NSW GOVERNMENT

Office of the Inspector of the
Law Enforcement Conduct Commission

ANNUAL REPORT

INSPECTOR OF THE LAW ENFORCEMENT CONDUCT COMMISSION

FOR THE PERIOD

ENDING 30 JUNE 2021

Table of Contents

PART 1: THE OFFICE OF THE INSPECTOR OF LECC

1.1 PRELIMINARY OBSERVATIONS

On 30 June 2017 the Police Integrity Commission ceased to exist as an agency. It was replaced by the Law Enforcement Conduct Commission ("LECC") which became fully operational on 1 July 2017. At the same time the position of Inspector of the Police Integrity Commission also ceased to exist. It was replaced by the position of Inspector of the Law Enforcement Conduct Commission ("Inspector of LECC").

Pursuant to section 120 of the *Law Enforcement Conduct Commission Act 2016* ("LECC Act") the Inspector is appointed by the Governor on the advice of the Executive Council. The Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission ("the Joint Committee") is empowered to veto the proposed appointment (Schedule 2 to the *LECC Act* and section 31BA of the *Ombudsman Act 1974*). Schedule 2 to the LECC Act also provides that the Office of Inspector can be either a full time or a part time position. My term as the inaugural Inspector of LECC commenced on 1 July 2017. I have been appointed on a part-time basis for a term of 5 years.

In addition to creating the position of the Inspector of LECC, Part 9 of the LECC Act also provides for the employment of staff. The Inspector of LECC, together with support staff, constitute the Office of the Inspector of LECC ("OILECC").

Responsibility for the administration of Part 9 and Schedule 2 to the LECC Act was initially allocated to the Premier by virtue of the *Administrative Arrangements (Administration of Acts – General) Order 2017* (NSW), while responsibility for the administration of the remainder of the LECC Act was allocated to the Minister for Police. Following representations, including in April 2019 from this Office to the Premier, it was recognised that such a state of affairs was untenable as it placed the Minister for Police in the invidious position of having to simultaneously administer both the NSW Police Force and the NSW Crime Commission as well as LECC, the independent body charged with responsibility for their oversight. Accordingly, responsibility for the administration of the entirety of the LECC Act is

now allocated jointly to the Premier and the Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts by virtue of the *Administrative Arrangements (Administration of Acts – General) Order (No.2) 2019* (NSW) and the *Administrative Arrangements (Administration of Acts – Amendment No 5) Order 2020* (NSW).

During the reporting period the support staff consisted of Angela Zekanovic as the Principal Legal Advisor, and during her absence on parental leave Chelsea Delahunty, together with Jenny Gotham as the Business Coordinator. Each of them also works in the Office of the Inspector of the Independent Commission Against Corruption ("OIICAC").

At the time that the Office was established on 1 July 2017, two full-time staff from the Secure Monitoring Unit ("SMU") within the Office of the NSW Ombudsman, Ian McCallan-Jamieson and Heather Brunello, were transferred to OILECC. That was to enable them to continue performing their pre-existing functions which related to the inspection of covert warrants that are issued to duly authorised investigative agencies. They had been performing those functions pursuant to a delegation from the Ombudsman. Section 128A of the LECC Act, which came into effect on 25 September 2017, enabled the Inspector to delegate his inspection functions to nominated members of staff. Appropriate delegations are now in existence and the responsibility for ensuring that those obligations are adhered to is performed by the two SMU staff.

I would particularly like to express my gratitude to all members of staff not only for the high level at which they performed their services, but also for ensuring that the Office's work was able to be carried out notwithstanding the challenges that were presented by COVID-19.

It is my pleasure to present this Annual Report pursuant to section 141 of the LECC Act and recommend that this Report be made public immediately pursuant to section 145(4) of the Act. This Report relates to the year ending 30 June 2021 which was my fourth year as the Inspector of LECC.

1.2 ADMINISTRATION

1.2.1 PREMISES

OILECC shares premises with OIICAC, the contact details for which appear below:

Postal address:	GPO Box 5341, Sydney, NSW, 2001
Telephone:	(02) 9228 3023
E-mail:	oilecc_executive@oiicac.nsw.gov.au

1.2.2 STAFF

The two SMU staff members report to the Inspector. As was indicated earlier, the Inspector also shares two staff, the Principal Legal Advisor and the Business Coordinator, with the Inspector of ICAC.

1.2.3 BUDGET AND FINANCE

The Office of the Inspector is a cost centre within the NSW Department of Premier and Cabinet ("DPC").

Information provided by the finance section of DPC reveals that the actual expenditure for the 2020-2021 financial year was $900,968 as compared with the actual expenditure for the 2019-2020 financial year which was $883,716 whilst the projected budget figures for those years were $681,223 and $750,607 respectively.

The Inspector is paid a daily rate of $2110 and also receives an annual retainer of $10, 000.

1.2.4 WEBSITE

The website of OILECC was reviewed and updated during the reporting period. It contains all relevant statutory and other information including details about its complaint handling processes for the benefit of members of the public.

As will become apparent, there are various Acts of Parliament which require the Inspector to provide reports concerning the monitoring of the use of covert powers by various investigative agencies. Those reports appear on the website after they have been tabled in Parliament. The website address is www.oilecc.nsw.gov.au.

PART 2: THE ROLE OF THE OFFICE OF THE INSPECTOR OF LECC

2.1 FUNCTIONS OF THE INSPECTOR

Pursuant to section 122(1) of the LECC Act, the Inspector is required to perform the functions of an inspecting officer. Those functions are conferred under various NSW Acts which deal with the use of covert powers that are issued to duly authorised investigative agencies. As has already been observed those functions were previously performed by the Ombudsman prior to the creation of the position of Inspector of LECC.

Pursuant to section 122(2) of the LECC Act, the Inspector also has what are described as the principal functions of the Inspector which are to:

a) audit the operations of the Commission for the purpose of monitoring compliance with the law of the State and
b) deal with (by reports and recommendations) conduct amounting to agency maladministration on the part of the Commission and conduct amounting to officer misconduct or officer maladministration on the part of officers of the Commission, whether or not the subject of a complaint (this function also extends to former officers of the Commission).
c) assess the effectiveness and appropriateness of the policies and procedures of the Commission relating to the legality or propriety of its activities.

Pursuant to section 123(1) of the LECC Act, the functions of the Inspector in relation to the matters set out above may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or misconduct information of which the Inspector becomes aware, or in response to a reference by the Joint Committee or by the Ombudsman, the ICAC, the Crime Commission, or any other government agency or member of a government agency. The Inspector is not subject to LECC in any respect (section 123(2)).

2.2 POWERS OF THE INSPECTOR

Pursuant to section 124 of the LECC Act, the Inspector is able to investigate any aspect of the Commission's operations or any conduct of its officers. The Inspector is entitled to full access to the records of the Commission and to take or have copies made of them. The Inspector is able to require officers of the Commission to supply

information or to produce documents or other things about any matter, or any kind of matter, relating to the Commission's operations or any conduct of its officers. The Inspector is able to require officers of the Commission to attend before the Inspector to answer questions or to produce documents or other things relating to the Commission's operations or any conduct of its officers.

The Inspector is able to investigate and assess complaints about the Commission or its officers and is able to refer matters relating to the Commission or its officers to other agencies for consideration or action. The Inspector may also recommend disciplinary action or criminal prosecution against officers of the Commission.

Pursuant to section 126 of the LECC Act, the Inspector is empowered to make or hold inquiries. The powers, authorities, protections and immunities conferred on a Commissioner by the *Royal Commission Act of 1923* are conferred on the Inspector when holding an inquiry. Any witness summoned by or appearing before the Inspector also has the benefit of the protection and immunities under the *Royal Commission Act*.

2.3 OTHER RELEVANT LEGISLATION

2.3.1 GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 (GIPA ACT)

The *Government Information (Public Access) Act 2009* ("GIPA Act" or "GIPA") came into force on 1 July 2010 replacing the *Freedom of Information Act 1989*. Section 43 of the GIPA Act prevents an access application from being made to an agency for "excluded information" of the agency.

Schedule 2(2) of the GIPA Act provides that so far as OILECC is concerned, the "excluded information" is information relating to its operational auditing, handling of misconduct matters (within the meaning of the LECC Act) investigative and reporting functions.

Schedule 1 of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information held by OILECC, the disclosure of which is prohibited by the LECC Act. Section 180(2) of the LECC Act provides that the Inspector or an officer of the Inspector must not, except for the purposes of carrying out their functions under the LECC Act, make a record of or divulge any information acquired in the exercise of the person's functions under

the Act. Section 180(5) provides that such information may however be disclosed in certain circumstances which are identified.

Section 20 of the GIPA Act requires each agency to have an agency information guide. The Office's agency information guide is available on its website at www.oilecc.nsw.gov.au, together with all other open access information that is made publicly available pursuant to section 6 of the GIPA Act.

In compliance with sections 7(3) and 125 of the GIPA Act and clause 8(a) of the Government Information (Public Access) Regulation 2018 ("the Regulation"), OILECC advises that it has conducted a review of its program to proactively release information which is in the public interest. All such information appears on the Office website.

In compliance with section 7 of the GIPA Act, OILECC also reviewed the website content to assess what, if any, further information could be proactively released. During the reporting period, OILECC made available on its website a number of reports concerning inspections conducted by the SMU.

In compliance with section 125 of the GIPA Act and clause 8(b) of the Regulation, OILECC advises that there were no access applications made under the GIPA Act to OILECC during the current reporting period.

In compliance with section 125 of the GIPA Act and clause 8(c) of the Regulation, OILECC advises that there were no access applications received by OILECC during the reporting period that the Office "refused, either wholly or partly, because the application was for the disclosure of information referred to in Schedule 1 to the Act (Information for which there is conclusive presumption of overriding public interest against disclosure)."

In compliance with section 125 of the GIPA Act and clause 8(d) and Schedule 2 of the Regulation, the required information about access applications is provided in tables A to I which are set out in Annexure A to this Report.

2.3.2 THE PUBLIC INTEREST DISCLOSURES ACT 1994 (PID ACT)

The *Public Interest Disclosures Act 1994* ("the PID Act") provides for public servants and other public officials to report serious wrong doing in public sector agencies on a confidential basis. Under the PID Act complaints or allegations made by public servants and public officials are called disclosures. The PID Act provides for public servants and public officials making disclosures to be protected against actual or potential reprisals. Pursuant to section 4 of the PID Act, the Inspector is an investigating authority to whom a public disclosure can be made under the Act.

Pursuant to section 125(1) of the LECC Act, a public official within the meaning of the PID Act may complain to the Inspector about the conduct of LECC, an officer of LECC or an officer of the Inspector.

Pursuant to section 12A(2) of the PID Act, to be protected by the Act, a disclosure by a public official to the Inspector must:

(a) be made in accordance with the LECC Act and

(b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the LECC, a LECC officer or an officer of the LECC Inspector.

Section 31(1) of the PID Act requires each public authority within 4 months after the end of each reporting year to prepare an annual report on the public authority's obligations under the PID Act.

The following information is provided pursuant to section 31(1) of the PID Act and clause 4(2) of the Public Interest Disclosures Regulation 2011 which specifies the information to be included in reports by public authorities:

a) The number of public officials who made a public interest disclosure to the Inspector – 0

b) The number of public interest disclosures received by the Inspector – 0

c) The number of public interest disclosures received by the Inspector relating to each of the following:

   i. Corrupt conduct – 0

ii. Maladministration – 0

iii. Serious and substantial waste of public money – 0

iv. Government information contraventions – 0

d) The number of public interest disclosures finalised – 0

Section 6D(1) of the PID Act requires each public authority to have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures. OILECC's PID policy and procedure is available on its website at www.oilecc.nsw.gov.au.

During the reporting period, staff were reminded about the contents of that policy and the protections afforded to a person who makes a public interest disclosure under the PID Act, as well as the need to comply with that policy and the obligations set out in the PID Act.

PART 3: THE INSPECTION FUNCTION

3.1 PRELIMINARY OBSERVATIONS

As would already be apparent, there are various Acts of Parliament which provide duly authorised investigative agencies with the power to investigate criminal activities. Those powers can involve significant intrusions into people's lives. In order to provide the community with some degree of assurance that those covert powers are being used lawfully, the agencies in question are subjected to legislative controls which are designed to ensure a measure of accountability.

Reporting and record keeping obligations are imposed upon those agencies which are authorised to use those powers. Provision is also made for the safe keeping and destruction of information obtained from the use of those powers.

While the inspections of records by this Office include an examination of the matters which are specified in the relevant legislation, they do not examine the sufficiency or otherwise of the information provided in support of the application as that is the function of the relevant judicial or other authorised officer.

Prior to 1 July 2017, the NSW Ombudsman was required to conduct inspections of the records of those investigative agencies in order to determine the extent of compliance by those agencies and their officers with the relevant legislation. As has been noted, the functions previously carried out by the NSW Ombudsman were transferred to the Inspector of LECC following the establishment of that position on 1 July 2017. Since that date, the Inspector has taken possession of all relevant information, documents and records previously held by the Ombudsman in relation to those functions and has also taken over the Ombudsman's work in progress.

The inspection and monitoring process is not only designed to foster agency compliance with the relevant legislation but also to provide public accountability through regular reporting to the relevant Minister and/or Parliament. The records of each agency are examined in order to determine if there has been compliance with those record and document keeping requirements. There is also a focus upon such other aspects of compliance as can be determined from examining those records as well as what can be gleaned from asking questions of relevant officers.

Such deficiencies as are identified as a result of the inspection and monitoring process are brought to the attention of the relevant agency prior to the furnishing of the final report. In due course, the head of each agency is provided with a copy of the section of the final report which pertains to the inspection of their particular agency.

In December 2020 the *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community* was released. It provided a detailed analysis of the Commonwealth Government's existing legislative scheme in relation to electronic surveillance powers as well as proposals for reform. It also recommended, amongst other things, that the Commonwealth Ombudsman should have oversight responsibility for the use of Commonwealth electronic surveillance powers by all agencies other than ASIO. In its response the Government indicated that, subject to consultation with the States and Territories, it agreed with the recommendation. The impact upon this Office of any possible amendments to the current scheme remain to be seen. Nevertheless, this Office will need to be in a position to respond to any such proposals as may arise.

Finally, I wish to acknowledge the professionalism which the two SMU staff members, Mr McCallan-Jamieson and Ms Brunello, have displayed in performing their functions. The significance of their roles came into particularly sharp focus when each of them recently informed me of their plans to retire in the near future. Not only are the roles which they each perform highly specialised but in large measure depend, for their effectiveness, upon their capacity to have developed strong, effective and professional working relationships with their counterparts at the agencies which they inspect. Mr McCallan-Jamieson, who is legally qualified, has been working in this space for 25 years. The knowledge and insight that he, in particular, has accumulated during that long period of service is unparalleled. In short, each of them will be difficult to replace.

Although their retirements are not anticipated until after my term as Inspector expires, I nevertheless decided that it was prudent to immediately embark upon the process of making provision for their departures. As a result, a very considerable amount of time and energy has already been devoted to developing comprehensive, fit for purpose standard operating procedure manuals for each of the areas in respect of which OILECC has inspection and reporting functions to

perform. That process, which will continue for some time to come, has been greatly facilitated by the professionalism and dedication to the task which has been demonstrated by Ms Delahunty.

3.2 THE PARTICULAR LEGISLATIVE REQUIREMENTS

3.2.1 TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) (NEW SOUTH WALES) ACT 1987

The *Telecommunications (Interceptions and Access) Act (Cth) 1979* ("the Commonwealth Act") is the primary legislation covering the interception of telecommunications and access to telecommunications data. Warrants for interception and access are applied for by "agencies" under that Act. The Commonwealth Ombudsman is the relevant inspecting authority for the records of those agencies, but only in relation to the records of Commonwealth agencies. The States and Territories have complementary legislation which enables certain State and Territory authorities to be declared as agencies for the purposes of the Commonwealth Act. So far as NSW is concerned, the *Telecommunications (Interception and Access) (New South Wales) Act 1987 (NSW)* ("the NSW Act") is the relevant complementary legislation. That legislation also imposes record keeping requirements upon those authorities.

The record keeping requirements in NSW apply to all "eligible authorities" within the meaning of that term under section 3 of the NSW Act. Those authorities are the:

- NSW Police Force (NSWPF)
- NSW Crime Commission (NSWCC)
- Independent Commission Against Corruption (ICAC)
- Law Enforcement Conduct Commission (LECC)
- Inspector of the ICAC

The Inspector of the Independent Commission Against Corruption is an eligible authority of a State for the purposes of both the Commonwealth Act and the NSW Act. The Inspector is therefore subject to the inspection requirements of the NSW

Act if the Inspector is ever in receipt of restricted records or lawfully obtained information.

The Inspector of the Law Enforcement Conduct Commission is an eligible authority of a State under the Commonwealth Act. However, the Inspector is not an eligible authority of a State under the NSW Act and is therefore not subject to the record keeping requirements of the NSW Act.

Part 2 of the NSW Act (sections 4 – 8) sets out the administrative responsibilities of the eligible authorities with respect to their procedures and record keeping functions in relation to the issue of telecommunications interception warrants.

Part 3 of the NSW Act confers upon the Inspector of LECC the functions of independently inspecting the records of eligible authorities required to be kept under Part 2 of that Act and then, pursuant to section 10 of the Act, reporting about those inspections. Those functions are performed by the SMU staff whose inspections are designed to assess the extent of the compliance of the eligible authorities with their statutory obligations.

Sections 4 and 5 of the NSW Act require the "chief officer of an eligible authority" to keep certain information which is connected with the issue of warrants or the interceptions. Sections 6 and 7 of the NSW Act require that certain reports be furnished to the relevant Minister (who is currently the NSW Attorney-General). Section 8 makes provision for the keeping and destruction of restricted records.

Section 10(1) of the NSW Act, to which reference was made earlier, provides that:

> An inspecting officer must inspect the records of an eligible authority at least twice during each financial year in order to ascertain the extent to which the authority's officers have complied with Part 2 **since the last inspection under this Part** (whether before or after the commencement of this section as substituted by the *Law Enforcement Conduct Commission Act 2016*). (emphasis added)

An inspection officer may also, pursuant to section 12 of the NSW Act, include information concerning contraventions of the Act in the report to the Minister. Inspecting officers are also provided with specific powers, pursuant to sections 13

and 14 of the NSW Act, to enable them to obtain relevant information from an eligible authority.

Inspections were conducted at each of the eligible authorities (excluding the Inspector of the ICAC) during the 1 July 2020 to 30 June 2021 reporting period. The overwhelming majority of all telecommunications interception warrants sought during the reporting period were made by the NSWPF.

The requirement for the Inspector to report about those inspections is set out in section 11 of the NSW Act which is in the following terms:

> *(1) An inspecting officer must, as soon as practicable, and in any event within 3 months, after the end of each financial year, report to the Minister in writing, in relation to an eligible authority, about the results of the inspections under section 10 (1), during that financial year, of the authority's records.*
>
> *(2) The inspecting officer must include the following in each report under subsection (1) in relation to a financial year:*
>
> > *(a) a summary of the inspections conducted in the financial year under section 10,*
> >
> > *(b) particulars of any deficiencies identified that impact on the integrity of the telecommunications interception regime established by the Commonwealth Act,*
> >
> > *(c) particulars of the remedial action (if any) taken or proposed to be taken to address those deficiencies.*
>
> ***Note—***
>
> *In complying with this section, the inspecting officer remains bound by section 63 of the Commonwealth Act, which prohibits the disclosure of intercepted information or designated warrant information.*
>
> *(3) The inspecting officer may report to the Minister in writing at any time about the results of an inspection under this Part and must do so if so requested by the Minister.*

(4) The inspecting officer must give a copy of a report under subsection (1) or (3) to the chief officer of the eligible authority to which the report relates.

In compliance with that requirement, the Attorney General was provided with a report on 23 July 2021 detailing the results of inspections conducted of agency records for the period from 1 July 2020 to 30 June 2021. There is no provision requiring the Minister to table the report. However, section 20 of the Act provides that the Attorney General shall as soon as practicable after receiving the report provide a copy of the report to the Minister administering the Commonwealth Act (currently that is the Minister for Home Affairs).

As indicated earlier, the Inspector of LECC is included as an "eligible authority" for the purposes of the Commonwealth Act. In accordance with reporting requirements under section 96(1) of that Act, the Minister for Home Affairs was advised by the Inspector that there was no usage of the relevant provisions of the Commonwealth Act during the reporting period.

3.2.2 SURVEILLANCE DEVICES ACT 2007

Section 2A of the *Surveillance Devices Act 2007* (NSW) ("SD Act") sets out the objects of the Act as follows:

> (a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and
>
> (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and
>
> (c) to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices.

The SD Act prohibits the installation, use and maintenance of the following kinds of surveillance devices:

- listening devices (section 7(1))
- optical surveillance devices (section 8(1))
- tracking devices (section 9(1))
- data surveillance devices (section 10(1))

Important exceptions to those prohibitions are provided for, which among other things, enable the installation, use and maintenance of a listening device in accordance with a warrant or some other similar form of authorisation.

Sections 11 to 14 contain the following further prohibitions:

- the communication or publication of "a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of [Part 2]" (section 11),
- the possession of a "a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of [Part 2]" (section 12),
- the manufacture, supply (or offer to supply) and possession of "a data surveillance device, listening device, optical surveillance device or tracking device with the intention of using it, or it being used, in contravention of [Part 2]" (section 13) and
- the communication or publication of "any information regarding the input of information into, or the output of information from, a computer obtained as a direct or indirect result of the use of a data surveillance device in contravention of [Part 2]" (section 14).

Section 15 provides that there are two types of warrants that may be used, namely a surveillance device warrant and a retrieval warrant. Section 16 provides that an eligible Judge may issue a warrant whilst an eligible Magistrate may only issue specific kinds of such warrants (section 5 defines the terms "eligible Judge" and "eligible Magistrate").

Section 17 outlines the application process for a surveillance device warrant whilst section 25 outlines the application process for a retrieval warrant. Applications for each kind of warrant must include certain specified information and must be accompanied by an affidavit setting out the grounds for seeking the warrant. Pursuant to sections 17(5A) and 25(5A) notification of the application in question

must also be given to the Surveillance Devices Commissioner (as the Attorney General's delegate).

Section 18 makes provision for remote warrants to be issued. Sections 22 to 24 make further provision for the variation, extension, revocation and discontinuance of a warrant.

Section 31 permits the emergency use of surveillance devices without a warrant (for which retrospective approval must be sought). Section 32 permits the authorisation of the use of a surveillance device in a participating jurisdiction in the event of an emergency.

Section 40 provides that law enforcement agencies must comply with restrictions on the use, communication and publication of "protected information" obtained from the use of a surveillance device. Section 41 provides that records and reports obtained by the use of a surveillance device must be securely kept and also that they must be destroyed if certain circumstances exist.

Section 44 requires that reports must be provided to the eligible Judge or eligible Magistrate who issued the warrant and to the Surveillance Devices Commissioner (as the Attorney General's delegate) about the use of a surveillance device with a warrant, the use of a surveillance device in an emergency without a warrant and the execution of a retrieval warrant.

Section 47(1) provides that the "chief officer of a law enforcement agency must cause a register of warrants and emergency authorisations to be kept," the details of which are specified in sections 47(2) and 47(3). Section 50 authorises a senior officer of a law enforcement agency to issue evidentiary certificates. Section 52 enables an eligible Judge, in certain circumstances, to direct that the subject of a surveillance device be provided with specified information.

Section 48(1) relevantly provides that:

> The Inspector must, from time to time, inspect the records of each law enforcement agency (other than the Australian Crime Commission) to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.

(The Commonwealth Ombudsman is required to inspect the records of the Australian Crime Commission.)

Sections 48(2) and (3) contain additional provisions that enable the Inspector to access the necessary records.

The law enforcement agencies which were the subject of inspections for the relevant reporting periods were:

- NSW Police Force
- NSW Crime Commission
- Independent Commission Against Corruption
- Law Enforcement Conduct Commission

Each surveillance device warrant file for the reporting period was inspected, a process that involved an examination of the application, the warrant, the required notice to the Surveillance Devices Commissioner (as the Attorney-General's delegate) under sections 17(5A) and 25(5A) and the report to the eligible Judge who issued the warrant and to the Surveillance Devices Commissioner (as the Attorney-General's delegate) as required by section 44, together with any other information contained on the file to ensure that there had been compliance with the various statutory requirements.

During the reporting period the *Statute Law (Miscellaneous Provisions) Act 2020* amended section 28(1A)(e) of the SD Act in order to provide reference to the correct section concerning the reporting on retrieval warrants.

The *Stronger Communities Legislation Amendment (Crimes) Act 2020,* which also made several amendments to the SD Act, commenced operation on 28 September 2020. The first such amendment extended the definition of "relevant proceeding" in section 4(1) to include the following subsections:

> (s) a proceeding before the State Parole Authority under Part 6 or 7 of the *Crimes (Administration of Sentences) Act 1999*,
>
> (t) an application under the *Crimes (Serious Crime Prevention Orders) Act 2016* to an appropriate court within the meaning of that Act, or an appeal under section 11 of that Act,

(u) an application under Part 5 of the *Crimes (Forensic Procedures) Act 2000*,

(v) a proceeding before the Civil and Administrative Tribunal in respect of an application for administrative review under section 75(1)(a) or (f) of the *Firearms Act 1996*.

A consequential amendment was also made to omit the words "or Division 3A of Part 6 of the *Crimes (Administration of Sentences) Act 1999*" from paragraph (q) of the definition of "relevant proceeding". The effect of those amendments was to expand the list of court, tribunal and other proceedings in which certain protected information (including information obtained from the use of a surveillance device) may be used, published or communicated.

Sections 18 and 26 were both amended to remove references to applications for surveillance device warrants and retrieval warrants being able to be made by fax. Those provisions also permit remote applications for warrants to be made if the eligible Judge or Magistrate requests that they are to be made in that fashion. Sections 19 and 27 were also amended to reflect those changes.

Section 33(1) of the SD Act, in its existing form, provided that within 2 business days of the use of a surveillance device without a warrant in an emergency under section 31 of the Act, an application had to be made to an eligible Judge for approval of the exercise of such powers. Section 33(1A) was inserted to provide for an exception to that requirement, namely when the law enforcement officer uses an optical surveillance device to observe, but not record, the carrying on of an activity. Section 33(3B) was also inserted to enable applications to be made by the use of e-mail if the eligible Judge so requests.

Those legislative amendments were of course borne in mind during the conduct of inspections.

The Inspector is required, pursuant to section 49(1) of the Act, to report to the Minister at six monthly intervals on the results of inspections. The Minister is required by section 49(2) to lay the report or cause the report to be laid before both Houses of Parliament within 15 days after receiving the report.

In compliance with that requirement, the Attorney General was provided with a report on 13 April 2021 detailing the results of inspections conducted of agency records for the period from 1 July 2020 to 31 December 2020. That report is available on the OILECC website at: https://www.oilecc.nsw.gov.au/reports/

In further compliance with that requirement, the Attorney General was provided with a report on 19 October 2021 detailing the results of inspections conducted of agency records for the period from 1 January 2021 to 30 June 2021. That report will also be made available on the OILECC website once it has been tabled in Parliament.

3.2.3 LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 – COVERT SEARCH WARRANTS

The power to seek and issue covert search warrants is contained within the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPR Act"). Covert search warrants provide eligible law enforcement agencies, and their officers, with the authority to enter and search premises without the knowledge of the occupiers, in relation to the investigation of serious offences. Further if it is necessary to do so in order to enter the subject premises, the executing officers are also authorised to enter premises adjoining or providing access to the subject premises (adjacent premises) without the knowledge of the occupier of the adjacent premises. They may also impersonate another person for the purposes of executing the warrant, and to do anything else that is reasonable for the purpose of concealing anything done in the execution of the warrant from the occupier of the premises.

It is not intended that covert search warrants are to be used as a routine investigative tool as covertly entering and searching premises is a significant departure from traditional entry and search powers. Nevertheless, an application may be made to the Supreme Court for a covert search warrant in the investigation of a "serious offence" as defined in section 46A(2) of the LEPR Act.

Sections 46C and 47 provide that an "eligible applicant" from within the NSWPF, the NSWCC and the LECC may apply to an "eligible issuing officer" (that is an "eligible judge" of the Supreme Court) for "a covert search warrant", which is defined in section 3 of the Act as being "a search warrant issued under Division 2 of Part 5 that may be executed covertly."

The Act provides that applications may be made by telephone if the issuing Judge is satisfied that the warrant is required urgently and the application cannot be made in person. Applications are made by using a prescribed form which contains all the relevant information that section 62 requires to be considered for a covert search warrant application. Before granting a covert search warrant, the issuing Judge must also be satisfied that it is necessary for the entry and search to be conducted without the occupier's knowledge.

While the initial searching may be done covertly, the occupier must eventually be given formal notice that it has occurred. Section 67(8) provides that the executing officer must serve the occupier's notice as soon as practicable after the warrant is executed, unless the service of the notice is postponed by the issuing Judge under section 67A. Service may be delayed for up to six months at a time and is usually delayed for several months after the search. In exceptional circumstances the service of the notice may be delayed beyond 18 months, but it must not be delayed beyond three years in any circumstances.

Section 73 provides that a covert search warrant expires 10 days after the date on which it is issued unless the warrant specifies an earlier expiry date. There is no provision in the Act for the extension of a covert search warrant.

Section 74A provides that the executing officer is required within 10 days of executing the warrant, or of the warrant expiry date (whichever occurs first), to provide a report in writing to the issuing Judge. The report must contain the particulars specified in that section, and such other particulars as may be prescribed by the regulations.

Section 242(1) of the LEPR Act requires the Inspector to "inspect the records of the NSW Police Force, the New South Wales Crime Commission and the Law Enforcement Conduct Commission under Part 5 in relation to covert search warrants every 12 months after the substitution of this section by the amending Act for the purpose of ascertaining whether or not the requirements of that Part (in so far as it relates to covert search warrants) are being complied with." Section 242(2) also provides the Inspector with powers to access records in relation to the warrants that are the subject of inspection.

Each covert search warrant file for the reporting period was inspected, a process that involved an examination of the application, the warrant itself, the occupier's notice, and the report to the issuing Judge, together with any other information contained on the file, to ensure that there had been compliance with the various statutory requirements. Records about the execution of covert search warrants and those relating to entry and seizures to ascertain the accuracy of the reports to the issuing Judge were also examined. Follow up inspections to confirm that occupier's notices had been served as soon as any period of postponement had expired were also conducted.

Pursuant to section 242(3) of the Act, the Inspector must as soon as practicable after 28 May 2017 and as soon as practicable after the expiration of each subsequent year, prepare a report of the Inspector's work and activities under subsection (1) and furnish a copy of the report to the Attorney General and to the Minister for Police. The Attorney General is required by section 242(7) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

In compliance with that requirement, the Attorney General and the Minister for Police were each provided with a report on 9 July 2021 detailing the results of inspections conducted of agency records for the period from 29 May 2020 to 28 May 2021. That report is available on the OILECC website at: https://www.oilecc.nsw.gov.au/report

3.2.4 LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 – CRIMINAL ORGANISATION SEARCH WARRANTS

The power to seek and issue criminal organisation search warrants is also contained within the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPR Act"). Criminal organisation search warrants authorise any executing officer for the warrant to enter the subject premises, and to search the premises for things connected with a particular searchable offence in relation to the warrant.

Sections 46D and 47 of the Act provide that a NSWPF officer who is an "eligible applicant" may apply to an "eligible issuing officer" (that is an "eligible judge" of the Supreme Court) for a "criminal organisation search warrant", which is defined in

section 3 of the Act as being a "a search warrant issued under Division 2 of Part 5 in relation to an organised crime offence".

If an eligible applicant has reasonable grounds to suspect that there is, or within 7 days there will be, in or on nominated premises a thing connected with a searchable offence, they may apply to an issuing Judge for a criminal organisation search warrant in respect of the premises.

A "searchable offence" is defined in section 46A as, in so far as it relates to a criminal organisation search warrant, an "organised crime offence". An "organised crime offence" is defined as "any serious indictable offence arising from, or occurring as a result of, organised criminal activity". Section 46AA in turn, amongst other things, defines "organised criminal activity" and "serious violence offence".

The Act also provides that applications may be made by telephone if the issuing Judge is satisfied that the warrant is required urgently and the application cannot be made in person. Applications are made by using a prescribed form which contains all the relevant information that section 62 requires to be considered for a search warrant application. The requirements of section 62(2A) which are specifically related to criminal organisation search warrants must also be observed. The Law Enforcement (Powers and Responsibilities) Regulation 2016 also prescribes the form of the warrant and the occupier's notice. These forms address the matters that are identified in sections 66 and 67.

Section 67(4)(a) provides that the occupier's notice is to be served by a person executing the warrant on entry into or onto the premises or as soon as practicable after entry. Should that not be possible, sections 67(4)(b) and 67(5) provide for other steps which are to be taken in order to facilitate service of the notice.

Section 73 provides that a criminal organisation search warrant expires 7 days after the date on which it is issued unless the warrant specifies an earlier expiry date. There is no provision in the Act for the extension of a criminal organisation search warrant.

Section 74 provides that the executing officer is required within 7 days of executing the warrant, or of the warrant expiry date (whichever occurs first), to provide a report in writing to the issuing Judge. The report must contain the particulars

specified in that section, and such other particulars as may be prescribed by the regulations.

Section 242(4) of the LEPR Act requires the Inspector to "inspect the records of the NSW Police Force under Part 5 in relation to criminal organisation search warrants every 2 years after the substitution of this section by the amending Act for the purpose of ascertaining whether or not the requirements of that Part (in so far as they relate to criminal organisation search warrants) are being complied with." Section 242(5) also provides the Inspector with powers to access records in relation to the warrants that are the subject of inspection.

Each criminal organisation search warrant file held by the NSWPF for the reporting period was inspected, a process that involved an examination of the application, the warrant itself, the occupier's notice, the report to the issuing Judge, together with any other information contained on the file, to ensure that there had been compliance with the various statutory requirements. Other records which were held by the NSWPF relating to the execution of criminal organisation search warrants were also examined in a further endeavour to ensure that there had been compliance.

Pursuant to section 242(6) of the Act the Inspector must, as soon as practicable after 7 August 2017 and as soon as practicable after the expiration of each subsequent 2-year period, prepare a report of the Inspector's work and activities under subsection (4) and furnish a copy of the report to the Attorney General and to the Minister for Police. The Attorney General is required, pursuant to section 242(7) of the Act to lay the report, or cause the report to be laid, before both Houses of Parliament as soon as practicable after receiving the report.

In compliance with that requirement, the Attorney General was provided with a report on 3 September 2021 detailing the results of inspections conducted of agency records for the period from 7 August 2019 to 6 August 2021. That report is available on the OILECC website at: https://www.oilecc.nsw.gov.au/report

The next Report in respect of inspections conducted between 7 August 2021 and 6 August 2023 is due to be presented to the Attorney-General as soon as practicable after 6 August 2023.

3.2.5 LAW ENFORCEMENT (CONTROLLED OPERATIONS) ACT 1997

The *Law Enforcement (Controlled Operations) Act 1997* ("LECO Act") enables a "controlled operation" to be authorised in certain circumstances. It also regulates their use as well as providing for immunities to be granted to participants involved in them.

Section 3(1) of the LECO Act defines a "controlled operation" as being an operation which is conducted for the purpose of:

(a) obtaining evidence of criminal activity or corrupt conduct, or

(b) arresting any person involved in criminal activity or corrupt conduct, or

(c) frustrating criminal activity or corrupt conduct, or

(d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),

being an operation that involves, or may involve, a controlled activity.

A "controlled activity" is defined in section 3(1) as "an activity that, but for section 16, would be unlawful." (Section 16 will be referred to in due course.)

Section 3(1) also provides that each of the following is a "law enforcement agency":

(a) the NSW Police Force,

(b) the Independent Commission Against Corruption,

(c) the New South Wales Crime Commission,

(d) the Law Enforcement Conduct Commission,

(e) such of the following agencies as may be prescribed by the regulations as law enforcement agencies for the purposes of this Act:

(i) the Australian Federal Police,

(ii) the Australian Crime Commission,

(iii) the Commonwealth Department of Immigration and Border Protection.

Section 5(1) enables a law enforcement officer to apply to the "chief executive officer" (which is defined in section 3(1) of the Act) of the law enforcement agency to conduct a controlled operation on behalf of the agency. Provision is made in section 5(2) for the making of an urgent application. Section 5(2A) requires that every application must include certain specified particulars of the operation.

Section 6(1) provides that the chief executive officer may either authorise or refuse the application. Section 6(2) provides that an authority may not be granted unless a code of conduct is prescribed by the regulations in relation to that agency. A comprehensive code of conduct is contained in Schedule 2 to Law Enforcement (Controlled Operations) Regulation 2017 ("LECO Regulation") and casts a number of obligations upon applicants. Section 6(3) states that an authority to conduct a controlled operation may not be granted unless the chief executive officer is satisfied about a number of matters which are identified, including that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency.

Section 6(4) provides that when considering the matters that are set out in section 6(3), the chief executive officer must have regard to the reliability of any information as to the nature and extent of the suspected criminal activity or corrupt conduct, the likelihood of success of the proposed controlled operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes, and the duration of the proposed controlled operation.

Section 7(1) provides that an authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:

> (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
>
> (b) engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property, or

(c) engaging in conduct that involves the commission of a sexual offence against any person.

Section 8(2) provides that an authority to conduct a controlled operation (even if it is urgent) must also identify a number of other matters which are set out.

Section 13 provides that an authority for a controlled operation authorises each law enforcement participant and civilian participant (if any) to engage in the particular controlled activities specified in the authority in respect of that participant.

Section 14 provides that the chief executive officer may grant a retrospective authority in certain limited circumstances.

Section 15 requires that "within 2 months after completing an authorised operation, the principal law enforcement officer for the operation must cause a report on the operation to be given to the chief executive officer."

Section 16 provides that an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes, of the operation is not unlawful so long as it is authorised by, and is engaged in in accordance with, the authority for the operation.

Section 19 provides that persons involved in an authorised operation are excluded from civil liability so long as their conduct was in good faith and was for the purpose of executing the Act.

Part 3A of the Act makes provision for cross-border controlled operations.

Part 4 of the Act provides for the monitoring by the Inspector of controlled operations which are authorised by the chief executive officer of an agency. Section 21 provides that the Inspector must be notified of each authority that is granted under the Act, of all variations to an authority, and of each report on a controlled operation that is received by the chief executive officer of an agency. Notices must be provided by the chief executive officer to the Inspector within 21 days of the event to which it relates. In the case of a retrospective authority having been granted, the required details must be provided no later than 7 days after it was granted. Requirements as to the content of those notices are set out in the LECO Regulation.

Section 22(1) requires the Inspector to conduct inspections of the records of each of the law enforcement agencies in order to assess whether or not the requirements of the Act are being complied with. Inspections of the law enforcement agencies' records must be conducted at least once every twelve months although they may be inspected at any time.

Section 22(2) provides that the provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* ("the NSW Act") apply to an inspection conducted under this section in the same way as they apply to an inspection conducted under that Act. Accordingly, inspecting officers are also provided with specific powers under sections 13 and 14 of the NSW Act to enable them to obtain relevant information from an eligible authority.

The process of monitoring controlled operations may be contrasted with the process for monitoring other covert investigative methods, such as the use of surveillance devices and telecommunication interceptions. Furthermore, those covert investigative methods are authorised externally by means of a warrant which is issued by a judicial officer whereas controlled operations are authorised internally by the law enforcement agencies empowered to conduct operations under the LECO Act.

Accordingly, and because the public interest requires adherence to the highest standards of compliance, inspections are conducted in a manner that is designed to ensure that the documentation which is relied upon at all stages of the authorisation process as well as the reporting obligations which are placed on agency personnel, are carefully scrutinised. All authorities and variations to authorities granted during the reporting period are inspected as is the supporting documentation. A sample of records held by the principal law enforcement officers responsible for the conduct of the operation may also be examined in order to ascertain how those officers have accounted for the controlled activities which have been conducted.

The Inspector is required, pursuant to section 23(1) of the Act to report to Parliament on the Inspector's work and activities under the Act for the 12-month period ending on 30 June each year and to do so as soon as practicable after that date.

Section 23(2) requires that the report must include, for each law enforcement agency, certain particulars including, among other things, the number of formal authorities that have been granted or varied by the chief executive officer of that agency, the number of urgent authorities granted and the nature of the criminal activity against which the controlled operations conducted under those authorities were directed.

In compliance with that requirement, a report was furnished to the Presiding Officer of each House of Parliament on 19 October 2020 detailing the results of inspections conducted of agency records for the period 1 July 2019 to 30 June 2020. That report is available on the OILECC website at: https://www.oilecc.nsw.gov.au/reports/

In last year's Annual Report I observed that "during inspections conducted in June 2020, an issue was identified concerning the use of assumed names by civilian participants in controlled operations in contravention of the legislation" and that "[inspecting] officers from my Office and staff at CAU are now in the process of determining how to implement the new practice. It is anticipated that the 2020-2021 OILECC Annual Report will provide an update as to how that new practice is working." (The CAU is the "clearing house" for all applications for covert warrants made on behalf of the NSW Police Force).

During the reporting period, inspecting officers from my Office and staff at CAU began liaising with each other about the content of the NSW Police Force's proposed Standard Operating Procedures for the use of assumed names during controlled operations. At the time of writing, that process is still continuing. I anticipate being able to provide a further update in due course.

Part 4: THE OVERSIGHT FUNCTION

4.1 PRELIMINARY OBSERVATIONS

In addition to the inspection functions described in the previous chapter, the Inspector also performs an oversight role but only in relation to the activities of LECC. Those functions, as indicated earlier, are set out in section 122(2) of the LECC Act. In due course I will address those functions, commencing with section 122(2)(b) of the Act which concerns the Inspector's functions to deal with complaints about the conduct of LECC and/or its officers.

It is apparent that the Inspector is required to perform a critical role in the oversight of LECC and its operations. Accordingly, it is highly desirable that an appropriate working relationship should exist between the two agencies to enable the required monitoring function to operate at an optimum level. Considerable efforts have been made by both agencies to achieve that objective. The result, in my view, is that the relationship between the two agencies has been at all times both professional and productive.

The starting point is a mutual expectation on the part of the Inspector of LECC and the Chief Commissioner of LECC that each will comply with their statutory functions. To that end, a Memorandum of Understanding was developed between the Inspector and the Commission which was formally entered into on 17 May 2018. It clearly sets out arrangements for communication and information exchange between the Inspector and the Commission concerning issues such as the referral of complaints, access to information and points of contact between both agencies. A copy of the MOU appears on the OILECC website.

The primary point of contact is between the Inspector and the Chief Commissioner. Such contact includes the exchange of formal correspondence as well as periodic meetings at which issues concerning the Inspector's functions and the conduct, operations and governance of the Commission are discussed. During the reporting period, issues about which I have been given briefings have included the restructure of key positions within LECC and associated personnel changes, various budgetary issues together with other issues including critical operational matters about which it is inappropriate to comment further given that they involve matters of considerable sensitivity.

Although there may well be occasions on which it will be entirely appropriate for the Inspector's opinion or informal advice to be sought and for him to act as a kind of "sounding board", it is important to stress that the Inspector has no role to play in LECC's decision making processes which remain solely a matter for the Chief Commissioner and/or the remainder of the Executive Team. Nor, in my view, is there any scope for an Inspector to perform any role which could be seen as constituting an endeavour to "micromanage" the organisation.

In last year's Annual Report I stated that "from my observations, the Chief Commissioner and Commissioner Drake have been most effective in leading the Commission during the reporting period and have been doing so in a highly professional and collaborative manner." I am pleased to be able to report that that continues to be the situation.

Following the *Report on the Statutory Review of the Law Enforcement Conduct Commission Act 2016* which was supported by DPC and conducted pursuant to section 198 of the LECC Act, the *Law Enforcement Conduct Commission Amendment (Commissioners) Act 2021* was introduced to provide for only two Commissioners to replace the original three Commissioner model. Although no doubt debate will continue about the type of model that best enables LECC to achieve its statutory purposes, that significant amendment to the governance of LECC was clear recognition of the stability that those two Commissioners have managed to provide to the organisation following a period of very considerable turbulence. That decision had a significant additional benefit in that it also provided LECC with much needed ongoing budgetary savings. As is apparent from a reading of the Report, this Office was invited to make a submission to that review (a copy of which appears in Annexure B to this Report). In that submission this Office expressed a view as to how the critical decisions which are required to be made under section 19(2) of the Act should be made in the context of a two Commissioner model. Section 19(4), in its amended form, appears to reflect that view.

This Office also welcomes two other significant appointments which were made to LECC's Executive Team during the reporting period. The first saw Gary Kirkpatrick assume the newly created position of Executive Director Operations. Apart from the undoubted skills which Mr Kirkpatrick brings to the role, the creation of the position itself will not only enable him to provide leadership in respect of all aspects of the

Commission's operational activities, but hopefully will also serve to ameliorate concerns (including those expressed by this Office) about the "silo effect" which the decision to introduce two separate divisions of the Commission seemed to have created.

The other was the appointment of Christina Anderson to the position of Chief Executive Officer (CEO), a role for which she appears to be ideally suited. I have had the benefit of meeting and corresponding with each of those officers since they have taken up their positions. The early indications are that their appointments have already served to further consolidate the leadership stability to which I referred earlier.

The stability which those appointments provide to the organisation will assume even greater significance when, as is anticipated, the terms of the two current Commissioners come to an end during the next reporting period.

In addition to maintaining contact with members of the Executive Team, OILECC often meets and/or corresponds with other members of staff who occupy significant leadership roles at LECC. There is also continuous contact between key members of LECC's operational staff and members of OILECC staff.

4.2 THE COMPLAINT HANDLING FUNCTION

4.2.1 BACKGROUND

In performing this particular function, this Office remains very aware of the context in which LECC operates. The starting point is that although LECC receives a high volume of complaints, it does not have unlimited resources available to it to enable it to deal with all of them. Moreover, the legislative scheme which underpins the manner in which it handles complaints means that the vast majority of them will, at least in the first instance, be referred to the NSW Police Force for its consideration. Given that LECC alone is in possession of all the relevant material about the entirety of the complaints it receives, it is uniquely placed to assess, prioritise and determine the most appropriate fashion in which to address each individual matter.

It is also important to observe that the Inspector's powers, as provided for in the LECC Act, are very specific. They are confined to dealing, by way of reports or recommendations, with complaints about LECC and/or its officers that constitute

agency or officer maladministration or officer misconduct. It follows that the Inspector cannot entertain complaints about any persons or agencies other than LECC and/or its officers. So far as LECC itself is concerned, the Inspector does not have power to direct its activities. It cannot, for example, compel LECC to either investigate or not investigate a particular complaint. Equally there is no power to direct LECC as to the manner in which an investigation is to be conducted. Nor does it have power to alter or reverse a decision made by LECC. Finally, in the normal course of events (that is when dealing with what may be described as a routine complaint), OILECC does not exercise some kind of appellate function in which it engages in a "merits review" of a decision made by LECC.

Extensive powers are conferred upon OILECC to enable it to perform its complaint handling function. Nevertheless, it is not in the public interest to engage in costly, time-consuming investigations in order to resolve complaints if some other more effective and/or efficient way of doing so can be utilised. Accordingly, each complaint which is received is initially assessed to determine whether it is capable of attracting OILECC's jurisdiction. If it does, then a decision is made as to whether there is any basis upon which further investigation of the complaint is warranted.

Clearly enough, the complaint handling function is a vitally important part of OILECC's work as it is for any agency charged with oversight responsibilities. That said, the performance of that function can present significant challenges. On the one hand, an oversight agency has responsibility to ensure not only that the body whose activities it is required to monitor is held accountable for its actions, but also to ensure that it is performing its role in a transparent manner. On the other hand, the body which is making the initial decision is often provided with information that is of a confidential nature and/or that is particularly sensitive. The agency being monitored, and indeed the oversight agency itself, need to be mindful of such considerations and must seek to achieve an appropriate balance between them. Complaints which are made anonymously or, in respect of which a claim is made that it is a public interest disclosure, often serve to further highlight just how difficult it can be to achieve that balance. Suffice it to say, that there were occasions during the reporting period in which issues of that kind arose for OILECC's consideration. Although there were relatively few such instances, they nevertheless occupied a significant amount of the Office's time and resources because of the particular challenges which they presented.

4.2.2 ANALYSIS OF COMPLAINTS RECEIVED

What follows is a summary of complaints received during the reporting period:

- 43 new complaints (2 of which were anonymous) were received, whereas during the previous reporting period 47 new complaints had been received.
- Of the 43 new complaints received, 38 were finalised. In addition to the 5 matters which remain unresolved, there is one further matter from the previous reporting period which still remains to be finalised.
- In all a total of 59 complaints were finalised, including 21 from previous reporting periods. These included matters which had been finalised, reopened following receipt of new material and then completed for a second time.

Beyond the raw figures, the following observations are to be made:

- A number of complaints on their face simply did not fall within the jurisdiction of OILECC. On a few occasions the complaint concerned an individual or agency unrelated to LECC or indeed the NSW Police Force. Those persons were directed, where it was possible to do so, to the appropriate agency whose details were also provided. On other occasions, the complaints were related solely to the conduct of members of the NSW Police Force and not, as the legislation requires, to the conduct of LECC and/or its officers. Those persons were advised that they may wish to direct their inquiries to LECC. Where it was considered appropriate to do so, a complainant was provided for their assistance with the contact details of the most convenient community law centre.
- In some instances, it took considerable time and effort (usually by way of lengthy correspondence) to determine whether OILECC did in fact have jurisdiction. In many such cases that was because the complainant provided material that was either insufficient or insufficiently comprehensible to enable such a decision to be made.
- In other instances, the complaint simply lapsed or was not proceeded with. That usually occurred after a complainant was unable, despite a number or requests to do so, to provide any material that was relevant to the exercise of OILECC's jurisdiction.

- On a few occasions, a complainant was informed that their complaint was, in effect, premature as the matter was still being considered by LECC and that the appropriate time for the complaint to be determined was when LECC had finalised its consideration of the matter.
- A number of complaints were dismissed because, upon close analysis, they constituted nothing more than dissatisfaction with the decision at which LECC had arrived and in respect of which the complainant was seeking a review of its decision but upon exactly the same material. Those complaints were assessed but only in order to determine whether the conduct alleged was of a kind which fell within the terms of section 122(2)(b) of the LECC Act.
- There were also a number of complaints which clearly fell within OILECC's jurisdiction. Although there was no instance on which a complaint was actually sustained, it is to be observed that there were however occasions, albeit relatively few in number, on which complainants did raise what appeared to be legitimate concerns about the manner in which LECC had handled their matters. They included complaints that LECC had not kept them informed as to the progress of their matter, that LECC had not responded to them in a timely fashion and that LECC had not provided them with adequate reasons as to the decisions at which it had arrived. That was particularly so in relation to decisions either to take no further action or to refer the complaint to the NSW Police Force. When those apparent deficiencies were identified by this Office, LECC accepted responsibility for them and indicated that it would address them.

One complaint that was within this Office's jurisdiction warrants further comment. Not only did it occupy a considerable amount of its time and resources but it is a matter that has already entered the public domain. That complaint arose from a LECC investigation codenamed Operation Coolum and raised issues both as to the manner in which LECC had conducted examinations in the matter and also the process upon which it had embarked when preparing the Report that was furnished to Parliament.

In the covering letter furnishing that Report dated 30 November 2020 which was addressed jointly to the President of the Legislative Council and to the Speaker of

the Legislative Assembly, Commissioner Drake referred to the fact that LECC had deferred submitting its Report pending my investigation of a complaint which had been lodged by the lawyers representing a person who had been provided with the pseudonym BLQ in the LECC investigation. That Report is available on the LECC website at: https://www.lecc.nsw.gov.au/investigations/past-investigations/investigation-reports-from-2020/operation-coolum

That complaint which consisted of a 54-page set of submissions together with fifteen annexures (many of which were very lengthy), identified twelve separate grounds of complaint asserting various instances in which BLQ had, in effect, been denied procedural fairness. The wide-ranging nature and scope of those various complaints made it necessary for me to examine not only the entire transcript of the examinations which had been conducted over a number of days together with the exhibits that had been tendered, but also the lengthy submissions which had been advanced on BLQ's behalf in response to LECC's Draft Report. Having done so, and having also carefully considered the further submissions provided on BLQ's behalf to which I referred at the beginning of this paragraph, I rejected all twelve grounds of complaint in a comprehensive letter dated 7 October 2020 which spanned 25 pages.

It is unnecessary for present purposes to provide an analysis of my assessment of the merits of the individual grounds of complaint. Nor is it necessary to explore the issue as to whether each of those grounds meaningfully engaged with the critical question concerning this Office's jurisdiction. One factor that was however particularly germane to my assessment of the complaint was a consideration of the legislative framework within which LECC operates when conducting examinations. It is to be noted that examinations are conducted in a manner that is rather different from the traditional prosecutorial process which is undeniably adversarial in nature. Similarly, the position of an examining Commissioner conducting a LECC investigation, may be contrasted with the role which is performed by a judicial officer in a traditional court setting. Because those considerations have significance beyond the scope of the present case, I have included a brief analysis of that legislative framework (which incidentally formed part of my response to BLQ's complaint). It is set out in Annexure C to this Report.

Before departing from this particular matter it is also worth observing that LECC, in accordance with its customary practice, took a number of steps in relation to the conduct of the examinations in that investigation which were designed to provide a measure of protection for the parties involved and, in particular, to ameliorate the potential for reputational damage. Those steps included providing anonymity not only to the individual given the pseudonym BLQ but also to all the other witnesses who were called to give evidence as well as to BLQ's representatives. LECC also decided to conduct the examinations in private sessions rather than in public hearings and to issue non-publication orders in respect of the evidence which was adduced in those sessions.

As it had during previous reporting periods, OILECC provided the Chief Commissioner of LECC at 6 monthly intervals with a schedule of information concerning the resolution of complaints which it had received about the conduct of LECC and/or its officers. The information provided in that schedule was nevertheless designed to ensure, wherever necessary, that the confidentiality of individuals was also protected. Finally, in the present context, there were discussions between the two offices as to the appropriate positioning on LECC's external website of the description of the Inspector's complaint handling function.

4.3 THE REMAINING FUNCTIONS – AUDITING THE OPERATIONS OF THE COMMISSION AND ASSESSING ITS POLICIES AND PROCEDURES

There is considerable overlap between the two functions which are contained in section 122(2)(a) and (c) of the LECC Act respectively. Accordingly, it is convenient to deal with them at the same time. Furthermore, material derived from complaints about the conduct of LECC and/or its officers which the Inspector receives pursuant to his complaint handling function also provides useful background information so far as the performance of those two functions are concerned.

As indicated earlier, section 122(2)(c) requires the Inspector to assess the "effectiveness and appropriateness" of LECC's policies and procedures. To assist this Office in performing that task, LECC regularly provides it with updated copies of its policies, protocols, guidelines, and standard operating procedures in all areas of its activities and particularly once they have been approved by the Executive Committee. LECC also furnishes other material which enables this Office to keep

track not only of the various policies themselves but also whether they are currently up to date. Not infrequently, there is correspondence between the two offices in relation to a particular policy. One such example is an area which is of particular interest to this Office. It concerns LECC's policy in relation to the use of social media by its staff. To that end, this Office made a number of suggestions as to how, in OILECC's view that policy could be enhanced and, in particular how it needed to align with LECC's own Conflicts of Interest Policy and Procedure. Given the critical importance of this issue and the policies that inform it, I hope to be able to provide further information about it in due course. There was also correspondence about the circumstances in which LECC could publish a report on its website before it had first been furnished to Parliament.

Although section 124 of the LECC Act and the MOU between the two agencies require certain information to be provided, it is to be observed that LECC has nonetheless routinely either volunteered such information or provided it upon request. It has also continued to facilitate access, where it is possible and appropriate to do so, to its databases and information systems.

Whilst on the question of information which is regularly provided, OILECC receives the agenda, the background papers and, in due course, the minutes from each of the meetings of LECC's most important committees. Those committees and the frequency with which they are scheduled to meet are set out below:

- Strategic Operations Committee (monthly)
- Executive Committee (weekly)
- Audit and Risk Committee (quarterly)
- Complaints Action Panel (weekly)

That material which is comprehensive and often voluminous is carefully read, and when necessary, additional information and/or clarification is sought about matters arising from it. On occasions the Principal Legal Advisor has attended the meetings of the Audit and Risk Committee but only as an observer.

Another helpful source of information with which OILECC is regularly provided is the weekly update which is distributed to all LECC staff. That initiative was introduced by Ms Anderson when she became CEO. Other material which is also regularly provided includes the Monthly Activities report and the results of the People Matter

Employment Surveys (PMES) which enables important information about the state of LECC's workplace and culture to be assessed. The provision of the minutes of the Misconduct Themes Committee (MTC) (which serves as a forum for staff across the Commission to participate in the identification and response to systemic issues, emerging trends or themes that may benefit from a coordinated, proactive or strategic response) provides a further opportunity for this Office to gain a different perspective about aspects of LECC's activities.

To better enable OILECC to perform its audit function under section 122(2)(a) of the Act, LECC also provides, on a confidential basis, an audit schedule which sets out details about the performance of its various statutory powers during the preceding month. The schedule contains information about the following matters:

- Section 19(2) determinations
- Section 32 reports
- Section 54 notices – power to obtain information
- Section 55 notices – power to obtain documents or other things
- Section 58 notices – power to enter public premises
- Section 63 examinations – including the decision as to whether a private and/or a public hearing is to be conducted
- Section 69 summons – power to summon witnesses and take evidence
- Section 79 – search warrants
- Section 84 – surveillance device warrants
- Sections 114 and 115 – monitoring of critical incident investigations
- Section 132 reports
- Section 134 reports
- Section 135(3) reports
- Section 136 reports
- GIPA requests
- PID reviews
- Acquisition and use of assumed identities

Also included is information about applications granted under the *Law Enforcement (Controlled Operations) Act 1997* and warrants issued under the *Telecommunications (Interception and Access) Act 1979* (Cth).

The issue as to what needs to be included in the audit schedule is being constantly reviewed by both this Office and LECC. As a result, LECC now also provides annual figures for each of the items that appear in the schedule. Furthermore, information concerning Integrity Checks about NSW Police Force personnel which LECC is required to conduct pursuant to sections 24, 34 and 72 of the *Police Act 1990* was recently added to the schedule.

In the present context it is to be observed that LECC has important audit functions of its own. These relate to various aspects of the activities of the NSWPF and the NSWCC for which it has oversight responsibilities. LECC is also required by legislation to conduct internal audits of some of its own activities e.g. as to its use of assumed identities. Furthermore, the Audit and Risk Committee of LECC, the composition of which includes a number of external members, performs a critical audit function. On other occasions, outside agencies such as Centium or the Auditor-General, embark upon a review of a particular aspect of LECC's activities. This Office is particularly mindful of the audit functions performed by those different bodies when determining how it will perform its own functions. Accordingly, not only does it seek to avoid unnecessary duplication but it is fully aware of the fact that it has only limited time, staff numbers and a finite set of skills available to enable it to conduct audits.

One aspect of LECC's work which has been, and remains of very considerable interest to OILECC concerns the manner in which LECC conducts its complaint handling processes. The importance of this function, and its contribution to LECC's overall standing in the community, cannot be overstated. Needless to say, LECC is also very aware of the significance of this area of its work. That said, it remains a primary focus of this Office's attention.

Over time, including during the reporting period, very considerable improvements have been made by LECC to its complaint handling processes. It has refined its policies, procedures and protocols. Enhancements to the decision-making process itself, including the composition of the Complaints Assessment Panel and the streamlining of its practices, have also been made. Those changes have led to considerable reductions in the time within which complaints are assessed.

Very considerable progress also continues to be made by the Assessments Team itself. For example, further steps have been taken to implement the

recommendations made by Centium following the extensive audit of the complaint assessment process which it conducted in 2019. An ongoing internal audit has produced amendments to key policy documents as well as a Business Plan. However, challenges still lie ahead. Some are the inevitable consequence of the fact that a very high proportion of complaints which are received are referred, as the LECC Act envisages, to the NSW Police Force. Nonetheless, issues surrounding best practice methods of communicating with complainants (including the timeliness of responses and the adequacy of reasons which LECC provides to them) continue to require active consideration. A meeting is scheduled for later this year at which such challenges will no doubt be further discussed. That meeting will also provide an opportunity for OILECC to be briefed about the impact that the introduction of LOIS (LECC's new case management system) and the increased automation of the complaint handling process has had in measuring and reporting on the key outcomes of the work of the Assessments Team and its capacity to collect and store data about that work.

In last year's Annual Report I made the observation that "more than adequate time has now passed for LECC to be able to implement and embed its policies, practices and procedures for the Oversight Division. I note however that it was a source of considerable frustration for this Office that it had been unable to obtain the information which it had sought on a number of occasions about the progress of that implementation process whilst (a previous officer) had responsibility for the Division. Hopefully, I will have some more positive news to report in next year's Annual Report." I am now in a position to report that LECC requested Centium to conduct a comprehensive audit of aspects of the Division's activities. Centium has only recently completed its report which is entitled *Oversight Investigation Prioritisation and Case Management Review*. At the time of writing, LECC is still finalising its response to that Audit and accordingly, further commentary should be deferred until that response is provided. Nevertheless, it is to LECC's credit that it took the decision to initiate the audit.

This Office was also able to examine at close quarters important aspects of the Oversight Division's decision making processes whilst conducting a detailed investigation into a complaint which had been made about its practices. Although some relatively minor deficiencies were identified during the course of that investigation, this Office was otherwise generally satisfied with LECC's approach

and ultimately determined to dismiss all the issues which were raised in the complaint.

The Oversight Division is also responsible for the monitoring of critical incidents (which is an incident involving a police operation that results in death or serious injury). As this is an area for which LECC first acquired responsibility upon its establishment in 2017, it is timely that its work in this area should now be carefully scrutinised. Moreover, it is also an area of LECC's operations that the Joint Committee in its 2020 review of the Annual Reports of oversighted bodies indicated that it would be monitoring. As this is another area of LECC's operations in which this Office has regularly expressed an interest, I am pleased to note that LECC has initiated its own internal report about that aspect of its operations. As I understand the situation, it is anticipated that that report will be completed in the near future and that its findings will then be presented to Parliament.

Two further areas of LECC's operations which have also continued to attract attention from this Office during the reporting period are the Electronic Collections Unit and the Covert Services Unit. That focus initially consisted of analysing the policies, procedures and protocols of those units and making suggestions as to their enhancement. Thereafter, issues have also been raised with each of those units concerning their compliance with their own internal policies but also with any legislation which is relevant to their activities. I am pleased to be able to report that not only have there been high levels of compliance with all aspects of the practices of both those units, but also a preparedness to entertain and, where appropriate, incorporate suggestions which this Office has made as to how those practices could be improved. On-site inspections have also been conducted, where possible, in order to expand this Office's understanding of the operational activities of those Units.

Finally, it is appropriate to observe that one area in which LECC has continued to be particularly effective is its work in highlighting systemic issues within the operations of the NSW Police Force which warrant attention. Of particular significance is the supplementary report codenamed Operation Tusket which followed up on the NSWPF's implementation of recommendations previously made to address deficiencies in the administration of the Child Protection Register. It is apparent that the report was the result of a high degree of collaboration between

LECC and the NSW Police Force and that its effectiveness was the result of the efforts of the many individuals within those agencies who helped to reveal those deficiencies. The contribution made by the Prevention and Education Team within LECC to this and other projects cannot, in my view, be underestimated.

It is also gratifying that the NSWPF has responded to LECC's reports following its extensive investigations into the contentious issue of strip searching by implementing various changes to aspects of is practices and Standard Operating Procedures. The final report which was tabled in December 2020 made a number of recommendations, one of which was that a collaborative audit by the NSW Police Force and the Commission of strip searches be conducted at music festivals in order to evaluate the impact of the new processes and training modules.

LECC's investigations into highly important and challenging workplace equity issues such as discrimination, harassment and bullying within the NSW Police Force were identified in Operation Shorewood. This Office has been advised that that critical work is ongoing. During the reporting period the Commission commenced a review of the NSW Police Force's management and investigation of domestic and family violence incidents. In addition to that vitally important work, the Commission is currently engaged in legislative reviews of consorting laws (under Part 3A Division 7 of the *Crimes Act 1900*) as well as the exercise of certain powers under the *Terrorism (Police Powers) Act 2002*.

In previous years the Inspector and the Principal Legal Advisor have been able to attend a number of conferences in an endeavour to obtain additional insights as to how the role of the Inspector might most usefully be performed. In a similar vein, a number of meetings were conducted with external agencies in previous years. The capacity to do so during the current reporting period was significantly reduced because of the impact of COVID-19.

Details of those meetings which were able to take place appear below:

Date	With Whom	Where	Purpose
29 September 2020	The Hon Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption	OILECC office	Meeting to discuss matters of mutual interest

2 November 2020	Michael Barnes, Commissioner, NSW Crime Commission	OILECC office	Meeting to discuss matters of mutual interest
6 November 2020	National meeting of Inspectors, Parliamentary Commissioners & Reviewers	Virtual meeting attended at 365Workspace	Meeting to discuss matters of mutual interest
23 November 2020	Michelle O'Brien, former CEO and General Counsel, LECC	OILECC office	Meeting to discuss matters of mutual interest
20 May 2021	National meeting of Inspectors, Parliamentary Commissioners & Reviewers	Office of the Commonwealth Ombudsman, Canberra	Meeting to discuss matters of mutual interest
28 May 2021	Hearing of the Parliamentary Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission	Parliament House, Sydney	Meeting to review OILECC's Annual Report and other matters of interest to the Committee

In addition to the meetings referred to above, there has been considerable ongoing correspondence and liaison with a number of external agencies.

PART 5: CONCLUSION

During next year's reporting period, it is anticipated that there will be a continuation of the type of work upon which the Office has embarked in its first four years of operations. To that end, it is proposed that meetings will be conducted with those teams or units within LECC which could not be arranged during the current reporting period. It is also envisaged that there will be follow up meetings and further liaison with other teams with which there has been contact in previous years.

Since LECC is dependent upon public funding, it can be safely assumed that its budgetary situation and the level of funding provided to it will continue to present it with challenges, particularly given the potential economic impact of the current health crisis. Related to that issue is the critically important question about the appropriate funding mechanism for LECC (and indeed other integrity agencies), a matter that has been addressed both in the Auditor-General's special report: *The Effectiveness of the Financial Arrangements and Management Practices in Four Integrity Agencies* (October 2020) and in the Public Accountability Committee of the Legislative Council's final report: *Budget process for independent oversight bodies and the Parliament of New South Wales* (February 2021). The debate about those issues will no doubt continue for some time. Regardless of how they are ultimately resolved, LECC will need to continue to carefully determine its priorities in allocating its resources. In that context it is pleasing to observe that LECC has been, and apparently remains, determined to focus its attention upon systemic issues within the agencies for which it has oversight responsibility.

As I observed in previous Annual Reports, it is a matter of public record that, on occasions, a civilian who is involved in a critical incident often has issues affecting their mental health. They may also be facing other challenges including drug dependency, intellectual and/or developmental disabilities, domestic abuse and/or non-compliance with medication and homelessness. A real and ongoing challenge for the criminal justice system arises when police in the course of their duties are required to interact with a person in such a condition, especially if that person is in a highly agitated state and in possession of a weapon. Needless to say, the challenge is even greater should a death or serious injury occur in those circumstances.

As I have also previously reported, clearly much useful work has been undertaken over many years, and in particular by the various agencies which have an interest in the area, in an attempt to address the challenges which I have identified. This Office will continue to observe how they are addressed in the future. No doubt given the complexity of the issues involved, any meaningful response will require a concerted and cooperative multi-agency approach. In that context, I note that a Select Committee of the Legislative Council is currently inquiring into the coronial system in NSW. In my view, that Committee would provide an ideal vehicle for the exploration of the issues to which I have just referred.

The Hon. Terry Buddin SC
Inspector LECC
29 October 2021

ANNEXURE A: Government Information (Public Access) Regulation 2018 clause 8(d), Schedule 2, Tables A - I

Table A: Number of applications by type of applicant and outcome*

	Access granted in full	Access granted in part	Access refused in full	Information not held	Information already available	Refuse to deal with application	Refuse to confirm/ deny whether information is held	Application withdrawn
Media	0	0	0	0	0	0	0	0
Members of Parliament	0	0	0	0	0	0	0	0
Private sector business	0	0	0	0	0	0	0	0
Not for profit organisations or community groups	0	0	0	0	0	0	0	0
Members of the public (application by legal representative)	0	0	0	0	0	0	0	0
Members of the public (other)	0	0	0	0	0	0	0	0

* More than one decision can be made in respect of a particular access application. If so, a recording must be made in relation to each such decision. This also applies to Table B.

Table B: Number of applications by type of application and outcome

	Access granted in full	Access granted in part	Access refused in full	Information not held	Information already available	Refuse to deal with application	Refuse to confirm/ deny whether information is held	Application withdrawn
Personal information applications*	0	0	0	0	0	0	0	0
Access applications (other than personal information applications)	0	0	0	0	0	0	0	0
Access applications that are partly personal information applications	0	0	0	0	0	0	0	0

and partly other								

* A ***personal information application*** is an access application for personal information (as defined in clause 4 of Schedule 4 to the Act) about the applicant (the applicant being an individual).

Table C: Invalid applications

Reason for invalidity	No of applications
Application does not comply with formal requirements (section 41 of the Act)	0
Application is for excluded information of the agency (section 43 of the Act)	1
Application contravenes restraint order (section 110 of the Act)	0
Total number of invalid applications received	1
Invalid applications that subsequently became valid applications	0

Table D: Conclusive presumption of overriding public interest against disclosure: matters listed in Schedule 1 to Act

	Number of times consideration used*
Overriding secrecy laws	0
Cabinet information	0
Executive Council information	0
Contempt	0
Legal professional privilege	0
Excluded information	0
Documents affecting law enforcement and public safety	0
Transport safety	0
Adoption	0
Care and protection of children	0
Ministerial code of conduct	0
Aboriginal and environmental heritage	0
Information about complaints to Judicial Commission	0
Information about authorised transactions under *Electricity Network Assets (Authorised Transactions) Act 2015*	0
Information about authorised transaction under *Land and Property Information NSW (Authorised Transaction) Act 2016*	0

* More than one public interest consideration may apply in relation to a particular access application and, if so, each such consideration is to be recorded (but only once per application). This also applies in relation to Table E.

Table E: Other public interest considerations against disclosure: matters listed in table to section 14 of Act

	Number of occasions when application not successful
Responsible and effective government	0
Law enforcement and security	0
Individual rights, judicial processes and natural justice	0
Business interests of agencies and other persons	0
Environment, culture, economy and general matters	0
Secrecy provisions	0
Exempt documents under interstate Freedom of Information legislation	0

Table F: Timeliness

	Number of applications
Decided within the statutory timeframe (20 days plus any extensions)	0
Decided after 35 days (by agreement with applicant)	0
Not decided within time (deemed refusal)	0
Total	0

Table G: Number of applications reviewed under Part 5 of the Act (by type of review and outcome)

	Decision varied	Decision upheld	Total
Internal review	0	0	0
Review by Information Commissioner*	0	0	0
Internal review following recommendation under section 93 of Act	0	0	0
Review by NCAT	0	0	0
Total	0	0	0

* The Information Commissioner does not have the authority to vary decisions, but can make recommendations to the original decision-maker. The data in this case indicates that a recommendation to vary or uphold the original decision has been made by the Information Commissioner.

Table H: Applications for review under Part 5 of the Act (by type of applicant)

	Number of applications for review
Applications by access applicants	0
Applications by persons to whom information the subject of access application relates (see section 54 of the Act)	0

Table I: Applications transferred to other agencies under Division 2 of Part 4 of the Act (by type of transfer)

	Number of applications transferred
Agency-initiated transfers	0
Applicant-initiated transfers	0

ANNEXURE B: THE INSPECTOR'S SUBMISSION TO THE STATUTORY REVIEW OF THE LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016

NSW GOVERNMENT | Office of the Inspector of the Law Enforcement Conduct Commission

1 December 2020 Our Reference: AD05 2021 02

Ms Kate Boyd
General Counsel
Department of Premier & Cabinet
GPO Box 5341
SYDNEY NSW 2001

[redacted]

Dear Ms Boyd

Re: s 198 review of the LECC Act

The original design of LECC

Thank you for providing me with the opportunity to respond to your letter dated 4 November 2020.

In addition to the Discussion Paper which is attached to your letter, I have also received a copy of a letter sent to you by the Chief Commissioner of LECC dated 5 November 2020. In it, the Chief Commissioner provides additional information about the proposed scope of the role of the second Commissioner and that of the newly created position of Executive Director Operations.

The Discussion Paper helpfully sets out the relevant background to the issues which arise for consideration. It includes reference to LECC's original organisational design as comprising a three Commissioner model. Such a model of governance has some obvious advantages. An agency, whose governing body consists of people with a range of skills, experience and opinions who are able to work together collaboratively, sounds very attractive.

My experience as Inspector has shown that there was a considerable degree of enthusiasm, both within LECC itself and more generally, for the three Commissioner concept from the time when LECC first became operational. Moreover, I sensed that there was a determination to make it work and that that attitude continued for some time.

Regrettably, that initial enthusiasm could not be sustained. Needless to say the complaint made by the Commissioner for Oversight against the former Chief Commissioner contributed significantly to that changed state of affairs. It is unnecessary for present purposes to revisit that issue except to say that, at its core, it involved a major disagreement between the two Commissioners about an operational decision which in turn gave rise to a fundamental question about the agency's governance. As history demonstrates, the complainant sought to call in aid s 19 of the LECC Act (or more particularly his interpretation of how that section should operate) in support of his position.

Office of the Inspector of the Law Enforcement Conduct Commission
GPO Box 5341, Sydney NSW 2001
T: (02) 9232-3350 | E: oilecc_executive@oilecc.nsw.gov.au

The current position

Since 1 February 2020, LECC has been operating as a two Commissioner model following the departure of the former Chief Commissioner (whose position has been filled by the Hon. R. O. Blanch AM QC) and the Commissioner for Oversight (whose position has not been filled).

That has provided a sufficient period of time within which to make an assessment of how that model is working. My view, which I have also previously expressed elsewhere, is that is functioning extremely well. The contrast between how LECC has been operating during 2020 (notwithstanding all the external challenges that have confronted it and indeed the entire community) and how it operated whilst the three Commissioner model was in existence could hardly be more stark.

Whatever explanation there may have been for the disagreement that arose between the previous Chief Commissioner and the Commissioner for Oversight, a considerable level of stability now exists. The importance of the need for stability in any organisation, particularly at the leadership level, is patently obvious. That sense of stability, in my view, is due in large measure to the fact that the present Commissioners have forged a strong professional working relationship. As a team they appear to have been able to accommodate all of the agency's requirements, especially in relation to handling the workload and making the decisions that need to be made. It is pertinent to observe that they also have been fortunate to have available to them a number of experienced officers in a range of positions whom they can consult and upon whose advice they can rely, as well as an Executive Team and a committee structure which provides additional important support.

As far as I am aware, there have been no disagreements about any issue of any significance and certainly none which they have not been able to resolve. The most contentious areas in which disagreements can potentially arise relate to the initial decision to commence an investigation and the decision to conduct an examination (including the separate and critical question of whether it should be a private or public hearing). Insofar as that latter issue is concerned, it would appear that LECC has, in practice, usually opted to conduct private examinations. Furthermore, it has pursued various measures (including making non-publication orders and anonymising the names of witnesses who appear before it) which are designed to mitigate the potential for reputational damage.

It is against that background that I have no difficulty in providing support for the Chief Commissioner's proposal that there be a two Commissioner model of the kind referred to in the correspondence. Having a second permanent commissioner is of course essential to ensure that he or she can act as the agency head in the event that the Chief Commissioner is on leave or otherwise unavailable or indisposed. As alluded to in the discussion Paper, provision for the appointment of an Assistant Commissioner also provides a measure of additional flexibility should the need arise.

Moreover, there are also other advantages in reducing the number of Commissioners, not least of which is the inevitable financial savings that will follow, which makes the case for doing so compelling.

The future

Whilst the present situation is stable, it is impossible to predict what the future holds. Some changes will inevitably occur, only some of which can be anticipated. First, in a post-pandemic world, aspects of LECC's work practices may well change. For understandable reasons, there were lengthy periods of time during this year when it was not possible for LECC to conduct examinations. Secondly, the additional functions of the second Commissioner may have an impact on other parts of the

organisation, particularly with the recent departure of the current CEO (and General Counsel). (I stress however that neither of these factors are likely, in my view, to impact upon the capacity of two Commissioners to manage the current workload). Thirdly, and of considerable importance, is the fact that the terms of each of the current Commissioners are due to expire in 2022. Hopefully, their replacements will enjoy the same productive working relationship as the current Commissioners have, in which case there is unlikely to be a problem. However, that cannot be guaranteed and it is quite conceivable that there may once again be disagreements in relation to some of the more contentious issues about which decisions have to be made. The laws of arithmetic make it apparent that in a two Commissioner model, only one view can prevail. It may be that the mechanism, which is provided in s 19 of the Act, to enable a disagreement to be resolved may then require reconsideration.

In that context, there are several matters which I consider are worth mentioning. As I understand the situation, when the three Commissioner model was created, it was originally envisaged that there would be a unanimity requirement for the making of s 19 decisions. However, following debates in Parliament, s 19 emerged in its current form because it was recognised that such a requirement was untenable. The position is even more acute in a two Commissioner model because the second Commissioner effectively has a power of veto over a decision for which the Chief Commissioner is contending. Not only could this lead (in an extreme situation where the disagreement extends over a period of time) to agency paralysis, but it would hardly be conducive to producing a harmonious working relationship. The corrosive effects of dissension can not only affect an agency's effective working capacity (both internally and externally) but also impact adversely upon its reputation. Furthermore, ongoing disagreements (or simply having a second Commissioner unavailable to make a decision) can lead to a delay in the making of a decision which, in some circumstances, may be critical. Finally, this is precisely the kind of scenario which might dissuade an otherwise suitable candidate for the position of Chief Commissioner in the future from taking up an appointment. On balance, in my view, in the event of a disagreement the view of the Chief Commissioner as the agency head should prevail.

I assume from your letter that the views of a number of people and organisations have been sought. May I be so bold as to suggest, if it has not already occurred that the views of Commissioner Drake be sought, particularly as she has the "lived" experience of having held her position since LECC's inception?

The present discussion underscores the critical issue that will arise in 2022 which is to ensure that the right people are selected for the two Commissioner positions. As I am sure everyone appreciates, that in turn will depend upon having an appropriate process in place to produce that outcome, but which also ensures that it occurs in a timely fashion.

Finally, I observe that from my perspective the objects of the Act remain valid.

I am of course available to further discuss any of these issues should you feel that it may assist you either in your completing your review or subsequently.

Yours sincerely

Terry Buddin

The Hon Terry Buddin SC
Inspector of the Law Enforcement Conduct Commission

Office of the Inspector of the Law Enforcement Conduct Commission
GPO Box 5341, Sydney NSW 2001
T: (02) 9232-3350 | E: oilecc_executive@oilecc.nsw.gov.au

ANNEXURE C: ANALYSIS OF THE LEGISLATIVE FRAMEWORK WITHIN WHICH LECC OPERATES WHEN CONDUCTING EXAMINATIONS

Given the vital importance of the legislative context in which LECC operates, it is necessary to refer to it in some detail. The starting point is the objects of the Act. Section 3(b), which is in the following terms, identifies the need "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".

Part 6 of the Act provides LECC with investigation powers. Section 51(1)(a) of Division 1 of that Part provides that it may use those powers if the conduct concerned involves a police officer and "the Commission has decided that the conduct concerned is (or could be) serious misconduct or officer maladministration that should be investigated". Division 2 confers upon LECC powers to obtain information, documents and other things.

Division 3 deals with examinations. Section 61 provides that LECC may hold an examination for the purpose of "an investigation of conduct that the Commission has decided is (or could be) serious misconduct or serious maladministration".

Section 62(1) provides that an examination must be held by the Chief Commissioner, by the Commissioner for Integrity or an Assistant Commissioner.[1] Section 62(2) provides that "(a)t an examination, the examining Commissioner must announce the general scope and purpose of the examination". Section 62(3) provides that "(a) person appearing at an examination is entitled to be informed of the general scope and purpose of the examination, unless the examining Commissioner is of the opinion that this would seriously prejudice the investigation concerned".

Section 63(1) provides that an examination may be held either in public or in private. That is subject to subsection (2) which provides that an examination may only be held in public if the Commission decides that it is appropriate to do so. Subsection (5) provides a non-exhaustive list of factors which the Commission may take into account in making the decision required by subsection (2). Section 63(6) provides that "(t)he examining Commissioner may give directions as to the persons who may be present at an examination when it is being held in private. A person must not be present at an examination in contravention of any such direction".

Section 64 makes provision for the appointment of counsel to assist the Commissioner at an examination.

Section 65 provides that "(i)f it is shown to the satisfaction of the examining Commissioner that any person is substantially and directly interested in any subject-matter of an examination, the examining Commissioner may authorise the person to appear at the examination or a specified part of the examination".

[1] Since the commencement of the Law Enforcement Conduct Commission Amendment (Commissioners) Act 2021, section 62(1) now provides as follows "An examination must be held by the Chief Commissioner, Commissioner or an Assistant Commissioner, as determined by the Chief Commissioner (**the examining Commissioner**)."

Section 66(1) provides that "(t)he examining Commissioner may, in relation to an examination, authorise—, (a) a person giving evidence at the hearing, or (b) a person referred to in section 65, to be represented by an Australian legal practitioner at the hearing or a specified part of the examination".

Section 67 is presently irrelevant.

Section 68(1) provides that "(a) person authorised or required to appear at an examination, or a person's Australian legal practitioner authorised to appear at an examination, may, with the leave of the examining Commissioner, examine or cross-examine any witness on any matter that the examining Commissioner considers relevant".

Section 69 provides the examining Commissioner with the power to summon witnesses and require them to produce document.

As section 70 is a pivotal provision it is convenient to set out the relevant parts of it:

Section 70

(1) In the exercise of an examining Commissioner's functions under this Part, the examining Commissioner is not bound by the rules or practice of evidence and can inform himself or herself on any matter in such manner as the examining Commissioner considers appropriate".
(2) The examining Commissioner is required to exercise the examining Commissioner's functions with as little formality and technicality as is possible, and, in particular, the examining Commissioner is required to accept written submissions as far as is reasonably possible and examinations are to be conducted with as little emphasis on an adversarial approach as is possible".

Section 75 provides that "(t)he examining Commissioner may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing".

What emerges from this review of the legislation is that a broad discretion is conferred upon the examining Commissioner as to the manner in which a particular examination is conducted. The process itself is inquisitorial in nature. Moreover, an examining Commissioner is required to:

(i) exercise his or her functions "with as little formality and technicality as is possible"
(ii) accept written submissions "as far as is reasonably possible"
(iii) conduct examinations "with as little emphasis on an adversarial approach as is possible"