



New South Wales

Law Enforcement Conduct Commission Bill 2016

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission becomes aware of otherwise than through a complaint that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration),
- (b) to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,
- (c) to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,
- (d) to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by:
 - (i) providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration, and
 - (ii) assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and

- (iii) encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and
- (iv) making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,
- (e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,
- (f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,
- (g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,
- (h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,
- (i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to Parliament,
- (j) to provide for the oversight of the use of covert powers under various Acts.

The Bill constitutes the Law Enforcement Conduct Commission (the *Commission*) as a single, independent, accountable body that is responsible for functions relating to the detection, investigation, exposure and prevention of police corruption and officer misconduct and officer and agency maladministration and for the oversight of certain operations and procedures of the NSW Police Force and the Crime Commission. The functions are broadly similar to those currently exercised by the Police Integrity Commission, the Inspector of the Crime Commission and the Ombudsman. The Commission is also empowered to monitor the carrying out of investigations of critical incidents involving police officers and other members of the NSW Police Force and provides for an Inspector of the Commission (the *Inspector*) to audit and oversee its operations and the conduct of its officers.

The Bill contains amendments to a number of Acts and regulations to confer functions on the Inspector involving the monitoring of the exercise of covert investigative powers by investigative agencies.

The Bill also amends various Acts and a regulation to override secrecy and non-disclosure provisions in that legislation that prohibit the disclosure of evidence and information obtained at hearings or inquiries or in the carrying out of other functions to permit the disclosure of such information to a health practitioner for the purposes of providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to persons required to give evidence or information at the hearings or inquiries or to the persons exercising the functions.

Outline of provisions

Part 1 Preliminary

Part 1 deals with preliminary matters, including the following:

- (a) the name of the proposed Act,
- (b) the commencement of the proposed Act,
- (c) the objects of the proposed Act, as set out in the Overview.

Part 2 Interpretation and key concepts

Division 1 Interpretation

Division 1 contains provisions that define terms used in the proposed Act, including *misconduct matter* (a complaint or misconduct information), *Crime Commission investigation*, *police investigation* and *unanimous decision of the Commissioners*.

A *police investigation* is defined to mean:

- (a) in relation to an agency complaint or misconduct information about conduct of the NSW Police Force that is (or could be) agency maladministration—investigation by the NSW Police Force under Part 8A of the *Police Act 1990*, or
- (b) in relation to a police complaint or misconduct information about conduct of a police officer that is (or could be) police misconduct or officer maladministration—investigation by the NSW Police Force under Part 8A of the *Police Act 1990*, or
- (c) in relation to an administrative employee complaint or misconduct information about conduct of an administrative employee that is (or could be) administrative employee misconduct or officer maladministration—action taken by the Commissioner of Police to deal with an allegation of misconduct or maladministration by an administrative employee under the *Government Sector Employment Act 2013*.

A *Crime Commission investigation* is defined to mean, in relation to a complaint or misconduct information about conduct of the Crime Commission that is (or could be) agency maladministration or conduct of a Crime Commission officer that is (or could be) Crime Commission officer misconduct or officer maladministration:

- (a) an investigation by the Crime Commission under the *Crime Commission Act 2012*, or
- (b) action taken by the Crime Commissioner to deal with an allegation of misconduct or maladministration by a Crime Commission officer under the *Government Sector Employment Act 2013*.

Division 2 Key concepts

Division 2 defines key concepts used in the proposed Act, including the following:

- (a) *police misconduct*, *administrative employee misconduct* and *Crime Commission officer misconduct*, which are broadly defined and can involve, for example, a criminal offence, corrupt conduct (within the meaning of the *Independent Commission Against Corruption Act 1988*) or a disciplinary infringement, and may involve participants other than the officer or employee concerned, occur outside of New South Wales or before the commencement of the proposed definition,
- (b) *serious misconduct*, which is broadly defined to cover conduct that could result in prosecution for a serious offence (defined as a serious indictable offence, that is, an offence punishable by imprisonment for life or for a term of 5 years or more) or serious disciplinary action (such as termination of employment) or a pattern of conduct indicating systemic issues or corrupt conduct,
- (c) *agency maladministration*, which is broadly defined as conduct by the NSW Police Force or the Crime Commission (other than excluded conduct) that is unlawful or that, although not unlawful, is procedurally unfair or that is engaged in in accordance with a law or practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory,
- (d) *officer maladministration*, which is broadly defined as conduct by a police officer, administrative employee or Crime Commission officer that, although not unlawful, is of a kind that is procedurally unfair,
- (e) *coercive examination power*, which is defined as a power conferred in relation to conduct that is (or could be) serious misconduct or serious maladministration to conduct an examination, summon a witness, punish for contempt, arrest a person in contempt, order attendance of an inmate or issue a search warrant,

- (f) **complaint**, which is defined as an allegation that conduct is (or could be) misconduct by officers or employees or agencies,
- (g) **misconduct information**, which is broadly defined to cover a thing other than a formal complaint (such as a report) that indicates or suggests conduct is (or could be) misconduct,
- (h) **misconduct matters management guidelines**, which is broadly defined to enable entry into agreements concerning how **misconduct matters** (complaints and misconduct information) are to be dealt with under the proposed Act (including agreements about matters which must be notified to the Commission (**notifiable misconduct matters**)) and to enable the Commission to issue guidelines concerning agreed matters and make them publicly available,
- (i) **serious maladministration** which is broadly defined as agency maladministration or officer maladministration that is conduct of a serious nature that is unreasonable, unjust, oppressive or improperly discriminatory or arises wholly or in part from improper motives.

Part 3 Constitution and management of Commission

Part 3 constitutes the Commission as a statutory corporation, the staff of which are employed in the Public Service in a separate agency with a public servant (the Chief Executive Officer) designated as the head of the agency (**Schedule 6.23**).

Part 3 also provides for the appointment of a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight. The Commissioners are to be appointed by the Governor. The person appointed as Chief Commissioner must be a Judge or Justice of a superior court of record of a State or Territory or Australia or a former Judge or Justice of one of those courts. The other Commissioners must have special legal qualifications.

The coercive examination powers relating to the detection and investigation of serious misconduct and serious maladministration conferred on the Commission under Part 6 of the proposed Act cannot be delegated and the other powers conferred under that Part may be delegated but are not to be exercised by or delegated to police officers or former police officers.

Part 4 Functions of Commission

Part 4 sets out the functions of the Commission. These include the following:

- (a) the detection, investigation and exposure of conduct that is (or could be) serious misconduct or serious maladministration,
- (b) the referral of misconduct matters relating to members of the NSW Police Force for police investigation and of misconduct matters relating to Crime Commission officers to the Crime Commission for Crime Commission investigation (unless the conduct concerned is (or could be) serious misconduct or serious maladministration and the Commission has decided to investigate the matter),
- (c) the referral of misconduct matters for investigation or action by other appropriate authorities,
- (d) the monitoring of the investigation or handling of misconduct matters referred by it to other authorities,
- (e) working collaboratively with the NSW Police Force and Crime Commission with respect to educating Crime Commission officers and members of the NSW Police Force about officer misconduct and maladministration and supporting and promoting initiatives of those agencies directed at the prevention and elimination of officer misconduct and maladministration,
- (f) assembling evidence and information that may be used in prosecuting criminal offences or dealing with disciplinary infringements and giving it to appropriate authorities,

- (g) forming opinions and making recommendations in the exercise of its functions without making any findings of guilt about the commission of criminal offences (but which may be used as a ground for taking disciplinary proceedings),
- (h) exercising the functions that may be exercised by the Crime Commission under the *Criminal Assets Recovery Act 1990* in connection with matters arising during or in the course of the Law Enforcement Conduct Commission's investigations under the proposed Act,
- (i) inspecting records and reports to ensure the NSW Police Force and Crime Commission are complying with certain legislative requirements.

Part 5 Dealing with misconduct matters

Division 1 Reporting officer misconduct

Division 1 imposes a duty on the Ombudsman, the Crime Commissioner, the Commissioner of Police, the Commissioner for the Independent Commission Against Corruption, the principal officer of a public authority and an officer who constitutes a public authority to report to the Commission any matter that the officer suspects on reasonable grounds concerns or may concern officer misconduct or serious maladministration and makes it clear certain investigatory bodies and persons may refer matters to the Commission even if not under a duty to do so.

Division 2 Making complaints about officer misconduct, officer maladministration and agency maladministration

Division 2 contains provisions relating to the making of formal complaints about officer misconduct, officer maladministration and agency maladministration to the Commission.

Division 3 Dealing with misconduct matters generally

Division 3 contains provisions with respect to how formal complaints and misconduct information (together described as misconduct matters) are to be dealt with, including provisions as follows:

- (a) requiring the Commissioner of Police and the Crime Commissioner to give notice of any notifiable misconduct matter to the Commission,
- (b) requiring the Commission to give notice to the relevant agency about misconduct matters it receives or of which it becomes aware,
- (c) requiring certain information about misconduct matters to be registered in a misconduct matters information system,
- (d) specifying the decisions that may be made to address a misconduct matter, including deciding to investigate the matter, or refer it for police investigation or action by other persons or bodies and to monitor the police investigation or action taken.

Any misconduct matters management guidelines and recommendations of the Commissioner of Police must be taken into account in deciding how to deal with misconduct matters concerning members of the NSW Police Force.

Part 6 Investigation powers

Part 6 sets out the Commission's powers of investigation (including powers of examination by public or private hearing in relation to serious misconduct and serious maladministration) and the limitations on those powers and specifies certain functions of the Commission that are exercisable by the Chief Commissioner or other Commissioners.

Division 1 Investigation powers generally

Division 1 confers general powers on the Commission to conduct investigations on its own initiative or on a complaint being made, allows preliminary inquiries to be made for the purposes

of deciding whether to undertake investigations (including examinations) and provides for the discontinuance or conclusion of investigations.

The Commission can exercise investigation powers:

- (a) if at least 2 Commissioners (one being the Chief Commissioner) have decided that the conduct concerned is (or could be) conduct that falls within the description of serious misconduct or serious maladministration, or
- (b) if the conduct concerned involves the Commissioner of Police or a Deputy Commissioner of Police and is (or could be) police misconduct or officer maladministration, or
- (c) if the conduct concerned involves the Crime Commissioner or an Assistant Commissioner of the Crime Commission and is (or could be) Crime Commission officer misconduct or officer maladministration, or
- (d) if both Houses of Parliament refer the matter to the Commission for investigation.

Officer misconduct or officer maladministration involving members of the NSW Police Force or Crime Commission officers other than conduct that is (or could be) serious misconduct or serious maladministration will generally be the subject of police investigation or Crime Commission investigation respectively.

Division 2 Powers to obtain information, documents and other things

Division 2 contains provisions relating to information gathering by the Commission, including provisions enabling the Commissioners to require public authorities and officials to produce statements of information, to compel attendance of persons at a place and time and produce documents or other things and to enter public premises and inspect and take copies of documents.

Division 3 Examinations

Division 3 empowers the Commission to hold examinations in the form of public or private hearings for the purpose of an investigation. Such an examination can only be held in public in relation to conduct that the Commissioners have decided is (or could be) serious misconduct or serious maladministration if they have unanimously decided that it is appropriate to hold a public examination. The Division also gives guidance as to the factors to be taken into account in determining whether to investigate serious misconduct or serious maladministration (including by holding an examination).

Division 4 Attendance before examining Commissioner

Division 4 deals with the Commissioner's powers to require the attendance of a witness at an examination and to give evidence. Privileges that would apply in a court of law are abrogated and it is made clear that the evidence given may be used in an investigation and to obtain further evidence.

Division 5 Search warrants

Division 5 deals with the issue of search warrants by a Commissioner for the purpose of an investigation being conducted by the Commission.

Division 6 Surveillance device warrants

Division 6 enables a Commissioner or another officer of the Commission to seek a warrant under the *Surveillance Devices Act 2007*.

Division 7 Protection of witnesses and evidence

Division 7 contains provisions for the protection of witnesses and evidence at examinations.

Division 8 Special powers and weapons

Division 8 contains provisions giving Commission investigators who are police officers seconded from outside the State the powers of a NSW police officer and allows Commission investigators and Commission surveillance officers who are seconded police officers or approved officers to have access to semi-automatic pistols and ammunition and anti-personnel spray, batons, handcuffs and certain other equipment when acting as officers of the Commission.

Division 9 Contempt

Division 9 provides a mechanism to deal with and punish contempt of the Commission.

Division 10 Miscellaneous

Division 10 empowers the Commission to carry out investigations despite pending civil or criminal proceedings provided it ensures the conduct of the investigation does not prejudice the proceedings.

Part 7 Oversight of police and Crime Commission investigations

Part 7 contains provisions relating to the oversight of police investigations and Crime Commission investigations in accordance with misconduct matters management guidelines and the provisions of the Part if the Commission considers it is in the public interest to oversee the investigations. The Commission can request information concerning the investigations and may request further investigation if it is not satisfied that the misconduct matter has been properly investigated. **Part 11** contains provisions enabling the Commission to report on the investigations to both the Commissioner of Police and the Crime Commissioner and the Minister and to recommend the report be made public.

Part 8 Oversight of critical incident investigations

Part 8 contains provisions relating to the monitoring of critical incident investigations. The Part provides for the Commissioner of Police (or his or her delegate) to declare an incident to be a critical incident if it is an incident involving a police officer or other member of the NSW Police Force that results in the death of, or serious injury to, a person (including another police officer) and the death or serious injury arises from certain specified actions (such as discharge of a firearm, application of physical force or use of equipment such as a Taser gun or capsicum spray). The Commission may monitor the progress of an investigation by police officers into the critical incident if the Commission decides that it is in the public interest for it to do so. The Part describes and limits the monitoring powers that may be exercised and ensures that the Commission cannot control, supervise, direct or interfere with the investigations. The Commission is empowered to give advice on aspects of any investigation that it considers inappropriate if an investigation is not fully and properly conducted.

Part 9 Inspector of Commission

Part 9 provides for the appointment of an Inspector of the Commission and sets out the functions and powers of the Inspector in relation to the audit of the operations of the Commission and conduct of its officers. **Schedule 6** contains amendments to a number of Acts to confer or impose additional functions on the Inspector concerning the oversight of various law enforcement agencies in relation to matters like the issue of covert search warrants and controlled operations.

Part 10 Parliamentary Joint Committee

Part 10 provides for the joint committee established under the *Ombudsman Act 1974* to monitor and review the exercise by the Commission and the Inspector of their functions. The name of the

joint committee is changed by an amendment to section 31A of that Act in Schedule 6 to the proposed Act to reflect this function and remove references to the Police Integrity Commission.

Part 11 Reports

Part 11 provides for special, annual and other reports that may be made to Parliament, the Commissioner of Police and the Crime Commissioner about matters investigated or monitored by the Commission and the Inspector and contains machinery provisions with respect to the making of reports.

The Part also includes provision to ensure that a person about whom an adverse comment is to be made in a report is given the grounds on which the comment is made and the opportunity to make submissions before the comment is included in the report, to omit matter from reports if it is in the public interest to do so and to require critical police information or critical Crime Commission information to be omitted from certain reports.

Part 12 Offences

Part 12 provides offences for the purpose of the proposed Act.

Part 13 Relationship of Commission with other agencies

Part 13 contains provisions regarding the relationship of the Commission with the Ombudsman, the Independent Commission Against Corruption (the *ICAC*), the Auditor-General and other agencies. It limits the role of the ICAC and Ombudsman in regard to the conduct of police officers. In the case of the Ombudsman, this reflects the amendments to the *Ombudsman Act 1974* made by Schedule 6 to the proposed Act limiting the Ombudsman's jurisdiction with respect to investigation of complaints concerning the NSW Police Force or members of the NSW Police Force to complaints that consist of or involve reportable allegations or reportable convictions within the meaning of Parts 3A and 3C of that Act.

The Part also enables the Commission to refer matters for investigation or action, or information, to other persons or bodies and to take further action if it is dissatisfied with the action taken by them.

Part 14 Secrecy and confidentiality

Part 14 imposes obligations of secrecy and non-disclosure on officers of the Commission and other persons with respect to investigations (including examinations) and the exercise of other functions of the Commission under the proposed Act and authorises the disclosure and use of evidence and information in specified circumstances. The circumstances include permitting the disclosure of such information to a registered medical practitioner or registered psychologist for the purposes of providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to persons required to give evidence or information at the hearings or inquiries or carrying out certain functions. The Ombudsman is also specifically authorised to furnish information to the Commission and secrecy and non-disclosure provisions in certain other Acts are overridden for the purpose of requirements under the proposed Act. The Commission is prohibited (with limited exceptions) from disclosing critical police information or critical Crime Commission information at any time.

Part 15 Miscellaneous

Part 15 contains miscellaneous provisions, including provisions as follows:

- (a) providing that the proposed Act binds the Crown,
- (b) providing for the vetting of prospective staff of the Commission,

- (c) providing protection from personal liability for things done or omitted to be done in good faith for the purposes of the proposed Act or other Acts imposing functions on the Commission, a Commissioner or the Inspector,
- (d) enabling regulations to be made for the disclosure of pecuniary interests and other matters by officers of the Commission,
- (e) providing for service of documents,
- (f) providing for penalties applicable to corporations,
- (g) requiring police officers to be authorised to exercise investigative, surveillance or enforcement functions under proposed Part 6,
- (h) providing for the manner in which offences are to be dealt with,
- (i) containing a regulation-making power,
- (j) requiring the review of the proposed Act within a specified period.

Schedule 1 Provisions relating to members of the Commission, Assistant Commissioners and alternate Commissioners

Schedule 1 contains provisions relating to the offices of the Commissioners, Assistant Commissioners and alternate Commissioners.

Schedule 2 Provisions relating to Inspector and Assistant Inspectors

Schedule 2 contains provisions relating to the Inspector and Assistant Inspectors.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings, transitional and other provisions.

Schedule 4 Repeals

Schedule 4 repeals the *Police Integrity Commission Act 1996* and regulations under it, the *Police Integrity Commission Amendment Act 2005* and the *Royal Commission (Police Service) Act 1994*.

Schedule 5 Amendment of Police Act 1990 No 47 and Police Regulation 2015

Schedule 5 makes consequential amendments to the *Police Act 1990* and the *Police Regulation 2015*. It also inserts a new provision into the Act (proposed section 211F) making it a duty for members of the NSW Police Force who have reasonable grounds to suspect that a police officer has engaged in police misconduct or officer maladministration to report the misconduct or alleged misconduct or maladministration to a more senior officer.

Schedule 6 Amendment of other Acts and regulations

Schedule 6 amends the Acts specified in the Schedule. The amendments include the following:

- (a) amendments consequential on the repeal of the *Police Integrity Commission Act 1996* and Part 4 (Inspector of the New South Wales Crime Commission) of the *Crime Commission Act 2012* and the enactment of the proposed Act,
- (b) amendments to the *Ombudsman Act 1974* to remove the jurisdiction of the Ombudsman with respect to the conduct of the NSW Police Force and its members (except to the extent

the conduct relates to a reportable allegation or reportable conviction within the meaning of Parts 3A and 3C of that Act or the inappropriate handling or response to such an allegation or conviction),

- (c) amendments to the following Acts to impose functions on the Inspector with respect to covert powers:
 - (i) the *Law Enforcement (Controlled Operations) Act 1997*,
 - (ii) the *Surveillance Devices Act 2007*,
 - (iii) the *Telecommunications (Interception and Access) (New South Wales) Act 1987*,
- (d) amendments to various Acts to confer functions on the Commission in place of the Police Integrity Commission or the Ombudsman (for example, with respect to preventative detention orders under the *Terrorism (Police Powers) Act 2002* and witness protection programs under the *Witness Protection Act 1995*).

Schedule 7 Amendments relating to non-disclosure for health service purposes

Schedule 7 amends various Acts and a regulation to override secrecy and non-disclosure provisions in that legislation that prohibit the disclosure of evidence and information obtained at hearings or inquiries or in carrying out certain functions to permit the disclosure of such information to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to persons required to give evidence or information at the hearings or inquiries or carrying out the functions.