

## INDEPENDENT COMMISSION AGAINST CORRUPTION

### STANDARD DIRECTIONS FOR PUBLIC INQUIRIES

JANUARY 2025

These directions apply to the conduct of a public inquiry by the Independent Commission Against Corruption (the Commission). They should be read in conjunction with the Procedural Guidelines issued by the Commission under s 31B of the *Independent Commission against Corruption Act 1988* (“the ICAC Act”).

#### **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 and legal representation**

2. The presiding Commissioner 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 presiding Commissioner that the person is substantially and directly interested in any subject-matter of the public inquiry. Authorisation can be granted subject to conditions.
3. The presiding Commissioner 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 public inquiry subject to the presiding Commissioner’s control and to such extent as the presiding Commissioner considers appropriate.
5. The presiding Commissioner may authorise:
  - a. a person authorised to appear; or
  - b. a person giving evidence at the public inquiry;to be legally represented at the public inquiry or at a specified part of the public inquiry.
6. Where it is proposed that an application will be made for authorisation to appear and/or for a party or witness to be legally represented, the application should be made in writing (including by email) to the Commission in the first instance. The application should provide the name of the

party or the witness, the names of the legal representatives who seek authorisation and the reason(s) why the party or the witness has a sufficient interest.

7. The Commission prefers that each person seeking to be legally represented have separate and independent representation. The presiding Commissioner 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 can 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; and
  - 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**

8. Subject to the control of the presiding Commissioner, Counsel Assisting will determine what witnesses to call at a public inquiry and the order in which they are called. It may be necessary to call some witnesses to give evidence on more than one occasion. In determining what evidence to place before the Commission Counsel Assisting will consider the credibility, relevance and significance of that evidence and the extent to which such evidence will assist the Commission to make factual and other findings.
9. The presiding Commissioner may decide to receive the evidence of a witness orally or by statement. The presiding Commissioner will decide whether to require a witness giving evidence by statement to attend for examination or cross-examination.
10. 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.
11. The Commission will regularly publish on its website a list of witnesses proposed to be called each week of the public inquiry.
12. 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, there may be circumstances in which a witness might be examined by more than one of the Counsel Assisting. The witness may then be cross-examined by or on behalf of any person considered by the presiding Commissioner 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.

13. In determining whether a person has sufficient interest to cross-examine a witness, the presiding Commissioner may call upon the cross-examiner to:
  - a. identify the purpose of the cross-examination;
  - b. set out the issues to be canvassed; and
  - c. state whether a contrary affirmative case is to be made, and if so the details of that case.
14. Where, in the opinion of the cross-examiner, public disclosure of any of the matters referred to in paragraph 13 would substantially undermine the forensic utility of the cross-examination, the cross-examiner may, with the leave of the presiding Commissioner, address those matters in writing. To that end, the cross-examiner must be in a position to do so when called upon by the presiding Commissioner.
15. The presiding Commissioner may:
  - a. limit the particular topics or issues upon which a party can examine or cross-examine; and
  - b. impose time limits upon examination or cross examination.
16. Save as set out in paragraphs 17 to 19 of these Directions, the Commission will not apply the rule in *Browne v Dunn*.
17. The Commission expects that, where it is to be invited to reject or not accept the evidence of a witness on a material fact or issue, on the grounds the witness deliberately gave false evidence, the evidence is unreliable, or the witness has made a mistake on a significant issue, the material grounds of such contention must be put to the witness to allow the witness an opportunity to offer an explanation.
18. What is stated in paragraph 17 is not intended to mean that:
  - (a) mere inconsistencies and unimportant differences in the evidence should be raised;
  - (b) once the grounds for rejecting or not accepting the evidence of a witness have been put by one party, other parties need to put them again; or
  - (c) the grounds for rejecting or not accepting the evidence of 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.
19. 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.

20. The procedure to be followed by any person seeking to place evidence before the public inquiry is set out in the s 31B Procedural Guidelines.
21. Leave may be granted to any affected person (under s 74A(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 ICAC 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**

22. The s 31B Procedural Guidelines set out the circumstances and procedure by which access will be given to documents prior to the commencement of the public inquiry.
23. Subject to the control of the presiding Commissioner, Counsel Assisting will determine which documents are tendered, and the time at which they will be tendered.
24. A copy of any document proposed to be put to a witness in cross-examination must be provided to Counsel Assisting as soon as possible after a decision is made to use the document for such purpose. In all cases, the document must be provided to Counsel Assisting prior to the commencement of the cross-examination.
25. 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**

26. Suppression orders may be made relating to names and identifying details of persons who have a legitimate need for protection.
27. 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.

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

**Publication of, and access to, evidence.**

30. 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 conditions 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**

31. 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.
32. In accordance with Commission practice, a suppression order under s112 of the ICAC Act will usually be made in relation to all written submissions. Ancillary orders may be made to permit publication of certain submissions to specified parties to ensure procedural fairness.

## **Use of Generative Artificial Intelligence (Gen AI)<sup>1</sup>**

33. Generative Artificial Intelligence (Gen AI) is a form of artificial intelligence capable of creating new content, including text, images or sounds, based on patterns and data acquired from a body of training material. That training material may include information obtained from “scraping” publicly and privately available text sources to produce large language models. It may take the form of generic large language model programs or more bespoke programs specifically directed to lawyers. Such programs may use “chatbots” and prompt requests and refined requests from the users of such programs.
34. These directions apply to both closed-source and open-source large language model Gen AI and are directed to circumstances where Gen AI may be used to assist legal practitioners and unrepresented parties involved in a public inquiry with various tasks, including drafting documents and summarising information.
35. For the purpose of these directions:
- a. Gen AI does not include technology or functionality which:
    - i. merely corrects spelling or grammar, provides transcription, assists with formatting and otherwise does not generate substantive content;
    - ii. generates chronologies from original source documents;
  - b. nothing is intended to preclude or apply to the use of:
    - i. search engines which produce a list of websites that match search criteria but which do not produce an apparently personalised textual answer in response to a specific prompt;
    - ii. dedicated legal research software which uses AI or machine learning to conduct searches across material comprising legislation or subordinate legislation, judgments of courts or tribunals, and/or books or articles written for a legal audience.
36. Legal practitioners and unrepresented parties should be aware of limits, risks and shortcomings of any particular Gen AI program which they use. These may include:
- a. the scope for “hallucinations”, that is, the generation of apparently plausible, authoritative and coherent responses but which are in fact inaccurate or fictitious. Examples include false citations and fabricated legislative, case or other secondary references;
  - b. the dependence of Gen AI on the quality and reach of underlying data sets, including the possibility that underlying database(s) may include misinformation or selective or

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<sup>1</sup> This section is largely derived from the NSW Supreme Court Practice Note SC GEN 23 – Use of Generative Artificial Intelligence (GEN AI).

incomplete data, data that is not up to date or data that is not relevant in New South Wales or Australia;

- c. the scope for biased or inaccurate output including by reason of the nature or limitations of the underlying data sets;
  - d. the fact that any search requests via a chatbot or interactions or prompts within a Gen AI program may, unless disabled, be automatically added to the large language model database, remembered and used to respond to queries from other users;
  - e. the lack of adequate safeguards, to preserve the confidentiality, privacy or legal professional privilege that may attach to information or otherwise sensitive material submitted to a public Gen AI chatbot; and
  - f. the fact that data contained in a Gen AI data set or database may have been obtained in breach of copyright.
37. Legal practitioners and unrepresented parties should be aware that data entered into Gen AI programs may be used to train the large language model, potentially making confidential information available to others. Any information entered into a public AI chatbot should be regarded as being published to all the world.
38. Information subject to a suppression order must not be entered into any Gen AI program. Should this occur, the person responsible must notify the Commission as soon as possible.
39. Gen AI must not be used in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination. Affidavits, witness statements, character references should contain and reflect a person's own knowledge, not AI-generated content.
40. Gen AI must not be used for the purpose of altering, embellishing, strengthening or diluting or otherwise rephrasing a witness's evidence when expressed in written form.
41. An affidavit, witness statement or character reference prepared for the purpose of the public inquiry must contain a disclosure that Gen AI was not used in generating:
- a. its content (including by way of altering, embellishing, strengthening or diluting or rephrasing a witness's evidence); or
  - b. subject to leave having been obtained in accordance with paragraph 43 below, the content of any annexure or exhibit prepared by the deponent of the affidavit or witness statement or character reference for the purposes of his or her evidence.

42. In exceptional cases, leave may be sought to use Gen AI for the preparation or generation of any annexure or exhibit to an affidavit, witness statement or character reference. Any application for leave must identify:
- a. the proposed use of Gen AI;
  - b. the Gen AI program that will be used (including the relevant version);
  - c. whether it is a closed-source or open-source program and or contains privacy and or confidentiality settings; and
  - d. the benefit to be derived from the proposed use of Gen AI in preparation of the annexure or exhibit.
43. Where Gen AI has been used in the preparation of written submissions or summaries or skeletons of argument, the author must verify in the body of the submissions, summaries or skeleton, that all citations, legal and academic authority and case law and legislative references:
- a. exist,
  - b. are accurate, and
  - c. are relevant to the proceedings,
- and make similar verification in relation to references to evidence in written submissions or summaries or skeletons of argument to evidence (whether the evidence be contained in affidavits or transcript).
44. Such verification must not be carried out by using a Gen AI tool or program.
45. Gen AI must not be used to draft or prepare the content of an expert report (or any part of an expert report) without prior leave of the Commission.
46. Any application for leave must identify:
- a. the proposed use of Gen AI;
  - b. the Gen AI program (including the version) that will be used and whether it is a closed-source or open-source program or contains privacy and or confidentiality settings;
  - c. the benefit to be derived from the proposed use of Gen AI in the preparation of the expert report;
  - d. any documents which it is proposed to submit to the Gen AI program for the purposes of generating any aspect of the expert report.



47. If an expert witness obtains prior leave to use Gen AI for any purpose in preparing an expert report for the Commission, the expert witness must:
- a. disclose in the report what part(s) of it was prepared using Gen AI or drawing upon Gen AI produced material and the Gen AI program, (and version) that was used;
  - b. keep records and identify in an annexure to the report a record of how the Gen AI tool or program was used (for example any prompts used, any default values used, and any variables set), except where the presiding Commissioner grants leave to dispense with this requirement (for example, where the presiding Commissioner determines this to be voluminous or unnecessary); and
  - c. if the use of Gen AI is regulated or addressed by any relevant code of practice or principles that bind or apply to the expert, identify that fact and annex to the report a copy of the relevant code(s) or principle(s).
48. Examples of the above use of Gen AI may include experts using software that uses Gen AI to analyse sound, graphic or video data, or to interrogate very large data sets, or to conduct statistical analysis.
49. Legal practitioners and unrepresented parties must draw the requirements of these directions to the attention of experts when instructing them.

**Liaison with the Commission**

50. 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.