

Counsel at the permanent commissions of inquiry

By Keith Chapple SC

Over the past 15 years or so one new area in which barristers have become involved is in appearances before the various permanent commissions of inquiry.

For decades counsel have been briefed from time to time in royal commissions and judicial inquiries which were set up to investigate discrete topics. The Independent Commission Against Corruption and the Police Integrity Commission are both permanent commissions which often involve appearance by counsel at both ends of the Bar table. The Legal Representation Office which is intimately involved with the commissions also regularly briefs counsel to appear at them.

The Independent Commission Against Corruption

The ICAC is an autonomous body set up in March 1989 to investigate allegations of corruption in the NSW public sector.

It has conducted highly successful investigations throughout the 1990's under a series of commissioners including Ian Temby QC and Justice Barry O'Keefe. Its success continued under the current commissioner, Irene Moss AO, whose statutory term is due to expire in late 2004. Assistant commissioners have often been appointed from the Bar.

Some investigations are long if the subject matter is complex or requires intensive financial analysis. The Inquiry into the NSW Grains Board Collapse began in December 2000 and the final report was issued in August 2003. Others are relatively short - such as the recent hearings regarding allegations involving the former minister for health.

Counsel assisting the commission are appointed under s106 of the *Independent Commission Against Corruption Act 1988*. Counsel assisting is instructed by the Solicitor to the Commissioner, Roy Waldon, and his staff. The counsel who is briefed is regarded as a key player in the particular investigation being conducted. The commission's proceedings are inquisitorial not adversarial and counsel assisting makes important decisions about lines of inquiry, whether hearings will be public or private and who will be summonsed to appear at those hearings. Often counsel is briefed before the commissioner becomes directly involved.

Apart from appearing at the hearings as well, towards the end of proceedings counsel assisting prepares submissions. These are circulated to those affected by the ICAC inquiry to allow their legal representatives to respond.

Deputy Commissioner John Pritchard described counsel assisting as the type of person who is capable of wearing a number of hats, not just a barrister fulfilling the traditional role of counsel. 'We are always on the lookout for competent counsel,' he said 'and I am happy to receive applications or CVs from any barrister interested in being considered for this type of role'.

Obviously a capacity for hard work is essential. Counsel assisting is often required to take decisions in the planning of an investigation and advise commission officers on the directions in which inquiries should be made. Hearings often bring their own complications and preparing submissions is a large part of counsel assisting's obligations - evidence has to be summarised, issues identified and views expressed about the findings available to the commission.

Both John Pritchard and Roy Waldon are solicitors of vast experience in this type of work. They are happy to liaise as far as possible with counsel who are authorised by the commission under the ICAC legislation to appear for a witness or an affected person during the course of a hearing. Co-operation is obviously limited by the inquisitorial nature of proceedings and confidentiality requirements.

The Legal Representation Office and private solicitors are involved in briefing counsel to appear for those summonsed by the commission.

The Police Integrity Commission

The PIC began operating in 1997 following recommendations from the Royal Commission into the NSW Police Service, conducted by Justice Wood. The extent of corruption uncovered by the royal commission clearly indicated the need for a permanent investigatory body and the first commissioner of the PIC, Judge Paul Urquhart QC, was a commissioner assisting Justice Wood in a number of the police royal commission probes.

The current commissioner of the PIC, Terry Griffin, is a former Commonwealth deputy DPP and highly experienced government lawyer.

The *Police Integrity Commission Act 1996* provides for the appointment of counsel assisting the commission in a similar way to the provisions governing the ICAC. The commissioner of the PIC can also authorise legal representation for those summonsed to private or public hearings.

The senior operational lawyer for the PIC, Michelle O'Brien, described the role of counsel assisting the PIC as involving some direction of the investigating activity of an inquiry, conducting hearings before the commission and overseeing the collating and presentation of evidence. Counsel assisting also prepares submissions on evidence presented to the commission and possible findings that can be made. Ms O'Brien said: 'I am the PIC's obvious contact point for barristers who want to be considered for the position of counsel assisting in a particular inquiry'. Applications can be forwarded to her at the PIC Offices at 111 Elizabeth Street Sydney.

PIC inquiries regularly involve many of the investigatory tools that received prominent publicity during the Police Royal

Commission. Telephone intercepts, listening devices and video surveillance are often used. So called 'rollover' witnesses are common. Investigations can be long and sometimes feature attempts by police officers targeted by the PIC to frustrate inquiries.

In a similar way to the ICAC, counsel appearing for those summonsed to the inquiry can be briefed by private solicitors or the Legal Representation Office. Ms O'Brien pointed out that the PIC legislation makes provision for an inspector of the PIC and as a result of work by the inspector and the PIC itself practice guidelines have been published governing appearances before the commission. They deal with such matters as the powers of the commission, procedure before the commission and other questions including conflicts of interests and the like.

The Legal Representation Office

The LRO operates through the Attorney General's Department of the New South Wales Government. It employs a number of solicitors who appear themselves at various inquiries including ICAC and the PIC. It also briefs counsel to appear at these bodies and various other inquiries, including for example the Thredbo Inquiry and the Waterfall Rail Inquiry.

Witnesses and affected persons summonsed to the ICAC and the PIC are provided with information regarding the LRO. In that sense the bodies are connected but the representation

provided by the LRO is completely independent of the ICAC and the PIC. Co-operation is high between all three entities as far as operational requirements allow.

Because of the wide ranging powers of both investigatory bodies, clients for whom counsel appear instructed by the LRO are compellable. Witnesses often require detailed advice at short notice and they are subject to sanctions under the legislation that controls both the ICAC and the PIC. On many occasions, especially at PIC hearings, clients may be involved in an involuntary change of status when they decide to assist the commission either in private or in public hearings.

Because of the inquisitorial nature of ICAC and PIC hearings, many of the general litigation devices are absent. Although the general scope of an inquiry is publicised, for obvious reasons witnesses are told little before they appear. They are often stood down and recalled, sometimes weeks after their first appearance. Particulars and discovery and similar processes are deliberately unavailable at these commissions.

The director of the Legal Representation Office, Annette Sinclair, also welcomed applications by counsel who wished to be considered for appearance work instructed by the Legal Representation Office. Ms Sinclair advised that advertisements for counsel to be included in the LRO's panel will be appearing later this year and details may be sent directly to her.