



NEW SOUTH WALES

SOLICITOR GENERAL

SG 2017/37

**QUESTION OF VALIDITY OF DECISION BY MINISTER FOR POLICE  
CONCERNING OVERSEAS TRAVEL BY OFFICER OF LAW ENFORCEMENT  
CONDUCT COMMISSION**

I have been asked by the Crown Solicitor, who acts for the Secretary of the Department of Justice and the Office of Police, to advise as to the validity of a decision by the Minister for Police (“the Minister”) declining to approve expenditure for overseas travel by an officer of the Law Enforcement Conduct Commission (“LECC”).

**Background**

On 10 August 2017 LECC sought approval from the Minister for its Director of Covert Services to attend a conference in Washington DC. Under a financial delegation, made in accordance with s 12A of the Public Finance and Audit Act 1983 (“the PFA Act”), relating to LECC and signed by the Minister on 27 April 2017, all overseas travel and accommodation was required to be approved by the Minister.

On 15 August 2017, consistently with the NSW Travel and Transport Policy, the Minister declined to approve the travel in question. The Minister noted on the request for approval from LECC:

Not approved. Establishment of LECC being in its infancy travel not supported at this time, Operating Priorities should be the focus at this time.

LECC requested the Minister to reconsider his decision but this request was refused.

On 24 November 2017 the Chief Commissioner of LECC, the Hon M F Adams QC, wrote to the Secretary of the Department of Justice in relation to the Minister's refusal to approve the requested expenditure. In the course of this letter the Chief Commissioner relevantly contended that the Minister's decision was:

- (i) contrary to s 22 of the Law Enforcement Conduct Commission Act 2016 ("the LECC Act");
- (ii) not made in the *bona fide* exercise of the power conferred on the Minister by the PFA Act;
- (iii) one that no rational decision-maker could have made; and
- (iv) for an improper purpose.

### **Relevant statutory provisions**

Section 22 of the Appropriation Act 2017 provides for an appropriation of \$21,195,000 to the Minister for the services of LECC for the 2017-2018 financial year. Section 22 provides the statutory basis for the sum in question to be drawn from the Consolidated Fund as required by s 45 of the Constitution Act 1902 and s 21(a) of the PFA Act. Section 3(a) of the Appropriation Act provides that a reference to "services" for which the Act makes an appropriation includes a reference to recurrent services, capital works and services and repayment of debt.

Section 12(1) of the PFA provides that expenditure shall 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. Section 12A(1) of the PFA is in the following terms:

A Minister to whom a sum of money is appropriated out of the Consolidated Fund for a use or purpose (whether by an annual Appropriation Act or other Act) may:

- (a) delegate to another Minister or to an officer of any authority, or

- (b) authorise another Minister to delegate to an officer of any authority,  
the committing or incurring of expenditure from the sum so appropriated.

The relevant “authority” in this case is the Office of the Law Enforcement Conduct Commission (“Office of LECC”) - a body established under the Government Sector Employment Act 2013 (“the GSE Act”): see the definition of “authority” in s 4(1) of the PFA Act and the definition of “Public Service agency” in s 3 of the GSE Act and Part 3 of Schedule 1 to the GSE Act. Persons may be employed in the Office of LECC to enable LECC and its Commissioners to exercise their functions: s 21(1) of the LECC Act.

In Part 3 of the LECC Act (ss 17-24), titled “Constitution and management of Commission”, s 17 constitutes a corporation with the corporate name of the Law Enforcement Conduct Commission (referred to as the “Commission” in the LECC Act). Section 18 provides that LECC consists of certain Commissioners and s 19 states that, subject to exceptions which are not presently relevant, the functions of LECC are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, LECC by a Commissioner is taken to have been done by LECC. As noted above, persons may be employed in the Office of LECC to enable LECC and the Commissioners to exercise their functions, s 21 providing that such persons may be referred to as members of staff of LECC.

Section 22 of the LECC Act states:

**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.

In Part 4 of the LECC Act (ss 25-32), headed “Functions of Commission”, s 25(1) provides that LECC has the functions conferred or imposed on it by or under the LECC Act or any other Act. The functions conferred or imposed in Part 4 include, for example: functions with respect to misconduct matters (s 26); administrative functions relating to education and prevention of officer misconduct (s 27); functions regarding evidence and information collected (s 28); and functions with respect to findings and opinions and making recommendations (s 29).

### **Advice of the Crown Solicitor**

In an advice dated 7 September 2017 the Crown Solicitor expressed the view that the Minister's discretion to approve the expenditure on overseas travel was not affected by s 22 of the LECC Act, essentially on the basis that the relevant financial provisions and s 22 had different spheres of operation: see at [1.2], [4.7]-[4.9].

The Crown Solicitor added that it was not unusual for otherwise independent bodies to be subject to restrictions with respect to the use of public monies: see at [1.3] and [4.11].

### **Was there a contravention of s 22 of the LECC Act?**

If the Minister attempted to control or direct LECC in relation to the exercise of functions conferred or imposed on LECC by the LECC Act or any other Act, a question would obviously arise under s 22 of the LECC Act. But this is very different, in my view, from the Minister, who has the responsibility of authorising the expenditure from the appropriation to LECC, retaining a discretion under the relevant financial delegation in relation to one or more categories of expenditure, in this case, overseas travel. Although LECC has a high degree of independence under its legislation, it is a body operating in the public sector and within the context of the broad policies of the government of the day in relation to public administration. Furthermore, as the Crown Solicitor observed at [4.9], it is not a function of LECC or its Commissioners to deal directly with money appropriated to the Minister out of the Consolidated Fund. I agree with the advice of the Crown Solicitor that the Minister's authority to determine whether or not to approve the particular expenditure was not affected by s 22 of the LECC Act.

### **Question of judicial review of Minister's decision**

The matters raised in the Chief Commissioner's letter of 24 November 2017 in addition to s 22 of the LECC Act, that is, matters (ii), (iii) and (iv) identified above, are really grounds for judicial review. That would seem to be an unlikely exercise in this instance but, in any event, none of these grounds could, in my view, be made out in relation to the Minister's decision in relation to the approval of expenditure for overseas travel in this case.

Please do not hesitate to contact me in relation to any of the matters raised in this advice.

**MG Sexton SC**

14 December 2017

**Deputy Secretary, Justice Strategy and Policy Division**

**General Counsel (Ms Lida Kaban)**

**Crown Solicitor (Mr Michael Granziera)**