

14 September 2016

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Mr Lee Evans MP
Chair Committee on the Office of the Ombudsman,
the Police Integrity Commission and the Crime Commission
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Evans

Law Enforcement Conduct Commission Bill

I refer to my letter of 15 August 2016 advising the Committee on the Office of the Ombudsman, the Police Integrity Commission and the Crime Commission (the Committee) about my concerns about the Law Enforcement Conduct Commission Bill (the Bill). As a matter of courtesy, I provided a copy of my letter to the Premier and Deputy Premier.

As outlined in my earlier letter, my office received a copy of the Draft Bill from the LECC Implementation Committee on 20 May 2016, with an invitation to provide comments by 30 June 2016. We subsequently made four detailed submissions on various aspects of the Bill on 27 May, 2 June, 16 June and 30 June 2016. Our submissions detailed a number of concerns that the Draft Bill did not accord with the recommendations made by Mr Tink in his report, *Review of Police Oversight 31 August 2015*.

When I wrote to you in August, the LECC Implementation Committee had not provided a response to our submissions. I advised that we would review the Bill once it had been tabled in the Parliament.

Since then, the LECC Implementation Committee provided my office with a revised version of the Bill for information purposes only, and the Bill was introduced into the Parliament yesterday.

I am pleased to advise that many of the submissions made by my office have been considered and reflected in the Bill. In particular, the Bill now:

- preserves the existing range of conduct about which a complaint can be made.
- provides the LECC with most of the Ombudsman's current powers and functions to oversight complaints and the police complaints system.
- includes improvements that we recommended in our previous submission to the review of the *Police Act 1990*, including a positive obligation on police to report misconduct, and provisions requiring the LECC and the NSWPF to provide a complainant with the reasons

for the decision made on their complaint, including a decision not to conduct an investigation

- includes provisions to enable the LECC to oversight all critical incident investigations (under current legislation, a critical incident investigation can only be oversighted by the Ombudsman if the incident was the subject of a complaint).

However, some significant issues identified in our submission to the LECC Implementation Committee have not been addressed.

A comparison of the current arrangements for police oversight and those that will apply under the LECC Bill reveals some important departures from key recommendations made by Mr Tink. We think it is appropriate to bring those departures to the Committee's attention, given its current oversight responsibilities for our office and its stated interest in hearing our views on the LECC Bill.

In summary, we remain concerned that the Bill fails to adequately deliver on Mr Tink's recommendations 1, 3, 4, 5, 11, and 15 relating to the functions and powers to be given to the LECC to oversight complaints. The oversight scheme established under the Bill will, in our view, diminish rather than strengthen the functions currently performed by the Ombudsman under Part 8A of the Police Act.

Part 8 of the LECC Bill establishes a scheme for the oversight of police critical incident investigations. However, it does not implement recommendations 43 and 45 made by Mr Tink, which could reduce the LECC's ability to effectively perform its oversight functions.

Lastly, as outlined in my previous letter to the Committee, we remain concerned that the level of resources proposed for the LECC is inadequate and contrary to recommendations 22 and 36 made by Mr Tink to ensure that the LECC is able to perform its functions effectively. Given our lengthy experience in conducting many of those functions, we think it important to highlight the areas which we consider will not be adequately resourced in the proposed LECC structure.

We expand below on these deficiencies, and their practical implications.

The LECC's 'own motion' investigative powers are limited to serious misconduct and serious maladministration

The LECC's 'own motion' investigation powers will be limited, and inferior to those currently available to the Ombudsman and the PIC.

Mr Tink made the following recommendations in relation to the LECC's 'own motion' investigation powers:

Recommendation 1: To simplify and improve the police oversight system in New South Wales, a new single civilian police oversight commission, headed up by a commissioner, should be established to exercise the functions currently carried out by the Police Integrity Commission, the Police Division of the Office of the Ombudsman and the Inspector of the Crime Commission.

Recommendation 3: *To improve understanding about how the complaints process works, and make it more ‘user-friendly’, all functions and powers of the new commission should be found in the Act establishing the commission, including:*

all the functions and powers of the Ombudsman currently set out in Part 8A of the Police Act 1990, such as the obligation to receive complaints, the obligation to keep the NSW Police Force complaints system under review, the right to monitor certain police investigations and the right to undertake direct investigations into complaints;

all the functions and powers of the Police Integrity Commission, including in relation to preventing, detecting and investigating serious police misconduct; and

the functions and powers of the Inspector of the Crime Commission to the extent these are different to those of the Police Integrity Commission.

Recommendation 15: *To provide the new commission with the capability to detect and prevent serious police misconduct, as well as investigate other misconduct or concerns about complaints management, the new commission should have the power to conduct own motion investigations in the same way as the Police Integrity Commission and Ombudsman do now (emphasis added).*

The Ombudsman and the PIC have broad jurisdiction and discretion to determine which matters to investigate, and how to conduct an investigation. In contrast, clause 51 of the Bill restricts the LECC’s investigative power to matters that concern (or could concern) ‘serious misconduct’, ‘serious officer maladministration’ or ‘serious maladministration’ as defined by clauses 10 and 11. The only exception is in relation to complaints about the Commissioner of Police or a Deputy Commissioner.

This means that the LECC will not be entitled to investigate a broad range of conduct that the Ombudsman can currently investigate, including conduct which is (or could be):

- a criminal offence that is not a serious indictable offence
- unlawful conduct that is not an offence or corrupt conduct
- NSWPF maladministration that does not meet the threshold of ‘serious maladministration’ under clause 11.
- conduct which the Ombudsman considers should be investigated in the public interest, but which does not meet any of the ‘serious’ thresholds required under clause 51.

An example of an investigation conducted by the Ombudsman on public interest grounds, that appears to be excluded by clause 51, was an investigation into police use of Tasers. This investigation was followed by a Special Report to Parliament in October 2012 called *How are Taser weapons used by the NSW Police Force?*

This investigation included a comprehensive review of over 2000 Taser use incidents, and the NSWPF systems, policies and procedures for the use of Tasers, including arrangements for ensuring proper governance and accountability for misuse of the devices. The investigation

resulted in 44 recommendations for strengthening police systems – the majority of which were supported and implemented by the NSWPF. Significantly, the investigation was conducted in the public interest, not in response to complaints of ‘serious misconduct’ or ‘serious maladministration’ as defined in the Bill. It is doubtful that the LECC would be able to commence such an investigation under the proposed Act.

The restrictive effect of clause 51 is that a broad range of complaints will no longer be able to be investigated by a civilian oversight agency and may only be investigated by internal police investigation. We acknowledge that, in many cases, an internal police investigation will be appropriate. However, an important feature of the current legislative arrangements for dealing with police complaints is that the oversight agency may investigate or take over any complaint from the NSWPF (s 156 of the Police Act). This allows the oversight agency to address any serious failures by the NSWPF to properly investigate a complaint, and also provides a strong incentive for the NSWPF to conduct a proper investigation of the complaint in the first instance. Without this feature in the proposed oversight arrangements, we believe there is a risk that the quality of police complaint investigations will diminish over time.

The limitations on the LECC’s investigation powers conflict with and depart from Mr Tink’s recommendations 1, 2 and 3 outlined above, because the LECC will not have ‘all the functions and powers of the Ombudsman currently set out in Part 8A of the Police Act’ or the ‘power to conduct own motion investigations in the same way as the Police Integrity Commission and Ombudsman do now’.

Mr Tink made it clear in his report (p 92) that he expected that the creation of a single oversight agency would increase the number of external investigations into what he described as ‘everyday policing’. He envisaged that these would be conducted by the Oversight Division. However, in our view, the LECC’s inability to investigate complaints about officer conduct that does not meet the threshold of ‘serious misconduct’ or ‘serious officer maladministration’ will make this outcome less likely.

Limitations on the authority of the Chief Commissioner to make operational decisions

Mr Tink’s recommendations 9 and 11 were as follows:

Recommendation 9: *To develop a cohesive culture within the new commission and enable it to respond to the opportunity that a combined model presents for the efficient and effective allocation of work between divisions, the new Act should establish a deliberative Commissioner’s Council, comprising the Commissioner and Deputy Commissioners.*

Recommendation 11: *To ensure certainty in decision-making, as well as reflect the status of the new body as one exercising royal commission type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioner’s Council cannot be resolved by consensus (emphasis added).*

Under clause 19 of the Bill, the Chief Commissioner’s powers are significantly limited. Clause 19 (2) requires that at least two of the Commissioners, one of whom is the Chief Commissioner, must agree to commence an investigation or to conduct an examination in private. Clause 19(3) requires

all three Commissioners to unanimously agree to delegate any of their functions, issue a search warrant, or conduct an examination in public.

We support the inclusion of provisions in the Bill for a deliberative council. However, in our view, clause 19 imposes unnecessary impediments to the Chief Commissioner's ability to manage the performance of the LECC's functions and perform the CEO functions.

Limitations on the authority of the Commissioner Oversight to conduct examinations

While recommending a single agency, Mr Tink also recognised that the functions of complaint oversight performed by the Ombudsman are distinct from the integrity functions performed by the PIC. In particular, Mr Tink made the following recommendations:

Recommendation 4: *To provide a clear basis for the new commission to embrace a variety of skill sets and work styles, the objects of the new Act should recognise that combining oversight and integrity functions in one organisation should not enable one function to take precedence over the other.*

Recommendation 5: *To establish an organisational structure that will support a smooth transition to a combined model, the new Act should create separate integrity and oversight divisions, each headed by a Deputy Commissioner who is able to exercise powers and functions, and receive funding allocations, that reflect each division's distinct responsibilities.*

Under current legislation the Ombudsman may conduct examinations in private. Division 3 of the Bill prevents the Commissioner Oversight from conducting such examinations. This limitation is inconsistent with Mr Tink's recommendations 3, 4 and 5.

It seems illogical to require the Commissioner Oversight to have special legal qualifications and to be responsible for the performance of the functions of the Oversight Division – including the conduct of investigations – and yet not allow the Commissioner Oversight to conduct a private examination to assist in those investigations. In essence, a private hearing is primarily designed to get to the truth of the issues involved. Accordingly, where a matter meets the threshold for commencing an investigation, that should also be sufficient to enable the Commissioner to conduct a private hearing for the purposes of that investigation.

We recognise that a public hearing may have a wider purpose – for example, to expose to the public a serious and/or systemic issue. The difference between public and private hearings should be reflected in the Bill. In particular, the threshold for deciding to conduct a public hearing should involve the application of a public interest test similar to those in s 31 of the *Independent Commission Against Corruption Act 1988* and s 33 of the *Police Integrity Commission Act 1996*.

Complexity of definitions

One of the key objects of the LECC Bill is that the LECC and other agencies should work 'collaboratively' to prevent officer misconduct. However, the Bill contains multiple overlapping definitions that will mark the boundaries of the LECC's jurisdiction (complaint, misconduct matters, notifiable misconduct matters, misconduct matters information system, misconduct,

serious misconduct, agency maladministration, officer maladministration, serious maladministration).

For example, to determine whether a complaint falls within the scope of the Act requires the consideration of three separate but overlapping definitions of conduct:

- clause 9 defines police misconduct, administrative officer misconduct, and Crime Commission officer misconduct
- clause 9 also includes terms such as ‘corrupt conduct’ and ‘disciplinary infringement’ that are defined elsewhere in clause 4
- clause 10 defines serious misconduct, including agency maladministration, as well as terms such as ‘serious disciplinary action’ and ‘serious offence’
- clause 11 defines ‘maladministration’, which includes separate definitions of ‘agency maladministration’, ‘officer maladministration’ and ‘serious maladministration’.

There is significant potential for disagreement between the LECC and the agencies it oversees about the meaning and application of these multiple definitions. We consider that the LECC’s capacity to effectively perform its functions may be undermined by disputes about its role in the oversight of complaints and the scope of its powers.

We also note that the term ‘misconduct’ is used inconsistently throughout the Bill, and at times appears to also encompass maladministration, for example, in the term ‘misconduct matters information system’, ‘misconduct matters management guidelines’, and ‘misconduct information’.

This complexity may also make the new police complaints system difficult for the public to navigate. Complainants and their advocates will not find it straightforward to work out whether their complaint falls within the jurisdiction of the LECC or whether the LECC is likely to investigate it, particularly given the varied and confusing ways the term ‘misconduct’ is used throughout the Bill.

Oversight of critical incident investigations

In proposing a framework for the civilian oversight of critical incident investigations, Mr Tink said: ‘It is essential that the public have confidence that an appropriate standard of police investigation will occur’. Mr Tink supported the need for police accountability through the ‘real time’ monitoring of critical incident investigations by a civilian oversight agency, while recognising the concerns of police that the oversight agency not interfere with the conduct of such investigations.

Mr Tink’s recommendations included:

Recommendation 43: To ensure high levels of public confidence in the standard of investigation of critical incidents by the NSW Police Force, the new commission should be conferred with a ‘real time’ power to monitor these investigations.

Recommendation 45: To establish a framework that strikes an appropriate balance between accountability, transparency and effective investigation, the Act establishing the new commission should reflect the features recommended by the NSW Bar Association in

its submission to this review, including an obligation on the NSW Police Force to immediately notify the new commission of any critical incident as soon as it is declared, with enough information to allow the commission to determine whether or not to monitor the investigation.

We made a number of suggestions about critical incident oversight in the course of the development of the LECC Bill. Some have been adopted: however, we remain concerned that key aspects of the critical incident oversight framework in the Bill are inconsistent with Mr Tink's observations and recommendations, and with the model proposed by the NSW Bar Association. The inconsistencies include:

- The LECC will not have a right to attend interviews as an independent observer and may only do so with the consent of both the Chief Critical Incident Investigator and the person being interviewed (clause 114(3)(c)). There is no such restriction in the current system. Section 146 of the Police Act allows the Ombudsman to act as an independent observer in monitoring the police complaint investigation. We are concerned the consent requirements will allow police to determine the level of LECC oversight and to stymie the effective performance of the LECC's oversight functions.
- The LECC will not be able to confer with critical incident investigators. By way of contrast, clause 101 of the Bill allows the LECC to confer with police complaint investigators. The LECC's inability to confer with critical incident investigators will not promote responsiveness to issues of concern identified by the LECC. The requirement for the LECC to escalate its concerns is likely to impede resolution in a timely manner.
- Clause 117(8) prevents the LECC from publishing a report about the adequacy of a police critical incident investigation until police have finalised the critical incident investigation. However, there is no provision in the Bill stipulating timeframes for completion of the investigation by police, or an obligation on police to complete it in a timely manner. Delays by police in completing a critical incident investigation are likely to undermine the benefits of civilian oversight by preventing the LECC from promptly publishing a report even though publication is in the public interest.

To illustrate the last point, the Ombudsman monitored the NSWPF critical incident investigation concerning the death of Roberto Laudisio Curti, which occurred on 18 March 2012. We published a report of our monitoring of the police investigation in March 2013, once we were satisfied the critical incident investigation was substantially concluded (and prior to the Coronial inquest). If we had been operating under comparable provisions to those in the LECC Bill, we would still not be able to publish that report as the NSWPF's critical incident investigation has not been concluded.

We have previously submitted that the extent of the LECC powers to oversight critical incident investigations should be commensurate with the fact that these investigations concern incidents in which members of the public or police may have been killed or seriously injured. Such powers should not be less than the LECC's oversight powers in relation to complaints about police. In our

view, the Bill restricts the ability of the LECC to conduct real time monitoring and to confer with critical incident investigators.

In addition, Part 8 of the Bill does not include the powers available to the LECC when reviewing complaint investigations under Part 7, that is to:

- make requests to the Commissioner of Police for further information (clause 101)
- request further investigation by police if the matter it has not been properly investigated (clause 104)
- review the actions proposed to be taken following the investigation (clause 105).

In our view, without such powers the LECC may be less effective in oversighting critical incident investigations and inspiring public confidence in the system.

Reduced independence of the inspection function

Schedule 6 of the Bill amends the following Acts to transfer the Ombudsman's inspection functions under these Acts to the Inspector of the LECC:

- the *Law Enforcement (Controlled Operations) Act 1997*
- the *Surveillance Devices Act 2007*
- the *Telecommunications (Interception and Access) (New South Wales) Act 1987*.

We made several submissions in relation to the exercise of these functions, some of which are reflected in the Bill.

A significant issue that has not been resolved is that the effect of the amendments is that while the LECC Inspector will be responsible for inspecting the records of eligible agencies, the LECC Inspector will himself be an eligible authority under the *Telecommunications (Interception and Access) (New South Wales) Act 1987*.

As an eligible authority, the LECC Inspector should also be subject to inspections like the other agencies that use covert law enforcement powers. Under the Bill, the LECC Inspector will not be subject to any inspections.

It remains our view that the best model for ensuring accountability and transparency in relation to the inspection functions is that they remain with the Ombudsman. Unlike the LECC Inspector, the Ombudsman is not an eligible authority and is therefore better placed to independently perform the inspection functions without any actual or potential conflict of interest.

Resourcing of the LECC

As outlined in my letter dated 15 August 2016, we have been advised by the CEO of the LECC that the LECC's budget for employee related costs will be reduced by 10% compared to the former budgets of the PIC and the Police Division in the Ombudsman's office. This decision appears contrary to Mr Tink's recommendation 22:

the creation of a new oversight model is not designed to realise cost-savings in the immediate or short-term.

...

additional allowance should be made at the time of establishing the new commission for the transitional costs associated with the transfer of staff, the establishment of new premises for the Oversight Division, and the movement or purchase of equipment and services from the Ombudsman's Office, particularly information technology costs;

some additional employee-related costs may be incurred since the new commission will not be able to leverage off the work of staff in other divisions of the Ombudsman's Office, such as the Aboriginal Unit in the Strategic Projects Division;

some additional employee-related costs will need to be included to ensure there is sufficient capacity to monitor critical incident investigations by the NSW Police Force.

We believe that decreasing the resources for the LECC will diminish the Oversight Division's capacity to effectively perform its functions.

The draft organisational chart for the LECC provided to our office indicates that the Oversight Division will have 27 roles across 3 teams including 5 roles in a new critical incident investigations monitoring team (the CIM team). This proposed resourcing of the Oversight Division will result in an overall reduction of 8.6 FTE in comparison to the current staffing of the Police Division.

Instead of providing the LECC with additional resources to staff the CIM team as recommended by Mr Tink, it appears the CIM team has been created by reducing the number of staff overseeing complaint investigations. As a result, the Oversight Division will have eight staff overseeing complaint investigations. This is a decrease of 6.6 FTE in comparison to the current staffing of the Serious Misconduct Team in the Police Division.

The Oversight Division will have an Assessments and Audits Team that will combine separate functions currently conducted by the Ombudsman and the PIC. The staffing for this team will represent a loss of five FTE from the resources allocated by the Ombudsman and the PIC.

In addition, the LECC's Prevention and Education Team will amalgamate the PIC's Corruption Prevention Team with the PCB's Research and Projects Team with the loss of one FTE.

We are concerned that the LECC will commence operations with reduced resources for complaint oversight in order to resource the 10% reduction in budget, the new critical incidents function, and the increased cost of the senior management structure.

Separately, we are concerned that additional resources have not been provided to 'leverage off the work of staff in other divisions of the Ombudsman's Office'. In particular the LECC proposed structure has not adequately resourced:

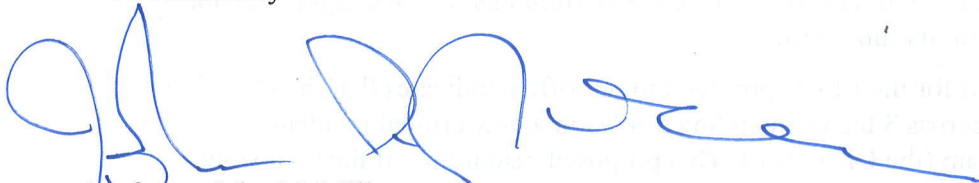
- the need to respond to inquiries from members of the public, either in person or over the telephone, and

- the need for dedicated Aboriginal community liaison officers to continue the important work that we have done over many years oversighting complaints about police made by people in Aboriginal communities across NSW.

Instead of seeking additional resources as recommended by Mr Tink, the LECC CEO has asked the Ombudsman's office to provide the LECC with additional funding taken from the budgets for our Corporate Division and for other areas of my office, such as the Public Administration Division and the Strategic Projects Division. I have declined that request.

I would be pleased to meet with the Committee to discuss these concerns and provide further information, if required. Deputy Ombudsman Linda Waugh and Acting Deputy Ombudsman Michael Gleeson, who respectively lead our Operation Prospect Team and the Police and Compliance Branch, are also available to meet with the Committee if required.

Yours sincerely



Professor John McMillan
Acting Ombudsman