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BY EMAIL ONLY

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**Re: Supplementary questions for witnesses- 22 May 2024- Inspector of the Law  
Enforcement Conduct Commission**

Dear Chair

Please see below my answers to the supplementary questions received by my Office on 22 May 2024.

- 1. Do you think the current staffing levels of your office are adequate to meet the demands of that office? Do you foresee any potential changes to the structure, including that of the SMU?**

The staff level of the joint office (of the Inspector of the Law Enforcement Conduct Commission (LECC) and of the Inspector of the Independent Commission Against Corruption (ICAC)) is now a Business Coordinator (clerk grade 5/6) and a Principal Legal Advisor (clerk grade 11/12).

The Inspector of the ICAC and I are in discussions regarding the restructure of the joint office so that the staffing adequately caters for the volume of incoming work and the type of skills needed to undertake that work. For example, we are exploring the value of adding an additional staff member to our team to assist in upcoming project work.

In addition, as Inspector of the LECC, I am responsible for the Secure Monitoring Unit (SMU) which has a staff of three. I do not envisage an increase in or change to the staff of the SMU, given it recently increased from two full-time employees to three full-time employees, which is presently adequate to do the necessary work.

- a. You noted the potential for merging the SMU with the Surveillance Devices Commissioner's office. Could you elaborate on the specifics, efficiencies, and resource savings that you believe that this amalgamation could yield? (Transcript p35)

The Surveillance Devices Commissioner and the SMU Team are presently working on a submission to the Attorney-General, the responsible Minister, dealing with this proposal and it is premature to deal with specifics at this stage. If the Committee wishes, I will respond to the question after the submission has been made to the Attorney-General and, if desired, supply a copy of that submission.

For the Committee to understand the present position I provide the following outline. Briefly, the Surveillance Devices Commissioner acts under delegation from the Attorney-General and exercises the powers granted to the Attorney-General by the *Surveillance Devices Act 2007* (NSW) (**Surveillance Devices Act**), including the right to be notified of an application for a surveillance devices warrant and the right to be heard by the issuing Judge (see, for example, *Surveillance Devices Act* s 21 (1)(e) & (f)).

In practice, that means that the Surveillance Devices Commissioner reviews the material prepared by the NSW Police Force (**NSWPF**) (or other relevant law enforcement agency) and indicates that he has no objection to the grant of a warrant or that he does so or suggests conditions be imposed, for example, in relation to material the subject of legal professional privilege.

My powers as Inspector are created by s 48 of the *Surveillance Devices Act* which requires me to inspect the records of each NSW law enforcement agency to determine compliance with the Act by the agency and its officers. Section 49 of the *Surveillance Devices Act* requires me to report to the Attorney-General at six monthly intervals on the results of s 48 inspections.

It will be seen that the Surveillance Devices Commissioner deals with compliance before issuance of the warrant and the Inspector deals with compliance after the warrant has been executed. It seems logical that the same agency should deal with both pre-issue and post issue compliance. In addition, the Inspector is required by various items of New South Wales legislation to fill a similar function in relation to telephone interception warrants issued under the Commonwealth legislation, controlled operations warrants, covert search warrants and assumed identity warrants. It may be appropriate that one agency deals with all such warrants, both before and after issuance.

2. Can you provide more detail on the changes made around the language used in reports following the investigation into the ABC complaint?

The complaint made by the ABC, has not in itself, resulted in changes to the language used by LECC in its complaint-handling process. As I mentioned at the hearing, I have regular meetings with the Commissioners to discuss various issues affecting the LECC's operations. At our the most recent meeting, I raised my concerns regarding certain aspects of the LECC's complaints-handling process, including language that could be improved in its communications to complainants.

It is difficult to provide "detail" — I have tried myself to write as clearly and as simply as possible, in plain English, in any communication with people who make complaints to my office. Many complainants face significant issues such as poor mental health, low level of educational attainment, fear of dealing with authority, discrimination issues etc. It is critically important that they believe they

have been listened to, their complaint to me about the LECC has been understood and that they have been fairly treated, even though I may have dismissed their complaint. Clarity in communication is critical to achieving those aims.

I believe the Commissioners approach the matter in the same way and there has been a marked improvement in the clarity of their communications with complainants to the LECC. As an example, a phrase used before the current Commissioners took over was "*The Commission is not unsatisfied*" with police handling of the matter which appeared to me to obscure the intended meaning. It is never used now.

**a. Do you think this has impacted the complaints-handling process at the Law Enforcement Conduct Commission (LECC)?**

I believe it has improved complaint handling at the LECC and assisted complainants in understanding the outcome. The Commissioners have been receptive to my feedback and agreed that there are some challenges in the assessment space. They indicated to me that the Commission is working on improving its processes and have recently implemented changes, which include reviewing and updating correspondence templates used by the Commission officers to enhance accessibility for complainants.

**b. How has this impacted the accessibility of information for individuals for diverse backgrounds?**

I continue to monitor the impact of the recent improvements made by the LECC to the complaints-handling processes. As indicated above, the clarity and effectiveness of the LECC communications has improved.

**3. Can you explain the challenges that the Secure Monitoring Unit (SMU) faces in meeting the differing requirements of the Acts it operates under? How does SMU report instances of non-compliance?**

The SMU and its challenges

Over the past two years, the SMU has commenced, and refined its, use of Microsoft Excel (**Excel**) worksheets to assist with monitoring compliance of law enforcement agencies with the Acts that come under the purview of the Office of the Inspector of the LECC. SMU's Excel worksheets are employed during inspections to manually record whether specific relevant sections of each Act have been met. Breaches of the Acts, administrative errors, and matters requiring clarification or further explanation, are recorded in the Excel worksheets, and are addressed with the law enforcement agencies after each inspection as outlined below.

A challenge for the SMU in meeting its various legislative requirements is the significant volume of telecommunication interception warrants and surveillance device warrants used by the NSWPF. The last two years has seen staff changes and staff shortages at the SMU, consequently the SMU has focused its attention on inspections at central repositories of warrant/authorisation documents, registers and associated covert material. A new compliance officer was engaged in February 2024 is now assisting with the large volume of compliance work involved.

During planned future local/regional NSWPF command inspections, members of the SMU will engage with individual investigators to audit; the levels of staff training, mandatory record

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keeping, secure storage of covert information, retention, and the destruction of covert information. The resumption of local/regional NSWPF command inspections is anticipated to commence at the end of 2024.

The SMU is engaging with other similar Australian regulators to discuss methodologies used by those agencies. The purpose of this engagement is to explore more productive ways of working in our unique environment and develop “industry” best practices. Continued engagement with our counterparts should also assist in maintaining compliance consistency across the country as Australian regulators monitor the same legislation or similar state legislation.

Another challenge faced by SMU are that many law enforcement agencies still have not carried out prompt destruction of their historical covert product. These products are no longer required for a permitted purpose. In the past, all agencies have had problems attending to the mandatory destruction of their covert material. High staff turnover, low numbers of compliance staff and competing demands for Inspectors have hindered the destruction process. Last year the SMU engaged with its stakeholders, the NSW law enforcement agencies, to remind them of their obligations in this area. Note, the SMU has been notified that the challenge to make progress on the destruction of covert product is not unique to NSW law enforcement agencies.

### The SMU and dealing with non-compliance

Regarding how SMU reports instances of non-compliance, the SMU initially encourages agencies to self-disclose any breaches. This approach empowers the NSW law enforcement agencies and particularly the staff involved to take responsibility for their actions and implement pre-emptive corrective measures to mitigate any potential consequences.

In circumstances where compliance breaches are not self-disclosed but are subsequently identified, during an inspection, the SMU will notify that agency’s compliance officer, via email, of the identified breach. At the time of notification, the SMU typically seeks, from the agency, a short explanation detailing the reason for the breach as well as the steps taken, or to be taken, by the agency to rectify the breach and prevent it in the future. Where appropriate, the SMU will remind an agency of the requirement for their investigators to disclose the breach to prosecutors who might consider using the affected covert material in current or future criminal proceedings.

At the conclusion of each inspection, a formal feedback letter is sent to the head of the inspected agency. Reference to any breach or breaches will always be included in the formal feedback letter. If appropriate, the feedback letter will alert the agency head to the fact that an identified breach or breaches will be referred to in a future statutory report.

The feedback letter might include a request that further information be provided by the agency if there are questions or concerns regarding the information provided by the agency’s compliance officer. Depending on the security classification of the technology, or the sensitivity of the investigation, an explanation could be requested by way of a verbal briefing or by a formal written response.

Once the SMU is satisfied with an agency’s provided information or the steps it will take, the SMU will follow up to determine if the proposed steps have been implemented during future inspections.

In the rare circumstance that the SMU remains dissatisfied with the additional information and actions taken by an agency in breach, the Inspector may refer the breach to an appropriate body or individual for further investigation and/or action.

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4. Have any areas of non-compliance or concerns been identified by the SMU in recent reports? If so, how are these categorised, addressed to ensure compliance with the law?

Specific instances of breaches of compliance have been identified by the SMU in recent reports as follows:

Surveillance Devices Act 2007 – April 2024

Seven s 44 reports were submitted by the NSWPF outside the designated timeframes, none substantially so. A substantially late report is categorised as one submitted over 3 months late.

Eight s 44 reports of the NSWPF lacked some information mandated for inclusion by s 44 NSWPF staff rectified the deficient reports and submitted amended versions thereof to the Attorney-General and relevant eligible Judges.

As indicated in the statutory SD report dated April 2024, over forthcoming reporting periods, the SMU will work with the NSWPF to encourage the provision of all s 44 reports in a timely manner with all the information mandated for inclusion.

It was also reported that the LECC had self-disclosed that due to a device malfunction, the LECC had obtained data using a surveillance device which fell outside the boundaries of two relevant warrants. The malfunction was identified within 12 hours. The extra data collected was quickly quarantined with general access subsequently restricted. The device has since been repaired. At the time of inspection, consideration was being given to the process of the destruction of the data. The SMU has recently sought an update as to the destruction of the extra material obtained.

Law Enforcement (Controlled Operations) Act 1997 – December 2023

Three s 15 reports were submitted to the delegated authorising officer outside the designated timeframes, none would be categorised as substantially late. The NSWPF is taking steps to ensure these reports are submitted by the due dates.

There was a report of one instance of delay in notification of the SMU as to the granting of a controlled operation, it was nine days late. The NSWPF has recently commenced providing the SMU with these reports through an encrypted document sharing system which should assist in avoiding a similar delay.

Law Enforcement (Powers and Responsibilities) Act 2002 – Criminal Organisation Search Warrants – October 2023

No breaches of compliance were identified.

Law Enforcement (Powers and Responsibilities) Act 2002 – Covert Search Warrants – September 2023

An application for a search warrant was sought and obtained from a local court registrar who is not eligible to issue such warrants. Only a judge of the Supreme Court who has been declared eligible by the Attorney General can issue covert search warrants. This resulted in an invalid warrant being

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executed at the request of the NSWPF. In addition, the required report to the registrar was not completed within the required 10 days after the invalid warrant expired.

The NSWPF provided the SMU with a report into the breach, explaining that it occurred due to an outdated link on the NSWPF Intranet. This outdated link has since been removed and the NSWPF intranet page now emphasises that all applications for covert search warrants must be completed through the Covert Applications Unit (CAU) of the NSWPF who assists to ensure compliance with the terms of the Act.

Telecommunications (Interception and Access) (New South Wales) Act 1987 – September 2023

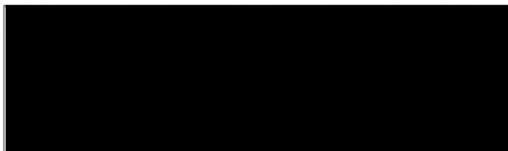
This statutory report is not tabled in the NSW Parliament. Pursuant to s. 11 of the Act, it is provided to the Minister who provides a report to the Commonwealth Minister.

**5. How do you use the information you receive through the minutes of the Misconduct Themes Committee of the LECC?**

**a. Does this inform you of any systemic issues, emerging trends or themes different to those informed by formal correspondence?**

I use the information I receive from the minutes of the Misconduct Themes Committee to keep myself abreast of issues that concern the Commission and the themes are being monitored. As the minutes are recommendations made by the Committee to the CAP Group about potential systemic issues regarding the NSW Police Force, these issues would be different to systemic issues relating to the LECC's operations. The complaints which I receive are related to the LECC agency maladministration or agency misconduct or officer misconduct.

Yours sincerely,



**Bruce McClintock SC**

Inspector, Law Enforcement Conduct Commission

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