

Law Enforcement Conduct Commission Bill 2016

Second Reading

The Hon. DUNCAN GAY (Minister for Roads, Maritime and Freight, and Vice-President of the Executive Council) (17:57 : 4): I move:

That this bill be now read a second time.

I seek leave to have my second reading speech incorporated in Hansard.

Leave granted.

I am pleased to introduce the Law Enforcement Conduct Commission Bill 2016. At the last election the Government made a commitment to review the oversight arrangements for law enforcement agencies in New South Wales. The Government delivered on this promise by commissioning former shadow Attorney General, Mr Andrew Tink, AM, to undertake this review with a view to simplifying and streamlining the current oversight system. The terms of reference for Mr Tink 's review required him to examine and report on any gaps in the current oversight system, the functional overlap between the existing oversight agencies, options for a single oversight agency and a recommended model for police oversight, including guidance on its design, structure and establishment.

Mr Tink consulted widely throughout his review and received a number of detailed written submissions from stakeholders. He also held meetings with a number of stakeholders to further inform his review. Mr Tink provided his final report to the Government on 31 August 2015. The final report of the Tink review is impressively thorough. It contains a very useful historical context on the evolution of police oversight in New South Wales; an in-depth analysis of the current police oversight system, including its strengths and flaws; an examination of oversight systems in other jurisdictions; and, most importantly, a number of comprehensive evidence-based recommendations. The Government accepted Mr Tink's recommendations, and they form the basis of this reform. I take this opportunity to once again thank Mr Tink for his undertaking and for the comprehensive review that he presented to Government.

The NSW Police Force and the New South Wales Crime Commission perform incredibly important roles, and are at the forefront of the fight against crime and the protection of community. However, as these agencies are given significant powers and authority to perform their functions, it is also important that there is an effective oversight system in place. Oversight of the NSW Police Force and Crime Commission is currently undertaken by three different agencies: the Police Integrity Commission, commonly known as PIC, the Ombudsman and the Inspector of the Crime Commission. Although these agencies are meant to have different oversight functions, there are overlapping responsibilities.

The Tink Review of Police Oversight confirmed what the Government has long suspected: The current system is outdated and complex and the overlapping responsibilities between existing oversight agencies cause confusion, inefficiencies and failures. It is simply not necessary to split the oversight arrangements for the NSW Police Force and the New South Wales Crime Commission across three different agencies. This reform is therefore well overdue. The establishment of the Law Enforcement Conduct Commission, which will be known as the

LECC, will create a single civilian law enforcement oversight body that will exercise the functions currently undertaken by the PIC, the Ombudsman and the Inspector of the Crime Commission.

The PIC and the Inspector of the Crime Commission will be abolished, and the Ombudsman's jurisdiction as it relates to police will be transferred. To this end, the LECC will be responsible for the oversight of the NSW Police Force and the New South Wales Crime Commission complaint investigations, as well as investigating matters that could amount to serious misconduct or serious maladministration. The Government will support the LECC in the exercise of its functions by transferring to LECC the budget of the abolished Police Integrity Commission, and the budget of the police and compliance branch of the Ombudsman's office. This funding will allow the LECC to proactively recruit a properly trained, skilled and experienced staff to fulfil its oversight responsibilities. The LECC will have the responsibility to monitor a NSW Police Force critical incident investigation in real time. This is a new oversight function that was recommended by the Tink review.

For those who are not aware, a critical incident is essentially an incident involving a police officer that results in the death or serious injury of a person. The bill outlines the circumstances in which a critical incident will be declared. This includes where the death of a person is caused by the discharge of a police officer's firearm, during the application of force by a police officer, or as a result of a police operation. Due to the serious nature of critical incidents, and the need to determine how and why a death or serious injury has occurred during a police operation, it is important that highly skilled and appropriately resourced personnel undertake critical incident investigations. The NSW Police Force has some of the best investigators in the world, particularly the elite Homicide Squad, which currently leads critical incident investigations involving the death of a person. It is therefore appropriate that the NSW Police Force retain responsibility for investigating critical incidents. This was a recommendation from the Tink Review.

However, it is equally important that an investigation into a critical incident be conducted in an impartial, objective and thorough manner. The families of people involved in a critical incident, as well as the general public, rightly expect this. While the Government has full confidence that the NSW Police Force conducts impartial, objective and thorough critical incident investigations, LECC oversight will ensure public confidence in this process is maintained. The LECC will be notified when a critical incident is declared, and will be able to monitor all stages of the investigation. The LECC will be able to attend the scene of a critical incident, view recordings or transcripts of witness interviews and liaise with senior investigators. If any issues with the conduct of a critical incident investigation are identified, the LECC will be able to bring this to the attention of the Commissioner of Police, and, where applicable, the Coroner.

The LECC will be given some extraordinary powers to exercise some of its functions, including the ability to hold hearings and compel people to give evidence, even if that evidence might incriminate the person. It is therefore important that the LECC be held accountable for the use of these powers, as well as for its general conduct. The new position of Inspector of the Law Enforcement Conduct Commission is being created to oversee the operations of the LECC. This position will replace the Inspector of the Police Integrity Commission, which is being abolished. The inspector of the LECC will be responsible for investigating complaints against officers of the LECC, as well as auditing and scrutinising the LECC's operations. The inspector will report directly to Parliament. The inspector will also have responsibility for monitoring the compliance of law enforcement agencies with legislative requirements relating to the use of covert powers, such as telecommunications interception.

The purpose of law enforcement oversight is to prevent, detect and investigate corruption and misconduct by law enforcement officers, and to provide accountability for the exercise of the powers given to police and Crime Commission officers. It is essential in ensuring the integrity of the New South Wales criminal justice system. It is therefore fundamentally important that there are no gaps in the oversight system. It is for this reason that the commencement of the legislation establishing and governing the LECC will be staged. Some provisions of the bill will commence straightaway. This will allow for the Chief Commissioner and commissioners to be appointed as soon as possible. This will also allow the structure and organisation of the LECC to be finalised. Importantly, the provisions providing the LECC with its investigation and oversight powers will not commence until the LECC, as an organisation, is ready to commence operations. The current oversight arrangements will therefore remain in place until this time.

I now turn to the detail of the bill. Part 2 provides the key definitions and concepts that underpin the LECC's jurisdiction. Of particular importance are the definitions in division 2. Division 2 provides for the kinds of misconduct that fall under the LECC's jurisdiction. These are police misconduct, administrative employee misconduct and Crime Commission officer misconduct. Police misconduct relates to a sworn police officer within the meaning of the Police Act 1990. Administrative employee misconduct relates to any employee of the NSW Police Force who is not a sworn police officer. Crime Commission officer misconduct relates to the Commissioner for the Crime Commission, an Assistant Commissioner for the Crime Commission or any other officer of the Crime Commission within the meaning of the Crime Commission Act 2012. Officer misconduct includes conduct that constitutes a criminal offence, corrupt conduct, unlawful conduct or a disciplinary infringement. This division also defines serious misconduct.

In general, the LECC will be able to investigate only misconduct that constitutes serious misconduct. Serious misconduct is conduct that could result in prosecution for a serious offence, which is an offence punishable by five years' imprisonment or more, or a serious disciplinary action, being action that could result in termination of employment or a demotion; a pattern of misconduct or maladministration carried out on more than one occasion or involving more than one officer that is indicative of systemic issues; or corrupt conduct. The LECC will also have jurisdiction over maladministration involving the NSW Police Force, the New South Wales Crime Commission, and individual officers. The LECC will be able to investigate officer maladministration only of a serious nature.

Misconduct matters management guidelines are also provided for in part 2. These are agreements entered into between the LECC, the NSW Police Force and New South Wales Crime Commission that outline how misconduct matters are dealt with by the parties to the agreement, including the types of misconduct matters that should be investigated and when a misconduct matter should be referred to the LECC. Where the content of misconduct matters management guidelines cannot be agreed between the parties, the Chief Commissioner of the LECC may determine the content.

Part 3 of the bill provides for the constitution and management of the LECC. The LECC will be led by a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight. The Chief Commissioner must be a serving or retired judge of a superior court of record within Australia. The Commissioner for Integrity and the Commissioner for Oversight must have special legal qualifications. This means the two commissioners must be Australian lawyers of at least seven years' standing. Part 3 also outlines the decision-making process for the LECC. Clause 19 (2) provides that decisions to investigate or hold an examination must be made with the

agreement of the Chief Commissioner and at least one other commissioner. Clause 19 (3) provides that certain decisions, including the decision to hold a public examination, can be made only with the unanimous agreement of all three commissioners.

To ensure the LECC exercises its functions independently of the Government, clause 22 provides that the LECC and the commissioners are not subject to the control or direction of the Minister responsible for administering the LECC Act. Part 4 explains the functions of the LECC, including its functions to detect, to investigate and to expose serious misconduct and serious maladministration, to refer less serious misconduct matters to the NSW Police Force and the Crime Commission for investigation, and to oversee the investigation or handling of those referred misconduct matters. When exercising its functions, the LECC must have regard to the objects of the Act, which are outlined in part 1. In relation to misconduct matters, the LECC must exercise its functions in accordance with any misconduct matters management guidelines. When exercising its education and prevention function, the LECC must comply with relevant information protection principles contained in the Privacy and Personal Information Protection Act 1998, and the Health Privacy Principles contained in the Health Records and Information Privacy Act 2002.

This part also allows the LECC to make findings, form opinions and make recommendations in the exercise of its functions. This includes making a finding that serious misconduct has occurred and recommending the action to be taken. However, the LECC will not be permitted to make a finding that a person is guilty of committing an offence. Where the LECC provides a report to the Commissioner of Police or the Crime Commissioner that contains a finding or opinion, disciplinary action will be able to be commenced based on the LECC's finding or opinion. The Commissioner of Police or Crime Commissioner will not be obliged to undertake a new investigation into the matter before commencing disciplinary action, but may choose to do so.

The functions of the LECC include assembling evidence that may be admissible in the prosecution of a person for a criminal offence and providing that evidence to the Director of Public Prosecutions. This part also establishes the LECC's inspection function. In order to determine whether the NSW Police Force and the New South Wales Crime Commission are complying with relevant legislative requirements, the LECC must inspect the records of both of these agencies at least once every 12 months. The LECC may undertake further inspections at any time. The LECC must also keep under scrutiny the systems established by the NSW Police Force and the New South Wales Crime Commission in relation to misconduct matters.

Part 5 of the bill outlines how complaints or information about misconduct or maladministration are to be dealt with by the LECC, the NSW Police Force, the New South Wales Crime Commission and various other public agencies. Division 1 of part 5 imposes a duty on the principal officer of a public authority to report to the LECC any matter that the officer suspects on reasonable grounds could be misconduct or maladministration. The LECC may issue guidelines that provide that certain matters do not need to be reported.

Division 2 of part 5 outlines the process by which a complaint about misconduct or maladministration may be made. Any person can complain to the LECC about conduct of a police officer, Crime Commission officer or NSW Police Force administrative employee that could be misconduct or maladministration. Likewise, any person can complain to the LECC about conduct of the NSW Police Force or Crime Commission that could constitute agency maladministration. This part does not affect any other rights of a person to complain about the

conduct of an officer of one of these agencies. For example, complaints against police officers are able to be made in accordance with the Police Act 1990.

A complaint to the LECC must be in writing. However, the LECC is able to accept complaints that are not in writing if it considers it is appropriate to do so. In this case the complaint will be reduced to writing as soon as practicable. A member of Parliament can also lodge a complaint on behalf of a person as long as the person consents. The bill clarifies that in this situation the member of Parliament does not become a complainant but can be given information about the progress or outcome of the complaint if the LECC considers it to be appropriate. Division 3 of part 5 outlines how a complaint or information about possible misconduct or maladministration must be dealt with. When the LECC receives or becomes aware of a misconduct matter it must provide notice to the agency to which the matter relates. Notice does not have to be given if it is not in the public interest to do so, for example if giving notice to the agency would prejudice a future investigation.

Clause 44 provides for the types of decisions that can be made by the LECC in relation to a misconduct matter, including whether to investigate the matter itself, to refer the matter to the NSW Police Force, the Crime Commission or another agency for investigation, and whether to oversee its investigation by another agency. This clause also requires the LECC to have regard to any misconduct matters management guidelines when deciding how to deal with a matter, but leaves the ultimate decision as to how to act with the LECC. Clauses 45 and 46 provide a list of factors that the LECC may take into account when deciding how a misconduct matter will be dealt with or whether to commence an investigation into conduct that may be serious misconduct or serious maladministration.

Part 6 sets out the LECC's powers of investigation, which, like the Police Integrity Commission [PIC] and the Independent Commission Against Corruption [ICAC], are modelled on the investigative powers of a royal commission. These powers can only be used to investigate the types of misconduct matters set out in clause 51. This includes investigations into conduct that could amount to serious misconduct, serious maladministration or agency maladministration. Part 6 investigation powers can also be used for investigations into conduct of the Commissioner of Police or a Deputy Commissioner, or the Crime Commissioner or an Assistant Crime Commissioner, that could amount to misconduct or maladministration. The threshold of serious misconduct does not need to be met in these cases.

When undertaking an investigation under Part 6 the LECC will be able to hold examinations. An examination can be held in private or in public. The LECC will be able to compel people to appear at an examination held under part 6. A person is not entitled to refuse to appear and give evidence at an examination. As with other investigative bodies exercising royal commission powers, a person is not entitled to refuse to answer any question or produce a document or other thing on the grounds that answering the question or producing the document might incriminate the person. The privilege against self-incrimination is therefore abrogated. However, if a person objects to answering a question on the grounds of self-incrimination, clause 74 imposes restrictions on how this evidence can be used in certain circumstances. Part 14 also permits the commission to impose further restrictions on how examination material can be used.

Part 7 provides the mechanism by which the LECC can oversight a NSW Police Force or Crime Commission investigation of a misconduct matter. In accordance with part 8A of the Police Act as well as any misconduct matters management guidelines issued by the LECC, the NSW Police Force will be responsible for investigating most misconduct matters that relate to police.

Oversight can be conducted by requesting reports and reviewing the outcomes of the investigation by the police or the Crime Commission, or, if the LECC is of the opinion that it is in the public interest to do so, the LECC will also be able to more closely monitor a police investigation under clause 101.

When monitoring a police investigation a LECC officer will be able to be present as an observer during any interviews conducted by police officers for the purposes of the investigation, confer with those police officers about the conduct of the investigation, and request the nominated contact for an investigation to provide reports on the progress of the investigation. The LECC will also be able to require the Commissioner of Police to provide specified information to inform the LECC as to whether a misconduct matter is being dealt with adequately by the NSW Police Force. The LECC's authority to oversight an NSW Police Force critical incident investigation is contained in part 8 of the bill. Clause 110 outlines the features of critical incident. In summary, it is an incident involving a police officer that results in the death of or serious injury to a person.

When an incident exhibiting the features outlined in clause 110 occurs, the Commissioner of Police may declare the incident to be a critical incident. It is usual practice for the responsibility of declaring a critical incident to be delegated to a region commander. As soon as a critical incident is declared, the LECC must be informed. The Commissioner of Police or delegate can revoke a critical incident declaration at any time. The LECC must also be informed of this. When undertaking a critical incident investigation, the critical incident team must examine and report on the matters outlined in clause 113, including the lawfulness and reasonableness of the conduct of the police officers involved. This clause also provides that a critical incident investigation should be undertaken in accordance with the NSW Police Force critical incident guidelines as far as is practicable and operationally appropriate.

The critical incident guidelines are not mandatory, however, and a departure from the guidelines does not affect or invalidate a critical incident investigation. After a critical incident has been declared and the LECC has been notified, the LECC may monitor a critical incident investigation if it decides it is in the public interest to do so. Clause 114 outlines the powers the LECC can use when undertaking its monitoring role. This includes being able to attend the scene of a critical incident, having access to recordings or transcripts of witness interviews, being able to observe witness interviews with the consent of the parties involved, and being able to require the senior investigator to provide access to all relevant documents and reports prepared by police in relation to the critical incident.

When undertaking its monitoring role, the Law Enforcement Conduct Commission will not be able to control, direct, supervise or interfere with the carrying out of a critical incident investigation. However, if during the course of an investigation the LECC considers that the factors outlined in clause 113 are not being examined adequately, or that the investigation is not being conducted in a competent, thorough or objective manner, or that any directions issued by the Coroner under section 51 of the Coroner's Act are not being complied with, the LECC will be able to communicate this to the senior investigator, the Commissioner of Police or the Coroner.

Part 9 of the bill establishes the Inspector of the LECC. The inspector will be responsible for auditing the operations of the Law Enforcement Conduct Commission to ensure compliance with the law, investigating the conduct of the LECC and its officers, and assessing the effectiveness and appropriateness of Law Enforcement Conduct Commission policy and

procedures relating to the legality and propriety of its operations. The inspector may exercise those functions whether or not a complaint has been made. Clause 124 outlines the powers the inspector has when carrying out his or her functions.

The Inspector of the LECC will also be given responsibility for inspecting the records of relevant agencies in accordance with relevant covert powers legislation, including the Telecommunications (Interception and Access) (New South Wales) Act 1987, Surveillance Devices Act 2007 and Law Enforcement (Controlled Operations) Act 1997. This will include the relevant records of the ICAC. This inspection function is currently undertaken by the Ombudsman. The amendments transferring this function to the Inspector of the LECC are contained in schedule 6 to the bill. Schedule 6 also makes consequential amendments to other pieces of legislation.

Part 13 of the bill provides for the interactions between the LECC and other agencies, including agencies from other jurisdictions. Clause 165 outlines the relationship with the Ombudsman. Conduct of the LECC or an officer of the LECC is not subject to the Ombudsman's jurisdiction under the Ombudsman Act 1974. The only exception to this is if a matter involving the LECC or an officer of the LECC is referred to the Ombudsman by the Inspector of the LECC. Likewise, the Law Enforcement Conduct Commission or officers of the LECC will not be subject to the jurisdiction of the ICAC unless a matter is referred to the ICAC by the Inspector of the Law Enforcement Conduct Commission.

The bill is moving the NSW Police Force from the jurisdiction of the Ombudsman to the Law Enforcement Conduct Commission. Conduct of the NSW Police Force or a member of the New South Wales police will not, therefore, be able to be made the subject of a complaint, inquiry, investigation or other action under the Ombudsman Act. Clause 165 does, however, allow the Law Enforcement Conduct Commission to consent to the Ombudsman dealing with a matter under the Ombudsman Act if the matter falls under parts 3A and 3C of the Ombudsman Act, and the child protection and disability jurisdiction of the Ombudsman as these types of matters often involve multiple agencies.

Part 14 imposes obligations of secrecy and non-disclosure on officers of the LECC as well as other people involved in investigations, examinations and the exercise of other functions of the LECC. Ordinarily, a person, such as a witness, who is required to provide the LECC with information, evidence, a document or other thing is not permitted to disclose this to any other person. However, the bill provides important welfare-related exemptions to the normal non-disclosure provisions. These exemptions allow a person to disclose information that would normally be subject to a non-disclosure provision to a registered medical practitioner or registered psychologist where this disclosure is necessary to receive medical treatment such as psychiatric care, treatment or counselling.

Schedules 1 and 2 to the bill contain provisions relating to the commissioners, assistant commissioners, inspector and assistant inspectors. Schedule 3 contains savings, transitional and other provisions. Schedule 3 will ensure there are no gaps in law enforcement oversight by providing that the LECC can continue to deal with any matter commenced by the Police Integrity Commission, Ombudsman or Inspector of the Crime Commission prior to the Law Enforcement Conduct Commission commencing operations. All records of these agencies will be transferred to the Law Enforcement Conduct Commission. Schedule 3 also confirms that responsibility for completing Operation Prospect will remain with the Ombudsman. With the consent of the Director of Public Prosecutions, the Ombudsman will be able to commence prosecutions for offences arising out of Operation Prospect. The Ombudsman will also be able

to exercise certain powers in relation to police, but this will be strictly limited to Operation Prospect. Any new investigations arising out of Operation Prospect will be conducted by the LECC.

Schedule 5 amends the Police Act 1990. While a large number of amendments being made to the Police Act are to replace references to the Police Integrity Commission with the Law Enforcement Conduct Commission, substantial amendments are being made to part 8A. Part 8A provides the legislative framework for complaints management and investigation within the NSW Police Force. Substantial amendments to this part are required in order to give the Law Enforcement Conduct Commission jurisdiction over NSW Police Force complaints and to ensure the Police Act is compatible with the Law Enforcement Conduct Commission legislation.

Schedule 7 contains an important welfare-related reform relating to parties who are compelled to give evidence before the Crime Commission, ICAC, Ombudsman and the Police Integrity Commission. Schedule 7 amends various Acts to provide an automatic exemption to secrecy provisions governing these aforementioned agencies when disclosure of certain information is required to be given to a registered medical practitioner or registered psychologist for the purposes of receiving medical treatment such as psychiatric care, treatment or counselling.

This bill improves law enforcement oversight in New South Wales by removing the unnecessary overlap and duplication between the existing oversight agencies. A single civilian oversight agency will be far more efficient than the current three oversight agencies. The establishment of the Law Enforcement Conduct Commission is yet another example of this Government's commitment to reforming areas that have been neglected in the past. I commend the bill to the House.