



Australian Government
**Australian Commission for
Law Enforcement Integrity**

PRACTICE NOTES

These Practice Notes are intended to inform and guide the conduct of appearances and legal representation before or in connection with hearings before the Integrity Commissioner. The Practice Notes are designed to promote the efficient and effective conduct of hearings. Legal practitioners must ensure that relevant requirements are observed.

The Practice Notes, as amended from time to time, may be downloaded from the Australian Commission for Law Enforcement Integrity (ACLEI) website at www.aclei.gov.au or obtained from ACLEI on 02 6229 9300 or via e-mail; contact@aclei.gov.au

NOTES:

Summary

1. Introduction
2. Context and nature of hearings
3. Control of hearings
4. Witnesses
5. Legal representatives
6. Commencement of hearing
7. Giving evidence at a hearing
8. Examination and cross-examination of witnesses
9. Hearings and rules of evidence
10. Responding to adverse evidence
11. Submissions and claims – special issues

SUMMARY

The office of Integrity Commissioner (the Commissioner) and the Australian Commission for Law Enforcement Integrity (ACLEI) are established under the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act). The LEIC Act confers a range of investigation, intelligence and reporting functions and powers on the Commissioner in relation to corruption and integrity in the Australian Crime Commission (ACC) and the Australian Federal Police (AFP). ACLEI supports the Commissioner in performing those functions and exercising those powers.

2. The Commissioner conducts investigations of particular corruption issues and, at the Minister's request, public inquiries into any issue about corruption or integrity within the ACC and the AFP. For the purposes of such investigations and inquiries the Commissioner may conduct public or private hearings. These Practice Notes provide information about the hearing process for witnesses and their legal representatives.

3. Hearings are part of an investigation strategy which may include a range of other measures, for example notices to produce, search warrants, voluntary interviews, telecommunications interception. Because of their investigative character, hearings by the Commissioner are different from a criminal trial or other court proceeding that has to decide an issue. The Commissioner is not required, before conducting a hearing, to disclose the purpose of the investigation or the extent or nature of the evidence already acquired, if that will prejudice an investigation. The witness does not appear to support a particular case, but to provide information.

4. The Commissioner has full control of the hearing and contemptuous conduct by a witness may result in prosecution. The Commissioner may decide to conduct hearings in private, although in the case of a public inquiry there is a presumption in favour of public hearings. The Commissioner can prohibit publication of evidence given before him or her, or of the identity of a witness. No public notice will be given of private hearings, they may be conducted at any time, depending on operational requirements, and attendance will normally be limited to the Commissioner, ACLEI staff, the witness and their legal representative. Public hearings will normally be conducted during weekday business hours. In the case of a public inquiry, public notice will be given of the subject matter of the inquiry.

5. The Commissioner determines who may appear as a witness. Witnesses, including voluntary witnesses, will normally be summoned to appear. No person may appear as of right, but a person wishing to appear should submit a written application to the Integrity Commissioner, setting out their reasons.

6. The Commissioner may be supported by Counsel Assisting or another suitably qualified person. Witnesses have a right to legal representation. In rare cases an interested third party may be represented with the Commissioner's leave. Legal representatives should seek leave to appear at or before the hearing. The Commissioner may refuse leave to a particular legal practitioner, especially if one practitioner seeks leave to appear for two or more witnesses. If operational considerations are relevant, it may not always be possible to give full reasons for such decisions.

7. The formality of hearings may vary depending on the circumstances, but lawyers are not required to robe and a formal mode of address is normally adopted.
8. In a public hearing the Commissioner will normally make an Opening Statement indicating how it is proposed to conduct the hearing and the general scope and purpose. If operational considerations permit, Counsel Assisting may also make an Opening Statement setting out more detail of evidence already gathered and the topics to be traversed in the hearing. These statements will not outline propositions of fact and law to be proved and will not bind the Commissioner as to the topics that will in fact be explored in the hearing. In a private hearing the Opening Statement will be limited to stating the rules applicable to the witness and their legal representative.
9. The Commissioner expects witnesses to participate in the hearing in a cooperative manner. They are not entitled to refuse to answer a question except on grounds of parliamentary privilege or, to a limited extent, legal professional privilege or public interest immunity. If the answer to a question may tend to incriminate the witness, the witness may still be required to answer the question, but (subject to some limited exceptions) the answer cannot then be used directly against the witness in a prosecution or other proceedings for a penalty. If the witness has been charged with an offence, the Commissioner will not ask questions directly related to the subject matter of the charge. A witness has legal protection against civil or criminal action for the evidence they give and may be provided with physical protection where necessary.
10. The Commissioner will agree to excuse a witness from attending only in exceptional circumstances. A witness who fails to comply with the Commissioner's lawful requirements may be prosecuted. An absconding witness may be arrested and his or her passport confiscated.
11. A witness who proposes to produce a document (including a written statement or submission) that the Commissioner has not called for at a hearing should give the Commissioner notice in advance (through Counsel Assisting).
12. There is no automatic right to examine or cross-examine. The Commissioner decides who may do so in light of all relevant considerations. Persons wishing to examine or cross-examine a witness should apply to the Commissioner, setting out their reasons. The Commissioner will give reasons for the decision unless to do so would prejudice an investigation.
13. Because a hearing by the Commissioner is part of an investigation, the rules of evidence do not apply. A legal representative may question the relevance or purpose of particular evidence but, in framing a submission, should bear in mind the open-ended character of an investigation in comparison with a trial. A successful submission is likely to be one that queries the potential utility of the evidence in the investigation.
14. The Commissioner will normally give a person the opportunity to respond to adverse evidence given in a public hearing. If adverse evidence about a person is given at a private hearing, the Commissioner need not to give the person an opportunity to respond if the evidence is not relevant to the Commissioner's findings in the matter.
15. Closing submissions should be submitted within the time set by the Commissioner.

16. Challenges to warrants issued to the Commissioner or ACLEI should be initiated in the appropriate court. Questions as to the Commissioner's jurisdiction in a matter should be raised with the Commissioner in advance of the hearing, or a challenge on this basis initiated in the Federal Court. The Commissioner will not consider a submission challenging jurisdiction, or the validity of a warrant, or seeking access to relevant documents, in the course of a hearing.

17. The Commissioner and ACLEI staff are not compellable witnesses in relation to information acquired in their official capacity, except in the range of circumstances specified in s 211 of the ACC Act. Generally speaking, they are compellable where there is a clear link between ACLEI and the legal proceedings.

1. INTRODUCTION

1.1 The Act and its objects

1.1.1 The Australian Commission for Law Enforcement Integrity (ACLEI) is a Commonwealth statutory agency established by the *Law Enforcement Integrity Commissioner Act 2006* (the Act). The objects of the Act are to facilitate the detection, investigation, prosecution and prevention of corrupt conduct, and to maintain and improve the integrity of staff members, in law enforcement agencies (s 3(1)).

1.2 The Commissioner and ACLEI

1.2.1 ACLEI is headed by the Integrity Commissioner (the Commissioner). The Act confers on the Commissioner a range of investigation, intelligence and reporting functions in relation to corruption in law enforcement agencies (s 15). The function of ACLEI is to support the Commissioner in performing those functions.

1.2.2 The agencies currently defined as law enforcement agencies, and therefore within the Commissioner's jurisdiction, are the Australian Federal Police and the Australian Crime Commission (s 5(1)).

1.3 Investigations

1.3.1 The Commissioner conducts:

- (a) investigations of corruption issues under Part 6 of the Act (Part 6 investigations), and
- (b) public inquiries requested by the Minister under Part 8 of the Act (Part 8 inquiries).

1.3.2 In these Practice Notes, in cases where the distinction is not significant, Part 6 investigations and Part 8 inquiries are collectively referred to as 'investigations'

1.4 Hearings

1.4.1 The Commissioner may conduct a hearing for the purposes of an investigation. A hearing, or part of a hearing, may be conducted in public or in private (s 82), although there is a presumption that a hearing in relation to a public inquiry should be held in public (s 82(5)).

1.4.2 Subject to the requirements of the Act, a hearing may be conducted in such manner as the Commissioner thinks fit (s 82(2)).

1.5 Purpose of Practice Directions

1.5.1 These Practice Directions are intended to inform and guide the conduct of witnesses, legal representatives and other interested persons at or in connection with

hearings by the Commissioner, in order to promote the efficient and effective conduct of such hearings.

1.6 Assistant Integrity Commissioner

1.6.1 The Commissioner may delegate to an Assistant Integrity Commissioner any power under the Act, other than the power to hold a hearing for a Part 8 inquiry (s 219). Unless otherwise indicated, a reference to the Commissioner in these Practice Notes includes an Assistant Integrity Commissioner acting under such a delegation.

1.7 References to legislation

1.7.1 Unless otherwise indicated, all section references in these Practice Directions are to the Law Enforcement Integrity Commissioner Act 2006.

2. CONTEXT AND NATURE OF HEARINGS

2.1 Hearings part of the investigation process

2.1.1 ACLEI is an investigative body. Hearings are held for the purposes of an investigation, to enable the Commissioner to be informed on relevant matters in order to get to the truth of a matter. For this purpose the Commissioner may direct an investigation into the issue under consideration and require persons and organisations to provide information and produce documents, in spite of the privilege against self-incrimination and most other forms of privilege which are normally applicable.

2.1.2 Hearings are only one means by which the Commissioner may conduct an investigation. In the case of Part 6 investigations, the Commissioner's intention is to use hearings to support effective, efficient and well planned investigations. Different considerations may apply in a public inquiry, depending upon the nature of the issue that the Minister has requested the Integrity Commissioner to inquire into, and the submissions to the inquiry.

2.2 Hearings differ from court proceedings

2.2.1 The Commissioner does not perform a judicial function or form part of the administration of justice.¹ The Commissioner does not make conclusions or findings in regard to criminal or civil liability and his/her hearings are inquisitorial and not adversarial in nature. To that extent a hearing before the Commissioner differs from criminal proceedings, even though a hearing can examine issues of criminal law and justice.

2.2.2 Unlike a party to court proceedings, a person who is asked to give evidence during a hearing by the Commissioner does not have a 'case' to pursue. The following extract explains this point:

¹Although see Note 2 to s 87(1), which notes that the Commissioner's power to take evidence by oath or affirmation means that a hearing before the Commissioner is a judicial proceeding for the purposes of Part III of the *Crimes Act 1914*.

Persons who are asked to assist an inquisitorial inquiry by giving evidence on matters being investigated do not have a 'case'. They have evidence to give. There may be adverse evidence that they wish to counter. They may have an interest in trying to ward off various conclusions which they fear the investigating inquiry may reach. And in preparing their evidence with all these things in mind, they may well need the assistance of legal advisers. But the conception that a witness needs to prepare a 'case' introduces an element inherent to adversarial proceedings but alien to an inquisitorial inquiry, at least at the investigative stage. (Sir Richard Scott, 'Procedures at Inquiries – The Duty to be Fair', 111 Law Quarterly Review 596 at 604.)

2.2.3 The word 'hearing', as employed in the Act, has no significance other than to describe a process whereby the Commissioner may gather information and evidence, and exercise certain coercive powers, for the purposes of an investigation. The purpose of the hearing is not to decide an issue, but to progress an investigation by assisting the Commissioner to discover facts that may lead to further action being taken. At the completion of an investigation the Commissioner may make recommendations, express opinions, refer material to relevant prosecuting authorities and communicate the results of an investigation to Parliament (see ss 54, 55, 57, 73, 74, 142–147).

2.2.4 There is no set approach or procedure to be followed at a hearing. Equally, the rules of procedural fairness at a hearing must adapt to the role and powers of the Integrity Commissioner in conducting an investigation into an allegation of corruption. In particular, it will usually be inappropriate for the Commissioner, in advance of a person's attendance at a hearing, to disclose information that has been acquired as a result of an investigation or received from other sources.

2.2.5 The Commissioner's hearings are a 'prescribed court' for the purposes of Part IIA of the *Public Order (Protection of Person and Property) Act 1971* (PO Act) (see r 4, *Public Order (Protection of Persons and Property) Regulations 1999*). The PO Act provides a degree of security to the Commissioner's hearing. Authorised officers under the PO Act are entitled to:

- require a person to provide personal particulars and evidence of identity and
- require a person to submit to a frisk search and deposit any hazardous substance or weapon

2.2.6 As the Commissioner's hearings are a 'prescribed court', a person must not enter into, or remain upon premises occupied or used by the Integrity Commissioner in connection with hearings or other operations conducted by the Integrity Commissioner, whilst they are in possession of any firearm, explosive substance or an offensive weapon.

2.2.7 Consequently, any law enforcement officer or person in possession an offensive weapon (eg OC spray, batons, or firearm), **must** either attend the hearing without their appointments, or surrender their appointments to an 'authorised officer' upon their attendance.

2.2.8 Any non-compliance with PO Act may constitute a criminal offence (s 13C(2), s 13D(2) and s 13F, PO Act).

2.3 Scope of investigations and hearings

2.3.1 The jurisdiction of the Commissioner to conduct an investigation and to hold a hearing is defined broadly in the Act. Firstly, the Commissioner has power to investigate a 'corruption issue' that relates to a law enforcement agency (eg, ss 7, 9, 15, 26). The issue under investigation can be referred by a law enforcement agency, the Minister, any person or government agency, or an investigation can be commenced on the initiative of the Commissioner (ss 18, 19, 23, 38). Secondly, at the request of the Minister, the Commissioner may conduct a public inquiry into a corruption issue, into the issue of corruption generally in law enforcement agencies, or into an issue about the integrity of staff members of those agencies (s 71).

2.3.2 The Commissioner may choose to hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry (s 82(1)).

2.3.3 The Act places no obligation on the Commissioner to define or publish terms of reference for an investigation or hearing. The nature of the information the Commissioner is required to provide a person in advance of a hearing is spelt out in two provisions of the Act. First, s 83(4) provides that a summons requiring a person to give evidence at a hearing that is being held for the purpose of a corruption issue, 'must set out, so far as is reasonably practicable, the general nature of the matters in relation to which the Integrity Commissioner intends to question the person'. Secondly, s 72 provides that the Commissioner 'must invite submissions on the issues that are to be the subject of [a] public inquiry'. It is implicit in that requirement that the Commissioner must provide public notice of the issues that will be dealt with at the public inquiry.

2.3.4 Consistent with the obligation to observe procedural fairness, the Commissioner will deal with any relevant question raised by a party or legal representative during the course of a hearing concerning the scope or direction of the investigation, the hearing or the examination of a witness. It may not be possible for the Commissioner to deal with such a question at the time it is raised, because of the need for confidentiality or to allow an investigation to take its proper course. The Commissioner will not normally deal with submissions or questions of this kind in advance of a hearing. An exception, dealt with later in Note 11 below, is that a submission framed as a question concerning, or challenge to, the jurisdiction of the Commissioner should ordinarily be made in advance of a hearing.

2.4 Obtaining evidence by request rather than hearing

2.4.1 Independently of a hearing, the Commissioner may make a written request to a staff member of a law enforcement agency or any other person to provide information or a document or thing specified in the request (ss 75, 76). It is an offence if a staff member or person fails to comply with the request (s 78). Similar principles apply to a request under s 75 or s 76 as apply to summonses, concerning legal professional privilege, self-incrimination and legal protection for compliance: see ss 79-81 and the separate Guidelines on Notices to Produce available on the ACLEI website www.aclei.gov.au.

3. CONTROL OF HEARINGS

3.1 General role of the Commissioner

3.1.1 The Commissioner has full control of the hearing, the witnesses to be called and their order, the documents and things to be produced, the matters and issues to be covered in evidence, whether the hearing is conducted in public or in private and who may be present at a private hearing (ss 82, 83, 86).

3.2 Control of conduct

3.2.1 The Commissioner will not tolerate behaviour at or in connection with a hearing that frustrates the conduct of the hearing. Action will be taken to ensure that the purpose of a hearing to get to the truth of a matter is not impeded. It is an offence for a person to insult the Commissioner in the course of a hearing, interrupt a hearing, cause a disturbance in or near a hearing or do anything else in relation to a hearing that would be a contempt if done in relation to a court (s 94).

3.3 Public and private hearings and confidentiality orders

3.3.1 The Commissioner may conduct a hearing either in public or in private. If a hearing is being conducted in public, the Commissioner may decide to conduct a part of the hearing in private (s 82).

3.3.2 Certain types of evidence must be given in private: broadly, this includes information subject to legal professional privilege, information protected by a secrecy provision, and information that is the subject of a confidentiality certificate issued by the Attorney-General under s 149 (to protect security, defence, international or intergovernmental relations, Cabinet processes, law enforcement operations and methods, and personal safety) (see ss 89(1), 149 & 150(3)).

3.3.3 In all other cases the Commissioner has a discretion to decide whether the hearing, or any part of it, will be held in public or in private. Circumstances in which it may be appropriate for evidence to be given in private are that the evidence is confidential in nature, it relates to the suspected commission of an offence, a person's reputation would be unfairly prejudiced, or a person has requested confidentiality to avoid unfair prejudice to the person's financial position or profits (see ss 82, 89(2)).

3.3.4 Another matter to be borne in mind is the presumption stated in s 82(5) that a Part 8 inquiry should be in public. It is in the nature of a public inquiry that matters are reported in the media, including information that is adverse to the reputation or interests of a person. An appropriate opportunity to respond can be given to a person at a later stage in the inquiry.

3.3.5 The Commissioner can also direct that evidence given or documents produced or the appearance of a witness at a hearing not be published (s 90). An order to the same effect can be made to prevent publication of the fact that a person may be about to give evidence (s 90(1)(d)). An order directing that evidence not be published must be made, if

the evidence was given at a private hearing and publication of the evidence would prejudice a person's safety, reputation or fair trial (s 90(2)).

3.3.6 A summons to a person to attend a hearing may include a notation making it an offence for a person to disclose information about the summons (s 91(2)).

3.3.7 A legal representative, witness or other person whose interests may be affected by a hearing may make a submission to the Commissioner that evidence be received in a private hearing, and that material (from a public or private hearing) not be published. The submission may be made at any time prior to or during the hearing. The submission should be framed with reference to the foregoing provisions of the Act on public and private inquiries and hearings. A submission should also explain why, in terms of the Act and the discretions conferred on the Commissioner, it is desirable that an order restricting publication of evidence should be made.

3.4 Participation in private and public hearings

3.4.1 Attendance at a private hearing will normally be confined to the Commissioner, the witness and his or her legal representative, counsel assisting or the legal practitioner appointed to assist the Commissioner, and other ACLEI officers. A witness at a private hearing has a right to be informed of, and to comment on, the presence of any other person at the hearing (s 86(3)). The Commissioner will not publish any notice of a scheduled private hearing.

3.4.2 A public hearing may be attended by any member of the public, subject to the availability of seating in the Hearing Room.

3.4.3 The hearing times for a public hearing will ordinarily be from 10.00 am to 4.00 pm on a Monday to Friday, with a short mid-morning break and a lunch adjournment usually between 1.00 pm and 2.00 pm, although this may be varied to meet operational needs. A private hearing may be held at any time, especially to suit operational exigencies and the availability of witnesses.

4. WITNESSES

4.1 Witnesses normally summoned to appear

4.1.1 The Act provides for the Commissioner to summon witnesses to appear at a hearing to give evidence or produce documents (s 83). This will be the normal course, even if a witness volunteers to attend without a summons. The issue of a summons to a person is integral to the other powers of the Commissioner to control the conduct of proceedings and the disclosure of information about a hearing.

4.2 Seeking leave to appear as a witness

4.2.1 Where practicable, a person intending to seek leave to appear at a hearing should make a written application to the Commissioner prior to the hearing, identifying as precisely as possible:

- the nature of the person's interest in the hearing

- if an appearance is sought on the basis of the rules of procedural fairness, the particular interest of the person and the reason for relying on those rules.

4.2.2 No person may appear before a hearing as a matter of right. It is within the discretion of the Commissioner to determine the manner of conducting an investigation or hearing (ss 48, 82(2)), and who shall appear at a hearing. Matters that the Commissioner will take into account in deciding whether to allow a person who has made application to appear at a hearing include:

- the reason given by the person in the application to appear concerning their interest in the hearing
- if the person has an interest to protect (such as reputation or to respond to an allegation)
- whether the person's evidence would assist the Commissioner's investigation
- whether information can be provided by the person to the Commissioner by means other than an appearance at a hearing.

5. LEGAL REPRESENTATIVES

5.1 Counsel Assisting

5.1.1 The Commissioner may retain a legal practitioner (as Counsel Assisting) to provide assistance at a hearing, particularly if the hearing is likely to be complex or involve several witnesses. In the alternative, a legal practitioner employed by ACLEI or any other person appointed by the Commissioner may assist in examining witnesses on any matter that the Commissioner considers relevant.

5.2 Legal representatives of witnesses and third parties

5.2.1 The Act provides for a person who is giving evidence at a hearing to be represented by a legal practitioner (s 85(1)). The Commissioner may also authorise a person who is not giving evidence to be legally represented at a hearing, if there are special circumstances (s 85(2)).

5.2.2 As a matter of protocol, a legal practitioner seeking to represent a witness or person at a hearing should seek leave to do so either before or at the hearing. It would assist the Commissioner, if in seeking leave the legal practitioner outlined the basis on which leave is sought, and if there is any special issue that relates to a person being legally represented at a hearing. The Commissioner will be concerned to avoid unnecessary legal representation at hearings and to ensure that legal representation in a hearing serves a real and direct interest of the person being represented at the hearing.

5.2.3 Without prejudice to the right of a witness to legal representation, the Commissioner may, in the exercise of the power under s 86(1) to determine who may be present at a private hearing, refuse leave for a particular legal practitioner to appear at the hearing. For operational reasons, it may not be appropriate for the Commissioner to disclose to the legal practitioner all the information known to the Commissioner that is relevant to such a decision.

5.3 Joint representation of different persons

5.3.1 A special issue that can arise is the appropriateness of a legal practitioner representing a number of people who are to give evidence at a hearing or are involved in an investigation by the Commissioner. It may not be in the interest of each person to be represented by the same practitioner. Alternatively, it may prejudice an investigation for a practitioner to represent more than one person. Similarly, it may not be appropriate that a legal practitioner (or 'in house' counsel) who is representing a public authority or other entity, also represents officers or staff of the authority.

5.3.2 One situation in which those issues are likely to arise is where evidence is to be given at a private hearing, or the Commissioner has issued a direction requiring that information relating to a summons or a hearing be treated as confidential or not be published.

5.3.3 The Commissioner, before granting leave to a legal practitioner to represent more than one person or party at a hearing, may require the practitioner to confirm that appropriate consideration has been given to the issue of joint representation. The Commissioner may also reconsider during the course of a hearing whether it is appropriate for a legal practitioner to continue to represent more than one person.

5.3.4 It may not be appropriate for the Commissioner, for operational reasons, to disclose to a legal practitioner all the information known to the Commissioner that is relevant to the issue of joint representation.

5.4 Formalities

5.4.1 There is no set rule as to whether a legal or other representative should stand or be seated when addressing the Commissioner. Practice may vary depending on the nature of the hearing and hearing room.

5.4.2 Legal practitioners do not robe when appearing before the Commissioner.

5.4.3 Unless the Commissioner directs otherwise, parties and representatives should address the Commissioner by that title, and other parties by surname.

6. COMMENCEMENT OF HEARING

6.1 It will be normal for the Commissioner at the commencement of a hearing to make an Opening Statement. In a public hearing the Statement will announce the general scope and purpose of the hearing, the order of proceedings, and the rules applying to witnesses and legal representatives at the hearing. The detail provided by the Commissioner in the Opening Statement may need to be confined to avoid prejudice to an investigation. In a private hearing the Opening Statement will be limited to the rules applying to witnesses and legal representatives.

6.2 In a public hearing Counsel Assisting the Commissioner may also be called on to present an Opening Statement. As befits a commission of inquiry, the purpose of the Statement will be to introduce each topic or issue generally, and possibly to outline the facts as then known, thereby providing the context for the examination of witnesses and

indicating matters of likely inquiry. The Opening Statement of Counsel Assisting differs from an opening address in conventional legal proceedings. One important difference is that the opening address in court proceedings puts the propositions of fact and law that a party will seek to persuade the court to accept.

6.3 An Opening Statement, by either the Commissioner or Counsel Assisting, cannot be definitive. It is usually not possible and, in any event, unwise for such a Statement at the outset of a hearing to predict or forecast the matters that the evidence is likely to establish. An important purpose of the Statement in a public hearing is to facilitate procedural fairness to those whose interests might be affected by the Commissioner's inquiry.

7. GIVING EVIDENCE AT A HEARING

7.1 Obligation to attend and participate in hearing

7.1.1 It is an offence for a person to fail, as required by a summons, to attend a hearing, to answer a question at a hearing, or to produce a document at a hearing (s 93). There is a procedure in the Act whereby a judge may issue a warrant for the arrest of a witness who has failed, or is likely to fail, to attend a hearing as required by a summons (s 99). There is a corresponding procedure for a judge to issue a warrant requiring a person who may be required to give evidence at a hearing to deliver his or her passport to the Commissioner (ss 97, 98).

7.1.2 A person who claims to be unable to attend a hearing or to produce documents in answer to a summons is expected to raise that claim with the Commissioner at the earliest opportunity. The Commissioner will give reasonable consideration to any request, but regards it as exceptional to excuse a person from the obligation to comply with a summons.

7.1.3 A conventional basis on which such a claim is made is that a person is unable to give evidence as a result of illness or absence from the country, or is unable to produce documents that have been destroyed or accidentally lost. It is less likely that the Commissioner will consider a claim of a different kind. The Commissioner may excuse a person for a limited time only, or impose other conditions on a person.

7.1.4 The basis for any claim should be clearly explained in writing and supported by other confirming details. A claim that a person is unable to comply with a summons due to illness should be supported by a medical certificate and diagnosis. The certificate should be prepared and signed by a medical practitioner who has examined the person. The certificate should explain the person's illness, why the illness would reasonably prevent the patient from providing evidence at the time required, and when it is expected that the patient will be able to provide evidence.

7.1.5 It is open to the Commissioner not to accept the reasons given or opinions stated in a medical certificate. The Commissioner may require a person to comply with a summons, notwithstanding the contrary opinion of a medical practitioner. A medical practitioner who is requested to provide a certificate should be informed that the matters stated in the certificate may be the subject of keen appraisal by the Commissioner.

7.2 Obligation to give truthful evidence

7.2.1 The Commissioner may administer an oath or affirmation to a witness (s 87). As a consequence, a hearing is regarded as a 'judicial proceeding' for the purposes of Part III of the *Crimes Act 1914* (Cth). Various criminal offences thereby apply to hearings of the Commissioner:

- giving false evidence
- intimidating a witness
- corrupting a witness
- destroying evidence
- attempting to pervert the course of justice
- fabricating evidence
- giving false testimony
- deceiving a witness
- conspiracy to make a false accusation.

7.2.2 In addition to those legal requirements, the Commissioner expects that witnesses and other persons participating in hearings will do so in a spirit of cooperation that assists the Commissioner to conduct an efficient and effective investigation. In particular, witnesses and other participants in hearings are advised not to withhold evidence or delay its presentation at a hearing. Conduct that is appropriate in the adversarial setting of a court proceeding, or that is designed to secure a forensic advantage to a party, will not necessarily be appropriate in a hearing being conducted by the Commissioner.

7.3 Self incrimination, legal professional privilege and other grounds of objection

Self incrimination

7.3.1 A witness who has been summoned to a hearing of the Commissioner cannot refuse to answer a question or produce a document or thing on the ground that doing so would tend to incriminate the person or expose them to a penalty, would disclose legal advice to or from an Australian Government agency, would be contrary to a secrecy provision (other than a taxation or law enforcement secrecy provision), or would otherwise be contrary to the public interest (s 96(1),(5)).

7.3.2 A witness who is giving evidence or producing a document or thing before the Commissioner at a hearing, is not entitled to seek a 'blanket declaration' against self incrimination pursuant to s 96(4) concerning all of their evidence, or the entirety of the document, as there will be portions of their evidence or within that document which could not be regarded as tending to incriminate them. Thus before the 'direct use indemnity' is invoked, the witness must specifically claim self incrimination before answering a question or line of questioning where they hold a reasonable belief that their answer or answers may tend to be incriminating.² The witness may object to answering a particular question or line of questioning, but they are still required to answer truthfully.

² Re C v National Crime Authority (1987) 78 ALR 338

7.3.3 As the witness may not know of the exact nature or extent of the Commissioner's investigation; the nature of evidence that has already been obtained or anticipated; or the proposed nature or direction of his/her examination at the hearing, the Commissioner may independently form the view, at any time throughout their evidence, that the witness is at risk of self incrimination and then turn to consider whether in the public interest the 'direct use indemnity' is applicable.

Privilege against spousal incrimination

7.3.4 The existence of a common law privilege against being compelled to give incriminating evidence against one's spouse has been accepted by courts in a number of recent cases. However, the Integrity Commissioner considers, on the basis of the decision of the Federal Court in *Stoddart v Boulton* [2009] FCA 1108 and obiter dicta of a majority of the Full Federal Court in *S v Boulton* [2006] FCAFC 99, that s 93(2) of the LEIC Act has abrogated this privilege for the purpose of hearings by the Integrity Commissioner under the Act.

Legal professional privilege (Client legal privilege)

7.3.5 Section 96(6) preserves the right of a person to make a claim of legal professional privilege in respect of any requirement imposed either on them or on some other person by a summons to attend a hearing to answer a question or produce a document or thing. An exception is that a claim of that kind cannot be made in respect of legal advice to or from an Australian Government agency (s 96(5)). However, a witness may be prohibited from giving information or producing a document if the Attorney-General has certified, under s 149, that such disclosure would be contrary to the public interest (s 150(3)).

7.3.6 A legal practitioner who is required by summons to attend a hearing may refuse to answer a question or produce a document or thing if to do so would breach a privileged communication by or to the legal practitioner (s 95(1)). This protection for privileged communications can be waived by a person to or by whom the privileged communication was made (s 95(3)). The Commissioner can require a legal practitioner to disclose the name and address of that person (s 95(4)).

Parliamentary privilege

7.3.7 Article 9 of the Bill of Rights, 1689 provides that 'proceedings in Parliament ought not to be impeached or questioned in any court'. Section 16 of the Parliamentary Privileges Act 1987 confirms that article 9 applies to the Parliament of the Commonwealth, defines the meaning of 'proceedings in Parliament' for that purpose and expressly restricts the capacity of courts and tribunals to require or receive evidence relating to proceedings in Parliament. 'Tribunal', as defined by this Act, includes the Integrity Commissioner. The LEIC Act makes no express mention of Parliamentary privilege. Accordingly, the Integrity Commissioner considers that his powers are conferred subject to Parliamentary privilege as clarified in section 16 of the Parliamentary Privileges Act.

7.3.8 In view of these provisions, the Integrity Commissioner's power to question a person at a hearing or to make use of a document produced by a person does not extend to advice prepared for or given to a person as to the transaction of any

Parliamentary business. For example, this limit on the Integrity Commissioner's powers would preclude him from receiving evidence about the drafting or content of a Question Time Brief or other proposed statement to Parliament, or of briefing for a person to appear before a Parliamentary Committee. Mere requirement to produce a document may not be precluded, but use of it for other than purely investigative purposes (eg as a source of leads, as opposed to challenging the veracity of, or motivation for, statements in the document) would not be permissible.

7.3.9 Conversely, there is no obstacle to the Integrity Commissioner requiring evidence about other kinds of documents or advice provided to a Minister to assist in the performance of executive functions, such as information briefs or submissions as to how the Minister should exercise a statutory power.

Questions relevant to pending charges against the witness

7.3.10 The High Court has held that it is a contempt of court for an administrative tribunal to compel a person to answer questions about conduct that is the subject of criminal charges against the person, because such inquiries risk interference with the administration of justice.³ The application of this rule to closed inquiries similar to a hearing by the Integrity Commissioner has recently been endorsed by the Federal Court.⁴ In the current state of the law, the Integrity Commissioner will seek to avoid questioning witnesses about matters directly relevant to pending criminal charges.

7.3.11 Witnesses or their legal representatives should draw the attention of the Integrity Commissioner, or Counsel Assisting, to any risk that a line of questioning will touch upon such matters. However, the Integrity Commissioner will not suspend a hearing or cease to pursue a line of questioning merely because there is a remote possibility, rather than a real risk, of an interference with the administration of justice.⁵

7.4 Protection of witnesses

7.4.1 If a witness notes their exposure to self-incrimination or a penalty by giving evidence or producing a document or thing, that evidence or document or thing is not admissible against the person in criminal proceedings (s 96(2)). Some exceptions to that principle are outlined in s 96(4).

7.4.2 A person who answers a question at a hearing or produces a document or thing, in accordance with a summons, does not commit an offence and is not liable to a penalty by reason of doing so (s 96(7)).

7.4.3 There is additional and supplementary protection for any person who gives evidence at a hearing, produces a document or thing at a hearing, or makes a submission to a public inquiry; such a person has the same protection as a witness in proceedings in the High Court (s 104A). In essence, the person is protected against an action for defamation or breach of confidence, and against victimisation or intimidation, by reason of giving evidence (though is still liable to prosecution for giving false evidence or for disrupting a hearing: s 94).

³ *Hammond v Commonwealth* [1982] HCA 42; (1982) 152 CLR 188.

⁴ *OK v Australian Crime Commission* [2009] FCA 1038.

⁵ *ABC v Sage* [2009] FCA 170

7.4.4 The Commissioner may make special arrangements to protect the safety of a person who is to give evidence or to prevent them being intimidated or harassed (s 94 (3)).

7.5 Presentation of documents

7.5.1 Documents or other items that are placed in evidence before the Commissioner should ordinarily be introduced by Counsel Assisting, and at a time of the Commissioner's choosing. Consequently, and where practicable, any person (including a legal representative) who proposes to place a document or item in evidence at a hearing before the Commissioner should first indicate their intention to do so to the Commissioner through Counsel Assisting. This should be done prior to the commencement of a hearing. A departure from this direction may be appropriate where the relevance of a document to a hearing only becomes known during the course of a hearing.

7.5.2 A similar direction applies to providing a statement or written submission to the Commissioner for the purposes of a hearing. The intent to do so should be raised with the Commissioner through Counsel Assisting in advance of tendering the statement or submission. This direction does not detract from s 23 of the Act, which provides that a person may at any time refer to the Commissioner an allegation or information that raises a corruption issue.

8. EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

8.1 Section 88 of the Act provides that the Commissioner may if appropriate permit examination or cross-examination of any witness on any matter that the Commissioner considers relevant. The opportunity to examine or cross-examine may be extended to Counsel Assisting, a legal representative, or a person summoned or otherwise authorised to appear at a hearing.

8.2 It is therefore for the Commissioner to decide under the Act whether to permit examination or cross-examination of a witness. This aligns with the doctrine of procedural fairness, which does not impose a general obligation to permit cross-examination in a non-judicial hearing, even in respect of evidence that is adverse to the interests of a person in an inquiry: *National Companies and Securities Commission v News Corporation Ltd (1984) 156 CLR 296*.

8.3 In deciding whether to permit cross-examination of a witness, the Commissioner will have regard to the following considerations:

- whether it would facilitate procedural fairness for any party to the hearing to permit cross-examination of a witness
- whether evidence given by a witness, the credibility or veracity of a witness, or other issues that are material to an investigation, should be tested by cross-examination, in order to assist the Commissioner in the investigation
- the importance to the investigation of the issue on which cross-examination may be permitted

- whether cross-examination of a witness should be undertaken by Counsel Assisting, rather than by a legal representative or other party in a hearing
- whether contrary evidence on an issue in dispute can be given in a form other than cross-examination
- whether it would impede or unduly lengthen a hearing to permit cross-examination.

8.5 A legal representative or party who wishes to cross-examine a witness should make a request to Counsel Assisting or the Commissioner, either before or during the hearing. The request should outline the issues on which cross-examination would be conducted, and the reason for the request to permit cross-examination.

8.6 The Commissioner may permit cross-examination on some issues but not others, or place restrictions on the cross-examination of a witness. The Commissioner may also decide to defer a decision on whether to allow cross-examination until a later stage in the hearing. If necessary, a party can be re-called to the hearing in order to be cross-examined.

8.7 In declining a request to permit cross-examination, the Commissioner will ordinarily, and to the extent practicable, explain the reasons for that decision.

9. HEARINGS AND RULES OF EVIDENCE

9.1 The purpose of a hearing is to assist the Commissioner in conducting an investigation. The Commissioner may conduct both an investigation and a hearing in such manner as the Commissioner thinks fit (ss 48, 82(2)). It follows that the rules of evidence do not apply in a hearing and the Commissioner may seek to be informed as he or she thinks fit.

9.2 It is open to a legal representative or a party in a hearing to question the relevance or purpose of an item of evidence or information being presented to the hearing. Any such objection should, however, take account of the special role that a hearing plays in an investigation being conducted by the Commissioner. It is in the nature of an investigation or inquisitorial proceeding that issues can be examined in order to gauge their potential relevance to an investigation. The purpose of a hearing is not to determine issues of fact, but to discover them. An objection that is framed solely by reference to the rules of evidence and the admissibility of evidence in a court proceeding will be unpersuasive in a hearing conducted by the Commissioner.

9.3 As a general guide, the circumstances in which the Commissioner is more likely to restrict evidence being presented or a witness being examined are:

- where the connection between the evidence or examination, and the scope and purpose of a hearing, cannot reasonably be drawn
- it is unlikely that a witness would be able to give a rational or helpful response to a question
- the apparent line of inquiry is unlikely to inform the Commissioner in the investigation to which the hearing relates.

10. RESPONDING TO ADVERSE EVIDENCE

10.1 If evidence is given at a public hearing that is adverse to the interests or reputation of a person, the Commissioner's approach will be to afford that person an opportunity to respond to that evidence or to make a submission regarding it. It may not always be appropriate or practicable to provide that opportunity, particularly if to do so would needlessly lengthen or complicate the public hearing or investigation.

10.2 If evidence adverse to a person is given at a private hearing, there may be less of a need to provide that person with an opportunity to respond. The main issue guiding the Commissioner will be the importance and relevance to the investigation of allowing an opportunity to respond.

10.3 A key consideration in either case is the prima facie requirement in s 51 of the Act that, before including an opinion or finding that is critical of a person in a report, the Commissioner must give the person a reasonable opportunity to appear before him or her and make submissions in relation to the opinion or finding.

10.4 It is not the practice of the Commissioner to notify a person in advance that evidence adverse to them may, or is likely to, be given at a public or a private hearing. Nor do the rules of procedural fairness impose an obligation upon the Commissioner to provide advance notice in those circumstances: *National Companies and Securities Commission v News Corporation Ltd (1984)156 CLR 296*.

11. SUBMISSIONS AND CLAIMS – SPECIAL ISSUES

11.1 Closing submissions

11.1.1 At the conclusion of a hearing the Commissioner may set a timetable for written submissions to be made by interested persons. A party given leave to make a written submission is expected to comply with the timetable set by the Commissioner. The Commissioner may not accept submissions lodged after the closing date.

11.2 Submissions on jurisdiction

11.2.1 A submission framed as a challenge to or question concerning the jurisdiction of the Commissioner to conduct an investigation, hearing or examination in a particular manner, should ordinarily be done by way of written submission provided in advance of a hearing.

11.3 Challenges to warrants

11.3.1 The *Law Enforcement Integrity Commissioner Act 2006* and other Commonwealth statutes confer powers on the Commissioner or an authorised ACLEI officer to apply for a warrant to conduct a search of premises, a surveillance device warrant, or a telecommunications interception warrant. Information or evidence obtained by that process can be used by the Commissioner in an investigation into a corruption issue, including in a hearing. The warrant is granted in each instance by an officer independent of ACLEI (for example, a judge or tribunal member) on application made by

the Commissioner or an authorised ACLEI officer. The Commissioner is also authorised by legislation to issue a certificate to conduct a controlled operation.

11.3.2 The Commissioner will not entertain, in the course of a hearing, any question, submission or challenge concerning the grant or execution of a warrant or certificate. Any issue of that kind should be raised either in another forum, or with the Commissioner independently of a hearing. Similarly, any request for access to a warrant or certificate or documents relating thereto should be made independently of a hearing. Any such request will be dealt with by ACLEI in accordance with the Act and other relevant statutes, including the *Freedom of Information Act 1982* (bearing in mind that the FOI Act contains exemption provisions, including to protect the enforcement of the law).

11.4 Non-compellability

11.4.1 The attention of legal representatives and others is drawn to s 211 of the Act, which provides that a person who is or has been a staff member of ACLEI is not compellable in proceedings before a court or tribunal to disclose information or produce documents obtained in the performance of the functions conferred on ACLEI by the Act. It is the practice of the Commissioner to invoke this immunity whenever the issue arises.

11.4.2 There are three exceptions stated in s 211(3) when an ACLEI staff member can be required to provide information or documents for the purpose of court or tribunal proceedings:

- proceedings to which the Commissioner or a delegate or authorised person is a party;
- proceedings that give effect to the provisions of the Act; and
- a prosecution, civil penalty proceeding or confiscation proceeding that arises from a corruption investigation or inquiry conducted, managed or overseen by the Commissioner.