



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Scope of discretion in determining overseas travel requests

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Prepared for: PES251 Office for Police

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1. Summary of advice

- 1.1 You seek my advice in relation to the scope of the Minister for Police's ("Minister") discretion in declining an overseas travel request from the Law Enforcement Conduct Commission ("Commission") without infringing s. 22 of the *Law Enforcement Conduct Commission Act 2016* ("LECC Act") which provides that the Commission and the Commissioners "are not subject to the control or direction of the Minister in the exercise of their functions".
- 1.2 The Minister's authority to determine whether or not to approve a particular expenditure from the amount appropriated from the Consolidated Fund for the purpose of the Commission under the *Constitution Act 1902* ("Constitution Act") and the *Public Finance and Audit Act 1983* ("PFA Act") is not affected by s. 22 of the *LECC Act*. These have different spheres of operation.
- 1.3 It is not unusual for otherwise independent bodies to be subject to restrictions with respect to the use of public moneys. The relevant safeguard is that the Minister is ultimately responsible to Parliament for the expenditure of the amount appropriated from the Consolidated Fund for the purpose of the Commission.
- 1.4 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct that the Office for Police has received an urgent request for legal advice from the Minister's Office about the Minister's scope of discretion in declining an overseas travel request from the Commission without infringing the Commission's independence.
- 2.2 On 27 April 2017 the Minister made various delegations under s. 12A of the *PFA Act* to different officers of the Commission to commit or incur expenditure ("Financial Delegations"), but not in respect of "Overseas Travel and Accommodation" (see item 6.2, Pt. B).
- 2.3 On 10 August 2017, the Commission sought approval from the Minister for its Director of Covert Services to attend the 2017 International Surveillance Group ("ISG") Conference in Washington DC at a projected cost of \$5,800 including airfares, accommodation and conference attendance.
- 2.4 On 15 August 2017, the Minister declined the Commission's request consistently with the Financial Delegations under s. 12A of the *PFA Act* and the NSW Government Travel and Transport Policy. This Policy refers to the Premier's request that Ministers "exercise

the strictest economy" in approving overseas travel. In his reasons, the Minister stated: "Establishment of LECC being in its infancy travel not supported at this time, Operating Priorities should be the focus at this time".

- 2.5 The Commission has requested the Minister to reconsider his decision referring, among other things, to the Chief Commissioner's "view of the Commission being independent with him being able to make decisions with regard to agency priorities".

3. Advice sought

- 3.1 By email and letter dated 6 September 2017, on behalf of the Minister's Office, you seek my urgent advice about the scope of the Minister's discretion in this matter.

4. Advice

Appropriations and Div. 2 of the PFA Act

- 4.1 Money may only be drawn from the Consolidated Fund under the authority of an Act (s. 45, *Constitution Act*; s. 21(a), *PFA Act*). The current authority for money to be drawn from the Consolidated Fund to fund the expenses and capital expenditure of the Commission is contained in s. 22 of the *Appropriation Act 2017* ("*Appropriation Act*"). This "appropriates the sum of \$21,195,000 to the Minister for Police out of the Consolidated Fund for the services of the [Commission] for the year 2017-18".
- 4.2 Division 2 of the *PFA Act* concerns accounting arrangements. Section 12A(1) addresses, among other things, the persons to whom "[a] Minister to whom a sum of money is appropriated out of the Consolidated Fund for a use or purpose" may delegate, or authorise another Minister to delegate, "the committing or incurring of expenditure from the sum so appropriated". A permissible delegate includes "an officer of any authority".
- 4.3 Section 12A is pertinent as expenditure may be "committed or incurred by an officer of an authority only within the limits of a delegation in writing conferred on the officer by a person entitled to make the delegation" (s. 12(1)). By reason of s. 12A(1) of the *PFA Act* and s. 22 of the *Appropriation Act*, the person entitled to make a delegation, with respect to committing or incurring expenditure from the sum appropriated for the services of the Commission, is the Minister. (There is nothing in the *LECC Act* to indicate the contrary.)

Division 2 of the PFA Act and the Commission

- 4.4 Sections 12, 12A and 13 are relevant to the Commission insofar as there is an applicable "authority" for the purposes of the *PFA Act*. An "authority" includes "a Public Service agency under" the *Government Sector Employment Act 2013* ("*GSE Act*") (s. 4(1)). The Commission is a statutory corporation constituted by the *LECC Act* (s. 17). It consists of a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight, who are appointed by the Governor with the Chief Commissioner's

concurrence in the case of the latter two (s. 18(1), (2), *LECC Act*). These are each referred to as a "Commissioner" (s. 4(1)).

- 4.5 The Commission does not itself meet any of the limbs of the definition of "authority" in s. 4(1); however, the "Office of the Law Enforcement Conduct Commission" ("Office of the Commission") is a Public Service agency under the *GSE Act* (s. 3(1), Sch. 1, *GSE Act*). The Office of the Commission is a separate Public Service agency established under the *GSE Act* in which persons may be employed to enable the Commission and the Commissioners to exercise their functions (s. 21(1), *LECC Act*; s. 22(1)(c), *GSE Act*).

Section 22 of the LECC Act and the Minister's discretion to decline an overseas travel request

- 4.6 It is clear from the text of the Financial Delegations, properly construed, that these do not encompass "Overseas Travel and Accommodation". While this is listed as item 6.2 in Pt. B, an em dash (-) appears underneath each nominated officer of the Office of the Commission and reference is made to "Note A" which relevantly provides "Overseas travel: The Minister must approv[e] all overseas travel and accommodation".
- 4.7 The Minister's authority (and discretion) to determine whether or not to approve a particular expenditure from the amount appropriated from the Consolidated Fund for the purpose of the Commission is derived from a s. 45 of the *Constitution Act*, s. 21(a) of the *PFA Act* and s. 22 of the *Appropriation Act*. In my view, this authority is not affected by s. 22 of the *LECC Act* which provides that the Commission and Commissioners "are not subject to the control or direction of the Minister in the exercise of their functions".
- 4.8 Importantly, these provisions have different spheres of operation. In NSW, the *Constitution Act*, annual Appropriation Acts, other Acts appropriating moneys from the Consolidated Fund for specified purposes and the *PFA Act* provide the statutory framework for appropriations and the expenditure of public money. The *LECC Act* contemplates the exercise of various functions by the Commission and the Commissioners, and these will obviously involve the expenditure of public moneys. However, the *LECC Act* is silent on the appropriation of funds from the Consolidated Fund and the expenditure of such funds with two exceptions. Witnesses appearing at an examination or summoned by or appearing before the Inspector of the Commissioner are entitled "to be paid, out of money provided by Parliament, in respect of the expenses of the witness's attendance..." (ss. 76, 126(3)). These provisions acknowledge that an appropriation of the Consolidated Fund for the purposes of the Commission occurs outside the scope of the *PFA Act*. Section 22 of the *LECC Act* must be construed in light of this.
- 4.9 Section 22 is concerned to ensure that the Commission and Commissioners are free from Ministerial direction and control "in the exercise of their functions". The Commission has "the functions conferred or imposed on it by or under" the *LECC Act* or

any other Act (s. 25(1)). These functions are generally "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" (s. 19(1)). However, it is not a function of the Commission under the *LECC Act* or any other Act, or the Commissioners, to deal directly with money appropriated to the Minister out of the Consolidated Fund for the use or purpose for which it was appropriated. That is a function conferred on the Minister under the legislation referred to above.

- 4.10 A Commissioner may, of course, be a recipient of a delegation from the Minister under s. 12A(1) of the *PFA Act*. (An "officer of an authority", in relation to a Public Service agency under the *GSE Act*, includes "a statutory officer who is not a Public Service employee under the [*GSE Act*] but who is the head of, or exercises functions in relation to, a Public Service agency under that Act" (cl. 14(1)(c), *Public Finance and Audit Regulation 2015*)). That has no relevance in the present case as no delegation has been made under s. 12A(1) with respect to overseas travel and accommodation. In any event, I do not consider this to be a "function" of a Commissioner within the meaning of the *LECC Act*. It is a function which is devolved on a Commissioner, in his or her capacity as an officer of an authority, under the *PFA Act*.
- 4.11 It is not unusual for otherwise independent bodies to be subject to restrictions with respect to the use of public moneys. The relevant safeguard is that the Minister must be responsible to Parliament for the expenditure of the amount appropriated from the Consolidated Fund for the purpose of the Commission. The requirement that "[o]nly Parliament can authorise the appropriation of money from the Consolidated Revenue Fund", forms one of the "three fundamental constitutional principles' supporting parliamentary control of finance" which "are central to the system of responsible ministerial government" (*Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 38, also 75-76).
- 4.12 Accordingly, should the Minister seek to decline to exercise his authority to approve expenditure of the amount appropriated from the Consolidated Fund in bad faith or for an improper purpose, such as seeking to undermine the operation of the Commission by depriving it of the minimum funds necessary to function, then this is something for which the Minister would be responsible to Parliament.

Signed:

Lea Armstrong
Crown Solicitor