

# JUDICIAL OFFICERS' BULLETIN

Published by the Judicial Commission of NSW

June 2024 | Volume 36 | No 5



## Accountability and integrity of NSW law enforcement agencies — recent developments and reports of the Law Enforcement Conduct Commission

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The Law Enforcement Conduct Commission (LECC/Commission) is an independent investigative agency providing oversight of the NSW Police Force and the NSW Crime Commission.

Unlike the Independent Commission Against Corruption (ICAC), the LECC has responsibility for only two agencies. In this respect, the Commission is different from other federal and State anti-corruption agencies in Australia which consider police issues as part of their broad coverage of the public sector.

In practice, the great bulk of LECC's time is directed to the NSW Police Force, an agency with more than 17,500 sworn officers. For convenience, this paper will refer to LECC's role in relation to the NSW Police Force only, although those functions apply equally to the NSW Crime Commission.

### Origin and role of the LECC

The LECC was established in 2017 upon commencement of the *Law Enforcement Conduct Commission Act 2016* (LECC Act). Before then, the oversight of police corruption and misconduct was undertaken by the Police Integrity Commission (PIC) and the Police Division of the NSW Ombudsman. The PIC was established in 1996 as a direct result of the Royal Commission into the NSW Police Service conducted by Justice Wood. In 2015, Mr Andrew Tink AM was commissioned to review police oversight in NSW. His review, published in August 2015, recommended the establishment of one oversight body.<sup>1</sup>

LECC's remit is to improve community trust in law enforcement by maintaining and enhancing the accountability and integrity of NSW law enforcement agencies. The LECC Act provides that the police retain primary responsibility for investigating and preventing officer misconduct and agency maladministration.

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The LECC's broad functions are threefold:

1. independent oversight of police handling of misconduct matters
2. independent investigation of serious misconduct or maladministration allegations, and
3. evaluation of the agency's processes and procedures to identify opportunities for systemic change.

The LECC and NSW Police Force are required to work collaboratively to foster a pro-integrity culture.<sup>2</sup>

### Structure of LECC

The structure of the LECC reflects these core functions: oversight of police handling of complaints, investigation of misconduct allegations and reviews of police policies and practices to identify systemic opportunities.

The Commission's Assessments Team oversees the handling by police of misconduct complaints. Complaints can be made directly to the Commission or through the NSW Police Force. For both types of complaints, the Assessments Team identifies the nature and seriousness of the complaint allegations to assist the Commission to determine whether it will investigate a matter itself or refer the complaint to police.

Whenever the Commission refers a complaint to the police, the Commission undertakes a review of the police's triage of the complaint. The Commission can make recommendations as to how police ought to deal with a matter, or particular issues they should address. If the police have decided not to investigate a complaint, and the Commission considers that it ought to be investigated, the Commission can require an investigation.<sup>3</sup> However, the Commission cannot tell the police what finding they must make in a police misconduct investigation.

The Commission assesses approximately 5,000 complaints per year, of which about one third are direct complaints to the Commission.

The Commission's Oversight Team has the capacity to monitor how police are investigating a particular complaint as that investigation takes place. The Commission does this by accessing the police investigation databases and by raising issues for police to consider as part of the investigation.

More commonly, the Commission waits until police have finished investigating a complaint and reviews the final police investigation report. The Oversight Team checks to see if the investigation was done reasonably and satisfactorily and whether it has resulted in appropriate outcomes. The Commission can request further investigation, although the police are not required to comply with the Commission's request.

A specialist aspect of the LECC's oversight of police investigations is the Commission's monitoring of the police investigations of critical incidents. Critical incidents arise when the actions of police are connected to the

death or serious injury of a person, such as death or serious injury caused by use of a police firearm, in the course of a police pursuit or as the result of a police operation.<sup>4</sup>

This function is unique to the LECC. It was not part of the functions of the PIC, and the Ombudsman had only a limited role in overseeing police critical incidents. Mr Andrew Tink recommended that the Commission "be conferred with a 'real time' power to monitor these investigations" in order to "ensure high levels of public confidence in the standard of investigation of critical incidents by the NSW Police Force".<sup>5</sup>

Under the LECC Act, police have the sole responsibility for investigating critical incidents.<sup>6</sup> The Commission's monitoring role operates, in effect, as the eyes and ears of the community in observing police investigating other police officers involved in death or serious injury arising from a critical incident.

The Commission's ability to access all of the documents relied on by the NSW Police Force in a critical incident investigation has been the subject of proceedings in the Court of Appeal brought by the Commissioner of Police.<sup>7</sup> Since September 2023, the police had contended that common law public interest immunity principles operated to restrict the Commission's access to certain documents held by police. The Commission ruled that public interest immunity principles had been modified by the statutory scheme contained in the LECC Act to allow it to undertake real time monitoring of critical incident investigations. The Commission's decision is available on its website.<sup>8</sup> On 19 June 2024, the Court of Appeal dismissed the summons.<sup>9</sup>

The Commission can choose to conduct its own investigations into allegations of serious misconduct or serious maladministration. An investigation can be the result of a complaint or instigated on the Commission's own motion.

The Commission has the powers of a Royal Commission in conducting these investigations and can summons persons to appear at examinations. Witnesses can be compelled to answer questions and produce documents. There is a restriction on the use of evidence given under objection.<sup>10</sup> The Commission is assisted by counsel assisting, either from its own staff or from the bar. Witnesses are also able to be represented by counsel, with the Commission's leave.

For the purpose of carrying out investigations, the Commission may also utilise specialist electronic, technical and covert capabilities.

Finally, there is the Commission's Prevention and Engagement Team, which considers and reports on a wide range of systemic issues, some of which are discussed below.

The Commission has been re-invigorating its community engagement activities. The Commission routinely engages with the ICAC and the Ombudsman in community events that raise awareness of the role of

integrity agencies in NSW. These events have been held in regional NSW, which is fitting given the reach of the Commission's jurisdiction.

The Commission has also welcomed two Aboriginal Engagement Officers to its staff. Law enforcement agencies have a long and complex history with First Nations communities. As the law enforcement oversight body, it is important that the Commission builds strong connections so that it is an agency trusted by First Nations communities.

The Commission has recently reviewed the way in which the NSW Police Force and the Commission handle complaints by Aboriginal and Torres Strait Islander people. This work is part of the Commission's contribution to Priority Reform 4 of the National Agreement on Closing the Gap. Priority Reform 4 requires government to tell Aboriginal and Torres Strait Islander people about the data it holds and how it can be accessed. The Commission's review will be tabled in Parliament shortly.

### Significant features of the Commission's reporting functions

As a type of standing Royal Commission, the Commission has the option of tabling reports before Parliament and recommending that they be made public.<sup>11</sup> It may also choose to provide a report to the Commissioner of Police, Minister for Police and Counter-terrorism and (if relevant) the complainant, without tabling the report.<sup>12</sup>

The way in which anti-corruption agencies report on the results of their inquiries has been the subject of judicial and independent scrutiny.<sup>13</sup>

Generally, the Commission's practice has been to use pseudonyms to disguise the identity of witnesses (whether they are police officers or civilians) in its reports. The Commission recently decided that it was appropriate to be more transparent about its decisions in this area. In 2023, it published *Guidelines on the use of pseudonyms and non-publication orders in Commission Reports*.

Unlike a Royal Commission appointed to undertake a specific task, the LECC has an important post-report function. Under s 146 of the LECC Act, the NSW Police Force must notify LECC of "the nature of action taken, or to be taken, as a result of a report". The Commission must consider the timeliness of the response and whether the action taken, or to be taken, is "unreasonable or inadequate". The process allows for escalation of any dispute to the Minister for Police and Counter-terrorism with the Commission being able to make a special report to Parliament under s 138 of the LECC Act if appropriate.

This provision allows the Commission to continue to engage with the NSW Police Force after a report is delivered, although the Commission cannot compel the police to take any particular action.

Recently the Commission has begun to include the NSW Police Force's response to its Report recommendations on its [website](#). The Commission's website will soon

include an interactive table that will allow the public to track the implementation of recommendations made by the Commission.

## Some recent reports and developments

### Operation Mantus — police interviewing of young persons — Report

In December 2023, the Commission issued its Report in Operation Mantus.<sup>14</sup> What began as an investigation into an allegation of excessive force in the arrest of a young person in northern NSW in September 2022 soon developed into an examination of systemic issues concerning the interviewing of young persons by police officers in custody, associated custody management issues, as well as the use of body worn video by operational plain clothes police.

The Commission used a combination of public and private hearings which included evidence from lawyers from the Aboriginal Legal Service and Legal Aid NSW concerning the telephone legal advice system operated by those agencies. This is a most valuable facility which advances the administration of justice by allowing legal advice to be given to persons, including young and otherwise vulnerable persons, when in custody in police stations throughout the State.

After the investigation was underway, the NSW Director of Public Prosecutions also made a complaint to the Commission concerning police practices in interviewing young or other vulnerable persons even after those persons had said (following legal advice), that they did not want to be interviewed. Courts have excluded interviews in a number of cases under s 138 of the *Evidence Act 1995* on the basis that they had been improperly obtained.<sup>15</sup>

The report in Operation Mantus and the [NSW Police Force response](#) are on the Commission website. The Commission has recently returned to the northern NSW community where the complaints originated to talk through the Commission's Report.

One of the recommendations to the Attorney General from Operation Mantus was that cl 29 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* should be amended to make it clear that a vulnerable person who purportedly changes their mind about being interviewed should be given a second opportunity to obtain legal advice before an interview begins.<sup>16</sup> The NSW Police Force have said that they will change their guidance, "[i]f the *LEPRA Regulation* is amended to reflect the Commission's recommendation".

### Operation Tepito — Suspect Targeting Management Plan and young persons — Final Report

In October 2023, the Commission released its Final Report in Operation Tepito.<sup>17</sup> This Report concerned the Suspect Targeting Management Plan (STMP) in its application to young persons. STMP was introduced by

the NSW Police Force in 2000 with the aim of preventing crime by interrupting criminal behaviour, with strategies such as increased surveillance, searches and home visits. The Commission was concerned that the STMP did not apply established principles found in both legislation and court decisions which require young people to be treated differently within the criminal justice system to adults.

The Report identified that Aboriginal young people were consistently overrepresented as targets and that STMP encouraged unreasonable surveillance and monitoring of young people. Many police misunderstood the STMP and considered (wrongly) that it provided them with powers to stop, search and otherwise deal with young persons beyond the statutory provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). In addition, police record-keeping was poor which limited the capacity for police to evaluate the effectiveness of the STMP program.

In October 2023, shortly before the release of the Commission's Report, the NSW Police Force indicated that they had discontinued using STMP on young people and that, by December 2023, the police would discontinue STMP for adults as well.<sup>18</sup> The police indicated that they were developing a replacement program that would improve outcomes for young people who are engaged in, or at risk of, repeat offending. The Commission has been briefed about the replacement model and will continue to watch carefully to see how police practices in this area evolve.

The reports in Operation Mantus and Operation Tepito touch upon, in different ways, the manner in which police deal with young persons in the criminal justice system. Important statements were made in both reports concerning the need for police to comply with the law in their engagement with young persons.

Both reports emphasise that each member of the NSW Police Force is to act in a manner which places integrity above all, upholds the rule of law, preserves the rights and freedoms of individuals and ensures that authority is exercised responsibly. These values are drawn from s 7 of the *Police Act 1990* which apply to all police officers in this State. These are important considerations as public debate takes place concerning the policing of young persons and vulnerable persons.

### Strip searches inquiry — Report

A further area of important work undertaken by the Commission concerns strip searches. In 2020, the Commission reported on its inquiry into strip search practices of the NSW Police Force.<sup>19</sup> In 2023, the Commission collaborated with the NSW Police to conduct an audit of initiatives introduced by the NSW Police Force following the Commission's 2020 Report.<sup>20</sup> There is ongoing debate within the community concerning the use of strip searches especially for persons under 18 years of age.<sup>21</sup> A class action is on foot in the Supreme Court of NSW with respect to persons searched at music festivals by police.<sup>22</sup>

### Critical incident investigation monitoring — Report

In May 2023, the Commission published a report reviewing the first five years of its critical incident investigation monitoring function.<sup>23</sup> Amongst other things, that report noted that 43% of critical incidents in that period involved a person in mental health crisis. This statistic has informed ongoing public discussion of the proper role of police in responding to people in mental health crisis, including the recent Legislative Council Report, *Equity, accessibility and appropriate delivery of outpatient and community mental health care in New South Wales*.<sup>24</sup>

### Police bail compliance checks — Issues Paper

Finally, in May 2024, the Commission published an Issues Paper concerning police bail compliance checks.<sup>25</sup> The Issues Paper explores the practice of bail compliance checks by police, and in particular curfew checks, in the absence of a bail enforcement condition imposed under s 30 of the *Bail Act 2013*. The Issues Paper seeks responses to eight questions, exploring topics such as the extent of the doctrine of implied licence and how police powers to conduct bail compliance checks could be clarified. Submissions are due by 25 July 2024. The Commission will analyse the responses and publish a final report on the topic later this year.

### Conclusion

The specialist work of the Commission aims to promote public confidence in law enforcement agencies in the State. It operates to identify misconduct at both an individual and systemic level and to encourage procedural improvements with a view to promoting the integrity and good reputation of the NSW Police Force and the NSW Crime Commission.

If any judicial officer has concerns about the conduct of law enforcement agencies, there is a [special complaint form](#) for judicial officers on the Commission's [website](#). Alternatively, complaints can be made by email or letter addressed to the Commission.

### Endnotes

- \* The Hon Peter Johnson SC is the Chief Commissioner of the Law Enforcement Conduct Commission.
- † Justine Simpkins is the Manager, Prevention and Engagement at the Law Enforcement Conduct Commission.
- 1 A Tink, *Review of police oversight: a report to the New South Wales Government on options for a single civilian oversight model for police*, 31 August 2015.
- 2 LECC Act, s 3.
- 3 *ibid*, s 99.
- 4 *ibid*, s 111(2).
- 5 Tink, above n 1, p 164.
- 6 LECC Act, s 44(1)(d).
- 7 *Commissioner of Police v Attorney General for NSW* [2024] NSWCA 150.
- 8 LECC, *Open Decision on objection by NSW Police Force to production of documents required under s 114 LECC Act*, 28 February 2024.

- 9 *Commissioner of Police v Attorney General for NSW* [2024] NSWCA 150.
- 10 LECC Act, s 74.
- 11 *ibid*, s 132 or s 138.
- 12 *ibid*, s 135.
- 13 *Crime and Corruption Commission (Qld) v Carne* [2023] HCA 28; *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2024] HCA 10; C Holmes, *Independent review into the Crime and Corruption Commission's reporting on the performance of its corruption functions*, 20 May 2024.
- 14 LECC, *Operation Mantus: A report under section 132 of Law Enforcement Conduct Commission Act 2016 concerning alleged excessive use of force and issues concerning police interviews of young persons in custody*, December 2023.
- 15 See for example, *R v FE* [2013] NSWSC 1692; *R v DN* [2019] NSWDC 492; *R v Nean* [2023] NSWDC 34; *R v Jai* [2023] NSWChC 9; *Mann v R* [2023] NSWCCA 256; *R v Ronald* [2024] NSWChC 4.
- 16 Recommendations 16 and 17.
- 17 LECC, *Operation Tepito: An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people*, October 2023.
- 18 At the time of writing, STMP was only used by the NSW Police Force in relation to domestic violence offenders, under "DV STMP".
- 19 LECC, *Inquiry into NSW Police Force strip search practices*, 15 December 2020.
- 20 LECC, *Review of a sample of NSW Police Force strip search records 2021–2022*, September 2023.
- 21 See LEPR, ss 33 and 34.
- 22 *Meredith v State of NSW* [2023] NSWSC 1546.
- 23 LECC, *Five years (2017–2022) of independent monitoring of NSW Police Force critical incident investigations*, May 2023.
- 24 NSW, Legislative Council, *Portfolio Committee No 2 — Health Report No 64*, June 2024, pp 81 and following.
- 25 LECC, *Bail compliance checks in NSW — Issues Paper*, May 2024.