allegations. (name of investigator) will contact you separately to make arrangements.

You should be aware that by treating this allegation as a disciplinary matter, once I have received and considered the investigation report together with any submissions you may choose to make to me concerning any adverse findings or comments made in the report, if I form the opinion that you have engaged in misconduct I may take disciplinary action against you.

Below is a list of the possible disciplinary actions that range from caution or reprimand to dismissal.

- *Caution*
- *Reprimand*
- *Fine*
- *Reduction in salary*
- *Demotion to a lower graded position*
- *To be allowed to resign*
- *Direction to resign*
- *Dismissal, or in the case of an officer on probation – annulment*

Please note that the Commission is committed to adopting investigative practices and procedures that ensure an appropriate level of procedural fairness is afforded to you throughout the investigation and to minimise any risks to the investigation. Accordingly, you should note the following matters:

- You are entitled to be provided with an opportunity to respond to the allegations during the course of the investigation. However, you are not obliged to exercise that option where to do so may expose you to criminal prosecution or a range of disciplinary penalties. However, if you are in a position to (and able to) explain or contradict evidence that to your knowledge must be true or untrue and which calls for an explanation or denial, and you fail to do so, doubts held about the reliability of that evidence may more easily be discounted by the investigator.

- You are entitled to have an independent observer present during the course of an interview and to receive a copy of the transcript of the record of interview in order to verify its accuracy
- If a preliminary finding of misconduct is made against you and/or adverse comments are made about your conduct in the investigation report, you are entitled to receive a copy of that report and any attachments (subject to any legislative or confidentiality requirements prohibiting disclosure). You are also entitled to make a written submission to the Commissioner about matters relevant to that preliminary finding or adverse comment. The Commissioner will have regard to the investigation report, attachments accompanying the report and any written submissions you may choose to make in determining whether you have engaged in misconduct.
- If you are found to have engaged in misconduct and disciplinary action is being considered, you are entitled to be advised of the disciplinary action under consideration and to make submissions to the Commissioner in relation to proposed disciplinary penalties.

Finally, you should note that you are entitled to avail yourself of professional counseling services made available through the Employee Assistance Program (EAP) (see policy 69). The services provided by the EAP are of a confidential nature except in limited circumstances (see paragraph 4.4 of policy 69). The use of EAP counseling is **voluntary**, and you have the right to choose whether or not to use the service.

Appointments can be made with the EAP on: **1800 009 644**. You can also make requests on-line via Citipsych's website www.citipsych.com.au or via Citipsych's e-mail address admin@citipsych.com.au which is monitored during business hours.

Any enquiries in relation to this matter should be referred to me on(telephone)

(Signed)

(Title)

(Date)

Note: It may not be appropriate to provide the allegation at first instance where the Commissioner is reasonably concerned that the nature of the allegation or circumstances surrounding the matter may lead to the destruction of evidence, harassment or victimisation of suspected complainants.

MISCONDUCT
Sample letter 5

Letter to officer subject of allegation calling for interview

Dear

As advised on I have been asked by the Commissioner, of the Independent Commission Against Corruption, to investigate and prepare an investigation report into an allegation that you may have engaged in misconduct. The alleged misconduct is as follows:

Specify in detail the allegation including date time, location and details of incident (names of other parties) where relevant – may and often would be more detail than provided in earlier correspondence

Examples of descriptions of acts of misconduct:

Fighting:

You did on(date and time) at.....(location) hit.....(name of person)..... by..... (kicking/ hitting etc number of times how – with fist etc, where on body if known etc)

Misuse of the Internet

You did on (date) at.....(location)..... using the Department's computer resources by entering the following search termsand/ or accessed the following webpages/websites/ downloaded the following imageswhich is considered (obscene, pornographic, offensive, child pornography etc).....

Stealing

You did on(date and time) at.....(location) take Departmental property.....(items and value) for your own personal use

ICAC's policy requires that you be given an opportunity to respond to the allegation, and I propose to interview you as part of my investigation. The interview will be at (time) on(date) at (venue). **Note: must give at least 7 days notice**

At this interview you will be provided with the opportunity to respond to questions asked in relation to the allegation/incident/s or make comments on these matters.

You may also wish to bring an observer to the interview. The role of this observer is as a witness or adviser but not an advocate. The interview will be sound recorded (*if other method, specify which method*) and a copy of the record of interview statement will be provided to you for signature by..... (when available).

You may also wish to bring any written submissions to this interview, and you will be given an opportunity following the interview to provide any further written submissions by..... (date - 7 days from interview – longer for complex matters).

If you have any enquiries in relation to this matter, please contact me on

(Signed)

(Date)

Note: If the investigator is in any doubt as to capacity of officer to speak effectively or adequately understand should invite officer to nominate a person to speak on his/ her behalf this may also be a signing or language interpreter.

Where the officer has requested an extension of time, the investigator may agree to any extension of time which is reasonable, having regard to the overall circumstances of the case and the need to ensure procedural fairness.

**MISCONDUCT
Sample letter 6**

Letter to officer – Misconduct not proven or dismissed

Dear

The investigation into the allegation you may have engaged in misconduct has now been completed.

Then choose either:

I have considered the investigation report (and the written submissions made by you or on your behalf and received on) and determined that the allegation of misconduct has not been made out and no further action will be taken in regard to these matters. The materials in relation to these matters including the investigation report will not be placed in or recorded on any of your Personnel records or files.

OR

I have considered the investigation report (and the written submissions made by you or on your behalf and received on) and determined that though the facts of the allegation have been made out, you have not engaged in misconduct and no further action will be taken in regard to these matters.

The facts of an event may be proven but it would not be misconduct (an example may be where an accident occurred which involved a physical connection between two officers) The materials in relation to these matters including the investigation report will not be placed or recorded on any of your Personnel records or files.

(Signed)

(Title)

(Date)

Note: The reasons for taking no further action where the facts of the allegation have been made out should be recorded in a submission, but are not necessary to include in the letter to the officer. Reasons for such a decision must be recorded.

MISCONDUCT
Sample letter 7

Letter - engaged in misconduct but no further action or remedial action

Dear

The investigation into the allegation you may have engaged in misconduct has now been completed. I have considered the investigation report (and the written submissions made by you or on your behalf and received on) and am of the opinion that you have engaged in misconduct as follows:

Specify the details of misconduct that the Commissioner is of the opinion the officer has engaged in – would be no more than details outlined in Sample Letter 5, although could be less. Then choose either:

I have decided, to take no further action in regard to the above misconduct.*

OR

I have decided, that remedial action is appropriate. The remedial action I propose is:

Specify remedial action to be taken. Remedial action, to mean one or more of the following:

- counseling – informal and formal
- training and development
- monitoring the officer's conduct or performance for a specified period of time
- implementing a Performance Improvement Plan
- issue a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory
- transferring the officer to another position in the Commission that does not involve a reduction of salary or demotion to a lower position, and
- any other action of a similar nature.
- Other similar actions that may be considered include mentoring, staff rotation, supervision, and referral to relevant policies

(Signed)

(Title)

(Date)

*** Note: The reasons for taking no further action should be recorded in a submission, but are not necessary to include in the letter to the officer. Reasons for such a decision must be recorded.**

MISCONDUCT
Sample letter 8

Letter engaged in misconduct – considering disciplinary action

Dear

The investigation into the allegation that you may have engaged in misconduct has now been completed.

Specify details of allegations

I have considered the investigation report (and the written submissions made by you or on your behalf and received on). I have formed the opinion that you have engaged in misconduct as follows:

Specify the details of misconduct that the Commissioner is of the opinion the officer has engaged in

I am now considering imposing disciplinary action. As previously advised on..... (Sample letter 4) there are 8 possible disciplinary actions ranging from a caution or reprimand to dismissal. In relation to this matter the severest penalty I would conceivably impose is:

Need to advise severest penalty being considered for the particular matter. In particular the officer should be advised if dismissal, a direction to resign or annulment in the case of an officer on probation is being considered. If the choice is for a direction to resign, the officer should be advised of the consequences of not resigning within the time allowed – that is termination.

You have 14 days from the receipt of the this letter to make a submission and to provide any additional information which you consider should be taken into account in relation to the disciplinary action being considered before I make a final decision.

Your submission may address such matters including my opinion that you have engaged in misconduct, the investigation report, or any extenuating and mitigating circumstances.

Before making a final decision on the appropriate action, I will consider the following:

1. the investigation report
2. the Commission's primary objectives as contained in the Policy (copy attached)
3. the following matters:
Outline the previous employment matters (such as past remedial actions, warnings or discipline matters or alternatively previous satisfactory work history) to be taken into account.
4. your submission if made.

You also have an opportunity to have an interview with me accompanied by a union or other representative (not a legal practitioner) before a final decision is made. Your representative may speak on your behalf at the interview but may not attempt to cross examine me.

Should you wish to have an interview the request should be made within 5 days of receipt of this letter. Please contact who will make arrangements for this interview.

(Signed)

(Title)

(Date)

Note: The Commissioner has discretion to extend the period for response if the officer applies for additional time and provides reasonable grounds for seeking the extension.

**MISCONDUCT
Sample letter 9**

Letter - final decision as to action

Dear

I refer to my letter of (date) where I advised you I had formed the opinion you had engaged in misconduct and I was considering imposing disciplinary action.

I have now considered the submissions and additional information provided by you and I have decided, with effect from.....(date) to take disciplinary action as follows:..... (specify action).

OR

I have now considered the submissions and additional information provided by you and I have decided, to take no further action.

OR

I have now considered the submissions and additional information provided by you and I have decided, with effect from.....(date) to take remedial action as follows:

Specify remedial action to be taken. Remedial action, to mean one or more of the following:

- counseling – informal and formal
- training and development
- monitoring the officer's conduct or performance for a specified period of time
- implementing a Performance Improvement Plan
- issuing of a warning to the officer that certain conduct is unacceptable or that the officer's performance is not satisfactory
- transferring the officer to another position in the Commission that does not involve a reduction of salary or demotion to a lower position, and
- any other action of a similar nature.

Other similar actions that may be considered include mentoring, staff rotation, supervision, and referral to relevant policies.

(Signed)

(Title)

(Date)

*** Note: The reasons for taking no further action should be recorded in a submission, but are not necessary to include in the letter to the officer. Reasons for such a decision must be recorded.**

NOTICE OF SERVICE

On (date) I served the decision of which the within is a duplicate upon the person to whom it is addressed by:

1. Of residence being (specify the full address)

OR

2. Sending by pre-paid post at the following place of employment / residence (specify the full address)

OR

3. Delivering to him/ her personally at the following place of employment (specify the full address)

(Signed)

(Date)

**MISCONDUCT
Sample letter 10**

Letter – to officer on timeframes (to be sent after 6 weeks)

Dear

I refer to my letter of (date) advising you I had received an allegation that you may have engaged in misconduct.

As you are aware I have decided to deal with the allegation as a disciplinary matter. The process of considering the allegation as a disciplinary matter involves four stages:

- Stage 1 – Initial Determination of an appropriate course of action regarding an allegation of Misconduct
- Stage 2 – Investigation
- Stage 3 – Initial decision
- Stage 4 – Implementation of final decision

I wish to advise you that the disciplinary process for the above allegation is at Stage..... (specify exactly where up to), and I anticipate this stage will conclude by (date).

If at Stage 4 indicate when matter will conclude by..... (date)

Would not include the following paragraph if it is expected the matter will conclude in less than 4

weeks from date of letter. In other circumstances must include the following:

The reason/s the disciplinary process has not progressed beyond the above stage is/are:

Need to specify reasons not concluding – may include complexity of matter, exceptional circumstances, external investigating authority requesting delay or availability of officer, must also include any anticipated future delays

I will keep you informed about the progress of the disciplinary process. If you have any enquiries please contact me on (telephone number).

(Signed)

(Title)

(Date)

*** Note: Letter is to be sent 6 weeks after receipt of allegation.**

Every 6 weeks thereafter officer is to be advised in writing on progress of the matter

**MISCONDUCT
Sample letter 11**

Letter – to officer on timeframes (advice to officer on progress of disciplinary process - to be sent after 18 weeks)

Dear

I refer to my previous letter of (date) advising you of progress in the disciplinary process in considering the allegation you may have engaged in misconduct. The four stages of the disciplinary process are:

- Stage 1 – Initial determination of an appropriate course of action regarding an allegation of
- Misconduct
- Stage 2 – Investigation
- Stage 3 – Initial decision
- Stage 4 – Implementation of final decision
-

I wish to advise you that the disciplinary process is now at stage..... (specify exactly where up to), and I anticipate this stage will conclude by (date).

The reason/s the disciplinary process has not progressed beyond the above stage is/are:

Need to specify reasons not concluding – may include complexity of matter, exceptional circumstances, external investigating authority requesting delay or availability of officer, indicate also whether there will be any further anticipated future delays.

I will keep you informed on the progress of the disciplinary process. If you have any enquiries please contact me on (telephone number).

(Signed)

(Title)

(Date)

*** Note: Officer is to be advised in writing on progress of the matter every 6 weeks following sending of Sample letter 10**

**MISCONDUCT
Sample letter 12**

**Letter to officer the subject of the allegation of misconduct – advice re
allegation and that treated as a remedial matter**

Dear

I have received an allegation that you may have engaged in misconduct.
The alleged misconduct is as follows:

Specify the details of the allegation as known at the time

I have decided it is appropriate to take remedial action. I have decided, with
effect from.....(date) to take remedial action as follows:

*Specify remedial action to be taken. Remedial action, to mean one or more of
the following:*

- counseling – informal and formal
- training and development
- monitoring the officer's conduct or performance for a specified period of
time
- implementing a Performance Improvement Plan
- issuing of a warning to the officer that certain conduct is unacceptable
or that the officer's performance is not satisfactory
- transferring the officer to another position in the Commission that
does not involve a reduction of salary or demotion to a lower position,
and
- any other action of a similar nature.

Other similar actions that may be considered include mentoring, staff rotation,
supervision, and referral to relevant policies.

(Signed)

(Title)

(Date)

**MISCONDUCT
Sample letter 13**

Letter to officer the subject of the allegation of misconduct – enclosing preliminary report

Dear

The investigation into the allegation you may have engaged in misconduct has now been completed.

I enclose a copy of the preliminary report together with the following statements and other attachments (identify attached documents in the letter).

A copy of the report has also been provided to the Commissioner.

You have 7 days to provide written submissions to the Commissioner concerning matters you think are relevant and should be taken into account by the Commissioner when considering the findings and comments made in the attached preliminary report.

If you do not intend to make written submissions please advise the Commissioner as soon as possible.

(Signed)

(Title)

(Date)
