

**Submission
No 10**

**INQUIRY INTO BUDGET PROCESS FOR INDEPENDENT
OVERSIGHT BODIES AND THE PARLIAMENT OF NEW
SOUTH WALES**

Organisation: Law Enforcement Conduct Commission

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Submission by the Law Enforcement Conduct Commission to the Inquiry into the Budget Process for Independent Oversight Bodies and the Parliament of New South Wales

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1. Introduction

The Commission is a statutory corporation, established by the *Law Enforcement Conduct Commission Act 2016* (“LECC Act”). Its principal functions are to detect, investigate and expose serious misconduct and maladministration in the NSW Police Force (NSWPF) and the NSW Crime Commission (NSWCC), and to monitor or oversight the NSWPF investigation of critical incidents and complaints against police.

The Commission commenced operations on 1 July 2017 and for the current financial year, 2019-2020, it has a recurrent budget allocation of \$23.5m¹. The current establishment is 115 staff which includes a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight.

2. Background

In May 2015, former NSW Shadow Attorney General Mr Andrew Tink AM was commissioned to examine ways in which oversight of the NSWPF and the NSWCC could be streamlined and strengthened.

Mr Tink submitted a report entitled *Review of Police Oversight* (the Tink Review) to Government on 31 August 2015. The Tink Review recommended the establishment of a single civilian oversight body for the NSWPF and the NSWCC.

On 26 November 2015, Minister for Police the Hon Troy Grant MP, announced the establishment of a Law Enforcement Conduct Commission to exercise the functions carried out by the Police Integrity Commission (PIC), the Inspector of the Crime Commission and the Police Division of the NSW Ombudsman’s office (PDOO). The new Commission would also have additional oversight powers concerning the investigation by police of critical incidents involving police.

The PIC, the Inspector of the Crime Commission and the PDOO were abolished when the Commission commenced operations on 1 July 2017.

The Commission was to be established on a budget-neutral basis, incorporating the approved budgets and funding levels of the PIC, the PDOO and a small amount of funding relating to the Inspector of the Crime Commission.

¹ Capital funding of \$1.2m for 2019-2020 is additional to the recurrent funding. Unless otherwise indicated, references to budget funding in this submission are to recurrent funding, as that is the budget allocation where savings are expected to be found. 75% of the Commission’s recurrent funding is spent on salaries.

Recommendation 22 of the Tink Review stated that the creation of a new oversight model was not designed to realise cost-savings in the immediate or short term. Specifically recommendation 22 stated the following;

‘To ensure the new commission is properly resourced to perform all of its functions, while ensuring that the Ombudsman’s Office can continue to perform the functions it retains, the budget for the new model should be developed with the following factors in mind:

- i. The creation of a new oversight model is not designed to realise cost-savings in the immediate or short-term, although it is reasonable to expect that some efficiencies may be gained over time with greater sharing of skills and information across functional areas (such as investigations of complaints and audits);*
- ii. The existing budget for the Police Integrity Commission and the Police Division of the Ombudsman’s Office, including any ad hoc funding for special projects in the Ombudsman’s Office involving police, should be made available in full to the new Commission for at least four years, adjusted for any additional functions conferred on the entity during that time as is required;*
- iii. Additional allowance should be made at the time of establishing the new commission for the transitional costs associated with the transfer of staff, the establishment of new premises for the Oversight Division, and the movement or purchase of equipment and services from the Ombudsman’s Office, particularly information technology costs;*
- iv. Some additional employee-related costs may be incurred since the new commission will not be able to leverage the work of staff in other divisions of the Ombudsman’s Office, such as the Aboriginal Unit in the Strategic Projects Division;*
- v. Some additional employee-related costs will need to be included to ensure there is sufficient capacity to monitor critical incident investigations by the NSW Police Force’.*

Whilst accepted in principle by Government, the recommendation above was not realised in the funding of the new Commission. No additional allowance was provided for the creation of a team to perform the new function of monitoring critical incident investigations. The Commission has appointed a team of 6 investigators to this role, two of whom must be available at any time to attend the scene of a critical incident at short notice. A composite salary is paid to those officers to reflect the fact that they may be called out to attend the scene of a critical incident at any time of the day or night.

As well as a Chief Commissioner the Commission has 2 additional Commissioners, however no allowance was made for their salaries (which are determined by SOORT) and so those salaries and those of their support staff are paid out of the recurrent funding, with the resultant impact on positions which can be funded from the balance.

In short, the Commission started with a budget not capable of funding the structure which would be necessary to perform the inherited work of the two agencies it replaced and the new function of critical incident investigation monitoring.

3. Efficiency Dividends

In 2017-2018 LECC started with a recurrent budget of \$25.4m and an establishment of 121 staff.

The same year the Commission was advised by Treasury of an “efficiency dividend” of 3% which it was required to meet for the succeeding four years. In 2019 the Commission was advised that those savings are expected to be closer to 6% from 2019-20 and are ongoing and permanent.

The following table illustrates the savings the Commission is required to make from the existing 2019-2020 recurrent budget of \$23.75m over the next four years:

	2019-20	2020-21	2021-22	2022-23
Total efficiency dividend	\$402,000	\$1,249,000	\$1,914,000	\$2,175,000

4. Additional Ad Hoc Functions

Recommendation 22(ii) of the Tink Report referred to the need for “*ad hoc funding for the special projects involving police [to] be made available in full to the new Commission for at least four years, adjusted for any additional functions conferred on the entity during that time as required*”.

In early 2019 a new statutory function was conferred on the Commission by the *Criminal Legislation Amendment (Consorting and Restricted Premises) Act 2018* to review the operation of amendments to consorting laws under Part 3A Division 7 of the *Crimes Act 1900*. The consorting laws make it a criminal offence for a person to continue to associate or communicate with

people who have previously been convicted of an indictable offence after receiving an official police warning. The review period started on 28 February 2019 and continues for a period of 3 years.

The amendments to the consorting powers do the following:

- extend the definition of indictable offence to include offences committed in other jurisdictions if they would be indictable if committed in NSW;
- exclude young people under 14 years from the offence of consorting;
- clarify what an official police warning must say, and limits the duration the warning remains in effect (six months for warnings given to people under 18 years, two years for warnings given to adults);
- extend the defence of reasonable consorting to situations where a person is complying with parole orders or accommodation recommendations made by Corrective Services NSW;
- clarify the definition of family member with regard to Aboriginal and Torres Strait Islander people to allow the defence of reasonable consorting to apply to extended family and kinship systems; and
- include definitions to clarify the defences of consorting that occurs in the course of the provision of a health or welfare service, and consorting that occurs in the course of complying with an order granted by the Parole Authority.

To get an idea of the magnitude of the review, it is useful to consider a previous review conducted by the NSW Ombudsman on the use of the consorting law in an earlier 3 year period. In that period, police issued more than 9,100 consorting warnings, more than 3,300 people were either issued a warning or were the subject of a warning, and 42 people were charged with 46 offences of habitually consorting. The NSW Ombudsman reviewed 1,968 COPS records which detailed the use of the consorting law.

It is anticipated that use of the law by police will be similar in the new review period, as the law continues to be strongly supported by police, and used across the state.

Based on the experience of the Ombudsman's Office it is assessed that, given the volume of information that is likely to be generated, two additional experienced staff will be required for the next two and half years to conduct the analysis and write the report after all the relevant data has been captured.

The Commission has not yet made a request for extra funding in order to employ the staff to conduct the ad hoc review (because it is still in dialogue with NSWPF about the manner in which the data will be delivered before the actual review can commence) but intends to make a request for additional funding.

5. Future forecast

In addition to ad hoc statutory reviews such as the one discussed above (which are not expected to be numerous), the Commission is concerned that the volume of its work will increase for other reasons, while at the same time the Commission's budget will continue to shrink in accordance with the government wide efficiency dividends applied across the board to all agencies, without any adjustment for the small size and unique functions of the Commission.

For example, the total number of complaints made directly to the Commission increased by 17% in the 2018-2019 financial year, resulting in an increase in the workload of the Complaints Assessment team.

In November 2018 the Government announced additional funding to increase NSWPF numbers by 1500 sworn officers, reportedly the largest increase in police numbers for approximately 30 years. This is an increase of 9%, which will inevitably flow on to the number of complaints against police which will need to be assessed and overseen by the Commission. The Commission assesses all "notifiable" complaints against police² and takes over a small proportion that are suggestive of serious police misconduct or maladministration (approximately 2%). The majority of investigations are therefore conducted by NSWPF but the Commission is required to notify NSWPF as to whether it agrees or disagrees with the NSWPF decision to investigate or otherwise deal with notifiable misconduct matters. The Commission's oversight team then reviews as many completed NSWPF investigations as possible

Continual inroads on the budget available to pay staff means that the quality of the oversight the Commission is able to carry out on the police investigations, and the number of investigations the Commission can itself undertake is constantly under threat.

In the Commission's submission, a different approach to funding is called for, so that the Commission is not subject to the wholesale "one size fits all"

² Notifiable complaints are a class of complaints agreed between the Commission and NSWPF pursuant to s 14(1)(b) of the LECC Act, as the kinds of misconduct matters required to be notified to the Commission.

budget cuts which are applied across the public service. A more nuanced approach, where the changing landscape faced by the Commission is taken into account, would be appropriate.

6. Conclusion

Experience over the period that has elapsed since the commencement of the Commission has shown a marked increase in its workload as compared to that of its progenitors. However, it now needs to deal with a significantly reduced capacity necessitated by staff reductions caused by the imposition of efficiency dividends. This restricted capacity will inevitably be compounded by continuing reductions at increasing rates. This is not a rational funding policy unless, of course, it reflects Government policy to reduce the extent to which the Commission should perform its functions. This, of course, is entirely a matter for Government. The point being made here is that funding should follow from the character of the Commission's function and its appropriate extent, rather than arbitrarily being reduced by an arithmetical calculation without regard to functional impact, and in particular, to the tasks regarded by the Government as being necessary for the Commission to perform.

A detailed analysis of the Commissions workload cannot be presently provided. This would give the basis for assessing appropriate funding levels, in line with the above proposal, and can be provided in due course. In the meantime, the Commissions annual report is a useful starting point.

It is obvious from what has been said that the Commission supports the submission made by the ICAC as to the need for an independent funding tribunal and its proposed functions.