

# Counsel assisting – advisor or scribe?

## Inquisitorial proceedings and the role of counsel assisting in report writing: what is permissible?

By the Inquests and Inquiries Committee (Chair, Kristina Stern SC)

How far, *can* or *should* counsel assisting an inquiry – whether a special or royal commission, or coronial inquest proceedings – assist the inquisitor with the final phase after the close of the evidence: that is, preparation of the draft report or findings. The answer depends on the nature of the proceedings and the issues. Importantly, if the proceedings raise contentious issues of fact or questions of serious misconduct it is essential that counsel assisting avoid trespassing into the quasi-judicial arena of drawing final conclusions or drafting adverse findings.

Although some statutes authorise the appointment of counsel assisting, ‘one will search in vain to find provisions that address in any specific way the role or the functions’ of a person so appointed.<sup>1</sup>

Surprisingly, there is a paucity of authority as to the nature of counsel assisting’s role. Such duties often include:

- a. identifying and refining the issues for investigation;
- b. preparing the draft witness list;
- c. presenting an opening statement outlining the background and scope of the inquiry;
- d. calling and examining witnesses, and tendering documents;
- e. making closing submissions to the inquisitor as to factual findings, and recommendations.

It has been suggested that the role of counsel assisting has some features common to the role of prosecuting counsel.<sup>2</sup> The (imperfect) analogy was highlighted by the ACT Court of Appeal in *R v Doogan, Re; Ex parte Lucas-Smith* (2005) 158 ACTR 1 at [162]:

While the duties of Crown prosecutors and counsel assisting coroners are by no means the same, we accept that both should be guided by the overriding principle that their goal is the attainment of justice rather than the achievement of a preconceived objective. However, justice is not always, nor even usually, attained by a forensically passive approach in

which counsel assisting eschew any responsibility to explore particular possibilities actively or to test assertions which may or may not be accurate. On the contrary, coroners are entitled to expect that counsel assisting them will actively pursue the truth and that will almost inevitably involve identifying particular possibilities or tentative conclusions and testing the evidence with a view to determining whether it can be confirmed or discounted.

Inquisitorial proceedings may traverse sensitive and difficult issues, frequently touching upon matters where personal views are strongly held. There can be a perception that counsel assisting is prosecuting a particular case theory. Sometimes there might be a legitimate basis for that perception.<sup>3</sup>

The question therefore arises: what is counsel assisting’s role once evidence and submissions have concluded at an inquest or inquiry? In particular, to what extent can or should counsel assisting support an inquisitor with their report or findings?

The integrity of inquisitorial proceedings depends in part upon counsel assisting acting fairly and not straying into matters reserved for the inquisitor.

### Relevant authorities

#### *Re Royal Commission on Thomas’s Case* [1982] 1 NZLR 252

In 1980, following his pardon, a Royal Commission was established to inquire into the circumstances of Mr Thomas’s wrongful conviction for two murders. In their report, the commissioners stated that two (named) police officers had planted evidence against Mr Thomas. These findings were subjected to judicial review on grounds unconnected to the role of counsel assisting. During the case, however, it emerged that, after the close of evidence, counsel assisting had conferred with the commissioners and helped draft their report. The NZ Court of Appeal observed (at 273):

When a commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of prosecutor. It is not right that they should participate in the preparation of the report. But as this was not a ground of complaint by the applicant in the present proceedings, we merely draw it to attention so that it is not treated as a precedent.

#### *Dato Tan Leong Min v Insider Trading Tribunal* [1999] 2 HKC 83

This Hong Kong Court of Appeal case examined the conduct of counsel assisting an inquiry into alleged insider trading. The tribunal was tasked with inquiring into certain matters, with the power to impose penalties for wrongdoing.

Counsel had been asked by the tribunal *in private deliberations* for his views on the evidence. He had then participated in drafting the inquiry report. The court found that by participating in this secret, advisory *and decision-making* role, counsel assisting (and the tribunal) had unfairly elided two functions – one advisory and the other quasi-judicial. It held there was an absolute prohibition on counsel participating in drafting the tribunal’s report. The court upheld the decision of the judge at first instance to quash the findings of the tribunal.<sup>4</sup>

#### *R v Doogan, Re; Ex parte Lucas-Smith* (2005) 158 ACTR 1 (*Doogan*)

An ACT coroner conducted a concurrent fire inquiry and inquest into four deaths in bushfires that ravaged Canberra in January 2003. The appellants sought an order prohibiting her from further conducting the coronial inquiry on grounds including an apprehension of bias on the part of counsel assisting.

The Court of Appeal accepted evidence that counsel and the team assisting the coroner had set aside time ‘to assist in writing the final report’ (at [164]). The court considered the limits of the assistance the coronial team could provide the coroner concerning the final report:

[165] While... a coroner cannot delegate his or her responsibility to weigh the evidence and make appropriate findings, that does not mean that he or she must write the report unaided. On the contrary, a coroner is entitled to have counsel assisting or an associate undertake a range of tasks, such as providing a summary of the evidence, an outline of the relevant statutory provisions and references to authorities.

On the facts, the court found there was no evidence suggesting that counsel assisting 'intended to trespass into areas that were exclusively the responsibility' of the coroner (at [166]).

### *R (Clarke) v Chairman of Magnox Public Inquiry* [2019] EWHC 3596

The chairman of a British non-statutory inquiry sent letters advising several people, including the applicants, that he proposed making adverse findings against them and seeking their response. Relying on *Dato Tan*, the applicants sought judicial review, one ground being that staff of the inquiry had assisted in drafting the impugned letters. It was argued that the chairman had unlawfully delegated his decision-making authority because staff members had gone beyond collating evidence to drawing conclusions. These were said to have been adopted by the chairman despite evidence that, while he had received assistance in drafting his findings, his conclusions were entirely his own. The judge accepted the chairman's evidence and distinguished *Dato Tan* on the basis that it dealt with a statutory inquiry holding public hearings, which was very different from the scope and nature of the Magnox inquiry itself, and that the criticisms made in the letters to the applicants were only 'provisional'.

With respect, the peculiar circumstances of the Magnox inquiry renders the decision of limited application in other contexts.

### Key points

From a practice perspective, several key points emerge from these decisions.

*First*, they underscore the important distinction between counsel assisting's role and that of the inquisitor: counsel assisting provides advice and *assists* the inquisitor conduct the inquiry. Ultimately, however, it is the inquisitor's responsibility to make findings.

*Secondly*, not all inquiries are alike and there may be good reason for procedures to be adopted by, for example, a Royal Commission that are not open to a coroner. Even within the coronial field there may be differences from one matter

to the next. For example, an inquest may be in the nature of a 'hand-up brief' where no factual matters or other contentions are in issue. As a corollary, there is no prospect of adverse comments being made about a particular party. In those circumstances, it may be appropriate for counsel assisting to adopt a more 'hands-on' approach to assisting the coroner in collating the evidence (in the form of summaries and chronologies).

*Thirdly*, in the coronial jurisdiction it is essential for counsel assisting to assume a very limited role (if any) in the preparation of findings in respect of any matters that are contentious: see *Doogan*.

*An absolute prohibition on counsel assisting participating in writing a report might be regarded as overly restrictive but caution is necessary where the perception of secret and unfair influence... is a possibility.*

The absolute prohibition on counsel assisting participating in writing a report in *Dato Tan* might be regarded as overly restrictive but caution is necessary where the perception of secret and unfair influence being exerted is a possibility. Conceivably, even summaries of evidence provided to the inquisitor could open up the final report or determination to an allegation of bias or procedural unfairness – for example, based on the manner in which summaries were presented or collated. The resolution of such allegations would obviously turn upon the particular circumstances.

*Fourthly*, there is a clear need for caution as to the content and scope of conferences with the inquisitor after the close of evidence. While discussion of procedural matters may be permissible,

counsel assisting should avoid substantive discussions that may (even inadvertently) trespass into weighing the evidence or the scope and nature of adverse findings about an individual. Counsel should be cautious about discussing the credibility of witnesses or the weight to be given to particular evidence with the inquisitor except via open submissions.

There is typically no relevant distinction between counsel assisting and solicitors assisting an inquisitor, when it comes to the preparation of a final report. The drawing of inferences and findings must be left to the commissioner/coroner once submissions have concluded. That is not to say that those assisting cannot review drafts for typographical or basic factual errors, but comments in the nature of further submissions should not be made and deletions or additions of matters of substance should be avoided.

The position was elegantly summarised in 2005 by ICAC Chief Commissioner Peter Hall QC (then a Supreme Court judge):

The question of the role of counsel assisting in the report writing phase, then, is one to be determined by reference to general principle, having regard to the particular nature of the issues that fall for determination. It is inappropriate, in my view, for counsel assisting who has put submissions before a commissioner calling for adverse findings involving illegality or serious impropriety to then, as it were, cross over and participate in the fact-finding necessary to determine whether or not counsel assisting's submissions should be accepted or rejected.<sup>5</sup>

In summary, counsel assisting are advisors – not decision-makers. Procedural fairness, and the legitimacy of inquiries, demands those roles not be blurred or elided. **BN**

### ENDNOTES

- 1 Justice Peter Hall, 'The role of Counsel Assisting in Commissions of Inquiry' *Bar News* Winter 2005, p 29.
- 2 As cited in *Death Investigation and the Coroner's Inquest*, Freckleton I and Ranson D at pp 564-5. See also Legal Profession Uniform Conduct (Barristers) Rules 2015, rr 96-100.
- 3 See, for example, Tom Frame's account of the first Voyager Royal Commission in which Jack Smyth QC was leading Counsel Assisting. Frame asserts that Smyth took on a role akin to that of a prosecutor of the unfortunate captain of the *HMAS Melbourne*, Captain John Robertson, who chose unwisely at the beginning of the inquiry not to seek legal representation. He became Smyth's principal 'person of interest'. (See *Where Fate Calls*, Hodder & Stoughton, 1992, 40-120.) It took a second Royal Commission to exonerate Robertson.
- 4 For commentary on this case, see Jason Beer KC (ed), *Public Inquiries*, (Oxford University Press, 2011), 169.
- 5 *Supra* fn 1, at pp 34-35.