

## **Law Enforcement Conduct Commission Bill 2016**

### **Summary of the Law Society's position**

The Law Society of NSW, in its submission to the 2015 Tink Review of police oversight, submitted that the investigation of critical incidents should be undertaken by a body independent of the NSW Police Force. The Tink Review did not support that proposal and instead recommended that police continue to investigate critical incidents, but with the Law Enforcement Conduct Commission (LECC) undertaking a "real-time" monitoring role of critical incident investigations (CIIs).

In its response to the Tink Review, the Government indicated its support for all of the Review's recommendations, noting "the LECC is therefore being given the ability to monitor critical incident investigations in "real time.""

The Law Society strongly supports the recommendation for real time monitoring and we consider that it is essential that the public have confidence that an appropriate standard of police investigation will occur, in relation to CIIs.

However, in our view, the legislative model reflected in the Law Enforcement Conduct Commission Bill 2016 (Bill) falls short of "real-time" monitoring of CIIs by the LECC, and does not contain other important features of the model recommended in the Tink Review report (and supported by Government).

We provide the following specific comments on the Bill.

#### **Part 4: Functions of Commission**

- Clause 29 of the Bill provides that the LECC is prohibited from making a finding of fact that an officer engaged in misconduct; rather, its powers appear to be limited to forming an opinion. In this context, the Law Society considers the LECC should be able to make a finding of misconduct. This would provide greater weight to the Commission's conclusions, and is similar to the corruption findings currently able to be made by the Independent Commission Against Corruption.

#### **Part 7: Oversight of police and Crime Commission investigations**

- The LECC's proposed monitoring functions are limited to those set out in clause 98(1) of the Bill i.e. misconduct matters "of a kind that, under misconduct matters management guidelines, should be subject to oversight by the Commission". The Law Society is concerned that the public interest test in clause 101(1) only applies once the test in clause 98(1) has been met.

The Law Society considers that this discretion, which allows the LECC, the NSW Police Force and the Crime Commission to agree on which police and Crime Commission investigations may be monitored by the LECC, could significantly weaken the monitoring functions of the LECC.

- The Tink review recommended that the LECC continue to undertake active monitoring of police investigations into complaints, noting that the LECC should not be empowered to direct police investigators.

Part 7 of the Bill appears to implement the Tink review recommendation; however, clause 107 of the Bill goes further in that it provides that:

*“in exercising its oversight function for the purposes of this Part, the Commission does not have a power of control, supervision or direction, and any such oversight is to be achieved by agreement”.*

The requirement for agreement before oversight may occur means that the NSW Police Force or the Crime Commission could potentially prevent independent scrutiny by the LECC of a NSW Police Force or Crime Commission investigation of a complaint against their own employee. The Law Society considers that this goes beyond the Tink review recommendation.

## **Part 8: Oversight of critical incident investigations**

- Features of a critical incident

The Law Society considers that the definition of critical incident ought to be explicitly defined to include deaths connected to police action, inaction or custody, in addition to death or serious injury. An inclusive definition would ensure that matters where, for example, police have been called to a scene but have not attended, or where their assistance has been requested and declined, or has ceased at a time proximate to a death, are captured by the monitoring functions of the LECC.<sup>1</sup>

In the Law Society's view, the discretion afforded to the Police Commissioner in clause 111(1)(b) is not an appropriate substitute for an express definition of a critical incident.

- Declaration of a “critical incident”

Clause 111 states that the “Commissioner of Police *may* (verbally or in writing), declare an incident...to be a critical incident” if the conditions in clause 111(1)(a) and (b) are fulfilled.

In the circumstances set out in those proposed subsections, the Law Society considers that “*may*” should be substituted with “*must*”.

- Commission may monitor critical incident investigation

Clause 114(1) of the Bill provides that the Commission may monitor the progress of a critical incident investigation if it decides it is in the public interest to do so. The Law Society considers that the qualifying phrase “if it is in the public interest to do so” should be removed, and that the attendance at the scene of the CII by the LECC at the outset should be mandatory.

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<sup>1</sup> Particularly where a matter is so serious as to have resulted in a death, the decision in such matters should err on the side of an inclusive interpretation. Recommendation 1 of the State Coroner's submission to the Tink Review is instructive in this respect: it refers to “deaths which are connected to police action, inaction or custody...” (Submission of the State Coroner to the Review of Police Oversight, 10 July 2015, 2, <<http://www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/State-Coroner.pdf>>