

43292/56

4 March 2020

Ms Emma Wood  
Committee Manager  
Committee on the Ombudsman, the Law Enforcement Conduct Commissioner  
and the Crime Commission  
Parliament of New South Wales  
Macquarie Street  
Sydney, NSW 2000

Dear Ms Wood,

Thank you for your letter dated 20 February and the enclosed transcript. The following question from the Hon. Adam Searle was taken on notice at that hearing.

**The Hon. ADAM SEARLE:** I am very conscious of the limited resources that the LECC currently has but will you take on notice and inform the Committee where the matter which is case study 9 ended up? What ended up happening to that matter?

### Response to question on notice

Regarding case study 9 within the Commission's annual report of 2018-2019, the Commission raised two issues for further consideration by the NSW Police Force:

- (1) By showing intimate images of the complainant, without her consent, subject officer 1 breached point one of the NSWPF Code of Conduct and Ethics; and
- (2) By sending an intimate image of the complainant to subject officer 2 via Snapchat, subject officer 1 breached point one of the NSWPF Code of Conduct and Ethics.

The NSW Police Force reviewed this request and ultimately declined to conduct any further investigation into either of the issues raised, or alternatively make different findings. The response by the NSW Police Force did provide some context to their decision making process, including what they considered were issues with the evidence of the complainant.

The NSW Police Force response also included acknowledgement that *"...two considerations of the evidence might result in equally valid, but different, outcomes."*

The Commission accepted the NSW Police Force response relating to issue (2); however, the Commission maintained concerns around the investigation and outcome for issue (1).

Whilst the Commission and the NSW Police Force may not share the same view as to whether there should be a sustained finding made for a breach of the code of conduct, the Commission considered the circumstances within this misconduct matter as well as any likely benefits of other action by the Commission, and decided that it would take no further action other than reporting on it within the annual report.

### Other options available to the Commission

In instances where the Commission, in overseeing a NSW Police Force misconduct investigation, does not agree with the investigation, or its findings, the Commission has a number of available options, including one or more of the following:

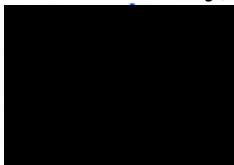
- (i) sending further correspondence to the NSWPF requesting reconsideration of the investigation and outcome. This can include escalating the request to a more senior officer than the officer that considered the original request;
- (ii) making a report pursuant to s 134 of the *Law Enforcement Conduct Commission Act 2016*; or,
- (iii) taking over the misconduct matter, and undertaking an investigation pursuant to Part 6 of the *Law Enforcement Conduct Commission Act 2016*.

It should be noted, the Commission is only able to take over the misconduct matter in circumstances where it meets the thresholds for an investigation under Part 6 of the *Law Enforcement Conduct Commission Act 2016*. In many of the investigations overseen by the Commission, the alleged misconduct does not meet this higher threshold, namely serious misconduct.

Regardless of any further action by the Commission, the NSW Police Force are ultimately responsible for any management action, if any, to be taken as a result of the misconduct.

I hope the above information satisfactorily answers the question raised by the Hon. Adam Searle.

Yours sincerely,



Aaron Bantoft  
Director Investigation – Oversight



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24 February 2020

43292/56

Ms Emma Wood  
Committee Manager  
Committee on the Ombudsman, the Law Enforcement Conduct Commissioner  
and the Crime Commission  
Parliament of New South Wales  
Macquarie Street  
Sydney, NSW 2000

Dear Ms Wood,

Thank you for your letter dated 20 February and the enclosed transcript. I enclose the following documents requested from me by Mr Lynch at page 7 of the transcript:

1. Submission by Commissioner Drake dated 22 November 2019;
2. Memorandum of Advice by Michelle O'Brien dated 22 February 2019.

I would be grateful if you could make one correction to the transcript, namely, changing my title to Chief Executive Officer and General Counsel (at the top of page 6).

Yours sincerely,

  
Michelle O'Brien  
CEO & General Counsel

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## Memo

To: Chief Commissioner  
From: Michelle O'Brien  
Subject: Commissioners' Protocol  
Date: 22 February 2019

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### INTRODUCTION

1. I have been asked to advise on the legal issues arising from two memos furnished to the Chief Commissioner (CC) by the Commissioner for Oversight (OC) following the creation by the CC of a document titled 'Commissioners' Protocol' in January 2019.
2. The fundamental question underlying the issues set out in the two memos submitted by the OC in response to the Commissioners' Protocol is the extent of the CC's authority as the head of the Commission.
3. I will address that question in the context of the relevant statutory framework and then consider some of the specific examples raised in the two memos.

### PART 1 LEGISLATION

#### Law Enforcement Conduct Commission Act 2016

4. The only interpretation open, when one has regard to the *Law Enforcement Conduct Commission Act 2016* (LECC Act) and relevant provisions of other acts touching upon the Commission's operations, is that, subject to s 19(2) of the LECC Act, the CC alone exercises the ultimate decision making authority in the Commission.
5. Section 19 of the LECC Act makes plain that, while the CC must have the agreement of at least one other Commissioner before exercising the Commission's most intrusive powers (undertaking an investigation, holding

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a compulsory examination, issuing a search warrant etc), the decision of the CC (alone) shall prevail should there otherwise be a disagreement or "*inconsistency*" in the decisions of Commissioners "*with respect to a matter*":

## 19 Exercise of Commission's functions

- (1) Except as otherwise provided by this section, the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by a Commissioner is taken to have been done by the Commission.
  - (2) A decision of the Commission to exercise any of the following functions must be authorised by the Chief Commissioner and at least one other Commissioner:
    - (a) a decision under sections 44 (1) (a) and 51 (1), made after taking into account the relevant factors set out in sections 45 and 46, that conduct is (or could be) serious misconduct, serious maladministration, police misconduct, Crime Commission officer misconduct, officer maladministration or agency maladministration and should be investigated,
    - (b) a decision to hold an examination under Division 3 of Part 6 (except where there is a duty to hold an examination into conduct referred by Parliament for investigation under section 196),
    - (c) a decision under Division 3 of Part 6 to hold an examination (or part of an examination) in public,
    - (d) a decision under section 79 (2) that there are reasonable grounds to issue a search warrant,
    - (e) a decision under section 23 (1) to delegate a function of the Commission.
  - (3) A decision of the Commission referred to in subsection (2) is presumed to have been duly authorised unless the contrary is established.
  - (4) Except as provided by subsection (2), a decision of the Chief Commissioner prevails in the event of an inconsistency in the decisions of Commissioners with respect to a matter.
6. It has been observed that no guidance is provided in the LECC Act as to what is meant by the expression "*with respect to a matter*" in s 19(4). However when s 19(4) is read in the context of s 19 as a whole, it becomes apparent that the reason no attempt has been made to prescribe a limit on the matters in respect of which the CC's authority shall prevail is because there are no limits, so long as it is a matter done in the name of or on behalf of the Commission.
7. While subsection (1) provides that the functions of the Commission are exercisable by a Commissioner, that does not mean a Commissioner can

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make decisions with respect to any act, matter or thing without the agreement of the CC. Subsection (1) is subject to subsection (4).

8. It is only in respect of those matters listed in subsection (2) that the CC must have the agreement of at least one other Commissioner. Otherwise the effect of subsection (4) is that the CC's decision will prevail in respect of any other matter.
9. It is consistent with the CC's seniority over the other two Commissioners that, while all three are appointed directly by the Governor, the Commissioner for Integrity and the OC may only be appointed with the concurrence of the CC: s18(2).
10. Section 21 of the LECC Act provides that persons may be employed in the public service under the *Government Sector Employment Act 2013* to enable the Commission and the Commissioners to perform their functions. Although referred to as members of the staff of the Commission, the staff so employed are to be employed in a separate public service agency. A **Note** appearing underneath s 21 of the LECC Act provides that the employer functions of the Government are to be exercised by a Chief Executive Officer.
11. No other functions are conferred on the Chief Executive Officer (CEO) in the LECC Act and in fact apart from a delegation provision in s 23(5)(c) and a passing reference in s 139(4)(c), there is no other reference to the CEO in the LECC Act. This is consistent with the fact that the CEO does not exercise any powers under the LECC Act.

## **Government Sector Employment Act 2013**

12. The *Government Sector Employment Act 2013* (GSE Act) provides for a public service agency called the Office of the Law Enforcement Conduct Commission. The head of that agency is the Chief Executive Officer of the Commission. The CC of the Commission is to exercise the employer functions of the Government in relation to the CEO and is to exercise the function of appointing or terminating the employment of the CEO in consultation with the Minister: Sch 1 Part 3.
13. The effect of this arrangement is that the CEO is the employer of the staff who are made available to the Commission to do the work of the Commission. The CEO is not the head of the Commission but, rather, is the

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head of the Office of the Law Enforcement Conduct Commission. The CEO is employed by and accountable to the CC. (This is consistent with the Commission's role description for the CEO, which provides that the CEO is accountable to the CC). The two Commissioners have no statutory role in the appointment or termination of the employment of the CEO. Nor do they have any role in the supervision of the CEO's duties (just as the CEO has no role in the supervision by the Commissioners of the staff in their respective divisions).

## **Public Finance and Audit Act 1983**

14. The *Public Finance and Audit Act 1983* (PFAA) also creates agency heads for the purpose of the financial record keeping and reporting which government agencies are required to undertake. Schedule 3 provides that the LECC is a "Department" and the "Department Head" for the purposes of the PFAA is the CEO of the Law Enforcement Conduct Commission. Section 45C requires a Department Head to keep proper books and records in relation to all the operations of the Department. Within 6 weeks after the end of each financial year the Department Head shall prepare and submit a financial report: s 45D. Despite the CEO bearing that responsibility under the PFAA, the NSW Auditor General takes the view that the CC is the true head of the agency and the Auditor General requires the CC to also sign off on the financial statements of the Commission, together with the CEO.

## **Comment**

15. It follows from the above summary that none of the statutory responsibilities conferred on the LECC CEO in any way diminish the authority of the CC as the head of the Commission. As the CEO is accountable to the CC then the CEO would be expected to comply with all reasonable requests and directions of the CC.

## **PART 2 THE COMMISSIONERS' PROTOCOL AND RESPONSE**

16. In January 2019, following discussions between the three Commissioners about the allocation of responsibility for the work of the Commission, the CC prepared a protocol which set out the general division of responsibilities between the three Commissioners (Annexure A). The protocol reflected the same interpretation of the statutory framework as set out above, with the CC being primarily responsible for the overall governance of the Commission

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and being the ultimate decision maker in the event of disagreement amongst Commissioners (s 19(4)).

17. The protocol allocated "*primary responsibility*" for particular areas of the Commission's work to particular Commissioners but advocated a collaborative approach in relation to the conduct of the business of the Commission. The protocol was circulated to the two Commissioners for their consideration.
18. The OC declined to accept the protocol. He provided a written response (Annexure B). In that response he stated that he did not agree to the CC having responsibility for the Assessments Team or the Education and Prevention Team (paragraph 4). He did not agree to responsibility for the overall governance of the Commission resting with the CC (paragraph 5). He did not consider that s 19(4) conferred such overall responsibility, given the lack of particularity in s 19(4) as to the sort of "*matters*" 19(4) extended to.
19. OC wrote that neither the LECC Act nor the Role Descriptions for the Commissioners made any reference to the Commissioners being subject to the direction or control of the CC.
20. As I stated in Part 1 above, I consider that the Commissioners being subject to the direction and control of the CC is exactly what was intended by s 19(4) and the absence of any particularisation about nature of "*matters caught by s 19(4)*" is deliberate, because it would have been impossible to exhaustively list the myriad issues that could arise for determination in the day to day conduct of the business of the Commission. Moreover, contrary to what OC claimed in his response, the Role Descriptions for the two Commissioner positions both state that the reporting line of each position is to the CC.
21. In paragraph 7 of his response to the protocol OC drew attention to s 22 of the LECC Act and said "*this reinforces independence*". Section 22 states:

## **22 Independence of Commission and Commissioners**

The Commission and Commissioners are not subject to the control or direction of the Minister in the exercise of their functions.

22. The above provision deals with the relationship between the Commissioners and the Minister, not the Commissioners' relationship with each other. There



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is no basis for implying that the operation of 19(4) is ousted by s 22. They concern different relationships.

23. In paragraphs 8 and 9 OC raised the role of the CEO and stated that he did not agree with the proposition that the CEO can in all respects be governed by the CC. He referred to the GSE Act and the PAFA which nominate the CEO as the head of agency and head of authority respectively. I discussed the effect of those provisions in paragraphs 15 and 16 above. The important distinction overlooked by OC is that the CEO is the head of the agency for the purpose of the statutory schemes created by those acts, not for the purposes of the LECC Act. So far as the LECC Act is concerned, the CEO is governed in all respects by the CC, and this is reflected in the CEO's role description which states that the CEO is accountable to CC.
24. In paragraph 12 OC raised three other issues of allocation of responsibility:
  - (1) The understanding held by OC that responsibility for the Crime Commission lay within the area of Oversight, "*based upon matters such as the audit team being within the oversight division and my attending the meetings of the Crime Commission in an oversight capacity*". So far as I can see there is nothing in the LECC Act which would support a view that the Crime Commission falls within the responsibility of the OC. The substantive powers in Parts 6 and 7 of the LECC Act to investigate misconduct matters and maladministration, or oversight the NSWPF in its investigation of those matters, apply equally to the Crime Commission. Accordingly, both operational divisions of the LECC would be responsible for doing work related to the Crime Commission, in the same manner that they are with respect to the NSWPF. In relation to the meetings attended by OC at the Crime Commission "*in an oversight capacity*", I have no information about such meetings so I cannot speculate on how that activity might have shored up his belief about responsibility for the Crime Commission coming within his area of responsibility.
  - (2) As a consequence of the understanding referred to in (1) above, OC believes that it is appropriate for him to communicate with the head of the Crime Commission. This is contrary to the proposition on page 2 of the protocol that responsibility for communications with the Commissioner of the Crime Commission and other heads of agencies lies with the CC. As I cannot see a basis for the understanding referred

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to in (1) I cannot see a basis for OC to assert that he, rather than the CC, should communicate with the Commissioner for the Crime Commission "*as and when required*".

- (3) OC believes one Commissioner should be given responsibility for LECC's witness protection functions and that officers reporting to that one Commissioner should undertake that work. This is a reference to the Commission's responsibilities under s 12(5) of the *Witness Protection Act 1995* (NSW) which provides:

## **12 Notice of involuntary termination or suspension and application for review**

...

A participant may appeal to the Commission within 3 days after being informed of the confirmation of a decision to terminate or suspend protection and assistance. The Commission must determine the appeal within 7 days after the appeal is received. The Commission, in determining the appeal, may make any decision that could have been made by the Commissioner and the Commission's determination has effect according to its tenor.

Contrary to the proposal on page 3 of the Commissioners' Protocol to the effect that "*decisions on appeals from the Commissioner of Police in respect of the suspension or cancellation of witness protection will be, if practicable, considered and made by all Commissioners*", OC does not think it practicable to have all three Commissioners deal with such matters. There may be some merit in that submission, but as the legislation is silent as to who in the Commission should exercise the function, it is a matter for the CC to ultimately determine, in accordance with his authority under s 19(4) of the LECC Act.

## **PART 3 THE SECOND MEMORANDUM**

25. Following receipt from OC of his response to the Commissioners' Protocol, the CC received a second memorandum from OC shortly thereafter expressing concerns held by OC regarding various aspects of the internal administration of the Commission (Annexure C). Much of that document contains observations and personal opinions which are so general in nature that no useful response can be made. I address some of the more particular claims as follows.

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26. In paragraphs 6 and 7 OC reiterates his view that the two Commissioners have "*statutory independence*" and are not subject to the direction or control of the CC. I disagree with that view, as explained in Parts 1 and 2 above.
27. Similarly in paragraphs 8, 9, 10 and 14 OC reiterates his view that the CEO, and not the CC, is the head of the Commission. OC relies on the GSE Act for this statement. As I explained in Parts 1 and 2 above, the CEO is head of the agency called the Office of the Law Enforcement Conduct Commission. That office exists for the sole purpose of employing staff to enable the Commission to perform its functions. The CEO has no power under the LECC Act. As the CEO is accountable to the CC then, necessarily, the recruitment decisions taken by the CEO, (including decisions to change the duties or the reporting lines of LECC staff), must have the approval, whether tacit or explicit, of the CC. This is consistent with the view taken by the Audit Office that, as the actual head of the agency, the CC must take responsibility for, (and sign off on), the Commission's expenditure (of which salaries form the greatest part).
28. At paragraph 17 OC reiterates his objection to the P&E team being "*taken over*" by a Commissioner. He believes that team should be available to all Commissioners, to assist in running a project for any of them. OC then goes on to say that "*the appropriate placement is with the CEO who is in a position to determine the resources and allocation, taking into account the strategies of the Commissioner as a whole*". This is an elaboration of what appeared in paragraph 4 of the OC's first memo. It needs no further comment as it reveals the already identified misunderstanding of the OC about the role of the CEO and the limited statutory power underpinning it. Furthermore, as a matter of practicality, a small unit like the P&E Team would not be able to serve three Commissioners unless one of those Commissioners had ultimate decision making responsibility about prioritisation of work, as occasions might arise when there were too many demands on their resources. Section 19(4) provides that decision making power.
29. In paragraphs 18 and 19 OC referred to his frustration at not being able to have the resources of the P&E team dedicated to area of particular interest to him. This merely demonstrates the reality that there will not always be consensus on how the Commission's limited resources are to be expended. In such times one Commissioner must have the power to make a decision.

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30. The remaining paragraphs in the second memo do not need to be individually addressed as they raise personal issues rather than legal issues regarding decisions or action taken by the CC which have caused OC frustration or annoyance. Such tensions will be inevitable in a small organisation with three Commissioners who have different approaches. A collaborative model, even with the best will in the world, will not achieve consensus on all occasions. The interpretation of s 19(4) proposed in this advice has the advantage of providing a “way through” those situations and removes the uncertainty which would otherwise prevail under the model proposed by OC.



**M M O'Brien**  
**Solicitor to the Commission**

## Commissioner's Protocol

The starting point for organising the work responsibilities undertaken by the Commissioners is necessarily the Act. For convenience, the provisions of particular relevance are set out below –

### 18 The Commissioners

(1) The Commission consists of the following members appointed by the Governor:

- (a) a Chief Commissioner,
- (b) a Commissioner for Integrity,
- (c) a Commissioner for Oversight.

(2) ...

...

(7) ...

### 19 Exercise of Commission's functions

(1) Except as otherwise provided by this section, the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by a Commissioner is taken to have been done by the Commission.

(2) A decision of the Commission to exercise any of the following functions must be authorised by the Chief Commissioner and at least one other Commissioner:

- (a) a decision under sections 44(1)(a) and 51(1), made after taking into account the relevant factors set out in sections 45 and 46, that conduct is (or could be) serious misconduct, serious maladministration, police misconduct, Crime Commission officer misconduct, officer maladministration or agency maladministration and should be investigated,
- (b) a decision to hold an examination under Division 3 of Part 6 (except where there is a duty to hold an examination into conduct referred by Parliament for investigation under section 196),
- (c) a decision under Division 3 of Part 6 to hold an examination (or part of an examination) in public,
- (d) a decision under section 79(2) that there are reasonable grounds to issue a search warrant,
- (e) a decision under section 23(1) to delegate a function of the Commission.

(3) A decision of the Commission referred to in subsection (2) is presumed to have been duly authorised unless the contrary is established.

(4) Except as provided by subsection (2), a decision of the Chief Commissioner prevails in the event of an inconsistency in the decisions of Commissioners with respect to a matter.

From these provisions (in the context of the Act), the following organising principles appear to follow –

- (i) the conduct of the business of the Commission is the responsibility of all Commissioners;
- (ii) there is no statutory division of functions between Commissioners, other than the implicit limitation placed on the Commissioner for Oversight by s 62(1) and specific duties imposed on the Chief Commissioner by s 20 (appointment of Assistant Commissioners), s 62(1) (assignment of examinations), and s93(5) (contempt of the Commission);
- (iii) all Commissioners need to consider and make decisions (one way or another) as to investigations and examinations, though the determination to investigate or examine is governed by s 19(2);
- (iv) if the three Commissioners do not agree in a decision (not being one required to be made under s 19(2)), the decision of the Chief Commissioner prevails.

#### **Allocation of responsibilities**

The following is agreed by the Commissioners –

- (i) efficient administration requires allocation of responsibilities between the Commissioners, by agreement if possible or by decision of the Chief Commissioner under s 19(4) if necessary, which should take into account and reflect the statutory identification of the Commissioners as Chief Commissioner, Commissioner for Integrity and Commissioner for Oversight;
- (iv) responsibility for overall governance of the Commission is primarily that of the Chief Commissioner; CEO
- (vi) responsibility for communications with Ministers, Heads of Government Departments, the Commissioner of Police, the Commissioner of the Crime Commission of NSW and otherwise on behalf of the Commission as a whole is that of the Chief Commissioner;
- (vii) responsibility for the Assessments Division, which receives and assesses and makes recommendations concerning complaint and misconduct information

- before decisions are made as to the exercise of the functions of the Commission in relation to them, is primarily that of the Chief Commissioner;
- (viii) responsibility for the Education and Prevention Division and Community outreach is primarily that of the Chief Commissioner;
  - (ix) responsibility for the Integrity Division (including Covert Services and Electronic Communications Unit) is primarily that of the Commissioner for Integrity;
  - (x) responsibility for the Oversight Division, including auditing and Critical Incidents, is primarily that of the Commissioner for Oversight;
  - (xi) the Chief Commissioner may consult, as he thinks appropriate, with the Commissioners for Integrity and Oversight in respect of his and their areas of primary responsibility;
  - (xii) each of the Commissioners for Integrity and Oversight may consult with the Chief Commissioner and each other, as they think appropriate, in respect of his and their areas of primary responsibility;
  - (xiii) decisions on appeals from the Commissioner of Police in respect of the suspension or cancellation of witness protection will be, if practicable, considered and made by all Commissioners; and
  - (xiii) where an issue of significant policy not previously agreed or decided arises in the course of the exercise of their responsibilities, the Commissioners will bring it to the attention of the other Commissioners before making a decision as to it unless it is impractical to do so.

Dated                      January 2019

Chief Commissioner

Commissioner for Integrity

Commissioner for Oversight

Chief Commissioner,

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**Re: Commissioner's Protocol**

- 1 I have had a look at the document prepared by yourself. I have concerns about the entering into such a protocol, or indeed even the necessity for such a protocol.
- 2 The concerns expressed by myself to you previously, in my view do not require the preparation of such a protocol to be drafted or agreed to. The protocol itself, in using such general terms adds nothing of substance to the manner in which the Commission currently operates. The concerns expressed by myself previously related primarily to management issues rather than issues of allocation of responsibilities, although these were raised.
- 3 I bring this to your attention not in any disrespectful manner, and certainly not in any manner that would indicate a lack of cooperation on my part to ensure that the Commission operates as far as possible harmoniously, productively and efficiently, within the context of a small organisation.
- 4 Furthermore, as indicated orally, I do not agree to the Chief Commissioner having responsibility for the Assessments Team, or the Education and Prevention division. I have given my reasons why, including inter alia, my belief (whether correct or otherwise) that such a division does not foster the most efficient or productive running of the Commission. My understanding is (correct or otherwise) that the Prevention and Education team were originally to come under the control of either the Chief Executive Officer, or strangely the Solicitor for the Commission (see role descriptions and first draft of role description for the Solicitor, although this was changed in a later draft). I believe that the CEO is the most appropriate placement, having regard to the CEO's job functions, and the legislative requirements.
- 5 I also do not accept that:  
"responsibility for overall governance of the Commission is primarily that of the Chief Commissioner".
- 6 Whilst aware of the provisions of section 19 (4), the difficulty that arises comes from the fact that "with respect to a matter" is contained in the legislation with virtually no guidance as to what it in fact means. What matters are in fact contemplated? I have no difficulty accepting that some major decisions relating to strategy, goals of the Commission, and similar type matters may fall within this provision. I do have difficulty



with the concept that any Commissioner when properly carrying out any such function can be directed by a Chief Commissioner as to the precise mode and means to carrying out such function, or otherwise be inhibited from properly carrying out any such function. When one looks at the Role Descriptions for the Chief Commissioner, and the Commissioners for Integrity and Oversight it is clearly contemplated that such roles are independent statutory roles which required collaboration with the other Commissioners and executive members. Neither in the Act nor in the Role Description is there any reference to the Commissioners being subject to the Direction or Control of the Chief Commissioner in the carrying out of their functions. Indeed, apart from some nominated exceptions, The Chief Commissioner's role is no greater than that of the Commissioners.

The 7  
also state  
that  
Commissioners  
reporting line  
is to Chief  
Commissioner

7 In saying the above, I also have in mind the provisions of section 22 which provides that the Commissioners are not subject to the control or direction of the Minister in the exercise of their functions. This re-inforces independence.

8 Whilst your protocol is that amongst Commissioners, it is opportune for me to point out that I do not agree with the proposition that the Chief Executive Officer can in all respects be governed by the Chief Commissioner. The Chief Executive Officer has his/her functions, responsibilities and obligations. There are statutory duties and obligations imposed upon the CEO under the provisions of the *Public Finance and Audit Act 1983*. Under that legislation the "Head of an Authority" (ie LECC) is the CEO (Schedule 3). Under the *Government Sector Employment Act 2013* the "Head of the Agency" (LECC) is the CEO, other than the provision that the Chief Commissioner is to exercise the employer functions in relation to the CEO him or herself. The CEO has all the functions of an employer in respect of employees, including (without limitation) the power to employ persons, to assign their roles and to terminate their employment. Whilst it is open (and desirable) for the Commissioners to consult and collaborate with the CEO, The Chief Commissioner and other Commissioners do not have this function and cannot usurp this function whether by agreement amongst themselves or otherwise.

9 In any event, it would not be good business management or practice to allow or agree to the Chief Executive Officer's role being diminished or disempowered by any belief that all power and decision-making rests with the Chief Commissioner or a majority decision of the Commissioners. As I understand it, and leaving aside for the moment the statutory requirements of the position, the Chief Executive Officer has responsibilities and is fully accountable for matters such as decision-making in relation to the leadership and management of operational and performance targets and service delivery. This role is required to make decisions regarding, inter alia, staffing allocation and effective management of the budget, Occupational Health & Safety considerations and the like. My view, again correct or otherwise, is that these matters should be dealt

with by the Chief Executive Officer, rather than the Commissioners . I have not seen the SES contract entered into between the CEO and the LECC, but I am given to understand that it would reflect the job functions that applies to the CEO. It goes without saying, that whatever provisions are contained within the contract, they must comply with the legislation.

- 10 Given my position as the Commissioner for Oversight, I believe it imperative to bring these matters to your attention. Good governance requires that all executive members carry out their statutory duties and obligations and that if there be any interference with the ability to so do, then it should be addressed.
- 11 For the above reasons I am not prepared to sign a document, the contents of which I am seriously concerned about.
- 12 Other matters:-

1. Issues have arisen as to where responsibility may lie in relation to various matters. The protocol does not refer to the NSW Crime Commission. It was my understanding that the Crime Commission fell within the area of Oversight. This understanding was based upon matters such as the audit team being within the oversight division, and my attending the meetings of the Crime Commission in an oversight capacity. The job Description for the Commissioner for Oversight indicates a clear accountability for the Crime Commission. Given recent discussions, I think it is critical that, if there be an issue as to who bears prime responsibility for the Crime Commission it should be cleared up as soon as possible. Based on the Job Description, current practice, and the legislation, my belief is that it is the Commissioner for Oversight. In light of Commissioner Cotter's invitation to look at the books of the Crime Commission, I propose to have my team take up the offer. If contrary to my belief, it could be shown that primary responsibility lies elsewhere, then that Commissioner should consider how to oversight the Crime Commission. Furthermore, it will not be necessary for me to attend future meetings of the Crime Commission. There must be, from a management point of view, responsibility clearly provided to a particular Commissioner for the oversight of the Crime Commission. Accountability is important.
2. If in fact there is agreement that the Commissioner for Oversight has responsibility for the Crime Commission, then it is appropriate that as and when required he be able to communicate with the head of the agency. Similarly, I am happy to accept as a convention that In important and appropriate matters communications should be between the heads of organisations, insofar as the NSW Police Commissioner is concerned, I am not prepared to accept this as a blanket rule.

3. Issues relating to witness protection need to be clarified. Which division has primary responsibility, and which team of which Commissioner bears responsibility should be clarified. Up till now it was assumed that Oversight (Aaron and Louise) were the appropriate officers to deal the matters and comply with the LECC guidelines. It is not merely a case as to which Commissioner should take responsibility, but which staff from which division or team should take responsibility. It is my suggestion that, whether it be Integrity or Oversight or any other team, the Commissioner responsible for the team should deal with the matter. Given the time limits imposed by the legislation, I doubt that it is practicable to have all three Commissioners deal with the matter.
4. Perhaps when drafting and/or reviewing Commission Guidelines and protocols in future, care should be taken to ensure that ownership and accountability for any matter is made clear.

Patrick Saidi

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## Memorandum to Chief Commissioner

- 1 Given the fact that LECC has now been operating for a period slightly in excess of 18 months and in light of recent events I believe it important to raise a number of issues with you in your capacity as Chief Commissioner. Some of these issues also directly impact upon the role of the Chief Executive officer, as I currently understand that role to be.
- 2 The results of the recent People Matter survey was disastrous from a Commission point of view. These results cannot be simply explained away. The only organisation that LECC's results bettered were the Health Care Complaints Commission, who have been operating in a toxic state for many years. I have known solicitors to have commenced work there and to have only lasted two weeks before leaving. For my part, I can understand possible reasons why the survey results for LECC were so poor.
- 3 The dissatisfaction with the way that LECC has been operating is not merely confined to those at the coal-face but also at the very top levels. I, for one, have my own grievances which I now wish to air. I do this more out of respect for the organisation and my colleagues because I believe that the Commission should not continue to carry out its functions the way it has in the past without closely examining how we should proceed in the future. What follows, I emphasise, should not be seen as disrespectful to yourself or others, but as a genuine desire to see improvements in the workplace that would be of benefit to all.
- 4 From my own perspective, I value the work of LECC and recognise the vital importance of the work of the Commission for the benefit of the community. I enjoy the work and the responsibility. However, in the past 12 months I have felt so frustrated, depressed and demoralised in my work that I was seriously contemplating resigning my statutory appointment. After many difficult moments of reflection on the matter, I recognised that if I were to take this option I would be letting down the Oversight Division teams for whom I have responsibility, and whatever problems exist within the Commission may never be recognised if I myself did not take steps to seek to correct them.
- 5 It was in the context of the above, that when I recently spoke with Commissioner Drake and yourself, I displayed anger when speaking with

you both. For this I do apologise for having expressed my grievances in that manner.

6 Of fundamental importance, there are too many people at the upper level, who are not prepared to challenge matters that should be challenged. In my discussion with Commissioner Drake and yourself a couple of weeks ago I was asked by Commissioner Drake why I did not come forward earlier with my grievances. That is a very fair question. The answer is, as I indicated at the time, that I wished to avoid conflict in the workplace. What I did not indicate was that I was hoping with the passage of time that the Chief Commissioner would develop trust in the other Commissioners so as to allow them to go about their business unhindered and with no micro-management, and with no supervision and oversight required. This did not occur, and because there was no opposition appeared to reinforce the belief that the Chief Commissioner was the head of the organisation entitled to make all captain's calls, and other important decisions without consultation.

7 I have expressed my views previously and wish to repeat them here. Each of the Commissioners for Integrity and Oversight are independent statutory office holders who are not subject to the direction or control of the Minister or the Chief Commissioner. They are not Deputy Commissioners. There is no provision in the legislation that allows the Chief Commissioner to unqualifiedly make whatever decision he wants, whether it relates to Section 19 matters or other provisions of the legislation. Section 19 (1) provides that the functions of the Commission are exercisable by a Commissioner, subject to the provisions of Section 19 (4). As to what precisely section 19 (4) means may well be a matter of difficult statutory interpretation. One thing is clear however, and that is Section 19 (4) cannot be interpreted to mean that the Commissioners are deprived of their statutory independence,

8 What is beyond doubt is that it is not the Chief Commissioner that is the "Head of Agency" of the Law Enforcement Conduct Commission. It is the Chief Executive Officer. This is provided for under the Government Sector Employment Act 2013 together with relevant Finance legislation. I have never questioned or had reason to question this issue before, and have accepted that the Commission has been operating in a manner according to government and statutory requirements. I now have my severe doubts that this is so. There seems to have been a management practice developed that all important decisions can be made by one or more

Commissioners, without consultation either among themselves, with the Chief Executive Officer or involved staff members. Examples of these are:-

1. restructuring of staff within teams, restructuring of teams themselves, and making determinations as to whether any staff are — required within particular areas, rather than leaving it to the CEO to consider with the appropriate Commissioner,
2. making decisions as to titles to be given to staff members carrying out particular duties (Notwithstanding the fact that such titles fell with their job descriptions when employed, and are the responsibility of the CEO)
3. Imposing requirements on staff when carrying out their duties without consultation with the CEO, or managers.
4. Going so far as making determinations, contrary to the view of the CEO (if not managers) that staff members are not required (e.g. Angela Zecanovic, in whom LECC lost a very talented and valuable member).

9 From my observations, this has led either directly or indirectly to a partial de fact redundancy of the CEO within the organisation. Why this was allowed to occur whilst Ms Williams was executing the role I am not sure, but I am concerned if any disempowerment of the CEO were to continue. I would also be concerned if any chief executive officer were not to fully accept his/her obligations and responsibilities. The full extent of the problem was recently highlighted to me when in a discussion with the Acting CEO, Ms O'Brien, she indicated to me that, in her view at least, the Chief Commissioner was the head of the organisation with the implication being that he could make all decisions whether large or small: Whilst one appreciates that as the Acting CEO, Ms O'Brien in normal circumstances would not be expected to know the ins and outs of the role as CEO, and may not necessarily be expected to be completely familiar with the provisions of the Government Sector Employment Act and Public Finance legislation it is concerning that her expressed view may be reflective of a current general belief.

10 I should also add that notwithstanding the responsibilities of a CEO, in the time that the substantive CEO has been on leave, I have been rarely, if at all been approached by the Acting CEO to obtain my views on any matter within the CEO's jurisdiction or my own jurisdiction. I have approached the CEO myself on a couple of occasions about issues, and have left those discussions with the distinct belief that the Acting CEO does not have a full appreciation of the matters raised, and why I am raising them. I should add that the appointment of the Acting CEO was another important decision made without any consultation with myself. In

my view, a dedicated and qualified CEO should have been appointed to the Acting position.

11 A controversial issue that has arisen within the LECC relates to the issue of restructuring insofar as staff are affected. There has been a failure by management to appreciate or understand the emotional or psychological impact that restructures have on staff members. They become demoralised and come to feel devalued, insecure and unappreciated when their futures are affected. This is compounded when there is a lack of consultation with them, and when they are not provided with reasons as to why any such restructuring is necessary. They also become resentful towards management. I am certain that the restructuring issue played a major role leading to the negative results of the people matters survey. If any management want to upset staff in an organisation all they have to do is mention the word "re-structure".

12 I have had discussions with Nick relating to the findings of the People Matter survey with a view to understanding how and why such results were so poor, at least so far as my teams were concerned. He pointed out the following to me:

- (i) The managers at the grade 9/10 level have not felt embraced as part of a management team. They feel that their opinions are not valued at the higher levels of the organisation.
- (ii) An example of this may be the critical incidents team. The managers of that team are specialists and subject matter experts who are at the coal-face actively dealing and coordinating with police on a regular basis. They believe that they have a greater knowledge and understanding of critical incidents, and how those incidents should be managed by LECC then someone such as myself as Commissioner, or anyone else.
- (iii) To a large extent I agree that managers who are subject matter experts may have a far greater understanding of their work than someone such as myself. In these circumstances, before any decision is made affecting their work or their team there should be consultation with them, with an opportunity given to them for their input.
- (iv) If for any reason their own views are to be over-ruled then a reasonable and clear explanation should be provided to them as to why this is the case.
- (v) People at any level of an organisation want to feel important to that organisation, and want to feel that they are making an

active and positive contribution to the organisation. I am advised that a number of members of staff in the organisation do in fact feel undermined by current processes.

- (vi) It is for the executives to show leadership, and a will to have staff embrace and follow any Commission strategy. This can never be achieved by the imposing of the executives will upon staff at any grade level within the organisation.
- (vii) If any changes within the organisation are to be accepted by staff, there must be consultation with them. Changes cannot be imposed on staff without their consultation and support.

13 For my part, I value highly the expertise and specialist skills of members of my teams. I would never make any major decision affecting them without their input.

14 When Ms Williams returns from leave, it is my expectation that she carries out the role of the CEO, without there being any doubt as to what the nature and extent of her powers are, and without any interference by any Commissioner. I would expect that as a Commissioner I would be able to consult with her relating to staffing matters, as well as other matters that fall within her jurisdiction. Should there be any doubt as to the nature and extent of her powers within the organisation, then I would be surprised if the matter could not be clarified by either guidelines, protocols or instruction sheets issued by the public service.

15 My view is that the Chief Commissioner does not own and is not the Law Enforcement Conduct Commission. The same applies to the Oversight and Integrity Commissioners, the CEO and the Solicitor for the Commission. The ownership of the Commission, if any such concept is valid, is that of all staff. Members of the executive will come and go once their period of statutory appointment expires. The staff will remain, together with any culture (whether good or bad) that has been created by the executive. If any member of the executive, whether it be the Chief Commissioner or the Chief Executive officer is of the belief that the Commission is theirs, then such a perception needs to be corrected.

16 There appears to have developed a perception within the Commission that the Commission is in fact run in circumstances where the Commissioner for Oversight has no real standing or authority. I am concerned about the possibility of such perception existing. I have had members of my team approached with ideas as to how my team should operate as well as other matters, in circumstances where I had not previously been consulted. Any



such approach should have come to me, via the Chief Executive Officer. Any perception that the Chief Commissioner or anyone else in the organisation can at will make a determination relating to my teams within the oversight division should be corrected. My teams should know that they are primarily accountable to the CEO and myself and not the Chief Commissioner. If there are any issues within my teams, it is my expectation that they be brought to my attention via the Chief Executive Officer.

17 As indicated to you orally, another area of great frustration, relates to the manner in which the teams have been set up (particularly education and prevention) and what appears to be ownership taken of those teams. It is an unsound proposition that a team such as the prevention and education team can be taken over by a Commissioner (whether Chief or otherwise) with other Commissioners being restricted in access to that team and having to seek the permission or approval of the Chief Commissioner for that team to undertake any project or even to liaise with the Manager of the team about a project. The prevention and education team is there for the benefit of the entire Commission, to assist in running projects for a Commissioner seeking to have any such project undertaken. It is my view that the appropriate placement is with the Chief Executive Officer who is in a position to determine resources and allocation, as well as priorities, taking into account the strategies of the Commission as a whole.

18 To highlight the difficulties, it is pointed out that a project proposal was submitted by the prevention and education team, approved by the Manager (Ms McDonald) on 3 August, 2017. The proposal had my full support, particularly since aspects of it related to Statements of Claim, how the NSWPF had responded to allegations of police misconduct and maladministration the subject of civil proceedings, the extent to which NSWPF misconduct and maladministration raised within the remit of the courts has escaped identification and scrutiny, and what improvements if any were required to the systems in place. Consideration was given as to the Commission possibly presenting its research findings to the NSWPF and engage with relevant parties to establish education and/or training initiatives. Consideration was also given to recommendations made being included in the Commission's annual report. This project proposal has not been actively pursued at all for approximately 18 months. Had the project proposal come under my own ownership I would have been in a position to follow it through.

- 19 On 21 June, 2018 I prepared a paper titled "Reasons for obtaining judgements, settlement amounts, legal advisings and other documentation". I pointed out that the work of the Oversight Division was being substantially delayed by the refusal on the part of OGC to co-operate. For that and other reasons, I strongly recommended a Part 6 enquiry to be agreed upon. I also pointed out that the education and prevention team were also enthusiastic about such an investigation. I offered to take ownership of the project. Notwithstanding the effort put in by myself this also came to nought. The timing was important, because had such a project been undertaken at that time, it could have shown, inter alia, just how inefficient and wanting the police system was in terms of investigating matters the subject of the Statements of Claim. This could have been used as a benchmark with what is now happening with LECC together with other very important information. From feedback received from the manager of the prevention and education team, I understand that there is still considerable interest from that team in undertaking such a project (albeit in revised form given developments in the last 12 months).
- 20 Other examples of causes of frustration I have previously brought to your attention. For example, the still continuing delay in serving a comprehensive section 32 notice (now in some respects outdated) which remains on your desk. I do not wish to issue it now, but will look at drafting a fresh one. However, it highlights the dangers of unnecessary consultation over a matter which I consider totally within my own function (subject to any need to consult with the Solicitor for the Commission).
- 21 Another example is the Borg letter and the reply to Mr Searson. My staff were very happy to draft their own letter in response. They saw a need for it given the tones of the letters being forwarded to them by Mr Searson. In They thought that they were being unnecessarily pushed around and disrespected by the NSWPF and a strong response was needed by LECC. At your request, the response was left to you. Notwithstanding attempted follow-ups by Aaron nothing was done. The staff kept asking what was happening with the matter until they themselves gave up asking out of frustration. This became a bad indicator to staff that they were not being supported by senior management (including myself), in circumstances that demanded it. I unwisely, on reflection, did not take it upon myself to forward my own response.
- 22 A matter having a detrimental impact on the morale of staff (including myself) was a perceived failure to recognise that the police were actively resisting oversight in any manner, and attempts to have them co-operate were fruitless. This was occurring in the context that meetings already

arranged between teams and members of LECC and teams and members of NSWPF were being cancelled by that organisation (on occasions without prior notice). Communications with, and cooperation from with NSWPF was drying up on a monthly basis. Correspondence being received from NSWPF could not be interpreted in any other manner than as displaying a completely resistant attitude to LECC and any powers it may wish to exercise. Those at the coal-face were having difficulty understanding why LECC was accepting this treatment. I, myself had trouble providing them with an adequate explanation.

23 Decisions affecting my own team have been made, in circumstances without my consultation, in matters of importance. One such decision related to a request made by the Commissioner of Police at a meeting, that all correspondence and communications between LECC and the NSWPF goes through the PSC liaison unit. This was agreed to at the meeting, and much to my chagrin, I was not provided an opportunity to comment or have any input before the proposal was agreed to. At the time I thought that the appropriate course of action was to indicate to the Commissioner that the matter would be given thought and LECC would get back to him. I did not challenge you at the meeting because I did not wish to show disrespect to you in front of the Commissioner. This arrangement has caused difficulty for members of the oversight division in their day-to-day communications with police. I do not need to go into details as to how and why, as the crucial point is that a major decision affecting me and my teams was made without any due thought or consideration, or importantly consultation.

24 At our recent meeting with Commissioner Drake present, I did not raise the fact that I have brought to your attention some of my concerns in the past. If my recollection be correct, you should have a written document outlining these matters previously handed to you. It is unfortunate that my concerns as exhibited then, to my mind at least, were not addressed as they should have been.

25 It may be my own degree of undue sensitivity but I have perceived a lack of respect from you to me. This is been exhibited by a belief on your part that you can come into my room, raise your voice at me, and seek to control me. I have not responded aggressively until perhaps the last couple of occasions when frankly I was quite fed up with the situation. On one occasion where such an incident occurred was with the door open, staff members within hearing, and listening to the heated exchange. On this, I

wish to make a couple of comments. Firstly, as the Commissioner for Oversight I believe that I have brought a great deal of knowledge, experience and capability to the role. This should be respected and appreciated. Secondly, I am not prepared to accept the control and direction of a Chief Commissioner which interferes with my own independence. I am only prepared to accept what the legislation provides for. Thirdly, and most importantly, I will not in future, be prepared to accept anyone coming into my room exhibiting any degree of disrespect towards me.

26 You have your style of management, as you are entitled to, and I have my style of management with my own teams. I prefer to seek to consult with my staff, obtain their views, have them provide as much input as possible to any decision-making, and encourage development in their roles. Indeed, on occasions when I may not even agree with their proposals, if they are within acceptable limits of judgment, I accept them. This empowers the staff. In the long run, this makes my job easier. It is my wish that my style of management be respected, without any interference from anyone else, whether it be the Chief Executive Officer or the Chief Commissioner.

27 Your belief appears to be that if no one comes into your room and complains directly to you then there is no problem. This is far from the truth. As the Chief Commissioner, it is highly unlikely that anyone would, of their own volition come into your room to make a complaint. Indeed, the person to whom any complaint should be made would be the human resources manager or the CEO. As far as my own position goes, in my capacity as Commissioner I discourage any staff member from coming directly to me, but redirect them to either their manager, or if not appropriate, human resources. I seek feedback from human resources, so that I'm aware if any problems develop. Whilst a suggestion only, I would strongly recommend that you actively seek feedback from the CEO, human resources or some other person in a position to give it to you. Do not wait for them to approach you, as in fact, unless encouraged, they may not approach you.

28 Whilst I do not profess to have any special qualifications in management, or special skills in dealing with people at a managerial level, I am aware that there is a syndrome in management known as "Founders syndrome". It can easily be looked up on the Internet. I believe that symptoms of such a syndrome have crept into the culture of LECC and steps should be taken to overcome this syndrome from continuing to progress.

- 29 Whether or not you are re-appointed as Chief Commissioner at the conclusion of your term, as is the case with me, the reality is that a foundation is being laid for future Commissioners to either embrace and be grateful for what was created for them by ourselves, or alternatively those future Commissioners will be looking at ways to overcome what they may perceive to have been bad management decisions, the creation of a bad culture, or other deficiencies in the current organisation. They may consider that concessions made by this administration to have been either unnecessary or inappropriate. For my part, as the Commissioner for Oversight, when the time comes, I am hoping to leave a legacy of little need for change, independence, a well-oiled and efficiently running team, an empowered staff who feel valued, with a sound culture and as little a need for supervision from above as possible.
- 30 I have been warning about the development of silos in LECC for some time. It is clear that silos exist. They exist not merely amongst divisions, but amongst teams. The recent example where Integrity put forward a proposal for the quarantining of information from other teams and the Oversight Division is a strong indicator of the extent to which a Division or interests within a division fail to consider the needs of other members of LECC before putting forward a proposal. Whilst the problem was resolved, what was not resolved was LECC's approach to the issue that silos now exist. One view is, that in order to overcome the problem, the Commissioners, together with the CEO, must as a group be firm and completely of one mind that the issue of silos be attacked. The executive as a group needs to make it clear that such a culture or attitude is not acceptable and will not be tolerated. A clear message must be sent that the Commission operates as one, with the importance of any one team not prevailing over the importance of any other team, and that it is the importance of the Commission as a whole that is paramount. I am sure that those better informed than me on how such a problem can be attacked can be consulted. Most importantly, the problem needs to be recognised.
- 31 I accept that opinions may be expressed in this memorandum that you do not necessarily agree with. I may not necessarily agree with opinions expressed by yourself as to the issues raised. Notwithstanding, I recognise that it is incumbent upon the Commissioners to work together harmoniously, resolve any differences of views, and ensure that there remains a good working relationship at all times. You are guaranteed that, for my part, I will be striving for a productive and courteous work relationship at all times.

32 By the time you come to this paragraph you may feel aggrieved. The purpose of this memorandum is not to cause you any offence, and it in no way should be seen as a personal attack upon you. It should be looked at constructively as an attempt by a person, who himself feels aggrieved, to bring a number of issues to your attention. Neither you nor any person in your position should be surrounded by people who are afraid to point out matters of concern, or who are for whatever reason accepting of a corporate structure that has room for improvement.

Patrick Saidi

25 January, 2019



## Response to requests dated 15 November and 19 November

22 November 2019

### The Background

I have already provided you with the materials which background this decision and on which I rely, and with which you are no doubt familiar. However, let me refer again to the following matters which I have listed below:

- After having performed Ms Williams' duties for some time whilst Ms Williams was on maternity leave, Ms O'Brien identified, at my request, that those duties, both statutory and corporate took her on average 8 - 10 hours per week to perform.
- Ms O'Brien's report verified what I already knew to be the case from my own observations regarding the hours of Commission work performed by Ms Williams.
- This situation existed, not because Ms Williams was lazy or attempting to avoid her responsibilities. She was not.
- Ms Williams came to us with recent experience in the setting up of the LECC workforce. She did not have a background in investigation or the management of a corporate team that might be considered appropriate for a CEO of this Commission but we had confidence in her ability to learn and we considered that over time she would develop into a competent and confident CEO. She did develop in some respects in the position but unfortunately, after creating the structure and managing the recruitment of the initial staff for LECC, there was insufficient further work for Ms Williams to do. She had a capable team of specialists which we have maintained to provide the essential corporate services but after the task of supervising them there was very little work for Ms Williams to do.
- Ms Williams' salary package (including on costs) at the time of her leaving the employ of LECC was \$380,865.00. LECC could not sustain that level of waste and, in any event, as a matter of the proper administration and management of public funds, should not do so. It was apparent to staff that she was the most highly paid public servant in the Commission with the least to do.



- You have described the financial benefit of this decision as limited. I do not agree. Given the requirements of the efficiency dividend then proposed, we would almost certainly have had to forfeit three operational positions if this decision had not been made. There was a significant benefit in retaining these important operational positions. The future cost to the Commission of the standalone CEO position in the next four years (FYE 2020 – 2023) would have been \$390,000, \$400,000, \$410,000 and \$420,000.
- In your correspondence you have referred to the benefits of a “dedicated” CEO position. If what you are referring to is a CEO with no other duties than those that arise from being the employer of staff as required by section 21 of the LECC Act, and the other statutory obligations referred to in the Crown Solicitors Office advice, I am not persuaded that the Minister would expect LECC to maintain a dedicated CEO on 10 hours work per week for \$380,000 per annum. The Minister was consulted but, although he raised some reservations regarding the possibility of future difficulties in the appointment of a CEO, he express no other doubt or dissatisfaction. I will deal with this issue later in this correspondence.

### **The Restructure**

When this decision was made LECC had been operational for sufficient time for it to identify its actual requirements in relation to the role of its CEO and the Corporate Services Division.

The issues you have outlined in your correspondence appear to address the redundancy of Ms Williams’ position without reference to the context in which it took place i.e. a total restructure of the Corporate Services Division of the LECC. This context may not have been apparent to you in the material already supplied.

Whilst consideration of the restructure was prompted by my original brief, this was not an isolated act involving only the transfer of all of the responsibilities of the CEO from the position as it existed under Ms Williams to Ms O’Brien.

Ms Williams' redundancy arose as part of a restructure of the Corporate Services Division following a detailed consideration of broader issues in that division after receipt of my proposal.

The restructure achieved a number of savings by not only assigning the responsibilities of the CEO to two existing senior members of staff but by also reducing the number of Managers in the Division. This opportunity arose because the position of Manager Risk and Security had become vacant following the resignation of its incumbent in 2018. One of the Security Officers acted in that position pending the recruitment of a replacement but it became apparent in that period that the role did not require a Manager at 9/10 level. Following consultation with the Executive group the position was abolished without having to make anyone redundant. A Senior Security Officer role at 7/8 level, advertised and filled. The management of the Security Officers was combined with the management of the Commission's Registry and a new position of Manager Registry and Security was created and filled. The responsibilities in the risk area were assigned to the Commission's IT Director, who was already diligently managing the Commission's IT risk. He was invited to become Director IT and Corporate Services, an opportunity which he accepted.

This Director had been the Director of IT under Ms Williams and is an experienced manager. His experience in the private sector, prior to his appointment to LECC by Ms Williams, was impressive. His appointment has been a success. He manages a team of employees at the top award level in finance, human resources, security media/communications and IT. He has the requisite skills to manage this team and relieves the CEO and General Counsel of the supervisory responsibility for the four Managers who report to him.

In the restructure Ms O'Brien has only assumed the statutory functions of the CEO. These functions are well within the skills of a lawyer of her standing and experience. Ms O'Brien was the Acting Commissioner of the Police Integrity Commission following the death of Commissioner Bruce James up until the creation of the LECC. She also worked as Assistant Commissioner in a relieving capacity under numerous PIC Commissioners. Ms O'Brien had managed the Legal Services Division both at the Police Integrity Commission and at LECC. Having worked at the Police Integrity Commission for many years, she is very well versed in the work of an anti-corruption agency such as LECC and the statutory requirements of this agency. Her legal experience is complemented

by eight years as a litigation lawyer in respected Sydney firms, prior to joining the Wood Royal Commission as a lawyer in the 1990s.

As well as reducing the number of Managers in the CEO Division, the restructure has had the benefit of resolving a situation where a staff member was widely known to be hugely over remunerated for her hours worked which led to staff resentment. The duties of the CEO are performed by two officers who, as it turns out, bring greater skills to the role than Ms Williams did, and are serving all the relevant Commission's needs at a higher level of competence.

Whilst Commissioner Saidi's complaint has focused solely on the redundancy of Ms Williams you can see by the issues I have outlined above that the restructure of the Corporate Services Division of LECC was a much wider undertaking, of which the redundancy of Ms Williams was only a part. Importantly, the changes have not only resulted in savings but have led to efficiencies and a more equitable distribution of responsibilities. I do not agree with you that "*the right CEO*" who you identify in your letter of 19 November 2019 would have brought "*real value*" to the Commission. You suggest that such a CEO might have moderated the conflict between the Chief Commissioner and the Commissioner for Oversight. This is a suggestion with which I strongly disagree for reasons identified later in this correspondence.

### **The issues identified in your correspondence**

1. I feel quite strongly about the enquiry raised by you in this paragraph. I hope I do not seem strident, but I do not believe that it can (let alone should) be assumed that a woman on maternity leave is necessarily in a vulnerable position. Such an assumption seems to me to be patronising. Certainly, a woman who is on maternity leave and still pregnant might be vulnerable. Immediately following the birth of a child, a woman might be vulnerable. A woman who is unwell following the birth of her child might be vulnerable. There are any number of circumstances, particular to the circumstances of an individual woman, which might raise the question of vulnerability.

Ms Williams had delivered a healthy child. So far as I am aware she was well. That was certainly the appearance given when she attended the

Commission with her baby on more than one occasion. She was extending her maternity leave by taking her leave at half pay per week. This was with the consent of the Commissioners.

Ms Williams had ample opportunity to indicate if she wished to defer any discussion. It was made clear to her that any consideration of this issue could be delayed until her return. She was not pressured at any time.

For my part, I considered it appropriate to raise this issue with her at an early stage because there was a considerable financial advantage available to her by early resolution.

As you are no doubt aware, if a state government employee accepts a redundancy package he/she is excluded from future employment in the state public service for the equivalent of the number of weeks represented by that package.

Ms Williams is a healthy, intelligent, articulate, adult who is also an experienced ex-employee of the Justice Department and an IR/HR specialist. She would have been well aware of this financial advantage and I wished her to have the opportunity to access that advantage at the earliest possible opportunity. I would have notified her of the matter under consideration earlier than it actually occurred if it had been solely up to me. Furthermore, it seemed no more than fair that she should be made aware of what was being considered in relation to her employment as soon as the issue had crystallised. To have raised it with her on her return would have smacked of ambush.

These are the reasons why I thought it was appropriate to contact her whilst on maternity leave and give her the opportunity to consider her options.

By the time the payment was made, Ms Williams was expressing understandable frustration.

The Commission was conscious of the distress which the delay in resolution was causing to Ms Williams and she was kept informed of the

steps the Commission was taking to try and finalise the matter. Ms Williams was paid her full salary by way of special leave, once her maternity leave had come to an end and she was awaiting the finalisation of the process.

2. I do not believe that the decision to restructure the Corporate Services Division of this organisation was short-sighted or detrimental to the efficient operation of LECC.

On the contrary, my experience regarding the outcome of our decision for the efficient operation of LECC has been entirely positive. I refer you to the matters outlined earlier in this correspondence.

Whilst I understand that your observations of the operation of ICAC may have persuaded you that a properly qualified stand alone CEO is a significant asset to an organisation such as LECC, the position of LECC is not comparable to that of ICAC. We are a small organisation with three full-time Commissioners and highly competent and expert Directors and Managers responsible for the separate divisions into which our operations are divided. These operations comprise assessing, supervising, investigating and reporting on a wide range of police and New South Wales Crime Commission functions. Supervision and management must necessarily be a hands-on responsibility, to which a separate level of inexpert management constituted by CEO could only be an impediment. Management issues of a more general kind, not involving the actual work of individual officers or the Division, might be usefully addressed to a CEO but these are well catered for in our present arrangements.

In brief, the present structure has proved entirely suitable for our functioning as is, in effect, borne out by the level and quality of our work, despite the difficulties posed by the attitude of the Commissioner for Oversight.

Our Director of Corporate Services and IT, under the supervision of the CEO and General Counsel, has embraced his new responsibilities admirably. In addition we are more than satisfied that Ms O'Brien

continues to perform well and is more than equipped to undertake the responsibilities of the CEO as set out in the legislation.

Although the Commission is a statutory corporation, it does not function like a traditional corporation in the sense that the term is commonly understood. The three Commissioners do not sit like a Board of Directors and leave the day to day running of the company to the CEO.

The reality is that the three Commissioners are hands on in the daily decision making about the exercise of the Commission's functions.

The CEO is responsible for the provision of corporate services to the Commission to support its functions but does not contribute to decisions about which matters to oversight, which matters to investigate, whether to conduct examinations, whether to report to Parliament etc.

Whilst the Government may have contemplated a more "hands off" role for the three Commissioners and a more central role for the CEO, this is not reflected as a requirement at all, certainly not a mandatory requirement, anywhere in the applicable legislation and it has not been borne out in practice. If there was an expectation that three senior legal practitioners, one of whom must be a current or former superior court Judge, would sit by and allow a less-qualified public servant to make decisions about how the important strategic issues confronting the Commission should be determined, this option failed to have any regard to how the three Commissioners would be likely to approach their roles.

Indeed, it immediately became apparent to the three Commissioners that we had more than enough experience between us to discuss and decide (not always unanimously) the manner in which the Commission should exercise its functions.

I am also aware that the recent appointment of a CEO at ICAC was not exactly a straightforward process. I note that ICAC operated for many years without the need for a CEO and the PIC never had a CEO in the 20 years of its existence. All organisations have to find their natural administrative solution. We have.

You speak of the likely lack of skills present in a Chief Commissioner appointed under this Act. This Chief Commissioner has had previous experience in managing, as Chairperson, the New South Wales Law Reform Commission and sat as a director for a number of years on the board of the College of Law. However, even if this had not been the case, or if you are of the opinion that his experience does not answer, the present arrangement provides for a number of specialised Managers reporting to a highly skilled Director working under an experienced lawyer who has had long experience dealing with government and integrity organisations and is more than capable of discharging the statutory requirements of the CEO role supported by those specialists underneath her performing the necessary work.

This arrangement is highly efficient and very satisfactory to all concerned. Despite the concerns expressed by you, and which you consider are implicitly supported by the Minister, I am certain that the current structure will be able to be continued at the present level of excellence into the future when and if the incumbents resign or retire.

At all events, these are issues that can be best considered in the context of the actual business of the Commission and the way in which its various functions are worked through its staff. I understand that others may have a different view. However, the opinions of those who have the responsibility of making these difficult decisions in the face of challenging circumstances should be given some respect and not set aside on the basis of necessarily less well-informed assumptions about alternative structures.

3. You have suggested that the "right" CEO could have moderated the conflict between the Chief Commissioner and Commissioner Saidi which has led to this complaint. For a number of reasons I consider that that would have been inappropriate as a general proposition for any CEO and, in the present circumstances, impossible.
  - Ms Williams as CEO was in a subordinate position to all three Commissioners. Conciliating between Commissioners would have

been a very difficult and awkward task for any CEO and it was not a situation in which I would have placed Ms Williams or any other CEO.

- Ms Williams reported directly to the Chief Commissioner. He had the power to end her employment at any time. She could never be considered to be in a neutral position to conciliate on issues between Commissioner Saidi and the Chief Commissioner. In any situation where she expressed a view supportive of the Chief Commissioner's position she could have been perceived as affected by pressure from him. In my opinion, in the present circumstances, such an allegation would be highly likely to be made.
- The matters in dispute, at least initially, between Commissioner Saidi and the Chief Commissioner involved questions of law. Your recent experience in dealing with them demonstrates their complexity. Ms Williams was without any legal qualifications or experience. She could not have dealt with this issue in any sensible fashion.
- You may be aware that I was, for 14 years of my career, a solicitor engaged in acting for a trade union and negotiating the resolution of disputes. Subsequent to that I was for 23 years a Presidential Member of the Fair Work Commission. Resolving conflict in the workplace was my core work. I have also been appointed in a part-time capacity to resolve disputes by other organisations.

In my present role I have endeavoured to resolve Commissioner Saidi's unhappiness since he first expressed it. I have put proposals to him. I have suggested that he withdraw opposition to issues that did not in fact alter his day-to-day work. I have spoken to him at length. I have remonstrated with him about his conduct in meetings. I have had to withdraw from meetings because of his rudeness. He raises his voice, he appears to shake with anger, he has put his hand up to stop me speaking, he interrupts and having invited me to meetings to discuss issues that he sees as



controversial, he frequently objects to my having an input. I have been unable to resolve these issues. As a result of my support for the Protocol, and because I have made decisions which supported the Chief Commissioner, I have now become the subject of complaint. I will not meet with Commissioner Saidi any longer without the presence of a notetaker.

I do not wish to appear conceited, but I sincerely put to you, that if I could not resolve Commissioner Saidi's issues, no one can. The Chief Commissioner has made decisions regarding the work of the Commission with which Commissioner Saidi disagrees. Unless the Chief Commissioner reverses those decisions, including the application of the Protocol, Commissioner Saidi will continue to be dissatisfied and unhappy. If you intend to deal with this issue in your report I ask that you include the gist of my response.

4. Parliament intended that there should be a CEO in the management structure of LECC. The extracts below are the only reference to the CEO role in the relevant legislation.

The CEO, pursuant to section 21 of the LECC Act is the employer of staff.

## **21 Staff of the Commission**

(1)...

**Note :** Section 59 of the *Government Sector Employment Act 2013* provides that the persons so employed (or whose services the Commission makes use of) may be referred to as officers or employees, or members of staff, of the Commission. Section 47A of the *Constitution Act 1902* precludes the Commission from employing staff. The employer functions of the Government are to be exercised by a Chief Executive Officer (other than the functions of employing and terminating the employment of the Chief Executive Officer).

Schedule 1, Part 3 - Separate agencies to the *Government Sector Employment Act 2013* is set out below.

| <b>Agency</b>                                    | <b>Head of agency</b>  |
|--|--|
| ...  |  |
| Office of the Law Enforcement Conduct Commission | Chief Executive Officer of the Commission. The Chief Commissioner of the Commission is to exercise the employer functions of the Government in relation to the Chief Executive Officer and is to exercise the function of appointing or terminating the employment of the Chief Executive Officer in consultation with the Minister administering Part 3 of the <i>Law Enforcement Conduct Commission Act 2016</i> . |

There is no reference either in the GSE Act or the LECC Act to any requirement for a dedicated CEO, a CEO with no other responsibilities whatsoever, which is what I understand you suggest might be preferable to the arrangement put in place by LECC.

In 2017 LECC was a new Commission operating with a new untested structure. I suggest that it is necessary for any organisation to function for a period of time before it can decide whether the structure it commenced with is suitable for the ongoing functions it has to perform.

The role performed by the CEO in the current structure at LECC is significant. In addition to performing the statutory functions she provides advice to the Commissioners on a daily basis and performs many other ad hoc functions which would have been beyond Ms Williams' abilities. For example, representing the Commission on steering committees for the reform of legislation relevant to the LECC's work and drafting submissions for Parliamentary inquiries.

I do not understand why you suggest in paragraph 4 of your correspondence dated 15 November 2019 that we have dispensed (in effect) with the position. With respect, this is patently not the case. The CEO functions still exist and are still being performed. They do however overlap significantly with the work of a General Counsel.

You have suggested that the combination of the role of CEO and Solicitor of the Commission compromises the Commission Solicitor's ability to provide independent, objective, unbiased and candid legal advice in a corporate context to the board. In this case I presume you mean the Commissioners.

As previously stated, the only duties of the CEO directly assigned to and performed by Ms O'Brien are the statutory functions of the Commission. All other corporate service functions are performed by a highly experienced and talented team overseen by the Director of Corporate Services and IT who is, in turn, supervised by the CEO.

The CEO is fully informed as to the performance of all of the corporate functions through the new Director. This improves her ability to provide independent, objective, unbiased and candid legal advice to the Commissioners rather than, as suggested by you, such an arrangement being a detriment.

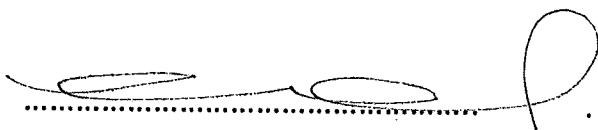
I do not share your doubt that one person can have the requisite, combination of skills. I am satisfied that between Ms O'Brien and the team under her, all of the necessary skills are available to the Executive and the Commissioners at the highest level.

I hope that the context and information I have provided to you has resolved your doubts in this regard.

You have said that you cannot help feeling that the right CEO could have prevented such decisions as the one made by the Chief Commissioner to approve the reimbursement of the \$8074.66. That decision was made by the Chief Commissioner when Ms Williams was the CEO. It was made on the basis of his view of the legal position, as to which Ms Williams had

no expertise. As I understand it he took the decision out of her hands to save her any future embarrassment.

You will have to address that issue with the Chief Commissioner.

A handwritten signature in black ink, appearing to read 'Lea Drake', written over a horizontal dotted line.

The Hon Lea Drake  
Commissioner for Integrity

Copy to: The Hon M F Adams QC  
Chief Commissioner