

PRACTICE GUIDELINE 2 – CONDUCT OF PUBLIC HEARINGS

Legal representation of persons giving evidence at public hearings

1. The Commissioner may authorise a person giving evidence at a public hearing to be legally represented. Applications to authorise legal representation of witnesses should be made at the relevant hearing date, or such prior occasion as may be appropriate. Prior notice of the application for authorisation, and its stated basis, should be provided in writing to the Secretary.

Conduct of the public hearings

2. Subject to the control of the Commissioner, Counsel Assisting will determine what witnesses are to be called, what documents are to be tendered to the Commission, and in what order witnesses will be called and examined. It may be necessary to call some witnesses to give evidence on more than one occasion.

3. The Commission may decide to receive the evidence of a witness orally or in statement form (such as by a statutory declaration). The Commission will decide whether to require a witness giving evidence by statement to attend for examination or cross examination.

Application for witnesses to appear before the Commission

4. All witnesses at a public hearing will be called by the Commissioner.

5. Any person wishing to have evidence of a witness or witnesses placed before the Commission is to notify the Secretary of the names of such witnesses, and provide a signed statement of their expected evidence (if possible in the form of a statutory declaration) as soon as practicable and in the case of a witness appearing at a hearing then at least 48 hours before their scheduled attendance.

6. If considered necessary or desirable, Counsel Assisting and/or Commission staff may interview such witnesses and take or request further statements from such witnesses. It is not necessary that any such interviews or obtaining of additional statements or information occur in the presence of the person, or legal representatives thereof, who sought to have the evidence of such witnesses placed before the Commission.

7. Counsel Assisting will determine whether or not to call the witness. An application may be made directly to the Commissioner (via the Secretary) to call the witness only after the above procedure has been completed and Counsel Assisting has indicated that the witness will not be called.

Examination and cross-examination of witnesses

8. All witnesses at a public hearing will be called by Counsel Assisting. Typically, Counsel Assisting will call and then examine the witness unless in particular instances Counsel Assisting (or the Commissioner) permits a witness' own legal representative to lead his or her evidence.

9. In the usual case, Counsel Assisting will call and examine the witness. In some circumstances, the witnesses might be examined by more than one of the Counsel Assisting. Subject to the discretion of the Commissioner, the witness may next be

cross-examined by or on behalf of any person considered by the Commissioner to have sufficient interest to do so, and may then be examined by his or her own legal representative. Counsel Assisting may re-examine. At all times, duplication and repetition is to be avoided and the Commissioner will disallow any questions of such nature.

10. In determining whether a person has a sufficient interest to cross-examine a particular witness (either at all or as to a particular topic), the Commissioner may call upon the person to:

- (a) identify the purpose of the proposed cross-examination;
- (b) set out the issues to be canvassed; and
- (c) state whether a contrary affirmative case is to be made in some respect, and if so the details of that case.

11. The Commissioner may:

- (a) limit the particular topics or issues upon which the person may examine and cross-examine witnesses; and
- (b) impose time limits upon examination and cross-examination.

12. The Commissioner may:

- (a) disallow questions posed to witnesses; and
- (b) ask questions of a witness at any time.

13. 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, and in all cases, prior to its intended use.

14. The Commission will not apply the rule in *Browne v Dunn* except as set out in paragraphs 15 to 18 below.

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 statement made during the 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.

Evidence to be adduced

19. The details of the evidence to be adduced to the Commission will generally not be provided in advance of the public hearing to any person who is authorised to appear before the Commission (and will generally not otherwise be published in advance of the public hearing).

Publication of proposed witness list and hearing hours

20. At, or shortly prior to, the commencement of each week of a public hearing, the Commission may publish on its website a list of witnesses proposed to be called that week. The scheduling of witnesses as published may be subject to change from time to time.

21. The public hearing of the Commission will sit on week days. Usual hearing hours will be from 10.00am to 1.00pm and from 2.00pm to 4.00pm.

Procedures relating to the tender and inspection of documents

22. Subject to the control of the Commissioner, Counsel Assisting will determine whether and which documents are to be tendered, and when they will be tendered.

23. Any person wishing to have a document placed before the Commission at a public hearing must notify the Commission by providing a copy of the document to the Counsel Assisting. Counsel Assisting will decide whether or not to tender the document. An application may be made directly to the Commissioner to tender a document only after the above procedure has been completed and Counsel Assisting has indicated that the document will not be tendered.

24. Any person (or legal representative of that person) having been granted authorisation to appear before the Commission may request to inspect and copy any book, document or writing tendered in evidence (and not subject to any relevant order restricting publication or access) for the purpose only of appearance before the Commission. Commission staff may require suitable arrangements to be made with the person seeking inspection and/or copying of tendered documents, including as to the costs of any such copying, before permitting access to the document(s).

25. Documents and other articles may be tendered to the Commission, by counsel assisting and received into evidence outside formal hearings of the Commission.

Publication of, and access to, evidence.

26. 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:
 - (d) it not be used or permitted to be used for any purpose other than the public reporting of the proceedings of the Commission; and
 - (e) 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 Secretary.

Submissions

27. 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.

28. Unless otherwise ordered, all written submissions are subject to a non-publication order 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.

Non-publication orders and closed hearings

29. In an appropriate case, the Commissioner may:

- (a) direct non-publication of the name, or the use of a pseudonym, to protect the name of any witness or any person about whom evidence is given;
- (b) give directions otherwise preventing or restricting the publication of evidence given before the Commissioner or of matters contained in documents tendered to the Commission; and
- (c) direct during a public hearing that part of such a hearing take place in private, and may give directions as to the persons who may be present during such part of the hearing to be held in private.

30. Any person who is authorised to appear who seeks a direction for a closed hearing for particular evidence, or a direction for non-publication of particular evidence must (as soon as is reasonably practicable) provide Counsel Assisting in advance with a copy of the proposed application, the form of the direction sought, the content of the proposed evidence and any submissions in support of the application.

Allowances for Witnesses

31. A person attending a commission hearing under an attendance notice, or otherwise as a witness at the request of the Commission, is entitled to be paid in accordance with section 204 of the *Crime and Corruption Act 2001*.

Further matters

32. At the conclusion of the evidence at the public hearings, it will be determined who will have the right to address the Commission, when, in what form (e.g. only in writing), on what issues, and in what order.

33. The Commission reserves the right to vary and/or depart from the above practices from time to time where considered necessary or desirable to do so.

A handwritten signature in black ink, appearing to read 'A. MacSporran', with a long horizontal stroke extending to the right.

A J MacSporran QC

5 April 2018