

**Open Decision on objection by the NSW Police Force to production of documents required by the Commission under s 114(3)(d) Law Enforcement Conduct Commission Act 2016**

1. This Open Decision arises from an objection made by the Commissioner of Police and relevant members of the NSW Police Force (“the Police interests”) to production of documents under s 114(3)(d) of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act).
2. The Law Enforcement Conduct Commission (“the Commission”) required production of these documents as part of its statutory monitoring function of the investigation by police officers of two critical incidents in which persons died in the course of a police operation: s 110 LECC Act.
3. The Police interests object to production of documents upon the basis that the common law principles of public interest immunity (PII) have application.
4. The Commission has determined that common law PII principles have been modified by provisions in the LECC Act with respect to police information. Production of documents containing police information as required by the Commission is necessary, with it being open to the Commissioner of Police to invoke s 179 LECC Act which provides for a modified form of PII for that class of documents.
5. In this way, there has been a targeted exclusion of common law PII principles with respect to a class of documents which are essential for the Commission to discharge its independent real time monitoring function of police critical incident investigations. A contrary position would be inconsistent with the community expectation that there will be effective and contemporary monitoring and oversight of police investigating other police officers arising from a critical incident.
6. The Commission’s reasons for reaching this conclusion are as follows.

**Factual background to the requirements under s 114(3)(d) LECC Act**

7. It is not appropriate to set out in detail in this Open Decision the factual circumstances of the critical incidents in question. Those circumstances are described in a Confidential Decision which will be provided with the Open Decision to the solicitor for the Police interests.

8. For the purposes of this Open Decision, it is sufficient to note that the requirements arise from two critical incidents which occurred in 2023.
9. The first incident involved the use of a specialist item of police equipment in a police operation where that use caused the death of a person. The equipment was utilised after a period of negotiations by police officers with the person in question.
10. In the case of the first critical incident, the section 114(3)(d) LECC Act requirement sought production of a NSW Police Force procedural manual concerning the use of items including the relevant equipment, together with “iSURV logs”.
11. The second critical incident involves the death of a person in premises after there had been an extended siege by police officers involving negotiations.
12. In the second critical incident, the s 114(3)(d) LECC Act requirement sought production of “State Technical Investigation Branch surveillance records” and “iSURV logs” relating to that critical incident.
13. It is sufficient to note in this Open Decision that the NSW Police Force manual would contain information concerning police procedures for the use of the equipment involved in the death in the first critical incident.
14. With respect to the first and second critical incidents, “iSURV logs” are generated by police officers in the context of a siege or hostage type scenario and would reveal police actions recorded at the time of the incident. Concerning the second critical incident, the “State Technical Investigation Branch surveillance records” would reveal information obtained or generated by police during the negotiations connected to the “*contain and negotiate*” aspects of a high risk situation.
15. It is not uncommon for critical incident investigations to arise out of siege and negotiation scenarios culminating in the death or serious injury of a person. In this way, it may be seen that “iSURV logs” and “State Technical Investigation Branch surveillance records” are documents sought regularly by the Commission when carrying out, in the interests of the community, its real time monitoring function of police critical incident investigations under Part 8 of the LECC Act.

### The procedural context for this decision

16. With respect to each of the critical incident investigations, the Commission required production of the documents sought and it was indicated by the Police interests that a common law claim of PII was made.

17. Correspondence passed between the Commissioner of Police and the Commission and there remained a dispute concerning the construction and application of provisions in the LECC Act. The Commissioner of Police raised the possibility of the Chief Commissioner giving a personal undertaking that the procedural manual (concerning the first critical incident) would not be disclosed outside of the Commission under any circumstances and that the manual would only be used for the purpose of monitoring the critical incident. The Commission took the view that the relationship between the Commission and the NSW Police Force in this area was governed by the LECC Act. It was considered unsatisfactory that the question be met in an ad hoc way by the giving of a personal undertaking by the Chief Commissioner in a particular case. It was appropriate for the Commission to consider the legal issues and proceed to give a ruling on the important question arising from the construction of the LECC Act.
18. Against this background, notices were issued on 31 January 2024 under s 114(3)(d) LECC Act (Exhibits CI1 and CI2) requiring production of the items specified and noting that, if objection was taken, a private hearing would take place before the Commission with respect to the objection on 16 February 2024.
19. In advance of the hearing, written submissions were furnished by Mr Hume, Counsel for the Police interests and by Ms Mitchell, Counsel Assisting the Commission. Oral submissions were made with respect to the objection at the hearing on 16 February 2024, at the conclusion of which the Commission's decision was reserved.
20. Following the hearing, the Commission wrote to the solicitor for the Police interests on 21 February 2024 (Exhibit CI6) inviting submissions on an issue which was not addressed at the hearing (see paragraph 65 below). Submissions were provided on this issue on behalf of the Police interests on 23 February 2024 (Exhibit CI7).

## Relevant provisions of the LECC Act

21. A number of provisions in the LECC Act are relevant to the issues to be considered in this decision. For ease of reference, pertinent sections from the LECC Act are reproduced in Appendix 1 to this Open Decision.
22. Reference will be made to these provisions in the course of this Open Decision.

## Submissions for the Police interests

23. Mr Hume furnished helpful written submissions in support of the objection (Exhibit CI3) and addressed the Commission at the hearing on 16 February 2024. In further written submissions dated 23 February 2024 (Exhibit CI7) in response

to the Commission's letter of 21 February 2024, Mr Hume clarified the submission for the Police interests.

24. It was submitted for the Police interests that the issue of whether s 114(3) empowered the Commission to compel production of documents otherwise subject to common law PII principles turned on the construction of s 114(3) LECC Act. Counsel submitted that very clear words are required before a statute would be construed as requiring the disclosure of documents subject to PII: *Commissioner of Police (NSW) v Guo* [2016] FCAFC 62: 69 AAR 74 at [62], [74]. It was submitted that this flowed from the principle of legality explained in *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15 and subsequent cases which have emphasised the need for unmistakable and unambiguous language before construing a statute as abrogating a fundamental common law principle such as PII.
25. Counsel submitted that common law PII principles apply to documents obtained by execution of a search warrant: *Jacobsen v Rogers* (1995) 182 CLR 572 at 588 – 590; [1995] HCA 6, and apply to immunised production to extra-curial bodies such as the Commission: *Jacobsen v Rogers* at [588] – [590]; *Middendorp Electric Co Pty Ltd v Law Institute of Victoria* [1994] 2 VR 313 at [323] – [324] (*'Middendorp'*); *Commissioner of Police (NSW) v Guo* at [61] - [62] and *Commissioner of Police v Attorney General for NSW* [2022] NSWSC 595 at [48].
26. It was submitted that it was inherently unlikely that the legislature would intend to abrogate PII which applies, relevantly, where the public interest in maintaining the confidentiality of a document outweighs the public interest in the receipt and use of the document by a particular person, whether that person be a court (in the administration of justice) or an investigative body (in the conduct of an investigation): *Jacobsen v Rogers* at [590]; *HT v R* (2019) 269 CLR 403; [2019] HCA 40 at [33].
27. It was submitted for the Police interests that there was no mention in s 114(3)(d) of an intention to abrogate common law PII principles. Section 114 was contrasted with provisions in Part 6 of the LECC Act. Reference was made to ss 54, 55 and 56 of the LECC Act with s 56(3) expressly stating that compliance with a notice was required despite any rule which might justify an objection to compliance on PII grounds. It was submitted that the clear contrast between s 56 and s 114 of the LECC Act supported the submission that there was no abrogation of common law PII principles.
28. Mr Hume submitted that s 179(1)(a) only applied where there was a "requirement" under the LECC Act or the *Police Act 1990*. In circumstances where common law PII principles had not been abrogated by the LECC Act, he submitted that there

was no “*requirement*” to provide information so that s 179 was not engaged. Section 179 has no role to play as there cannot be a “*requirement*” to provide information which is subject to common law PII principles.

29. Counsel submitted that s 179 would apply where information had been provided under s 114(3)(d) which was not information which was subject to common law PII principles. In this way, s 179 had work to do but not where the information sought was subject to common law PII principles.
30. It was submitted that the presence of s 179 in the Act did not support an argument that the common law PII principles had been modified so as to prevent them being invoked by the Police interests in response to a requirement under s 114(3)(d) of the LECC Act.
31. In oral submissions, Mr Hume submitted that the common law PII principles remained available to be invoked and that no construction of the LECC Act as a whole supported a contrary conclusion. To the extent that reference may be made to extrinsic material such as the second reading speech for the LECC Act, it was submitted that it was necessary for the Commission to construe the words of the statute and not the second reading speech: *Lacey v Attorney General (Qld)* (2011) 242 CLR 573; [2011] HCA 10 at [61]. As will be seen, Mr Hume developed this argument in his further written submissions dated 23 February 2024 (Exhibit C17) (see paragraph 65 below).
32. It was common ground that, if the submission for the Police interests was accepted, it would be necessary for common law PII principles to be applied with a balancing exercise to be undertaken in the manner summarised by Wright J in *Commissioner of Police v Attorney General for NSW* [2022] NSWSC 595 at [49] – [53].
33. To the extent that the submission for the Police interests would require a common law PII claim to be determined by the Supreme Court of New South Wales inspecting the relevant documents and undertaking the necessary balancing exercise, Mr Hume submitted that practical difficulties in giving effect to the immunity was an inadequate reason for holding the PII doctrine to be inapplicable: *Jacobsen v Rogers* at [589].
34. It was submitted for the Police interests that, should their submissions be accepted, the means by which a PII claim would be determined would be as follows:

- a) the Police interests would inform the Commission that a common law PII claim was made with respect to the documents sought under the s114(3)(d) requirement;
- b) an explanation of the reasons for making the claim would be provided in writing (in affidavit or statutory declaration form if necessary), but the documents would not be produced to the Commission for inspection;
- c) if the Commission upheld the PII claim, then production of the documents would not be required;
- d) if the Commission determined that consideration of the PII claim required inspection of the documents which were the subject of the claim, the Police interests submitted that the Commission ought not undertake this task but that it would be necessary for the Supreme Court of New South Wales to consider the claim;
- e) if this point was reached, it would be necessary for the Commissioner of Police to commence proceedings in the Supreme Court of New South Wales for the purpose of that Court ruling on the common law PII claim.

## Submissions of Counsel Assisting

35. Ms Mitchell, Counsel Assisting the Commission, furnished helpful written submissions (Exhibit C14) and addressed the Commission at the hearing on 16 February 2024.
36. Counsel Assisting submitted that, on a proper construction of the LECC Act including ss 114 and 179, the common law PII principles have been replaced in respect of critical incident investigations conducted by the Commission so that a PII claim is not a valid basis for declining to produce documents pursuant to a s 114(3)(d) requirement.
37. Counsel Assisting did not dispute the legal principles relied upon by Counsel for the Police interests with respect to construction of a statute said to abrogate common law PII principles.
38. However, Counsel Assisting submitted that the principle of legality ought not be extended beyond its rationale and that it does not exist to shield rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clear identified legislative objects: *Lee v NSW Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 at [313]. It was submitted that it is necessary, in the exercise of statutory construction, to have regard to the context and purpose of the provisions: *Lam v R* [2024] NSWCCA 6 at [18].
39. Counsel Assisting noted the formulations as to the clarity of language required to interfere with common law principles ( such as “very clear words” or “unambiguously clear language”) but submitted that these formulations should

not be taken to suggest that there needs to be an express abrogation of PII by the legislature. The fact that common law PII principles are encompassed by the principle of legality does not alter the task of statutory interpretation which requires construction of the legislation in light of its purpose, context and history: *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25 at [205].

40. Counsel Assisting referred to the legislative history of the LECC Act and the review, by Andrew Tink AM which led to its enactment: “*Review of Police Oversight*” (31 August 2015) (“the Tink Report”). Reference was made as well to the second reading speech for the LECC Bill in support of the submission that common law PII principles had been modified by provisions of the LECC Act.
41. Specific reference was made to the purpose or object of Part 8 of the LECC Act in s 3(h), as well as the terms of s 179. It was submitted that s 179 was an “*important and somewhat unique provision*” which had the effect, viewed in context and having regard to the purpose or object of Part 8 of the LECC Act, of modifying common law PII principles so that PII took statutory form through section 179 with respect to police information.
42. Counsel Assisting submitted that s 114(3)(d) was a “*requirement*” for the purpose of s 179(1)(a) LECC Act. It was submitted that s 179 was part of the statutory scheme which mandated production under a s 114(3)(d) requirement with the Commissioner of Police being entitled to assert that the documents were “*critical police information*”, in a fashion akin to PII, so as to activate section 179 of the LECC Act.
43. Counsel Assisting submitted that the objection made by the Police interests should be overruled and that they should be required to produce the documents sought under the statutory requirements served on them in notices under s 114(3)(d) of the LECC Act, with it being a matter for the Commissioner of Police to engage s 179 on PII grounds if it was considered appropriate to do so.

## Principles of statutory construction

44. The starting point in the process of statutory construction is the text of the provision or provisions in question considered in context, including the surrounding provisions in the legislation and their legislative purpose: *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 269 CLR 507; [2019] HCA 35 at [32]–[37], [124].
45. In *Lam v R*, Meagher JA (Weinstein J agreeing) said at [18]:

*18. Ordinarily, questions concerning the legal meaning of a statutory provision are not to be considered without regard to their context and purpose. Whilst*

*the “language which has actually been employed in the text of legislation is the surest guide to legislative intention”, the “meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy” (Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41 at [47] (citations omitted)). However, to the extent recourse is had to extrinsic materials, including historical considerations, they “cannot be relied on to displace the clear meaning of the text” (Alcan at [47]).*

46. In the interpretation of a provision of a statute, a construction that would promote the purpose or object underlying the statute (whether or not that purpose or object is expressly stated in the statute) shall be preferred to a construction that would not promote that purpose or object: s 33 *Interpretation Act 1987*.
47. Extrinsic material, including the second reading speech, explanatory memorandum or relevant report may be used in the ways referred to in s 34 *Interpretation Act 1987* in construing provisions in the legislation. However, the Minister’s words in the second reading speech cannot be substituted for the text of the law itself: *Lacey v Attorney General (Qld)* at [61].
48. The present question of statutory construction should be approached with the principle of legality in mind, that is, very clear words are required to exclude common law PII principles in the context of Part 8 of the LECC Act: *Jacobsen v Rogers* at [588] – [589]; *Commissioner of Police (NSW) v Guo* at [62], [72].
49. In approaching the question whether common law PII principles are modified or abrogated by provisions in the LECC Act, it is appropriate to keep in mind the statement by Gageler and Keane JJ in *Lee v New South Wales Crime Commission* at [313]:

*313. Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.*



50. In *Shade Systems Pty Ltd v Probuild (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379, Basten JA (Macfarlan and Leeming JJA agreeing) said at [45] – [46] (references omitted):
45. *The standard of clarity required of the parliament has also been expressed in differing language. However, in X7 v Australian Crime Commission, in a passage cited in R v Anti-corruption Commissioner, Kiefel J stated:*
- “The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.”*
46. *Although it has not been expressed in such terms, it seems likely that the level of clarity required of the legislature will depend upon the nature of the perceived infringement, the nature of the rights or general principles infringed and, no doubt, other factors. It is not necessary, and is probably misguided, to construct some quasi-constitutional distinction between categories of legislation, requiring different standards of expression on the part of the legislature in order to achieve their apparent purpose. Indeed, what is covered by the “general system of law”, at least in civil jurisdiction, remains to be identified.*
51. The Commission accepts the submission of Counsel Assisting that the fact that common law PII principles are encompassed by the principle of legality does not detract from the fundamental task of statutory interpretation. It remains necessary to construe relevant provisions of the LECC Act by considering the text of the provisions in light of their purpose, context and history. The requirement for “express” or “*unmistakable and unambiguous language*” is not to be read as excluding recourse to conventional methods of statutory construction including consideration of legislative history which can reveal a necessary implication: *CTM v The Queen* at [205].

## Constitution and functions of the Commission

52. Part 3 of the LECC Act provides for the constitution and management of the Commission, which comprises Commissioners with legal expertise and staff with investigatory and other forms of experience to carry out the various functions of the Commission as contained in Part 4.
53. In exercising its functions, the statute requires the Commission to have regard to the objects in s 3: s 25(2) LECC Act. In this way, the object in s 3(h) acquires additional force as a mandatory factor to be considered by the Commission.

## Relevant extrinsic material

54. The critical incident investigation oversight function was introduced by the LECC Act. The Commission's predecessor, the Police Integrity Commission, did not have such a statutory function. As noted in the Tink Report (pages 152 – 154), the Ombudsman had a limited role concerning police critical incident investigations, but there was no legislative framework for the oversight of police critical incident investigations.

55. The LECC Act followed the review undertaken by Mr Tink which culminated in the Tink Report. In Chapter 10 of that Report, Mr Tink considered oversight of critical incidents leading to a recommendation that the NSW Police Force should retain responsibility for the investigation of critical incidents, but that police should be required to notify the new oversight commission of all such incidents as soon as practicable, and that *"at its discretion, that oversight body should also be able to conduct real-time monitoring of any police critical incident investigation"* (pg 149). Mr Tink observed (at pg 151):

*So it can be seen that while critical incidents do not necessarily equate with misconduct, it is essential that they are investigated in a manner that instils confidence in the public. Striking the right balance in this space has proven to be the single most difficult task I have undertaken during my review.*

56. Recommendation 43 made by Mr Tink was in the following terms (pg 164):

*To ensure high levels of public confidence in the standard of investigation of critical incidents by the NSW Police Force, the new commission should be conferred with a 'real time' power to monitor these investigations.*

57. An important part of the Tink Report concerned the way in which the critical incident oversight function would operate in practice. In this regard, Mr Tink set out in detail the submission of the NSW Bar Association concerning *"a workable model that strikes the right balance"*. Mr Tink said (pp 164 – 166) (emphasis added):

*To fashion a system that allows for real time monitoring of critical incident investigations, without exerting improper influence on police investigators, is challenging. Nevertheless, it seems to me that the NSW Bar Association's submission particularises a workable model that strikes the right balance. That model is as follows:*

*Whatever independent body is chosen to do the monitoring, it should have the following characteristics:*

- a) a positive obligation on the NSW Police Force to immediately notify the independent body of any critical incident as soon as it is declared to be a critical incident;
- b) A power in the independent body to determine whether or not the investigation of the critical incident requires monitoring by it;
- c) The independent body should have the capacity to immediately allocate appropriately trained and experienced officers to monitor a critical incident investigation either as an individual or as part of a team;
- d) The monitoring officers should have the right to attend the crime scene, request and receive reports and information concerning the investigation and its progress, view exhibits, assess police photographs, attend all witness interviews, receive all police communications and written reports and to require a written statement of actions undertaken by police investigators prior to the arrival of a monitoring officer;**
- e) The monitoring officers should be empowered to record any relevant observations or events, to make sound recordings of any observations and to take photographs provided that they do so in a manner that does not interfere with any aspect of the police investigation;
- f) The monitoring officers should not have the power to control, supervise or interfere with the police investigation, but should simply monitor what occurs;
- g) Where a monitoring officer observes an apparent departure from appropriate conduct or the Critical Incident Guidelines, he or she should be empowered to draw the apparent departure to the attention of the SCII (Senior Critical Incident Investigator), but not otherwise require or direct a change in police actions;
- h) Where the SCII disagrees with the monitor, the monitor should immediately reduce the observation to writing. If the SCII remains in disagreement and decides against a change that responds with the monitor's observation, written reasons should be provided by that SCII within 24 hours of the observation being communicated to the SCII;
- i) At the conclusion of the investigation, the independent monitoring body should be required to produce a critical incident report to each of the Commissioner of Police, the Minister and, where death has occurred to the Coroner. Where possible misconduct in the investigation has been identified, a body responsible for the investigation of such conduct should be notified;
- j) There should be limitations on the information that may be published by the independent body similar to that provided by s 163 of the Police Act 1990 in respect of the publication by the Ombudsman of "police critical information";**

- k) *The monitoring officers should be subject to strict confidentiality as to any matter monitored until the independent body's critical incident report has been finalised; and*
- l) *Except as set out below, the monitoring body and its officers should not engage with witnesses or family members affected by a police critical incident, nor act in any way that would interfere with the ordinary role of the police. Nevertheless, the monitoring body and its officers should be able to:*
  - i. *Inform family members and witnesses of their presence in a monitoring role;*
  - ii. *Receive any complaint or observation and communicate that complaint or observation if authorised by the family member or complainant to the senior investigating police officer;*
- m) *The monitoring officers should be competent and compellable in the event of future disciplinary, coronial proceedings or criminal proceedings.*
- n) *A monitoring role is designed to maintain and ensure administrative regularity rather than for the investigation of wrongdoing. For that reason, the Association considers that the independent body responsible for monitoring critical incident investigations should not exercise a role in the investigation of complaints in respect of the critical incident or investigation.*

*That is, the monitoring of critical incident investigations should reside in one body and the investigation of complaints concerning the incident and its investigation should reside in another. Complaints concerning police action in critical incidents should be handled by the PIC.*

58. Mr Tink adopted the NSW Bar Association submission in recommendation 45 which states:

*To establish a framework that strikes an appropriate balance between accountability, transparency and effective investigation, the Act establishing the new commission should reflect the features recommended by the NSW Bar Association in its submission to this review, including an obligation on the NSW Police Force to immediately notify the new commission of any critical incident as soon as it is declared as one with enough information to allow the commission to determine whether or not to monitor the investigation.*

59. Paragraph j) in the extract from the Tink Report (at paragraph 57 above) refers to s 163 *Police Act 1990*. That section has been repealed. Section 163 *Police Act 1990*, as it stood in 2016, is reproduced in Appendix 2.

60. It will be apparent immediately that there are significant similarities between the repealed s 163 *Police Act 1990* and s 179 of the LECC Act. It is clear that the

Parliamentary draftsman has utilised s 163 as a model for s 179 of the LECC Act.

61. It is important to observe that Mr Tink proposed a provision such as s 163 *Police Act 1990* to apply to information and documents obtained by monitoring officers as part of the critical incident investigation monitoring function. In this way, there is a direct link between the process for obtaining information (now contained in s 114 LECC Act) and the non-disclosure provision now contained in s 179 of the LECC Act.

62. In the second reading speech for the LECC Bill 2016, (Hansard, Legislative Assembly, 13 September 2016), the Deputy Premier and Minister for Justice and Police, Mr Grant, referred to the Tink Report and stated:

*The Government accepted Mr Tink's recommendations, and they form the basis of this reform.*

63. With respect to the critical incident monitoring function, Mr Grant said in the second reading speech (emphasis added):

***The LECC will have the responsibility to monitor a NSW Police Force critical incident investigation in real time. This is a new oversight function that was recommended by the Tink review.***

*For those who are not aware, a critical incident is essentially an incident involving a police officer that results in the death or serious injury of a person. The bill outlines the circumstances in which a critical incident will be declared. This includes where the death of a person is caused by the discharge of a police officer's firearm, during the application of force by a police officer, or as a result of a police operation. Due to the serious nature of critical incidents, and the need to determine how and why a death or serious injury has occurred during a police operation, it is important that highly skilled and appropriately resourced personnel undertake critical incident investigations. The NSW Police Force has some of the best investigators in the world, particularly the elite Homicide Squad, which currently leads critical incident investigations involving the death of a person. It is therefore appropriate that the NSW Police Force retain responsibility for investigating critical incidents. This was a recommendation from the Tink Review.*

***However, it is equally important that an investigation into a critical incident be conducted in an impartial, objective and thorough manner. The families of people involved in a critical incident, as well as the general public, rightly expect this. While the Government has full confidence that the NSW Police Force conducts impartial, objective and thorough critical incident investigations, LECC oversight will ensure public confidence in this process is maintained.***

*The LECC will be notified when a critical incident is declared, and will be able to monitor all stages of the investigation. The LECC will be able to attend the scene of a critical incident, view recordings or transcripts of witness interviews and liaise with senior investigators. If any issues with the conduct of a critical incident investigation are identified, the LECC will be able to bring this to the attention of the Commissioner of Police, and, where applicable, the Coroner.*

64. Later in the second reading speech, Mr Grant said (emphasis added):

*“After a critical incident has been declared and the LECC has been notified, the LECC may monitor a critical incident investigation if it decides it is in the public interest to do so. Clause 114 outlines the powers the LECC can use when undertaking its monitoring role. This includes being able to attend the scene of a critical incident, having access to recordings or transcripts of witness interviews, being able to observe witness interviews with the consent of the parties involved, and **being able to require the senior investigator to provide access to all relevant documents and reports prepared by police in relation to the critical incident.**”*

65. As noted earlier, Counsel for the Police interests was invited to make submissions concerning the effect of the passages from the Tink Report set out at paragraphs 57 to 58 above. Counsel did so in written submissions dated 23 February 2024 (Exhibit C17). Counsel submitted that caution is required in relying on extrinsic material and an objects clause, observing that *“it is not for a court to construe a statute in a way which furthers its objects to the greatest extent possible since this may not have been the legislative intention”*: *Aurizon Operations Limited v Australian Rail Tram and Bus Industry Union NSW Branch*; *The Office of the National Rail Safety Regulator v Australian Rail Tram and Bus Industry Union NSW Branch* [2024] NSWCA 24 at [63]. Reference was made to decisions which had stressed that *“no legislation pursues its purposes at all costs”*: *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40]–[41]; *Helicopter Tjungarrayi v State of Western Australia* (2019) 269 CLR 150; [2019] HCA 12 at [45]–[46].

66. The Commission has kept these principles in mind in construing the legislation. In the Commission’s view, the objects clause in s 3(h) and the provisions in Part 8 of the LECC Act all move in the same direction, being a direction contrary to that advanced by the Police interests. In exercising its functions, the Commission is required to have regard to the objects set out in s 3: s 25(2) LECC Act.

67. The second reading speech of Mr Grant and the extracts from the Tink Report referred to in this decision may be taken into account under s 34 *Interpretation Act 1987* in construing the relevant provisions of the LECC Act: *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211; [2008] NSWCA 134 at [18]–[27]. The extrinsic material confirms that the meaning of s 3(h), Part 8 and s 179 is the ordinary meaning conveyed by the text of the provisions (taking into

account their context and the purpose or object underlying the LECC Act):  
s 34(1)(a) *Interpretation Act 1987*.

68. What they reveal is an intention to create a scheme for monitoring the police critical incident investigation “*in real time*” with Commission monitoring officers being entitled to obtain documents in the hands of the police for the purpose of the critical incident investigation. The Tink Report was adopted in the second reading speech. It stated expressly that a provision such as that now contained in s 179 of the LECC Act would apply to information and documents obtained by Commission monitoring officers in the course of their monitoring of a police critical incident investigation.
69. There is a clear pathway in the extrinsic material which assists an understanding of the provisions contained in the LECC Act. This permissible use of extrinsic material serves to undermine the arguments advanced by the Police interests concerning the availability of a common law PII claim in response to a requirement under s 114(3)(d) of the LECC Act, with s 179 being the applicable statutory provision to operate should the police seek to raise PII type considerations with respect to police information required to be provided to the Commission. In effect, for the purpose of Part 8 LECC Act, s 179 replaces common law PII principles concerning police information. This is the result of clear and coherent statutory provisions with the extrinsic material fortifying this conclusion.
70. It should be kept in mind that the question here is whether the statutory scheme, including ss 114 and 179, serves to restrict a PII claim on policing issues of the type referred to in s 179(2). Section 179 is a targeted provision which applies only to “*critical police information*”. The present issue does not extend to other forms of PII such as Cabinet documents which lie outside the terms of s 179.

## Returning to the relevant provisions of the LECC Act

71. Against the factual and historical background set out so far in this decision, together with an examination of pertinent extrinsic material, it is appropriate to return to relevant provisions of the LECC Act.

### *The objects clause*

72. The objects provision of the LECC Act in s 3 states as a legislative object “*to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force*”: s 3(h) LECC Act. The objects clause operates as a source for identifying the purpose or object of legislation to assist statutory construction: *Lynn v State of NSW* (2016) 91 NSWLR 636; [2016] NSWCA 57 at [54]; Pearce, *Statutory Interpretation in Australia*, 2019, 9<sup>th</sup> Edition at paragraph 4.64.

73. Perhaps unusually, the statute speaks of “*real time monitoring*”. This reflects what was said in the second reading speech and in the Tink Report which addressed this issue. The ordinary meaning of the term “*real time*” is well understood as meaning “*contemporaneous*” or “*at the same time*” as the event being monitored. This meaning is confirmed by dictionary definitions. The Cambridge Dictionary defines the terms “*real time*” as meaning “*communicated, shown, presented etc at the same time as events actually happening*”.

*Contrasting ss 54–56 of the LECC Act*

74. Counsel for the Police interests points to s 56(3)(a) of the LECC Act as an express abrogation of common law PII principles and contrasts that provision with the absence of a similar provision with respect to critical incident investigation monitoring under Part 8 of the LECC Act.
75. There is a significant difference between ss 54–56 of the LECC Act and s 179. Section 54 provides for the Commission to issue a notice on a “*public authority or public official*”. Section 55(1) empowers the Commission to issue a notice “*on a person (whether or not a public authority or public official)*”. These provisions lie in Part 6 of the LECC Act concerning investigation powers. A notice under s 55 can require anyone to produce a document, and abrogates (almost) all claims for PII.
76. Section 179 is found in Part 14 of the Act concerning secrecy and confidentiality. Relevantly, the operation of s 179 is confined to the provision of police information (which overlaps with only a discrete number of possible PII claims) and applies only to the Commissioner of Police or by some other police officer.
77. For the purposes of monitoring of critical incident investigations, s 179 is confined in its application to the relationship between the Commission and officers of the NSW Police Force. Section 179 operates in the context of the special relationship between the Commission and the NSW Police Force. This is an important distinction which can be traced back to the Tink Report where the predecessor to s 179 was linked directly to information provided to the Commission as part of the monitoring of a critical incident investigation.
78. The Commission is not persuaded that the presence of s 56 and the absence of a similar provision in Part 8 of the LECC Act has any significant bearing on the issues for determination in this decision.



## Part 8 of the LECC Act

79. It is appropriate now to turn to the detailed provisions in Part 8 concerning oversight of critical incident investigations.
80. In effect, the legislation prevents the Commission from itself investigating a critical incident: s 44(9), s 113(5) LECC Act. Section 113(1) requires the Commissioner of Police to ensure that the actions of police officers involved in a critical incident at the time of, and leading to, the critical incident are “*fully and properly investigated by the NSW Police Force*”. Section 113(2) requires, amongst other things, the critical incident investigation to include an examination and report on the extent to which police officers complied with relevant legislation and policies, practices and procedures of the NSW Police Force (s 113(2)(b)), the need (if any) for changes to relevant policies, practices and procedures of the NSW Police Force (s 113(2)(e)) and any systemic, safety or procedural issues arising from the actions of police officers involved in a critical incident (s 113(2)(f)).
81. Section 114(1) provides that the Commission may monitor the conduct of a critical incident investigation if the Commission “*decides that it is in the public interest to do so*”. In this way, the concept of “*public interest*” is invoked for the Commission to consider in determining whether to monitor a particular investigation. Where the present debate concerns the question whether common law PII principles are affected by the LECC Act, this provision itself is noteworthy.
82. Once the Commission is monitoring a critical incident investigation, the functions of the Commission include the provision of advice during the course of the investigation as to whether it is being conducted in accordance with s 113(2) of the LECC Act or is not being conducted in a competent, thorough or objective manner: s 116(a) and (b) LECC Act.
83. Clearly, the exercise of this function to provide advice can only be discharged if the Commission monitoring officer is fully aware of the matters arising under s 113(2) which include (amongst other things) the extent to which police officers have complied with relevant policies, practices and procedures of the NSW Police Force. It is apparent that Commission monitoring officers must be aware of that police information for the purpose of fulfilling that function.
84. Further, the Commission is to give advice concerning the critical incident investigation under s 117 at the conclusion of the investigation. This advice can only be given meaningfully if the Commission is fully aware of what occurred during the course of the critical incident (including critical incidents involving negotiations and sieges) and what policies, practices and procedures applied within the NSW Police Force for the use of particular weapons or equipment

which played a part in the death or serious injury of a person in the course of a police operation.

85. It is notable that s 117(9) LECC Act provides that the Commission may defer publishing an advice if it is satisfied that it is desirable to do so in the public interest. Once again, the “*public interest*” is raised for consideration by the Commission. This aspect is significant in considering the submission for the Police interests that common law PII principles remain fully applicable to a s 114 requirement.
86. It is appropriate to note s 115 given that s 114(3) is said to be “*subject to section 115*”. Section 115(1) provides for a duty of the Commissioner of Police and police officers acting under s 113 and the Commission “*to work co-operatively in the exercise of their respective functions to ensure the critical incident is investigated in a competent, thorough and objective manner*”. Section 115(2)(b) requires the Commissioner of Police to “*co-operate with the Commission by providing it with such reasonable support and assistance as is necessary for it to carry out its monitoring function*”. These provisions emphasise the need for investigating police officers to proactively co-operate to ensure the Commission can carry out its independent real time monitoring function. These provisions do not sit comfortably with the arguments advanced for the Police interests.
87. In construing s 114, it is necessary to keep in mind that it is officers of the NSW Police Force who are carrying out the investigation and not Commission officers. This is a further and significant distinction between Part 6 where the Commission is exercising investigation powers.
88. Section 114(3)(d) allows for the Commission to require the nominated police officer to provide, within the specified period, access to documents obtained or prepared by police officers for the purposes of the investigation (including any report about the conduct of the investigation and progress on it). This is a wide class of documents. It includes documents obtained by police officers for the purposes of the investigation, documents prepared by police officers for the purposes of the investigation, and any report about the conduct of the investigation and its progress.
89. In the present context, the “iSURV logs” and “surveillance records” were documents prepared by the police officers whose actions are under investigation by other police officers as part of the critical incident investigation. They would constitute documents obtained by the police critical incident investigators for the purpose of the investigation. The NSW Police Force procedural manual concerning the use of the item which caused lethal injury to a person in the first critical incident, is also clearly a document obtained by police officers for the

purposes of the investigation.

90. It is simply not possible for Commission officers to discharge their real time monitoring function without prompt access to documents of this type. There is no meaningful scope in s 114 for common law PII principles to apply to police information of this type. This is the inevitable conclusion arising from an examination of the provisions in Part 8 which articulate the manner in which the Commission will undertake real time monitoring.
91. A further provision in Part 8 is noteworthy. Section 118(a) of the LECC Act requires the senior critical incident investigator to inform a family member of a person who suffered serious injury or was killed as result of a critical incident, or a person being interviewed by a police officer in connection with a critical incident that the Commission is carrying out monitoring powers in relation to the incident.
92. Clearly, that statutory requirement is intended to ensure that interested persons are aware that the Commission is carrying out meaningful and real time monitoring functions in relation to the incident. It serves the purpose of reassuring family members and others that independent and effective real time monitoring is being undertaken as the critical incident investigation proceeds. This is a direct means for meeting community expectations that there will be independent contemporaneous scrutiny of the police investigation.
93. If common law PII principles operate to allow the NSW Police Force to decline to provide police information under s114(3)(d), then it would be quite wrong for the investigating police officer to inform family members that effective real time monitoring of the critical incident investigation was in fact occurring.

### Section 179 LECC Act

94. It is necessary to turn to s 179 of the LECC Act. This provision has its origin in the now repealed s 163 *Police Act 1990*. The Tink Report explained its proposed application in the context of monitoring of a critical incident investigation (see paragraph 57 above). On its face, s 179(2) allows the Commissioner of Police to characterise police information as “*critical police information*” where the disclosure of the information may, in the opinion of the Commissioner of Police, “*prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest*”. This is an accurate summary of the class of PII which the Commissioner of Police may raise in the context of police investigations.
95. The formula of words used in s 179(2) is a neat summary of the grounds on which a PII claim may be made by the Commissioner of Police concerning police

information. To this extent, s 179 replaces common law PII principles and has direct application to a requirement under s 114(3)(d).

96. Importantly, a notice under s 179(2) which invokes PII concerning “*critical police information*” must include the reasons for which the Commissioner of Police has formed the opinion referred to in that subsection. The provision of reasons by the Commissioner of Police assists the Commission in reaching an understanding of the level of sensitivity of the information. This allows the Commission to take this aspect into account in determining whether any permissible disclosure (as defined in s 175) should take place under s 179 with respect to the police information.
97. Section 179 does not purport to exclude Part 8 of the LECC Act. Section 179(7) states that s 179(5) and (6) do not apply to, or in respect of, the disclosure of information for the purpose of Part 6. This provision relates solely to Part 6 and is understandable given the operation of s 56(3) which abrogates various forms of privilege.
98. The statutory scheme then is that once a police officer provides documents in response to a requirement of the Commission under s 114(3)(d), it is open to the Commissioner of Police, if there is a foundation for the relevant opinion, to notify the Commission that the information furnished is “*critical police information*” for the reasons contained in the notice. In this way, public interest considerations are accommodated by the Act.
99. The existence of s 179 confirms and reinforces what is otherwise clear with respect to Part 8 – that the application of common law PII principles for police information is entirely inconsistent with real time monitoring and the provision of documents in response to s 114 requirements.
100. This conclusion is clear from a proper examination of provisions including s 3, Part 8 and s 179 of the LECC Act. This constitutes unmistakable and unambiguous language, which, after application of the principles of statutory construction, leads to the conclusion that common law PII principles have no role to play with respect to police information sought under s 114 of the LECC Act.
101. This conclusion serves to promote the purpose or object of the provisions for critical incident investigation monitoring in Part 8 of the LECC Act.

## Distinguishing the cases relied upon by the Police interests

102. The cases relied upon by Counsel for the Police interests do not involve legislation of the type under consideration here. In particular, the purpose and

object of Part 8 of the LECC Act, which includes s 114, and the terms of s 179 contain an unusual series of provisions.

103. Part 8 of the LECC Act involves a special statutory relationship between the NSW Police Force (as investigators) and the Commission (as the oversight and monitoring body) for the purpose of critical incident investigations which must be conducted by police officers. The legislation reflects the strong public interest in there being independent and contemporary monitoring where “*police are investigating police*” arising from a critical incident. The context of the present cases is far removed from those in the decisions upon which Counsel for the Police interests relies.
104. The legislation under consideration in *Middendorp* comprised the secrecy obligations (under s 16) and the power to obtain documents (under s 263) of the *Income Tax Assessment Act 1936* (Cth): *Middendorp* at [324] – [325]. These were general provisions quite unlike the specific provisions in Part 8 and s 179 of the LECC Act with the latter provision referring expressly to PII in the context of police information.
105. *Jacobsen v Rogers* concerned the search warrant issuing power in s 10 *Crimes Act 1914* (Cth) which did not abrogate common law PII principles: *Jacobsen v Rogers* at [588] – [589]. Once again, there was no provision analogous to Part 8 or s 179 of the LECC Act with that statutory scheme operating only with respect to the Commission and (relevantly) the NSW Police Force.
106. In *Commissioner of Police v Guo* the issue concerned provisions in the *Administrative Appeals Tribunal Act 1975* (Cth). Robertson and Griffiths JJ referred to the provisions (at [29] – [34]) and concluded that common law PII had not been displaced by the legislation (at [62] – [72]). Once again, there was no provision of the type contained in Part 8 and s 179 of the LECC Act.

## Practical ramifications of the Police approach

107. It is appropriate to consider the practical consequences if the submissions advanced for the Police interests were to be accepted.
108. On those submissions, the Commissioner of Police could, in effect, elect whether to make a common law PII claim in response to a s 114 requirement, or elect to produce the documents in answer to the requirement and seek to rely upon s 179 of the LECC Act.
109. It should be kept in mind that a PII claim must be approved by the Solicitor General or the Crown Advocate: *Premiers Memorandum M1997-26: Litigation involving Government Authorities*. The Crown Solicitor’s Office will consult the

Solicitor General or the Crown Advocate to obtain approval. It would be necessary for the NSW Police Force to obtain such approval before a PII claim could be made arising from the s 114 requirement.

110. On the argument advanced for the Police interests, a common law PII claim could not be determined to finality by the Commission. If examination of the documents subject of the claim was necessary, then it would be necessary for proceedings to be commenced in the Supreme Court of New South Wales to rule upon the common law PII claim made by the Commissioner of Police.
111. Such an approach is entirely inconsistent with the scheme for real time monitoring laid down under Part 8 of the LECC Act. It is entirely inconsistent with the community expectation that there will be effective and contemporary monitoring and oversight of police investigating other police officers arising from a critical incident.
112. This approach would serve to undermine the purpose of Part 8 critical incident investigation monitoring rather than promote it: s 33 *Interpretation Act 1987*. The simple and clear pathway for the NSW Police Force, if PII issues arise for consideration, is to comply with the s 114(3)(d) requirement and to seek to invoke s 179 of the LECC Act in the manner provided for in that provision with respect to police information. This is a coherent approach which flows from the words of the statute and the extrinsic material considered in accordance with s 34 *Interpretation Act 1987*.

## The Commission's approach if s 179 is invoked

113. Where the Commissioner of Police invokes s 179(2), with reasons explaining the basis of the Commissioner's opinion under s 179(4), the Commission will always give careful and cautious attention to the matters raised by the Commissioner of Police.
114. If disclosure of critical police information was under consideration, the Commission would always provide the Commissioner of Police with notice and an opportunity to make submissions on that question.
115. It is appropriate to keep in mind that the Commission is a specialist body discharging functions under the LECC Act with respect to the NSW Police Force and the NSW Crime Commission. Officers of the Commission are well aware of issues of sensitivity with critical police information and the need for appropriate care to be taken before it is disclosed.
116. To the extent that any concern is felt by the NSW Police Force because of the risk of uncontrolled disclosure of critical police information by the Commission, it may

be stated immediately that no example of this type has ever arisen.

117. The statutory pathway which leads to s 179 of the LECC Act involves the responsible assessment of possible disclosure of information, with a proper opportunity for the Commissioner of Police to be consulted if disclosure of critical police information was under consideration.

## Conclusion

118. The Commission has reached the following conclusions with respect to the issues raised on the present objection.
119. Firstly, with respect to each of the critical incidents under consideration, a notice was served on the relevant police officer in accordance with s 114(3)(d) of the LECC Act requiring production of documents which fell within the terms of that section.
120. Secondly, the proper construction of ss 3, 54–56, Part 8 and s 179 of the LECC Act leads to the conclusion that common law PII principles have no application in response to a s 114 requirement with respect to the class of PII concerning police information as described in s 179(2).
121. Thirdly, if a police officer wishes to raise PII considerations when complying with a s 114(3)(d) requirement, the way for that to occur is as follows –if there is a foundation for the Commissioner of Police to form the relevant opinion, a notice under s 179(2) with reasons under s 179(4) of the LECC Act may be served on the Commission explaining why the relevant information is “*critical police information*”.
122. Fourthly, where s 179 is invoked by the Commissioner of Police concerning “*critical police information*”, the Commission will consider the material with appropriate care and caution and would only consider disclosure of the material after the Commissioner of Police has had an opportunity to be heard on that question.
123. Fifthly, this construction gives effect to the purpose and object of critical incident investigation monitoring under Part 8 of the LECC Act and is fortified by the legislative history and relevant extrinsic material. A most important purpose of Part 8 is to provide and maintain public confidence by oversight and real time monitoring of an investigation by police officers of the conduct of other police officers where death or serious injury has resulted. The construction advanced by

the Police interests would not promote the maintenance of public confidence in this most important area.

124. Accordingly, the Commission overrules the objection taken by the Police interests to compliance with the requirements in the two s 114(3)(d) notices of requirement in this case.
125. In the event that the Commission reached this conclusion, Counsel for the Police interests requested that some time be allowed for compliance. The Commission will accede to this request by allowing a period of seven days for production. Given the need for the Commission to undertake its real time monitoring functions concerning these matters, it is not appropriate to delay the requirement for production for an extended period.
126. It is the present intention of the Commission to make public this Open Decision which considers important issues of statutory construction concerning the monitoring of critical incident investigations. The Commission will enquire of the legal representatives for the Police interests as to whether there is any reason why the Open Decision should not be made public .
127. The Confidential Decision, which contains details of the critical incidents, will not be made public.
128. The Commission extends time for compliance with the requirements contained in the two notices dated 31 January 2024 until 2pm on Wednesday, 6 March 2024. The documents are to be provided by email by that time to the Manager, Legal Services Unit at the Commission.



The Hon Peter Johnson SC  
Chief Commissioner

28 February 2024

NOTE: Proceedings seeking judicial review of this decision were filed by the NSW Police Force in the Court of Appeal on 6 March 2024 and are yet to be determined.



## Appendix 1 – Relevant sections of the *Law Enforcement Conduct Commission Act 2016*

### 3 Objects of Act

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.*

#### **54 Power to obtain information**

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to prepare and produce a statement of information.*
- (2) A notice under this section must specify or describe the information concerned, must fix a time and date for compliance and must specify the person (being a Commissioner, an Assistant Commissioner or any other officer of the Commission) to whom production is to be made.*
- (3) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the public authority or public official and may, but need not, specify the person or class of persons who may so act.*
- (4) A person must not —*
  - (a) without reasonable excuse, fail to comply with a notice served on the person under this section, or*
  - (b) in purported compliance with a notice served on the person or some other person under this section, furnish information knowing it to be false or misleading in a material particular.*

*Maximum penalty — 100 penalty units or imprisonment for 2 years, or both.*

*Note —*

*It is an offence to procure or cause a person to furnish false or misleading information in purported compliance with a notice under this section — see section 153.*

## 55 Power to obtain documents or other things

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person —
  - (a) to attend, at a time and place specified in the notice, before a person (being a Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
  - (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.
- (2) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the person on whom it was imposed and may, but need not, specify the person or class of persons who may so act.
- (3) A person must not, without reasonable excuse, refuse or fail to comply with a notice served on the person under this section.

Maximum penalty — 100 penalty units or imprisonment for 2 years, or both.

## 56 Abrogation of privileges

- (1) This section applies where, under section 54 or 55, the Commission requires any person to produce —
  - (a) any statement of information, or
  - (b) any document or other thing.
- (2) The Commission must set aside the requirement if it appears to the Commission that any person has a ground of privilege under which, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.
- (3) The person must, however, comply with the requirement despite —
  - (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
  - (b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law, or
  - (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official or a former public authority or public official.

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**Part 8 Oversight of critical incident investigations**

**108 Interpretation**

(1) In this Part —

*crime scene has the same meaning as in the Law Enforcement (Powers and Responsibilities) Act 2002.*

*critical incident means an incident declared to be a critical incident under section 111.*

*critical incident guidelines — see section 109.*

*defensive equipment means equipment (such as a Taser gun, capsicum spray, baton or handcuffs) issued to a member of the NSW Police Force for the purpose of exercising the functions of a police officer.*

*investigation cessation notice — see section 112 (3).*

*investigatory powers, in relation to a crime scene, means powers referred to in section 95 (1) (e), (g), (h), (l) and (m) of the Law Enforcement (Powers and Responsibilities) Act 2002.*

*monitoring powers — see section 114.*

*nominated contact, in relation to the investigation of a critical incident, means the senior critical incident investigator or a member of the NSW Police Force nominated by the senior critical incident investigator as the nominated contact.*

*police operation means any activity engaged in by a police officer while exercising the functions of a police officer other than an activity for the purpose of a search and rescue operation.*

*police vehicle means a vehicle used or operated for the purpose of police operations.*

*senior critical incident investigator means the police officer in charge of the investigation of a critical incident.*

*serious injury to a person means an injury that threatens or is likely to threaten the life of the person or that results, or is likely to result, in the person sustaining permanent and significant physical impairment or disfigurement and includes the infliction of a grievous bodily disease on the person or the destruction of the foetus of a pregnant woman.*

*vehicle means a motor vehicle, trailer or other registrable vehicle within the meaning of the Road Transport Act 2013 and includes an aircraft or vessel.*

(2) Subject to the regulations, a reference in this Part to the conclusion of a critical incident investigation is a reference to the final report of the police officers

*investigating a critical incident given after the conclusion of all criminal or coronial proceedings arising out of the critical incident.*

- (3) *A reference in this Part to a person in custody is a reference to a person who has been detained by, or is otherwise in the custody of, a police officer, including being placed under arrest or being apprehended or being taken to or from a mental health facility under the Mental Health Act 2007 or to or from a hospital or other medical facility.*

### **109 Critical incident guidelines**

- (1) *The Commissioner of Police may, from time to time, issue guidelines with respect to the investigation of critical incidents and reporting on the outcomes of such investigations.*
- (2) *The Commissioner of Police may at any time vary or replace the guidelines issued under subsection (1).*

### **110 Features of critical incident**

*The features of a critical incident are —*

- (a) *it is an incident involving a police officer or other member of the NSW Police Force that results in the death of, or serious injury to, a person (including another police officer), and*
- (b) *the death or serious injury —*
- (i) *arises from a discharge of a firearm by the member involved, or*
  - (ii) *arises from the use or operation of defensive equipment by the member involved, or*
  - (iii) *arises from the application of physical force by the member involved while exercising any function as a police officer, or*
  - (iv) *arises from the use of a police vehicle by the member involved (including its use as a passenger), or*
  - (v) *arises while the person is in custody or while escaping or attempting to escape from custody, or*
  - (vi) *appears to be likely to have resulted from any police operation.*

### **111 Declaration of critical incident**

- (1) *The Commissioner of Police may (verbally or in writing) declare an incident to be a critical incident for the purposes of this Part if —*

- (a) the Commissioner of Police becomes aware that an incident involving a member of the NSW Police Force has occurred that exhibits the features of a critical incident set out in section 110, or
- (b) the Commissioner of Police has other grounds for considering it is in the public interest to do so.

Note—

The Commissioner of Police may delegate the Commissioner of Police's functions under this Part to another member of the NSW Police Force— see the Police Act 1990, section 31.

- (2) Without limiting subsection (1) (b), the Commissioner of Police may declare an incident involving the death as a result of the homicide (not including suicide) of a police officer by another police officer or any other person (whether or not resulting from, or occurring in the course of, a police operation) to be a critical incident.
- (3) A critical incident declaration takes effect on its making.
- (4) The Commissioner of Police may (verbally or in writing) revoke a critical incident declaration at any time.

## **112 Duty to notify Commission of declaration of critical incident**

- (1) The Commissioner of Police must ensure that the Commission is given notice of the making of a critical incident declaration immediately after it is made.
- (2) The notice is to include enough information about the critical incident concerned for the Commission to make an initial assessment as to whether or not the investigation of the critical incident should be overseen by the Commission or whether further information is required before a decision with respect to oversight can be made.
- (3) The Commissioner of Police must ensure that the Commission is given notice in writing if it is decided to revoke a critical incident declaration or to otherwise cease the investigation of a critical incident and the reasons for the revocation or cessation (an investigation cessation notice).
- (4) Protocols and memoranda of understanding may be entered into by the Commissioner of Police and the Commission regarding the giving of notice and provision of information under this section.

## **113 Critical incident investigations**

- (1) The Commissioner of Police is to ensure that the actions of members of the Police Force involved in a critical incident at the time of, and leading to, the critical incident are fully and properly investigated by the NSW Police Force.

- (2) Without limiting subsection (1), the investigation of a critical incident is to include an examination and report to each appropriate authority on any of the following that is applicable –
- (a) the lawfulness and reasonableness of the actions of the members of the Police Force involved in the critical incident,
  - (b) the extent to which those members complied with relevant legislation and policies, practices and procedures of the NSW Police Force,
  - (c) any complaint about the conduct of those members that has been referred to the senior critical incident investigator,
  - (d) any evidence of officer misconduct by those members,
  - (e) the need (if any) for changes to relevant policies, practices and procedures of the NSW Police Force,
  - (f) any systemic, safety or procedural issues arising from the actions of those members.
- (3) The investigation is to be carried out so far as is practicable and operationally appropriate in conformity with the critical incident guidelines.
- (4) However the critical incident guidelines are not mandatory and a departure from the guidelines does not in itself affect or invalidate an investigation.
- (5) Despite subsection (2)(c) and (d), the Commissioner of Police may, if the Commissioner of Police considers it appropriate, refer a complaint about a member of the Police Force involved in a critical incident to the Commission with a recommendation that –
- (a) the Commission investigate the complaint, or
  - (b) the Commission investigate the complaint concurrently with the investigation by the NSW Police Force.
- (6) The Commission may decide to investigate a complaint referred to it under subsection (5) despite section 44 (9).
- (7) In this section –
- appropriate authority means the following –
- (a) for any investigation of a critical incident – the Commissioner of Police,
  - (b) for any investigation of a critical incident monitored by the Commission – the Commission,
  - (c) for any investigation of a critical incident involving the death of a person – the coroner.

## 114 Commission may monitor conduct of critical incident investigation

- (1) *The Commission may monitor the conduct of a critical incident investigation if the Commission decides that it is in the public interest to do so.*
- (2) *The Commission must notify the Commissioner of Police as soon as practicable after the Commission decides that the Commission is to monitor the conduct of a critical incident investigation.*
- (3) *For the purpose of the Commission monitoring a critical incident investigation, a Commissioner or other officer of the Commission authorised in writing by a Commissioner may (subject to section 115) do all or any of the following —*
  - (a) *attend a place where a critical incident occurred (including a place where a crime scene has been established) for the purpose of observing the exercise by police officers of any investigatory powers at or in relation to the place,*

*Note —*

*See section 115 (5).*

- (b) *be given access without unreasonable delay to transcripts or any recordings of interviews of witnesses of a critical incident conducted by police officers for the purposes of the investigation,*
- (c) *with the consent of the person being interviewed and the senior critical incident investigator, be present as an observer during an interview conducted by police officers for the purposes of the investigation or view such an interview by audio visual link,*
- (d) *require the nominated contact for the critical incident to provide, within the period specified by the Commission, access to documents obtained or prepared by police officers for the purposes of the investigation (including any report about the conduct of the investigation and progress on it).*

*Note —*

*The Interpretation Act 1987 provides that —*

*document means any record of information, and includes —*

- (a) *anything on which there is writing, or*
- (b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or*
- (c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or*



- (d) a map, plan, drawing or photograph.
- (4) Access may be provided under subsection (3) (b) and (d) by any electronic means that enables the transcript, recording or document to be viewed and copies made of, or extracts taken from, it.
- (5) The Commission may cease to monitor the conduct of an investigation of a critical incident at any time.
- (6) The Commission must cease to monitor the conduct of an investigation of a critical incident if the Commission receives an investigation cessation notice.
- (7) The Commission is to give the senior critical incident investigator notice (verbally or in writing) if it ceases to monitor the conduct of an investigation of a critical incident.

Note —

Under Part 7, the Commission may monitor an on-going police investigation under Part 8A of the Police Act 1990 of an incident that ceases to be a critical incident if the on-going investigation relates to police misconduct.

## 115 Monitoring critical incident investigations

- (1) It is the duty of the Commissioner of Police and police officers involved in investigating a critical incident under section 113, and the Commission in monitoring an investigation under section 114, to work co-operatively in the exercise of their respective functions to ensure the critical incident is investigated in a competent, thorough and objective manner.
- (2) The Commissioner of Police and any police officers involved in investigating a critical incident —
- (a) must comply with any arrangements agreed between the Commissioner of Police and the Commission in relation to the investigation, and
  - (b) must co-operate with the Commission by providing it with such reasonable support and assistance as is necessary for it to carry out its monitoring function.
- (3) The Commission must exercise its monitoring function —
- (a) in accordance with any arrangements agreed between the Commission and the Commissioner of Police as to the manner in which that function is to be exercised, and
  - (b) if the investigation involves a coronial investigation scene within the meaning of Chapter 5 of the Coroners Act 2009, any directions of the coroner.

- (4) *The Commission cannot control, supervise, direct or interfere with the carrying out by the police officers of their function of investigating a critical incident.*
- (5) *In particular, and without limiting subsection (4), a Commissioner or other officer of the Commission attending the place where a critical incident occurred under section 114 (3) (a) must not interfere with the carrying out of the functions of police officers at that place and must comply with any reasonable direction concerning the preservation of the integrity of a crime scene at that place given by the nominated contact or a person authorised to give such a direction by the nominated contact.*
- (6) *All communication between the Commission in the exercise of its monitoring function and police officers investigating a critical incident must be made through the nominated contact for that critical incident.*
- (7) *In determining the arrangements referred to in subsections (2) and (3), the Commission and the Commissioner of Police are to consult with the coroner and take into account any recommendations made by the coroner.*
- (8) *If any arrangement referred to in subsection (3) is inconsistent with any direction of the coroner referred to in that subsection, the direction of the coroner is (to the extent of the inconsistency) to apply for the purposes of that subsection.*

## **116 Advice during course of critical incident investigation**

*A Commissioner overseeing the investigation of a critical incident may, at any time during the course of the investigation, advise the Commissioner of Police, the nominated contact for the investigation or the coroner that the Commissioner considers that the investigation or an aspect of the investigation —*

- (a) is not being conducted in accordance with section 113 (2), or*
- (b) is not being conducted in a competent, thorough or objective manner, or*
- (c) if it involves a coronial investigation scene within the meaning of Chapter 5 of the Coroners Act 2009, does not accord with any direction of the coroner under section 51 of that Act.*

## **117 Advice concerning critical incident investigation**

- (1) *The Commission is to give the Commissioner of Police (and, if the critical incident concerned involved the death of a person, the coroner) the following advice in relation to the investigation of a critical incident monitored by the Commission —*
  - (a) advice confirming that it considers the investigation was fully and properly conducted, or*
  - (b) if it considers any aspect of the investigation was inappropriate, advice of its concerns.*

- (2) *The advice may, if considered appropriate by the Commission, be given before the conclusion of the critical incident investigation.*
- (3) *The Commission may, without limiting subsection (1) (b), advise that —*
- (a) *an aspect of the conduct of the investigation was not in accordance with section 113 (2) or a direction of the coroner with respect to a coronial investigation scene, or*
  - (b) *conduct of a police officer involved in the investigation may be police misconduct that may or will be investigated by the Commission under this Act or that it recommends the Commissioner of Police investigate under the Police Act 1990.*
- (4) *Before including in an advice under this section any comment about a person that the Commission considers is adverse, the Commission must, so far as practicable —*
- (a) *inform that person of the substance of the grounds of the adverse comment, and*
  - (b) *give the person an opportunity to make submissions.*
- (5) *Before including in an advice under this section any comment about the NSW Police Force that the Commission considers is adverse, the Commission must, so far as practicable —*
- (a) *inform the Commissioner of Police of the substance of the grounds of the adverse comment, and*
  - (b) *give the Commissioner of Police an opportunity to make submissions.*
- (6) *If the Commission makes a recommendation to the Commissioner of Police, the Commission may require the Commissioner of Police to provide to the Commission, within a reasonable time specified by the Commission, advice as to whether the Commissioner of Police intends to implement the recommendation and, if not, the reasons for not doing so.*

*Note —*

*See section 179 (Commission not to disclose critical police or Crime Commission information) in relation to disclosure by the Commission of critical police information.*

- (7) *The advice may include recommendations as to changes that the Commissioner of Police might implement with respect to the critical incident guidelines.*
- (8) *The Commission may make public any advice it has given under this section at any time after the conclusion of a critical incident investigation.*

- (9) *The Commission may defer publishing an advice if it is satisfied that it is desirable to do so in the public interest.*

**118 Interaction with relatives, witnesses and others**

*The senior critical incident investigator (or a person nominated by the senior critical incident investigator) must –*

- (a) *inform a parent, guardian or relative (a family member) of a person who suffered serious injury or was killed as a result of a critical incident or a person being interviewed by a police officer in connection with the critical incident that the Commission is carrying out monitoring powers in relation to the incident, and*
- (b) *inform family members of procedures relating to the making of complaints about alleged police misconduct.*

**119 Complaints relating to investigation of critical incidents**

- (1) *Any person may complain to the Inspector (verbally or in writing) under Part 9 about any conduct of a Commissioner, Assistant Commissioner or other officer of the Commission in overseeing the conduct of the investigation of a critical incident that is or could be officer misconduct or officer maladministration and the Inspector may deal with the matter under that Part.*
- (2) *Any person may complain to the Commission under Part 5 about the conduct in general of an investigation by the NSW Police Force of a critical incident or of a police officer conducting such an investigation that is or could be agency maladministration, officer misconduct or officer maladministration.*
- (3) *The Commission must give notice of a complaint about a police officer conducting the investigation of a critical incident to the Commissioner of Police immediately after it is received and must take into account any recommendation of the Commissioner of Police in deciding whether to refer the matter to the Commissioner of Police for police investigation or to itself investigate the complaint under this Act.*

*Note –*

*Under section 44 (9) the Commission must postpone making a decision about a police misconduct matter if the subject of the misconduct matter is the conduct of a police officer who was involved in a critical incident that is the subject of an investigation until the conclusion of any critical incident investigation of the incident.*

## **Part 14 Secrecy and confidentiality**

### **175 Definitions**

In this Part—

*disclose examination material, police information or any other information includes the following—*

- (a) to make available,*
- (b) to disclose copies, contents or descriptions of examination material or information.*

*use of examination material or information includes use of copies, contents or descriptions of that material or information.*

...

### **179 Commission not to disclose critical police or Crime Commission information**

*(1) This section applies—*

- (a) to information (referred to as police information) that is provided to the Commission by the Commissioner of Police or by some other police officer in accordance with a requirement under this Act or the Police Act 1990, and*
- (b) to information (referred to as Crime Commission information) that is provided to the Commission by the Crime Commissioner or by some other Crime Commission officer in accordance with a requirement under this Act or the Crime Commission Act 2012.*

- (2) The Commissioner of Police may at any time notify the Commission that specified police information (referred to in this section as critical police information) is information the disclosure of which may, in the opinion of the Commissioner of Police, prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest.*
- (3) The Crime Commissioner may at any time notify the Commission that specified Crime Commission information (referred to in this section as critical Crime Commission information) is information the disclosure of which may, in the opinion of the Crime Commissioner, prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest.*
- (4) Any notice under subsection (2) or (3) must include the reasons for which the Commissioner of Police or Crime Commissioner has formed the opinion referred to in that subsection.*
- (5) The Commission is not to disclose critical police information or critical Crime Commission information at any time.*

- (6) *The Commission is not to disclose police information or Crime Commission information that is provided to the Commission by the Commissioner of Police or some other police officer or the Crime Commissioner or some other Crime Commission officer in accordance with a requirement under this Act (other than critical police information or critical Crime Commission information) before the expiry of 21 days after the date on which it was provided.*

Note —

*The 21-day period provides the Commissioner of Police and Crime Commissioner with an opportunity to notify the Commission that the information is critical police information or critical Crime Commission information, respectively.*

- (7) *Subsections (5) and (6) do not apply to or in respect of the disclosure of information for the purpose of Part 6.*

- (8) *Nothing in this section prevents the Commission from disclosing —*

*(a) police information (including critical police information) to the Minister or the Commissioner of Police or to any other person to whom the Commissioner of Police authorises disclosure of the information, or*

*(b) Crime Commission information (including critical Crime Commission information) to the Minister or the Crime Commissioner or to any other person to whom the Crime Commissioner authorises disclosure of the information.*

- (9) *Nothing in this section prevents the Commission from including police information (including critical police information) or Crime Commission information (including critical Crime Commission information) —*

*(a) in any report submitted to the Presiding Officer of each House of Parliament,  
or*

*(b) in the copy of any such report submitted to the Minister,*

*if, in the Commission's opinion, the circumstances so warrant.*

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## **Appendix 2 – Section 163 Police Act 1990 as at 8 December 2016**

### **163 Ombudsman not to publish certain information**

- (1) *This section applies to information (referred to as police information):*
- (a) *that is provided to the Ombudsman by the Commissioner or by some other police officer in accordance with a requirement under the Ombudsman Act 1974, or*
  - (b) *that is provided to the Ombudsman by the Commissioner in accordance with a requirement under this Part.*
- (2) *The Commissioner may at any time notify the Ombudsman that specified police information (referred to in this section as critical police information) is information whose publication may, in the opinion of the Commissioner, prejudice the investigation or prevention of crime, or otherwise be contrary to the public interest.*
- (3) *Any notice under subsection (2) must include the reasons for which the Commissioner has formed the opinion referred to in that subsection.*
- (4) *The Ombudsman is not to publish critical police information at any time.*
- (5) *The Ombudsman is not to publish police information that is provided to the Ombudsman by the Commissioner or some other police officer in accordance with a requirement under the Ombudsman Act 1974 (other than critical police information) before the expiry of 21 days after the date on which it was provided to the Ombudsman.*

*Note —*

*The 21 day period provides the Commissioner with an opportunity to notify the Ombudsman that the information is critical police information.*

- (6) *Nothing in this section prevents the Ombudsman from publishing police information (including critical police information) to the Minister or the Commissioner or to any other person to whom the Commissioner authorises publication of the information.*
- (7) *Nothing in this section prevents the Ombudsman from including police information (including critical police information):*
- (a) *in any report submitted to the Presiding Officer of each House of Parliament,*  
*or*
  - (b) *in the copy of any such report submitted to the Minister,*  
*if, in his or her opinion, the circumstances so warrant.*