

Australian Capital Territory

# Integrity Commission (Examination Conduct) Guidelines 2021

Notifiable instrument NI2021–120

made under the

***Integrity Commission Act 2018*, section 142(2) (Examination conduct guidelines)**

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**1 Name of instrument**

This instrument is the *Integrity Commission (Examination Conduct) Guidelines 2021*.

**2 Commencement**

This instrument commences on the day after notification.

**3 Commission's Guidelines**

I make the *Integrity Commission (Examination Conduct) Guidelines 2021* as set out at Schedule 1 to this instrument.

The Hon Michael F Adams QC

Acting Commissioner  
ACT Integrity Commission

**18 February 2021**

**Schedule 1**

# Integrity Commission (Examination Conduct) Guidelines 2021

February 2021

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## 1. Introduction

- 1.1 The ACT Integrity Commission (**‘Commission’**) was created in response to an election commitment made by the 9<sup>th</sup> Legislative Assembly. On 31 October 2017, the Select Committee on an Independent Integrity Commission **‘(Select Committee)’** released its report in which it recommended the establishment of a standing ACT independent integrity body to investigate corruption in public administration and strengthen public confidence in government integrity.<sup>1</sup>
- 1.2 The *Integrity Commission Act 2018* (**‘Act’**), which established the Commission came into operation on 1 July 2019.
- 1.3 The functions of the Commission are to:
- a) investigate conduct that is alleged to be corrupt conduct;
  - b) refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action;
  - c) prevent corruption, including by researching corrupt practices and mitigating the risks of corruption;
  - d) publish information about investigations conducted by the commission, including lessons learned;
  - e) provide education programs about the operation of this Act and the commission, including providing advice, training and education services to —
    - (a) the Legislative Assembly and the public sector to increase capacity to prevent corrupt conduct;
    - (b) people who are required to report corrupt conduct under this Act;
    - (c) the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct; and
  - f) foster public confidence in the Legislative Assembly and public sector.<sup>2</sup>
- 1.4 The Commission is empowered by s 140 to hold an examination as part of an investigation. Such an examination is inquisitorial in nature, such as those conducted by a Royal Commission. The Commissioner (**‘Commissioner’**) must preside at an

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<sup>1</sup> Explanatory Statement, Integrity Commission Bill 2018, p 3

<sup>2</sup> Section 23(1), *Integrity Commission Act 2018*. All references to sections in these Guidelines are references to the *Integrity Commission Act 2018*, unless otherwise specified.

examination.<sup>3</sup> The Commissioner may require a person to give evidence at an examination and/or produce a document or other thing to the Commission, or both.

- 1.5 Examinations may be held in public or in private.<sup>4</sup> If the examination is to be held in public, it is necessary for the Commission to notify the Inspector not less than seven days before its commencement of the fact that such examination is to be held, and the reasons why the Commission has decided to hold a public examination.<sup>5</sup>
- 1.6 The primary purpose of Commission public examinations and private examinations is to assist the investigation process by facts that are relevant to an investigation, either directly or that open up potentially useful lines of inquiry.
- 1.7 These Examination Conduct Guidelines ('**Guidelines**') are issued in accordance with the provisions of s 142(2) of the Act.
- 1.8 In conducting an examination, the Commission:<sup>6</sup>
  - (a) must comply with the rules of natural justice and procedural fairness; and
  - (b) is not bound by the rules of evidence and may inform itself of anything in the way it considers appropriate; and
  - (c) may decide the procedure of the examination as the Commission considers appropriate; and
  - (d) must exercise its functions with as little formality and technicality as is possible and, in particular -
    - (i) must accept written submissions as far as possible; and
    - (ii) examinations must be conducted with as little emphasis on an adversarial approach as is possible; and
  - (e) may do whatever it considers necessary or convenient for the fair and prompt conduct of the proceeding.
- 1.9 As a public authority under the *Human Rights Act 2004* (ACT), the Commission is required to act consistently with human rights and to give proper consideration to human rights when making decisions. This includes decisions regarding the conduct of examinations.

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<sup>3</sup> Section 141

<sup>4</sup> Section 143(1).

<sup>5</sup> Section 144.

<sup>6</sup> Section 142(1).

- 1.10 The manner in which the Guidelines are implemented in respect of a particular examination, and the timing of such implementation, are matters that are within the discretion of the Commissioner. The Commissioner will take into account the following:
- i. the efficient conduct of the examination;
  - ii. the effective pursuit of the Commission's functions as outlined in s 23 of the Act;
  - iii. the requirements of the rules of natural justice and procedural fairness; and
  - iv. the conduct of the examination in such a manner as to avoid unreasonable infringement of a person's human rights.
- 1.11 These Guidelines are to be read in conjunction with the Standard Directions for public examinations.

## 2. Natural justice and procedural fairness

- 2.1 In conducting an examination, the Commission must comply with the rules of natural justice and procedural fairness.<sup>7</sup> In substance, this means that the person being examined must be treated fairly.
- 2.2 The requirement to comply with the rules of natural justice benefits persons summonsed by the Commission to an examination, but also the reputation of the Commission itself.
- 2.3 Precisely how natural justice and procedural fairness applies to particular examinations depends upon considerations that may well apply differently in each case. Thus, although witnesses are entitled to be informed at the outset of the nature of the matters about which they are to be questioned, this may be significantly limited if the information would be likely to compromise an investigation or otherwise be contrary to the public interest. Usually witnesses will be given sufficient notice of an examination to enable them to consult a lawyer but in some exceptional cases, the requirements of an investigation may not permit this. Where the Commission proposes to examine a witness in public, the witness will, unless the circumstances are exceptional, be afforded the opportunity to make submissions on the question of holding that examination in public. Generally, a witness (either personally or through their lawyer) will be given an opportunity to make submissions about procedural steps that affect them, including whether any suppression or confidentiality orders should be made. Claims of privilege will always be permitted to be made.
- 2.4 Although, in most private examinations, a person of interest who might be adversely affected by the witness's evidence will not be permitted to attend or to cross-examine, the Commissioner will decide on a case by case basis whether natural justice and procedural fairness require this opportunity to be provided. Where the examination is in public, cross-examination will usually be permitted, subject to the discretion of the Commissioner as to its utility.
- 2.5 In the context of an examination, the following general principles can be stated:
- (i) the Commissioner makes all procedural decisions;

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<sup>7</sup> Section 142(1)(a)

- (ii) the Commissioner decides the people who are to be summonsed to give evidence at an examination and/or to produce documents or other things to the Commission;
- (iii) the Commissioner decides the matters which are to be the subject of the examination; and
- (iv) the Commissioner decides how witnesses will be examined, bearing in mind the inquisitorial rather than adversarial nature of the examination (this rule has a direct bearing on whether witnesses may be asked leading questions or not).



### 3. Service and Notice

#### Notice

3.1 Adequate notice of the requirement to attend the Commission for an examination is usually necessary to ensure a person is afforded procedural fairness. Notice enables the person time to collate materials they are required to produce, to seek legal advice, and to obtain potentially exculpatory information.

3.2 Where it is proposed to issue an examination summons, the Act requires, subject to the exception noted below, the recipient to be served at least 7 days before the day the person is required to attend or produce a document or thing.<sup>8</sup>

3.3 An examination summons requiring immediate attendance by a person before the Commission if the Commissioner considers on reasonable grounds that a delay in the person's attendance is likely to result in –

- evidence being lost or destroyed; or
- the commission of an offence; or
- the escape of a person who is summoned; or
- serious prejudice to the conduct of the investigation.<sup>9</sup>

#### Service

3.4 The Act is silent as to the manner in which a person should be served. Part 19.5 of the *Legislation Act 2001* (ACT) (**'Legislation Act'**) therefore applies. While the *Legislation Act* outlines a variety of methods by which a document may be served on a person, it will generally be preferable to serve the person named in the summons personally due to the sensitive nature of an examination summons.

3.5 Where it is not possible to serve a person personally, the following options are available:

- 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;

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<sup>8</sup> Section 150(1)

<sup>9</sup> Section 150(2)

- service via email, but only if:
  - service by 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 by email that they are willing to accept service by that method, and service is to be effected by reply to the email.

### **Service on an inmate of a correctional centre**

3.6 Inmates of correctional centres will be served with an examination summons personally. In certain circumstances the examination summons will be returned to the Commission after service is effected and held on the detainee's behalf.

3.7 In some circumstances it may be appropriate to serve a detainee with an examination summons after his or her arrival to give evidence at the Commission.

### **Documents to be included with an examination summons**

3.8 An examination summons should be accompanied by the Commission's 'Information for Witnesses' brochure (also available on the website).

## 4. Representation and Authorisation

### Representation

- 4.1 A person giving evidence at an examination may be legally represented.<sup>10</sup> The Commissioner can, however, refuse to grant leave for a particular legal representative to appear on that person's behalf (a legal advice direction) in certain circumstances,<sup>11</sup> although this would be an exceptional step.

### Authorisation

- 4.3 Where there are special circumstances, the Commissioner may authorise a person who is not a witness to be represented by a lawyer during the examination of a witness.<sup>12</sup> For example, the Commissioner may authorise a person to appear at a public examination or a specified part of a public examination if it is shown that the person is substantially and directly interested in any subject-matter of the public examination. Authorisation may be granted subject to conditions.
- 4.4 The Commissioner may withdraw authorisation or make the authorisation subject to altered or additional conditions, at any time. Authorisation to appear entitles the person to whom it is granted to participate in the public examination subject to the Commissioner's control and to such extent as the Commissioner considers appropriate.
- 4.5 Where it is proposed that an application will be made for authorisation to appear, the application must be made in writing to the Commission. The application should provide:
- the name of the party seeking to be represented;
  - the names of the legal representatives who seek authorisation;
  - the reason why the party has a sufficient interest in proceedings such that they require legal representation.
- 4.6 It is preferable that each person or witness seeking to be legally represented have separate and independent legal representation. The Commissioner will, however, receive and consider applications that a single lawyer or team of lawyers be permitted to represent more than one person where:

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<sup>10</sup> ss 148(3)(vi), 152

<sup>11</sup> Section 193.

<sup>12</sup> s 152(4)

- it can be demonstrated that there are reasonable grounds for representation of that kind;
- the most senior lawyer involved is able to assure the Commission that no conflict of interest is anticipated; and
- 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.

## 5. Witnesses and Evidence

### General

- 5.1 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.
- 5.2 It is a matter for Counsel Assisting, under the direction of the Commissioner, to determine which witnesses to call for an examination, and the order in which they are called. Witnesses may be required to give evidence on more than one occasion.
- 5.3 All witnesses will be called to give evidence by Counsel Assisting, and first 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 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.
- 5.4 In determining whether a person has sufficient interest to cross-examine a witness, the Commissioner may call upon the cross-examiner to:
- identify the purpose of the cross-examination;
  - set out the issues to be canvassed; and
  - state whether a contrary affirmative case is to be made, and if so the details of that case.
- 5.5 The Commissioner may limit the particular topics or issues upon which a party can examine or cross-examine and may impose time limits upon examination or cross-examination.
- 5.6 The Commission will not apply the rule in *Browne v Dunn* (1893) 6 R 67.<sup>13</sup> However, 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

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<sup>13</sup> The rule in *Browne v Dunn* states that if counsel intends to present evidence contradictory to a witness's testimony as part of his or her argument, he or she must put this version of events to the witness during cross-examination.

deliberately gave false evidence, the evidence is unreliable, or the witness has made a mistake on a significant issue, the material grounds for such a contention must be put to the witness to allow the witness an opportunity to offer an explanation.

### **COVID-19 policy**

5.7 The Commission has a COVID-19 policy. Should examinations take place at the Commission offices during a time when the ACT Government has identified a public health emergency in response to the COVID-19 pandemic, the following will occur:

- all individuals attending the Commission offices must submit to a temperature scan on their forehead taken via infrared thermometer;
- hand sanitiser will be made readily available to visitors to the Commission;
- the layout of the hearing room will accommodate social distancing requirements;
- the Commission may require face masks to be used; and
- the hearing room will be effectively cleaned and sanitised by professional cleaners prior to an examination.

5.8 Any public hearing which may be scheduled during the public health emergency in response to the COVID-19 pandemic will not have an in-person public gallery. Arrangements will be made to live screen the proceedings.

5.9 The Commission will consider applications or proposals by witnesses to give evidence remotely due to the COVID-19 public health emergency on a case by case basis. Matters that may be considered by the Commission in coming to a decision include:

- the location of the witness and whether they have access to appropriate technology;
- whether the witness has the technical ability to successfully utilise video conferencing platforms or applications;
- whether there is appropriate service coverage to ensure the clarity of the video, and to ensure the examination will not be delayed or prolonged due to technical or service difficulties or outages;
- whether the Commission is confident there will not be a third-party present during the examination;
- whether the Commission can ensure the examination is not being recorded for provision to another witness or a person of interest;
- whether the Commission can verify whether the witness is referencing material either digitally or physically to assist them in answering questions; and

- whether there is the technological ability to show witnesses documents and/or other things while video recording the witness giving their evidence.

## **Witnesses**

5.10 Before a witness who is summonsed to attend an examination is asked any questions or required to produce a document or other thing, the Commission must comply with the requirements of s 156(1):

- (a) if the Commission considers the witness may be under the age of 18 years – confirm the age of the witness; and
- (b) release any witness under the age of 16 years from compliance with the examination summons; and
- (c) tell the witness orally and in writing about the witness’s rights and obligations, as stated in s 148(3); and
- (d) if a lawyer is representing a person at the examination – tell the lawyer about any non-disclosure requirements that apply under the Act; and
- (e) take any other action prescribed by regulation; and
- (f) tell the witness the nature of the matters about which the witness is to be asked questions, except if the Commission considers on reasonable grounds that it would prejudice the investigation or be contrary to the public interest.<sup>14</sup>

5.11 An examination summons must be accompanied by any relevant confidentiality notice and a statement setting out:<sup>15</sup>

- the failure to comply with the examination summons may be a contempt of the Commission, or an offence, and penalties may apply;
- giving false or misleading information to the Commission is a serious offence;
- whether the examination is intended to be held in public or private;
- that the person is entitled to seek legal advice in relation to the examination summons and examination generally;
- that the person is entitled to be legally represented at the examination;
- the person may have the right to an interpreter present at the examination;
- the person may be required to have a parent, guardian or independent person present at the examination;

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<sup>14</sup> Section 156(2)

<sup>15</sup> Section 148(3).

- that the person may be able to claim a privilege but is not excused from answering a question, giving information or producing a document or other thing on the ground that the answer, information, document or other thing may tend to incriminate the person or make the person liable to a civil penalty;
- that if the person gives any answer, information, document or other thing that may tend to incriminate the person, an immunity as to the use of that evidence may apply;
- that if the person is a member of the Legislative Assembly, the person is not required to attend on a sitting day of the Legislative Assembly;
- the person has the right to complain to the Inspector; and
- any other matter prescribed by regulation.

#### **Provision of documents prior to examination**

- 5.12 The pre-hearing disclosure of documents for a private examination is exceptional. Such disclosure, if any, requires a direction from the Commissioner.
- 5.13 A decision as to whether statements or documents will be disclosed before a public examination and the method of disclosure will be determined by the Commissioner in consultation with Counsel Assisting.
- 5.14 In determining the statements and documents that should be disclosed prior to a public examination or determining how that information is to be used in a compulsory examination or public examination the following considerations apply:
- ***Surveillance audio and video recordings:*** whether surveillance audio and video product is to be introduced into a public examination is a matter for the Commissioner to determine. A primary consideration is the public interest in the preservation and protection of law enforcement methodology, as well as the safety and security of Commission staff and members of the public.
  - ***Statements, interviews 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 private examination) is subject to any necessary variation of a suppression order. Release of any of this material must be approved by the Commissioner.



- ***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. 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 examination, it should be redacted from the tender copy prior to the public examination. Otherwise, consideration should be given to identifying the information or the class of information in respect of which a suppression order should be made prior to or at the time the information is used or tendered as an exhibit in the hearing.

- 5.15 Care should be taken to ensure that information of a private or personal nature that is not relevant to the investigation is not sought during examining a witness in a public examination. If such information is provided by a witness, then consideration should be given to the need for an application to be made to the Commissioner for a suppression order under s 154 of the Act.
- 5.16 In cases where information of a private or personal nature is relevant to the investigation but its disclosure would adversely affect the privacy or reputation of a person who is not the subject of the investigation, consideration will be given to what measures should be taken to protect the privacy or reputation of that person, including by means of a suppression order under s 154 of the Act or by giving the person a pseudonym.

## 6. Provision of a video recording and/or transcript

- 6.1 If a person attends the Commission for an examination in accordance with an examination summons, the Commission must ensure that the person's attendance is video recorded.<sup>16</sup>
- 6.2 Under s 158(2), the person is to be provided with a copy of the video recording of the their evidence,<sup>17</sup> and any transcript created of it.<sup>18</sup> However, the Commission will not provide a copy of that video recording/transcript where the Commissioner considers on reasonable grounds that doing so may prejudice an investigation.<sup>19</sup> The provision of any copy of a person's evidence may also be covered by a confidentiality notice that restricts the use that may be made of the video/transcript.
- 6.3 Transcripts for public hearings will be published on the Commission's website as soon as practicable.

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<sup>16</sup> Section 158(1)

<sup>17</sup> Section 158(2)(a)

<sup>18</sup> Section 158(2)(b)

<sup>19</sup> Section 158(2)

## 7. Claims of Privilege

7.1 If a witness is required to give evidence or produce a document or thing under a s 147 examination summons, the witness is not able to rely upon the privilege against self-incrimination or the privilege against exposure to the imposition of a civil penalty.<sup>20</sup> The claims of privilege available to witnesses are:

- client legal privilege (legal professional privilege);
- professional confidential relationship privilege;
- journalist privilege;
- religious confession; and
- public interest immunity – such as matters of state.<sup>21</sup>

7.2 If a claim of privilege is made, the witness must still attend the Commission for the examination or to produce the document or other thing.<sup>22</sup> The Commissioner will consider the claim of privilege and either withdraw, or refuse to withdraw, the requirement to answer the question, provide the information or produce the document or other thing. If considering a claim that relates to a document or other thing, the Commissioner does **not** inspect the document or other thing.<sup>23</sup>

7.3 If the Commissioner refuses to withdraw the requirement to produce the document or thing, and the claim of privilege is maintained, the claimant must immediately seal the document or other thing (for example, in an envelope) and give it to the Commission.<sup>24</sup> The Commission must give the secured document to the Registrar of the Supreme Court to be held in safe custody.<sup>25</sup>

7.4 Within seven days, the Commission must apply to the Supreme Court for the determination of the claim of privilege and give notice to the claimant of the hearing of that application.<sup>26</sup> The claimant is entitled to appear and be heard on the hearing of the application.

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<sup>20</sup> Section 175 – privileges disapplied under the Act

<sup>21</sup> Section 174

<sup>22</sup> Section 161(2)

<sup>23</sup> Section 161(4)

<sup>24</sup> Section 161(3)(b)

<sup>25</sup> Section 162(1)(a)

<sup>26</sup> Section 162(1)(b) & (c)

## 8. Suppression orders

### **Making a suppression order**

- 8.1 A suppression order is made by the Commissioner pursuant to s 154 of the Act. An order may only be made in relation to evidence given in *public* examinations, and may be applied for by Counsel Assisting or by a witness in an examination. Such an order may be varied either during a hearing or after a hearing has concluded, to change the terms of the original order or lift it entirely.
- 8.2 A suppression order may be made in relation to a range of circumstances including, but not limited to:
- (i) any evidence given before the Commission;
  - (ii) the contents of any document, or description of anything, produced to the Commission or seized under a search warrant issued under the Act;
  - (iii) 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;
  - (iv) the fact that a person has given or may be about to give evidence before the Commission; or
  - (v) any written submissions received by the Commission.
- 8.3 A person may challenge the making of a suppression order, or the refusal to make such an order, on judicial review to the Supreme Court.<sup>27</sup>

### **Making or varying a suppression order during a hearing**

- 8.4 The Commissioner may issue a suppression order prohibiting or restricting the publication of any information or evidence given during a public examination if the Commissioner considers that the order is necessary:
- (a) to prevent prejudice or hardship being caused to a person, including harm to their safety or reputation; or
  - (b) to avoid the possibility of prejudice to:
    - (i) a legal proceeding; or

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<sup>27</sup> See, for example, *Obeid v Independent Commission Against Corruption* [2015] NSWSC 1891 and *Obeid v Ipp* (2016) 338 ALR 234.

(ii) an investigation by the Commission under the Act.<sup>28</sup>

- 8.5 For example, a suppression order may be made to protect the identity of a person named in evidence but not the subject of a Commission investigation, to prevent the publication of an allegation before a response has been made, to protect trade secrets or law enforcement procedures, or for reasons of national security.
- 8.6 When a suppression order is made or varied it should be placed onto the record by the Commissioner with an indication of the grounds on which it is made.<sup>29</sup>
- 8.7 The Commission (usually the case lawyer) will take reasonable steps to notify any relevant people (such as anyone who was 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. A notice about the suppression order will be published on the Commission's website.<sup>30</sup>
- 8.8 If the suppression order is made in relation to information or evidence that is given by the Commission to another person, the Commission will give a copy of the suppression order to the person.<sup>31</sup>
- 8.9 At the conclusion of an investigation, all outstanding suppression orders will be reviewed and, where appropriate, the orders will be lifted or their duration prescribed by the Commissioner. If any exhibits are affected the exhibit will be mentioned specifically in any variation.

#### **Making or varying a suppression order after a hearing has concluded**

- 8.10 All applications to vary suppression order after a hearing has concluded must be in writing and submitted to the Commission for determination by the Commissioner. All such variations will be recorded in writing.
- 8.11 Where a suppression order or variation to a suppression order is made after a hearing has concluded, the Commission officer responsible for seeking the direction or variation will ensure that details of the suppression order or variation are recorded

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<sup>28</sup> Section 154(1)

<sup>29</sup> Section 154(1)(a) and (b)

<sup>30</sup> Section 154(4)

<sup>31</sup> Section 154(5)

against the relevant transcript session. The publicly available transcript will reflect any further direction or variation.

## 9. Contempt

### General considerations

9.1 Conduct that may constitute contempt of the Commission is set out in s 166 of the Act. The offence is committed where a person, without reasonable excuse:<sup>32</sup>

- a) has been served with a preliminary examination notice and refuses or fails to produce a document or other thing as required by the preliminary examination notice; or
- b) has been served with an examination summons and –
  - (i) fails to attend the examination as required by the examination summons; or
  - (ii) when appearing as a witness at the examination –
    - (A) refuses or fails to take an oath when required; or
    - (B) refuses or fails to answer a question relevant to the subject matter of the examination;<sup>33</sup> or
    - (C) refuses or fails to produce a document or other thing as required by the examination summons; or
- c) gives evidence at an examination that the person knows is false or misleading in a material particular; or
- d) obstructs or hinders the Commissioner in the performance of the Commissioner's functions at an examination; or
- e) disrupts an examination; or
- f) threatens a person present at an examination.

9.2 Section 167 enables the Commission to apply to the Supreme Court to deal with an alleged contempt. An application must be accompanied by a certificate (a contempt certificate) that states the grounds for making the application and the evidence in support of the application. The Supreme Court is to deal with a contempt of the Commission as if it were a contempt of the Supreme Court.

9.3 'Offences' of contempt of court are brought within the civil jurisdiction of the Supreme Court. Despite this, the standard of proof for all contempts (both 'civil' and 'criminal') is beyond reasonable doubt and all elements of the offence must be proven.<sup>34</sup>

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<sup>32</sup> See s 166(1)

<sup>33</sup> See *Smith v The Queen* (1991) 25 NSWLR 1; *DPP v Chidiac* (1991) 25 NSWLR 372

<sup>34</sup> *Witham v Holloway* (1995) 183 CLR 525, 534; *Fortune Holding Group Pty Ltd v Zhang (No 2)* [2017] VSC 738 at [28]-[29].

Contempt of court is a common law offence and there is no maximum penalty, subject to the *Bill of Rights 1688*.<sup>35</sup> However, r 2506(2) of the *Court Procedures Rules 2006* (ACT) (**Rules**) states if a person is found guilty of contempt, the court may punish the person by making an order that may be made under the *Crimes (Sentencing) Act 2005* (ACT).

- 9.4 Division 2.18.16 of the Rules outlines the procedure for the Supreme Court dealing with applications for contempt of the court. Rule 2500 states that the division relates to:
- (a) contempt for contravention of an order of the court or an undertaking given to the court;
  - (b) contempt committed in the face or hearing of the court;
  - (c) any other contempt of court;
  - (d) contempt of the Australian Crime Commission under the *Australian Crime Commission Act 2002* (Cth), s 34A; and
  - (e) contempt of the Commission under the Act (s 166).

### **Conduct constituting both contempt and an offence**

- 9.5 Some of conduct which may constitute contempt may also be punishable as a criminal offence. Section 170 of the Act provides that an act or omission that is punishable as an offence and a contempt may be punished as either, but not both.
- 9.6 Offences that may be committed during an examination include those in Chapter 7 of the *Criminal Code 2002* (ACT) (**Code**). An examination before the Commission is a legal proceeding for the Code, Ch 7.<sup>36</sup>
- 9.7 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 purposes and objectives of the investigation.

### **Procedure**

- 9.8 Where conduct that may amount to contempt of the Commission occurs in the actual course of a hearing, or otherwise, the Commissioner will determine the proposed course of action in dealing with that conduct.

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<sup>35</sup> *R v Smith* (1991) 25 NSWLR 1 at 13.

<sup>36</sup> Section 173



## 10. Closing submissions

- 10.1 The Commissioner may direct that closing submissions be filed. Closing submissions are to be made in writing. The Commissioner will set a timetable for the filing of closing submissions by Counsel Assisting and other relevant parties, with timeframes determined on a case-by-case basis.
- 10.2 The Commissioner may limit the topics or issues which may be addressed and impose time or page limits on submissions.
- 10.3 A suppression order may be made in relation to all written submissions. Ancillary orders may be made to permit publication of certain written submissions to specified parties to ensure procedural fairness.
- 10.4 The Commissioner may direct that oral submissions are also to be made.