



Office of the Inspector of the
Law Enforcement Conduct Commission

**A report dealing with a complaint by
the Commissioner for Oversight of the
Law Enforcement Conduct
Commission against the Chief
Commissioner**

(Special Report 20/01)



Office of the Inspector of the
Law Enforcement Conduct Commission

3 December 2019

Reference No. AI 2020 28

The Hon John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker

I was appointed Assistant Inspector of the Law Enforcement Conduct Commission on 4 September 2019 for a period of three months expiring on 3 December 2019. I attach a copy of the Executive Council Minute of my appointment as such (Document A3104379).

I have the honour to present to you pursuant section 140 of the *Law Enforcement Conduct Commission Act (2016)* (LECC Act), a *Report dealing with a complaint by the Commissioner for Oversight of the Law Enforcement Conduct Commission against the Chief Commissioner*.

I have considered, but decided against, making a recommendation pursuant to s142(2) of the LECC Act.

Yours sincerely

A handwritten signature in blue ink that reads 'B. R. McClintock'.

Bruce McClintock SC
Assistant Inspector, Law Enforcement Conduct Commission



Minute Paper for the Executive Council

Subject: - Assistant Inspector of the Law Enforcement Conduct Commission

Department of Premier and Cabinet
Document Number: A3104379

Approved by the
Executive Council,

Clerk of the Council.

Minute No. -- 21 --

Date 04 SEP 2019

Approved,

Governor

Her Excellency the Governor
and The Executive Council

I RECOMMEND that Her Excellency the Governor, with the advice of the Executive Council:

- (a) pursuant to section 121 and Schedule 2 of the *Law Enforcement Conduct Commission Act 2016* (the Act), **appoint** Bruce McClintock SC as Assistant Inspector of the Law Enforcement Conduct Commission commencing on and from the date of this Minute for a period of three months on a part-time basis; and
- (b) pursuant to clause 6 of Schedule 2 to the Act, **determine** the remuneration to be paid to Mr McClintock as the Attorney's daily rate for Senior Counsel (\$4,700 plus GST) (with amounts paid to be included in the annual cap on Mr McClintock's current remuneration as Inspector of the ICAC, of 50% of the annual remuneration of the Chief Commissioner of the ICAC);

AND I ADVISE that the Inspector of the Law Enforcement Conduct Commission, Professor Terry Buddin SC, concurs in the proposed appointment.

Don Harwin MLC
Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts

A REPORT DEALING WITH A COMPLAINT BY THE COMMISSIONER FOR OVERSIGHT OF THE LAW ENFORCEMENT CONDUCT COMMISSION AGAINST THE CHIEF COMMISSIONER

Executive Summary

1. This is a Special Report pursuant to s140 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act). It determines a complaint made by Mr Patrick Saidi, the Commissioner for Oversight of the Law Enforcement Conduct Commission (“LECC”) principally against the Chief Commissioner, the Honourable Michael Adams QC but also to limited extent against the Commissioner for Integrity, The Honourable Lea Drake to the Inspector of LECC on 18 June 2019. I was appointed Assistant Inspector of LECC on 4 September 2019 pursuant to s 121 of the LECC Act for the purpose of dealing with this complaint. My appointment expires on 3 December 2019.
2. LECC was created by the LECC Act and commenced operations on 1 July 2017 as the integrity and oversight agency for the New South Wales Police Force and the NSW Crime Commission. It comprises three Commissioners, the Chief Commissioner, the Honourable Michael Adams QC (whose term expires February 2020), the Commissioner for Oversight, Mr Patrick Saidi (whose term expires June 2022) and the Commissioner for Integrity, the Honourable Lea Drake (whose term expires April 2022).
3. I have decided that Mr Saidi’s complaint should be dismissed because the conduct which forms the basis of his complaint does not, in my opinion, amount either to “officer maladministration” or “officer misconduct” within the meaning of s 122 of the LECC Act which I set out below. I have considered whether Mr Saidi himself was guilty of officer maladministration or misconduct as described below but have decided against making such a finding.
4. There are a number of matters that have come to my attention in the course of investigating Mr Saidi’s complaint which give rise to concern and suggests that relationships between him and the Chief Commissioner and the Commissioner for Integrity have broken down to such an extent as to damage the operational capacity of LECC. I will address those matters as well as Mr Saidi’s complaint in this report.

Public Interest Disclosure

5. In a letter to the Inspector of LECC dated 19 July 2019 the Commissioner for Oversight submitted that his “complaint and the disclosures contained therein fall within the terms of s 8 of the PID Act” (*Public Interest Disclosures Act 1994*). At the time of writing that letter he did not consent “to the disclosure of the information made known. . . . to the Inspector that may identify or tend to identify” the Commissioner for Oversight “as a person that made the public interest disclosure”. However, following correspondence that has passed between the Commissioner for Oversight and me, on 8 October 2019 he

provided his consent to enable me to investigate his complaint and disclose the contents of it to the people whom he complains about, in the following terms: “having regard to the importance of the matters to be considered, and to the importance to the Commission itself, I provide my consent”.

6. Section 6 of the PID Act requires me to notify the Commissioner for Oversight, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure. This report satisfies that legislative requirement.

Statutory Background

7. Section 122 of the LECC Act specifies one of the principal functions of the Inspector of LECC and therefore of me as Assistant Inspector (see s 121(2) of the Act) as the following:

*to deal with (all by reports and recommendations) conduct amounting to agency maladministration on the part of the Commission and conduct amounting to officer misconduct or officer maladministration on the part of officers of the Commission, whether or not the subject of a complaint (**Commission misconduct matters**).*

8. “Officer maladministration” and “officer misconduct”, the relevant concepts here, are defined by adoption, *mutatis mutandis*, of the definitions of the equivalent concepts for NSW Crime Commission officers (s 122(3)), which terms are defined by s 9(3), 9(4) and 11(2) and of the LECC Act as follows:

9(3) *For the purposes of this Act, **Crime Commission officer misconduct** means any misconduct (by way of action or inaction) of a Crime Commission officer:*

- (a) *whether or not it also involves participants who are not Crime Commission officers, and*
- (b) *whether or not it occurs while the Crime Commission officer is officially on duty, and*
- (c) *whether or not it occurred before the commencement of this subsection, and*
- (d) *whether or not it occurred outside the State or outside Australia.*

9(4) **Examples** *Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively:*

- (a) *conduct of the officer or employee that constitutes a criminal offence,*
- (b) *conduct of the officer or employee that constitutes corrupt conduct,*
- (c) *conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),*

(d) conduct of the officer or employee that constitutes a disciplinary infringement.

11(2) *For the purposes of this Act, **officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):*

- a. it is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
- b. arises, wholly or in part, from improper motives, or*
- c. arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
- d. arises, wholly or in part, from a mistake of law or fact, or*
- e. is conduct of a kind which reason should have (but have not) been given.*

9. In summary, the question for my decision is whether the Chief Commissioner and the Commissioner for Integrity engaged in “misconduct” such as a criminal offence, corrupt conduct or unlawful conduct (other than a criminal offence or corrupt conduct) or “maladministration”, that is, conduct that is not unlawful but is:

- a. unreasonable, unjust, oppressive or improperly discriminatory;
- b. arises from a decision that takes irrelevant matters into consideration;
- c. arises from a mistake of law or fact.

10. To the extent I am considering the conduct of the Commissioner for Oversight identical questions arise.

The Law Enforcement Conduct Commission

11. LECC was established following an extensive review in 2015 by the former NSW Shadow Attorney General, Mr Andrew Tink AM (“the Tink Review”), into the oversight of the NSW Police Force (NSWPF) and the NSW Crime Commission (NSWCC). Mr Tink was commissioned to examine ways in which oversight of the NSWPF and the NSWCC could be streamlined and strengthened. The Tink Review found that the oversight models that were then operating were outdated and complex and the overlapping responsibilities between existing oversight agencies led to confusion and inefficiencies.

12. Following the review, Mr Tink submitted a report entitled *Review of Police Oversight* 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, the then Minister for Police the Hon Troy Grant MP, announced the establishment of LECC as the new oversight body.

13. The LECC exercises the functions previously carried out by the Police Integrity Commission (PIC), the Police Division of the Office of the Ombudsman (PDOO) and the Inspector of the NSW Crime Commission. The Commission also has additional oversight powers concerning police investigations into critical incidents. Following the establishment of LECC on 1 July 2017, the PIC, the Inspector of the Crime Commission and the PDOO were abolished.
14. The LECC Act was assented to on 14 November 2016. The legislation was enacted in stages to accommodate the establishment of LECC as an organisation, including the appointment of the Chief Commissioner and Commissioners and also so that its structure and organisation could be finalised. The Honourable Michael Adams QC was appointed as the Chief Commissioner effective from 13 February 2017. The Commissioner for Integrity, the Honourable Lea Drake was appointed effective from 14 April 2017 and Mr Patrick Saidi was appointed as Commissioner for Oversight from 7 June 2017.
15. Section 3 of the LECC Act explains the Commission's purpose and remit:

The objects of this Act are as follows:

- (a) to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission becomes aware of otherwise than through a complaint that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration),*
- (b) to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,*
- (c) to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,*
- (d) to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by:*
 - (i) providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration, and*
 - (ii) assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and*

(iii) encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and

(iv) making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,

(e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,

(f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,

(g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,

(h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,

(i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to Parliament,

(j) to provide for the oversight by the Inspector of the use of covert powers under various Acts.

16. Significantly the integrity and oversight functions are divided in the LECC Act. Part 6 of the Act deals with “Investigation powers”, which enable the Commission to obtain information and documents for the purposes of an investigation and hold both public and private examinations. Part 7 of the Act which is titled “Oversight of police and Crime Commission investigations”, as the title suggests, provides LECC with the power to oversight the handling of complaints about NSW Police and Crime Commission officers. Part 7 enables the Commission to request information from those agencies and also enables it to request from them the further investigation of a misconduct matter. Part 8 of the LECC Act provides for the “Oversight of critical incident investigations” which empowers the Commission to oversight NSW police investigations of critical incidents.

The Complaint

17. The Commissioner for Oversight’s complaint is set out in a *Memorandum to the Inspector of LECC* dated 18 June 2019. I will annex it to this report together with other correspondence I received in connection with this matter and which is referred to in this report. The volume of material supplied by the

Commissioner for Oversight is very great and it is unnecessary to refer to it all in this report to determine his complaint. The material that I refer to is sufficient to understand Mr Saidi's complaint. However, I am happy to make available to the Presiding Officers of each House of Parliament and the Committee on the Ombudsman, the LECC and the Crime Commission (which monitors and reviews the Commission's functions and use of its powers) all the material I have received and reviewed in respect of this complaint.

18. The complaint falls into three general categories:

- a. an allegation that the Chief Commissioner is managing LECC in an autocratic manner contrary to the LECC Act;
- b. an allegation that the services of the former Chief Executive Officer of LECC, Ms Amber Williams, were dispensed with contrary to law and without proper consultation with the relevant Minister and the Commissioner for Oversight, so as to constitute agency maladministration;
- c. an allegation that the Chief Commissioner wrongfully caused certain monies (which he had paid personally to send a LECC officer to an overseas conference) to be reimbursed to him.

19. In addition, Mr Saidi complains that the Chief Commissioner and the Commissioner for Integrity were close friends and have a relationship going back many years and exclude Mr Saidi from participation in the management of LECC, treating his role as "an unnecessary appendage". There is a further matter raised by Mr Saidi which I will also consider, that is, a refusal by the Chief Commissioner and the Commissioner for Integrity to sanction an investigation which Mr Saidi wished to carry out pursuant to Part 6 of the LECC Act within the Oversight Division of LECC.

Consideration of the complaint and determination thereof

Powers of the Chief Commissioner

20. Sections 17 and 18 of the LECC Act are in the following terms:

17 CONSTITUTION OF LAW ENFORCEMENT CONDUCT COMMISSION

There is constituted by this Act a corporation with the corporate name of the Law Enforcement Conduct Commission.

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) The Commissioner for Integrity and Commissioner for Oversight may only be appointed with the concurrence of the Chief Commissioner.

(3) A person is not eligible to be appointed as Chief Commissioner or to act in that office unless the person is:

(a) a Judge or other judicial officer of a superior court of record of the State or of any other State or Territory or of Australia, or

(b) a former Judge or judicial officer of such a court.

(4) A person is not eligible to be appointed as Commissioner for Integrity or Commissioner for Oversight or to act in either office unless the person has special legal qualifications.

(5) A person is not eligible to be appointed as the Commissioner for Integrity or to act in that office if the person is a police officer or a former police officer.

(6) A person is not eligible to be appointed as a member of the Commission or to act in that office if the person is a member of the Legislative Council or of the Legislative Assembly or is a member of a House of Parliament or legislature of another State or Territory or of the Commonwealth.

(7) Schedule 1 contains provisions relating to the Commissioners.

21. Section 19 of the LECC Act, which is at the centre of the disputes between the Chief Commissioner and the Commissioner for Oversight concerning the governance of LECC, is in the following terms:

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.

22. Mr Saidi's concern regarding the construction of section 19 is set out in his complaint as follows:

My position is as follows: The Chief Commissioner is to be considered as no more than a "first among equals" as contemplated by the Tink Review and associated reports referred to in my Memorandum at Tab 1. The Chief Commissioner has made it clear to me that he does not accept this and that he is entitled to run the Commission any way he sees fit in his capacity as the Chief Commissioner. He bases his view on the provisions of section 19 (4) of the Act. For reasons given in my memorandum I strongly disagree with this view. In short, though this is dealt with at length in my Memorandum at Tab 1 the reasons why I disagree are based upon the following:

(i) The LECC consists of 3 Commissioners who comprise a flat hierarchical structure.

(ii) Section 19 (1) provides that the functions of the Commission are exercisable by a Commissioner. This is not qualified in any later subsection of section 19 other than ss (2) which qualifies the exercise of specific functions. There is no other qualification anywhere else in the legislation as to the exercise of functions other than the Commissioner for Oversight does not have the power to conduct private or public examinations.

(iii) Section 19 Subsections (2) and (3) refer to a decision made.

(iv) Section 19 ss (4) in effect holds that the Chief Commissioner has a casting vote whenever there is an inconsistency in the decisions of Commissioners with respect to a matter. The use of the plural is deliberate and refers to decisions made by the Commissioners in a Commissioners Council. The Commissioners Council is to make decisions of a significant or important nature affecting the work of the LECC generally. Further, whilst Sub-sections (1), (2), and (3) use the word "functions" Subsection (4) does not.

(v) The word "matter" is to be construed in its context and is referable to any matter of significance that is to come before and be determined by a Commissioners Council.

(vi) *The provisions of section 34 of the Interpretation Act, when called in aid supports the above interpretation.*

(vii) *Nowhere in the legislation is it provided that the Chief Commissioner can direct a Commissioner in the exercise of his/her functions, or that he could fetter the Commissioner's discretion in carrying out his/her functions (other than by way of the vehicle of ss (2) and by way of a Commissioners Council process.*

23. In addition, Mr Saidi complains that a “Commissioners’ Protocol” issued by the Chief Commissioner on 2 May 2019 over his opposition is invalid. The Commissioners’ Protocol is in the following terms (omitting the passages of the legislation quoted in it and which are set out above):

Decision of the Chief Commissioner pursuant to s 19(4) of the LECC Act

There being inconsistency in the decisions of the Commissioners with respect to the allocation of responsibilities between them, the following decision is made by the Chief Commissioner pursuant to s 19(4) of the LECC Act.

Organizing principles

Having regard to the LECC Act and Schedule 1, Part 3 of the Government Sector Employment Act 2013, the following organising principles apply

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(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 concerning the Chief Executive Officer, in respect of whom the employer functions of the Government are to be exercised by the Chief Commissioner who also exercises the functions of employing or terminating the employment of the CEO in consultation with the Minister, 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 s 93(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) *efficient administration requires allocation of responsibilities between the Commissioners, which should take into account and reflect the statutory identification of the Commissioners as Chief Commissioner, Commissioner for Integrity and Commissioner for Oversight; and*

(v) *if the Commissioners do not agree in a decision as to any matter (not being one required to be made under s 19(2)), the decision of the Chief Commissioner prevails.*

Allocation of responsibilities

1. *Responsibility for overall governance of the Commission is primarily that of the Chief Commissioner.*
 2. *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 primarily that of the Chief Commissioner.*
 3. *Responsibility for the Assessments Division, which receives, 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.*
 4. *Responsibility for the Legal Services Unit, Education and Prevention Division and Community outreach is primarily that of the Chief Commissioner.*
 5. *Responsibility for the Integrity Division (including Covert Services and Electronic Communications Unit) is primarily that of the Commissioner for Integrity.*
 6. *Responsibility for the Oversight Division, including auditing and Critical Incidents, is primarily that of the Commissioner for Oversight.*
 7. *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 and will consult with them in respect of the appointment or termination of the employment of the Chief Executive Officer.*
 8. *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.*
 9. *Decisions on appeals from the Commissioner of Police in respect of the suspension or cancellation of witness protection will, if practicable, be considered and made by all Commissioners.*
 10. *Where an issue of significant policy not previously agreed or decided arises in the course of the exercise of their responsibilities, each Commissioner will bring it to the attention of the other Commissioners before making a decision as to it unless it is impractical to do so.*
24. Mr Saidi's position concerning the Commissioners' Protocol is set out in a Memorandum dated 12 June 2019 (which is attached) from him to the Chief Commissioner as follows:

The Commissioners Protocol dated 2 May 2019 is on my recollection the fourth version of a Commissioners protocol first presented to me earlier this year. I have refused to enter into an agreement to abide by the previous Commissioners protocols. The reasons why have been

previously communicated to the Chief Commissioner. Given that I have now been provided with a copy of the version of 2 May, I feel it appropriate to point out that, in my view at least, the Chief Commissioner has no power to unilaterally impose upon me as a Commissioner for Oversight the terms of such a protocol, either in its entirety or with respect to the individual matters contained therein. What follows are my reasons as to why I am of this view.

Having regard to the analysis of the Tink Report set out above, the history of the Bills, and the manner in which the legislation came to be enacted by Parliament it is my view that neither the Tink report nor the legislation as enacted contemplated that the Chief Commissioner of LECC could exercise power (whether correctly described as autocratic, unilateral or otherwise) to manage and conduct the affairs of LECC other than by way of a process of a Commissioners Council.

I note the full text of this section of the memorandum from which this extract is taken. It appears on pp 18-20 thereof.

25. The Chief Commissioner's position is set out in a Memorandum from him to the Commissioner for Oversight dated 27 February 2019:

4. The effects of the LECC Act (and relevant provisions of other Acts touching upon the Commission's operations) is that, subject to s 19(2) of the Act, the [Chief Commissioner], as distinct from the other Commissioners, exercises ultimate decision-making authority in the Commission.

5. Section 19 of the LECC Act makes plain that, while the [Chief Commissioner] together with at least one other Commissioner must agree before the Commission's most intrusive powers can be exercised (undertaking an investigation, holding a compulsory examination, issuing a search warrant etc), the decision of the [Chief Commissioner] (alone) shall prevail to their otherwise be a disagreement or "inconsistency" in the decisions of Commissioners "with respect to a matter".

6. No specific 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 is clear the phrase should be understood in its ordinary English meaning, so that the [Chief Commissioner's] decision will prevail in respect of anything capable of being considered or, to adapt the language of s 19(4), be the subject of agreement or disagreement by the Commissioners, so long as it concerns the business or operations of the LECC.

7. Section 19 (1), in providing the functions of the Commission are exercisable by a Commissioner, is merely a conventional provision of agency so far as third parties are concerned. Section 19(1) commences with the words "[e]xcept as otherwise provided by this section" and is therefore subject to s 19(4). Furthermore, the opening words of s 19(4) make it explicit that the only exception to its application is the matter

covered by subsection 19(2). Accordingly, s 19(1) does not empower a Commissioner to make decisions with which the [Chief Commissioner] disagrees.

8. The LECC Act, with one exception, does not assign any particular role to the [Commissioner for Oversight] and the Commissioner for Integrity. The exceptions contained in s 63, which requires examinations to be held by the [Chief Commissioner], the [Commissioner for Integrity] or an Assistant Commissioner, as determined by the [Chief Commissioner], thus excluding the [Commissioner for Oversight] from this task. Although there is an assignment of work to the [Commissioner for Integrity], is subject to the determination of the [Chief Commissioner]. Accordingly, it is evident that the only responsibility legislatively assigned to any Commissioner is that to the [Chief Commissioner] of ultimate decision-making. Of course, it is assumed that the Commissioners will work cooperatively to fulfil the object of the Act, which could not be achieved if it were necessary for the [Chief Commissioner] to make all decisions.

9. In short, with the sole exception of those matters listed in s 19(2), when the [Chief Commissioner] must have the agreement of at least one other Commissioner, the effect of s 19(4) is that the [Chief Commissioner's] decision will prevail in respect of any other matter.

10. It is consistent with this role that, while all three Commissioners are appointed directly by the Governor, is provided by s 18(2), that the [Commissioner for Integrity] and the [Commissioner for Oversight] may only be appointed with the concurrence of the [Chief Commissioner], a provision no doubt inserted to make operations more likely.

* * * *

21. As I stated in Part 1 above, I consider that the Commission as being subject to the direction and control of the [Chief Commissioner] is the only viable interpretation of s 19(4) and the absence of any particularised nation about nature of "matters" caught by s 19(4) is deliberate, because it was intended to cover the entire business of Commission without exceptions; it would also have been impossible to exhaustively list the myriad issues that could arise for determination in the conduct of the business of the Commission. Moreover, contrary to what [the Commissioner for Oversight] claimed in his response, the Role Descriptions fully to Commissioner positions both state that the reporting line of each position is to the [Chief Commissioner].

26. It is also necessary to set out a passage from the Chief Commissioner's response to me which was received on 6 November 2019 in respect of Mr Saidi's complaint:

1.The interpretation of s19 of the law Enforcement Conduct Commission Act 2016.

This strikes me as the simplest complaint to dispose of, since it is purely a matter of statutory interpretation. You will have noted that Mr Saidi

wrote an extensive memorandum on the point, making extensive (but misplaced) reference to the Tink Report. I gave him a detailed response (RESPONSE TO THE MEMORANDUM OF THE COMMISSIONER FOR OVERSIGHT TO SECTION 19 OF THE LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016) in which I discussed the significance of the Tink Report and the interpretation of s 19. I enclose that response. In short, I think it is clear that the effect of s 19(4) is to give to the Chief Commission the ultimate decision-making responsibility in respect of any matter requiring decision in the management of the Commission or the conduct of its functions. There may be a question whether this power applies only where the other Commissioners disagree (so that the Chief Commissioner can be overridden by agreement between the other Commissioners). The issue has not so far arisen, as it happens. However, in my view the phrase "inconsistency in the decisions of the Commissioners" applies to all such occurrences, the Chief Commissioner being one of the "Commissioners". Section 18 refers to the "Chief Commissioner", the "Commissioner for Integrity" and the "Commissioner for Oversight" (thus with particularity) and s 18(7) to Sch 1 containing "provisions relating to the Commissioners" (applying to all of the Chief Commissioner, the Commissioner for Integrity and the Commissioner for Oversight), s 19(1) uses "Commissioner" to comprehend the Chief Commissioner and the other Commissioners and s 19(2) refers to "one other Commissioner", in a context in which, if it were intended that only the Commissioner for Integrity and the Commissioner for Oversight were "Commissioners" (ie, the term excluded the Chief Commissioner) the adjective "other" would not have been necessary.

Of course, the creation of three Commissioners necessarily requires a circuit-breaker to avoid chaos.

Mr Saidi complains about the Commissioners' Protocol, which organizes the prime responsibilities of the three Commissioners, in order to avoid conflict and impose a rational structure of management. I enclose a copy. I think it is self-evidently within the authority of the Chief Commissioner. Mr Saidi complains about a lack of consultation about the Protocol. A draft of the proposed Protocol instigated two memos from the Commissioner for Oversight that dealt extensively with the Chief Commissioner's authority. On 22 February I obtained from Ms O'Brien, the Solicitor to the Commission, a memo on the legal issues raised by the two memos from Mr Saidi and provided it to him and Commissioner Drake (enclosed). On 27 February 2019, I responded myself to his memos (enclosed). On 27 March I emailed a fresh draft Protocol to Commissioners Saidi and Drake, together with the formers two responses and a memorandum by me in reply. On 1 March 2019 Mr Saidi responded by email, making a number of points, to which I responded on 15 March. These two emails are enclosed. As foreshadowed, Mr Saidi sent me another long memorandum about the subject, raising complaints not only about the Protocol but also about my management of the Commission in respect of the Education and Prevention Unit and the

Assessments Division and the position of the CEO. I responded to all these issues as briefly as I could manage on 2 July 2019 (enclosed).

I apologise for the amount of paper to which I am subjecting you, especially since I take the view that s 19 of the Act is clear about the central issue, namely the authority of the Chief Commissioner, from which authority to promulgate the Protocol clearly flows. The arguments mounted by Mr Saidi against this position are plainly mistaken. His notion that somehow the Tink Report has decisive authority in relation to the respective positions of the Commissioners is illogical in light of its own language and immaterial in light of the clear language of the Act.

I should point out that the position I adopted as to the interpretation of the Act and the management of the Commission was reached in consultation with and the agreement of Commissioner Drake, with whom I shared all my communications with Mr Saidi before they were sent.

(Commissioner Saidi also complains about my refusal (agreed by Commissioner Drake) to conduct a Part 6 investigation into litigation concerning intentional torts by police officers. I enclose my memorandum of 16 August explaining that decision.)

27. It seemed to me that neither the views of the Chief Commissioner nor those of the Commissioner for Oversight accurately reflected the legislation and consequently I sought advice from Crown Solicitor. I received such advice on 5 November 2019 and a follow-up advice as a result of a further request from me on 15 November 2019. Once again, I have attached both advices to this report. The Executive Summary of the 5 November advice is in the following terms:

1. You seek my advice on s. 19 of the Law Enforcement Conduct Commission Act 2016 ("LECC Act), in particular, s. 19(4).

2. There is no provision in the LECC Act requiring the functions of the Law Enforcement Conduct Commission ("the Commission") to be exercised by a governing body, "Commissioner's Council" or similar.

3. In my view, s. 19(4) applies when there is "an inconsistency in the decisions of" any two or more Commissioners with respect to a matter, in which case, the decision of the Chief Commissioner prevails. Where a statutory function of the Commission has been exercised by a Commissioner in reliance on s. 19(1), s. 19(4) does not empower the Chief Commissioner to review or revisit the exercise of that function or to replace the decision with that of the Chief Commissioner.

4. The Chief Executive Officer of the Commission ("CEO") exercises the employer functions of the government in relation to the employees of the Office of the Law Enforcement Commission. As the accountable authority for the Commission for the purposes of the Government Sector Finance Act 2018 ("GSF Act"), the CEO has certain obligations in respect

of financial management of the Commission and, once relevant provisions commence, in relation to the Commission's financial reporting. Since these matters are the responsibility of the CEO, not the Commission or the Commissioners, there would appear to be a relatively narrow class of decisions "with respect to a matter" to which s. 19(4) is capable of applying where there is an inconsistency in such decisions. Decisions with respect to the strategic direction and general policies of the Commission would seem to fall within this class of decisions [footnote omitted].

28. I sought the follow-up advice from the Crown Solicitor as a result of concern expressed by the Chief Commissioner that, if the original advice quoted in the preceding paragraph were correct, it would cause "chaos" in the operations of LECC. That advice was provided on 15 November 2019. The Executive Summary is in the following terms:

- 1. On 4 November 2019, I provided advice on the construction of s. 19 of the LECC Act. On 12 November 2019, you requested I consider and provide urgent advice about the points raised by the Chief Commissioner of the LECC's response to the advice.*
- 2. The Chief Commissioner is concerned that the interpretation I have provided would (if understood correctly) lead to "chaos" because "the functions of the Commission would be exercised in the way decided by the Commissioner managed to get in first".*
- 3. I do not consider that s. 19(1) must operate so as to permit any Commissioner who "gets in first" to exercise the functions of the Commission in any way that he or she may choose. The exercise of function by Commissioners under s. 19(1) must be done in accordance with any decisions that have already been made under s 19(4). Section 19(4) can operate as a limit on the exercise of a statutory function prior to its exercise. Understood in this way, the Commission may function effectively, even in circumstances where cooperation may not always be forthcoming.*
- 4. The effective functioning of the Commission will, however, depend heavily on the exercise of the executive control and management, the procedures for which are not governed by the LECC Act. The role of the CEO may be of significant assistance to the Chief Commissioner in this regard.*

Correct Construction of LECC Act and Section 19 thereof

29. I accept the Crown Solicitor's advice with which I agree. Nevertheless, I will set out my own views which take account of that advice:

- a. First, Mr Saidi's reliance on the Tink Report as an aid to the construction of the LECC Act and s 34 of the *Interpretation Act* is misplaced. The reason is that the aspects of the Tink Report upon which Mr Saidi relies were not carried through in the legislation in its final

form. This indicates to me that Parliament specifically rejected those matters. Thus, his strongly argued view that, because of the Tink Report, the legislation requires a Commissioners' Council is wrong. The concept is not mentioned in the legislation and clearly Parliament rejected any suggestions by Mr Tink in that regard, as it is entitled to do in respect of any such recommendation. As a consequence, Mr Saidi's assertion that s 19(4) "refers to decisions made by the Commissioners in a Commissioners Council" is incorrect. Nor is it correct to say that the "the Commissioners Council is to make decisions of a significant or important nature affecting the work of LECC generally". The legislation neither creates nor contemplates such a Council;

- b. secondly, the Chief Commissioner's assertion that s 19 means either that the Chief Commissioner "exercises ultimate decision-making authority in the Commission" or that s 19(1) does not empower a Commissioner to make decisions with which the [Chief Commissioner] disagrees" is not accurate. Nevertheless, the Chief Commissioner is entitled pursuant to s 19(4) in the event of disagreement between the Commissioners to establish protocols and guidelines as to how LECC carries out its functions and such a protocol is binding upon the dissenting Commissioner;
- c. thirdly, the Commissioner's Protocol is an example of a valid exercise of the power granted by s 19(4) to the Chief Commissioner. To my mind, Mr Saidi's criticisms of it and its validity are misplaced. It is binding upon him and he should comply with it.
- d. fourthly, while a decision made or action taken by a Commissioner in breach of the Commissioner's Protocol or similar document is invalid, a decision made by a Commissioner not caught by the Protocol is valid and cannot be reversed or changed by the Chief Commissioner. Putting it bluntly, contrary to the Chief Commissioner's assertion, the legislation does enable a Commissioner to make a decision with which the Chief Commissioner disagrees provided it is not one that the Commissioner is precluded from making by an existing decision made, or policy adopted, under s 19(4) such as the Commissioner's Protocol;
- e. fifthly, this is subject to the powers which the legislative scheme gives to the CEO, matters in respect of which no Commissioner has power under the legislative scheme. See paragraph 4 of the Crown Solicitor's first advice to me dated 5 November 2019.

30. It follows that I disagree with the opinions expressed by Ms Michelle O'Brien, the Solicitor to the Commission in her memorandum dated 22 February 2019 dealing with the Commissioners Protocol and, specifically, the assertion in paragraph 20 thereof that "the Commissioners being subject to the direction and control of the [Chief Commissioner] is exactly what was intended by s 19(4)". It was not.

31. Finally, in relation to this matter to the extent that Mr Saidi asserts that it was inappropriate for the Assessments Team, or the Prevention and Education

Team to report to the Chief Commissioner or that the Chief Commissioner has controlled his access to the latter division, I consider that the Chief Commissioner's actions in this regard are authorised by s 19(4).

32. While I have concluded that in some respects the Chief Commissioner's view of the operation of the LECC Act was erroneous, there is no evidence that any unlawful action on his part was caused by such erroneous view. While Mr Saidi complains that the Chief Commissioner has been autocratic and while the Chief Commissioner's views of his power under the Act go too far, I see no evidence that he has ever actually behaved in an autocratic manner. On the contrary, all material I have read shows that he has behaved in a consultative manner showing very considerable forbearance towards Mr Saidi in the face of rudeness and provocation.
33. I consider that Mr Saidi has failed to make good his claim of maladministration of any kind in respect of the governance of the Commission against the Chief Commissioner.
34. There are other matters I should mention. After receiving the Crown Solicitor's second advice dated 15 November 2019, I forwarded it to Mr Saidi. I received a response from him on 20 November 2019 in which he disputed the accuracy of the Crown Solicitor's advice. A copy is attached. On reading this letter, I became extremely concerned at the Commissioner for Oversight's refusal to accept independent advice whose correctness I had endorsed. The correspondence between the Commissioners over the issue of the powers of the Chief Commissioner and the construction of s 19(4) of the LECC Act indicated a serious breakdown in relations over a significant LECC internal governance issue. Commissioner Saidi's continuing refusal to accept the validity of viewpoints with which he disagrees would necessarily have a damaging impact on the work of LECC, as no doubt it already has. Consequently, on 22 November 2019, I wrote to Mr Saidi in the following terms:

Dear Commissioner

I have read your letter dated 20 November 2019 carefully and several times. In that letter you respond to my letter dated 18 November 2019 which enclosed the Crown Solicitor's advice dated 15 November 2019.

I do not accept the propositions of law set out in your letter. The Crown Solicitor's advice is correct. Specifically, I, like the Crown Solicitor, am of the view that a decision made under s 19(4) can and does operate to establish a limit on the s 19(1) power to exercise a statutory function prior to the exercise of that function. That means that the Commissioners' Protocol is valid and operates to limit the powers you would otherwise have under s 19(1) of the LECC Act.

I have set out in an appendix to this letter a more detailed response to the points you raise in your letter.

The point has now been reached where you must accept both the Crown Solicitor's construction of the Act and the necessary consequence that you are bound by decisions made under s 19(4) of the LECC Act,

including the Commissioners' Protocol. This is so whether you personally agree with the advice or my view that it is correct.

If you are not willing to do so, you should resign. It is inimical to the good governance of an important public agency such as LECC and damaging to its work that this dispute continues, and that one Commissioner continues to challenge the validity of decisions in the face of independent advice that such decisions conform to s 19(4). You yourself pointed out that the police have become aware of the strained relations between yourself and the other Commissioners and the dysfunction and damage to the Commission's work that has caused. That must stop.

I ask you to confirm that you now accept the position stated and that you are bound by decisions made under s 19(4), including the Commissioners' Protocol. I look forward to receiving that confirmation no later than 5.00pm Wednesday 27 November 2019.

35. He replied by letter dated 26 November 2018 as follows:

Dear Assistant Inspector

Your correspondence of 22 November 2019

I acknowledge receipt of your letter dated 22 November 2019.

The previous Crown Solicitor advisings upon which I was invited to make submissions dealt with complex issues of statutory construction. It is evident that those issues raise matters on which reasonable minds may differ. I, of course, respect the opinion of the Crown Solicitor, as well as your view.

With specific reference to your request in the last paragraph of your abovementioned letter, I confirm that I accept the position as stated in the Crown Solicitor advisings and accordingly acknowledge that I am bound by decisions made under section 19 (4), including the Commissioners' protocol. It was never my intention to act otherwise, and any matters I did raise were intended to obtain as comprehensive as possible view of what appeared to be complex legal questions so as to provide a clear way forward for the operation of the Law Enforcement Conduct Commission ('the Commission').

Now that the legal issues appear to have been resolved, I have no doubt that the three Commissioners have a clear legal foundation in the carrying out of their functions. I look forward to working with my fellow Commissioners to carry out the vital work of the Commission.

36. I hope Mr Saidi is sincere in his indication that he accepts the Crown Solicitors

advice and is bound by decisions made under s 19(4) and by the Commissioner's protocol. The history of his dealings with the Chief Commissioner as shown in the documents attached to this report do not give cause for optimism in that regard.

The Commissioner for Oversight's Proposed Part 6 Investigation

37. The following appears in Mr Saidi's complaint to the Inspector of LECC dated 18 June 2019:

37. It was the expectation of the Tink review that the Commissioner for Oversight would conduct more investigations in the public interest than those which were carried out by the Ombudsman. This has not materialised. Indeed, the Commissioner for Oversight has not been able to undertake one investigation in the past two years. The reasons for this are that firstly, the education and prevention team fall under the jurisdiction of the Chief Commissioner, and the manager has been advised that she is accountable to him and no one else in the Commission. Secondly, for a Part 6 to be undertaken it requires a decision by the Commissioners, and not merely the Commissioner for Oversight. Thirdly, given the fact that the prevention and education team have been silo'd, the Commissioner for Oversight is not even able to have a project undertaken without the Chief Commissioner's approval. Fourthly, given the resistance that I have shown to the Chief Commissioner being able to manage the LECC in an autocratic fashion, I have a strong suspicion that I am being prevented from having a Part 6 investigation on this basis. If I am correct, then I am the subject of a more sophisticated form of bullying. A suggested example is outlined below.

40. The attempts by myself to have a project at the very least or a Part 6 investigation go back to July 2017. At that time I put forward a proposal relating to, inter alia, civil actions brought against police, the interaction between those civil actions and the Professional Standards Command insofar as whether or not matters were referred to that command, and appropriate action taken in relation to the alleged misconduct. The project had the anticipated outcomes of, inter alia,

(i) how the NSWPF has responded to allegations of police misconduct and maladministration the subject of civil proceedings and identified in local Court criminal prosecutions;

(ii) to what extent NSWPF misconduct and maladministration raised within the remit of the Courts has escaped identification and scrutiny by the oversight system;

(iii) to what extent if any such systems then in operation could be improved.

38. These matters were dealt with by the Chief Commissioner in a memorandum to Mr Saidi on 16 August 2019. Regrettably, it is necessary to quote it in full:

1. *On 21 May and 19 June 2019 you sent me memoranda proposing an investigation under Part 6 of the LECC Act, to be conducted within the Oversight Division. The former memorandum was discussed on 23 May 2019 at a meeting of yourself, Commissioner Drake and me. At that time both Commissioner Drake and I indicated that we did not agree with your proposal and I explained briefly why I took that view. The latter memorandum raised much the same issues together with additional discussion, including with reference to my earlier explanation. In my view that memorandum did not carry the matter any further. I have decided to provide a brief written explanation for my decision.*

2. *I do not intend to set out in full the matters which you identified in your memorandum as requiring investigation. In summary, they concerned the extent of information sharing between OGC and complaint investigators and related procedures, the outcomes of civil litigation involving the conduct of the NSWPF and its officers, comparisons between those outcomes and outcomes of investigations and the numbers of proceedings commenced against the NSWPF for the last 18 months to 2 years. You also referred to obtaining information about damages paid to plaintiffs and details of legal costs.*

3. *Both oral and written communications have taken place over some time with PSC, concerning the provision of information gathered in the litigation process to investigators. Considerable progress has been made towards an acceptable process, although a number of issues require further negotiation, principally as to the extent to which "new" information (now agreed to be provided) covers all relevant material, whether or not it contains references to misconduct additional to that already being investigated, the possible refusal to provide information on the basis of legal professional privilege, the provision of judicial decisions on the matters being investigated and how they are utilised for the purposes of the investigation and more widely for training and information.*

4. *As stated in our initial discussion, it is more appropriate that these matters be the subject of continuing discussions. I do not think much is to be gained, if anything, by conducting an investigation in relation to them: firstly, any relevant documentation as to the process can be obtained cooperatively; secondly, the LECC Act precludes any examinations by you of particular officers and it is obviously inefficient for either Commissioner Drake or myself to conduct examinations in relation to matters which the Oversight Division is investigating under*

your supervision and, at all events, examinations of particular officers are unlikely to produce any information which will not otherwise be obtained by simple request or conference; thirdly, the extent to which the procedure presently in place relating to the provision of litigation information to investigators can be audited at all events. To institute a Part 6 investigation, therefore, will be of little use and undermine attempts to resolve the issues by cooperative negotiation.

5. The resources of the Oversight Division are overtaxed as it is, with substantial delays in finalising oversight of police investigations and imposing the further burden of the proposed investigation is not an appropriate use of its resources. So far as the Prevention and Education Unit is concerned, it also is fully engaged in current projects which are some months from conclusion. Whether it will be in a position to take on the investigation you propose when those projects are completed will depend upon other projects which might be in the pipeline at the time and the relative priorities which will need to be applied.

6. So far as the proposed investigation is concerned into the amounts of damages paid or payable for identified intentional torts and associated legal costs, whether by settlement or judgments, I cannot see any sufficient relevance to the functions of the Commission of this information, having regard especially to the very substantial work that would need to be done to unpack the details of settlements, which is the mode by which the overwhelming bulk of litigation is concluded, let alone the complexities involved in the calculation of costs. I have no doubt that the NSWPF is well aware of the substantial amount of damages being paid in respect of the commission of intentional torts. I do not think that providing details of those amounts will have any effect on the manner in which police conduct potentially involving such tort [sic] is dealt with, whether by training, management or investigation, additional to that which is already being undertaken or being considered as a result of the focus on this area by the Commission. There is no basis for doubting that senior management of the NSWPF, and the Commissioner in particular, are committed to ensuring that officers comply with the legal conditions applying to the exercise of their powers, though the extent to which management processes have adequately addressed this issue can appropriately be criticised. The fact that damages, potentially in large amounts, may have been, and might have to be, paid for failures in this area will not, in my view, add to the commitment to improve the situation which, to my mind reflects a genuine acceptance that police have a duty to obey the law.

7. You mention that conducting an investigation "would allow the Oversight Division to exercise its coercive powers, thus reminding the NSWPF that the Division has coercive powers to conduct an investigation". Part 7 of the LECC Act provides for significant coercive powers to operate in the oversight space although, of course, the Oversight Division is not referred to. Those powers have been exercised on many occasions. There is no need to remind the NSWPF about their

existence. I do not see that there is any point in reminding the NSWPF of the powers of the Commission under Part 6 in which, again, the Oversight Division is not referred to. So far as the Tink Report is concerned, it is clear (as I have exhaustively discussed in other communications) that the LECC Act departs from his proposed scheme in a number of significant respects. The construction of Part 6 and Part 7 is one of them. I do not regard the passage as to Mr Tink's expectation that the "Deputy Commissioner for Oversight's power to initiate public interest investigations will be activated more frequently" as relevant to the present discussion.

8. You mention the development of "a perception that the work of the Integrity Division has in fact taken precedence over the important work that could and should be carried out by the Oversight Division". I do not know what you mean by "precedence" in this statement nor what might be the "work that could and should be carried out by the Oversight Division" as distinct from the work that can and is being carried out by the Division. At all events, I am not aware of any such perception and I do not accept that any fair understanding of the work performed by the Commission as a whole could reasonably lead to such a perception. There should be no question that the Oversight Division is in any sense competing with the Integrity Division. It would be most unfortunate (for obvious reasons) if, assuming this were your perception, you communicated it to members of the Oversight Division, since it is patently untrue.

9. Lastly, the allocation of work to the Oversight and Integrity Divisions and the Prevention and Education Unit, is not a matter for the CEO.

39. Mr Saidi responded by memorandum on 9 September 2019. That memorandum is too long to quote in full and I will attach it. I do not regard its tone as appropriate for communications between Commissioners and the second (unnumbered) paragraph makes an insupportable suggestion of duplicity against the Chief Commissioner. Of very great concern to me are the following passages:

27. Assuming for the moment that in your opinion, there is a lack of resources to undertake such a project has validity [sic], then it would appear to be the case that all of the work involving investigations has gone to the Integrity Division and the Prevention and Education Team. No resources have been used by the Oversight Division in the past two years. This would lead to a conclusion that the work of the Commission is heavily balanced in favour of the Integrity Division who are using up necessary resources for the purpose of carrying out their own work, to the exclusion of the functions of the Oversight Division. This imbalance needs to be corrected, and precedence shown to the Integrity Division needs to cease. Such bias cannot be allowed to continue, whether in the public interest or otherwise.

For this reason, unless I receive an assurance from my fellow Commissioners that this situation will not continue, and appropriate consideration be given to my proposed Part 6 investigation, and appropriate and credible reasons are given as to why there should not be such an investigation, I am contemplating opposing future Part 6 investigations that do not have a public interest element.

Such investigations undertaken by the Integrity Division should not take up resources that could be better put use in carrying out an investigation put forward by myself, or similar Part 6 investigations that have a much greater potential for satisfying the public interest. Of course, I do recognise that there will be investigations that should be undertaken by the Integrity Division in the public interest, and those investigations I would be happy to agree to. As to why I have taken this view can of course be explained either by yourself or myself at any CAP Meeting to those present.

29 If in future, in my capacity as a Commissioner I agreed to the holding of a Part 6 investigation or to a project been undertaken, if I am not kept appraised as to the progress of the matter, or if in any way I am sidelined, I will give serious consideration to revoking my agreement. Agreeing to the conduct of an investigation or to the holding of a project does not finish once approval is given. (My emphasis).

40. Two issues arise. The first is whether there is any merit in Mr Saidi's criticism of the Chief Commissioner's refusal to sanction a Part 6 investigation. The second is whether Mr Saidi, by making the threats (as they clearly were) set out in the material quoted in the preceding paragraph himself engaged in "officer misconduct" or "officer maladministration" within the meaning of the LECC Act.

41. In my view, there is no merit in Mr Saidi's criticisms of the Chief Commissioner's refusal to sanction a Part 6 Investigation as he had requested. First, it is highly doubtful whether an investigation of the type sought by Mr Saidi is authorised by the legislation. So far as I can determine, the only relevant power is contained in s 51(1) of the LECC Act which provides:

51 EXERCISE OF INVESTIGATION POWERS

(1) The Commission may exercise its investigation powers in respect of conduct:

(a) if the conduct concerned involves a police officer, administrative employee or Crime Commission officer and the Commission has decided that the conduct concerned is (or could be) serious misconduct or officer maladministration that is serious maladministration and should be investigated, or

Note : See section 19 (2) in relation to the making of a decision under this provision.

(b) if the conduct concerned involves the Commissioner of Police or a Deputy Commissioner of Police and is (or could be) police misconduct or officer maladministration, or

(c) if the conduct concerned involves the Crime Commissioner or an Assistant Commissioner of the Crime Commission and is (or could be) Crime Commission officer misconduct or officer maladministration, or

(d) if the conduct concerned is (or could be) agency maladministration, or

(e) if both Houses of Parliament refer the conduct concerned to the Commission for investigation under section 196.

42. On the materials provided to me, there is no evidence that the criteria referred to, that is, misconduct or maladministration, were satisfied. Secondly, a decision to investigate made under s 51(1) is one of the matters which must be authorised by the Chief Commissioner and one other Commissioner. Thirdly, the reasons expressed by the Chief Commissioner are unexceptionable and, on their face, perfectly good reasons for refusing to sanction the investigation sought by the Commissioner for Oversight.

43. As I have indicated in [40] above, the passages from Mr Saidi's memorandum quoted in [39] appear to me to be threats to oppose justifiable Part 6 investigations unless Mr Saidi gets his way in relation to the allocation of additional resources to undertake his Part 6 investigation. Persons in the position of the Commissioner for Oversight are bound to exercise powers which they have been granted in good faith and for proper purposes. That precludes taking account of irrelevant matters. Clearly an attempt to threaten the other Commissioners that he would oppose other Part 6 investigations until the Chief Commissioner and Commissioner for Integrity agreed to the investigation he sought takes account of irrelevant factors. Such decisions must be based solely on the merits of the particular proposal, which naturally include matters such as available resources and the public interest.

44. I raised these matters with Mr Saidi by letter dated 14 November 2019 in which after setting out the passage I have quoted above from his 9 September 2019 memorandum. I said this:

The quoted portions of your memorandum appear to me to be capable of being construed as a threat to block other Part 6 investigations unless you get your way in relation to your proposed Part 6 Investigation. It appears to me to be obvious that any decision whether to conduct a Part 6 investigation should be based exclusively on the merits of that investigation. You state that you will contemplate opposing such investigations to compel consideration of another investigation which appears to me to be a matter irrelevant to the question whether the original investigation should proceed.

Equally, the last paragraph of your memorandum, also quoted above, where you threaten to revoke agreement to the holding of a Part 6 investigation unless you are kept apprised (sic) and not sidelined (sic), seems to me to give rise to similar issues. Put bluntly, such revocation would involve an attempt to prevent a presumably valuable investigation for reasons irrelevant to its value.

Would you address these matters and, in particular, whether there are any reasons why I should not find that your conduct in making the threats in question amounts to misconduct within the meaning of sections 9(3) and 122 (3) of the Act and officer maladministration within the meaning of section 11(2) and 122 (3) of the Act, in that it involves conduct that takes irrelevant matters into consideration.

Finally, would you address the question of whether it was appropriate for a Commissioner of a significant public service agency to engage in such conduct, that is, send correspondence to the other Commissioners containing the material I have quoted above. Some people might reasonably think that such conduct was entirely inappropriate and inimical to the proper functioning of an agency such as LECC.

45. Mr Saidi responded to me in a letter dated 19 November 2019. I will attach a copy. I refer to paragraph 2 thereof which seems to me to confirm that the passages from his 9 September 2019 email did constitute a threat. I do not regard Mr Saidi's explanation for what he had said as satisfactory.
46. As I suggested in my letter quoted above, I consider the Commissioner for Oversight's conduct in this respect as entirely inappropriate and inimical to the proper functioning of LECC. Further, it clearly shows that relations between him and the Chief Commissioner and Commissioner for Integrity have broken down. While I believe I should express my disapproval in the strongest terms about Mr Saidi's threats and I do so, I do not believe it is necessary to go further and make a formal finding of misconduct or maladministration.

Relationship of the Chief Commissioner and the Commissioner for Integrity

47. In paragraph 2 of his complaint dated 18 June 2019 Mr Saidi said this:

By way of background, it became clear to me after I had taken up my appointment as the Commissioner for Oversight that the Chief Commissioner and the Commissioner for Integrity have had a substantial personal and professional relationship going back many years. In my case, there was no such relationship with either Commissioner before joining LECC. The closeness of their relationship, in my eyes at least, led to their making many decisions involving LECC without any consultation with me. Whilst it is appreciated that all important decisions involving LECC should be dealt with by the three Commissioners in consultation, it is recognised that at any and at all

times I could be outvoted in relation to any proposal. Their relationship is such that they are prepared to accept decisions made by the other without formal meetings having been held amongst Commissioners, and in some circumstances without consultation with myself. I found myself in the position where significant decisions were being made by the Chief Commissioner without any input from myself, and without any prior consultation with myself. Some decisions made have led to adverse consequences for not only the Oversight Division of LECC but also for LECC generally.

48. I understand that the Chief Commissioner and the Commissioner for Integrity have known each other for many years. There is nothing wrong with that. I see no evidence that that relationship has ever affected any decision made in their official capacities, still less, that it has done so improperly or so as to amount to maladministration. I see no basis for any suggestion that the Commissioner for Integrity let any such friendship influence her decisions or that she brought anything other than an independent mind to the performance of her duties.

Redundancy of the LECC Chief Executive Officer

49. Mr Saidi makes a number of complaints about the circumstances in which Ms Amber Williams' employment as CEO of LECC came to an end. In addition, he complains that the Chief Commissioner has not permitted him to be briefed by the current CEO, Ms M O'Brien who also fills the role of Solicitor to the Commission.

50. The complaint concerning termination of Ms Williams is expressed as follows by Mr Saidi in a letter to the Inspector of LECC dated 9 July 2019 and in a further *Memorandum to the Inspector* of the same date as follows:

(iii) the termination of the services of Ms Amber Williams as Chief Executive Officer, the appointment of Ms Michelle O'Brien as the proposed new Chief Executive Officer, and the proposed new structure of the Commission insofar as the Chief Executive Officer is concerned has not accord with the legal requirements under the legislation, and

(iv) there was a failure on the part of the Chief Commissioner to comply with legislative requirements before terminating the services of Ms Williams.

These general complaints were given further particularity in the memorandum referred to, as follows:

(i) Steps were taken well prior to March 2019 to terminate the then role of Ms Amber Williams.

(ii) I was never consulted or made aware of steps taken until early February 2019.

(iii) Ms Williams was placed in a situation of having no real choice but to accept a redundancy package offered to her, such acceptance being in March 2019.

(iv) On 1 May 2019 Commission staff were made aware of the proposed changes to not only the termination of Ms Williams' services but also the appointment of Ms Michelle O'Brien in her stead.

(v) The relevant Minister was not advised, or otherwise consulted, about the termination of Ms Williams' services, the appointment of Ms O'Brien as the new Chief Executive Officer until correspondence was forwarded to him dated 3 May 2019.

(vi) The failure to consult with the Minister did not come about as a result of oversight, inadvertence, or negligence on the part of the Commission. I had previously warned the Chief Commissioner both orally and in writing of the need for consultation with the Minister prior to the termination of Ms Williams' services.

51. The references to "legislative requirements" are to Schedule 1 Public Service Agencies to the *Government Sector Employment Act 2013* which contains the following reference to the Office of LECC:

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 it 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 Law Enforcement Conduct Commission Act 2016.

The relevant Minister then and now in question is the Honourable Don Harwin MLC, Special Minister of State and Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts.

52. The proposition advanced by Mr Saidi quoted in paragraph 50 above is not correct. While the Commissioner for Integrity had obviously been considering the future role of the CEO and had obtained advice from Messrs Carroll & O'Dea Solicitors concerning the legal requirements for redundancy of the CEO, no steps, whether formal or informal, had been taken to terminate Ms Williams' role. It is hardly fair to criticise Ms Drake for such matters-in my view she was conducting herself exactly as a commissioner of a body such as LECC should by informing herself about the issues and obtaining advice.

53. I sought a response from Commissioner Drake to these issues raised by Commissioner Saidi. Her response which I received on 25 November 2019 is attached to this report.

54. Ms Drake informed the Chief Commissioner and Mr Saidi by memorandum concerning these matters on 5 February 2019. I can see no valid basis for criticism of her doing so.

55. The criticisms made in (iii) and (iv) first quoted in [50] above have no merit.

56. It is factually wrong to assert, as Mr Saidi does in (v) and (vi) of [50] that the Minister was not advised or consulted about the termination of Ms Williams services. The Chief Commissioner did so by letter to the Minister dated 3 May 2019 which commences with the following language:

I am writing to you for the purpose of consulting about the termination of the employment of the Commission's Chief Executive Officer and the transfer of the CEO role to the Commission Solicitor, a proposal to which I am currently giving consideration.

57. The Minister certainly seems to have been under no illusion that he was being consulted. His reply to the Chief Commissioner dated 21 June 2019 commences:

Thank you for consulting me in relation to the proposed termination of the employment of the Law Enforcement Conduct Commission's Chief Executive Officer.

58. In my view the Chief Commissioner complied with all requirements of the legislation. To the extent that it is part of Mr Saidi's criticism that the Chief Commissioner and the Commissioner for Integrity had already made their minds up that the CEO should be terminated and that therefore they did not consult, it seems to involve a misunderstanding of the legislative requirements. It would be rare for a person in the position of the Chief Commissioner not to have come to at least a preliminary view as to what should occur prior to complying with the obligation to consult with the Minister. There is nothing wrong in that.

59. In my view, Mr Saidi's complaints concerning the termination of the employment of the CEO have not been substantiated and neither the Chief Commissioner nor the Commissioner for Integrity have been guilty of officer misconduct or maladministration or agency maladministration.

Complaint concerning access to CEO

60. A dispute has arisen between Mr Saidi and the Chief Commissioner concerning briefings by the CEO. On 12 June 2019 Mr Saidi sent a memorandum to the Chief Commissioner which included the following passage:

There is one other important matter that should be raised. When the LECC commenced the Commissioners were provided with a briefing by the Chief Executive Officer on Monday mornings. For my part I wish to be briefed by the Chief Executive Officer as the operations of the LECC on a regular basis. As a Commissioner I would like to be informed by the Chief Executive Officer as to the ongoing running and management of the LECC....

61. The Chief Commissioner replied in a memorandum dated 2 July 2019 as follows:

The Commissioner for Oversight says that he wishes to be briefed by the CEO as to the operations of LECC on a regular basis. Since he is present

at every executive meeting in every meeting of the strategic operations committee, at which he is free to ask any questions about the activities of any unit of the LECC, it is difficult to understand why any additional briefing is necessary. He doesn't explain why these meetings are not sufficiently informative. Ad hoc meetings might be necessary where urgent or, perhaps, confidential issues need to be considered by all commissioners. On the one hand, I do not accept that the Commissioner for Oversight should be involved in any decisions relating to the day-to-day management of the Commission which are within the purview of the CEO/ Solicitor and the proposed director (corporate services) under my overall supervision.

62. Mr Saidi raised this with me by letter dated 15 November 2019 to which he attached an email dated 12 November 2019 from himself to the Chief Commissioner and the Commissioner for Integrity. That email included the following paragraphs which raise issues concerning that part of the Chief Commissioner's memorandum which I have quoted in the preceding paragraph:

Does the Chief Commissioner continue to adhere to this view?

Does the Commissioner for Integrity agree with the above view?

On what basis is the Chief Commissioner on his own accord, or with the agreement of the Commissioner for Integrity entitled to believe that he is lawfully or managerially entitled to interfere with, or otherwise limit any, Commissioner seeking to be briefed whether alone, or in a meeting of commissioners by the CEO?

Your response by close of business on Wednesday, 13 November, 2019 would be appreciated. Given that I currently have a complaint for consideration before the Assistant Inspector of the Office of the Inspector, should it be the case that either the Chief Commissioner and/or the Commissioner for Integrity is of the belief that access to the Chief Executive Officer to the Commissioner for Oversight can be so restricted, it is my intention to take this matter up immediately with the Assistant Inspector. I consider this issue to be a matter of great importance and should be resolved at the earliest possible time.

63. I do not agree with Mr Saidi that "the Chief Commissioner has no power to prevent any Commissioner from having access to the CEO, or to restrict the flow of information from the CEO to any Commissioner".

64. Under the legislation the Chief Commissioner exercises the functions of the employer of the CEO. Those functions are set out in Schedule 1, Part 3 of the *Government Sector Employment Act 2013* which provides that: *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 Law Enforcement Conduct Commission Act 2016.*

65. It follows that the strategic direction of LECC is a matter for the Chief Commissioner and the role of the CEO is to provide the necessary resources to support that strategic direction. The Crown Solicitor's advice of 15 November 2019 supports that view. Specifically, the Crown Solicitor advises that:

18. The Chief Commissioner may call regular meetings of the Commissioners (the Commission Executive). As these meetings, the Commission Executive may discuss and decide upon the strategic policies and general direction of the Commission including, for example, the misconduct matters to be prioritised for the current financial year and the resources to be applied to the various areas of the Commission.

19. If one Commissioner decides the Commission should prioritise a misconduct matter (or matters of a particular type) and the other Commissioner decides to prioritise other matters, the decision of the Chief Commissioner prevails. The CEO would then ensure the resources of the Commission are applied to the matter or matters determined as a priority by the Chief Commissioner. A Commissioner is not authorised to exercise the functions of the Commission under s.19(1) in respect of a matter where to do so would be contrary to a decision of the Chief Commissioner under s.19(4).

66. The Crown Solicitor's advice indicates that although the Commissioners may meet to consider collectively the strategic direction of the Commission, the Chief Commissioner's decision prevails in the event of any disagreement amongst the Commissioners. It follows that the role of CEO is to provide the necessary resources to support that decision. That in itself implies that the CEO reports to and is ultimately responsible to the Chief Commissioner.

67. Furthermore, I do not agree with the view that "the CEO should be free to divulge such information to all Commissioners and should not in any way be inhibited by any direction given by the Chief Commissioner or any other Commissioner from bringing such information to attention". There will inevitably be matters that arise, particularly in relation to Commission staff, where it is entirely appropriate that information be quarantined and access to it limited to the Chief Commissioner whose ultimate responsibility it is to decide whether and, if so, what information from the CEO should be passed on to the individual Commissioners. I do not see it as necessary or appropriate that the Commissioner for Integrity and Commissioner for Oversight have access to or be provided with confidential information involving staff members that do not come within the teams at LECC for which they are not responsible. It follows that neither Commissioner has any entitlement to be apprised of such information simply by virtue of the fact that they hold the position of Commissioner.

68. Mr Saidi also asserts that one function of the CEO "is to provide backup support, administrative staff and other services to the Commissioners so as to allow them to effectively carry out their functions". That view is contrary to the strategic role of the Chief Commissioner as indicated by the Crown Solicitor. It does not seem to me to be a practical or sensible way of allocating resources to

individual teams of LECC as it fails to consider its broader strategic direction, which the Chief Commissioner ultimately determines. The request for additional resources in one area or team at LECC (or any organisation for that matter) needs to be balanced against the staffing requirements of the other teams. This is then to be considered against the Commission's overall strategic direction, which as I indicated above, and as set out in the Crown Solicitors advice, is a matter for the Chief Commissioner.

69. There is a valid analogy with the management of companies. While the Chairman has access to the CEO, it would be highly irregular for an individual director to have such access.

70. There is no merit in this aspect of Mr Saidi's complaint.

Some further issues concerning the LECC CEO

71. While I have rejected Mr Saidi's complaints concerning the manner in which the CEO was terminated and concerning his claim to the right of access to the CEO, I have some very considerable concerns as to the wisdom of the decision to dispense with a dedicated CEO and go to a model where the role is carried out, presumably on a part-time basis by the Commission Solicitor. It is obvious from the preceding section of this report and the quotations from the Crown Solicitor's advices that Parliament recognised the significance of the office of CEO in statutory authorities such as LECC. So much is also obvious from the full terms of the letter from the Minister dated 21 June 2019, the opening sentence of which I have quoted above. The letter is worth setting out in full because it demonstrates the thinking of the Executive in respect of this matter as well as accurately reflecting Parliamentary intention:

Dear Chief Commissioner

Thank you for consulting me in relation to the proposed termination of the employment of the Law Enforcement Conduct Commission's Chief Executive Officer (CEO).

I respect the independence of the Law Enforcement Conduct Commission as one of the cornerstone integrity bodies in the State, and your independence as its Chief Commissioner to lead the management of the organisation.

That said, I will take this opportunity to raise certain matters that you may wish to consider in deciding whether to implement the proposal.

A decision to remove a Band 2 SES position from the agency, on the basis that the position is not required, is likely to be taken into account in relation to future resource requests. Such a decision may make it difficult to demonstrate a need for an additional position of this level in the future.

In July 2016 the Department of Premier and Cabinet made a submission to the Parliamentary Committee on the Independent Commission Against Corruption (ICAC), identifying a 'best practice'

organisational structure of oversight bodies, which was characterised by the following two features:

- A decision-making body, invested with the statutory powers of the Commission, constituted by a panel of Commissioners appointed by the Governor.*
- Structural separation between the members of the decision-making body and the operational organisation. The CEO of the operational organisation to be appointed by, or on the recommendation of, the Chief Commissioner/ Commissioners.*

The identified benefits of this organisational structure relevantly included:

- By separating the statutory decision-makers (the Commissioners) from the organisation itself (the CEO and staff), there is less risk of the decision-makers being 'captured by' the organisation. This structure positions the decision-makers above and at a distance from the day-to-day business and management of the organisation, allowing for greater focus on decision-making.*
- This separation also allows for the better use of the particular skill sets of each person to be aligned with particular functions. For example, former judicial officers would be responsible for making legal decisions based on submissions, while a CEO with management and administrative skills would be responsible for the day-to-day running of the organisation, subject to the oversight of and policies set by, the panel of Commissioners.*

I note that you are not proposing to abolish the statutory office of the CEO, but are proposing to confer the CEO's statutory functions on the Commission Solicitor, who would become CEO and General Counsel (SES Band 2), and transfer the CEO's administrative oversight responsibilities to the Director, IT (SES Band 1) who would become Director, Corporate Services (SES Band 1).

The Government Sector Employment Act 2013 (NSW) and public service employment law is, however, a specialist area. Accordingly, you may wish to seek the advice of the Crown Solicitor's Office in relation to this matter.

Thank you again for consulting me on this matter.

72. I appreciate that the decision by the Commission to delete the standalone CEO position took into consideration the budgetary constraints the Commission will be subject to in future financial years as a result of "efficiency dividend" savings which are imposed on all NSW government agencies. However, I am concerned that the decision was short sighted and did not consider or appreciate the strategic role that a CEO plays in an organisation such as LECC.

73. A competent CEO has a fundamental role to play in ensuring the sound management and good governance of an organisation. Such functions cannot be done on a part time basis. As indicated in the Crown Solicitors advice of 15 November 2019:

4. The effective functioning of the Commission will, however, depend heavily on the exercise of executive control and management, the procedures for which are not governed by the LECC Act. The role of the CEO may be of significant assistance to the Chief Commissioner in this regard.

74. The role of the CEO is to support the strategic direction of LECC, it is not merely an administrative role that is there to supervise and manage the corporate functions of LECC. The right CEO should serve as a critical interface between LECC and the government and should also advise the Commissioners on government policy which has implications for LECC more broadly.

75. The role of General Counsel (and in my view the current Commission Solicitor is performing that role) is to provide independent, objective, unbiased and candid legal advice, in a corporate context to the board and, in the context of LECC, to the Commissioners. In my view, a combination of the two roles compromises the Commission Solicitor's ability to do so. I should also add that the skills necessary for a CEO on the one hand and General Counsel on the other are entirely different so much so that I doubt whether any one person has the requisite combination of skills.

76. In addition, the right CEO could have been of real value to LECC. That view is obviously shared by Minister Harwin in his letter referred to above as well as by the Crown Solicitor. I cannot help feeling that the right CEO could have moderated the conflict between Commissioners which has become apparent in dealing with Commissioner Saidi's complaint and prevented such obviously erroneous decisions as to approve the reimbursement to the Chief Commissioner of the travel expenses.

77. Nevertheless, whether to dispense of the CEO role as a standalone position is not a matter for me to determine but is ultimately a matter for the incoming Chief Commissioner and whether he or she is of the view that the CEO position should be reinstated.

Overseas travel expenditure reimbursed when prohibited by the Minister

78. The final aspect of Mr Saidi's complaint involves the circumstances in which the Chief Commissioner reimbursed himself the sum of \$8074.66 which he had spent personally to enable a LECC officer to travel to a conference overseas.

79. This matter has previously been dealt with by the NSW Auditor General in a special report dated 21 February 2019¹. In that report the Auditor General expressed her conclusion in the following terms:

¹ A copy of that report can be found at: <https://www.audit.nsw.gov.au/>

In my opinion, the LECC did not comply with s. 12A of the [Public Finance and Audit Act 1983] because the Minister:

- *had not delegated his authority to approve expenditure for overseas travel to an officer in the LECC*
- *had specifically declined approving a request from the LECC to incur expenditure on the travel in question.*

Despite this, the LECC incurred the expenditure.

In my view, the LECC required the Ministers approval to incur the overseas travel expenditure before it could legally spend funds for this purpose from its appropriation.

80. I agree with the Auditor General's conclusion. That said, I accept that the Chief Commissioner acted in good faith, albeit based on a mistaken view of the law, in authorising the payment in question. Further, he has repaid the funds in question. In such circumstances I do not believe that I should make a finding of misconduct or maladministration. Given the comprehensive manner with which the Auditor General has dealt with the issue, such a finding would serve no good purpose.

The functioning of LECC

81. Despite the dissension between the Commissioners, LECC has been able to and continues to successfully carry out its statutory functions. I note that in the Commission's 2018-19 Annual Report it is reported that LECC assessed significantly more complaints than the previous years, almost doubled the number of full investigations it undertook in comparison to the previous year and continued its significant community engagement and prevention and education work amongst many other achievements. Most recently, LECC has submitted a number of significant reports to Parliament concerning systemic issues and misconduct within the NSW Police Force. There is no doubt that the Commission's achievements are attributable, in large part, to its dedicated and committed staff. However, how long this good work can continue when there is dissension amongst the three Commissioners is a different matter. The reports in question come from the Chief Commissioner's and Commissioner for Integrity's sections of LECC. I am unable to express a view about how well the Commissioner for Oversight's team is functioning.

Conclusion

82. In preparing this report I gave the Chief Commissioner and each of the Commissioners a draft. I took account each of their responses in finalising this report. Their responses are attached.

83. I have determined the Commissioner for Oversight's complaint should be dismissed. I cannot, however, conclude this report without pointing out the harm that the matters considered in it may well have done to the operational efficiency of LECC, although the Integrity Division has apparently been working

well. If nothing else, the amount of time that the Commissioner for Oversight has spent in writing correspondence concerning his dispute with the Chief Commissioner must have reduced the amount of time available for him to spend on the duties the Act requires him to perform. I hope the disputes between him on the one hand and the Chief Commissioner and the Commissioner for Integrity on the other and Mr Saidi's repeated refusals to accept decisions of the Chief Commissioner which, it should now be clear, were authorised by the legislation, come to an end. I note Mr Saidi's statement that he accepts the position set out in the Crown Solicitor's two advices. Given that the dispute has extended over many months and involved extraordinary amounts of less than illuminating correspondence from the Commissioner for Oversight I am not optimistic that that will occur. I fear that the harmonious relationships necessary for effective functioning of this significant public agency may be impossible to restore. This itself may have a serious impact on staff recruitment and, indeed recruitment of a new Chief Commissioner when Mr Adams' term expires in February next year.

84. Finally, one thing has become apparent to me in the course of preparing this report. It is that s 18(3) of the LECC Act contains too narrow a definition of the persons eligible for appointment as Chief Commissioner. That subsection is in the following terms:

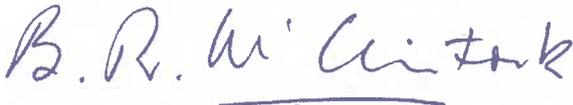
A person is not eligible to be appointed as Chief Commissioner or to act in that office unless the person is:

(a) a Judge or other judicial officer of a superior court of record of the State or of any other State or Territory or of Australia, or

(b) a former Judge or judicial officer of such a court.

There are very few people who fall within the category described and many of them would, for various reasons, be either unsuitable or unwilling to accept such an appointment. In my opinion, the provision undesirably narrows the pool of persons available for appointment. For example, the reference to *superior court of record* excludes judges and former judges of the New South Wales District Court, many of whom to my knowledge would have experience and abilities making them highly suitable for appointment as Chief Commissioner. I am aware that s 18(3) was enacted as a result of a recommendation made in the Tink Report, but I recommend that consideration be given to widening the definition of persons eligible for appointment. An alternative would be for the Executive to appoint a suitable candidate to the Supreme Court to enable such a person to take up the role of Chief Commissioner but that itself may give rise to other issues.

85. I make no recommendation pursuant to s142(2) of the LECC Act.



Bruce McClintock SC

Assistant Inspector, Inspector of the Law Enforcement Conduct Commission

3 December 2019

**PRIVATE &
CONFIDENTIAL**

Complaint to the Inspector of the Law
Enforcement Conduct Commission
pursuant to the provisions of Part 9 of the
Law Enforcement Conduct Commission
Act 2016.

Patrick Saidi
Commissioner for Oversight
18 June 2019

Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act 2016.

It is with the greatest sadness that I find myself making this formal complaint to the Inspector. However, given my responsibilities and duties under the legislation I consider myself obligated to put forward such complaint, notwithstanding any negative consequences that may follow. For my part I have in the past and continue to enjoy carrying out my functions as the Commissioner for Oversight of the Law Enforcement Conduct Commission ("LECC"). Unfortunately, given the manner in which the Chief Commissioner seeks to conduct the affairs and management of the Commission I consider it necessary, and desirable to have the situation rectified at the earliest possible time. The terms of my complaint are not merely relevant to the way the LECC is currently being conducted and managed but is relevant to how the LECC is to be conducted and managed in future no matter who may be the Commissioners in office.

The terms of the complaint

1. The governance and general management of the Law Enforcement Conduct Commission is being conducted contrary to the terms of the Law Enforcement Conduct Commission Act 2016.
2. The services of the Chief Executive Officer, Ms Amber Williams, were disengaged in circumstances where there was no proper, if any, consultation with the Commissioner for Oversight before steps were taken to disengage her services. Further, her disengagement, in the circumstances in which it occurred may be said to constitute agency maladministration.
3. In disengaging the services of the Chief Executive Officer, the Commission and more particularly the Chief Commissioner did not comply with the legislative requirement that he consult with the Minister prior to her disengagement.
4. There was a failure on the part of the Chief Commissioner to consult with the Minister (and with the Commissioner for Oversight) prior to

- (i) Appointing a replacement CEO, and
- (ii) Changing the role of the CEO in the organisation.
- (iii) Following on from (i) and (ii) the structure of the Commission has now significantly departed from that contemplated by the Tink Review and other recommendations regarding best practice guidelines so as to constitute agency maladministration.

5. The Chief Commissioner purporting to manage and run the Commission on the basis that he has the final say on all matters involving the Commission, and on the basis that he has a power to direct and control the Commissioners for Oversight and Integrity in the exercise of those Commissioners' functions has impermissibly fettered the discretion of the Commissioners, interfered with their independence, and acted contrary to the provisions of the legislation.

Each of the above matters will now be dealt with in turn.

A. The governance and general management of the Law Enforcement Conduct Commission is being conducted contrary to the terms of the Law Enforcement Conduct Commission Act 2016 ("the Act").

1. I accepted the appointment of Commissioner for Oversight on the basis that as Commissioner I would have independence in the carrying out of my duties and functions subject to any limitations imposed by statute. It was not contemplated by myself, and so far as I am concerned, by the Act that I could be directed, controlled or managed by the Chief Commissioner in the performance of my functions and duties. My belief is that the only qualification to my independence is that as set out in the provisions of section 19 of the Act. Please find attached a 28 page Memorandum (Tab 1) ¹which sets out in detail the reasons why I hold the belief that the Commissioner for Oversight undertakes an independent statutory function and is not subject to the management and dictation of the Chief Commissioner, other than in the limited respects provided for pursuant to the provisions of section 19 (2) of the Act. Also attached is the Commissioners protocol referred to in my Memorandum (Tab 2). For reasons given in my Memorandum to the Chief Commissioner

¹ Without Annexures. These will be annexed to this Memorandum.

I do not accept the validity of such a document. The role description for the Commissioner for Oversight is at Tab 3.

2. By way of background, it became clear to me after I had taken up my appointment as the Commissioner for Oversight that the Chief Commissioner and the Commissioner for Integrity have had a substantial personal and professional relationship going back many years. In my case, there was no such relationship with either Commissioner before my joining LECC. The closeness of their relationship, in my eyes at least, led to their making many decisions involving LECC without any consultation with me. Whilst it is appreciated that all important decisions involving LECC should be dealt with by the three Commissioners in consultation, it is recognised that at any and all times I could be outvoted in relation to any proposal. Their relationship is such that they are prepared to accept decisions made by the other without formal meetings having been held amongst Commissioners, and in some circumstances without consultation with myself. I found myself in the position where significant decisions were being made by the Chief Commissioner without any input from myself, and without any prior consultation with myself. Some decisions made have led to adverse consequences for not only the Oversight Division of LECC but also for LECC generally.
3. Becoming frustrated at the situation, I forwarded to the Chief Commissioner a memorandum in about September/October of 2018. Attached hereto at Tab 4 is a copy of such memorandum. Whilst the memorandum speaks for itself, it could be seen that I did raise issues relating to the disempowerment of myself both internally and externally, the lack of consultation that was taking place, the decision to appoint Ms O'Brien as the acting CEO, as well as difficulties with the Chief Commissioner having taken over the Assessment Team within the Oversight Division, together with my having limited access to the prevention and education team.
4. After I provided the Chief Commissioner with the memorandum, I did meet with him and the issues were orally discussed. To the best of my recollection, whilst the Chief Commissioner expressed gratitude for my having brought these matters to his attention, no concession whatsoever was made that any of the matters raised had any substance, or that there would be any change in his approach to the management of the Commission.

5. From the date of my above meeting with the Chief Commissioner until my return from leave after the Christmas/New Year vacation I was becoming so concerned, disillusioned and demoralised about how the management of the Commission was being conducted, and the nature and extent of the disempowerment of myself as the Commissioner for Oversight that I gave serious consideration to resigning my appointment. I could not see any real possibility of the Chief Commissioner recognising or giving validity to any of the concerns raised by myself up till that point of time.
6. On Monday, 7 January, 2019 after I had returned from leave, and on that afternoon there was a discussion between the Chief Commissioner, the Commissioner for Integrity and myself relating to my concerns. It is fair to say that towards the latter stages of the discussion it became heated.
7. On 25 January, 2019 I provided a document titled "Memorandum to Chief Commissioner" seeking to bring to the attention of the Chief Commissioner a number of issues relating to the operation of LECC. At page 2 of that document reference is made to the ongoing issue as to whether or not the Commissioners are to be considered as being subject to the direction or control of the Chief Commissioner. The document is informative and sets out my perception of least of the problems then existing within LECC and that needed to be addressed. That document is at Tab 5.
8. My position is as follows: The Chief Commissioner is to be considered as no more than a "first among equals" as contemplated by the Tink Review and associated reports referred to in my Memorandum at Tab 1. The Chief Commissioner has made it clear to me that he does not accept this and that he is entitled to run the Commission any way he sees fit in his capacity as the Chief Commissioner. He bases his view on the provisions of section 19 (4) of the Act. For reasons given in my memorandum I strongly disagree with this view. In short, though this is dealt with at length in my Memorandum at Tab 1 the reasons why I disagree are based upon the following:
 - (i) The LECC consists of 3 Commissioners who comprise a flat hierarchical structure.
 - (ii) Section 19 (1) provides that the functions of the Commission are exercisable by a Commissioner. This is not qualified in any later subsection of section 19 other than ss (2) which qualifies the exercise of specific functions. There is no other

qualification anywhere else in the legislation as to the exercise of functions other than the Commissioner for Oversight does not have the power to conduct private or public examinations.

- (iii) Section 19 Subsections (2) and (3) refer to a **decision** made.
- (iv) Section 19 ss (4) in effect holds that the Chief Commissioner has a casting vote whenever there is an inconsistency in the **decisions** of Commissioners with respect to a **matter**. The use of the plural is deliberate and refers to decisions made by the Commissioners in a Commissioners Council. The Commissioners Council is to make decisions of a significant or important nature affecting the work of the LECC generally. Further, whilst Sub-sections (1), (2), and (3) use the word "functions" Subsection (4) does not.
- (v) The word "matter" is to be construed in its context and is referable to any matter of significance that is to come before and be determined by a Commissioners Council.
- (vi) The provisions of section 34 of the Interpretation Act, when called in aid supports the above interpretation.
- (vii) Nowhere in the legislation is it provided that the Chief Commissioner can direct a Commissioner in the exercise of his/her functions, or that he could fetter the Commissioner's discretion in carrying out his/her functions (other than by way of the vehicle of ss (2) and by way of a Commissioners Council process.

9. A full and detailed analysis as to why I have adopted the above interpretation of the provisions of section 19 are set out in the attached memorandum at Tab 1.
10. The Chief Commissioner's interpretation of the relevant provisions of the LECC Act are set out in a memorandum dated 27 February, 2019. (Tab 6). It is clear that the Chief Commissioner's interpretation of the legislation differs significantly from mine.

11. It would follow that if I am correct in my interpretation, the manner in which the LECC is currently being managed would fall within the definition of agency maladministration, as it would be contrary to law.

It should be noted that the legal issues involved are relevant not merely to LECC but also bodies which have similar legislation and a 3 Commissioner body. One such body is the Greyhound Welfare and Integrity Commission.²

12. On the Chief Commissioner's view of the operation of LECC, both the Commissioner for Integrity and the Commissioner for Oversight are subordinate to him and are subject to his dictates. In essence, notwithstanding the fact that I am given statutory independence from the Minister and the government, I do not hold such internal independence within the operation of LECC itself, is the view of the Chief Commissioner. Thus, he believes that he is entitled to dictate to me as to how I should carry out my functions as a Commissioner independently of the operation of a Commissioners Council.

13. There has been ongoing dissension within LECC for some considerable period of time. Issues relating to how LECC is being managed have been brought to the attention of the Chief Commissioner (as well as the acting CEO) on previous occasions. This dissension has related to a number of significant issues and, rather than my repeating them here, I attach a copy of the following:

- (i) Memorandum forwarded by myself to the Chief Commissioner dated 25th of January 2019 (at Tab 5). The contents are self-explanatory. You will note that this memorandum contains references to the CEO by myself, when at the time I was not aware that steps were on foot to disengage her from the organisation. You will also note the contents of paragraph 15 where I bring it to the Chief Commissioner's attention (not for the first time) that he does not own and is not the Law Enforcement Conduct Commission.

- (ii) Email forwarded to myself and Commissioner Drake relating to the roles of Commissioners by the Chief Commissioner, together with my response by way of email dated 1 March, 2019. An email in response

² See section 6 of the *Greyhound Racing Act 2017* which for relevant purposes is in similar terms to section 19 of the LECC legislation.

from the Chief Commissioner to myself was forwarded on 15 March, 2019. These documents are contained within Tab 7.

- (iii) Draft Commissioners protocol, undated, but apparently presented to me in January 2019 for agreement and signature. Also attached is my response to the proposed Commissioners protocol (undated). These documents are contained within Tab "8".

Whilst ever there is such a clear divergence of views between Commissioners as to the extent of their powers, or the ability of the Commissioners for Oversight and Integrity to exercise their functions without interference from the Chief Commissioner, LECC will continue to operate in a dysfunctional manner. The situation must be addressed.

- B. The services of the Chief Executive Officer, Ms Amber Williams, were disengaged in circumstances where there was no proper, if any, consultation with the Commissioner for Oversight before steps were taken to disengage her services. Further, her disengagement, in the circumstances in which it occurred constituted agency maladministration.

14. Unbeknown to me, Commissioner Drake requested Ms Michelle O'Brien on 5 October, 2018 to provide a summary of her experience of acting in the position of CEO. Furthermore, Commissioner Drake gave instructions to Messrs Carroll and O'Dea, solicitors, to advise on the position of CEO. Ms O'Brien entered into a dialogue with those solicitors on the issue, again all of this occurring without my knowledge. Attached and at Tab 9 is a copy of the memorandum forwarded by myself to the Chief Commissioner dated 18 March, 2019 relating to this and other issues.

15. To the best of my recollection it was not until 6 February, 2019 that I was first made aware that steps are on foot to disengage the services of Ms Amber Williams as the Chief Executive Officer. On that date Commissioner Drake appeared in my room and left a "private and confidential" envelope on my desk. That envelope contained the following:-

- (i) A memorandum dated 5 February, 2019 addressed to the Chief Commissioner relating to the Chief Executive Officer Position.

- (ii) An advising obtained from Caroll & O'Dea, lawyers, dated 13 December, 2018.
- (iii) A report prepared by Ms O'Brien, Acting CEO, provided at the direction of Commissioner Drake to the lawyers.

Annexed hereto in marked with the letter "10" is a copy of such documentation.

16. On 7 February, 2019 I was provided with a document titled "Memorandum on position of the CEO" dated 7 February, 2019. It is obvious that the decision had been made to disengage the services of Ms Williams by that date and without any prior discussion with me or knowledge on my part. Annexed hereto at Tab "11" is a copy of such document.
17. On 20 February, 2019 the Chief Commissioner provided me with a further document titled "Memorandum on position of the CEO". It is clear from such memorandum that the Chief Commissioner was of the view that "appropriate and responsible governance of the LECC requires appropriate arrangements be put in place to adjust the role of CEO to the actual requirements of the Commission". He also referred to the "practical matter of the time actually necessary for the performance of the CEO's responsibilities."
18. The document of 20 February, 2019 was provided to Ms Williams by the Acting Manager, Human Resources, Nick Athas, by way of email dated 20 February, 2019. A response was invited from Ms Williams. I was not aware of such letter being forwarded by the Chief Commissioner until a later point of time. Attached hereto at Tab 12 is a copy of the email provided to me by Ms Williams at my request.
19. On 27 February, 2019 I received an email from the Chief Commissioner attaching a further proposed Commissioners protocol. I responded to the Chief Commissioner by way of email dated 1 March, 2019. In that response I indicated my firm view that not only should the CEO be retained, but she should be empowered in carrying out her duties. A response was received by way of email from the Chief Commissioner dated 15 March, 2019. Copies of such emails are attached. (Tab 13).
20. On 27 February, 2019 I received a memorandum from the Chief Commissioner in response to my earlier communications with him. In

Such Memorandum The Chief Commissioner posits his view that the effect of The LECC Act is that, subject to section 19 (2) of the Act, the Chief Commissioner, as distinct from the other Commissioners, exercises ultimate decision-making authority in the Commission.³ The Chief Commissioner rejects the view that the 2 Commissioners have “statutory independence” and are not subject to the direction or control of the Chief Commissioner. In essence, the Chief Commissioner makes it clear that he disagrees with my interpretation of nearly all of the legal issues raised by myself in relation to the overall management and governance of the LECC. Significantly, in conducting his analysis, the Chief Commissioner does not refer to the Tink Review, submissions made by the Department of Premier and Cabinet and other similar material in existence, the speeches and readings that took place before Parliament, and particularly the speeches which related to the amendment of section 19 before the bill was enacted in its final form. The provisions of section 34 of the Interpretation Act were not referred to or called in aid by the Chief Commissioner in the interpretation of the statute.⁴

21. In my view the legal position postulated by the Chief Commissioner does not correctly reflect an interpretation of the legislation and is flawed.

22. On 18 March, 2019 I forwarded a memorandum to the Chief Commissioner with respect to the Chief Executive Officer position. In that memorandum I made it clear that I had significant concerns about the proposal that “appropriate arrangements must be made to adjust the position of CEO to the actual requirements of the Commission” as signed off by the Chief Commissioner on 7 February, 2019. Whilst I requested the Chief Commissioner to keep the contents private and confidential, he indicated to me that he did not consider that appropriate and accordingly I gave him my consent to distribute it. In my memorandum I raised with the Chief Commissioner the issue that, even if Ms Williams’s appointment were to be consensually terminated, given the factual circumstances as to how such termination came about, whether it was necessary for him to consult the Minister. I also raised with him the appropriateness of “downgrading” the position of the CEO in the organisation. Importantly, I raised the further issue as to whether there needed to be consultation with the Minister before wheels were put in motion, or continued, for any change in the position. I made clear my view, in

³ see paragraphs 4 and 9 of the memorandum.

⁴ All of this material is referred to in the memorandum located at Tab 1.

the memorandum itself and orally, that consultation with the Minister should take place prior to steps being taken to disengage Ms Williams' services. My view was, as expressed, that the Minister should not be presented with a *fait accompli* and thus deprived of his right to consultation.

23. On 19 March I met with the Chief Commissioner for approximately 1 to 1 ½ hours discussing some of the issues raised in my memorandum of 18 March. At the meeting he told me in the clearest terms that he will not change his mind in relation to the issue involving the CEO. When I questioned why it was that actions were taken by both Commissioner Drake and Ms O'Brien in relation to disengaging the services of the CEO without my being told he advised me that there was no need for them to tell me. When I asked why I had not been consulted in the process I was advised that there was nothing wrong with him or the others telling me at such a late stage, and thus I was consulted. This was notwithstanding the fact that the decision had already been made and I was being advised of the result of the decision. I indicated to him this was hardly consultation. In that same conversation I indicated my concern that the legislation be complied with and that the Minister be consulted before any termination took place. I also indicated to the Chief Commissioner that my strong opposition to the steps being taken for the termination of Ms Williams' employment be made known to the Minister.

24. On 19 March, 2019 I was provided with a draft letter prepared by the Chief Commissioner addressed to the Minister. The terms of the draft were amended by myself so that any letter sent by the Chief Commissioner would indicate that as a Commissioner for Oversight I strongly opposed the proposal. Attached and contained within Tab "14" is a copy of such draft letter. I never saw the final form of the document that went out, until the 17th June 2019, after a request had been made by myself of the CEO and the Chief Commissioner for a copy of such document. Also attached as part of Tab 17 is a copy of such letter dated 3 May 2019 forwarded by the Chief Commissioner to the Minister. It should be noted that notwithstanding my earlier request (and his agreement) that when notifying the Minister the Chief Commissioner would also notify the Minister of the fact of my opposition to the termination of Ms Williams' appointment, this is not referred to in the letter.

25. Annexed hereto and located within Tab "15" is a memorandum forwarded to myself from the Chief Commissioner dated 19 March, 2019.

26. For completeness, I should also indicate that I had discussions with the Chief Commissioner wherein I stated to him that I felt what was occurring was wrong, and I felt conscious bound to make it known to the Minister by way of correspondence, the strength of my opposition to what had taken place. The Chief Commissioner indicated to me that whilst that option was available to me, it was not going to have any effect on his changing his mind in terms of the proposed action to terminate Ms Williams' services. To the best of my recollection I indicated to him that such an approach by him would not be consistent with the need for him to consult with the Minister about the matter. A couple of weeks later, after speaking with Ms Williams, and having regard to the fact that she was adamant that she was going to take the redundancy package and in the circumstances did not wish to return to LECC given what had transpired, so as not to delay the process of her being paid the redundancy package. I indicated to the Chief Commissioner that having regard to the overall interests of the LECC, and so as not to bring it into disrepute I would not be writing to the Minister. I was also concerned about Ms Williams being delayed in terms of payment to her. I now regret that decision given what has transpired since.

27. At pages 7-9 of tab "12" is correspondence forwarded by Ms Williams to the Acting Manager, Human Resources, Mr Athas forwarded on 17 March, 2019. In that email Ms Williams indicates that she did wish to proceed with the redundancy option that was put to her. Following Ms Williams' email, Mr Athas forwarded an email to the Chief Commissioner, presumably on the following day. From my perspective, I think it is fair to say that Ms Williams was placed in the invidious position of having no other option than that of accepting a redundancy package. In view of what had been transpiring without her knowledge, it is difficult to see how anyone in her position could have been motivated to respond by making submissions in relation to the role of the CEO in circumstances in which she was already aware that steps were taken to relieve her of the position. How could any person be expected to return to a workplace and work with the same people in such circumstances? What transpired was in effect a de facto termination.

28. This de facto termination occurred prior to any consultation with the Minister as required under the legislation. Indeed up till the present time, Ms Williams is still technically employed as the CEO, receiving her salary and benefits whilst on special leave. As of this date, the Minister has not expressed any view with respect to her termination. I

have obtained a copy of the letter forwarded by the Chief Commissioner to the Minister as of today's date. It is attached within Tab 14. To my mind, the terms of the letter are misleading, for reasons, inter alia,

- (i) There was no real consultation with Ms Williams about the termination of her employment, or the change of role. It was presented to her as a *fait accompli*. This was all done before any consultation with the Minister.
- (ii) The letter does not refer to the fact that the Minister was to be advised that the Commissioner for Oversight was strenuously opposed to the termination of such employment
- (iii) The letter does not make it clear that I was strenuously opposed to the change in role function, and the fact that the CEO role would be taken over by the Solicitor for the Commission.

C. In disengaging the services of the Chief Executive Officer, The Commission and more particularly the Chief Commissioner did not comply with the legislative requirement that he consult with the Minister prior to her disengagement.

29. Part 3, Schedule 1 of the Government Sector Employment Act 2013 provides as follows:

“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 *Law Enforcement Conduct Commission Act 2016*.”

30. This requirement raises significant issues from a policy, legal and management perspective. From a legal perspective it is considered that this requirement was not complied with. The word “consult” in its everyday meaning is defined as “seek information or advice from, refer to a person for advice etc, take into account”⁵. For reasons already given, this was not complied with respect to the termination of Ms Williams services. The decision to terminate her

⁵ the Pocket Oxford dictionary

services was effectively made before the Minister was advised of the fact, before the date that she accepted the redundancy offered to her, in circumstances where the Chief Commissioner made it perfectly clear to myself that, in effect, he had made his decision and whatever the Minister may have to say would not affect his decision. This discussion, and other material in support, has been referred to previously in this memorandum.

31. By the same token, having regard to the fact that the proposed appointment of Ms O'Brien as the CEO was made prior to any consultation with the Minister, there has been a breach of the legislation in this respect.

32. The appointment of Ms O'Brien as a CEO is inextricably interwoven with the change in structure of the Commission. Under the Commissioners protocol it is the Chief Commissioner who is to take primary responsibility for the CEO division. One assumes from this that the CEO is directly responsible to and accountable to the CEO. This is considered to be contrary to the legislation for a number of reasons. Firstly, the CEO is responsible to and accountable to the Commissioners as a whole. Secondly, making the CEO responsible to the Chief Commissioner overlooks the fact that the CEO has his/her own statutory responsibilities which must be complied with. If there is a failure on the part of the CEO in carrying out her statutory responsibilities the fault is that of all Commissioners. Thirdly, by appointing as CEO the Solicitor for the Commission creates a conflict in her position. On the one hand she undertakes the role of Solicitor to the Commission, being subject to the instructions of the Commissioners, whilst on the other hand she is required to carry out duties as the CEO, having her own statutory responsibilities, which in some respects may conflict with her responsibilities as the Solicitor. Fourthly, the appointment of a CEO who holds the position of Solicitor to the Commission is contrary to the "best practice model" contemplated by those responsible for the creation of the three Commissioner model. It was clearly contemplated that the CEO would be responsible for the management of the affairs of the Commission, leaving the Commissioners to focus on their core areas of work and responsibility. Fifthly, by creating such a model and making the CEO responsible to the Chief Commissioner would give greater opportunity and power to the Chief Commissioner to dictate the affairs of the Commission, whether legal or managerial, in circumstances where it is suggested that his role is that of the "first among equals" and no greater. All of these matters should have been

the subject of consideration with the Minister prior to being implemented by the Commission. If I am correct as to my interpretation of how the LECC Act should operate, such a structure would infringe the legislation. It would allow the Chief Commissioner to operate in a far more autocratic manner than presently exists. Should my interpretation of the law be correct, it would re-inforce any agency mal-administration.

33. The failure to properly consult with the Minister in accordance with the legislative requirements carries other severe consequences. It affects the ability of the LECC, to ever return to the structure of a full-time (or even part-time) Chief Executive Officer due to financial constraints. Whilst the Chief Commissioner may be of the view that this is the most appropriate structure, when any new Chief Commissioner were to be appointed, and if the wish of that Chief Commissioner and the Commissioners (whether one or both) wish to return to the original structure, it will be made very difficult for them. That this would be so was the subject of discussion between myself and the Chief Commissioner. I gave him my view that, given that he only had a short term left to run on his appointment, it perhaps would be better left to the new Commissioner to determine issues relating to the CEO. He rejected this view.

- D. There was a failure on the part of the Chief Commissioner and the Commission to consult with the Minister (and the Commissioner for Oversight) prior to
- (iv) Appointing a replacement CEO, and
 - (v) Changing the role of the CEO in the organisation.
 - (vi) Following on from (i) and (ii) the structure of the Commission has now significantly departed from that contemplated by the Tink Review and other recommendations regarding best practice guidelines so as to constitute agency maladministration.

These matters have been dealt with previously in this memorandum, and do not need to be repeated here.

- E. The Chief Commissioner purporting to manage and run the Commission on the basis that he has the final say on all matters involving the Commission, and on the basis that he has a power to direct and control the Commissioners for Oversight and Integrity in the exercise of those Commissioner's functions has impermissibly fettered the discretion of the Commissioners,

interfered with their independence, and acted contrary to the provisions of the legislation.

34. That the Chief Commissioner is of the view that he has the final say on all matters is clear from my discussions with him referred to in this memorandum, and from documentation attached. The view of the Chief Commissioner is diametrically opposed to the view held by myself. It is critical to the functioning of the LECC that this legal issue be resolved at the earliest time. It is of the utmost significance, and as previously indicated also affects other commissions having a three Commissioner model. This ongoing disagreement, if allowed to continue, will have a negative impact upon the management, operation and morale of Commission staff.
35. The fact that there is major disagreement between the Commissioners is now becoming well-known amongst NSWPF. This is most unfortunate as it affects the ability of LECC to effectively oversight the NSWPF. It also detracts from my authority as the Commissioner for Oversight if it be perceived that the Chief Commissioner and another Commissioner are in conflict. Given that LECC is a relatively small organisation, notwithstanding the best efforts of the Commissioners it is likely that the extent of the rift amongst Commissioners will become well known to staff. It is fair to say that senior staff are already aware that the Commissioners are not *ad idem* in a number of respects.
36. The question can be asked as to why I am in conflict with the Chief Commissioner on this point, whilst the Commissioner for Integrity does not appear to have any such problem. To my mind, The answer appears to be that the Chief Commissioner and the Commissioner for Integrity have been friends for many years. It appears that Commissioner Drake is allowed to go about her business without interference by the Chief Commissioner. I do not have that privilege. Indeed, the more resistance I show to the Chief Commissioner acting autocratically, the greater is the attempt on his part to exert his authority on me, whether directly or otherwise.
37. It was the expectation of the Tink review that the Commissioner for Oversight would conduct more investigations in the public interest than those which were carried out by the Ombudsman. This has not materialised. Indeed, the Commissioner for Oversight has not been able to undertake one investigation in the past two years. The reasons for this are that firstly, the education and prevention team

fall under the jurisdiction of the Chief Commissioner, and the manager has been advised that she is accountable to him and no one else in the Commission. Secondly, for a Part 6 to be undertaken it requires a decision by the Commissioners, and not merely the Commissioner for Oversight. Thirdly, given the fact that the prevention and education team have been silo'd, the Commissioner for Oversight is not even able to have a project undertaken without the Chief Commissioner's approval. Fourthly, given the resistance that I have shown to the Chief Commissioner being able to manage the LECC in an autocratic fashion, I have a strong suspicion that I am being prevented from having a Part 6 investigation on this basis. If I am correct, then I am the subject of a more sophisticated form of bullying. A suggested example is outlined below.

38. The issue of civil actions against the police, the nature of such actions, and the damages paid as a result of such actions have been the subject of contention and community interest in the past. Also, issues relating to what steps are taken by the NSWPF by way of education, prevention and further training of police officers after substantial damages have been awarded have been raised. Up till now, Commanders who have had police officers under their command have not been advised of the fact that damages or compensation monies have been paid as a result of the misconduct or unlawful actions of police officers under their command. It has gone so far as that there has been a systemic failure for police officers themselves involved in the civil action to have made known to them how much their misconduct or unlawful actions have cost the taxpayer of New South Wales. It has been almost impossible for people such as David Shoebridge MLC, Shopfront Lawyers (a community legal group), legal aid bodies as well as LECC itself to obtain information. One such example relates to the fact that in the NSWPF yearly accounts over the past few years contingent liabilities for damages in civil actions have been in the range of \$45 million up to slightly in excess of \$110 million. I have attempted through LECC to obtain this information from the NSWPF, but there has been a refusal to provide such information. David Shoebridge has attempted to obtain this information through the parliamentary process but has been provided with answers that mean virtually nothing. For very good reasons, some of which are well known to the Chief Commissioner, the concern about these issues is more than warranted.

39. In more recent times, LECC has negotiated with the NSWPF for an improvement in the systems in place for the sharing of

information between the Office of General Counsel of the police (being the body primarily responsible for the managing of civil actions against the police). For my part I am not satisfied that these proposed arrangements would satisfy community and public interest concerns and I have made my view known to the other Commissioners. Notwithstanding the strong views expressed by myself to the Chief Commissioner he is resistant to a Part 6 investigation. It is my intention to keep pressuring for a Part 6 investigation and to ensure that any decision made is duly recorded within LECC's administrative system.

40. The attempts by myself to have a project at the very least or a Part 6 investigation go back to July 2017. At that time I put forward a proposal relating to, inter alia, civil actions brought against police, the interaction between those civil actions and the Professional Standards Command insofar as whether or not matters were referred to that command, and appropriate action taken in relation to the alleged misconduct. The project had the anticipated outcomes of, inter alia,

- (i) how the NSWPF has responded to allegations of police misconduct and maladministration the subject of civil proceedings and identified in local Court criminal prosecutions;
- (ii) to what extent NSWPF misconduct and maladministration raised within the remit of the Courts has escaped identification and scrutiny by the oversight system;
- (iii) to what extent if any such systems then in operation could be improved.

41. This project was signed off on by the Manager, Prevention on 3 August, 2017. The document itself also contains a signature of the Chief Commissioner dated 18 August, 2017. For my part, and without my knowledge, this project was never proceeded with and appears to have died without any input from me. This was a consequence of the Chief Commissioner having control over the prevention and education team without any consultation with the Commissioner for Oversight who in fact was the driving force for the project. I was only made aware that the project fell by the wayside upon making enquiries from the prevention and education team as to how the project was progressing. A copy of the project proposal together with the comments of the Chief Commissioner contained within such document is at Tab 16.

42. Sometime after having been made aware that the project had lapsed, I prepared a document titled "Reasons for Obtaining Judgements, Settlement Amounts, Legal Advising and Other Documentation". The purpose of the document was to have, amongst other things, LECC approve an investigation pursuant to the provisions of Part 6. No such investigation ever came to be voted upon by the Commissioners or approved. Such document is contained within Tab 17.
43. It would also be noted from Tab 17 that a section 32 notice was being drafted for the purpose of being served upon the NSWPF and provided to the Chief Commissioner. A lengthy document was in fact drafted and provided to the Chief Commissioner for his perusal. Notwithstanding my indication that I wished for the document to be served upon the police, the Chief Commissioner never came round to having any input into the document and thus it was never pursued. In part, I accept responsibility although in mitigation the Chief Commissioner's view is that such a document should not be served upon the police without his approval.
44. Out of further frustration, I approached the manager of prevention and education after my return from leave in January 2019 for the purpose of discussing a Part 6 investigation in relation to the same subject matter, that is civil actions, sharing of information amongst police internal bodies, Statements of Claim, et cetera. The manager indicated to me her enthusiasm for the project and advised me that the team was in a position to undertake such an investigation.
45. On 6 February I was advised by the manager that she had spoken to the Chief Commissioner and that he would not approve the project. When I queried why, she indicated that resources may have been an issue. This was notwithstanding what I had been told by her previously that the team was indeed in a position to pursue such a project.
46. Feeling frustrated once again, I forwarded a written memorandum to my fellow Commissioners dated 21 May, 2019 setting out the reasons why there should be a Part 6 investigation. On 23 May at 3:15 PM there was a meeting held between the three Commissioners specifically for the purpose of discussing my

memorandum. Amongst other things for discussion the subject of resources for such an investigation were discussed. I indicated to the Chief Commissioner that it was a matter of important public interest that there be such a project. If it was a matter of resources I indicated that I would be prepared to allocate members from my own Oversight Division to participate in the investigation. Thus, this removed the resource issue was a problem. Notwithstanding, there was still resistance for a Part 6 investigation. Other suggestions were put forward by the Chief Commissioner such as the conducting of an audit of OGC, but I indicated to him that given the police attitude up until the present time an audit would not be effective or successful as the police would not produce all the documents required. To say the least, the meeting did not end comfortably. More on this will be set out in a further memorandum which I will be forwarding to your office. The Chief Commissioner invited me to put in written form why police proposals for reform were inadequate. In due course, I have now done this. However, I am putting forward this as an example of how difficult it is for me in my capacity as Commissioner for Oversight to operate to my maximum ability in the exercise of my functions. In the past two years I have never experienced the Chief Commissioner or the Commissioner for Integrity having to encounter such opposition and difficulty in trying to achieve when acting within their functions.

47. There are a couple of important points to be made in relation to the meeting referred to in the previous paragraph. Firstly, the Chief Commissioner indicated that all investigations within LECC fell within the province of the Integrity Division and not Oversight. I had to correct him and point out the recommendations of the Tink review, and the hope of the review that the Commissioner for Oversight would conduct more investigations. A copy of the relevant page of the report was provided to the Chief Commissioner after the meeting. Secondly, on the Monday following the meeting I again spoke to the manager of the prevention and education team and asked whether or not the team was in a position to take on a Part 6 investigation, and I was advised that they were. I was also advised that the team would be keen to take on such a project given its importance. This added to my suspicion that the Chief Commissioner in using resources as an excuse at our meeting may not have been a well based or founded excuse.
48. Because of my belief that such a project is of significance to LECC and its oversight of the NSWPF, coupled with obvious community concern, I once again provided the Chief Commissioner,

the Commissioner for integrity and the Chief Executive Officer with a proposal for a Part 6 investigation into the same matters. Such proposal is dated 12 June, 2019 and has not yet been dealt with. A copy of my proposal will be forwarded to you in due course.

Other concerns

49. When first taking up my appointment in June 2017, I quickly became aware of the extent of the friendship between the Chief Commissioner and Commissioner Drake, and the fact that the relationship went back many years. As time progressed, it became clear to me (as well as others) that the LECC was being managed by the two of them, to the exclusion of others who should have had input such as myself as Commissioner for Oversight and Ms Amber Williams as the Chief Executive Officer. The Commissioner for Oversight role was treated almost as an unnecessary appendage. I will have more to say about this in a further Memorandum I will be forwarding to you.

Why not resign ?

50. A question that can be validly asked of me relates to that of given the level of my frustration, lack of satisfaction and disillusionment I don't simply take the step of resigning my appointment. I have given this matter serious consideration. After having spent many years in the legal profession, representing the interests of and defending citizens and their rights, I do not feel it appropriate that I walk away from the situation which I believe will continue, if not become worse, should I resign. Unless someone is prepared to stand up and take a stance there is a probability that those who follow will come to believe that this is the way in which LECC is managed. A challenge to such management once it becomes ingrained will be much more difficult for those who follow.
51. Of particular concern to me is the fact that if I resign prior to the expiration of the Chief Commissioner's term of three years, which I believe to be in about mid-February 2020, any replacement

Commissioner will have to be approved by the Chief Commissioner. The process would likely lead to the selection of a Commissioner for Oversight who may not have the moral strength or characteristics to stand up to the Chief Commissioner and correct any mismanagement that may occur. There also is a possibility that any new Commissioner may feel beholden to the Chief Commissioner after his/her appointment. There is also a fear that any new Commissioner, if in conflict with any new incoming Chief Commissioner will be able to thwart any attempts to correct current management, reinstate the Chief Executive Officer role to its former position, or otherwise prevent the Chief Commissioner being able to implement due strategies by way of siding with the Commissioner for Integrity and preventing any resolution being passed at a Commissioners council meeting.

52. The work of LECC is extremely important in the interests of society. In overlooking the police force, it can be likened to a minnow swimming amongst whales. LECC's financial resources are limited, it is way understaffed given the functions it is to perform, and it is not an organisation that is considered by the public to carry out major and important functions. There is virtually no political clout. It is of critical importance given LECC's limitations that it function to its utmost ability. It is also of great importance that it function in a functional manner; with the three Commissioners and all members of the Commission carrying out their duties and functions in a cooperative and supportive manner. There must be mutual respect not only amongst the Commissioners but also amongst all other members of the Commission, whether directors, managers or those at the coalface itself. As my correspondence with the Chief Commissioner has shown, I have felt disempowered in my role as Commissioner for Oversight, and I have felt a lack of respect in the management of the organisation. This has come about, *into alia*, as a result of the Chief Commissioner believing that he can operate LECC in an autocratic fashion. The disempowerment of the CEO has aided this process.
53. Either I am correct in the interpretation of the legislation, or the Chief Commissioner's interpretation is the correct one. The situation must be clarified. If the Chief Commissioner's interpretation is found to be substantially correct then, in that circumstance it would be my choice as to whether I should continue in my role under such a regime or whether I should resign. It would also enable any future appointees to the roles of Commissioner for Oversight or Commissioner for Integrity to know precisely how they are to perform their functions, and the

extent to which they may not enjoy internal independence should they take up such appointments.

Re-imbusement for overseas travel

54. This is a matter that has caused me great concern. From my perspective what transpired between the Chief Commissioner and the then Minister for Police was unnecessary and could easily have been avoided. It had a reputational impact upon not only LECC but also the Commissioners who were caught up in the dispute. What follows hereafter is my understanding of the events that unfolded.
55. The Chief Commissioner paid from his own financial sources for the attendance at international forum in the United States of one of our managers (security). The matter was discussed amongst the three Commissioners and we were made aware that that was going to be the situation.
56. In the meantime, and unknown to me at that time I believe that an advising was sought from the Solicitor General relating to the "question of decision by Minister of Police concerning overseas travel by an officer of the Law Enforcement Conduct Commission". This advising would have an indirect impact upon the issue as to whether the Chief Commissioner was entitled to reimburse himself. I understand that the advising did not coincide with the Chief Commissioner's view of the law. At about this time, I understand that the Chief Commissioner had contrary to the advice of the Chief Executive Officer requested reimbursement of the monies. Both the CEO and the finance manager advised the Chief Commissioner that it was contrary to the rules. He thereupon directed that a payment for reimbursement be made to him.
57. In my initial discussions with the Chief Commissioner about the issue together with the Commissioner for Integrity, the Chief Commissioner provided me with his view of the law. I formed the view that it was arguable and thus did not oppose it. What I didn't know was the actual terms of the advising that had been obtained from the Solicitor General. I also did not know that the Chief Commissioner had been advised against making such payment to himself by the responsible personnel in the Commission. Had I have

been made aware of these facts I would have opposed any reimbursement taking place.

58. After the dispute with the Minister was made public, I was prepared to support the Chief Commissioner's position on the basis that the Commissioners had discussed the matter and the Chief Commissioner appeared to have an arguable position. The fact that the Chief Commissioner was supported by his fellow Commissioners and the Solicitor to the Commission was made known to the Commission staff at a general meeting, and as I understand it by way of media releases. Again, I was never made aware of the underlying factual background to the situation.
59. Thereafter an Auditor General's investigation and report was carried out. Notwithstanding the fact that I am a Commissioner, this document was never provided to me and I was only made aware of it in general terms. Again I took the position that, on the information then available to me the Chief Commissioner's position was arguable and I was prepared to at least show support for his position. Once again my support was forthcoming without any knowledge on my part as to what had transpired previously. Again it was made known by the Chief Commissioner that notwithstanding the adverse Auditor General's report he had the support of his Commissioners. I do readily concede that the Auditor-General's report was publicly available on the website, and to my regret I did not check its contents before agreeing to provide support to the Chief Commissioner.
60. To put the matter in simple terms, had the Chief Commissioner followed the advice provided to him from different sources to the effect that he was not entitled to reimburse himself none of this controversy would have occurred. My own reputation would not have been adversely affected, and that of the Commission itself would not have been adversely affected. Given the importance of this matter, I also intend forwarding to you a separate memorandum relating to this issue, after I have accessed all relevant documentation relating to the matter.
61. The importance of the Chief Commissioner reimbursing himself contrary to multiple advisings, and against internal advice is indicative of the failures that can occur within an organisation when a person in authority acts in an autocratic manner, does not seek the

advice of his fellow executive members, and withholds the substance of such information from, at the very least myself, if not the Commissioner for Integrity. Had I been made aware of the terms of such advisings that existed (and provided with copies), and the fact that internal advice was given that no such reimbursement should take place, I would have strongly opposed such reimbursement.

62. Also attached for your information are copies of the following:

- (i) Role Description for Chief Executive Officer (two versions, 17 August 2016 and 1 March 2017) (Tab 18)
- (ii) Role Description for Commissioner for Integrity (Tab 19)
- (iii) Role Description for Chief Commissioner (Tab 20)
- (iv) Role Description for Solicitor to the Commission (Tab 21)

63. Given the importance of the matters raised within this Complaint, I would like the opportunity to discuss the matters raised with you. In the meantime, until I have discussed these matters with you, I would like the terms of my complaint to be kept completely confidential. As one would appreciate, making such a complaint in itself is a serious matter made with considerable thought, and will likely have consequences within the workplace environment. The Commission has become sufficiently dysfunctional as it is.

Patrick Saidi

Commissioner for Oversight

18 June 2019

Memorandum to Chief
Commissioner regarding the
provisions of Section 19 of the
Law Enforcement Conduct
Commission Act

Name
Title

Memo

To: Chief Commissioner Adams
From: Commissioner Saidi
CC: Commissioner Drake and Acting CEO, Ms Michelle O'Brien
Subject: Memorandum to Chief Commissioner regarding the provisions of Section 19 of the Law Enforcement Conduct Commission Act
Date: 12th June 2019

On 18 March 2019 I forwarded to you a memorandum with respect to the Chief Executive Officer position at LECC. In paragraph 18 of that memorandum I stated as follows:

"In due course, the power of the Chief Commissioner vis-à-vis the other Commissioners will need to be resolved. Whether it comes about as a result of negotiation, intervention or legislative change remains to be seen. Whilst I digress for the moment, on one view of the matter the Chief Commissioner is entitled to act as a dictator under the legislation as it currently can be read (other than in qualified respects as set out in s 19). On another view, the Commissioners are far more empowered in the running of the organisation".

By way of memorandum in response dated 19 March 2019 you indicated the following (paragraph 19):

"The role of the Chief Commissioner vis-à-vis the other Commissioners is the subject of a memorandum which I proposed to circulate during the course of today, which refers to a decision about the issues made by me under s 19 (4) of the LECC Act..... In nothing that you have so far written on this subject have you suggested precisely what, under the legislation, might be the actual roles of the Commissioners which would or should qualify the specific provisions of s 19".

It is my view that for the Commission to run efficiently and productively there needs to be certainty and agreement as to the roles of each of the Commissioners in the running of the organisation. It is quite clear that your view of the powers of the Chief Commissioner and those of each of the Commissioners differ significantly from mine.

I will now take up the opportunity to respond to your memorandum of 19 March 2019, and more particularly to paragraph 19 thereof. Please forgive any repetition as

I do not have the time to thoroughly edit the document.

In order to understand the nature and purpose of the legislation, it is worthwhile looking at the Tink Review itself and the recommendations made therein, together with the proposed legislation at first instance, and the legislation which was finally enacted after debate in Parliament. The submissions made by the Department of Premier and Cabinet are also instructive.¹

The Tink Review

In recommending a new model of police oversight for New South Wales, Mr Tink indicated that the new body should have a Commissioners Council- a governing council comprised of the Commissioner and two Deputy Commissioners. The Council should be chaired by the Commissioner, and should meet regularly to:

- consider which matters are to be investigated;
- consider which matters are to proceed to a private hearing;
- consider which matters are to proceed to a public hearing;
- consider which matters are to be transferred from the Oversight Division to the Integrity Division, and vice versa;
- establish a triage system for the handling of complaints received;
- consider the scope of referral arrangements to other bodies after consultation with the Police Commissioner;
- settle class and kind agreements after consultation with the Police Commissioner; and
- consider trends in granular intelligence.

He further indicated that while it is expected that this new council will be able to operate in a collegiate atmosphere, the Commissioner will have the final say in the event of any disagreement.²

It is considered that the Tink review, in referring to the Commissioner having the final say in the event of any disagreement was referring to a disagreement relating to those types of, and similar matters set out in the bullet points above. That the above matters were not the only matters that should be subject to a meeting of, and deliberation by the Commissioner's Council can be seen from the further recommendation relating to the employment of former New South Wales Police Officers in the Oversight Division. On this aspect, the recommendation was that the final decision on any particular proposal to engage a former NSWPF officer should be made following deliberation by the Commissioner's Council.³ . In the context of

¹ "Review of the Inspector's report to the Premier: the Inspector's review of the ICAC", submission number 25, 29 July 2016

² see pages 3 and 111, and recommendations 9-11 of the Tink report.

³ see Clause 23 at page 9 and recommendation 23.

the report when read as a whole, it is considered that the Tink Report was referring to any matter of significant importance to the Commission, requiring the attention of the three Commissioners acting as a group in coming to any determination. That this is so can also be gleaned from Recommendation 11 (set out below) which refers to the Chief Commissioner having the final say on any matter which is to be the subject of deliberation by the Commissioner's council. There was no recommendation made, nor does it appear in the legislation apart from perhaps a weak argument based upon an unfortunately drafted s 19 that the Chief Commissioner is entitled to have the final say in any matter not required to come before the proposed "Commissioners council".

Recommendation 11 of the Tink report provided as follows:

"To ensure certainty in decision-making as well as reflect the status of the new body as one exercising Royal commission -type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioner's council cannot be resolved by consensus."

In the first draft of the *Law Enforcement Conduct Commission Bill 2016* the provisions of section 19 read as follows:-

19 Decisions of Commission

- (1) Except as otherwise provided by this section, any act, matter or thing done in accordance with this Act by or in the name of, or on behalf of the Commission by a Commissioner, is taken to have been done by the Commission.*
- (2) The following functions of the Commission are exercisable only by at least two of the Commissioners (one of whom being the chief 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 under section 61 to hold an examination under Division 3 of Part 6 of conduct that is (or could be) serious misconduct or serious maladministration.*
- (3) The following functions of the Commission are exercisable only by a unanimous decision of the Commissioners:*
 - (a) a decision under section 21 (1) to delegate a function of the Commission,*

- (b) a decision under section 63 (2) and (5) to hold an examination (or part of an examination) of conduct that is (or could be) serious misconduct in public,
 - (c) a decision under section 79 (2) that there are reasonable grounds to issue a search warrant.
- (4) In this section:
unanimous decision of the Commissioners means a decision supported unanimously at a meeting of the Commissioners at which all Commissioners are present or, if the matter is decided by circulation of papers among the Commissioners, approved in writing by all Commissioners.

It is noteworthy that nowhere in the first draft bill was any provision made for the Chief Commissioner to have the final say on any matters other than his having a casting vote in those matters coming within the terms of Section 19 (2).

Proposed amendments of the *Law Enforcement Conduct Commission Bill 2016* suggested that section 19 read as follows:-

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.*

The reason for the proposed change may be gleaned from the speeches delivered in Parliament. On the reading before the Legislative Council on 8 November 2016 the following statements were made in speeches delivered:

"This amendment would require decisions to have the consent of two of the three commissioners, one of course being the chief commissioner. The Government supports this amendment. The Government recognises concerns about the potential for delays to certain decisions if unanimous agreement of all Commissioners is required and one of the Commissioners is not available. The Government is confident that the high-level scrutiny which is required will still occur with the decision-making structure in which two of the three Commissioners, one being the chief commissioner must agree. The amendment is also consistent with the recommendations of the recently released committee on the Independent Commission against Corruption review and report on the ICAC Inspector' Report. In that report the committee recommended a three-member commission for the ICAC and that the use of its extraordinary power be authorised by majority agreement of the three-member Commission. The Government supports the amendment."⁴

Upon the third reading before the Legislative Council on 8 November, 2016. Mr Shoebridge stated, *into alia*, as follows:-

".....one would hope that wherever possible the three Commissioners would be a united team, but there is also a place for a dissenting voice amongst the Commissioners that might challenge the majority and say, "is this really the place for a public hearing?" A Commissioner may have that philosophical view and be more willing to challenge it, which would lead to those questions being tested amongst the three Commissioners. However, we would not want that minority position to nullify the views of the majority, meaning there could never be public hearings. This amendment will not only significantly improve the day-to-day operation of the Commission by facilitating some robust exchange between the Commissioners and potentially small amounts of disagreement; it will also allow for a ready mechanism for the question to be determined by majority and ensure that there will be some public hearings."

Thus it could be seen that the basis for the introduction of a provision such as

⁴ The Hon John Ajaka. See also speech by the Hon Lynda Voltz "We feel that it is better that the commission exercises its functions by majority decision. This amendment will avoid any difficulty that will arise in that regard".

section 19 (4) in its current form was effectively to overcome the provisions of section 19 (3) of the first draft Bill which required unanimity on the part of the Commissioners in decision making so far as the matters referred to were concerned. It was not meant to give the Chief Commissioner power to make decisions on his/her own in relation to all matters that are not governed by section 19 itself. All major or significant decisions falling outside of the scope of section 19 (2) and (3) were intended to be determined in a meeting of the Commissioners Council.

Nowhere within the Tink Review, draft bills (whether the first or later), the second reading speech, or the speeches before the Legislative Council was any indication given that the Chief Commissioner was to have the right to make any important decisions unilaterally.⁵ The provisions of section 19 (4) were predicated on the belief that LECC would be governed by a Commissioners Council. Any disagreement by the Commissioners at such a Council meeting would be resolved by the Chief Commissioner having the final say in such matters (i.e. a casting vote). Further, the provisions of s 19 (1) make it clear that each Commissioner "except as provided by this section" can exercise the functions of the Commission, and carry out any necessary acts and duties and has the necessary powers to undertake that Commission's function. There is no qualification along the lines of "subject to the direction of the Chief Commissioner", "subject to the approval of the Chief Commissioner" or "with the concurrence of the Chief Commissioner". Importantly, Section 19 (4) does not qualify Section 19 (1) in terms of the exercise of functions.

The Tink review examined closely the role of the Ombudsman as well as that of the Police Integrity Commission before recommending the creation of a single body. As to how the new body was to operate, and the extent of the powers of the "Deputy Commissioners" (as envisaged by Tink) can be seen from the following recommendations and comments made:-

Recommendation 5

To establish an organisational structure that will support a smooth transition to a combined model, the new Act should create separate integrity and oversight divisions, each headed by a Deputy Commissioner who is able to exercise powers and functions, and receive funding allocations, that reflect each divisions distinct responsibilities.

Recommendation 8

To recognise the status of the new commission as a body exercising Royal

⁵ One possible arguable exception relates to the appointment and/or termination of the employment of the Chief Executive Officer under the legislation. However, given that the Chief Commissioner may have this lawful right given to him, it is suggested that such an action being of a significant nature it was not contemplated that the exercise of such lawful power by Chief Commissioner should ever be exercised without consultation with the other Commissioners, and by way of vote at a Commissioners Council.

commission type powers, the new Deputy Commissioners should be appointed by the Governor, with the concurrence of the Commissioner, each for a period not exceeding five years, and be Australian legal practitioners of a minimum of seven years standing.

In making this recommendation, the Tink review felt it was necessary to establish legislation for the provision of a formal process involving these Deputy Commissioners in managing the affairs of the new body in a way that does not detract from the authority of the Commissioner. On that basis he recommended that there be a "Commissioners Council" which met on a regular basis to determine, among other things, the matters set out in his recommendation.

The Tink Review referred to the fact that the Ombudsman's role was perceived by community sector organisations as not having been sufficiently pro-active. On this aspect the report stated "*I consider it likely that the Deputy Commissioner for Oversight's power to initiate public interest investigations will be activated more frequently, along the lines I discussed in chapter 7*".⁶ Significantly, up to the present date, and after the LECC had been operational since 1 July, 2017, there has been not one investigation carried out by the Oversight Division. This has been caused in part by the Prevention and Education team being silo'ed under the authority of the Chief Commissioner with the Commissioner for Oversight being prevented from having free and ready access to the services of that team or the CEO.

In his recommendations 9, 10, and 11 Mr Tink emphasised the role of the Commissioners Council in the organisation and the hope that the Commissioners would be able to work in a collegiate atmosphere to determine all such matters referred to. If the three statutory office holders cannot reach consensus then the final decision should be for the Commissioner alone to make.⁷ What is clear is that there is to be deliberation by the three Commissioners. Nowhere in the Tink review is there any suggestion made that any Chief Commissioner can and should act on his own in the making of any important decision affecting the Commission.

Recommendation 11

"To ensure certainty in decision-making, as well as reflect the status of the new body as one exercising royal commission type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioners Council cannot be resolved by consensus".

Nowhere in the Tink Report, Review of the Independent Commission against Corruption: Consideration of the Inspector's Reports⁸, the first draft bill, the second

⁶ The Tink Review, Recommendation 8, at Page 111.

⁷ Ibid, Recommendations 10 and 11, page 1112.

⁸ Report 2/56, October 2016, Parliament of New South Wales

draft or the Act as proclaimed was there any specific provision for the Chief Commissioner in his own right, having the final say in any matter, or of his having the power to direct any Commissioner in the exercise of his/her functions in managing the affairs of the Division. Any supervisory control for the governance or management of the affairs of the Commission was to take place by the Commissioners through the Commissioners Council. As referred to elsewhere, it was contemplated that only matters of a significant or serious nature, would be dealt with by such council.

The Tink review in making recommendations had in mind that the Commissioner for Integrity and the Commissioner for Oversight were to be task-specific with their own unique responsibilities and powers. It was for these Deputy Commissioners to manage the affairs of the new body in a way that did not detract from the authority of the Commissioner. It was with that in mind that a "Commissioners Council" be established. It was not contemplated that the Chief Commissioner would himself manage the affairs of the Commission by taking over any of the duties, responsibilities or functions of the Commissioners for Integrity or Oversight.

The requirement that each of the Commissioners be appointed by the Governor on the recommendation of the Government is another indicator that the position was one carrying major responsibility in the exercise of functions by any Commissioner.

In terms of the proposed structure of the LECC (and "best practice models") the matters set out below were considered for discussion in the Submission made by the Department of Premier and Cabinet to the Parliamentary Committee on the Independent Commission against Corruption.⁹ The Department of Premier and Cabinet in making its submission drew to the committee's attention the recent and proposed reforms to the design of integrity institutions such as LECC so as to support the more effective exercise of an organisation's functions and powers.

"The staff of the LECC will be employed in a separate public service agency under the GSE Act to enable the Commission and the Commissioners to exercise their functions. The Chief Commissioner will not be the head of the staff agency. Instead, the staff agency will be run by a public official employed under the GSE Act. The Executive Manager/CEO of that public sector will be responsible for running the corporate and governance aspects of the LECC. The Executive Manager may also support the Chief Commissioner and other Commissioners in the execution of their statutory functions."¹⁰

In considering a possible "best practice" model for the ICAC the submission stated the following:-

⁹ And as adopted in the report of the Committee on the Independent Commission against Corruption, Report 2/56, October 2016.

¹⁰ Page 11 of DPC Report dated 29 July 2016.

"The structure of the NSWEC and the proposed LECC, and comparable integrity agencies in other Australian jurisdictions, suggest a number of features that could now be considered to be best practice for the organisational design of oversight bodies.

There are two core features of such a model.

The first is a decision-making body, invested with the statutory powers of the Commission, constituted by a panel of Commissioners (or a Commissioner and Deputy Commissioners), rather than by a single Commissioner. In the LECC example, it is proposed that there will be three Commissioners, one of whom is designated the "Chief Commissioner"..... Importantly, members of the Commission are appointed by the Governor, and so are not in any direct employment relationship between each other. Rather, they are peers, albeit that one of them may, in respect of decision-making, be designated as chair or chief in the sense of being the "first among equals".

The second core feature is structural separation between the members of that decision-making body, and the operational organisation..... That day-to-day business and management of the organisation would be a matter for the organisation itself, managed by a manager, subject to the oversight of and policies set by, the panel of Commissioners. To ensure organisational alignment, the manager should be appointed by, or on the recommendation of, the Commissioners".

The benefits of the best practice model structure include:-

- The model does not require a sole Commissioner to have the skills, experience or interest in managing the organisational aspects of the organisation.
- With multiple Commissioners there would be a more diverse set of skills and experiences brought to bear on the Commission's deliberations and in exercise of its other skills, such as policy, financial investigation and audit skills, or to its educational and corruption prevention functions.
- Multiple Commissioners also provide a peer group and a check against "agency capture" and a check against idiosyncratic decision-making.
- Although a panel structure does involve the potential for disagreement between the Commissioners, this is an important aspect of their role.
- The Constitution of the Commission as a panel of Commissioners (together with similar proposals in respect of the Inspector) may assist in alleviating tensions that can arise between a single Commissioner and a single inspector, a panel structure reduces the extent to which the entire Commission or Inspectorate is identified with a particular individual.

- By separating the statutory decision-makers (the Commissioners) from the organisation itself (the Executive Manager/CEO and staff), there is less risk of the decision-makers being “captured by” the organisation. This structure positions the decision-makers above and at a distance from the day-to-day business and management of the organisation, allowing for greater focus on decision-making.
- This separation also allows for the better use of the particular skill sets of each person to be aligned with particular functions. For example, former judicial officers would be responsible for making legal decisions based on submissions, while an Executive Manager/CEO with management and administrative skills would be responsible for the day-to-day running of the organisation.
- Importantly, such a structure appears to be consistent with the government's commitment to maintenance of a strong and effective Commission.”¹¹

Constitution of the Commission

The LECC is constituted as a corporation. It consists of a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight. No Commissioner is given prominence over another Commissioner within section 18 of the LECC Act itself. There is no provision in the legislation which specifically provides for the Chief Commissioner to give any direction to any other Commissioner as to how to carry out their functions or conduct the management of their affairs within their respective divisions.

Summary

Having regard to the above it is considered that the following matters arise:-

1. The Law Enforcement Conduct Commission comprises three Commissioners with the Chief Commissioner having the status of the “first among equals” amongst the Commissioners. The structure of the three Commissioners is that of a flat panel, and not hierarchical.
2. Each of the Commissioners being appointed pursuant to statute have their own responsibilities and independence. They are not subject to the direction or control of the Chief Commissioner in the carrying out of their respective functions, obligations and duties.
3. The Commissioners (including the Chief Commissioner) are subject to decisions made by the contemplated Commissioners Council. Whilst not intending to be exhaustive, this would include decisions not only covered by Section 19 (2)-(3) but also important decisions relating to strategy of the

¹¹ Ibid, pages 14-16

- Commission, employment or dismissal of a CEO, Solicitor to the Commission, Directors and significant matters of the like. It would not cover matters involving the day to day functions of the areas of responsibility of the Commissioners for Oversight or Integrity.
4. The "Best Practice" model for governance of the Commission should be followed.
 5. For the Commission to operate effectively, and as contemplated by the Tink Review, the Commission needs to introduce a formalised procedure whereby all major decisions to be made come before a meeting of Commissioners. Records should be kept of decisions made by the Commissioners Council or an equivalent body.
 6. The Chief Commissioner is not entitled to act unilaterally in making any major decisions affecting the LECC.
 7. It would defeat the purpose of the legislation if the Commissioner for Oversight and the Commissioner for Integrity were required to act under dictation. This would also be contrary to the common law prohibition on fettering of discretion.

Section 19 (4) of the Act.

The Tink Report, the submission made by the Department of Premier and Cabinet and the other material referred to previously have been referred to at some length in order for one to gain an understanding as to how it was envisaged that the LECC would operate. It is recognised that in construing legislation, it is primarily the legislation itself which must be carefully considered when any interpretation is undertaken.

It is considered that the Tink review and the recommendations made are important matters to consider in construing the legislation. As was stated by Mr Troy Grant in introducing the legislation in the Second Reading Speech, inter alia,:

"Mr Tink consulted widely throughout his review and received a number of detailed written submissions from stakeholders. He also held meetings with a number of stakeholders to further inform his review. Mr Tink provided his final report to the government on 31 August, 2015. The final report of the Tink review is impressively thorough. It contains a very useful historical context on the evolution of police oversight in New South Wales; an examination of oversight systems in other jurisdictions; and, most importantly, a number of comprehensive evidence-based recommendations. **The government accepted Mr Tink's recommendations, and they form the basis of this reform.** I take this opportunity to once again thank Mr Tink for his undertaking and for the comprehensive review that he presented to

Government".¹²

(emphasis is mine)

Provisions such as Section 33 and more importantly Section 34 of the *Interpretation Act 1987*¹³ are of great assistance in interpreting the provisions of Section 19 (4), particularly if one or a court were to be of the view that some or all of the extrinsic material referred to in this Memorandum should be taken into account so as to assist in arriving at a correct interpretation of the provision.

If one were to ignore the underlying philosophy of the proposed legislation together with the extrinsic material, an interpretation of s 19 becomes not merely problematic but it can lead to absurd results.

The following matters are set out for consideration.

- (i)
- (a) Section 19 (1) provides that "except as otherwise provided by this section, the functions of the Commission are exercisable by a Commissioner...." The "Functions of Commission" are set out in Part 4 of the Act. Matters contained in Parts such as 5, 6, 7 and 8 also set out functions of the Commission.
 - (b) The only provision that limits the exercise of functions by a Commissioner (whether Chief or otherwise) is sub-section (2).
 - (c) Of utmost importance, ss (4) refers to decisions on matters and not decisions on the exercise of functions. Thus, ss (1) is not and cannot be otherwise read down
 - (d) The terms of section 19 (4) read as "..... A decision of the Chief Commissioner prevails in the extent of an inconsistency in the decisions of Commissioners with respect to a matter".
 - (e) It is significant that the word "decision" appears in subsections (2),(3) and (4) confirming the view that the word's meaning should be interpreted in its context, that being "decisions" of significance made by way of a meeting of Commissioners.
 - (f) Had subsection (4) read "..... A decision of the Chief Commissioner prevails in the event of an inconsistency in the exercise of *functions* of Commissioners" there may have been some weight given to the argument that the Chief Commissioner has the ability to overturn any decision made by a Commissioner in the exercise of his/her functions.
 - (g) The reference to "an inconsistency in the decisions of Commissioners with respect to a matter ", having regard to what

¹² Second Reading speech, 13 September 2016.

¹³ Section 34 is reproduced in whole at the end of this document.

appears to be the deliberate use of the plural also indicates that the sub-section relates to decisions made by way of the Commissioners Council.

- (ii) The word "matter" in section 19 (4) is capable of a number of meanings. The word is one of such generality that it necessarily takes its content from the category of matters, and the context in which it appears.¹⁴ In this case, it needs to be given a meaning consistent with the other provisions of Section 19. The reference to "matters" cannot mean all matters. Rather, it is referable back to a matter that requires the decisions of Commissioners acting as a group or council. That this is so can be seen from the interpretation of the words "matter" and "matters" in constitutional cases.¹⁵
- (iii) If one goes to the Macquarie Dictionary (5th edition) the word "matter" is defined *into alia*, as "something of consequence, importance or significance" if this interpretation were to be adopted that would lend support to the analysis conducted previously that matters of importance or significance should come before a Commissioner's Council for determination. This is the only meaning consistent with the legislative intent.
- (iv) If the word "matter" were to be given a wider meaning so as to mean the equivalent of "anything" or "any matter no matter how significant or insignificant" this would lead to absurd results. Adopting such a liberal reading of Section 19 (4) for the moment could lead to the following consequences:
 - (a) The Chief Commissioner may be able to direct any Commissioner in the carrying out of every day functions such as whether or not correspondence should be replied to, the terms of such correspondence, the language used within such correspondence, and indeed the use of grammar within such correspondence.
 - (b) The Chief Commissioner may arguably be able to tell any other Commissioner what time their starting time for work should be, what time they should finish and how they are to spend their day in terms of priority for work.

¹⁴ *AB -v- National Crime Authority (1997) 49 ALD 397 at 402-403 per Northrop ACJ.*

¹⁵ See for example: *Re Judiciary and Navigation Acts (1921) 29 CLR 257; [1921] HCA 20; Truth about Motorways -v- Macquarie [2000] HCA 11; (2000) CLR 591; State of South Australia -v- State of Victoria [1911] HCA 17; (1911) 12 CLR 667.*

- (c) The Chief Commissioner on an unrestricted basis would be able to make decisions relating to the staff of the respective divisions, their work practices, their management structure, and effectively overrule every determination and policy decision made by a Commissioner in managing their division.
 - (d) The Chief Commissioner may arguably prevent any Commissioner in exercising the functions reposed in him/her by virtue of section 22 (1).
 - (e) The Chief Commissioner may arguably have power to direct the Commissioners as to whom they can meet with, the basis upon which they can meet with any person, and what is to be the subject matter of the meeting.
 - (f) The Chief Commissioner would arguably have a power to prevent a Commissioner from undertaking any project relevant to that Commissioner's responsibilities.
 - (g) The Chief Commissioner may arguably interfere with a Commissioner's function and right to report to Parliament.
 - (h) The Chief Commissioner may arguably have a power so as to tell each Commissioner what his/her lunchtime hours are to be.
 - (i) Many other similar examples could be given to those set out above.
- (v) It would be somewhat strange to find in such legislation the Commissioners being given the broad powers and discretions in sections 18 and 19 (1) yet those powers can be taken away by way of decision-making by the Chief Commissioner by means of section 19 (4).

In addition to the matters raised in the previous paragraph, if Section 19 were to be interpreted in the way contended for by the Chief Commissioner does this mean that:

- (a) The Chief Commissioner would have the power to tell the Commissioner for Oversight what Statutory Notices should be issued by the Commissioner under Part 7 of the Act, as well as the terms of such notices.
- (b) What Section 32 Notices, Section 103 or 104 requests can or should be made by the Commissioner, as well as the terms of such requests.
- (c) If and when to monitor an investigation. If and when to discontinue the oversight of an investigation.
- (d) What reports if any should be made to Parliament, and the contents of such reports.
- (e) Whether critical incidents should be monitored, and if so, by whom.

- (f) Does the Chief Commissioner have the right to tell the Commissioner for Integrity how to run hearings, what findings should be made, and what witnesses should be called ?
- (g) Again, many other significant questions can be raised on this aspect.
- (h) The Chief Commissioner could fetter the discretion of the other Commissioners in the exercise of their statutory functions and they would be required to act under dictation.¹⁶

(vi) There are other important legal issues that arise which are pointed out here and are not intended to be dealt with in this Memorandum.

- (a) To what extent, if any, can a power to exercise a function given by Parliament to a Commissioner be taken away by decision-making on the part of the Chief Commissioner, acting alone?
- (b) To what extent, if any, can a discretion given to a Commissioner to exercise a function by an Act of Parliament be interfered with by a Chief Commissioner, acting alone?
- (c) Does any such power exist in the current legislation, whether by way of Section 19 (4) or elsewhere?

My suggested answer to each of the above is in the negative.

(vii) At a managerial and organisational level, given the extent of the powers given to the Commissioners for Oversight and Integrity by virtue of Section 19 (1), if any Chief Commissioner were to seek to micro-manage or attempt to unduly place restrictions on the work of the Commissioners, then there is a prospect that any Commissioner may seek to carry out his/her functions and give as little feedback as possible to a Chief Commissioner so as to avoid unnecessary interference. This phenomenon is one known to exist as management practice in badly managed corporations. Put simply, the more a person or corporation is "kept in the dark" about a Division's activities, the less likely there will be interference from upper management.

¹⁶ Given that there may be unreasonable or absurd results arrived at if a very broad or liberal interpretation of "matters" and "decisions" were to be adopted, this would lead to one calling in aid the provisions of Section 34 (1) of the Interpretation Act. Also, Section 34 requires that "decisions" and "matter" be read and construed within the context of Section 19 itself.

Is Judicial Independence an appropriate guide ?

Does it assist for one to look at the concept of internal judicial independence, which requires that a judicial officers functions must be free from control by other judicial officers, including the presiding or most senior judicial officers. It is recognised that judicial independence is not absolute in that it must be restricted by the demands of good judicial administration.

“Generally, one cannot deny the need for administrative supervision over judges to promote the efficiency of judicial administration. Therefore, judges must submit to administrative guidance by other judges who are in charge of the administrative management of the court. Such administrative guidance should be directed to matters of case management and court administration but should not refer to the exercise of the judicial function itself, i.e. the procedural and substantive decision-making aspect of adjudication.”¹⁷

The core concept of internal judicial independence was referred to by the High Court as follows:

“The independence of the judiciary includes the independence of judges from one another. The Chief Justice of a superior court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities..... Responsibility for ensuring the orderly and expeditious discharge of the business of the court..... Does not extend to directing, or influencing, or seeking to direct or influence, judges is how to decide cases that come before them.”¹⁸

There appears to be widespread acceptance of the principle that unless provided for otherwise in the legislation governing the jurisdiction, the head or designated chief of the jurisdiction should be regarded as the first among equals.¹⁹ This concept, it is suggested, is at the very core of the Tink Review and material already referred to.

¹⁷ Shetreet and Deschenes (eds), 'Judicial Independence; The Contemporary Debate' (1985) The governance and general management of the Law Enforcement Conduct Commission is being conducted contrary to the terms of the Law Enforcement Conduct Commission Act 2016.

¹⁸ Re Colina; Ex parte Torney (1999) 73 ALJR 1576 at 1582

¹⁹ There are a number of articles, publications and court cases on this topic of internal judicial independence but for the sake of brevity they are not referred to here. It is considered that the core principles are sufficiently set out here.

I point out that when I first took up my appointment, the Chief Commissioner indicated to me orally that he saw his role as Chief Commissioner as that analogous with that of the head of a jurisdiction. In its context I understood him to mean, a position similar to a Chief Judge at Common Law, or the District Court.

The Commissioners Protocol dated 2 May 2019

The Commissioners Protocol dated 2 May 2019 is on my recollection the fourth version of a Commissioners protocol first presented to me earlier this year. I have refused to enter into an agreement to abide by the previous Commissioners protocols. The reasons why have been previously communicated to the Chief Commissioner. Given that I have now been provided with a copy of the version of 2 May, I feel it appropriate to point out that, in my view at least, the Chief Commissioner has no power to unilaterally impose upon me as a Commissioner for Oversight the terms of such a protocol, either in its entirety or with respect to the individual matters contained therein.. What follows are my reasons as to why I am of this view.

Having regard to the analysis of the Tink Report set out above, the history of the Bills, and the manner in which the legislation came to be enacted by Parliament it is my view that neither the Tink report nor the legislation as enacted contemplated that the Chief Commissioner of LECC could exercise power (whether correctly described as autocratic, unilateral or otherwise) to manage and conduct the affairs of LECC other than by way of a process of a Commissioners Council.

Just as the Premier, the Minister, the Attorney-General cannot impeach the independence of any Commissioner, it is strongly felt that the Chief Commissioner has no greater power. The Chief Commissioner should be considered as the "first among equals" with a casting vote on any matter considered by the three Commissioners as a group. Nowhere in the legislation is it provided that the Chief Commissioner has any power to tell any Commissioner how to go about the "run-of-the-mill business" of the day-to-day management of his/her affairs. Nowhere is it specifically provided that any Commissioner is accountable to the Chief Commissioner in any respect.

If the Chief Commissioner wishes to maintain a position that "a decision" or "a matter" as referred to in section 19 (4) refers to any and every aspect of a Commissioners functions, powers or duties, for reasons already stated this would be contrary to the purpose of the legislation, and would make a mockery as to the recommendations of the Tink review, best practice guidelines and the legislative view as to how the LECC should operate. If this were the intention of the legislature then the Commissioners would not have been given the status so given to them

under the legislation. There would not have been a need for each Commissioner to have been appointed by the Governor, and to have bestowed upon them under legislation the independence that they enjoy.

The legislation makes it clear that the affairs and management of the Commission is that of the three Commissioners. The overall responsibility for the Commission is that of the three Commissioners with the assistance of the CEO who has his/her statutory obligations.

In any frank exchange of ideas, for my part I would find it useful for the Chief Commissioner (and any other relevant person in the Commission) to indicate to me his/her view as to what "a decision" or "a matter" as referred to in section 19 (4) in fact means or should be defined as meaning should there be no agreement with my interpretation. If any other interpretation were contended for, I would appreciate the basis upon which any other interpretation is put forward. I would also like to appreciate any view to the contrary that Section 34 of the Interpretation Act can be called into play so as to assist in interpreting Section 19 of the LECC Act.

I would be particularly interested in knowing, if there is agreement that the word "matter" is to be read down, what the meaning of the word should be after it has been read down. It would also be useful to know the Chief Commissioner's view as to what "functions" both the Commissioner for Oversight and the Commissioner for Integrity would be permitted to perform without being subjected to control.

An important reason as to why I do not agree with the Commissioners Protocol is my belief that the Chief Commissioner does not have the power to impose such a protocol whether unilaterally, or with the support of the Commissioner for Integrity.

Item (v) under the title of "organising principles" is in part misconceived. The reference to "matter" and "decision" takes a meaning of those words which, for reasons given, I disagree with. Furthermore:

- a. It is not appropriate to bundle what are in effect 10 separate "decisions" into one document when each and every one of those decisions should be the subject of separate discussion.
- b. A formal record should be made and kept as to each decision made.
- c. The matters were never discussed by the 3 Commissioners at a Commissioners council or meeting,
- d. If the protocol is meant to reflect how the Commission is currently being managed by the Commissioners and the CEO, my view is that such management does not accord with the legislation or the recommendations of the Tink Review as well as the other material referred to in this memorandum..

A further major reason as to why I am opposed to the Commissioners Protocol is the lack of clarity and definition to the meaning of words and phrases such as "responsibility", "consult" and "primarily". It is clear from my past dealings with the Chief Commissioner that his interpretation of the word "consult" appears to differ substantially from my understanding of the word. If, as set out in clause 6 ("responsibility for the Oversight Division, including auditing and Critical Incidents, is primarily that of the Commissioner for Oversight") the word "primarily" is intended to mean that the Chief Commissioner has the ability to manage and control the Oversight Division other than by means of significant decisions made by the "Commissioner's Council", this view is rejected.

It is conceded that, on the face of it, on the assumption that such a protocol is lawfully authorised, the Commissioners protocol, subject to what is said later, may appear to be non-contentious. Any controversy that does arise comes about as a result of the interpretation of the document and the obvious disagreement between the Chief Commissioner and myself as to the nature and extent of any power he holds within the Commission. For my part, I am happy to willingly co-operate and engage in matters relevant to the conduct and management of the Commission. In saying this, I am not prepared to accept that the Chief Commissioner is the only decision-maker in all matters relevant to the Commission, or that he can act unilaterally in any significant matter concerning the Commission.

Allocation of Responsibilities

Looking at the numbered clauses the following further comments are offered with reference to each numbered clause.

1. It is disagreed that the Chief Commissioner has primary responsibility for the overall governance of the Commission. Furthermore, the absolute responsibility for overall governance of the Commission is that of the three Commissioners. Such governance is to be through the Commissioners Council. The Commissioners for Integrity and Oversight cannot abrogate their responsibilities nor have them taken away by a Chief Commissioner. The Chief Executive Officer has statutory responsibilities which must be complied with. In essence, Clause 1 has no legislative basis.

On the assumption (which I do not accept) that Clause 1 has legislative authority, the term "overall governance" requires greater definition in any event, given that one interpretation would mean that a Chief Commissioner could in effect run the Commission in an autocratic manner, thus attacking the independence of the Commissioner for Oversight and the Commissioner for Integrity. One says this given the definition of "govern" and "governance

in the Pocket Oxford Dictionary means “rule or control with authority” and “function of governing”.

Nowhere in the legislation is it provided that the Chief Commissioner has the responsibility for “governance”, and nowhere is it provided that the Chief Commissioner can “rule or control with authority” or similar. In saying this, there is nothing that would prevent the Commissioners amongst themselves agreeing on issues relating to governance on a co-operative basis (so long as they do not abrogate their statutory responsibilities). For my part, as I have already indicated I am not prepared to agree to the Chief Commissioner having “governance” over the LECC. It is the responsibility of all three Commissioners. I am prepared to concede, in accordance with “best practice” models that the Chief Commissioner should be regarded as the “first among equals”.

Furthermore, and of utmost importance, such an arrangement is contrary to, and attacks the second core feature of structural separation between members of the decision making body and the operational organisation referred to previously²⁰. It also raises the potential for attacking the independence of the Commissioner’s for Integrity and Oversight. As the current system is operating, this potential, it is felt, has been realised.

2. If this clause seeks to preclude the Commissioner for Oversight or the Commissioner for Integrity from communicating with any of the nominated persons in circumstances where the Commissioners consider it appropriate to do so, then such a clause is not acceptable. I am prepared to accept however that as a matter of courtesy, and if appropriate, the Chief Commissioner can be advised of any such communication. The clause also overlooks the fact that in my capacity as Commissioner for Oversight I am required to regularly come into contact with and have discussions with the Commissioner and Assistant Commissioner of the Crime Commission. It also overlooks the fact that communications with the NSWPF are at the request of PSC addressed to the Commissioner of Police.
3. Leaving all else aside, I completely disagree with clause 3. The decision to take responsibility for the Assessments Division was made by the Chief Commissioner without any real consultation with myself as Commissioner for Oversight, nor was it a matter of discussion or put to a vote amongst the three Commissioners. On my understanding, it was a course of action taken without any input from the Chief Executive Officer. Furthermore, the Assessments Division clearly comes within the function and jurisdiction of the Commissioner for Oversight. In addition, my view is that the work of the Assessments Division and the Oversight Investigations Division is so

²⁰ Set out at pages 9 - 10 of this memorandum.

inextricably intertwined that the action taken by the Chief Commissioner failed to have regard to this and other important matters. Additionally, given the attitude of the Chief Commissioner that his teams cannot be approached without his approval may constitute agency maladministration insofar as there is any attempt to limit the Commissioner for Oversight from having free access to a team within his Division. The taking over of the Assessments team by the Chief Commissioner has affected the efficiency of the work of the Oversight Division. I have made my position clear to the Chief Commissioner and repeat it here: He had no right whatsoever to take over the Assessments team in the circumstances in which he did. This was at the very least action taken without any consultation with myself, a Commissioners council and the CEO.

4. Whilst in principle one should not be opposed to responsibility for those Divisions being held by an appropriate person within the Commission itself, I have major objections to any Chief Commissioner having primary responsibility. These bodies and their work are integral to the work of the Commission generally. Every Commissioner should have readily available access to those bodies. In terms of better and more efficient management these bodies should be the responsibility of a Chief Executive Officer, who in turn would be responsible to each of the Commissioners. Most certainly if the intention is that before any Commissioner can access the services of the Legal Services Unit, the Education and Prevention Division, and the Community Outreach team then this must be done through the Chief Commissioner, not only would such an intention be unsound, possibly contrary to the legislation, but also managerially defective. It is also contrary to the Tink recommendations.

The Chief Executive Officer is responsible for providing services to each of the Commissioners and not the Chief Commissioner alone.

For my part, I readily recognise the need to regulate the allocation of resources within the Commission. The current system of preventing access to any of the teams does not constitute regulation but rather prohibition.

5. Clauses 5 & 6. As a matter of principle, one would not object to these clauses, subject to one important qualification. In the management of the day-to-day affairs of the Commission the Chief Commissioner is not entitled to direct or otherwise interfere with the Commissioner for Oversight or the Commissioner for Integrity in the carrying out of their functions other than in important respects by the mechanism of the Commissioner's Council.
6. The meaning of clause 7 is unclear. Consultation amongst the three Commissioners should occur as a matter of course. Should it be intended by way of paragraph 7 that the Chief Commissioner can direct the Commissioner

for Oversight or the Commissioner for Integrity, as indicated previously, in their everyday functions then this is not permissible. If by "consult" the dictionary meaning of the word is adopted i.e. "seek information or advice from" that would be acceptable. Indeed, the Tink Review would appear to have contemplated such an arrangement.

7. Further as to paragraph 7, if there is any suggestion (whether implicit or otherwise) that the Chief Commissioner is entitled to appoint or terminate the employment of the Chief Executive Officer without referral to the Commissioners Council so that the matter can be fully discussed and canvassed and a decision is made by way of such a formal process, it is considered that the legislation has not been complied with up to the present time. Whilst the Chief Commissioner may at law, be the employer of the Chief Executive Officer, this does not mean and should not be taken to mean that the Chief Commissioner can make an important decision involving the employment or termination of the Chief Executive Officer without consultation, discussion and the matter being approved by way of a formal meeting. It would follow, based on this view, that the procedure which was followed in dispensing with the services of Ms Amber Williams (however described) did not comply with the legislation. All that followed in terms of setting up a new organisational structure also did not comply with the legislation. If the Chief Commissioner is of the view that the disengagement of Ms Williams from her role was appropriate or proper, then we are in violent disagreement. The same applies with the process followed for appointment of Ms O'Brien as CEO. It is my view that the requirement that the Chief Commissioner to consult with the Minister prior to the disengagement of Ms Williams' services was also not complied with.

I also find it not only a lack of courtesy but also take the view that it is contrary to the legislation that discussions were had and preliminary steps were taken in relation to the role of the CEO and disengagement of the services of Ms Williams over a period of time when I was neither informed nor consulted about what was transpiring. My belief is that I was only made aware after a decision was made to disengage her services. It is considered that firstly, the options available in relation to her position should have been fully canvassed amongst the Commissioners, and secondly, I should have been made aware of the steps being taken at the time when they were being taken. I believe that the reality was that I was not advised or consulted with until the decision was made. Her disengagement was a *fait accompli*, both from her perspective and from mine. Out of fairness I should indicate that the view of the Chief Commissioner is that he did consult with me. I reject that view. The Chief Commissioner and myself have differing views about what consultation means.

At this point I wish to make a couple things clear. Firstly, my opposition to the termination of Ms Williams' services is not based primarily on the fact that I was opposed to her termination as CEO specifically. My opposition is based on the fact that there should have been no substantial change in the position of CEO within the organisation. Similarly, I wish to make it clear that I am not and do not wish to attack Ms O'Brien personally. What I am attacking is the fact that the role that she has been given in my belief contravenes the best practice guidelines for the running of the Commission. This problem is magnified given the belief that the Chief Commissioner has the belief that he is able to exercise overriding power in the management of the Commission.

Role description for Commissioner for Oversight

Acknowledging that the role description for the Commissioner for Oversight is not determinative in itself, it is also a useful guide as to the role and functions of the Commissioner for Oversight. The primary purpose of the role is stated as, *inter alia*,

"The Commissioner for Oversight must work with the Chief Commissioner, Commissioner for integrity, CEO and Solicitor to The Commission to ensure a streamlined approach to oversight of the NSW Police Force and the Crime Commission by promoting collaboration across the LECC".

The key accountabilities set out show that the Commissioner for Oversight has extensive responsibilities which can be exercised by himself. The obligation to report to the Parliamentary Joint Committee on the Ombudsman, the LECC and the Crime Commission on the exercise of the Commission's functions is that of the Commissioner for Oversight, albeit through the Chief Commissioner. It is the responsibility of the Commissioner for Oversight to provide independent, informed advice regarding police oversight to Parliament and the Minister for Police.

In terms of role dimensions and decision-making it is stated that:

"The Commissioner for Oversight will make decisions that are organisationally or externally controversial or contentious, and which cannot otherwise be resolved through consultation and negotiation, may impact adversely on other agencies or on the LECC and involve risk to the welfare of staff and any other person exposed to the LECC's investigative activity."

Nowhere in the role description is there any reference to the Commissioner for Oversight being under the direct authority of the Chief Commissioner, being responsible for carrying out decisions of the Chief Commissioner (other than by way of collaboration) or being limited in the making of any decisions in the role of Commissioner for Oversight to any direction or control that may be exerted by the Chief Commissioner.

Indeed, were it to be suggested that in my role as Commissioner for Oversight, I would be disentitled from making my own independent decisions insofar as the Oversight Division is concerned, or that I could be directed by the Chief Commissioner in the carrying out of every day functions, I would not have accepted the appointment. I imagine many other highly qualified and suitable applicants would feel the same way.²¹

The issue of the governance of LECC is a critical one. The powers of the Chief Commissioner *vis-a-vis* the other Commissioners and the Chief Executive Officer need to be clarified at the earliest possible time. Any uncertainty or disagreement impacts adversely not only on the current administration but would also affect LECC in the long term. My suggestion is that independent legal advice be sought from a barrister of the highest repute to provide an advising on the matter. I should also indicate that I recognise that whatever advice is handed down cannot of itself bind any Commissioner to adopt such advice given the statutory duties and functions they are to perform. Such advice however may be useful as a guide to the Commissioners as to how the legislation may be said should operate.

The situation should not be permitted to continue whereby the Chief Commissioner and the Commissioner for Oversight have distinctly contrary views about their respective powers and functions. On the one hand, if I am correct in my interpretation of section 19 it may follow that the Commission is operating in the context of agency maladministration. On the other hand, if I am completely wrong in my expressed views, I may arguably be guilty of maladministration.

In the meantime, given what has been set out in the body of this Memorandum and as indicated previously, it would be useful to me to understand how one should interpret section 19 (4), should my interpretation not be accepted, and in particular what the meaning of "*decisions*", *inconsistency in the decisions of Commissioners* and "*with respect to a matter*" are to be taken to mean.

Given the importance of the matters raised, a copy of this memorandum is to be provided to the Commissioner for Integrity for her consideration. A copy will also be given to the Chief Executive Officer. I suggest that the matter be discussed at a meeting to be held between the Commissioners of LECC and the CEO.

There is one other important matter that should be raised. When the LECC commenced the Commissioners were provided with a briefing by the Chief Executive Officer on Monday mornings. For my part I wish to be briefed by the Chief Executive Officer as to the operations of LECC on a regular basis. As a Commissioner I would like to be informed by the Chief Executive Officer as to the

²¹ the role description for the position of Commissioner for Oversight as well as that for the Chief Executive Officer is attached for easy reference.

ongoing running and management of the LECC. In addition, I would like to see a protocol introduced for the recording of decisions made by LECC through the Commissioners Council. Up till now, there has been no recording of decisions made with respect to the operation of the Oversight Division, and my belief is that for the sake of transparency and record-keeping a system of recording should be established. The system of recording also needs to include all significant decisions made with respect to the LECC by Commissioners.

Patrick Saidi
Commissioner for Oversight
12th June, 2019

Attached:

Section 34 of the *Interpretation Act*.

Chief Commissioner's Memorandum dated 19 March 2019.

Chief Commissioner's memorandum dated 27 February, 2019.

Commissioners protocol of 2 May 2019.

Role Description for Commissioner for Oversight.

Role Description for Chief Executive Officer - pre-termination of Ms Williams as CEO. (x2) (17 August, 2016 and 1 March 2017.

Role Description - Commissioner for Integrity

Role Description- Solicitor to the Commission



ADVICE

CONSTRUCTION OF SECTION 19 OF THE LAW ENFORCEMENT CONDUCT COMMISSION ACT

Executive summary

1. You seek my advice on s. 19 of the *Law Enforcement Conduct Commission Act 2016* ("*LECC Act*"), in particular, s. 19(4).
2. There is no provision in the *LECC Act* requiring the functions of the Law Enforcement Conduct Commission ("the Commission") to be exercised by a governing body, "Commissioner's Council" or similar.
3. In my view, s. 19(4) applies when there is "an inconsistency in the decisions of" any two or more Commissioners with respect to a matter, in which case, the decision of the Chief Commissioner prevails. Where a statutory function of the Commission has been exercised by a Commissioner in reliance on s. 19(1), s. 19(4) does not empower the Chief Commissioner to review or revisit the exercise of that function or to replace the decision with that of the Chief Commissioner.
4. The Chief Executive Officer of the Commission ("CEO") exercises the employer functions of the government in relation to the employees of the Office of the Law Enforcement Commission. As the accountable authority for the Commission for the purposes of the *Government Sector Finance Act 2018* ("*GSF Act*"), the CEO has certain obligations in respect of financial management of the Commission and, once relevant provisions commence, in relation to the Commission's financial reporting.¹ Since these matters are the responsibility of the CEO, not the Commission or the Commissioners, there would appear to be a relatively narrow class of decisions "with respect to a matter" to which s. 19(4) is capable of applying where there is an inconsistency in such decisions. Decisions with respect to the strategic direction and general policies of the Commission would seem to fall within this class of decisions.

Background

5. I am instructed with a confidential complaint made to you by the Commissioner for Oversight, dated 18 June 2019, including a memorandum dated 12 June 2019, and a Memo from the Chief Commissioner to the other Commissioners, dated 27 February 2019 concerning the powers of Commissioners.

¹ Part 7 of the *GSF Act*, which is concerned with reporting, has not yet commenced. This Part is scheduled to commence for the purposes of reporting for the 2019/2020 financial year (see factsheet available on NSW Treasury website, "GSF Act: commencement timetable").

Analysis

Relevant provisions of the *LECC Act*

6. The Commission is constituted as a corporation (s. 17, *LECC Act*). By s. 18(1), the Commission consists of the following members appointed by the Governor: a Chief Commissioner, a Commissioner for Integrity and a Commissioner for Oversight. The latter two Commissioners may only be appointed with the concurrence of the Chief Commissioner (s. 18(3)(2), *LECC Act*). Schedule 1 to the *LECC Act* contains provisions relating to the Commissioners. The Governor may also appoint one or more Assistant Commissioners, with the concurrence of the Chief Commissioner (s. 20(1), *LECC Act*).
7. The Commission has the functions conferred or imposed on it by or under the *LECC Act* or any other Act (s. 25(1), *LECC Act*), these include, for instance, functions with respect to: misconduct matters (s. 26, *LECC Act*), administrative functions relating to education and prevent of misconduct (s. 27, *LECC Act*), functions regarding evidence and information (s. 28, *LECC Act*) and functions with respect to findings and opinions and making recommendations (s. 29, *LECC Act*).
8. Persons may be employed in the Public Service under the *Government Sector Employment Act 2013* ("*GSE Act*"), in a separate Public Service agency, to enable the Commission and the Commissioners to exercise their functions (s. 21(1), *LECC Act*). Staff of the Commission are employed in the Office of the Law Enforcement Conduct Commission.
9. Section 19 is concerned with the exercise of the Commission's functions. Subsection (1) provides that, "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." "Function" is defined to include a power, authority or duty, and "exercise" a function includes perform a duty (s. 4(1)).
10. Section 19(2) then provides that "a decision of the Commission" to exercise the functions specified in paras (a) to (e) of that section "must be authorised by the Chief Commissioner and at least one other Commissioner". A "decision of the Commission" referred to in subsection (2) is presumed to have been duly authorised unless the contrary is established (s. 19(3), *LECC Act*).
11. By s. 19(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."
12. By s. 62(1), an examination must be held "by the Chief Commissioner, by the Commissioner for Integrity or an Assistant Commissioner, as determined by the Chief Commissioner (the *examining Commissioner*)". At an examination, the examining Commissioner must "announce the general scope and purpose of the examination" (s. 62(2), *LECC Act*). That is, an examination may not be held by the Commissioner for Oversight.

Interpretation of s. 19, *LECC Act*

13. From the provisions referred to above at [7]-[12], it may be observed that there is no provision in the *LECC Act* requiring the functions of the Commission to be exercised by a governing body, "Commissioner's Council" or similar. The *LECC Act* does not prescribe any decision-making procedures for the Commission, such as in relation to the calling and conduct of meetings, or procedures for voting on decisions (cf, for instance, cl. 13-17 of Sch. 1 to the *Electoral Act 2017*).
14. Other than s. 62 and s. 19(2), there is no express delineation in the *LECC Act* as to the respective spheres of operation or responsibility of the Commissioner for Integrity and Commissioner for Oversight. In relation to the Chief Commissioner, he has specific powers in s. 19, and he alone has power to issue a warrant for contempt (s. 93(5)). The Governor may only appoint the other Commissioners, and any Assistant Commissioners, with the Commissioner's concurrence (ss. 18(2), 20(1)).
15. The effect of s. 19(1) is that, except as otherwise provided in subsections (2) – (4), the functions of the Commission are exercisable by any one of the three Commissioners. Accordingly, unless subsections (2) - (4) apply, an act matter or thing done in the name of the Commission by any of the Commissioners "is taken to have been done by the Commission".
16. The operation of s. 19(1) is subject to subsections (2) to (4). Subsection (2) provides that "a decision of the Commission" to exercise any of the functions specified in paras (a) to (e) of that section cannot be made by any one of the Commissioners alone, but must be "authorised by the Chief Commissioner and at least one other Commissioner".
17. Subsection (4) provides that "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." Given that the *LECC Act* does not prescribe any decision-making procedures for the Commission, the circumstances in which s. 19(4) is intended to operate are not necessarily clear. The materials provided to me allude to several different interpretations of s. 19(4), including:
 - (a) That the Chief Commissioner's decisions prevail in respect of all matters, except those specified in s. 19(2);
 - (b) That the provision applies where there is an inconsistency between decisions of the Commissioner for Oversight and the Commissioner for Integrity with respect to a matter, in which case a subsequent decision made by the Chief Commissioner prevails; and
 - (c) That the provision requires all three Commissioners to deliberate over significant "matters" and the Chief Commissioner has a "casting vote".
18. Section 19 was inserted into the *Law Enforcement Conduct Commission Bill 2016* by Opposition amendment.² As originally drafted, s. 19 provided that some functions of the Commission were exercisable by at least two Commissioners (one of whom being the Chief Commissioner) and

² Legislative Council, *Hansard* (8 November 2016), pp.6-8.

certain other functions were exercisable only by a "unanimous decision of the Commission", meaning "a decision supported unanimously at a meeting of the Commissioners at which all Commissioners are present or, if the matter is decided by circulation of papers among the Commissioners, approved in writing by all Commissioners." There was no provision equivalent to s. 19(4). The Opposition MP who introduced the amendment described its purpose as being to remove the requirement that some decisions be made by a majority and others be unanimous and instead, made "all the decisions majority decisions".

19. In consenting to the amendments, the Minister for Disability Services, Minister for Ageing and Minister for Multiculturalism described them as requiring that "decisions have the consent of two out of three commissioners, one of course being the chief commissioner", stating that the Government remained confident that "high-level scrutiny which is required will still occur with the decision-making structure in which two of the three commissioners, one being the chief commissioner, must agree."
20. Several points may be made about s. 19(4). First, the operation of the provision requires "an inconsistency *in the decisions of Commissioners* with respect to a matter." A question arises as to which of the Commissioners this provision refers to. In the *LECC Act*, "Commissioner" means the Chief Commissioner, Commissioner for Integrity or Commissioner for Oversight (s. 4(1)). Applying this definition to s. 19(4), the reference to "an inconsistency in the decisions of *the Commissioners* with respect to a matter" would mean an inconsistency in the decisions of any two or more of the Commissioners (including the Chief Commissioner) in respect of a matter. For instance, if the Chief Commissioner and either the Commissioner for Oversight or the Commissioner for Integrity made inconsistent decisions with respect to a matter, the decision of the Chief Commissioner would prevail. There could therefore be scenarios where a decision with respect to a matter is supported only by the Chief Commissioner and not by any other Commissioner.
21. The definition of "Commissioner" is, however, to be read as impliedly subject to any contrary intention in the relevant provision (see *Hall v Jones* (1942) 42 SR (NSW) 203). An alternative argument might be made that, in the context of s. 19(4), "decisions of Commissioners" means decisions of the Commissioner for Oversight and the Commissioner for Integrity only, on the basis that the earlier specific reference to the Chief Commissioner suggests that the Chief Commissioner is excluded from the reference to "Commissioners". This approach seems to reflect the purpose of s. 19 stated in the parliamentary debate, being to implement majority decision-making, where "two of the three commissioners, one being the chief commissioner, must agree". In my view, however, this interpretation is not, to be preferred. Whilst majority decision-making may have been the general purpose of the provision, the language used in s. 19(4), and in particular, the application of the definition of "Commissioners", does not readily accommodate this interpretation.
22. Reading the reference to "an inconsistency in the decisions of the Commissioners" as a reference to an inconsistency between the decisions of any two or more of the Commissioners is also consistent with s. 19(4) operating as an "exception" to s. 19(2). Except where s. 19(2) applies

(to functions specified in paras (a) to (e)) and the authorisation of the Chief Commissioner and at least one other Commissioner is required, where there is an inconsistency in the decisions of two or more Commissioners, "a decision of the Chief Commissioner prevails". In this way, s. 19(4) operates as an exception to s. 19(2) because where the former provision applies, the Chief Commissioner's prevailing decision may not be supported by any other Commissioner, whereas a decision under s. 19(2) can only be authorised by the Chief Commissioner and another Commissioner.

23. Secondly, s. 19(4) refers to an inconsistency "in the *decisions* of Commissioners with respect to any matter", in which case "a *decision* of the Chief Commissioner prevails". As originally drafted, s. 19 contemplated that decisions would be made by the Commission "at a meeting of the Commissioners at which all Commissioners are present" or determined on the papers circulated among the Commissioners. No such provision was included in amended s. 19. Section 19(4) seems to assume that there will be some form of internal decision-making process adopted by the Commission, although the *LECC Act* does not specify what that procedure is to be. Section 19(4) operates, in my view, only once inconsistent decisions with respect to a matter have been made by two or more Commissioners.
24. However, where a statutory function of the Commission has been exercised by a Commissioner in reliance on s. 19(1), s. 19(4) does not empower the Chief Commissioner to "review" the exercise of that function or to replace the decision with that of the Chief Commissioner. This conclusion follows from the general rule that a decision, once made, is final and the decision-maker is *functus officio* once the decision is made. Once a statutory function is performed, there is no further function or act for the person authorised under statute to perform: *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 48 ALD 265 at 274 (Goldberg J). Section 19(4) would not, for instance, enable the Chief Commissioner to review a decision made by another Commissioner to exercise the Commission's function of issuing a notice requiring the production of information under s. 54, *LECC Act*.
25. Moreover, the *LECC Act* does not contemplate any form of "internal review" of decisions. It is evident from s. 19(1) and from the absence, other than in the limited circumstances in which some functions are assigned to specific Commissioners referred to in para [14] above, that the functions of the Commission may be exercised by any one of the Commissioners.
26. Thirdly, it is necessary to make some observations about the "matters" to which s. 19(4) might apply. The reference to "decisions...with respect to a matter" in s. 19(4) can be distinguished from the reference in s. 19(2) to "a decision...to exercise any of the following functions..." The word "matter" is used elsewhere in the *LECC Act* in relation to misconduct "matters", for example (s. 14). The reference to a decision with respect to "a matter" in s. 19(4), takes its ordinary meaning, relevantly, a "thing, affair or business" (*Macquarie Dictionary Online*), but, as discussed in the preceding paragraphs, it does not extend to a "decision" that constitutes the exercise of a statutory function of the Commission.
27. Practically, there are other limitations on the "matters" that may be the subject of inconsistent decisions of Commissioners for the purposes of s. 19(4). As explained later in this advice, the

CEO of the Commission is responsible for the exercise of "employer functions" under the *GSE Act* in relation to the Commission's staff and has specific functions in respect of financial management and the Commission's financial reporting. These are not "matters" within the functions of the Commission, or that are exercisable by the Commissioners, that could be the subject of inconsistent decisions "with respect to a matter". It is conceivable that s. 19(4) might apply to decisions of the Commissioners with respect to the broader policy or strategy to be applied to the exercise of the statutory functions of the Commission, for instance, decisions about whether the Commission should focus on specific types of misconduct matters in a given period.

28. It is open to the Commission to develop procedures regarding its internal decision-making. Being a statutory corporation, the Commission can only exercise those functions conferred on it by its enabling legislation or other legislation (*Hillig v Darkinjung* [2008] NSWCA 75 at [80], [106]). It also may do and suffer all other things that bodies corporate may, by law, do and suffer and "that are necessary for, or incidental to, the exercise of its functions" (s. 50(1)(e), *Interpretation Act 1987*). In my view, a power to implement procedures in respect of decision-making by the Commission, would be a function "necessary for, or incidental to" the exercise of the Commission's functions by or under the *LECC Act*. Such a policy or procedure could address, in a manner not inconsistent with the *LECC Act*, matters such as the intended spheres of operation of each of the Commissioners.

Role of the CEO

29. In the materials that you have provided, a suggestion is made that the Chief Commissioner has "ultimate decision-making authority" for the Commission, and, in particular, that no statutory function conferred on the CEO detracts from this conclusion. This characterisation of the CEO's role does not account for the statutory responsibilities conferred on the CEO under the *GSF Act*, the *Public Finance and Audit Act 1983* ("PF&A Act"), the *GSE Act* and the *Annual Reports (Departments) Act 1985* ("ARD Act").
30. I note that the CEO is an "authorised person" to whom the Commission may delegate "any of the functions of the Commission or of a Commissioner" (s. 23(1), (5)(c), *LECC Act*). However, functions of the Commission that can only be exercised by two or more Commissioners cannot be delegated, nor can a coercive examination power (s. 23(3), *LECC Act*). I am not instructed as to whether the CEO has been delegated any functions under the *LECC Act* (or under any other Act).

Financial reports and annual reports

31. The Commission is a GSF agency and the CEO is the accountable authority for the Commission (ss. 2.4(1)(e), 2.7(2)(g), *GSF Act*).
32. The *GSF Act* confers a range of responsibilities on an accountable authority. Without attempting to comprehensively set out those responsibilities, these include that under s. 3.6, the accountable authority is:

- “(a) to develop, maintain and make available financial management policies and procedures, and
- (b) to establish, maintain and keep under review each of the following:
- (i) effective systems for risk management, internal control and assurance (including by means of internal audits) that are appropriate systems for the agency,
 - (ii) arrangements for protecting the integrity of financial and performance information,
 - (iii) arrangements for ensuring that there is compliance with this Act, and
- (c) to ensure that the agency complies with those policies and procedures.”
33. Part 7 of the *GSF Act* which is concerned with reporting, has not yet commenced and is scheduled to commence for the purposes of reporting for the 2019/2020 financial year.³ Once the relevant provisions commence, the CEO as accountable authority for the Commission (which will be a reporting GSF agency unless prescribed by regulation)⁴ must cause annual GSF financial statements to be prepared for the annual reporting period for the agency and give those statements to the Auditor-General for auditing (s. 7.6(1), *GSF Act*).
34. Until Pt. 7 of the *GSF Act* commences, relevant provisions of the *PF&A Act* will remain in effect. The Commission is a Department for the purposes of the *PF&A Act* and the CEO is the Department Head (s. 45A, Sch. 3, *PF&A Act*). The Department Head is required to, within the period of 6 weeks after the end of the financial year of the Department, prepare and submit to the Minister responsible for the Department and to the Auditor-General a financial report for the financial year then ended (s. 45A(2), *PF&A Act*). The Auditor-General is not to furnish an opinion in relation to the financial report of a Department unless the Auditor-General has received a statement signed by the Department Head stating whether, in the opinion of the Department Head, the financial report exhibits a true and fair view of the financial position and financial performance of the Department (s. 45F(1B), (1C), *PF&A Act*).
35. The CEO is also responsible for the preparation of annual reports of the operation of the LECC and for submitting those reports to the Minister responsible for the LECC for presentation to Parliament in accordance with the requirements of the *ARD Act* (see s. 10, 12(1), 13, *ARD Act*). The *ARD Act* is to be repealed⁵ and will be replaced by Div. 7.3 of *GSF Act*, which will govern annual reporting by reporting GSF agencies⁶. The CEO as accountable authority for the LECC will, once Div. 7.3 commences, be responsible for ensuring that the “annual reporting information” for the LECC is prepared in accordance with the *GSF Act*, and given to the responsible Minister for the LECC, for tabling in Parliament (ss. 7.12, 7.13, *GSF Act*).

³ See n.1 above.

⁴ Section 7.3(1), (2), *GSF Act*.

⁵ By the *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*, Sch. 1, cl. (a), which has not yet commenced.

⁶ As noted above in para [33], the LECC will be a reporting GSF agency unless prescribed otherwise by regulation.

Government Sector Employment Act 2013

36. The head of a Public Service agency (other than a Department) may, subject to the *GSE Act* and any other Act or law, exercise on behalf of the Government the "employer functions" of the Government in relation to the employees of the agency (other than Public Service senior executives of an agency that is related to a Department) (s. 31(1), *GSE Act*). The "employer functions" of the Government are 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 (s. 31(2), *GSE Act*).
37. The Office of the Law Enforcement Conduct Commission, in which the Commission's staff are employed, is a separate Public Service agency for the purposes of the *GSE Act* (Sch. 1, Pt. 3, *GSE Act*). The CEO is the head of the agency. The Chief Commissioner 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 CEO in consultation with the Minister administering Part 3 of the *LECC Act*.



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CONSTRUCTION OF SECTION 19 OF THE LAW ENFORCEMENT CONDUCT
COMMISSION ACT 2016 - ADVICE 2

Executive summary

1. On 4 November 2019, I provided advice on the construction of s. 19 of the *LECC Act*. On 12 November 2019, you requested I consider and provide urgent advice about the points raised by the Chief Commissioner of the LECC in his response to the advice.
2. The Chief Commissioner is concerned that the interpretation I have provided would (if understood correctly) lead to "chaos" because "the functions of the Commission would be exercised in the way decided by the Commissioner who managed to get in first".
3. I do not consider that s. 19(1) must operate so as to permit any Commissioner who "gets in first" to exercise the functions of the Commission in any way that he or she may choose. The exercise of functions by Commissioners under s. 19(1) must be done in accordance with any decisions that have already been made under s. 19(4). Section 19(4) can operate as a limit on the exercise of a statutory function *prior to* its exercise. Understood in this way, the Commission may function effectively, even in circumstances where co-operation may not always be forthcoming.
4. The effective functioning of the Commission will, however, depend heavily on the exercise of executive control and management, the procedures for which are not governed by the *LECC Act*. The role of the CEO may be of significant assistance to the Chief Commissioner in this regard.

Analysis

Part 1 – Interpretation of s. 19, *LECC Act*

5. With respect to the issue of what functions of the Commission are exercisable by a Commissioner in particular circumstances, guidance is to be derived from the text and structure of s. 19. Section 19(1) is expressed as being subject to s. 19(2) - (4). Section 19(4) is expressed as being subject to s. 19(2). Accordingly, the starting point is s. 19(2).
6. Section 19(2) provides that "decision[s]" of the Commission to exercise the particular "functions" set out in that sub-section "must be authorised by the Chief Commissioner and at least one other Commissioner". These decisions include "a decision to hold an examination" and "a decision ... to delegate a function of the Commission."
7. The terms of s. 19(2) expressly recognise that the exercise of a function is preceded by a "decision *to*" exercise that function (emphasis added). For example, the authorisation requirement attaches not to the exercise of the relevant functions but, rather, to the "decision of the Commission to exercise" the relevant functions.

8. Accordingly, for the purposes of s. 19(2), a “decision” to exercise a function and the exercise of that function are conceptually distinct; the former preceding the latter. This reading of “decision” is consistent with its ordinary meaning; that meaning being “a making up of one’s mind” or the “determination of a question” (*Macquarie Dictionary*).

9. In accordance with the principle of construction that where a word is used consistently in legislation it should consistently be given the same meaning, (see e.g. *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 (“*Craig Williamsort*”)), “decision” should be understood to have the same meaning for the purposes of s. 19(4). Section 19(4) provides:

“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.”

10. Applying the definition above, a “decision ... with respect to a matter” refers to the determining of a question with respect to a matter. Matter should be understood consistently with its use in s. 19(1) as a term of wide import. It would include decisions in relation to the exercise of functions, but would not be limited to decisions in relation to the exercise of functions. It would not, however, include the exercise of a function itself. This flows from the conceptual distinction between decisions and the exercise of functions established by the terms of s. 19(2).

11. It follows that any power of the Chief Commissioner to prevail over a Commissioner, pursuant to s. 19(4), is limited to “decisions” and, accordingly, the operation of s. 19(4) is necessarily limited to the time prior to the exercise of the statutory function. There is, in my view, nothing in the text, context or purpose of s. 19, or the *LECC Act* more generally, to support the view that s. 19(4) operates as a quasi-review provision by which the exercise of statutory functions by a Commissioner can be reconsidered by the Chief Commissioner.

12. With respect to the internal operations of the Commission and the process by which decisions are made, there is nothing, in my view, to prevent the Chief Commissioner from establishing internal decision-making procedures which facilitate the operation of s. 19(4). The establishment of internal processes for this purpose would not improperly preclude or limit the general power of a Commissioner to exercise the functions of the Commission under s. 19(1), as that power is expressly conferred subject to, relevantly, s. 19(4).

13. Further, the concept of collective or collaborative decision-making is consistent with the legislative history of s. 19. As originally drafted, s. 19 of the *Law Enforcement Conduct Commission Bill 2016* required that decisions to exercise particular functions were required to be unanimous. The Bill as originally drafted contained the following definition of “unanimous decision of the Commissioners”:

“a decision supported unanimously at a meeting of the Commissioners at which all Commissioners are present or, if the matter is decided by circulation of papers among the Commissioners, approved in writing by all Commissioners”

14. The terms of s. 19 were amended in the Legislative Council. Transcript of the relevant parliamentary debates¹ reveals that the purpose of amendment was not to do away with a collective decision-making model but, rather, to lower the threshold requirements for decision to exercise particular functions. That is, to transform, with respect to certain decisions, a requirement that the decision be unanimous to a requirement that the decision have majority support.
15. The fact that s. 19(1) is expressed as being subject to s. 19(4) has implications for the functions that a Commissioner may exercise pursuant to s. 19(1). The power to exercise the functions of the Commission, though broadly expressed, is subject to the limitation in s. 19(4) on the making of a decision to exercise that power.
16. It follows that a Commissioner may not exercise a function in reliance on s. 19(1) where to do so would be contrary to a decision made under s. 19(4). A Commissioner may not exercise a function in circumstances where the Chief Commissioner has disagreed with the decision to exercise that function in advance of its exercise. This is because s. 19(1), which confers the power to exercise the function, is expressed as subject to s. 19(4), which imposes a limit on the decision-making power of the Commissioner in relation to the exercise of a function. The limit being a requirement to give way to the decision of the Chief Commissioner in the event there is inconsistency in the decisions. The Commissioner would have no power to exercise the relevant function in those circumstances.
17. I have considered how my interpretation of s. 19 may permit the Commission to function effectively in a practical sense, in light of the concerns expressed by the Chief Commissioner in his correspondence.
18. The Chief Commissioner may call regular meetings of the Commissioners² (the Commission Executive). At these meetings, the Commission Executive may discuss and decide upon the strategic policies and general direction of the Commission including, for example, the misconduct matters to be prioritised for the current financial year and the resources to be applied to the various areas of the Commission.
19. If one Commissioner decides the Commission should prioritise a particular misconduct matter (or matters of a particular type) and the other Commissioner decides to prioritise other matters, the decision of the Chief Commissioner prevails. The CEO would then ensure the resources of the Commission are applied to the matter or matters determined as a priority by the Chief Commissioner. A Commissioner is not authorised to exercise the functions of the Commission under s. 19(1) in respect of a matter where to do so would be contrary to a decision of the Chief Commissioner made under s. 19(4).

¹ Legislative Council, *Hansard* (8 November 2016) pp. 7-8.

² It may assist for the CEO of the Commission to also attend these meetings, even though he or she is not a relevant decision-maker for the purposes of s. 19.

20. To the extent that two Commissioners disagreed upon the priorities or resources for a unit or part of the Commission, the decision of the Chief Commissioner would prevail. A Commissioner would not be entitled to rely on s. 19(1) to exercise a function in relation to that unit that was contrary to a decision made under s. 19(4).

Part 2 – Implied functional separation of the Commissioner’s roles

21. You have asked that, for the purposes of this advice, I take into account matters referred to in your letter of instructions relating to “the division of functions between Commissioners expressed in the LECC Act” and the structural basis for any such division, in particular with respect to the roles of the Commissioners for Integrity and Oversight.
22. Commissioner is defined in the *LECC Act* to mean “Chief Commissioner, Commissioner for Integrity or Commissioner for Oversight”: s. 4(1).
23. As you observe in your instructions, s. 18 of the *LECC Act* creates the positions of Commissioner of Oversight and Commissioner of Integrity. In addition, s. 18 creates the position of Chief Commissioner. Part 6 of the *LECC Act* is entitled “Investigation Powers” and Parts 7 and 8 are entitled “Oversight of police and Crime Commission investigations” and “Oversight of critical incident investigations” respectively.
24. I agree with the observation that the fact that Parliament thought it appropriate to create two distinct Commissioners, the titles of their offices being as they are, does support an inference that each Commissioner is to exercise distinct and separate functions. I accept also that it seems likely that Parliament intended the functions set out in Parts 7 and 8 to ordinarily be exercised by the Commissioner of Oversight. I note that s. 18(5) provides that “a person is not eligible to be appointed as the Commissioner for Integrity or to act in that office if the person is a police officer or a former police officer.”
25. However, subject to any express limitations, it seems to me all functions conferred on “the Commission” under the *LECC Act* are exercisable by the Chief Commissioner, the Commissioner for Integrity or the Commissioner for Oversight.
26. The terms of s. 19(1) unambiguously provide that “Except as otherwise provided by this section, *the functions of the Commission are exercisable by a Commissioner*” (emphasis added). As noted above, “Commissioner” is defined to include the Chief Commissioner and the Commissioners of Oversight and Integrity. Section 19 otherwise says nothing about particular functions being exercisable, or not being exercisable, by either the Commissioner for Integrity or the Commissioner for Oversight.
27. I note that the phrase “the functions of the Commission are exercisable by a Commissioner” did not appear in s. 19(1) in the *Law Enforcement Conduct Commission Bill 2016* as originally drafted. This phrase was inserted by Opposition amendment. The relevant Parliamentary Debates provide no insight into the purpose for its inclusion.

28. Section 62(1) of the *LECC Act* provides:

"An examination must be held by the Chief Commissioner, by the Commissioner for Integrity or an Assistant Commissioner, as determined by the Chief Commissioner."

29. Section 62(1) falls within Part 6 of the *LECC Act*. In my view, the express reference to the Commissioner for Integrity, and not the Commissioner of Oversight, with respect to the power to hold an examination in s. 62(1), further supports the view that a power conferred on "the Commission" elsewhere in the *LECC Act* is exercisable by any of the Commissioners, consistently with the terms of s. 19(1). This would include powers conferred on the Commission elsewhere in Part 6.

30. This view is supported by the terms of s. 19(2). As noted above, s. 19(2) provides that "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." What follows is a list of decisions. Significantly, two of those decisions are decisions with respect to provisions falling within Part 6: ss. 19(2)(b) and (c). This is significant, in my view, given the provision refers to authorisation by the Chief Commissioner and "at least one other Commissioner". Use of the phrase "at least" appears to contemplate that authorisation for a decision may be provided by all three Commissioners. Further, the phrase "one other Commissioner" contemplates that it is either the Commissioner of Oversight or the Commissioner of Integrity who can provide the relevant authorisation. Accordingly, the terms of s. 19(2) contemplate involvement by the Commissioner of Oversight in decisions involving the exercise of powers outside of Parts 7 and 8, including powers contained in Part 6.

31. While the *LECC Act* does not, in my view, impliedly provide for distinct powers exercisable exclusively by either the Commissioner of Oversight or the Commissioner of Integrity, I consider it is clearly contemplated that, in the usual course, these two Commissioners would have separate roles and responsibilities. As stated in my previous advice, I consider that these separate roles and responsibilities are a matter relating to the "general policies and strategic direction" of the Commission that could properly be discussed and decided upon at a meeting of the Commission Executive, with the decision of the Chief Commissioner prevailing to the extent of any inconsistency in a decision of either Commissioner in accordance with s. 19(4)



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20 November 2019

Mr Bruce McClintock
Assistant Inspector
Office of the Inspector of the
Law Enforcement Conduct Commission
PO Box 5341
Sydney NSW 2001

BY:

By Hand
Private and Confidential

Dear Assistant Inspector,

Response to your letter of 18 November 2019 enclosing further Crown
Solicitor advising of 15 November 2019

Whilst I generally agree with the Crown Solicitor advising of 5 November 2019
(the first advising), I strongly disagree with aspects of the terms of the advising
provided by the Crown Solicitor of 15 November 2019 (the second advising).
There are a number of reasons for this, which I will set out below.

1. The second advising of 15 November is in some key respects inconsistent
with the terms of the advising provided on 5 November. In the earlier
advising the Crown Solicitor looked at the history of the legislation and
obviously had regard to my memorandum of the legal issues raised in
rendering the opinion that:
 - (i) The effect of section 19(1)-(4) is that the functions of the
Law Enforcement Conduct Commission ('the
Commission') are exercisable by any one of the three
Commissioners. Accordingly, unless subsections (2)-(4)
apply, any act matter or thing done in the name of the
Commission by any of the Commissioners "*is taken to
have been done by the Commission*" (paragraph 15).
 - (ii) Section 19(4) seems to assume that there will be some
form of internal decision-making process adopted by the
Commission. Section 19(4) operates, in my view, only once
inconsistent decisions with respect to a matter have been
made by two or more Commissioners (paragraph 23).
 - (iii) The reference to a decision with respect to "a matter" in
section 19(4), does not extend to a "decision" that

constitutes the exercise of a statutory function of the Commission (paragraph 26).

- (iv) It is conceivable that section 19(4) might apply to decisions of the Commissioners with respect to the broader policy or strategy to be applied to the exercise of the statutory functions of the Commission, for instance, decisions about whether the Commission should focus on specific types of misconduct matters in a given period (paragraph 27).
- (v) It is open to the Commission to develop procedures regarding internal decision-making. Such a policy or procedure could address, in a manner not inconsistent with the *Law Enforcement Conduct Act 2016*, matters such as the intended spheres of operation of each of the Commissioners (paragraph 28).

2. It would seem to follow from the above that by the Commission developing procedures regarding internal decision making, much if not all of the suggested "chaos" referred to in the Chief Commissioner's response would not exist. The Commission would not operate on the basis of which Commissioner "managed to get in first" as suggested by the Chief Commissioner. This seemed to have been considered to be a matter of importance having regard to the executive summary (paragraph 2).
3. In the second advising of 15 November it is opined that, *inter alia*:
 - (i) Section 19(4) can operate as a limit on the exercise of a statutory function *prior* to its exercise. On the face of it this does not appear to be consistent with the opinion expressed in the first advising.
 - (ii) A Commissioner may not exercise a function in reliance on section 19(1) where to do so would be contrary to a decision made under section 19(4) (paragraph 16).
 - (iii) A Commissioner is not authorised to exercise the functions of the Commission under section 19(1) in respect of a matter where to do so would be contrary to a decision of the Chief Commissioner made under section 19(4) (paragraph 16).
4. It would thus appear that if the terms of the first advising were to be adopted, the Chief Commissioner would not be permitted to interfere with the exercise of functions of a Commissioner by way of section 19(4) other than by way of decisions being made in relation to such matters as spheres of operation of the Commissioners, strategy of the Commission and matters of the like.

5. If one were to accept the second advising as being correct, this in itself would lead to unreasonable if not absurd results. Examples would include:-

- (i) By way of a protocol pursuant to section 19(4) an individual Commissioner may be given no sphere of operation at all;
- (ii) An individual Commissioner could be micro-managed, or subject to direction and control to such an extent that the Commissioner for Oversight can be prevented from exercising oversight functions issuing notices or seeking information under provisions such as sections 102-105, seeking any review of a decision under section 105, or discontinuing oversight functions under section 106. Equally the Commissioner for Oversight may be prevented from exercising powers under section 101, or taking action under section 99. Many other examples could be given;
- (iii) A Commissioner for Oversight may be prevented from exercising functions such as providing reports to Parliament, or utilising the Prevention and Education Team, auditing or other powers available under the *Law Enforcement Conduct Act 2016*;
- (iv) In circumstances where no outside body or person such as a Minister can attack the independence of the Commissioner for Oversight in the exercise of his functions, the advice opines that the Chief Commissioner can so do;
- (v) Such a view would place the Commissioners for Oversight and Integrity in the position of Deputy or Assistant Commissioners, or worse still employees who are subject to the dictates, direction and control of the Chief Commissioner. There would be no internal independence; or
- (vi) The effect of (5) above would effectively make a mockery of the Tink review and recommendations, the three Commissioner model introduced, and the need for a Commissioner to be approved by Cabinet and the Governor prior to appointment. This is in circumstances where it was a clear intention on the part of the legislators to ensure that there was no employment relationship between Commissioners, and the positions created were that of Commissioners and not of Assistant or Deputy Commissioners.

6. The second advising does not deal with perhaps the most critical issue. That is, whether the Chief Commissioner has any power under section 19(4) or otherwise to fetter the discretion of a Commissioner to exercise any functions of the Commission conferred on a Commissioner under section 19(1). As alluded to in the first advising, section 19(1) invests each Commissioner with statutory functions which are defined to include a power, authority or duty. This was touched upon by myself in my letters to the Assistant Inspector dated 6 and 11 November 2019 respectively responding to the first Crown Solicitor advising.
7. The common law recognises the tension in what is commonly known as the "no fetter principle". In this regard a helpful outline of this principle follows.
8. When Parliament confers a discretionary power, the courts have insisted that "*such a power must be exercised on each occasion in the light of the circumstances at that time*" the future exercise of a discretionary power cannot be fettered. This no-fetter principle does not preclude administrative decision-makers developing policies (non-statutory rules) to guide the exercise of discretionary powers. The principle does, however, mean these policies must not remove the discretion or being applied inflexibly (i.e. in a blanket fashion).
9. Any such policies must be lawful, in the sense that they must be consistent with the statutory scheme. Any policy which on its face, fetters or removes a discretion granted by statute is impermissible."¹
10. The no-fettering principle also has the consequence of preventing decision-makers from exercising their discretionary powers on the say-so of someone else. A personal discretionary power must not be exercised at "*the direction or behest of another person*". As has been noted by the authors most difficulties involved in the application of the "dictation" ground stem from the fact that, although administrative powers are typically conferred on particular persons or officers, those persons or offices are part of a broader bureaucratic hierarchy.²

It is submitted that unless legislation is clear in its terms so as to permit dictation or fettering of discretion then the same cannot be lawfully done. The *Law Enforcement Conduct Act 2016* is far from clear, as can be seen from the current debate. Indeed by adopting the three Commissioner model and the provisions of section 19(1) would in itself militate against the fettering of discretion.

11. Unfortunately, this principle of law, although referred to in my prior summaries and correspondence has not been dealt with by the Crown Solicitor in her advisings. It is submitted that, on any attempt to interpret

¹ Principles of Administrative Law, Legal Regulation of Governance, Peter Kane and Leighton McDonald, Oxford University Press, 2008 at page 158.

² Ibid page 159.

section 19(4) a necessary starting point is whether the “no-fettering principle” applies, as well as the “dictation” ground referred to above. For this reason alone, the second advising is, as stated previously, unsound or at best incomplete.

The Commissioners protocol

12. The first and second advising appear to be inconsistent in terms of what matters could be the subject of a Commissioners protocol. For present purposes, I accept that there may need to be appropriate policies and procedures in place governing the work of the Commissioners (and upper level managers) in order to regulate the affairs of the Commission and ensure they operate in an orderly fashion. To that extent I am in agreement with the second advising. However, in expressing the opinion that she did the Crown Solicitor did not analyse each of the matters raised within the Commissioners protocol. That also leaves open for consideration what matters are appropriate or inappropriate to be included within such a protocol.
13. The better view is that any matter put in a protocol which goes beyond regulating the exercise of functions from an administrative perspective, and seeks to fetter the discretion of any Commissioner or provide for dictation in the actual exercise of functions would be invalid. This would include any attempt to prevent a Commissioner from exercising his functions under the *Law Enforcement Conduct Act 2016*, or to interfere with the Commissioner exercising his/her discretion in exercising a function. Most certainly, neither the Chief Commissioner nor any protocol can prevent a Commissioner from carrying out a duty when exercising a function. As to my concerns about the protocol as drafted this was also a matter the subject of a detailed memorandum prepared by myself previously, but not provided to the Crown Solicitor for the purpose of this advising.
14. Any protocol or policy must be consistent with the Act and cannot operate to fetter the power of a Commissioner to exercise his or her functions as allowed by section 19(1) by removing that power in advance by, “getting in first” with a protocol or policy under section 19(4).
15. In short, the Crown Solicitor should be asked to clarify her second advising in light of the apparent inconsistencies in her opinions expressed in her first advising. I would respectfully submit that at the very least she be given again;
 - (i) A copy of the memoranda forwarded and the following questions below for the purpose of her first advising;
 - (ii) A copy of my response to her first advice of 11 November 2019;
 - (iii) A copy of my letter to the Assistant Inspector of 6 November 2019, and
 - (iv) A copy of this response along with any response that may be forthcoming from the Chief Commissioner to her second advising.

16. The Crown solicitor should be asked the following questions:

- (i) Whether a decision of the Chief Commissioner under section 19(4) can operate so as to fetter the power conferred on a Commissioner under section 19(1) and the *Law Enforcement Conduct Act 2016* generally, to exercise the functions of a Commissioner; and
- (ii) Whether section 19(4) can empower the Chief Commissioner to require another Commissioner to, in effect, act under dictation when exercising any function.
- (iii) In short, what impact does the non-fetter principle have on the relationship between the operations of section 19(1) read in conjunction with section 19(4).

17. I am aware that in your role as an Assistant Inspector you are under significant time constraints. However, the matters raised are of significant importance, and do need to be carefully considered given that they affect not only the current operation of the Commission, but also the manner in which the Commission is to be managed in future.

18. It is of critical importance that the correct managerial approach be adopted with a clear understanding as to what the role of each Commissioner within the Commission may be. One notes that the second advising was sought on, understandably, an urgent basis and the Crown Solicitor's second advising was provided on an urgent basis having regard to the fact that the request for such advising was made on 12 November any advising itself was dated 15 November.

19. Also of concern, is the fact that in the urgent advising provided no reference is made to the arguments presented by myself in my memorandum which was relied upon by the Crown Solicitor in the first advising. This is a matter of great importance given that the first advising agreed in part at least with the propositions put forward by myself, but the second advising appeared to reject those propositions with no explanation given as to why this was done.

20. It may be the case that in formulating the opinion for the purpose of the second advising, to greater reliance was placed on the arguments put forward by the Chief Commissioner in his letter of 11 November to the Assistant Inspector. The concern expressed by the Chief Commissioner that the first advising, if accepted, would lead to "chaos" has sufficient importance to be referred to as part of the executive summary.

21. This suggestion, together with other matters put forward by the Chief Commissioner, to my mind at least have little weight and could be readily refuted in argument. For example, so long as an appropriate management

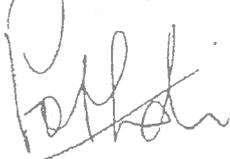
structure is put in place, and an appropriate protocol or policy is adopted, no chaos would or should ensue. Any suggestion that the Commissioner for Oversight issuing coercive notices under section 54 or section 55 whilst of the investigation is being dealt with by another Commissioner, whilst theoretically possible, would never occur. Up until now, such a situation has not come even remotely close to occurring. By the same token the Commissioner for Integrity, under current management structure does not play an active role in the issuing of notices under the provisions of Part 7.

22. As to other matters raised by the Chief Commissioner, in for example paragraph 4 these are matters that could be governed by a management protocol, and decisions relating to strategy under section 19(4). It is beyond question that the resources of the Commission are scarce, and need to be wisely used. It is inconceivable to think that any one Commissioner would undertake any important steps, or any strategy without first discussing the matter with fellow Commissioners at Commissioner's meetings. This has not occurred up until now, and although theoretical, is unlikely to ever occur in the future. The prospects of any Commissioner "getting in first" so as to exercise any function is extremely remote. These matters should have been given, little weight if any when considering the operation of section 19(4) under the legislation

23. Given the importance of the issues raised not only from the perspective of the management of the Commission but also from a public interest point of view, it may be that consideration also needs to be given to the obtaining of an advising from the Solicitor General on the issue. As stated previously, the outcome of the advising will have a significant impact on the work and operations of the Commission in future.

24. Acknowledging the time limitations applicable to yourself in your role as Assistant Inspector, one possible option may be that an extension be sought in your role. This suggestion should by no means be seen as disrespectful, but more as a result of concern that the finalisation of the matter, whether in terms of legal advisings or other aspects be carefully considered and not rushed in any way.

Yours faithfully,



Patrick Saidi
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**Response to memorandum of Chief
Commissioner regarding proposed Part 6
Investigation dated 16 August 2019**

PATRICK SAIDI, COMMISSIONER OF OVERSIGHT

Response to memorandum of Chief Commissioner regarding proposed Part 6 Investigation dated 16 August 2019

Given the matters raised in your memorandum, and my belief that a great deal of what is stated is challengeable whether in terms of the facts stated or opinions expressed, it is necessary to provide you with a memorandum in response correcting those matters.

As previously indicated to you one's suspicion is that you have drafted your memorandum for the purposes of the Law Enforcement Conduct Commission's records, and this response is provided with that in mind. For that reason, it is more detailed than it otherwise would have been. What I have to say should go on record.

This memorandum should be read in conjunction with the matters raised in my earlier memorandum of 21 May 2019 and more particularly the later memorandum of 12 June 2019. It is unfortunate that many of the points raised in my later memorandum of 12 June have not been addressed by yourself. Given the importance of matters raised they should have been addressed.

The following matters need to be taken into account when consideration is given as to the validity of matters raised in your memorandum:-

1. My recollection is that at the meeting of 23 May 2019 Commissioner Drake did not indicate, in my presence at least, that she did not agree with my proposal. In fact, she made a number of suggestions about how such an investigation might proceed which she thought were positive.¹

What I was advised by Commissioner Drake by way of the same email was that one of the reasons given by myself for the holding of a part six investigation was the need to have Oversight "flex its muscles". She indicated to me in the email that she could not think of a worse attitude towards an investigation for promoting change and achieving a proper outcome. For that reason she opposed the investigation proposed. No other reasons were given.

There was further correspondence between Commissioner Drake and myself relating to the matter in which I made it quite clear that the primary purpose of Part 6 investigation was not so as to flex any muscles, and any reading of my proposal would make that clear.

¹ That this is so is confirmed in her email to me of the 14 June 2019.

2. The fact that Commissioner Drake stated that she could not think of a "worse attitude towards achieving an investigation" takes me by surprise given that on no less than three occasions now I have heard her indicate in my presence to others in attendance that at a meeting with representatives of NSWPF when she sought police co-operation for one of the Law Enforcement Conduct Commission's (*the Commission's*) projects (I believe it may have been STMP) when such co-operation was not immediately forthcoming she indicated to those police present that she could always use her Part 6 powers.

Commissioner Drake went on to say that upon making this statement Deputy Commissioner Hudson looked over to his colleague and indicated to her to, in turn indicate to Commissioner Drake that co-operation would be forthcoming without the need for a Part 6 investigation. The use of a threat to use a coercive power so as to obtain co-operation was not only used by Commissioner Drake but was successful on her own version of events.

3. I have also been advised by members of staff who came from the Ombudsman's office that such a strategy was, on occasions, also used by the Ombudsman quite successfully, in obtaining cooperation from police.
4. Your reference to the provisions of Part 7 of *the Law Enforcement Conduct Commission Act (2018)* (*the Act*) providing significant coercive powers overstates the position. You are well aware, and this has been the topic of many conversations amongst ourselves of the police resistance to providing information, or complying with requests made. The NSWPF pays lip service to the provisions of section 107 of the Act, and up till now has made it quite plain that it will object to the provision of any material or information which it perceives, whether correctly or incorrectly, it is not obliged to provide.

To both your and my knowledge there would be dozens of letters within the Commission's holdings attesting to this. There have also been many occasions when police have refused to cooperate and you have advised me of your intentions, if need be, of testing the matter before the Supreme Court. I pointed out to you, again on occasions, that the failure on the part of the police to co-operate could be dealt with by way of the use of Part 6 powers. As the

Commissioner for Oversight I am in a far better position to assess this situation than either yourself or the Commissioner for Integrity.²

5. Whilst you hold the view, so far as the Tink Report is concerned that the Act departs from the proposed scheme in the number of significant respects, I do not hold this view. The provisions of Part 6 and Part 7 are consistent with the Tink Review that the Commissioner for Oversight may undertake investigations and exercise those powers save for one important exception. That is, in the holding of examinations. Provisions such as sections 51-59 of the Act apply whether or not an examination is held. They are applicable for the purpose of an investigation. Section 60 of the Act makes that clear.

The Tink Report's view was that, if during the course of, or after an investigation by the Commissioner for Oversight it is considered by that Commissioner that consideration should be given to the matter progressing to the examination stage, then the matter can again be considered by the three Commissioners. The Tink Review had an emphasis on collegiality and co-operation between Commissioners, something which is clearly lacking currently in the Commission.

Neither the Tink Review nor the legislation mandates the Chief Commissioner exercising autocratic powers. The emphasis is also on consultation amongst Commissioners, and a respect for each other's views and requirements so as to carry out their respective functions.

6. The important aspect is that rather than the Commissioner for Oversight having to rely upon Part 7 powers alone there is an option for the more coercive powers under Part 6 to be exercised.

Significantly, the legislation clearly supports the Tink Review, and my view, of the extent of the powers of the Commissioner for Oversight. Unlike section 62 of the Act which mandates that examinations must be held by the Commissioners nominated, nowhere in the legislation is there any disqualification to the Commissioner for Oversight conducting investigations.

7. It is pointed out that, whilst you state that "considerable progress has been made towards an acceptable process..." I challenge this

² Only in this this week, the NSWPF has forwarded correspondence to LECC indicating that further barriers are being put up to the work of LECC. I am sure that you have been made aware of this.

view as insupportable. The Ombudsman had a far more open and free process for the sharing of information than what the Commission has achieved.

There was general agreement between the Ombudsman and the NSWPF for the supply of information such as witness statements obtained in civil proceedings, and consideration being given to providing a commander with advice about the substance of any legal advising obtained. There is no such agreement with the NSWPF at the present time. The situation has gone backwards³. I can give many other examples as to other areas where this has also occurred.⁴

Furthermore, whilst you may consider it appropriate that these matters be the subject of continuing discussions, these discussions have taken place since 1 July 2017 with little success being achieved by the Commission. The NSWPF has been disinclined to co-operate, and have made it clear that no relevant documentation can be obtained co-operatively on a number of occasions. You have been made well aware of this attitude in the past, and in the past week.

Your suggestion that examinations of particular officers are unlikely to produce any information which will not otherwise be obtained by simple request or conference does not reflect the reality of lack of cooperation by the NSWPF up till the present time. The likelihood of information being provided voluntarily in conference is unrealistic having regard to past experience.

8. An investigation does not require any input from yourself or Commissioner Drake, and as stated previously any such input would only be necessary should an examination under Part 6 take place. As to your suggestion that an audit may suffice, past experience once again would suggest that the NSWPF would give the most minimal cooperation to any such audit and there will almost certainly be pushback to the auditors obtaining the full extent of information required or requested. To that end, and from a strategic point of view a combined audit with the use of Part 6 powers would be the preferred option. The issuing of section 54 and 55 Notices should in many cases suffice in terms of obtaining necessary information.

³ See the contents of my memorandum of 12 June, 2019 at pages 5-6.

⁴ I should add that this situation was worsened when you arrived at agreements with the NSWPF affecting the Oversight Division without consulting either with myself or senior members of my staff about the matters.

9. As to the suggestion that a Part 6 investigation would undermine attempts to resolve the issues by co-operative negotiation, it is difficult to see how, having regard to the history of the past two years in terms of attempted negotiations, the seeking of cooperation from NSWPF, and the obvious resistance repeatedly shown by the NSWPF one could have any optimism that cooperative negotiation would achieve any results.
10. In more recent times the director for Oversight-Investigations in a conversation with [redacted] from PSC indicated that in relation to one matter in particular, the Oversight Division may prepare a report to be provided to Parliament. The response from [redacted] was words to the effect "you can do that and we may or may not read the report". Upon hearing this, I asked Aaron to inform you of this so that you are well aware of the extent of pushback and lack of cooperation forthcoming from the NSWPF.

The lack of respect is also clear. This is not the only occasion, but one of a number, where such an attitude has been shown by NSWPF. In the knowledge of this, how could the Chief Commissioner of this Commission or anyone else come to a view that any cooperation would be forthcoming on a voluntary basis from the NSWPF?

11. I now come to the issue of the resources of the Oversight Division and your suggestion that they are overtaxed. As the Commissioner for Oversight I consider myself to be in a far better position to determine whether the Oversight Division for whom I am responsible is in a position to carry out a Part 6 investigation. Serious consideration has been given to this aspect by the Oversight Division Commissioner, Director and Senior Manager.

As far as those discussions have revealed, the Oversight Division is in a position to undertake such an investigation. It is a question of how best the managers and myself can implement an investigation, and it is for us to determine how resources can best be allocated. It is also for us to best determine the priorities in allocating resources.

Matters that have been discussed include which staff member(s) could best be allocated to such a project, finalisation of the project parameters so as to ensure that any such investigation would not be too wide in its terms, and would be sufficiently structured so as to impose the least possible allocation of resources. Prior to your memorandum at no previous time in the past two years or more have

you suggested to me that the Oversight Division was so resource taxed that it could not conduct such an investigation. It has never been the subject of discussion.

12. It was generally agreed by the Director of Oversight- Investigations, Senior Manager of Oversight- Investigations and myself that the proposal put forward by myself was in very wide terms, but that was for discussion purposes only. Once an investigation was agreed upon by the Commissioners, the focus could have shifted to the actual terms of the investigation. On this aspect, it is noted that the discussions that took place amongst the Commissioners did not in reality proceed very much past the point of whether an investigation should take place or not, and there was no discussion of any substance relating to how the project would or could be implemented and how resources would or could be allocated.
13. Indeed, it should be pointed out that there was no further discussion with you or Commissioner Drake after the meeting of 23 May 2019 relating to whether or not an investigation should be held. The matters raised by you in your memorandum of 16 August 2019, are matters that I was unable to meet or otherwise refute in a meeting of Commissioners. Such important matters as these should be dealt with in a meeting of Commissioners, with each Commissioner articulating his or her own views of the matter, listening to the view of other Commissioners, and then forming one's own judgment. I would much prefer to have Commissioner Drake express her views orally at such a meeting, rather than having her views expressed through your memorandum.
14. You state that you have no doubt that the NSWPF is well aware of the substantial amount of damages being paid in respect of the commission of intentional torts by its officers. I also have no doubt. The critical issue is not so much the awareness of how much is being paid out, but what is being done about the payment of many millions of dollars to plaintiffs because police officers have failed to comply with their legal responsibilities.

Arguably the police have been treating damages paid in civil suits as "the cost of doing business". The cost to society both in terms of damages paid and the legal costs of the civil litigation are horrendous. One is entitled to query why, the NSWPF does not provide such information when asked for whether

by way of parliamentary questions, request for information made by the Commission, requests for information made by community groups such as the Redfern Legal Centre and other legal centres such information is not provided.

The public interest in having this information available is significantly greater than the Commission allocating resources to one off investigations that have no systemic issues to consider.

15. That the NSWPF have not been complying with their own Complaint Practice Notes, OGC Guidance Notes, and representations made to the Commission at past meetings which can easily be seen from the IAPro system, and a check of investigation documentation.

There are very few, if any cases where OGC has in fact provided witness statements to an investigator, the substance of legal advisings, or other relevant material which could be usefully put to use in a complaint investigation. As far as I'm aware, there is no case on IAPro where commands or investigators have been informed as to the outcome of legal proceedings, or details provided as to what police misconduct was identified in the assessment of the damages claim so as to lead to a compromise settlement. The police officers, being the subject of the tort claim, are given no feedback as to the illegality of any action on their part. On this point, neither the Investigator nor the command are provided with such information.

16. In the last sentence of paragraph 6 of your memorandum you referred to "the commitment to improve the situation" by NSWPF. We are at odds on this point. I see very little commitment on the part of NSWPF to improve the situation. The commitment is more that of hiding from the public and from the Commission itself the true extent of the problem that exists. The extent of the problem is reflected in the huge amount of damages paid on a yearly basis.

It is necessary to repeat what I have said previously-there is enormous interest amongst lawyers, community groups and legal centres, and politician(s) in obtaining this information. Over the past many years this information has been blocked by NSWPF. Indeed, you would recall that I also forwarded a letter to Ms Talbot in which she refused to provide such information. So much for the adequacy of Part 7 powers.

17. As to paragraph 8, you state that you are not aware of any perception that the work of the Integrity Division has in fact taken precedence over the important work that could and should be carried out by the Oversight Division. It is difficult to see how such a statement could be made in circumstances where I have continuously raised with you the fact that such a perception does exist.

I have also raised with you the creation of silos within LECC, as well as other matters of dissatisfaction not only by staff members but myself. I have given you reasons why these issues have been raised. I have suggested that you speak to the Human Resources Manager about the matter. What I have had to say has been ignored, and my understanding is that you never approached the Human Resources Manager about the matter. It is a shame, because Nick Athas could have illuminated you about many matters. He had his feet and ears to the ground so far as the Commission was concerned. You obviously do not value my advice and input on these matters.

18. The fact that the resources of the Commission, including access to the Prevention and Education Team are made readily available to both yourself and the Integrity Division, but not available to the Oversight Division speaks volumes in itself.
19. So as to illustrate points made by myself, I would ask you to reflect on your statement as contained in paragraph 3 that "considerable progress has been made towards an acceptable process". I am not aware of any considerable progress, and as stated in paragraph 12 above, a check of IAPro and investigation records would indicate that no progress has been made.

In my capacity as Commissioner for Oversight, I am not only of the strong view that there has been no such progress, but also have a clear view that contrary to the expectations of the Tink review (and the legislation), the manner in which the Oversight Division functions is far less positive, productive or beneficial when compared to the manner in which the former Ombudsman functioned before the commencement of the Commission.

At the very least, the Ombudsman had investigation and coercive powers which are denied to the Commissioner for Oversight of the Commission, who is reliant upon the agreement of his fellow Commissioners, who in turn I feel are not truly familiar with, or otherwise do not recognise the difficulties that the Oversight Division

is encountering in its dealings with the police, and are more focused on the work of the Integrity Division rather than the important work carried out by the Oversight Division. The Ombudsman had access to resources such as a Prevention and Education Team for which I am denied.

20. I understand that the former Ombudsman, Mr John McMillan, as recently as last Friday, 30 August 2019, expressed the view that his one regret in his time as Ombudsman was not holding more public examinations. He clearly valued the need for the Ombudsman to have investigations which moved on to become either private or public examinations. The Commission should learn from this.

21. You are also referred to the recent Budget Estimates Hearing in which David Shoebridge asked a number of questions relating to strip searches of the Commissioner of Police. The answers provided by the Commissioner of Police have been described as arrogant by some, ill-informed by others, and far from being reflective of the reality by others again.

The area of strip searching comes not only under the jurisdiction of the integrity division in the Commission but also the jurisdiction of the Oversight Division. To deal with the problem facing the Oversight Division, there must on occasions, be the ability to fall back upon an exercise Part 6 powers.

It should also be noted that Mr Shoebridge also sought details from the Commissioner of Police relating to Statements of Claim. This area and associated areas involving civil litigation have been the subject of misinformation provided by the NSWPF to the Commission at conferences and meetings in the past. The problem has been so pervasive that one truly questions how one could expect any voluntary cooperation from the NSWPF in future, or otherwise can accept information provided by the NSWPF in the future as being accurate.

22. Without wishing to be disrespectful, the matters raised in your memorandum of 16 August 2019 reflect a lack of true understanding of the legislation and the manner in which it was intended to operate, the reflection of a lack of reality as to the interpretation of history over the past two years in terms of the Commission's dealings with the NSWPF, and a lack of understanding of the difficulties that have confronted the Oversight Division over the past two years.

It is also reflective of the lack of insight and recognition that you have as the Chief Commissioner as to how the work of the Integrity Division has in fact taken precedence over the work of the Oversight Division. Your belief that my perception is "patently untrue" also shows how far removed you are from the coalface in the Commission and your failure to give consideration to the views expressed to you by a fellow Commissioner as to how the Commission is operating.

23. I most vigorously challenge statements made by yourself to the effect that the Education and Prevention Team are too busy to undertake such a project. The factual basis for my challenge has previously been indicated to you and in short I shall repeat them here.

On every occasion before a discussion about any project or investigation taking place, I have informally approached the manager of the Education and Prevention Team as to the team's capability of undertaking the project. On each and every occasion I was advised that the team was in such a position, as well as the fact that the team would be most interested in undertaking such a project or investigation.

Had I been advised otherwise I would not have put forward any such proposal at the time. Contrary to the representation made by the manager to myself, when discussing the matter with you I would be advised that the team is too busy. This is now happened on multiple occasions. After being notified that the team was too busy at the meeting of 23 May 2019 I once again checked with the Manager who once again advised me that contrary to your representations, the team was in a position to take on such a project and would be willing to do so. This was the case on other occasions as well.

24. As if the matters raised in the previous paragraph are not enough, I now refer you to the meeting of the Strategic Operations Group held on 3 September 2019. The Manager of the Education and Prevention Team indicated to the group that some of the projects and work that that team are doing will shortly be coming to an end. They would be looking to other projects to undertake.

As the report shows, the Prevention Team will hold a half day planning session on 17 September 2019 with the aim of the session being to brainstorm potential project ideas which can be presented for the consideration of the Chief Commissioner. It appears to me to be the case, that when you wrote your recent memorandum to me

you were aware that after completion of current projects, the Education and Prevention Team would be in a position to take on new projects. This information is but another reason why I do not accept your explanations at face value.

25. I would also like to add that in my view at least, any new projects that are to be undertaken by the Prevention and Education Team should be the subject of consultation amongst the Commissioners and should not be decided by yourself alone. They are matters that fall within the province of section 19 (4) of the Act.

26. There is another matter that needs to be pointed out so that an understanding can be gained as to why I do not accept such statements being made.

Prior to 4 April 2019, [redacted] from the Prevention and Education Team, in circumstances made known to you, volunteered to obtain information from BOCSAR, and to show both [redacted] and [redacted] how to go about the process. Once her suggested inquiries were complete, I asked her to provide a copy to my fellow Commissioners so that they could also indicate any information that they may wish to have added to the request.

It then transpired that in your capacity as the Chief Commissioner you prevented [redacted] from forwarding the email being sent. This was done without any consultation with myself. I became aware of your actions at a meeting on Thursday 4 April 2019 by chance and you would recall I approached you about why you had done this. You initially advised me that [redacted] was too busy to do such work. You would recall that I challenged you on this and indicated that all needed to do was press a "send email" button on her computer. You then advised me, *inter alia*, that you would not approve an email going out because I had wrongly approached "your team".

An interesting and animated discussion then took place between yourself and myself. In that discussion, you went on to indicate that you may have approved [redacted] sending the email if I had approached you first. Other statements were made by you at that meeting which I found to be internally inconsistent and I left that meeting with the distinct belief that any excuse based upon lack of resources had no substance. I continue to hold that belief whenever that excuse is raised on any occasion.

27. Assuming for the moment that in your opinion, there is a lack of resources to undertake such a project has validity, then it would appear to be the case that all of the work involving investigations has gone to the Integrity Division and the Prevention and Education Team. No resources have been used by the Oversight Division in the past two years. This would lead to a conclusion that the work of the Commission is heavily balanced in favour of the Integrity Division who are using up necessary resources for the purpose of carrying out their own work, to the exclusion of the functions of the Oversight Division. This imbalance needs to be corrected, and precedence shown to the Integrity Division needs to cease. Such bias cannot be allowed to continue, whether in the public interest or otherwise.

For this reason, unless I receive an assurance from my fellow Commissioners that this situation will not continue, and appropriate consideration be given to my proposed Part 6 investigation, and appropriate and credible reasons are given as to why there should not be such an investigation, I am contemplating opposing future Part 6 investigations that do not have a public interest element.

Such investigations undertaken by the Integrity Division should not take up resources that could be better put use in carrying out an investigation put forward by myself, or similar Part 6 investigations that have a much greater potential for satisfying the public interest. Of course, I do recognise that there will be investigations that should be undertaken by the Integrity Division in the public interest, and those investigations I would be happy to agree to. As to why I have taken this view can of course be explained either by yourself or myself at any CAP Meeting to those present.

28. There is one further matter that you should know. In paragraph 8 of your memorandum you expressed concern about my communicating my perception to members of the Oversight Division. For the past two years, and more particularly the last eight months, my perception has been that the Commission has been operating in a dysfunctional manner particularly amongst the Commissioners.

The Oversight Division has been viewed as a minor party in the operation of the Commission, and there has been clear precedence shown to the Integrity Division. There has been a lack of respect shown for the work of the Oversight Division and myself as the Commissioner for Oversight. I have as far as possible shielded the Oversight Division staff from these matters. This includes my Director and the Senior Manager of the team.

You need not concern yourself with my keeping matters away from my team, because I do it not out of any respect for my fellow Commissioners, but out of respect for them. I do not wish the extent of my demoralisation and disillusionment to affect them. I have a wonderful team with wonderful people.

In saying this, you are no doubt aware that the Commission is a small organisation, and as such there is a great flow of information at all levels. Without my having to breathe a word to anyone, I understand that the staff may be well aware of the dysfunction amongst Commissioners. Not only have I not promoted any such flow of information, but I have done my best to prevent it. On this aspect, perhaps you should reflect on your own actions and the communications engaged in by yourself with the NSWPF in which you have unfairly and wrongly criticised me. Do you really expect that this will not come back to my staff or any other staff of the Commission?

29. There is one final matter that I wish to bring to your attention. At the recent SOC meeting, it came to my attention that both you and Commissioner Drake together with two other staff members met with Assistant Commissioner Lanyon in relation to strip search issues.

I was never made aware that such a meeting was to be held. Strip search issues are of importance to all areas of the Commission. My position is clear in that if the other two Commissioners were to meet with Assistant Commissioner Lanyon then I also should have been given the opportunity.

If in future, in my capacity as a Commissioner I agreed to the holding of a part 6 investigation or to a project been undertaken, if I am not kept apprised as to the progress of the matter, or if in any way I am sidelined, I will give serious consideration to revoking my agreement. Agreeing to the conduct of an investigation or to the holding of a project does not finish once approval is given.

9 September 2019

Patrick Saidi

Commissioner for Oversight

40066/822

19 November 2019

Mr Bruce McClintock
Assistant Inspector
Office of the Inspector of the
Law Enforcement Conduct Commission
PO Box 5341
Sydney NSW 2001

By Hand
Private and Confidential

Dear Assistant Inspector,

Your correspondence dated 14 November 2019

I acknowledge receipt of your letter dated 14 November 2019, and in accordance with your request provide the following responses.

Please excuse the length of the response as I did not have the opportunity, given time constraints, to edit the document so as to make the contents more succinct.

Paragraphs 27-28 of my memorandum dated 9 September, 2019

At the outset, I am willing to concede that for anyone unfamiliar with the facts, general context and overall background situation what is stated in isolation may be capable of being construed as a threat. This was most certainly not the intent.

Paragraph 27

1. Paragraph 27 follows on from the contents of paragraphs 23, 24 and in particular paragraph 26 where I indicated to the Chief Commissioner that I found any excuse based upon lack of resources had no substance. This was because on a number of prior occasions the Chief Commissioner raised lack of resources as an excuse in circumstances where, prior to any discussion, I had raised with the Manager of the Prevention and Education Team the viability of any project and I was assured that there was capacity for the project suggested, and indeed the Prevention and Education Team would be both motivated and interested in undertaking such a project.

Had I been advised otherwise, I would not have put forward any such proposal to my fellow Commissioners. In the face of this assurance, when putting the project forward I was advised by the Chief Commissioner that there were no resources available for any investigation project suggested by myself. In such cases, when checking with the Manager of the team

after the Chief Commissioner gave his indication as to lack of resources, I was again advised that the necessary resources were available if the project were to be approved. This led to frustration on my part.

2. It was for this reason that I expressed myself in the terms as underlined in paragraph 27. On one view of the matter, perhaps the terms could have been better expressed, however the message that I was trying to get across was to the effect that if I was going to be continually blocked in my request for a project, whether a Part 6 investigation or otherwise, on this or any other occasion, and if lack of resources was continued to be provided as a reason, then in those circumstances I would be reluctant to agree to a future part 6 investigation that will take up resources, when in the case of competing resources, there would be much more compelling projects or investigations that should, in the public interest be given priority.

The undertaking of Part 6 investigations can take up a great deal of resources, which in my view which may be put to better use, having regard to the public interest.

3. It should be pointed out that since my memorandum of 9 September 2019 I have opposed, to the best of my recollection, only one Part 6 investigation (and hearing consequential to that investigation), or perhaps two at most. This is in circumstances in which a number of other Part 6 investigations and private examinations have been approved by myself.

The reason why an investigation (and later examination) was opposed is, in short, as follows:-

The incident involved, in effect, whether a Superintendent of Police whilst visiting premises of a fellow female police officer may have acted in an improper fashion towards her. My view was that this was an isolated incident between two police officers that could adequately be dealt with by an internal police investigation rather than the Law Enforcement Conduct Commission ('the Commission') using its scarce resources, which could be put to better use.

If need be, such an investigation could have been undertaken by NSWPF and if necessary monitored by the oversight team of the Commission pursuant to the provisions of section 101 of the *Law Enforcement Conduct Act 2016*. Had there been systemic issues involved (which were not), or a matter of overall importance to the NSWPF or in the public interest, I would have readily agreed to an investigation and private examination. Such matters are handled internally by police investigators on a regular basis and, in my view, did not warrant the attention or resources of the Commission.

4. There is no other matter, investigation or private examination that has been dealt with by the Commission where it could be even remotely suggested that I have misused my power, misused the exercise of my

discretion, or exercised my discretion for an ulterior or impermissible motive. I would assume that no such example has been brought to your attention given that I have not been requested to respond to any one particular incident or event.

5. In short, perhaps I should have expressed myself in terms of, when considering future Part 6 investigations, having regard to the limited resources of the Commission, and the competing projects and investigations that need to be considered, I would be more careful in considering which matters should be the subject of Part 6 investigations, and which matters should be left to be investigated by police, whether monitored or otherwise by the Commission itself.

It is a question of the Commission having to weigh up how best to use its resources, which currently are extremely limited and stretched. As for my reference to a "public interest element" this was meant to be a reference to the Commission, with its scarce resources, making a determination as to how best to use the resources in carrying out its functions and with the public interest in mind.

Paragraph 29

6. In order to understand what is stated, the following is pointed out; up until now, the practice amongst Commissioners at the Commission is that at a Complaints Action Panel meeting ('CAP') constituted by the three Commissioners and senior staff, matters come before the CAP for consideration.

It may be agreed that the matters become a preliminary investigation pursuant to the provisions of Part 6, a full investigation or the matter be dealt with in other ways. A preliminary investigation may disclose that there is no substance to the allegations made, or it may disclose that the matter should be further investigated in which case it could become a full investigation.

7. It does happen that even after a preliminary or full investigation has been conducted, that the circumstances disclose that the investigation should not proceed because evidence is lacking, the complaints made on further investigation appear doubtful, or for some other reason. In those circumstances the investigation should be discontinued.

The practice of the Commission up until the present time is that in discontinuing an investigation a vote of the 3 Commissioners is required. There is within the Commission's internal procedures no prohibition on any one Commissioner questioning the need to continue with an investigation should appropriate circumstances arise for doing so.

8. A difficulty that I have encountered in my capacity as the Commissioner for Oversight has arisen as a result of what could be described as a "silo effect". That is, on not all occasions I not been made aware, of the stages reached in an investigation, or of the progress of the investigation.

This is subject to one qualification, and that is at Strategic Operations Committee meetings ('SOC') a summary is prepared as to the progress of investigations. It is at that point of time that I may express a view as to whether an investigation should be continued or discontinued. The same does not apply for projects. Projects are generally undertaken by the Prevention and Education Team. Such projects can involve the work of the Commission across all levels.

Generally, and much to my concern, projects can be undertaken without my direct knowledge or consent. Projects can be undertaken but then abandoned for whatever reason (as happened in my case when a project relating to Statements of Claim recommended by me was commenced but then abandoned without my knowledge by the Chief Commissioner). It has also transpired in the past that projects highly relevant to the three Commissioners have been undertaken and as those projects have progressed, meetings are being held by the Chief Commissioner and the Commissioner for Integrity, to the exclusion of myself in circumstances where the subject matter of meetings is of relevance to the exercise of my functions.

Indeed, such meetings have been held in circumstances where I have not even being aware of such meetings. It is in that context that I am referring to my being "sidelined". One such example is contained in paragraph 29 of my memorandum of 9 September 2019, where a meeting with assistant Commissioner Lanyon was held in relation to strip search issues. The consequences of sidelining me, or cutting off the flow of information to me in relation to the conduct and progress of investigations, or projects is that I am unable to make any informed decisions in my role or exercise my function effectively. I can indicate that I have taken up this issue of my being "sidelined" with my fellow Commissioners in the past.

9. It is my view that any decision made by a Commissioner pursuant to the provisions of section 19(2) carries with it the power and function of a Commissioner to withdraw his/her consent. Independently of section 19, as stated above, the Commission's current procedures allow for discontinuance of an investigation once commenced. There is nothing in the current procedures that would prevent any one Commissioner from advocating for a discontinuance. Circumstances where a discontinuance may be considered appropriate include, *inter alia*:-

- (i) Circumstances may change, such as new facts or information comes to light relevant to the initial decision, and based on such material a Commissioner believes it appropriate to either withdraw any consent or raise the issue of a discontinuance of the investigation.

- (ii) There is a need to discontinue the investigation, not only because of the matters stated in (i) above, but also a lack of resources, necessary changed prioritisation, inability to conduct the investigation within a timely manner, or inability due to lack of resources or whatever to conduct an examination even if the investigation were to be continued. In such circumstances one option may be to discontinue the investigation and refer it back to the NSWPF for their investigation (an option which I understand was utilised by PIC). This option also is not frequently used by the Commission.
- (iii) When the investigation is progressing, if for any reason, a Commissioner is not satisfied that he/she is being kept adequately advised as to the conduct of the investigation so as to satisfy him/herself that the original decision is still valid, or if any information is withheld from a Commissioner preventing the Commissioner from assessing the progress of the original decision to investigate, then in those circumstances the Commissioner should be entitled to indicate that unless he/she is kept updated, the Commissioner is entitled to re-evaluate the original decision to allow an investigation to occur, or alternatively may press for a closure or discontinuance of the investigation.

In such a case, where the Chief Commissioner and the Commissioner for Integrity holds a meeting with now Deputy Commissioner Lanyon on issues relating to strip searches without the knowledge of the Commissioner for Oversight this does impact upon the exercise of functions of the Commissioner for Oversight.

The Commission has had a number of hearings relating to strip searches. The Oversight Division has been monitoring investigations relating to unlawful strip searches. What if any information arises during the course of such meetings that may be relevant to matters such as, are police taking active steps to deal with the issue so as not to require any further investigations by the Commission, or the need to actively monitor internal police investigations (a process that also requires the use of limited resources).

Such information may relate to NSWPF advising that they are in the process of modifying its instructions to police, conducting their own studies, or otherwise taking steps to deal with the problems that arise with respect to strip searches.

- (iv) In the circumstances referred to in (iii) above, a Commissioner may determine that future investigations by the Commission may not be warranted, or given priority over other matters or projects having regard to proposed police actions. The same may apply to any pending investigations. The need to continue with them may no longer exist. Resources of the Commission may then be put to better use.

10. So far as the discontinuance of any investigation goes, there has been only one matter where I have opposed the discontinuance of an investigation. The reasons for my so doing were based upon:-

- (i) The fact that I believed that the investigation carried out by the Commission's investigator was wholly inadequate. Matters that should have been attended to during the course of the investigation were not, and very important lines of enquiry were not followed up. Subject matters of the complaint which were of an important nature were not dealt with by the investigator.

To my mind unless such inquiries were conducted no informed decision could be made in terms of discontinuing the investigation. These deficiencies were made known by myself to my fellow Commissioners and notwithstanding, on a 2-1 basis the discontinuance was approved (Operation Redonda).

- (ii) The complaint itself related to a matter that had received substantial media exposure over a number of years, and it was my view that in prior resolutions of the complaints the matters had not been appropriately handled.
- (iii) The complaint related to an internal police informant who came forward and gave evidence that the evidence being provided by her fellow police officers was false and had been fabricated. Her version of events corroborated that of the accused persons who were acquitted at trial, awarded the sum of \$100,000 in costs, and on my understanding when later suing the NSWPF were awarded substantial damages of six figures and above.
- (iv) The informant police officer and her husband were allegedly the targets of substantial retaliatory police actions for her having come forward and giving such evidence. They are no longer members of the NSWPF, having been in their words forced out of the service.
- (v) Under the provisions of section 211 F of the *Police Act 1990* police officers are required by law to report misconduct. It was and remains my view that any police officer who complies with such law should not be subjected to retributory action.

Both the NSWPF and the Commission should be seen as supporting such "whistleblowers". Such support would not only have a positive effect on any other officers who may fear coming forward and complying with their obligations, but also vindicate an officer who did come forward and consequently, on her complaint, having suffered for so doing.

- (vi) To my mind, such an investigation was of significant importance and should have been given the careful attention it deserved given the

public interest requiring the protection and support of "whistleblowers".

- (vii) It was a matter for consideration, as to whether even if the investigation were to be shut down or discontinued, the matter was worthy of a report to Parliament pursuant to the provisions of section 138, or other provisions of Part 11 of the *Law Enforcement Conduct Commission Act 2016*.

In order for such a report to be undertaken, it would be necessary for further information to be obtained under coercive powers. The Oversight Division does not have those coercive powers unless an investigation were to be on foot.

- (viii) In short, the investigation should not have been shut down given its clear inadequacies. Even if it were to be properly shut down, all information obtained as a result of the investigation could have been put to use by the Commission in the exercise of its other functions.

11. If I may, I would now like to address the matters raised relating to "officer maladministration" at page 2 of your letter. For my part, I am most concerned about my carrying out my functions as the Commissioner for Oversight lawfully, with integrity and most responsibly. That was the motivating factor in my making my complaint to the Office of the Inspector. Whilst, as you point out there is a capability of the contents of my correspondence being construed as a threat to undertake action on improper grounds that would only be the case if the comments were viewed in isolation.

The message that I was trying to send to my fellow Commissioners was not one that I was prepared to act contrary to the legislation, but rather that we as Commissioners acting as a whole need to ensure that we each act in the public interest. We should use the Commission's resources as limited as they are, in the best public interest. It is correct, as you state, that each proposal for a Part 6 investigation should be based exclusively on the merits of that investigation. The merits of that investigation need also to be considered in the context of the limited resources of the Commission, the priorities that need to govern the allocation of resources, and the overall strategies and objectives of the Commission in carrying out its corporate functions.

12. The ideal position would be if the Commission could investigate and conduct examinations in relation to all serious misconduct matters, rather than leaving those to the NSWPF. That cannot occur, even though the Commission may be lawfully justified in doing so, due to the lack of resources. It is in that context I express the view that each proposed investigation and examination should not only be dealt with on its merits, but prioritised, particularly having regard to the public interest. When such

prioritisation occurs, it is clear that many matters suitable for investigation or examination may not be approved.

13. More specifically, the reference to "appropriate consideration be given to my proposed to Part 6 investigation, and appropriate and credible reasons are given as to why they should not be such an investigation, I am contemplating opposing future Part 6 investigations that do not have a public interest element.

This is to be taken as my referring to the reasons which were given by the Chief Commissioner to me in a meeting when the matter was first discussed, where the primary reason given was that the Prevention and Education Team did not have the resources to assist in the project or investigation. At such meeting, I pointed out to the Chief Commissioner that this was not the case because I had already spoken to the Manager of that team and I was again assured they did have the capacity. After that meeting, and some few days later I was assured by the manager that they did have the capacity. At that meeting, no other substantial reasons were given by the Chief Commissioner as to why there should not be such an investigation.

That is why I made reference to the fact that appropriate and credible reasons should be given. The reference to "*I am contemplating opposing future Part 6 investigations that do not have a public interest element*", was meant as an indication that when considering future investigations, I would be giving consideration to those investigations that not only satisfy the factors to be taken into account pursuant to the provisions of sections 44-46, but giving priority to those investigations which would serve the public interest to a greater extent than other investigations where there is no broader public interest involved.

14. Examples of such investigations and public examinations would include;
 - (i) systematic failures within the NSWPF;
 - (ii) widespread and unlawful use of strip search powers by NSWPF;
 - (iii) widespread problems involving the unlawful arrest of citizens for breach of bail conditions when there is systemic failure in the use of police computerised information systems;
 - (iv) matters where there has been displayed a widespread and fundamental misunderstanding of legislation and police procedures, abuse of citizens through implementation of the STMP policing system; and
 - (v) other issues, such as widespread abuse of the giving of "move along" directions that affect not only the rights of one citizen, but the outcome and the exposure of the issue can lead to the

protection of the rights of many hundreds if not thousands of citizens in this State.

The current controversy relating to the unlawful strip searches is but one example of how the Commission's investigation, examinations and involvement would lead to the protection of the rights of many people.

15. The use of the Commission's resources, in the public interest, should be directed towards these issues rather than isolated cases, which have no real bearing on the broader public interest, even if the factors under sections 44-46 satisfy the criteria for the Commission to investigate the matter. If the public interest were not to be considered, and priorities given, the Commission would be faced with having to conduct hundreds if not thousands of investigations every year. That is the context in which my comments were made.
16. As previously stated in my complaint over the past two and a half years in my capacity as the Commissioner for Oversight I have not been able to undertake one Part 6 investigation, one project, or one report to Parliament as well as other functions due to the lack of resources available to me. It was with that background in mind that I was seeking to make the point to my fellow Commissioners that if indeed resourcing was an issue (which for reasons previously stated does not appear to be the case) then a balance needed to be struck between the Integrity Division having resources available for investigations, when some of those investigations did not need to have priority, in the public interest. The public interest may be better served by resources being allocated other than for the purpose of investigations.
17. At no stage did I indicate, or do I believe, that when considering investigations the matters specified in sections 44-46 are not to be taken into account, in the exercise of any discretion by myself. Those matters must be taken into account and I am most aware of that fact. My understanding is that in determining the issue of priority in the work of the Commission, it is necessary for the public interest to be considered.

That can be seen from the legislation where in section 45 it is provided that in deciding whether any misconduct matter should be or does not need to be investigated whether by the Commission itself or by the NSWPF, the Commission may have regard to such matters as the Commission thinks fit including, those matters set out in sections 1 (a)-(g).

Thus the public interest can section 46 does not exclude any public interest consideration. Section 51(4) also confirms that the public interest is a relevant factor by way of the use of the words "*and the Commission considers it in the public interest to do so*".

18. In addition to the matters previously referred to I would like to point out the following matters for consideration and which I believe support my position:-

- (i) At no stage did the Chief Commissioner or the Commissioner for Integrity during the course of any meeting amongst the Commissioners raise the issue or suggest to me that I was exercising my discretion or powers in any improper manner. If it were to have been raised I would have made my position clear insofar as I would not make any decision other than on proper grounds, and an important issue was the scarcity of the Commission's resources, and the need to prioritise those scarce resources. In fact, in the one Part 6 Investigation I did not consent to, that was made clear by myself to my fellow Commissioners.
- (ii) Any and all decisions made by myself whether in the exercise of my discretion or in use of power cannot be validly challenged. It is noted that no suggestion has been put to me that on any one occasion I have acted improperly or inappropriately when either casting a vote under section 19 or when otherwise exercising my functions. I am confident in saying that there is not one decision made by myself where any challenge can be made to the manner in which I have undertaken my function.
- (iii) I am the Commissioner who proposed that meeting minutes be kept, and detailed records be kept of the discussions amongst Commissioners. I requested that in any matter involving or likely to involve a 2-1 decision a formal meeting be held amongst Commissioners so that the matter can be fully discussed amongst Commissioners. One would ask rhetorically, if there was any intention to abuse my position, why would I insist that such detailed records be kept, particularly in the case of likely 2-1 decisions?
- (iv) The same applies for the discontinuance of investigations. It was I who insisted that a meeting be held amongst the Commissioners to discuss the issue amongst themselves given its importance. It was also myself who made the request that a record of this meeting be held. A lengthy memorandum was presented by myself at the meeting as to why the investigation should not be discontinued. My reasoning process was set out in the lengthy memorandum which was spoken to, and comments made were recorded at the meeting.
- (v) The Part 6 investigation proposed by myself has been rejected twice. After its rejection a second time, I did not request any such Part 6 investigation again, either before or after 9 September. It thus could not be said that I was trying to force the other Commissioners to agree to my proposal for a Part 6 investigation by myself, because the matter was never going to be pursued again.

- (vi) In the circumstances, such a complaint against me in terms of my acting improperly when exercising my functions should be seen in the context in which my stated position was that the Chief Commissioner was not agreeing to any proposal or project put forward by myself primarily on the basis of my refusing to succumb to the authority which he believed he had over me.
- (vii) If I was abusing my authority in such a significant manner, why was the matter never canvassed with me at any prior Commissioner's meeting, and why was such a serious allegation not made against me until this late stage, that is, after I had lodged my complaint relating to both agency and officer maladministration?
- (viii) A further important matter is the fact that all Section 19 decisions requiring approval for a Part 6 investigation, come before a CAP meeting held on Thursdays. Present at such meetings are not only the three Commissioners but also directors and some managers of different teams (such as the Prevention and Education Team). If I were to act improperly, it would take place in front of all these members of staff.
- (ix) Discontinuance or finalisation of investigations come before a SOC meeting held monthly. Again, if I were to act improperly in considering blocking a discontinuance or similar it would come to the attention of attendees including, the Commissioners, Directors, Solicitor for the Commission, CEO and managers of each division or team in attendance.

19. Having regard to the matters raised by myself, I would respectfully suggest that neither misconduct nor can officer maladministration be established. Having regard to the seriousness of the allegations, the appropriate test should be comfortable satisfaction as per *Briginshaw*. Such a test cannot be satisfied having regard to the background facts presented, and the history of the matter.

In terms of sections 9(3) and 122(3) of the *Law Enforcement Conduct Act 2016*, one needs to look at section 9(4) for guidance. I would respectfully submit that none of the matters set out in section 9(4) can apply on the facts presented. It cannot be said that the relevant *mens rea* would exist for any alleged misconduct that is based on the commission of a criminal offence, and one must express doubt that any wrongful exercise of discretion, not done wilfully, or otherwise based on a mistake of law would satisfy the necessary criteria.

20. From an evidentiary viewpoint, at no stage did I indicate in clear, or even not so clear terms, that in giving consideration to approaching investigations whether in terms of approval or discontinuance with an emphasis on the public interest, that I was going to ignore the considerations raised in sections 45 - 46 of the *Law Enforcement Conduct Act 2016*.

Unless such a clear statement were to be made, and action taken in accordance with such statement no finding of misconduct can be made. The evidence, in my submission is insufficient to support such a finding.

21. Whilst it is always a matter of judgment and perspective, such correspondence, to my mind at least was not inappropriate, when viewed in its context, having regard to the general background circumstances. Viewed of itself it may at first glance appear inappropriate, however it should be borne in mind that the Chief Commissioner is a person, who cannot be regarded as susceptible to being overborne or having an inability to engage in robust discussion. He is a person of many years standing at the NSW Bar, and some 18 years on the Bench of the Supreme Court. Commissioner Drake is a person with the standing of a Federal Court Judge, who sat on the Fair Work Commission for 23 or so years. Both of these Commissioners, especially when sitting together as Commissioners of the Commission are very capable of engaging in forthright and robust discussions.

This is an important part of the Commission's functioning amongst Commissioners. Whilst it is suggested in your correspondence that some people may reasonably think that such conduct was inappropriate and inimical to the proper functioning of an agency such as the Commission it is suggested that the comments made, viewed in context would have no real effect on the functioning of the agency.

Parts 7 and 8- The Commissioner for Oversight's functions

22. Section 19(1) provides that the functions of the Commission are exercisable by any Commissioner. That is of course subject to the provisions of section 19(2), and possibly section 19(4) depending on the decision to be made. Apart from section 62 which applies to examinations there is no other restriction on the powers of the Commissioner for Oversight to carry out any other functions of the Commission.

Thus, whilst it is accepted that Part 6 investigations may generally fall within the province of the Commissioner for Integrity (or Chief Commissioner) there is no prohibition on the Commissioner for Oversight undertaking a Part 6 investigation once the criteria in sections 44-46, and 51 are satisfied. The Tink Review considered this issue, and indicated that the hope was that the Oversight Division would carry out more investigations than what the Ombudsman had undertaken.

23. In carrying out his function, it is necessary for the Commissioner for Oversight to utilise the powers as contained in, *inter alia*, Part 4 ("Functions of Commission"), Part 5, Part 7, Part 8 as well as Parts 11 and 13.

24. In order to understand why the matters in the preceding paragraph are put forward, the following information is offered. When a complaint is referred to or received by the Commission, it needs to be assessed so that consideration could be given as to how to deal with the matter appropriately. This allows the Commission to utilise its powers under sections such as 40 and 41. Once all required information is obtained the Commission under section 44 (1) -(5) can determine how to deal with the matter.

The current procedure is that all such assessments are carried out by the Oversight Division, and recommendations are made as to the appropriate manner of dealing with the misconduct matter. Those matters that may warrant consideration for a Part 6 investigation are brought to the attention of the CAP meetings held on Thursdays. The options for dealing with Complaints include the following:

- (i) Agreeing to a Preliminary investigation so as to determine whether a full investigation is warranted;
- (ii) If warranted, proceeding to a full Part 6 investigation (once the results of the preliminary investigation come to hand);
- (iii) Referring the matter to police for investigation, and thereafter waiting for a Section 137 report on the investigation for assessment;
- (iv) Referring the matter to NSWPF with the investigation to be monitored by the Oversight Division investigators pursuant to Section 101; or
- (v) No further action to be taken.

25. In exercising functions under Part 7 it should be noted that the Commissioner for Oversight does not enjoy coercive powers. There is great reliance on the provisions of Section 107 which creates a duty on members of the NSWPF to co-operate.

So far, such co-operation has been lacking, and many requests for information by the Oversight Division have been denied. For example, whilst NSWPF may provide information under Section 54-55 of the *Law Enforcement Conduct Act 2016*, if the same information is requested under Section 102 this may be rejected on the basis that Section 102 is not as wide as sections 54-55.

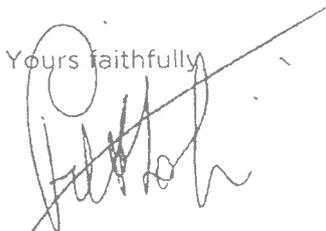
One such example is that if a civil litigation file is sought under section 55 it will be provided, but will not be provided under a section 102 request notwithstanding the terms of section 102 (1) and (3). Thus in order to obtain information or documentation, if considered necessary, consideration may have to be given to the Commissioner for Oversight undertaking a Part 6 investigation in order to exercise his functions and obtain such material.

26. By the same token, the Commissioner for Oversight may consider it appropriate to provide a report to Parliament in any appropriate case. Section 134 (1) specifically provides for the exercise of such function, and relates back to the provisions of sections 103 - 105 of Part 7. The Commissioner for Oversight would also be entitled to provide a report to Parliament pursuant to the provisions of section 138. Part 13 would also be applicable to all Commissioners.
27. Thus it can be seen that the provisions of Part 4 ("Functions of Commission"), Part 5, Part 7, Part 8 as well as Parts 11 and 13, are largely inextricably interwoven in the sense of the functions to be exercised by the Commissioner for Oversight.

If it be accepted that the Commissioner for Oversight is entitled at the very least to undertake Part 6 investigations, it must follow that any attempt on my part to compel a Part 6 investigation (which is vigorously denied) (or any future Part 6 investigation) is not based on a mistake of law. The legislation allows, and most certainly does not prohibit myself as the Commissioner for Oversight from conducting any Part 6 investigation, providing a report to Parliament or the carrying out of any function under the legislation other than the holding of private or public examinations. Whilst I have not yet read closely the more recent advising of the Crown Solicitor dated 15 November 2019, the contents of paragraphs 25 - 30 would support this view.

28. In passing, I point out that the view expressed by the Chief Commissioner in the past has been that Part 6 investigations are the exclusive province of the Integrity Division. I strongly disagreed with him, and gave him the reasons why, those reasons being similar to what I have set out above. If any such view is maintained it would be based on a mistaken view of the law.

Yours faithfully



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RECEIVED
25 NOV 2019

Response to requests dated 15 November and 19 November

BY:

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.

Agency	Head of agency
...	
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.

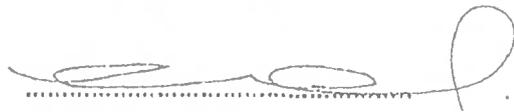
I do not share your doubt that one person can have the requisite, combination of skills. I am satisfied that between Ms O'Brien and the team under her, all of the necessary skills are available to the Executive and the Commissioners at the highest level.

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

LECC

Law Enforcement
Conduct Commission

RECEIVED
2 NOV 2019

BY:

Office of the Chief Commissioner

47249/184

27 November 2019

Mr Bruce McClintock SC
Assistant Inspector
Law Enforcement Conduct Commission
Level 3, 60-70 Elizabeth Street
Sydney NSW 2000

Dear Mr McClintock,

Thank you for the opportunity of commenting on your draft report. In the result, I wish to take up five matters.

The executive summary

In paragraph 3, you refer to relationships between the Commissioners as having "broken down to such an extent as to render the functioning of the LECC less than optimal". This implies, as I read it, that the breakdown has occurred between the three Commissioners. In fact, the relationship between myself and Commissioner Drake is cooperative and professional. It is true that the relationship between us and Commissioner Saidi is broken, despite our efforts to keep it professional. In the final sentence of your report, you mention "dissent amongst the three Commissioners". This is also ambiguous and potentially misleading for the same reason.

The s 19 issue

The essential distinction between the view for which I contend and that contended for (in the "clarifying opinion" of 15 November, to which all paragraph references are made) by the Crown Solicitor, with which you agree depends, as I understand it on the timing of the disagreement for which sub s 19(4) provides the solution.

My view, if I may slightly reformulate it, is that the exercise of any function necessarily follows from a decision even though, stated in para 8, the decision to exercise the function is conceptually distinct from the exercising of the function. The terms of s 19(4) refer to "decisions" which must encompass, as indeed I think the Crown Solicitor accepts (para 10), decisions as to the exercise of a function, although not limited to the exercise of a function, "matter" being a term of the "widest import". Once a function has been exercised, however, there is no room, according to this argument, for the Chief Commissioner to make any decision that the function should not be exercised or exercised in the way it has been. On the other hand, I consider that s 19(4) does not preclude, indeed it positively permits the Chief Commissioner to make an inconsistent decision as to the exercise of the function and the position of the Commission as to that function in the particular

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case is altered accordingly. In short, I consider that the Crown Solicitor's view is inappropriately artificial and does not give the ordinary meaning to the words of the section, considered as a whole in light of its clear purpose to provide a circuit breaker in the event of disagreement.

It is not quite clear how the interpretation espoused by the Crown Solicitor would apply to a function which (say, the Commissioners agreed) had been mistakenly exercised. It seems to me that the Commission must necessarily have the power to correct it. (In saying this, I am in effect repeating my earlier expressed view that the notion of *functus officio* cannot apply to decisions of the Commission as an investigative body.) It follows that the decision to correct it could fall within s 19(4). The same argument must by parity of logic apply to the exercise of a function that a Commissioner (including the Chief Commissioner) considered had been wrongly exercised in the circumstances.

With respect, it seems to me that your paragraph 19(d) goes much further than the position taken by the Crown Solicitor. You state -

"While a decision or action taken by a Commissioner in breach of the Commissioner's Protocol or similar document is invalid, a decision made by a Commissioner not caught by the Protocol cannot be reversed or changed by the Chief Commissioner. Putting it bluntly, contrary to the Chief Commissioner's assertion, the legislation does enable a Commissioner to make a decision with which the Chief Commissioner disagrees provided it is not one that the Commissioner is precluded from making by an existing decision made or policy adopted under s 19(4) such as the Commissioner's Protocol".

The key passage is in para 16 of the Crown Solicitor's opinion, which states -

16. It follows that a Commissioner may not exercise a function in reliance on s 19(1) where to do so would be contrary to a decision made under s 19(4). A Commissioner may not exercise a function in circumstances where the Chief Commissioner has disagreed with the decision to exercise that function in advance of its exercise. This is because s 19(1), which confers the power to exercise the function, is expressed as subject to s 19(4), which imposes a limit on the decision-making power of the Commissioner in relation to the exercise of a function. The limit being a requirement to give way to the decision of the Chief Commissioner in the event there is inconsistency in the decisions. The Commissioner would have no power to exercise the relevant function in those circumstances."

Thus, the prevailing decision of the Chief Commissioner applies to any decision made before the function is actually exercised and not only to those decisions contrary to the Protocol or prior decisions. On this construction, a decision of the Chief Commissioner following an inconsistent decision will prevail, provided only that the function has not yet been exercised.

In substance, the Crown Solicitor proposes that s 19, in effect, allows for the management of conflicting opinion between Commissioners by the making (which could, of course, be by agreement) of procedural rules governing areas of decision-making, thus providing for decisions to be made before the exercise of a function to be resolved, in the event of disagreement, by the s 19(4) mechanism. In para 16, the Crown Solicitor makes it clear (if I correctly understand) that this is not the

only way in which s 19(4) could apply, since it would do so in any case where a decision as to the exercise of a function had been made or (I should think) foreshadowed, providing there was either an extant differing decision of the Chief Commissioner or one that was made before the function had been exercised.

In the result, I would not be concerned to litigate the difference of opinion between my view and that of the Crown Solicitor, as I consider, though somewhat awkward and cumbersome as it is, the management of disagreement between Commissioners by the procedure for which the Crown Solicitor contends would, as a practical matter, enable the Commission to function reasonably well. The question whether the notion of *functus officio* applies to the exercise of a function by the Commission also does not need to be finally determined for present purposes and I am content to leave it to another occasion, should it become necessary for decision.

Of course, the terms of your report must be a matter for you but may I respectfully suggest that this issue might be appropriately addressed along the following lines (essentially agreeing that the question is not entirely free from doubt) -

In substance, I consider (in agreement with the Crown Solicitor) that a decision of the Chief Commissioner that will prevail in the event of a disagreement by virtue of s 19(4) must be made before the exercise by the other Commissioner of the relevant function and, once the function is exercised, there is no room for s 19(4) to operate. However, if the inconsistent decision of the Chief Commissioner is made before the function is exercised (either generally by virtue of the Commissioners Protocol or by a particular distinct decision), s 19(4) operates to make this decision decisive and the function cannot then be exercised.

On the other hand, the Chief Commissioner considers that an inconsistent decision made by him at any time, whether the function has been exercised or not, must prevail. There is something to be said for the construction adopted by the Chief Commissioner. However, in the result, I have decided that the view of the Crown Solicitor is to be preferred. The Chief Commissioner has said that he is prepared to accept this view as he considers that the Commission can still operate effectively on that basis.

The CEO

I have carefully considered the submissions of Commissioner Drake as to this matter and entirely agree with what she has said.

I should just clarify an ambiguity. In the paragraph that points to the delay in obtaining the Minister's response to the proposal, Commissioner Drake mentioned that this "probably eliminated the financial advantage I had identified". The financial advantage mentioned was that which it was hoped would accrue to Ms Williams by virtue of the early activation of her entitlements. It was not a reference to the financial advantage accruing to the Commission, which were fully obtained because the relevant financial arrangements preceded 30 June.

The reimbursement of travel expenses

My problem with this discussion is only to the extent that I think that the

background for the reimbursement may not be understood by persons reading the report who do not bother to turn to the Auditor General's report. I feel it would be fair to point out that the question in issue was whether the Director of Covert Services should attend a high-level surveillance conference overseas

I paid the Director's expenses out of my own pocket and attempted a negotiation with the Minister, which was unsuccessful. I then reimbursed myself.

As it happened, this became an issue with the new Minister and, to avoid further difficulties with the work of the Commission, I repaid the sum. Accordingly, I am now out-of-pocket for a sum paid by me to further the work of the Commission.

Commissioner Drake's decision-making

The allegation that Commissioner Drake did not bring an entirely independent mind to making decisions as to matters where I had expressed an opinion is patronising, offensive and completely false. You should say so.

Yours faithfully,



The Hon M F Adams QC
Chief Commissioner

LECC

Law Enforcement
Conduct Commission

Office of Commissioner for Integrity

26 November 2019

Mr Bruce McClintock SC
Assistant Inspector, Inspector of the Law Enforcement Conduct Commission
Level 3, 60-70 Elizabeth Street
SYDNEY NSW 2000

BY EMAIL: Jennifer.Gotham@oicac.nsw.gov.au
Angela.Zekanovic@oicac.nsw.gov.au

Dear Mr McClintock

Thank you for providing a copy of your Draft Report received on 22 November 2019.

I will now respond.

The Operation of s.19 of the LECC Act.

The Crown Solicitor's opinion presents a workable solution. It is not necessary to be more precise at present. I have no further comment to make on this issue.

Commissioner Saidi's complaint concerning the CEO position.

Your Draft Report, in paragraphs 58 to 62, repeats the questions which you put to me in your correspondence of 15 and 19 November 2019.

I hope my response of 22 November 2019 adequately answered your enquiries and satisfies your concerns. Despite the issues outlined in my response you may still disagree with the decision to restructure. However, even if that is the case, I think I can submit with confidence that appropriate consideration was given to the relevant issues and an outcome has been reached which meets the operational needs of the LECC.

Office of Commissioner for Integrity

Your Draft Findings regarding Commissioner Saidi's Conduct

In previous correspondence I informed you that I regarded Commissioner Saidi's threat of non-cooperation dated 9 September 2019 to be misbehaviour in a Commissioner. I advised the LECC Inspector of my opinion regarding Commissioner Saidi's conduct on 10 September 2019. He made a note to that effect. I am still of that opinion.

Commissioner Saidi's access to the CEO

My experience is that Ms O'Brien is very accessible. Anyone can approach her in her office. My observation is that Commissioner Saidi visits Ms O'Brien. In any event, we have an Executive Meeting three weeks out of four, on the fourth week we have a Strategic Operations Committee Meeting. At both meetings Directors, Commissioners and senior staff are all usually in attendance. Ms O'Brien is in attendance. Matters arising from the minutes are addressed and there is always an opportunity to raise new matters at the end of the meeting. Any other access to the CEO is a matter for the Chief Commissioner. I cannot add anything further. I did not answer Commissioner Saidi's interrogatory. I did not consider it appropriate to respond or likely that any response from me would resolve his issues.

Commissioner Saidi's complaint concerning my decision-making

Commissioner Saidi has alleged that I make decisions involving the Commission, in conjunction with the Chief Commissioner, without consulting him. I am alleged to conduct myself in this fashion because of my close personal relationship with the Chief Commissioner. No particulars as to this conduct were provided.

I have previously rejected his allegation and now reaffirm that denial. I determine matters on their merit in accordance with my obligations as a Commissioner. I do not make decisions in the inappropriate manner alleged by Commissioner Saidi.

You have indicated that all the materials involved in this complaint will be provided to Parliament and will be able to be read. I do not wish any person reading your report to note Commissioner Saidi's allegation and infer an adverse conclusion regarding my conduct as a Commissioner in the absence of a positive finding.

LECC
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Conduct Commission

Office of Commissioner for Integrity

If you are able to do so I ask that you make a positive finding that I have conducted myself appropriately in decision making as a Commissioner of the LECC.

Thank you

A handwritten signature in black ink, consisting of a series of loops and a final vertical stroke, positioned above the typed name.

The Honourable Lea Drake
Commissioner for Integrity

LECC
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27 November 2019

BY:

Mr Bruce McClintock
Assistant Inspector
Office of the Inspector of the
Law Enforcement Conduct Commission
PO Box 5341
Sydney NSW 2001

By Hand
Private and Confidential

Dear Assistant Inspector

Your correspondence dated 21 November 2019

I refer to your letter dated 21 November 2019 and in particular to the draft report pursuant to s 140 of the Law Enforcement Conduct Commission Act ('the Act') attached thereto. Thank you for inviting me to make comments in relation to the draft report. These are set out below.

By way of preliminary observation, I note that such matters raised below are made on the basis of providing you with assistance in finalising your draft report. They should not be seen, and are not intended to be seen, as criticism of any person. I propose to first make a number of general comments and then deal with a number of specific matters. To the extent that the draft report deals with matters of legal construction relating to s 19 of the Act, there is no need for me to make any comments in light of my letter dated 26 November 2019 in response to your letter of 22 November 2019.

General comments

1. It is submitted that much of the evidence I have put forward in support of the complaint including the various examples given by me of being hamstrung in my ability to exercise my functions have been discounted. In contrast, in relation to the views expressed by and actions taken by the Chief Commissioner, while you accept they may have been incorrect or erroneous on his part, for example, as to the extent of his powers under the Act, his consultation of the Minister as far as the position of the Chief Executive Officer is concerned, and his breach of the Public Finance and Audit Act 1983 (see also s 62 of that Act), these incorrect views and actions have been discounted in favour of the Chief Commissioner.

In this regard, you have made draft findings that the Chief Commissioner has acted bona fide, or upon an erroneous view of the law or with no intent but that this fell short of officer maladministration or officer misconduct. Also, a finding of no officer maladministration was made partly based on the fact that the Chief Commissioner did not act in accordance with his erroneous view of the law.

2. I only ask that if any allegation of officer maladministration or misconduct is to be found against me, it be assessed or treated to the same standard and reasoning process applied to the Chief Commissioner.
3. With the foregoing in mind, in relation the draft finding of officer maladministration against me, as previously indicated to you in my earlier submission, I categorically state that whilst my language may have been robust, it was not a threat and I have never acted in a manner that could be said to have been consistent with the suggested threat.
4. My robust language needed to be considered in the context in which it was made, and to whom it was directed. At all times, I was acting bona fides and with the intention of furthering the public interest by seeking that all Divisions of the Law Enforcement Conduct Commission ('the Commission') have the ability to function as optimally as possible given the limited resources available. I was advocating for the Oversight Division but in the context of the operation of the Commission as a whole. As with the conduct of the Chief Commissioner which you have found to be bona fides, in part based upon his erroneous view of the law, and without intent and no implementation of his erroneous view, in my case and on the same principles involved, no officer maladministration should be found.
5. Many of the matters I raised, which were robustly rejected by the Chief Commissioner and the Solicitor for the Commission, you propose to find were in fact erroneous on the part of the Chief Commissioner and Solicitor. It was in the face of such repeated and steadfast opposition that my robust advocacy took place.

The Crown Solicitor advisings, in critical aspects supports my interpretation of s 19. Of critical importance, the concept that the Chief Commissioner can direct and control me in the exercise of my functions under provisions such as Part 7 have been rejected, not only by the Crown solicitor in her advisings but in terms of paragraph 20 of your draft report. From my perspective, this was the critical issue that arose in the terms of my complaint, and was a critical matter to be determined having regard to the future management of the Commission and the public interest generally.

6. The above was in the context in which I, on no less than two or more occasions had specifically requested for an independent legal advising to be obtained in relation to the appropriate legal interpretation of the provisions of s 19 of the Act. These requests were rejected on the basis of the Chief Commissioner continuing to contend that his interpretation of the provision was correct and that could be no valid argument to the contrary. For her part, notwithstanding the issues involved, the Commissioner for Integrity did not consider it justifiable having regard to the legal cost involved in obtaining such an advice.
7. From an overall perspective, whilst this was never the subject of my earlier submissions, it is considered necessary to point out the following. In my 40 years of practice as a legal practitioner I have never had any finding of misconduct or even minor impropriety made against me. When analyzing my conduct this is a matter that should be taken into account, even at this point of time and should weigh heavily in my favour.

8. From a general perspective, consideration needs to be given to the issue of when an alleged threat is made, whether that in itself is sufficient to ground improper conduct or otherwise constitute misconduct. For that reason, relevant legal principles on this point have been set out in the body of this response. Based upon an application of those principles the statement in question cannot be considered an improper or unlawful threat from a legal perspective.
9. In short, it is respectfully submitted that if upon the application of the same factors, principles and analysis applied when examining the conduct of the Chief Commissioner were to be applied in an assessment of my actions, this should also lead to a finding of no officer maladministration on my part.

More specific matters

Paragraph 22

10. At no stage in my dealings with the Chief Commissioner did I ever intend to choose to be rude or provocative. The correspondence and discussions that followed were robust both ways, as it may be expected amongst Commissioners in a 3 Commissioner model. I would respectfully ask that you consider deleting the words "*in the face of an amount of rudeness and provocation*" from the report as these words may be construed as indicating an intent to engage in such action on my part, in circumstances where I intended to engage in no more than robust dialogue.
11. Further as to paragraph 22, the draft report clearly indicates that the Chief Commissioner's view of the operation of the Act was erroneous. It is further stated that there is no evidence that any action on his part was caused by such erroneous view, and no evidence is seen that the Chief Commissioner has actually behaved in an autocratic manner. I am not aware as to the information or evidence upon which this statement is based. Should it be the case that the Chief Commissioner or the Commissioner for Integrity have put forward such a proposition, again I have not had the opportunity of responding. The fact is, as seen from the ample correspondence forwarded by myself, and the memoranda received by myself from the Chief Commissioner, it was made clear by the Chief Commissioner that he could act in an autocratic manner throughout a lengthy period of time, and that I was to comply with his view of the law.

At all times I did act under this view of the law expressed by the Chief Commissioner up till the present date. Similarly the Commissioner for Integrity, and the Solicitor for the Commission/CEO made it clear at meetings of the executive that the Commission was to operate on this basis. Had the matter being raised with me, and if the matter were considered of such importance to the outcome of my complaint, I would have been in a position to provide concrete examples of where I have been inhibited up till now in the carrying out of my functions.

On another occasion, the Chief Commissioner indicated to me that I am not entitled in my capacity as Commissioner for Oversight to write letters on behalf of the Commission. One such letter related to correspondence forwarded by myself to the Police Minister requesting further information as to a matter raised in a parliamentary report. An innocuous letter. Such indications most certainly did influence myself in the manner in which I exercised my functions. Many other examples can be given.

Paragraph 26

12. Reference is made to my making *"an insupportable suggestion of duplicity against the Chief Commissioner"*. Might I respectfully suggest that such a statement is too strong. I have not made any suggestion of duplicity against the Chief Commissioner. What I have done is brought to the Chief Commissioner's attention, and your attention, the fact that on multiple occasions the Chief Commissioner has indicated to me that the Prevention and Education Team were, *inter alia*, too busy to undertake any investigation or project that had been put forward by myself. This was referred to in paragraphs 23, 24, 25 and 26 of my memo of 9 September 2019.

I am not aware of the Chief Commissioner's response to these paragraphs, however those paragraphs do make it clear that prior to discussing any investigation or project with the Chief Commissioner I had raised the issue with the Manager of the Prevention and Education Team and on each occasion I was advised that that team had the necessary resources to carry out the intended project. Were that not so, I would not have put forward any such project. In my meeting with the Chief Commissioner when discussing the project, I would be given as an excuse the lack of resources. After being told this, on each occasion I would again speak with the Manager of the Prevention and Education Team and again be assured that they had the resources to carry out the project.

Perhaps the most striking example is that as contained in paragraph 26 of my said memorandum in which I was told that a member of the Prevention and Education Team was too busy to perform work for me when all that was required for that member was to press a "send email" button on her computer. Given that the incident did happen, and thus unlikely to be disputed by the Chief Commissioner it is difficult to see how an opinion of *"insupportable suggestion"* (whether of duplicity, or as a challenge to the facts being presented by the Chief Commissioner) can be supported in those circumstances. I respectfully ask that you consider deleting the words *"insupportable suggestion of duplicity against the Chief Commissioner"* from your final report.

Paragraph 28

13. In paragraph 28 it is stated that *"it is highly doubtful whether an investigation of the type sought by Mr Saidi is authorised by the legislation."* Had I have been requested to provide reasons as to why such an investigation is authorised by the legislation I would have done so. For example, the NSWPF guidelines and agreement with LECC provide for a number of matters to be had regard to. The NSWPF internal guidelines provided for police investigators to be able to request and obtain from the Office of General Counsel copies of documentation obtained for the purpose of the civil litigation. Such documentation included requests for legal advices, witness statements, conference notes, video or CCTV footage, court judgements and any other material that may be useful in determining what action should be taken in the course of a police investigation, and so as to assist the Commission in determining whether or not all relevant information was had regard to in the investigation itself. It is clear from the material provided by the NSWPF to the Commission that these guidelines are not being complied with. That in itself would constitute agency maladministration.

14. Another aspect relates to whether or not, based upon the causes of action that are brought by plaintiffs, adequate steps are being taken by the NSWPF in order to deal with the issues that arise or whether there is systemic failure in dealing with such issues. One example of the importance of such an issue arises from the fact that

if any, in terms of Prevention and Education, when matters come before the courts and those matters are resolved by way of agreement or otherwise proceed to a full court hearing with judgment being handed down. This lack of action means that unlawful police actions or misconduct can go unrecognised by the NSWPF, and thus those actions which were the subject of, in many cases, substantial court verdicts are not addressed.

Paragraphs 31-32

15. In paragraph 31 reference is made to paragraph 2 of my correspondence of 19 November 2019. What was stated in paragraph 2 of my letter should not be seen as a confirmation that the words used by me did in fact constitute a threat. The words used by me were a repetition of the words used in your correspondence of 14 November 2019, and should be seen and understood as a restatement or paraphrase of what you have put in your letter. The word 'may' was used by myself, and thereafter reasons were given as to why the words did not constitute a threat.

16. That brings one back to paragraph 29 of the draft report. It is stated in paragraph 29 that, it appears to you at least, that the threats to oppose justifiable Part 6 investigations unless I get my way in relation to the allocation of additional resources to undertake the Part 6 investigation in question. That is not what was stated by myself in my memorandum.

The dispute up to that point of time related to whether or not appropriate consideration and appropriate and credible reasons were given as to why there should not be such an investigation. There was heavy reliance by the Chief Commissioner upon the alleged lack of resources, to conduct such a project. For reasons canvassed, in my memorandum of 9 September (and other documentation) it was my genuine belief that such reasons were not credible. What I was seeking to achieve and what constituted the "alleged threat" was to have my intended project considered appropriately with all relevant factors being taken into consideration. Had that occurred and appropriate and credible reasons been given to my mind, that would have been the end of the matter, at least so far as my own proposed Part 6 investigation was concerned.

It is respectfully submitted that any meaning to be conveyed to the paragraph in question should be read in its context and it is clarified by what is stated in the paragraph that immediately follows that in question. Critically, any request for an assurance for appropriate consideration to be given and appropriate and credible reasons to be given as to why there should not be such an investigation, with the greatest respect, cannot as a matter of law constitute an impropriety. The legal principles on this are discussed later.

17. Furthermore, the draft report states at paragraph 29 that, I would oppose other Part 6 investigations until the Chief Commissioner and the Commissioner for Integrity agreed to the investigation sought. It is respectfully submitted that

this is factually incorrect. No such words were used, and as stated previously what was sought was the provision of appropriate and credible reasons as to why there should not be an investigation.

It was certainly not stated that "*unless the part 6 investigation is approved I will oppose future part 6 investigations*". It was the seeking of appropriate and credible reasons that was critical and not the approval for an investigation that was being referred to. The difference is significant. This is more so given the gravity of any such findings relating to a Commissioner of an anti-corruption body. The warnings given by the High Court in *Briginshaw* about such matters as inexact proofs, indirect inferences and matters of the like should be carefully considered in any analysis of my actions, as should the principle of the level and degree of comfortable satisfaction required before any such findings are made. The legal position set out below should also be considered.

The Legal Position

18. As to the legal position the law draws a distinction between "coercion", "threat" and "warning". Much regard needs to be had to the context in which any statement is made. (*Hodges -v- Webb* [1920] Ch.d 70; *Allen -v- Flood* [1898] A.C. 1; and *Quinn -v- Leatham* [1901] A.C. 495)

19. Regard must be had to the difference between a threat, an intimation and a warning. A question is whether a person has employed unlawful means, and that question is not to be solved by saying that his words amount to a threat. A mere threat in itself does not give rise to a cause of action, or a finding of guilt.¹

20. It has been held that:

"The question is whether unlawful means have been employed. It is not, as has already been pointed out, every statement which may be called a threat that is unlawful; and for myself, I find it impossible to hold that in a simple case where there is no question of conspiracy or unlawful combination, a firm, and, if you please, emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which you can lawfully take, the speaker will do that which is lawfully entitled to do, is a threat for which a speaker can be held liable at law. Whether it be called a threat or a warning, it is a statement by the person who makes it of any intention to act on his legal rights, made for the purpose of inducing the other to exercise his legal rights in a particular direction."²

21. Further, in the same judgment Peterson J stated as follows:

"I am not, for the reasons which I have given, prepared to hold that he could be made liable to the plaintiff for telling the latter that he intended to do that which he was lawfully entitled to do. It may be that some would call it a threat; others might say that it was only right that the plaintiff should have a full opportunity of appreciating the circumstances before he made up his mind. But whether it be called a threat or a warning, or whatever other description be given of it, it was in effect a statement that the defendant would adopt lawful means for the purpose of giving effect to his Union's

¹ *Hodges -v- Webb* [1920] Ch.D 70 at p90 per Peterson J.

² *Hodges v Webb*, *ibid*, at page 94.

lawful policy; and I am not prepared to hold that the defendant could be made liable for doing so."

22. It is in that context that the critical paragraph in my memorandum of 9 September 2019 needs to be considered. Firstly, there was no threat or warning insisting upon my fellow Commissioners to approve the subject investigation. What was requested, was the receiving of an assurance that appropriate consideration be given to the proposed Part 6 investigation, and appropriate and credible reasons are given as to why there should not be such an investigation. There is nothing untoward in making such a request. Indeed, if appropriate and credible reasons are given the matter would away and any indication intimation or warning has been satisfied.
23. In short, and based upon general legal principles, I was entitled to, and there was nothing improper in my seeking to receive first, such an assurance; secondly, the seeking of appropriate consideration to be given; and thirdly, that appropriate and credible reasons be given. I was also entitled at law to indicate my concerns as to the way I did, and these concerns cannot be said to constitute a threat, let alone any improper threat.

The Factual Issues

24. Having set out the legal issues above, and at the risk of being considered repetitive, having regard to previous submissions made, I would like to put forward the following considerations when analysing the matter from a factual perspective.

It is further submitted with the utmost respect that a finding of officer maladministration or officer misconduct is not available on the evidence. That this is so is for the following reasons, *inter alia*:-

- (i) Critically, as previously pointed out there was never any threat made as referred to in Paragraph 29 of the draft report "to oppose other Part 6 investigations until the Chief Commissioner and the Commissioner for Integrity agreed to the investigation he sought".
- (ii) At no stage was it indicated that when considering Part 6 investigations at any future point of time that when exercising my discretion or powers I would not have regard to the provisions of ss 44-46 of the Act. It was never indicated that the only criteria I would have regard to when considering future Part 6 investigations was a public interest element. Without such a view being expressed it cannot be said that I was prepared to act on the basis of the taking of irrelevant matters into consideration or improper motives.
- (iii) An indication that when considering Part 6 investigations, weight would be given to (among other considerations) the public interest aspect in any decision made cannot be said to constitute an improper motive or an abuse of power.
- (iv) The paragraph in which the alleged threat is contained should be read in conjunction with the paragraph that follows. That paragraph makes it clear that a basis for the opinion expressed by myself relating to the need to have regard to the public interest element, is based upon the resourcing of the

Commission. Furthermore, it is made clear that I would be happy for investigations to be undertaken by the Integrity Division where there is a public interest element. From a transparency perspective, the last sentence of that paragraph makes it clear that I would be prepared to justify the approach taken by myself at any Complaints Action Meeting to participants. It is hardly likely that if one were making decisions based on improper motives or not in accordance with legal requirements that such an offer to be transparent would be made.

(v) Not only is a lack of information or evidence capable of confirming or corroborating the fact that I have actually acted in any unlawful or improper manner when making such decisions, but there appears to be no complaint or allegation on foot that I have so acted. The fact that it was found to be a relevant consideration that the Chief Commissioner did not act upon his erroneous belief as to the operation of s 19, should also lead to it be considered a relevant consideration that I also did not act in accordance with the alleged threat.

(vi) If the same reasoning process were to be applied to my case as that which was applied to the Chief Commissioner, i.e. in his case that whilst he held an erroneous view of the law but never acted upon it, then in my case a similar finding should be made, of no agency maladministration, having regard to all relevant circumstances.

Redundancy of the LECC Chief Executive Officer

25. This is dealt with in paragraphs 33-42 of the draft report. The finding is made that the Chief Commissioner complied with all requirements of the legislation. My complaint was that there was no consultation with the Minister until after the termination of Ms Williams' employment. The essence of my complaint was that there could be no consultation under the legislation after the event. The legal principles indicate that the duty to consult, is far from an empty duty. It imposes flexible but demanding procedural requirements, to communicate fully, to allow proper time to respond, and to consider carefully any responses received.

26. By way of illustration, I note the following:

"The common law duty of consultation is well-established: consultations must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R -v-Brent London Borough Council, Ex parte Gunning (1985) 84 LGR 168; R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213, [108] (R.(on the application of Compton) v Wiltshire Primary Care Trust [2009] EWHC (Admin) at para 104.)"

27. Further, Logan J after reviewing a number of authorities dealing with the requirement to consult, observed what follows:

"...The authorities serve to confirm an impression as to the content of an obligation to "consult" evident from the dictionary meaning of the word."

As further noted by Logan J

"A key element of that content is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon

.....

"There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, "this is what is going to be done" and saying to that person "I'm thinking of doing this; what have you got to say about that?" Only in the latter case is their "consultation"."³ (emphasise is mine)

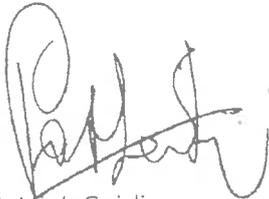
28. In the present case, it is clear from the chronology that consultation took place after the event and certainly not before any course of action was embarked upon. Thus legal compliance, on case law and common law principles did not occur.

Final

29. It is respectfully submitted that upon analysis of my complaint, if a consistent approach is adopted to that taken in relation to the Chief Commissioner's actions, that should lead to no finding of agency maladministration or misconduct against myself. Alternatively, findings of agency maladministration should be made against the Chief Commissioner based upon the process of reasoning and analysis undertaken when examining my own actions.

I trust that the above comments and analysis will be of assistance to you in finalising your report

Yours faithfully,



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³ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia -v- QR Ltd* [2010] FCA 591 per Logan J at p 394-395] . See also *Tomvald -v- Toll Transport Pty Ltd* [2017] FCA 1208, per Flick J. at paragraphs 42-45; See also *QR Limited & Anor -v- Communications, Electricals, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Others* QUD 244 of 2010 at page 59.