



Office of the Inspector of the  
**Law Enforcement Conduct Commission**

**SPECIAL REPORT ON AN AUDIT OF THE LAW  
ENFORCEMENT CONDUCT COMMISSION'S  
ACQUISITION AND USE OF ASSUMED  
IDENTITIES AND OTHER MATTERS RELATED  
TO THE SYSTEM OF OVERSIGHT OF COVERT  
INVESTIGATIVE POWERS IN NSW**

**MAY 2022**



Office of the Inspector of the  
**Law Enforcement Conduct Commission**

27 May 2022

Reference: A02 2021

The Hon. Matthew Ryan Mason-Cox MLC  
President  
Legislative Council  
Parliament House  
Sydney NSW 2000

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

Dear Mr President & Mr Speaker

In accordance with section 140 of the *Law Enforcement Conduct Commission Act 2016* (the LECC Act), I furnish to each of you for presentation to the Parliament my special report entitled: *Special Report on an Audit of the Law Enforcement Conduct Commission's Acquisition and Use of Assumed Identities and Other Matters Related to the System of Oversight of Covert Investigative Powers in NSW*.

Pursuant to section 142 of the LECC Act, I recommend that the report be made public immediately.

Yours sincerely,

A handwritten signature in blue ink that reads 'Terry Buddin'.

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

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# 1. INTRODUCTION

## 1.1 Background

The *Law Enforcement Conduct Commission Act 2016* (the LECC Act) established the Law Enforcement Conduct Commission (LECC) which became fully operational on 1 July 2017. Its establishment followed a report in 2015 by Mr Andrew Tink AM entitled “The Review of Police Oversight”, in which it was recommended that a single agency should have responsibility for police oversight functions in New South Wales.

As a result, LECC took over many of the functions which had previously been performed by the Police Integrity Commission, the Inspector of the Crime Commission and the Police Division of the Office of the Ombudsman respectively. LECC independently oversees the NSW Police Force (NSWPF) and the NSW Crime Commission (NSWCC) and its functions include:

- detecting, investigating and exposing ‘serious misconduct’ and ‘maladministration’ in the NSWPF and the NSWCC
- assessing complaints received about the NSWPF and the NSWCC
- monitoring critical incident investigations of the NSWPF
- overseeing complaint handling by the NSWPF and the NSWCC
- providing for education about and prevention of officer misconduct.

The LECC Act also created the position of the Inspector of the LECC. The Office of the Inspector of the LECC (OILECC) is the agency that provides support to that position.

## 1.2 The Inspector’s Legislative Powers

This is a special report which is furnished to Parliament pursuant to section 140 of the LECC Act. That section provides as follows:

*The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament on any of the following –*

- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs,*
- (b) any administrative or general policy matter relating to the functions of the Inspector,*
- (c) any other matter relating to the exercise of a function to audit, deal with or assess any matter under section 122 (Functions of Inspector) that the Inspector considers warrants the making, in the public interest, of a special report.*

Section 122, to which specific reference is made in section 140, relevantly provides that:

- (1) The Inspector has the functions conferred or imposed on the Inspector by or under this or any other Act.*

**Note—**

*Functions conferred on the Inspector under other Acts include the functions of an inspecting officer under the Telecommunications (Interception and Access) (New South Wales) Act 1987 and of the Inspector under the Surveillance Devices Act 2007 and the Law Enforcement (Controlled Operations) Act 1997.*

*(2) The principal functions of the Inspector are—*

*(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*

*(b) to 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 (Commission misconduct matters), and*

*(c) to assess the effectiveness and appropriateness of the policies and procedures of the Commission relating to the legality or propriety of its activities.*

So far as subsection (1) is concerned, the relevant legislation confers on the Inspector an inspection function which also includes certain reporting obligations. Other than the legislation concerning covert investigative powers which is specifically referred to in that subsection, those functions also extend to other forms of covert activities, namely covert search warrants and criminal organisation search warrants that have been authorised under the *Law Enforcement (Powers and Responsibilities) Act 2002*. The main law enforcement agencies which use the various covert investigative powers just referred to are the NSW Police Force (NSWPF), NSW Crime Commission (NSWCC), Independent Commission Against Corruption (ICAC) as well as LECC. It should be noted that the inspection and reporting functions that are conferred upon the Inspector of the LECC (which are performed by two officers of OILECC acting under delegation) were previously performed by them whilst they were working at the office of the Ombudsman. Both of those officers transferred to OILECC upon its establishment.

So far as subsection (2) is concerned, which sets out what are described as the ‘principal functions’ of the Inspector, it will be seen that it provides in turn for an ‘audit’ function (subsection (2)(a)), for a ‘complaint handling’ function (subsection (2)(b)) and for an ‘assessment’ function (subsection (2)(c)).

As has already been observed, this report is produced pursuant to the broad powers which are conferred by section 140. Its scope and purpose will be addressed shortly. Its contents have been significantly informed by the material which has been made available to this Office in the exercise of the functions which are identified in sections 122(1), 122(2)(a) and (2)(c). (The complaint handling function in subsection (2)(b), whilst being an important aspect of this Office’s work, is beyond the scope of this report.)

### 1.3 The use of covert powers – some historical context

It has long been recognised that covert strategies which entail a measure of involvement in criminal activities by law enforcement officers is necessary in order to acquire information and evidence about those activities that would otherwise be unavailable. The use of undercover operatives is but one such example. Nevertheless, the risks associated with such a state of affairs are readily apparent. A most useful and detailed analysis of those risks is provided by Clive Harfield in an article entitled “The Governance of Covert Investigation” ((2010) Melbourne University Law Review, volume 34, pages 773-804).

Several events which occurred in the 1990s concerning the conduct of covert law enforcement activities highlighted those risks. In 1995 the High Court handed down its decision in *Ridgeway v The Queen* (1995) 184 CLR 19 in which a quantity of heroin had been imported into Australia by a Malaysian police officer as part of a “controlled operation”. The Malaysian police officer was accompanied on the trip to Australia by a police informer from whom the appellant had initially sought to obtain the heroin. The controlled operation, which had been facilitated by the Australian Federal Police and the Australian Customs Service, had enabled the Malaysian police officer to clear customs. The heroin had then been delivered to the appellant in Australia whereupon he was arrested and subsequently convicted of an offence under section 233B(1)(c) of the *Customs Act 1901* (Cth) for possession of heroin without lawful excuse. The High Court quashed the appellant’s conviction as the importation itself, which had been brought about by the conduct of law enforcement officers, was illegal. The Court held that as the relevant evidence had been procured illegally, it should have been ruled inadmissible.

Following that decision, the Australian Police Ministers’ Council decided in April 1996 to seek cross-jurisdictional recognition of legislation which was designed to address the problems that had been highlighted by the decision in *Ridgeway*. The decision, together with a number of other matters, also attracted the attention of the Wood Royal Commission into the NSW Police Service. In its Final Report, the Royal Commission expressed concerns about operations in which a police undercover operative, or an informant acting under police instructions, participated in unlawful activity. It observed that such persons would be exposed to the risk of being charged with criminal and/or disciplinary offences, notwithstanding the fact that the conduct had been approved at the highest level of the Police Service.

The Royal Commission also expressed concerns about the arrangements that the NSW Police Service were then utilising to create false identities. It described them as being “ad hoc, uncertain in their legality...and...lacking in accountability” (at Volume II, page 412).

Accordingly, the Royal Commission recommended:

- the introduction of legislation to regulate undercover operations and to provide an immunity from civil and criminal liability to officers involved in approved controlled operations, and
- the introduction of legislation to regularise the issue of false documents such as birth certificates, drivers' licences, passports and the like to support false identities, both of protected witnesses and undercover operatives.

The NSW Parliament responded by enacting the *Law Enforcement (Controlled Operations) Act 1997* (NSW) (LECO Act) which provided that "controlled operation authorities" could be granted by the "chief executive officer" (or their delegate) of prescribed law enforcement agencies. It also enabled, among other things, participants authorised under these authorities to use "assumed names" during the course of those authorised operations.

The NSW Parliament also enacted the *Law Enforcement and National Security (Assumed Identities) Act 1998*. While that legislation facilitated the lawful acquisition and use of AIs within NSW, it did not extend to making provision for the use of an authorised AI in other Australian jurisdictions. In 2003, the "Cross-Border Investigative Powers for Law Enforcement" report was published by the then Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers. Following that report, model laws were developed which were intended to be adopted in all Australian jurisdictions to provide for mutual recognition of AIs in corresponding jurisdictions. The NSW Parliament responded to the report by introducing the *Law Enforcement and National Security (Assumed Identities) Act 2010* (the AI Act).

In 2013 a statutory review of the AI Act was conducted by the Ministry for Police and Emergency Services pursuant to section 43 of that Act. Other than recommending several minor amendments to that Act (which were reflected in the *National Security (Assumed Identities) Amendment Act 2013 No.55*), the statutory review was otherwise satisfied with the operation of the Act. Indeed, it concluded that "[s]ubmissions received indicated that the Act is an effective law enforcement tool and is meeting its policy objectives and that authorised agencies are using the powers provided by the Act in an appropriate and responsible manner. The Review found that the policy objectives of the Act remained valid and no substantive amendments are required" (at 4).

## 1.4 The nature and use of an AI

It is apparent that there is limited information available in the public domain about precisely what an AI is and how it may be used. However, as the name implies, an AI is essentially a false identity. It can be acquired and used by officers of law enforcement agencies to conduct covert investigation or intelligence-gathering in relation to criminal activity, as well as for the safe and effective administration of witness protection programs. Aspects of an identity that may be falsified include, among other things, an individual's name, date of birth and address. In

NSW, the AI Act (which is set out in chapter 2) facilitates the lawful acquisition and use of AIs and their mutual recognition under corresponding laws of other Australian jurisdictions.

Provided that an AI has been properly authorised, the chief officer of a law enforcement agency is authorised to acquire evidence of the AI from both government and non-government issuing agencies. Such evidence may include for example, a credit card, a driver's licence, a motor vehicle's registration papers or a passport. The acquisition of such evidence would enable an authorised officer with an AI to, for example, rent premises in a false name.

Law enforcement roles that typically rely on the acquisition and use of AIs include surveillance officers, technical officers, and undercover officers. Offences that are the subject of investigation in respect of which AIs are frequently utilised include the supply and purchase of drugs and/or firearms as well as many forms of cybercrimes such as child exploitation offences. Their use may be particularly significant in the effort to detect the activities of networks engaged in organised crime.

In essence, an AI is designed to protect the identity of the individual (or individuals) carrying out the investigative or intelligence gathering activities by creating a degree of separation between the law enforcement officer engaged in such activity and their true identity. It follows that the use of an AI can provide law enforcement agencies with a powerful investigative tool by ensuring that various acts of deception which would otherwise be unlawful are protected. Furthermore, an AI may be used in conjunction with other covert powers. For example, law enforcement officers may engage in a controlled operation in which a civilian is also involved. The various participants in such an operation may also have acquired AIs.

## **1.5 Scope and purpose of this report**

As will become apparent, LECC is one of the law enforcement agencies that is authorised to acquire and use AIs in the performance of its statutory functions. Furthermore, the use of AIs is not, and never has been, the subject of external scrutiny by a dedicated oversight agency in NSW. That may be contrasted with the existence of the oversight functions which are conferred upon OILECC so far as the use of other covert powers in NSW is concerned, to which reference was made earlier. As may be expected, various issues have arisen during the course of this Office's performance of its regular inspection role over the first few years of its existence. It was against that background that the decision was taken to conduct an audit of LECC's activities concerning its use of AIs. The audit, which was conducted in accordance with the audit and assessment functions specifically conferred upon this Office in section 122(2) in respect of LECC's activities, is discussed in some detail in chapter 3.

The purpose of this report is twofold. First, it is to inform the Parliament of the results of that audit. Secondly, in accordance with section 140, it is to express this Office's views more broadly about various aspects of the existing regime in



respect of the use and oversight of covert investigative powers that have emerged from this Office's routine performance of its inspection and reporting functions under section 122(1) of the LECC Act.

## 2. THE LEGISLATIVE FRAMEWORK

### 2.1 The provisions which govern the acquisition and use of AIs in NSW

As the AI Act is the legislation which governs the operation of AIs in NSW, it is appropriate to make detailed reference to it.

Part 1 of the Act deals with various preliminary matters including its objects which are set out in section 3 in the following terms:

*(1) The main purposes of this Act are —*

- (a) to facilitate, for law enforcement purposes, investigations and intelligence-gathering in relation to criminal activity, including investigations extending beyond New South Wales, and*
- (b) to enable the safe and effective exercise of functions in administering witness protection programs.*

*(2) The main ways in which those purposes are to be achieved by this Act include —*

- (a) providing for the lawful acquisition and use of assumed identities, and*
- (b) facilitating mutual recognition of things done in relation to assumed identities under corresponding laws.*

Part 1 also contains section 4(1) in which the following key definitions are included:

***acquire** an assumed identity, means acquire evidence of the identity and includes taking steps towards acquiring evidence of the identity.*

...

***authorised civilian** means a person (other than a law enforcement officer) who is authorised under an authority to acquire or use an assumed identity.*

***authorised officer** means a law enforcement officer who is authorised under an authority to acquire or use an assumed identity.*

***authorised person** means —*

- (a) an authorised civilian, or*
- (b) an authorised officer.*

***authority** means an authority granted under section 6 to acquire and use an assumed identity, including the authority as varied under section 9.*

...

***chief officer** of a law enforcement agency means the person for the time being holding office or acting as —*

- (a) in relation to the NSW Police Force, the Commissioner of Police, or*
- (b) in relation to the Independent Commission Against Corruption, the Chief Commissioner of that Commission, or*
- (c) in relation to the New South Wales Crime Commission, the Commissioner for that Commission, or*

*(d) in relation to the Law Enforcement Conduct Commission, the Chief Commissioner of that Commission, or*

*(e) in relation to Corrective Services NSW, the Commissioner of Corrective Services, or*

*(f) in relation to the Australian Crime Commission, the Chief Executive Officer of the Australian Crime Commission, or*

*(g) in relation to an agency prescribed by the regulations as a law enforcement agency for the purposes of this Act, the officer prescribed by the regulations as the chief executive officer of the agency.*

*[Clause 5 of the Regulation to the AI Act relevantly provides:*

*For the purposes of paragraph (g) of the definition of chief officer of a law enforcement agency in section 4 (1) of the Act, the following officers are prescribed as the chief officers in respect of the following law enforcement agencies:*

*(a) in respect of the Australian Federal Police—the Commissioner of the Australian Federal Police,*

*(b) in respect of the Australian Security Intelligence Organisation—the Director-General of Security,*

*(c) in respect of the Australian Secret Intelligence Service—the Director-General of that Service,*

*(d) in respect of the Department of Immigration and Border Protection—the Secretary of the Department,*

*(e) in respect of the Australian Taxation Office—the Commissioner of Taxation.]*

**chief officer** of an issuing agency means the chief officer (however described) of the agency.

...

**corresponding authority** means—

*(a) an authority under a corresponding law to acquire or use an assumed identity in this jurisdiction, or*

*(b) an authority under a corresponding law to request the production of evidence of an assumed identity in this jurisdiction.*

**corresponding law** means a law of another jurisdiction that corresponds to this Act or a provision of this Act (as the case may be), and includes a law of another jurisdiction that is declared by the regulations to correspond to this Act or a provision of this Act.

*[Clause 9 of the Regulation declares the following laws of other jurisdictions to be 'corresponding laws':*

*(a) the Crimes (Assumed Identities) Act 2009 of the Australian Capital Territory,*

*(b) Part IAC of the Crimes Act 1914 of the Commonwealth,*

*(c) Chapter 12 of the Police Powers and Responsibilities Act 2000 of Queensland,*

*(d) Part 3 of the Criminal Investigation (Covert Operations) Act 2009 of South Australia,*

- (e) the Police Powers (Assumed Identities) Act 2006 of Tasmania,*
- (f) the Crimes (Assumed Identities) Act 2004 of Victoria,*
- (g) the Criminal Investigation (Covert Powers) Act 2012 of Western Australia,*
- (h) the Police (Special Investigative and Other Powers) Act 2015 of the Northern Territory.]*

...

**evidence of identity** means a document or other thing (such as a driver licence, birth certificate, credit card or identity card) that evidences or indicates, or can be used to evidence or indicate, a person's identity or any aspect of a person's identity.

...

**government issuing agency**, in relation to an authority, means an entity that —

- (a) is named in the authority, and*
- (b) issues evidence of identity as part of performing any function of the Government of the State.*

Note —

*Government issuing agencies may include entities such as Transport for NSW and the NSW Police Force.*

**issuing agency** means —

- (a) a government issuing agency, or*
- (b) a non-government issuing agency.*

**jurisdiction** means the Commonwealth or a State or Territory of the Commonwealth.

**law enforcement agency** means the following —

- (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) Corrective Services NSW,*
- (f) the Australian Crime Commission,*
- (g) 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 Security Intelligence Organisation,*
  - (iii) the Australian Secret Intelligence Service,*
  - (iv) Customs (within the meaning of the Customs Administration Act 1985 of the Commonwealth),*
  - (v) the Australian Taxation Office.*

*[clause 4 of the Regulation provides that each of those agencies is so prescribed]*

*law enforcement officer means the following –*

*(a) in relation to the NSW Police Force, a member of the NSW Police Force,*

*(b) in relation to the Independent Commission Against Corruption, an officer of the Commission (within the meaning of the Independent Commission Against Corruption Act 1988),*

*(c) in relation to the New South Wales Crime Commission, an officer of the Commission (within the meaning of the Crime Commission Act 2012),*

*(d) in relation to the Law Enforcement Conduct Commission, an officer of the Commission (within the meaning of the Law Enforcement Conduct Commission Act 2016),*

[Section 3 of the LECC Act defines an ‘officer of the Commission’ to mean a Commissioner, an Assistant Commissioner and a member of staff of the Commission]

*(e) in relation to Corrective Services NSW, a correctional officer (within the meaning of the Crimes (Administration of Sentences) Act 1999),*

*(f) in relation to the Australian Crime Commission, a member of the staff of the Australian Crime Commission (within the meaning of the Australian Crime Commission Act 2002 of the Commonwealth),*

*(g) in relation to an agency prescribed by the regulations as a law enforcement agency for the purposes of this Act, such members, officers or employees or class of members, officers or employees as may be prescribed by the regulations as law enforcement officers for the purposes of this Act in relation to that agency,*

*and includes a person who is seconded to a law enforcement agency, including (but not limited to) a member of the police force or police service or a police officer (however described) of another jurisdiction.*

*However, (despite the above) the term does not include the chief officer of a law enforcement agency.*

*[Relevantly, clause 6 of the Regulation is in the following terms:*

*For the purposes of paragraph (g) of the definition of **law enforcement officer** in section 4 (1) of the Act, the following are prescribed as law enforcement officers in respect of the following law enforcement agencies:*

*(a) in respect of the Australian Federal Police – a Deputy Commissioner of the Australian Federal Police, an AFP employee or a special member of the Australian Federal Police (within the meaning of the Australian Federal Police Act 1979 of the Commonwealth),*

*(b) in respect of the Australian Security Intelligence Organisation – a member of staff of the Australian Security Intelligence Organisation, whether an employee, a consultant or contractor, or a person who is made available by another Commonwealth, State or Territory agency or another body or person to perform services for the Australian Security Intelligence Organisation,*

*(c) in respect of the Australian Secret Intelligence Service – a staff member of the Service,*

*(d) in respect of the Department of Immigration and Border Protection – an officer of Customs,*

*(e) in respect of the Australian Taxation Office—a person engaged under the Public Service Act 1999 of the Commonwealth and performing duties in the Australian Taxation Office.]*

**non-government issuing agency**, in relation to an authority, means an entity, other than a government issuing agency, that—

*(a) is named in the authority, and*

*(b) issues evidence of identity.*

*Note—*

*Non-government issuing agencies may include entities such as banking institutions and registered clubs.*

**officer** of an agency includes a person employed or engaged in the agency.

**participating jurisdiction** means a jurisdiction in which a corresponding law is in force.

...

**supervisor** of an authorised civilian means the law enforcement officer who supervises or is to supervise the acquisition or use of an assumed identity by the authorised civilian. [As to which see clause 7 referred to later.]

**use** an assumed identity includes representing (whether expressly or impliedly, or by saying or doing something) the identity to be real when it is not.

...

Part 2 is entitled “Authority for assumed identity”. It contains section 5 which enables a ‘law enforcement officer’ of a ‘law enforcement agency’ to apply for an AI. It is in the following terms:

*(1) A law enforcement officer of a law enforcement agency may apply to the chief officer of the agency for an authority for the law enforcement officer or any other person to do either or both of the following—*

*(a) acquire an assumed identity,*

*(b) use an assumed identity.*

*(2) A separate application must be made in respect of each assumed identity to be acquired or used.*

*(3) An application—*

*(a) must be in writing in the form approved by the chief officer, and*

*(b) must contain—*

*(i) the name of the applicant, and*

*(ii) the name of the person to be authorised to acquire or use an assumed identity (if not the applicant), and*

*(iii) if the person referred to in subparagraph (ii) is not a law enforcement officer, the name and rank or position of the person proposed to be appointed as supervisor and an explanation of why it is necessary for a person who is not a law enforcement officer to acquire or use the assumed identity, and*

*(iv) details of the proposed assumed identity, and*

*(v) reasons for the need to acquire or use an assumed identity, and*  
*(vi) if the assumed identity is to be used in an investigation or for intelligence-gathering, details of the investigation or intelligence-gathering exercise (to the extent known), and*

*(vii) if the assumed identity is to be used for the purposes of implementing measures to facilitate the conduct of investigations or intelligence-gathering that may take place in the future, details of those measures, and*

*(viii) if the assumed identity is to be used to ensure the effective and safe exercise of functions in administering witness protection programs, details of the functions concerned, and*

*(ix) details of any issuing agencies and the types of evidence to be issued by them in relation to the assumed identity to be acquired or used, and*

*(x) details of any application to be made for an order under section 11 (Making entries in Births, Deaths and Marriages Register) in respect of the assumed identity.*

*(4) The chief officer may require the applicant to furnish such additional information concerning the application as is necessary for the chief officer's proper consideration of the application.*

Any such application is then considered by the chief officer or a 'senior officer' who has the appropriate delegation conferred by section 39. In determining the application, the relevant officer must comply with the requirements of section 6 which is in the following terms:

*(1) After considering an application for an authority to acquire or use an assumed identity, and any additional information under section 5 (4), the chief officer –*

*(a) may grant an authority to acquire or use the assumed identity, either unconditionally or subject to conditions, or*

*(b) may refuse the application.*

*(2) An authority to acquire or use an assumed identity may not be granted unless the chief officer is satisfied on reasonable grounds –*

*(a) that the assumed identity is necessary for the purposes of –*

*(i) an investigation or intelligence-gathering in relation to criminal activity, or*

*(ii) implementing measures to facilitate the conduct of such investigations or intelligence-gathering that may take place in the future, or*

*(iii) enabling employees of the NSW Police Force to exercise their functions in administering witness protection programs and ensuring their safety while doing so, and*

*(b) that the risk of abuse of the assumed identity by the authorised person is minimal, and*

*(c) if the application is for authorisation of an assumed identity for a person who is not a law enforcement officer – that it would be impossible or*

*impracticable in the circumstances for a law enforcement officer to acquire or use the assumed identity for the purpose sought.*

*(3) If an authority is granted for an authorised civilian, the chief officer must appoint a law enforcement officer of the law enforcement agency to supervise the acquisition or use of the assumed identity by the authorised civilian.*

*(4) The law enforcement officer appointed as supervisor must be —*

*(a) in relation to the NSW Police Force, of or above the rank of Sergeant, and*

*(b) in relation to the Independent Commission Against Corruption, of or above the rank of Senior Investigator, and*

*(c) in relation to the New South Wales Crime Commission, an officer of the New South Wales Crime Commission who is designated by that Commission as a New South Wales Crime Commission Senior Investigator, and*

*(d) in relation to the Law Enforcement Conduct Commission, a Commission investigator, and*

*(e) in relation to Corrective Services NSW, of or above the rank of Assistant Superintendent, and*

*(f) in relation to the Australian Crime Commission, of or above the rank of senior investigator, and*

*(g) in relation to an agency prescribed by the regulations as a law enforcement agency for the purposes of this Act, of or above such rank or position as may be prescribed by the regulations for the purposes of this provision in relation to that agency.*

*[Clause 7 of the Regulation provides:*

*For the purposes of section 6 (4) (g) of the Act, the following ranks and positions are prescribed in respect of the following law enforcement agencies:*

*(a) in respect of the Australian Federal Police — the rank of sergeant or an equivalent or higher rank,*

*(b) in respect of the Australian Security Intelligence Organisation — the position of ASIO Executive Employee Level 1 or an equivalent or higher position,*

*(c) in respect of the Australian Secret Intelligence Service — the position of ASIS Executive Level 1 or an equivalent or higher position,*

*(d) in respect of the Department of Immigration and Border Protection — an APS employee who holds or performs the duties of an Executive Level 1 position, or an equivalent or higher position, in that Department,*

*(e) in respect of the Australian Taxation Office — the position of an Australian Public Service Executive Level 2 or an equivalent or higher position.]*

*(5) An authority may also authorise any one or more of the following —*



*(a) an application for an order for an entry in the Births, Deaths and Marriages Register under section 11 or a like register under a corresponding law,*

*(b) a request under section 15 or 27,*

*(c) the use of an assumed identity in a participating jurisdiction.*

*(6) A separate authority is required for each assumed identity.*

Section 7 specifies the form and the information which must be contained in the authority. Section 8 is concerned with the duration of an authority. Section 9, which is concerned with the variation or cancellation of an authority, is in the following terms:

*(1) The chief officer who grants an authority—*

*(a) may vary or cancel the authority at any time, and*

*(b) must cancel the authority if the chief officer is satisfied that use of the assumed identity is no longer necessary.*

*(2) The chief officer must give written notice of the variation or cancellation of an authority to—*

*(a) the authorised person to whom it relates, and*

*(b) if the authorised person is an authorised civilian—the authorised person's supervisor.*

*(3) The notice must state why the authority is varied or cancelled.*

*(4) The variation or cancellation takes effect—*

*(a) on the day the written notice is given to the authorised person, or*

*(b) if a later date of effect is stated in the notice—on the day stated.*

Section 11 provides that an eligible Judge (within the meaning of section 12) “may order the Registrar to make an entry in the Births, Deaths and Marriages Register in relation to the acquisition of an assumed identity under an authority or corresponding authority” on application by the chief officer of a law enforcement agency. Section 14 similarly provides that an eligible Judge may cancel such an entry on application by the relevant chief officer.

Part 3 is entitled “Evidence of assumed identity”. Section 15, which concerns requests for evidence of an AI, is in the following terms:

*(1) This section applies if an authority granted under section 6 authorises a request under this section.*

*(2) The chief officer who grants the authority may request the chief officer of an issuing agency stated in the authority to—*

*(a) produce evidence of an assumed identity in accordance with the authority, and*

*(b) give evidence of the assumed identity to the authorised person named in the authority.*

*(3) The request must state a reasonable period for compliance with the request.*

*(4) A request cannot be made under this section for an entry in the Births, Deaths and Marriages Register or a like register of a participating jurisdiction.*

*(5) In this section –*

*evidence means evidence similar to that ordinarily produced or given by the issuing agency.*

Sections 16 and 17 deal with the obligations of issuing agencies (both government and non-government) to comply with such requests. Section 18 addresses the circumstances in which evidence of an AI that has been produced is to be cancelled. Section 19 provides protection from liability for officers of issuing agencies who perform functions under Part 3, whilst section 20 provides indemnities for issuing agencies and officers who do so.

Part 4 is entitled “Effect of authority”. Section 21, which deals with the acquisition and use of an AI, is in the following terms:

*(1) An authorised officer may acquire or use (or both) an assumed identity if the acquisition or use (or both) are –*

*(a) in accordance with an authority, and*

*(b) in the course of duty.*

*(2) An authorised civilian may acquire or use (or both) an assumed identity if the acquisition or use (or both) are in accordance with –*

*(a) an authority, and*

*(b) any direction by the person’s supervisor under the authority.*

Section 22, which protects authorised persons from liability, is in the following terms:

*Anything done by an authorised person (whether in this jurisdiction or elsewhere) in the course of acquiring or using an assumed identity is not unlawful, and does not constitute an offence or corrupt conduct if –*

*(a) the thing is done in accordance with an authority, and*

*(b) the thing is done in the course of the authorised person’s duty (in the case of an authorised officer) or in accordance with any direction by the authorised person’s supervisor under the authority (in the case of an authorised civilian), and*

*(c) doing the thing would not be unlawful or constitute an offence or corrupt conduct if the assumed identity were the person’s real identity.*

Section 23, which provides indemnities for authorised persons, is in the following terms:

*(1) This section applies if the chief officer of a law enforcement agency grants an authority.*

*(2) The law enforcement agency must indemnify the authorised person under the authority for any liability incurred by the person (including reasonable costs) because of something done by the person (whether in this jurisdiction or elsewhere) if –*

*(a) the thing is done in the course of acquiring or using an assumed identity in accordance with the authority, and*

*(b) the thing is done—*

*(i) in the case of an authorised officer—in the course of his or her duty, or*

*(ii) in the case of an authorised civilian—in accordance with any direction by his or her supervisor under the authority, and*

*(c) any requirements prescribed under the regulations have been met.*

However, those protections do not apply if the authorised person does a thing which required a particular qualification to do that thing and the person does not have that qualification (section 24). Should an authority be cancelled or varied, but the person to whom the authority applies is unaware of that fact, the protections contained in Part 4 continue to apply so long as that person is not reckless as to the existence of the variation or cancellation (section 25). The chief officer who grants an authority is permitted to make ‘any false or misleading representation about the authorised person to whom it relates’ so long as it is ‘for the purpose of or in connection with the acquisition or use of the [AI] by the authorised person’ (section 26).

Part 5 is entitled “Mutual recognition under corresponding laws”. Section 27 is in the following terms:

*(1) This section applies if an authority granted under section 6 authorises a request under this section.*

*(2) The chief officer who grants the authority may request the chief officer of an issuing agency of a participating jurisdiction stated in the authority to—*

*(a) produce evidence of the assumed identity in accordance with the authority, and*

*(b) give evidence of the assumed identity to the authorised person named in the authority.*

Section 28 is concerned with requests from a participating jurisdiction for evidence of an assumed identity, whilst section 29 concerns directions from a participating jurisdiction to cancel evidence of assumed identity. Section 30 provides for an indemnity for issuing agencies and officers in relation to section 27 requests. Section 31 provides that certain identified provisions apply to authorities under corresponding laws. As has been observed, the Commonwealth and all other States and Territories have corresponding laws.

Part 6, amongst other things, creates certain offences. Section 32 provides that it is an offence for an authorised officer or authorised civilian to misuse an assumed identity whilst section 33 creates offences in relation to the disclosure of information about an assumed identity. Section 34 provides that the identity of certain persons is not to be disclosed in legal proceedings unless the Court or a tribunal or a Royal Commission or other commission of inquiry determines otherwise “in the interests of justice”.

Part 7 is concerned with general matters such as the delegation of the chief officer’s functions (section 39), the procedure for conducting proceedings for offences against the Act (section 41) and the requirement for the Minister to review the Act (section 43).

## 2.2 The provisions that create key compliance and monitoring obligations in relation to the acquisition and use of AIs

In the previous section, reference was made to Part 6 which is entitled “Compliance and monitoring”. Given the focus of this report, it is now convenient to make reference to several key accountability measures that are contained in the Act.

Section 10 requires that AIs which are authorised for use in a participating jurisdiction are to be reviewed every 12 months by the chief officer. That section provides that:

*(1) The chief officer of a law enforcement agency must periodically review each authority granted by the chief officer under this Act that authorises the use of an assumed identity in a participating jurisdiction.*

*(2) A review of an authority under this section is to be conducted at least once every 12 months.*

*(3) The purpose of a review is to determine whether use of the assumed identity under the authority is still necessary.*

*(4) If the chief officer is satisfied on a review that use of the assumed identity under the authority is no longer necessary, he or she must cancel the authority under section 9.*

*(5) If the chief officer is satisfied on a review that use of the assumed identity under the authority is still necessary, he or she must record his or her opinion, and the reasons for it, in writing.*

Section 35, which is contained in Part 6, requires the chief officer to submit a report to the Minister each financial year. It is in the following terms:

*(1) As soon as practicable after the end of each financial year, the chief officer of a law enforcement agency must submit a report to the Minister that includes the following information for the year —*

*(a) the number of authorities granted, and the number of authorities cancelled, during the year,*

*(b) a general description of the activities undertaken by authorised persons when using assumed identities under this Act during the year,*

*(c) the number of applications for authorities that were refused during the year,*

*(d) a statement as to whether or not any fraud or other unlawful activity was identified by an audit under section 37 during the year,*

*(e) any other information relating to authorities and assumed identities and the administration of this Act that the Minister considers appropriate.*

*(2) The chief officer must advise the Minister of any information in the report that, in the chief officer's opinion, should be excluded from the report before the report is laid before Parliament because the information, if made public, could reasonably be expected to —*

*(a) endanger a person's safety, or*

*(b) prejudice an investigation or prosecution, or*

*(c) compromise any law enforcement agency's operational activities or methodologies.*

*(3) The Minister must—*

*(a) exclude information from the report if satisfied on the advice of the chief officer of any of the grounds set out in subsection (2), and*

*(b) cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the day on which the Minister receives the report.*

*(4) If a House of Parliament is not sitting when the Minister seeks to lay a report before it, the Minister may present copies of the report to the Clerk of the House concerned.*

Section 36, which specifies that certain records are to be kept, is in the following terms:

*(1) The chief officer of a law enforcement agency must cause appropriate records to be kept about the operation of this Act in respect of the agency.*

*(2) The records must include the following, in respect of authorities granted, varied or cancelled under this Act in respect of the agency—*

*(a) the date on which an authority was granted, varied or cancelled and the name of the person who granted, varied or cancelled it,*

**Note—**

*The functions under this Act of the chief officer of a law enforcement agency (including that of granting authorities) may be delegated under section 39.*

*(b) the name of the authorised person under the authority, together with details of the assumed identity to which the authority applies,*

*(c) details of any request made to an issuing agency under section 15 in respect of the authority,*

*(d) the general nature of the duties undertaken by the authorised person under the assumed identity,*

*(e) general details of relevant financial transactions entered into using the assumed identity,*

*(f) details of any review of the authority under section 10.*

Section 37, which requires the chief officer to arrange for an audit of those records to be conducted, is in the following terms:

*(1) The chief officer of a law enforcement agency must arrange for the records kept under section 36—*

*(a) for each authority in respect of the agency that authorises the use of an assumed identity in a participating jurisdiction, to be audited—*

*(i) at least once every 6 months while the authority is in force, and*

*(ii) once in the 6 months after the cancellation or expiry of the authority, and*

*(b) for each other authority in respect of the agency, to be audited at least once every 12 months while the authority is in force.*

*(2) The audit is to be conducted by a person appointed by the chief officer.*

*(3) The person appointed to conduct the audit—*

*(a) may but need not be an officer of the law enforcement agency, and*

*(b) must not be a person—*

*(i) who granted, varied or cancelled any of the authorities to which the records under section 36 relate, or*

*(ii) who is or was an authorised person under any of the authorities to which those records relate.*

**Note—**

*The functions under this Act of the chief officer of a law enforcement agency (including that of granting authorities) may be delegated under section 39.*

*(4) The results of an audit are to be reported to the chief officer.*

## 2.3 The provisions which govern the conduct of Controlled Operations in NSW

Reference was made earlier to the LECO Act and the fact that “[i]t also enabled, among other things, participants authorised under these authorities to use ‘assumed names’ during the course of those authorised operations”. The LECO Act establishes a scheme whereby the chief officer of a law enforcement agency can certify the use of an ‘assumed name’ by a law enforcement participant or civilian participant for the purpose of an authorised operation. As is apparent, the AI Act establishes a scheme whereby the chief officer of a law enforcement agency can authorise a law enforcement officer or an authorised civilian to acquire and use an AI for the purpose of investigation and intelligence gathering (and in the case of the NSWPF, to ensure the effective and safe exercise of functions in administering witness protection programs). As there is the potential for the two Acts to overlap, it is necessary to make some reference to the legislative framework that governs the operation of the LECO Act. The references in that Act to the use of an assumed name are emphasised in the material which follows.

That Act enables a “controlled operation” to be authorised for use by a law enforcement agency 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) 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 as being “an activity that, but for section 16, would be unlawful.”

Section 3(1) also provides that each of the following agencies is defined as being 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. [Clause 4 of the Regulation provides that each of those agencies is so prescribed.]*

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) sets out what information must be included in an application. It provides that:

*In any application, whether formal or urgent, the applicant must provide the following particulars –*

- (a) a plan of the proposed operation,*
- (b) the nature of the criminal activity or corrupt conduct in respect of which the proposed operation is to be conducted,*
- (c) the nature of the controlled activity in respect of which an authority is sought,*
- (d) a statement of whether or not the proposed operation, or any other controlled operation with respect to the same criminal activity or corrupt conduct, has been the subject of an earlier application for an authority or variation of an authority and, if so, whether or not the authority was given or variation granted,*
- (e) the names and ranks of the law enforcement officers nominated to be the principal law enforcement officer and the secondary law enforcement officer for the proposed operation,*
- (f) details of the proposed use of a listening device or optical surveillance device (within the meaning of the Surveillance Devices Act 2007) if the use will be carried out other than in accordance with a surveillance device warrant under that Act.*

Section 6(1) provides that the chief executive officer (or a person with an appropriate delegation) 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, which applies to all law enforcement agencies that conduct controlled operations, has been prescribed and is contained in Schedule 2 to Law Enforcement (Controlled Operations) Regulation 2017 (LECO Regulation). It casts a number of obligations upon applicants and the code of conduct is set out in full at the end of this section of the report. 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 prohibits the authorisation of certain activities. Subsection 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 is concerned with the form of an authority. Subsection 8(1) draws a distinction between a “formal application” and an “urgent application”.

Subsection 8(2) is in the following terms:

*An authority, whether formal or urgent—*

*(a) must identify the operation by reference to the plan referred to in section 5(2A)(a), and*

*(b) must identify the principal law enforcement officer who is the person who is to conduct, and to have responsibility for, the operation, and*

*(b1) must identify the secondary law enforcement officer who is the person who is to conduct, and to have responsibility for, the operation whenever the principal law enforcement officer is unavailable to do so, and*

*(c) must identify each person who may engage in controlled activities for the purposes of the operation, and*

*(d) must state whether or not any such person may operate under an assumed name, and*

*(e) must identify—*

*(i) with respect to the law enforcement participants, the nature of the controlled activities that those participants may engage in, and*

*(ii) with respect to the civilian participants, the particular controlled activities (if any) that each such participant may engage in, and*

*(f) in respect of an urgent authority, must specify the period (not exceeding 72 hours) for which the authority is to remain in force, and*

*(g) in respect of a formal authority, must specify the period (not exceeding 6 months) for which the authority is to remain in force, and*

*(h) must specify any conditions to which the conduct of the operation is subject under section 6(1)(a). (Emphasis added.)*

Section 8(3) is in the following terms:

*A person is sufficiently identified for the purposes of subsection (2)(b), (b1) or (c) if the person is identified—*

*(a) by an assumed name under which the person is operating, or*

*(b) by a code name or code number,*

*so long as the assumed name, code name or code number can be matched to the person’s identity by reference to documentation kept by the chief executive officer. (Emphasis added.)*

Section 9 deals with the duration of an authority. Section 10 makes provision for the variation of an authority, whilst section 12 provides for the cancellation of an authority.

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.” The LECO Regulation identifies the matters which are to be included in that report.

Section 16 provides that an activity that is engaged in by a participant in an authorised operation in the course, 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 17 provides for the lawfulness of activities with respect to assumed names. It is in the following terms:

*(1) Despite any other Act or law, the following activities –*

*(a) the preparation of any false documentation (such as the preparation of a driver licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,*

*(b) the inclusion of any false information in any record or register (such as that relevant to the issue of a driver licence, credit card or identity card under an assumed name) in accordance with a request by the chief executive officer of a law enforcement agency,*

*(c) the use of such documentation or information by any person in the course of, and for the purposes of, an authorised operation conducted on behalf of a law enforcement agency,*

*are not unlawful, and do not constitute offences or corrupt conduct, so long as the documentation or information is the subject of a certificate, signed by the chief executive officer of the agency, to the effect that the documentation or information is to be used for the purposes of this Act.*

*(2) Subsection (1) does not render lawful the preparation of false documentation, the inclusion of false information in any record or register or the use of such documentation or information in relation to matters of the kind recorded or registered under the Births, Deaths and Marriages Registration Act 1995.*

*(Emphasis added.)*

Section 18 provides that certain ancillary activities with respect to the conduct of an authorised operation are not unlawful.

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.

Section 20 is in the following terms:

*(1) The regulations may prescribe codes of conduct for authorised operations conducted on behalf of law enforcement agencies.*

*(2) Different codes of conduct may be prescribed for different law enforcement agencies.*

*(3) A code of conduct may make provision for or with respect to any aspect of the conduct of an authorised operation.*

*(4) A regulation may not be made for the purposes of this section except on the recommendation of the Inspector.*

*(5) Contravention of the code of conduct for a law enforcement agency by any person (including a law enforcement officer) employed within that agency is taken to be misconduct for the purposes of any disciplinary proceedings taken against that person with respect to the contravention.*

The code of conduct, to which reference was made earlier, is set out below:

**1 Applicants for authorities to act in good faith**

*(1) In making an application for an authority, or for a variation of an authority, the applicant must at all times act in good faith.*

*(2) In particular, the applicant must ensure that the application—*

*(a) discloses all information of which the applicant is aware as to the circumstances giving rise to the application, especially those that could affect the way in which the application will be determined, and*

*(b) does not contain anything that is incorrect or misleading in a material particular.*

*(3) If the applicant subsequently becomes aware of information that, had it been known to the chief executive officer when the application was determined, could have affected the way in which the application would have been determined, the applicant must ensure that the information is given to the chief executive officer as soon as practicable.*

**2 Disclosure of changed circumstances**

*If the principal law enforcement officer for an authorised operation becomes aware of circumstances that are likely to require a variation of the authority for the operation, the officer must ensure that—*

*(a) information as to those circumstances is given to the chief executive officer as soon as practicable, and*

*(b) a written application for such a variation is made to the chief executive officer before it becomes impracticable to do so.*

**3 Participants to be properly briefed**

*Before conducting an authorised operation, the principal law enforcement officer for the operation—*

*(a) must ensure that each law enforcement participant and each civilian participant—*

*(i) has a thorough understanding of the nature and extent of any controlled activities in which the participant may be directed to engage for the purposes of the operation, and*

*(ii) is made aware of the terms of the authority to the extent to which it authorises the participant to engage in those activities, and*

*(b) must ensure that each civilian participant undertakes not to engage in any controlled activities other than those referred to in paragraph (a), and*

*(c) must make a written record of each undertaking given by a civilian participant as referred to in paragraph (b).*

**4 Obligations of law enforcement participants with respect to their own actions**

*At all times during the conduct of an authorised operation, each law enforcement participant—*

*(a) must act in good faith, and*

*(b) must comply with any lawful directions given to the participant by the law enforcement officer who is conducting, and has responsibility for, the operation.*

#### **5 Obligations of law enforcement participants with respect to the actions of others**

*Each law enforcement participant in an authorised operation must take all reasonable steps to ensure that the conduct of the operation does not involve 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, or*

*(d) engaging in any activity that, not being a controlled activity, is unlawful.*

#### **6 Reports to be made in good faith**

*(1) In preparing a report on the conduct of an authorised operation, the reporting officer must at all times act in good faith.*

*(2) In particular, the reporting officer must ensure that the report—*

*(a) discloses all information of which the officer is aware as to matters required to be included in the report, and*

*(b) does not contain anything that is incorrect or misleading in a material particular.*

*(3) If the reporting officer subsequently becomes aware of—*

*(a) information that, had it been known to the officer when the report was prepared, should have been included in the report, or*

*(b) information that indicates that anything contained in the report is incorrect or misleading in a material particular,*

*the officer must ensure that the information is given to the chief executive officer as soon as practicable.*

#### **7 Breaches of code to be reported**

*(1) If a law enforcement participant in an authorised operation becomes aware that a breach of this code has occurred in relation to the operation, the participant must ensure that notice of the breach is given to the chief executive officer as soon as practicable.*

*(2) It is sufficient compliance with this clause if notice of the breach is reported in accordance with the internal reporting procedures applicable to the law enforcement agency to which the law enforcement participant belongs.*

#### **8 Relationship to other codes of conduct**

*In its application to a law enforcement agency, the provisions of this code are in addition to, and do not derogate from, the provisions of any other code of conduct that applies to that agency.*

Part 3A of the Act makes provision for cross-border controlled operations. The conduct of such operations differ in a number of respects from controlled operations which are conducted within the borders of a particular jurisdiction.

Part 4 of the Act is entitled “Monitoring of controlled operations” (the provisions of which will be set out in the next section). Part 5 is concerned with miscellaneous matters such as the requirement to notify the Director of Public Prosecutions of evidence obtained in the course of an authorised operation

(section 26), the delegation of the chief executive officer's functions under the Act (section 29) and the requirement for the Minister to review the Act (section 32).

## 2.4 The provisions that create key compliance and monitoring obligations in relation to the conduct of Controlled Operations

Section 21, which provides that the Inspector of LECC is to be notified of certain matters, is in the following terms:

*(1) Within 21 days after –*

*(a) granting an authority (other than a retrospective authority) or variation of authority, or*

*(b) receiving a report on the conduct of an authorised operation to which an authority relates,*

*a chief executive officer must cause written notice of that fact to be given to the Inspector.*

*(1A) A chief executive officer who grants a retrospective authority must provide the Inspector with written details of the retrospective authority and the circumstances justifying that authority.*

*(1B) The details are to be provided as soon as practicable after the retrospective authority is granted but, in any case, no later than 7 days after it is granted.*

*(2) The Inspector may require the chief executive officer to furnish such information concerning the authority, variation or report as is necessary for the Inspector's proper consideration of it.*

The details that must be included in such notifications are specified in the LECO Regulation.

Section 22, which requires the Inspector to inspect the records of law enforcement agencies, is in the following terms:

*(1) The Inspector –*

*(a) must inspect the records of each law enforcement agency at least once every 12 months, and*

*(b) may inspect the records of any law enforcement agency at any time, for the purpose of ascertaining whether or not the requirements of this Act are being complied with.*

*(2) The provisions of the Telecommunications (Interception) (New South Wales) Act 1987 apply to an inspection conducted under this section in the same way as they apply to an inspection conducted under that Act.*

*(3) The Inspector may, at any time, make a special report to the Presiding Officer of each House of Parliament with respect to any inspection conducted under this section.*

*(4) Nothing in this section requires the Inspector to inspect records in relation to an authorised operation that has not been completed.*

Section 22(2) provides that the provisions of the *Telecommunications (Interception) (New South Wales) Act 1987* (the NSW TIA 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 TIA Act to enable them to obtain relevant information from a law enforcement agency.

Section 23, which also provides the Inspector with a reporting function, is in the following terms:

*(1) The Inspector must, as soon as practicable after 30 June in each year, prepare a report of the Inspector's work and activities under this Act for the preceding 12 months and furnish the report to the Presiding Officer of each House of Parliament.*

*(2) The report must include, for each law enforcement agency, the following particulars—*

*(a) the number of formal authorities that have been granted or varied by the chief executive officer of that agency, and the number of formal applications for the granting or variation of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,*

*(a1) the number of urgent authorities or urgent variations of authorities that have been granted by the chief executive officer of that agency, and the number of urgent applications for authorities or urgent variations of authorities that have been refused by the chief executive officer of that agency, during the period to which the report relates,*

*(b) the nature of the criminal activity or corrupt conduct against which the controlled operations conducted under those authorities were directed,*

*(c) the number of law enforcement participants, and the number of civilian participants, involved in the controlled operations conducted under those authorities,*

*(d) the nature of the controlled activities engaged in for the purposes of the controlled operations conducted under those authorities,*

*(e) the number of law enforcement participants, and the number of civilian participants, who have engaged in controlled activities for the purposes of the controlled operations conducted under those authorities.*

*(3) Nothing in this section requires particulars of an authorised operation to be included in a report for a year if the operation had not been completed as at 30 June in that year, but the particulars must instead be included in the report for the year in which the operation is completed.*

That section is to be read in conjunction with section 24(1) which provides that:

*A report prepared under this Part must not include any information that, if made public, could reasonably be expected—*

*(a) to endanger the health or safety of any person, or*

*(b) to disclose the methodology used in any investigation (whether or not an authorised operation) that is being, has been or is proposed to be conducted by any law enforcement agency, or*

*(c) to prejudice any investigation (whether or not an authorised operation) that is being or is proposed to be conducted by a law enforcement agency, or*

*(d) to prejudice any legal proceedings arising from any such investigation.*

Section 24(3) provides that “[t]he Inspector must give a copy of any report prepared under this Part to the chief executive officer of the law enforcement agency to which the report relates and to the Minister responsible for that agency.”

## **3. THE AUDIT OF LECC'S ACQUISITION AND USE OF AIs**

### **3.1 The scope and purpose of the audit**

As indicated earlier, this audit was conducted pursuant to the audit and assessment functions that have been conferred upon the Inspector by Parliament. Its broad objective was to assess the issue of LECC's compliance with the AI Act. In addressing that objective, particular attention was directed to the level of its compliance with each of the following matters:

- i. the legislative requirements of the Act concerning key aspects of its compliance and monitoring obligations
- ii. the legislative requirements concerning the governance of the acquisition and use of AIs
- iii. its own AI Policy and Procedure.

Although OILECC was aware of a number of instances in which issues concerning the use of AIs and other covert strategies had arisen in other agencies (a topic which will be explored in some detail in the next chapter), it is important to stress that it had not received a complaint of any kind about the misuse of AIs by LECC officers. Nor was it aware of any suggestion that LECC was failing to comply with its statutory obligations under the Act. The catalyst for conducting the audit was provided, in part, by the experiences which had occurred elsewhere. Just as importantly, the decision was informed by the recognition that although the use of AIs is a highly important covert investigative strategy, there is presently very limited external oversight of that use in NSW. Furthermore, there is very little publicly available information as to how this critical power is being used. Part of the impetus for this audit was, accordingly, to provide some information about one agency's activities in order to partly fill the void that currently exists.

In order to conduct the audit, OILECC needed access to LECC's records and holdings. At the outset, it should be immediately recorded that all material that OILECC sought during the course of the audit was provided without hesitation. At no stage was there any occasion for this Office to consider invoking its statutory powers to obtain the information which it required. On the contrary, there were a number of occasions on which LECC furnished records and/or provided material in addition to what had been specifically requested, in circumstances in which LECC had formed the view that to do so would enable this Office to obtain a better understanding of the issue that was being considered. In short, LECC is to be commended for its cooperation and assistance in what has been a rather longer process than had been originally envisaged.

The audit commenced in August 2020. At that time it had a narrow focus, namely an examination of LECC's activities and all of its records in relation to applications for, and variations to, AIs for the 2018-19 financial year. However, a preliminary examination of the records which were received immediately revealed that much greater information was required in order to gain an accurate picture of what AI activities had occurred even during that limited period. To obtain such a picture, it became apparent that it would be necessary to consider what AI activities had occurred in surrounding years as well. That was because, for example, the use of an AI which is authorised for an individual officer may remain in existence for an extended period of time which could cover a number of reporting periods. That



realisation also led to a greater focus having to be placed upon LECC's overall practices concerning the variation and cancellation of the use of AIs. Accordingly, the decision was made in December 2020 to broaden the scope of the audit to include all AIs which LECC had authorised in the first 3 years of its operations, namely the 2017-18, 2018-19 and 2019-20 financial years.

That decision in turn gave rise to a further issue. As has been observed, one of the agencies which LECC absorbed on its establishment was the Police Integrity Commission (PIC). A number of officers who had been employed in that agency took up positions within LECC. Some of those officers had been authorised to use AIs whilst employed by PIC. The question of the status of those AIs thus became an early focus of the audit, a matter to which further reference will be made in due course.

In June 2021, the decision was made to pause work on the audit. That decision was largely dictated by the restrictions which were imposed by various Public Health Orders in NSW that were designed to manage the spread of the Delta variant of Covid-19. In practical terms, what that meant, was that opportunities for OILECC staff to conduct face to face meetings to examine confidential records were significantly reduced, as was their capacity to access hard copy files containing sensitive material that was stored securely. When the restrictions eased, work recommenced on the audit in early 2022. Because it was necessary to furnish the report to Parliament before my term as Inspector expired, a number of issues that had attracted OILECC's attention could not be further explored.

Before turning to a detailed examination of the way in which the audit was conducted, it is necessary to make some preliminary observations. First, it was neither necessary nor possible to inspect every single document which pertained to LECC's use of AIs. Accordingly, only material that was considered to be essential to satisfying the overall objectives of the audit, in light of the earlier discussion about its scope, was obtained and examined. Secondly, although the processes which surrounded the making of critical decisions, such as those to grant, vary or cancel an AI were closely examined, the actual decisions themselves were not a focus of the audit. Thirdly, although the focus was upon the AI Act, that did not require consideration of each individual provision contained in it. Attention focused largely on those provisions which created obligations with which LECC and/or its officers were required to comply. Finally, some provisions were not considered because it became clear that LECC had not conducted any activities in relation to them. One such example is section 6(3) which addresses the question of the granting of an authority for an authorised civilian.

### **3.2 Obtaining and assembling the audit material**

In order to obtain the necessary material to conduct the audit, correspondence was exchanged (at least initially) between this Office and the Chief Commissioner. Thereafter, for reasons largely of administrative convenience, correspondence and indeed other forms of communication were made directly with the Director, Covert Services.

Set out below is a list of the records, copies of which OILECC received during the course of the audit:

- LECC's AI policy and procedure (including the amended versions approved in July 2020 and in September 2021)
- pro-forma documents for applications under section 5, authorities under section 6, and variations under section 9 of the AI Act (including the versions approved in September 2017 and in September 2021)
- signed copies of the actual applications and authorities granted by LECC for the 2017-18, 2018-19 and 2019-20 financial years together with any variations and cancellations that were made during those years
- statutory declarations evidencing the service of AI cancellations and variations for the 2017-2018, 2018-2019 and 2019-2020 financial years
- internal LECC memoranda concerning requirements to vary certain AIs
- role descriptions for persons who have an AI authorisation
- LECC's AI register (including the versions of it for the 2017-2018, 2018-2019 and 2019-2020 financial years)
- all monthly reports submitted by LECC officers who have an AI authorised about how they used their AI for financial and/or investigative purposes for the 2017-2018, 2018-2019 and 2019-2020 financial years
- the review performed by LECC under section 10 of the AI Act during February 2021
- annual Reports given to the Minister by LECC under section 35 of the AI Act for the 2017-18, 2018-19, 2019-20 and 2020-21 financial years
- audits performed by LECC under section 37 of the AI Act for the 2017-18, 2018-19, 2019-20 and 2020-21 financial years
- delegations of the chief officer's functions under section 39 of the AI Act.

However, the records to which reference has just been made were not all received at the one time but rather at different periods during the course of the audit. That was due in part to the fact that OILECC's assessment of the material which it received frequently prompted it to make requests for further records and more information. In that sense the audit was constantly evolving in an organic fashion and its scope also continued to shift. One method that OILECC employed in order to elicit information from LECC and to better understand its practices was to seek LECC's responses to a series of targeted questions. The list of topics which were addressed in that fashion included the following:

- the decision making process that underlies the making of an application, variation and cancellation of an AI. Examples include:
  - how the decision is made as to which officers may apply to the Chief Commissioner or his delegate for an AI
  - what information is to be provided to justify the need for an AI
  - how is the decision made as to the name and other details which appear in the AI
- the management and administration of the use of AIs, including determining the continuing need for each AI authorised
- the arrangements that were made in relation to any AIs that were in existence when LECC commenced operations

- LECC's procedure for the storage of documents when officers with AIs are on extended leave or not using their AIs for extended periods
- LECC's methods of collecting and retaining data surrounding the use of AIs
- LECC's processes to enable it to detect any fraud or other unlawful activity in the use of AIs
- LECC's records concerning statistical information about its use of AIs
- staff training about the use and responsibilities associated with the use of AIs
- as to LECC's AI Policy and Procedure:
  - why certain matters are not addressed in it
  - how certain procedures referred to in it operate in practice.

Once the material had been assembled, OILECC developed its own audit checklist to assess the fundamental issue of LECC's compliance with the formal application requirements of the Act. That entailed examining each AI that was granted together with any variations and cancellations for the 2017-18, 2018-19 and 2019-20 financial years.

The checklist included specific references to certain provisions in the legislation which require particular information to be recorded. It also included references to certain parts of LECC's AI policy and procedure and aspects of its pro-forma documents (such as checking whether the officer had signed a consent to enable LECC to conduct the necessary enquiries to determine whether that officer was still suitable to hold an AI).

The information obtained through the use of the checklist was then entered into a database which enabled OILECC to create a profile of each AI which had been authorised by LECC. That meant that any discrepancies on the face of the records which LECC was required to maintain would then be readily apparent. Furthermore, the process enabled OILECC to ascertain whether LECC's record keeping practices complied with aspects of its AI policy and procedure. The examination of those records was a time-consuming process. It entailed in some instances, cross checking documents to resolve various issues such as discrepancies as to the correct date. The examination was largely conducted by two of OILECC's officers.

As has already been indicated, OILECC's approach to the conduct of the audit has been constantly evolving. As a result there has been an ongoing process of engagement with LECC. That has enabled this Office to make suggestions about, and encourage improvements to, specific matters as they arose rather than waiting until the end of the process to do so. The view was taken that such an approach would be of greater utility than one in which recommendations were only made at the conclusion of the audit. It must be again emphasised that such an approach was only feasible because LECC was prepared to cooperate with it. A particular example of the evolving nature of the audit is addressed in the next section.

### **3.3 LECC's management of the use of AIs during its transitional period**

Reference was made earlier to the fact that when LECC commenced operations, it took over a number of the functions of PIC. One of those functions was its management of the use of AIs. As already mentioned, the question of the status of AIs held by employees of PIC who were subsequently employed by LECC became an early focus of OILECC's audit. That prompted it to enquire of LECC as to what arrangements had been made to facilitate the use of AIs during the period of transition of PIC to LECC.

In its response LECC informed this Office that in January 2017 the Acting Commissioner of PIC had either revoked or cancelled (according to the terminology of the particular legislation under which they were authorised) the approved AIs of all PIC employees who had ceased their employment with PIC at the end of December 2016. Staff who were transitioning from PIC to LECC retained their PIC authorised AIs in the interim period until LECC became operational on 1 July 2017.

When LECC commenced, those employees had new AIs approved by the inaugural Chief Commissioner pursuant to section 6 of the Act. Generally, those AIs were approved on 3 July 2017 and progressively thereafter as required. Things did not, however, go entirely according to plan. As it was anticipated that operational activity may be required during the weekend of 1 and 2 July 2017, 5 authorisations were granted for the continued use of AIs by several PIC officers who were transitioning to LECC and who were involved in ongoing operations. To enable that activity to occur, those authorisations had been signed on 30 June 2017. Subsequently the Solicitor to the Commission advised that, as the Chief Commissioner did not then have the authority to grant those authorisations, those approvals were invalid. So far as four of those authorisations were concerned, the applications were resubmitted and approved by the Chief Commissioner in September 2017.

There was, however, a further issue concerning this subject that was identified in the report of the audit of LECC's records which had been conducted for the 2017-18 financial year (the obligation to conduct such an audit arises from section 37 which was set out earlier). One of the 5 officers who had been granted an authorisation on 30 June 2017, did not resubmit an application for authorisation because they were on long service leave. That issue was subsequently addressed when that officer returned to work.

Overall, it is clear that LECC itself took the necessary steps to address the issues which had arisen. Whilst it is commendable that those matters have been addressed, it is nevertheless strongly arguable that those deficiencies should also have been included in the section 35 report that was submitted to Parliament for the 2017-18 financial year. That is because section 35(1)(d) requires that the report must include "a statement as to whether or not any fraud or *other unlawful activity* was identified by an audit under section 37 during the year" (emphasis added). This is a matter that needs to be borne in mind when future audits are being conducted.

There are a couple of additional matters in the 2017-18 report to which the auditor made reference that are worth mentioning. One matter also concerned the position of officers who had transitioned from PIC to LECC and whose AIs needed

to be updated. That issue arose because it was not until September 2017 that steps were taken to include the new AI codes for those officers in LECC's database in order to facilitate compliance with its monthly reporting policy. A second matter arose from a discussion between the auditor and the Director, Covert Services that AIs which had been authorised may also have been used in participating jurisdictions. It was in that context that the auditor made a recommendation that "variations are prepared for all AIs that may be used in other participating jurisdictions to ensure that the required States are recorded on the AI authority." It is apparent that the recommendation was then implemented following which it would appear that a number of variations were made.

### **3.4 Assessment of LECC's practices in relation to its key compliance and monitoring obligations concerning the acquisition and use of AIs**

At the outset of this chapter, there was reference to the fact that there is presently very limited external oversight of the use of AIs in NSW. In section 2.2 of the previous chapter, the compliance and monitoring obligations which are placed on the chief officer of a law enforcement agency were set out. Of those obligations, only section 35, which requires that an Annual Report be submitted to the Minister, makes provision for any measure of external oversight.

It is now convenient to address what the audit revealed about the manner in which LECC has approached each of the compliance and monitoring obligations in question.

#### ***3.4.1 Reviews conducted under section 10***

It will be recalled that section 10(1) requires that there must be a periodic review of each authority granted to use an AI in a participating jurisdiction. The first occasion on which such a review was required, by operation of section 10(2), was in February 2020. Because that review was not in fact conducted until February 2021 it follows that there was a contravention of the Act. The explanation provided by LECC for that delay was precisely the same as those which had occasioned the delays in the cancellation of AIs to which reference will be made a little later. Indeed, the obligations in question related to the same period of time.

OILECC also examined the remainder of the review that was conducted in February 2021. That examination revealed that each of the remaining section 10 obligations, namely those identified in subsections (3)-(5), had been complied with.

#### ***3.4.2 Annual Reports to the Minister under section 35***

For each year of its existence, LECC has submitted the report to the Minister which is required by section 35. For that purpose, it has created a standard form document. Accordingly, any changes which appear from one year to the next relate only to the statistical information which is provided.

The report which LECC submitted to the Minister for the 1 July 2019 – 30 June 2020 period (which is the most recent report that is publicly available), is set out below:

***"(a) the number of authorities granted, and the number of authorities cancelled, during the year***

*During the reporting year ten (10) new authorities were granted. No authorities were cancelled during the reporting period.*

***(b) a general description of the activities undertaken by authorised persons when using assumed identities under this Act during the year,***

*The following were activities undertaken by authorised persons during the reporting period when using assumed identities:*

- Investigative duties*
- Physical surveillance duties*
- Technical surveillance duties*
- Administrative duties*

***(c) the number of applications for authorities that were refused during the year,***

*During the reporting period nil applications were refused.*

***(d) a statement as to whether or not any fraud or other unlawful activity was identified by an audit under section 37 during the year,***

*The Commission has conducted an audit in accordance with the requirements of section 37 of the Act. The audit identified **no fraudulent or other unlawful activity** in connection with the use of authorities by the Law Enforcement Conduct Commission.*

***(e) any other information relating to authorities and assumed identities and the administration of this Act that the Minister considers appropriate.***

*The Commission is not aware of any other information that the Minister considers appropriate to be reported. The Commission has nil to report under this subsection."*

Section 35 requires that the report is to be submitted to the Minister "as soon as practicable" after the end of each financial year.

The details of when each of the reports was submitted is set out below:

- 2017-18: 9 January 2019
- 2018-19: 21 November 2019
- 2019-20: 16 February 2021
- 2020-21: 8 February 2022

Accordingly, it appears that there have been no instances of unreasonable delay in relation to this obligation, particularly when regard is had to the explanations which have been provided to this Office. One such explanation was that it was LECC's practice to submit the section 35 reports at the same time as the reports detailing the results of the section 37 audits were completed.

There is, however, an issue that arose in respect of the 2018-19 report that emerged from OILECC's audit which requires comment. LECC's report for that year indicated that 15 AIs had been granted, whereas the correct figure was 16. When LECC's attention was directed to that discrepancy, it immediately reviewed its records and acknowledged that an error had been made. It also promptly provided an acceptable explanation as to how the error had occurred. Furthermore, LECC indicated that it had advised the Minister of the error and provided an amended report which contained the correct figure. Nevertheless, it appears that LECC has been generally compliant with its section 35 obligations.

### ***3.4.3 Record keeping in accordance with section 36***

OILECC's audit revealed that LECC has established processes to enable it to comply with the requirements created by section 36. An important aspect of that compliance is the maintenance of a dedicated AI register. That register operates as a single point of reference for the status of each AI (for example, whether it is active and can be used in a participating jurisdiction) and links to some of the key records held in relation to each AI (including the authority form, variations and requests for evidence). That is done by either entering the information directly into the register or by hyperlinking the information to more detailed records which are stored electronically. It also keeps a file in respect of each AI which has been authorised. That file contains all documentation which LECC creates in order to meet its obligations under subsections (2)(a) to (c). In order to comply with the requirements of subsections (2)(d) and (e), LECC has created an automated reporting system which requires the authorised officer to record the information that is required by those subsections. LECC also keeps a record of its section 10 reviews as required by subsection (2)(f).

### ***3.4.4 Audits under section 37***

OILECC has also had an opportunity to consider the section 37 audits which LECC has conducted for each of the years that it has been operating. The results of those audits are reported to the Chief Commissioner pursuant to section 37(4) and are not publicly available. That being so, a considerable degree of circumspection must attach to anything that is said about them. It is important to emphasise that this Office's role in reviewing that material was solely for the purpose of making an assessment as to LECC's compliance with its statutory obligations. Accordingly, it did not undertake an assessment of the material which had been considered by the auditor. The audit is conducted by a person appointed by the Chief Commissioner, but section 37(3)(b) imposes certain restrictions as to who may perform that role. OILECC's audit revealed that neither of the officers who have thus far performed that role, each of whom is in the Legal Services Unit (LSU), fell within the restricted categories.

It will be helpful to provide some information about the structure of the section 37(4) report which is submitted to the Chief Commissioner. Set out below is a summary of the information that is contained in a typical report by reference to the headings that appear in it.

#### **Introduction and background**

This section commences with an overview of the scheme of the AI Act, including the fact that LECC being a "law enforcement agency" is subject to it. The relevant reporting period is then identified.

#### **Legislative provisions**

This section sets out the relevant provisions, namely sections 35 - 37.

#### **Conduct of the audit**

This section deals initially with the appointment of the auditor and the period during which the audit was conducted. Next a list of LECC's standard form documents and the procedures upon which it relies to ensure compliance with the Act is provided. Reference is also made to LECC's practices in relation to the retention of records, be they in hard copy or electronic form.

Finally, the audit methodology that was employed is identified including an indication as to what records were, and were not, examined.

### **Summary of approved identities activities**

This section sets out statistical information about the following activities for the relevant reporting period:

- numbers of approvals granted, varied and cancelled,
- purpose of approvals,
- purpose of variations,
- requests to issuing authorities to produce evidence of AIs, and
- requests to issuing authorities for the cancellation of evidence.

On occasions where it was deemed necessary to do so, the auditor provided an analysis of aspects of LECC's activities including any deficiencies which had been identified.

In the final part of this section there are tables which are designed to provide a comparison between the statistical information that is contained in the audit for the particular audit period in question and that contained in earlier audits.

### **Compliance with statutory requirements**

This section contains the greatest amount of material. That is undoubtedly because it addresses the requirement in section 36(2) about the keeping of records in respect of AIs granted, varied or cancelled. In compliance with that obligation, the audit provides an analysis of its examination of the records in respect of each of the matters listed below.

- s 36(2)(a): Date approval granted, varied or cancelled and by whom**
- s 36(2)(b): Name of officer and details of assumed identity**
- s 36(2)(c): Details of section 15 requests**
- s 36(2)(d): Duties undertaken**
- s 36(2)(e): General details of relevant financial transactions**
- s 36(2)(f): Details of any review of the authority under section 10**

On occasions where the auditor deemed it necessary to do so, they provided an analysis of aspects of LECC's activities including any deficiencies which had been identified.

### **Requests for cancellation of evidence of assumed identities**

This section addresses the requirements of sections 18 and 36(1). The observation is made that section 36(2) does not expressly require that LECC maintain records relating to requests to issuing agencies for the cancellation of evidence of AIs.



Nevertheless, LECC does so because it has taken the view that those records fall within the general description of “appropriate records” which are required to be maintained by section 36(1). A summary of the audit’s findings is then included. On occasions where the auditor deemed it necessary to do so, they provided an analysis of aspects of LECC’s activities including any deficiencies which had been identified.

### **Requests for evidence of assumed identities other than section 15 requests**

This section addresses the requirements of sections 27 and 36(1). The observation made in the previous section about the operation of sections 36(1) and (2), albeit in the context of the present subject, is repeated. A summary of the audit’s findings is then provided. On occasions where the auditor deemed it necessary to do so, they provided an analysis of aspects of LECC’s activities including any deficiencies which had been identified.

### **“Fraudulent or other unlawful activity”**

This section is concerned with the requirement in section 35(1)(d) to include in a report to the Minister “a statement as to whether or not any fraud or other unlawful activity was identified by an audit under section 37 during the year”.

The steps that were undertaken to meet this requirement are set out although it is indicated that it did not include examining the records of individual transactions entered into by officers operating under an AI.

### **Summary of audit findings**

This section provides a short summary of each of the matters identified under the headings 5-8 above. It also repeats the conclusions which had been earlier identified as to LECC’s level of compliance with each of the matters contained in those sections.

### **Conclusions and recommendations**

This section contains the auditor’s conclusions and recommendations. It also includes any deficiencies that were identified together with proposals as to how those deficiencies may be addressed.

Given the importance of the issues that are addressed in the ‘conclusions and recommendations’ section of the report, OILECC paid particular attention to examining its contents. OILECC’s examination of each of the four years of LECC’s operations revealed that it contained recommendations, which in this Office’s view were carefully considered and worthy of LECC’s close attention.

Although a range of matters received attention over that period of time, the following overarching themes emerged:

- the need for quality assurance processes to be implemented for:
  - the administration of the system of making applications, variations and cancellations of the use of AIs
  - monitoring compliance with the section 36 record keeping requirements

- ensuring the effective operation of LECC's automated monthly reporting system and associated data collection issues
- ensuring appropriate training for all staff involved in the administration and use of AIs and communication to them of their ongoing compliance obligations.

What that examination of the audits over the four years reveals is that there are now few, if any, recommendations that remain outstanding. The passage of time has enabled worthwhile suggestions to be implemented even if, at least initially, some recommendations had to be repeated. To that end, the auditor on various occasions made reference to whether an earlier recommendation had been implemented.

One further observation concerns recommendations which have been made to amend aspects of LECC's AI policy and procedure. When that has occurred the practice is for those proposals to be considered by the Executive Committee of LECC which invariably accepts them and authorises the steps to be taken to facilitate their implementation.

For the first 3 years of LECC's operations the auditor was approved to conduct an audit which covered all the matters that are required by section 37. An Annual Report about its findings then appeared in a single document. That created a challenge because the records that fall within section 37(1)(a) have to be audited at least once every six months, whilst those which fall within section 37(1)(b) only have to be audited at least once every 12 months. In any event, for the first time during the 2020-21 financial year LECC produced a "standalone" report which related solely to the section 37(1)(a)(ii) requirement. That was in this Office's view an appropriate step in enabling LECC to comply with the timing requirement that is contained in that provision. OILECC's audit revealed (by reference to LECC's AI register) that in respect of each AI that was required to be audited in accordance with that provision, LECC had done so in each instance within the required timeframe. In recent correspondence LECC has indicated that it is now intending to also produce a similar "standalone" audit report which will henceforth enable it to fulfil the requirements of section 37(1)(a)(i).

Before departing from the present discussion, reference should be made to section 37(3)(a) which provides that the person appointed to conduct the audit "may but need not be an officer of the law enforcement agency". In that context and having received the 2017-18 audit report, the Inspector wrote to the then Chief Commissioner on 15 February 2019 and made the following enquiry, "I note that pursuant to section 37(3)(a) of the Act the person appointed to conduct the audit may but need not be an officer of the law enforcement agency. May I enquire as to whether consideration will be given to having the audit undertaken by someone external to the Commission in the future, such as the independent members of the Commission's Audit and Risk Committee. That is not intended to be any reflection upon the quality of the work done by the person who prepared this report but is purely suggested as a means of providing a greater level of transparency."

As no response was received in relation to that request, it was repeated when the current Chief Commissioner assumed office. His response dated 4 June 2020 was that the issue had been considered by the Commission, but the decision had been

reached that the expense of hiring outside auditors for this additional task was neither justified nor necessary. The matter was not further pursued as that was a decision which the Chief Commissioner was clearly entitled to reach.

Nevertheless, it is this Office's overall view that the contents of the section 37 audit reports reflect the fact that they have been compiled in a thorough and professional manner.

### **3.5 Assessment of LECC's practices concerning its governance of the acquisition and use of AIs**

A convenient starting point for the discussion of this aspect of the report, which reflects positively on LECC's approach to its obligations, is the fact that it has taken the initiative to do things even where there is no statutory requirement for it to do so. Examples include:

- LECC retains, in respect of evidence requested under section 15 for a credit card, copies of correspondence from the issuing agency providing replacement credit cards for when a card is due to expire, signed acknowledgement of receipt and use, and emails to the bank requesting card activation
- LECC retains records about requests for cancellation of evidence under section 18
- LECC retains records about requests for evidence under section 27
- LECC requires its staff who have AI authorities to submit monthly reports about their investigative and financial use of AIs (including nil reports) in order to keep the kind of records required by sections 36(2)(d) and (e).

While the audit was being conducted, LECC made some discernible improvements to various of its practices. One such area of improvement related to the structure and contents of its AI register. That is a prime example of the result of cooperation between the two agencies, to which reference was made earlier. In this instance, OILECC made certain enquiries as a result of which LECC took the initiative to enhance the AI register in such a manner as to make it of much greater utility. The result is the register now contains, in relation to each individual AI, an appropriate reference to the relevant section of the AI Act as well as an indication as to whether the AI in question may be used in a participating jurisdiction. Moreover, the register is a consolidated living document as distinct from the previous structure, which involved having a separate register that only applied for the relevant financial year.

Another area in which there has been a significant enhancement in the governance of LECC's use of AIs is in the critical area of its record keeping responsibilities. This was an issue that attracted the attention of the auditor, particularly when preparing the early annual section 37 reports. It has also been an issue of considerable interest to OILECC. In any event, LECC has determined to assign certain record keeping responsibilities to the person who occupies the

recently created role of Senior Business Services Officer (SBSO). That role is described as having the following responsibilities:

*Monitors all officers' use of AIs and compliance with recording and reporting obligations and in support of the preparation of the annual AI audit report.*

*Receives new AIs and other instruments and records same on AI Register.*

*Responsible for serving new AIs and other instruments, including cancellation of AIs, on authorised officers.*

LECC has also created the position of Legal Review Officer (LRO), a role that can be performed by any officer within the LECC's Legal Services Unit (LSU). That person's role is described as being:

*[r]esponsible for reviewing all documentation relating to the administration of an AI, including applications, variations, requests for evidence and cancellations, to ensure compliance with the NSW AI Act and/or any other relevant legislation.*

(Those tasks are performed prior to the documentation being provided to the Chief Commissioner or his delegate for consideration.)

OILECC commends LECC for having created those two positions. It did, however, raise an issue about the potential for a conflict of interest for the LRO role. That possibility related to the fact that the person who is appointed to perform the audit under section 37 may, in their capacity as the LRO, have earlier reviewed the initial documentation (namely applications, requests for evidence, variations and cancellations) in respect of an AI that is subsequently the subject of the audit. If that were to occur, it would mean that the auditor would in effect be required to review their own work. In response, LECC indicated that it will take steps to ensure that such an officer is not placed in that invidious position.

Having those positions (together with their assigned roles) has enabled LECC to have greater organisational capacity to administer the governance of its use of AIs on an ongoing basis.

A related matter, which gave rise to concerns on the part of OILECC, arose from the discovery that LECC had failed to act in a timely fashion to cancel the AIs of persons who had been authorised to use them following their departure from the organisation. Amongst the delays identified were four instances where the cancellations had not occurred until around 12 months after the departure of the officer in question. A delayed cancellation is a matter of considerable concern because section 8 provides that an AI which is authorised remains in force until it is cancelled by the chief officer under section 9.

During the audit OILECC sought an explanation about what it had discovered. LECC responded by indicating that insofar as the delays could be explained, they were largely attributable to staffing issues with people in the relevant roles only occupying them on a temporary or acting basis with the result that their roles may not have always been clearly understood. The matter was not further pursued by OILECC as the people in question (who had only held an acting position) had by then ceased their employment at LECC. More importantly, as previously advised, LECC has now created the SBSO position with specific responsibilities for

coordinating LECC's record keeping of its AI activities. LECC has further advised that since commencing in the role, the SBSO has:

- *conducted a full review of the AI Register, including cross-checking dates of relevant documentation with original documents, and checking and updating hyperlinks to all associated documents on SharePoint;*
- *created and updated online AI identification folders for each authorised officer;*
- *reviewed the filing system of all hardcopy documents for each employee that has an AI;*
- *submitted covering memos and AI documents to the Chief Commissioner for new AI authorities, cancellations and variations as required;*
- *reviewed all AI monthly reports to ensure compliance with reporting obligations by all officers, notified officers of any outstanding monthly reports, and confirmed that all monthly reports are currently up to date.*

It is interesting to observe that LECC reported in its section 35 report that during the 2020-21 reporting period that there were 15 cancellations. OILECC's inquiries found that several of those resulted from what the section 10 audit conducted in February 2021 had revealed. A significant proportion of the cancellations, however, followed the termination of the employment of various officers. It may be that the explanation for the number of cancellations that fell into that latter category is attributable to a greater awareness of the need to adhere to appropriate standards concerning the cancellation of AIs.

A little earlier, reference was made to monthly reports, the creation of which is a practice that LECC inherited from PIC. What that entails is a requirement for all LECC officers who have an AI to submit a report within 10 days of the end of each month as to their use of their AI for investigative and/or financial purposes during that period. The obligation to report exists even if they do not use their AI during that period. The purpose of providing such reports is to enable LECC to maintain the records which section 36(2)(d) and (e) of the Act require. The creation of the position of SBSO will no doubt have also alleviated concerns which the auditor had initially expressed about non-compliance issues insofar as they related to monthly reporting obligations.

As was indicated earlier, OILECC examined the documentation pertaining to each application, variation and cancellation of an AI for the period of the audit. OILECC ascertained that the pro-forma documents which LECC had designed to record the information that is mandated by sections 5, 6, 7 and 9 of the Act were appropriate. Having reviewed that documentation, OILECC ascertained that LECC had complied with a number of those requirements including:

- ensuring that all applications were made in writing in the form approved by the chief officer
- a separate authority was granted for each AI
- all authorities were in writing in the form approved by the chief officer and were also signed by the person granting it
- authorised persons whose authority had been varied or cancelled were given written notice of that fact and provided with reasons for that decision.

Although the audit revealed some issues of non-compliance with aspects of the requirements contained in those sections, they were all of a relatively minor nature. Examples included:

- instances of authorities which had been granted or variations or cancellations that had been made that did not include the date upon which they had been authorised, varied or cancelled
- in respect of some AIs that had been granted, the reasons which had been provided were not immediately apparent on the face of the application.

OILECC sought either clarification and/or an explanation for each of those issues. Additional supporting documentation was then provided to OILECC which, for the most part, sufficiently explained the questions which had been raised.

On other occasions, the audit discovered that the information or details in question had not been appropriately captured or entered into LECC's system. In relation to this and other issues, it would appear that LECC did not then have the quality assurance processes in place for the proper administration of its AI records that now exist. Overall, OILECC is satisfied with the responses that it received in relation to the issues which it raised. That is particularly so given that LECC also made the necessary changes to its AI Policy and Procedure. It did so by embedding its processes as to the administration of the use of AIs with the appointment of the SBSO and LRO.

Speaking of the AI Policy and Procedure, LECC has updated that document on several occasions since it was initially approved in September 2017. Whilst it is unnecessary to refer to those changes in any detail, it is pertinent to observe that LECC has acknowledged that some of the observations, comments and suggestions which OILECC has made during the course of the audit contributed to the changes. Those changes are reflected in the most recent version of that document, which was implemented in September 2021. That is exemplified in the comments of the Director, Covert Services who in a letter dated 24 May 2021 observed that:

*[t]he OILECC's audit and review process has informed those of us involved with the administration and use of AIs as to elements of the policy and procedure that can be improved and implemented. This will culminate in the AI Policy and Procedure being thoroughly reviewed and updated by the relevant parties, and then reviewed and approved by the LECC Executive, to ensure it accurately reflects those learnings and recommendations...*

One particular matter in which OILECC has expressed an interest relates to the level of training that an officer, who is granted an AI, receives. LECC indicated that such an officer is informed at the time that their AI is granted, of the contents of the AI policy and procedure following which they are made aware of what is required of them concerning "expectations of intended use, reporting responsibilities and security and storage of supporting documentation." The adequacy or otherwise of the induction training that is provided to an officer when they are granted an AI is but one consideration. Ideally there should also be ongoing training programs which would provide updates as to any changes to the AI policy and procedure or internal practices, that would also remind staff of their

statutory obligations under the Act and that would also record staff formally acknowledging their awareness of those obligations.

In a letter dated 10 March 2022, LECC has indicated a willingness to update its pro-forma AI documentation to specifically require its officers to acknowledge the application of sections 32 and 33 of the Act to their conduct. Those provisions, which were set out earlier, create specific statutory offences. Such a step would ensure that officers are fully informed as to the significance of their responsibilities when they acquire and use an AI.

### **3.6 The way forward**

At the outset of this chapter, it was emphasised that OILECC had not received any complaints about LECC's use of AIs and nor had it become aware of any failings in relation to its statutory obligations. Although a number of deficiencies and shortcomings have been revealed during the course of the audit (some of which had also been identified in LECC's own section 37 audits), the audit has not uncovered any major areas of concern about the way in which LECC has been performing its statutory functions. Moreover it is gratifying to be able to report that where deficiencies and shortcomings have been identified, LECC has invariably responded by making appropriate changes to improve its policies, procedures and practices. Equally importantly, it has also demonstrated a preparedness to give active consideration to addressing any other issues about which OILECC has remaining concerns.

The presentation of this report to Parliament should not however, be regarded as marking the end of OILECC's involvement in scrutinising LECC's management of the use of AIs. On the contrary, it represents only the first step in that process.

In the next section, there will be a discussion about some systemic questions concerning the use and oversight of covert investigative powers in NSW which extend beyond the current issue pertaining to LECC's use of AIs. However, so far as the ongoing oversight of LECC's use of AIs is concerned, there are several matters that could be usefully explored in any follow up audit. The first is that it would enable a thorough examination to be conducted of LECC's records for the period since the previous audit which extended to include the first 3 years of its operations. Such an audit would provide an ideal opportunity to examine other areas of LECC's practices which it was not possible to fully consider during the course of the present audit. Some examples are listed below:

- the process upon which LECC embarks in requesting evidence of AIs under sections 15 and 27 (including having access to the actual correspondence that passes between LECC and the agency in question)
- what practices and procedures LECC has in place to deal with the important protections from liability and provision of indemnities for authorised persons that are contained in sections 22 to 24 of the Act
- what practices and procedures LECC has in place to review the ongoing suitability of an officer to hold an AI.

Another issue which OILECC identified during the course of the audit was that a number of officers had been authorised to use more than one AI. Whilst it is apparent that the AI Act does not expressly prohibit such a practice, OILECC nonetheless has some concerns about it. Indeed, it was an issue that received considerable attention in a report of the Parliamentary Inspector of Western Australia to which further reference will be made in the next chapter. Although OILECC is not aware of the misuse of AIs by LECC officers, the authorisation of the use of more than one AI for an individual officer is nevertheless a contentious issue. There has been some reference to the issue in recent correspondence with LECC, but the matter could usefully be further pursued in any future audit in order to determine both the lawfulness of such use and indeed its appropriateness.

Any future audit could also consider employing different approaches with a view to obtaining a better understanding about the manner in which LECC actually uses AIs. For example, case studies could be utilised to examine the reasons why AIs were required in particular instances. They could also explore how they were actually used together with an assessment of their overall effectiveness. The tracking of the entire history of the use of particular AIs from the point of authorisation through to cancellation may also provide additional useful information. Clearly what could be revealed in those case studies would need to be carefully assessed by both LECC and OILECC prior to relying on such an approach.

A future audit would have the added advantage of enabling a review to be undertaken of LECC's progress in implementing and enhancing changes to its overall practices concerning its use of AIs. Nevertheless, as my term as Inspector ends on 30 June 2022 the decision as to if, and/or when, such an audit may be conducted will of course be a matter for my successor.

There is one final matter that is worthy of mention. The Chief Commissioner was sent a draft of this report for the purpose of enabling him to provide comments about any aspect of it. In his response dated 16 May 2022, the Chief Commissioner observed that:

*Your examination was both thorough and useful and the Commission has implemented changes to address any issues. I believe the exercise has been very worthwhile and I agree with your suggestion that it be repeated at some stage in the future.*

Those observations, which are reproduced with the Chief Commissioner's concurrence, further reinforce the fact that much of what this audit has managed to achieve, in respect of improvements to LECC's practices, has resulted from the cooperative manner in which it has been conducted.



## 4. REFLECTIONS UPON ASPECTS OF THE SYSTEM OF THE USE AND OVERSIGHT OF COVERT INVESTIGATIVE POWERS IN NSW

The audit of LECC’s acquisition and use of AIs, which was the focus of the last chapter, was conducted pursuant to OILECC’s functions in overseeing LECC’s activities (which were described earlier as the ‘audit’ and ‘assessment’ functions). It was concerned with only one specific, albeit a most important, aspect of LECC’s activities. Nevertheless, what it revealed potentially has implications for all the other agencies (that is other than LECC) which have the authority to use AIs. Reference was made earlier to another of the Inspector’s functions, namely the inspection and reporting functions under section 122(1) in relation to law enforcement agencies which include, but are not limited to, LECC. Reference was also made to the fact that the routine performance of those functions over an extended period of time, has provided OILECC with insights into some broader systemic issues associated with the overall use and oversight of the exercise of covert powers.

This chapter represents an endeavour to draw together all the threads that have been identified before making some proposals as to how those issues may be addressed. Before doing so, it would be helpful to describe some basic aspects of the current system concerning the use of covert powers.

### 4.1 The agencies that may use covert investigative powers in NSW

Table 1 outlines the covert powers that may be utilised in NSW together with a list of the law enforcement agencies that are entitled to use them.

**Table 1**

Power	Legislation	Agencies that may use covert powers
<b>Assumed Identities</b>	<i>Law Enforcement and National Security (Assumed Identities) Act 2010</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> <li>• NSWCC</li> <li>• ICAC</li> <li>• LECC</li> <li>• Corrective Services NSW</li> <li>• Australian Crime Commission (ACC)</li> <li>• Australian Federal Police (AFP)</li> <li>• Australian Security Intelligence Organisation (ASIO)</li> <li>• Australian Secret Intelligence Service (ASIS)</li> <li>• Customs ((within the meaning of the Customs Administration Act 1985 of the Commonwealth))</li> </ul>

		<ul style="list-style-type: none"> <li>• Australian Taxation Office (ATO)</li> </ul>
<b>Controlled Operations</b>	<i>Law Enforcement (Controlled Operations) Act 1997</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> <li>• NSWCC</li> <li>• ICAC</li> <li>• LECC,</li> <li>• AFP</li> <li>• ACC</li> <li>• Commonwealth Department of Immigration and Border Protection (CDIBP)</li> </ul>
<b>Covert Search Warrants</b>	<i>Law Enforcement (Powers and Responsibilities) Act 2002, Part 5</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> <li>• NSWCC</li> <li>• LECC</li> </ul>
<b>Covert Search Warrants (Terrorism Powers)</b>	<i>Terrorism (Police Powers) Act 2002, Part 3</i>	<ul style="list-style-type: none"> <li>▪ NSWPF</li> </ul>
<b>Criminal Organisation Search Warrants*</b>	<i>Law Enforcement (Powers and Responsibilities) Act 2002, Part 5</i>	<ul style="list-style-type: none"> <li>▪ NSWPF</li> </ul>
<b>Surveillance Devices</b>	<i>Surveillance Devices Act 2007</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> <li>• NSWCC</li> <li>• ICAC</li> <li>• LECC</li> </ul>
<b>Telecommunications Interceptions</b>	<i>Telecommunications (Interception and Access) (New South Wales) Act 1987; Telecommunications (Interception and Access) Act 1979, Chapter 2</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> <li>• NSWCC</li> <li>• ICAC</li> <li>• LECC</li> <li>• Inspector of the Independent Commission Against Corruption.</li> </ul>
<b>Witness Protection*</b>	<i>Witness Protection Act 1995</i>	<ul style="list-style-type: none"> <li>• NSWPF</li> </ul>

(Note: \* - Although neither criminal organisation search warrants nor the witness protection scheme are technically covert investigative powers, they are included for completeness particularly bearing in mind the issue of external oversight which is discussed later.)

A glance at that table reveals that of the various covert powers that are available, AIs and controlled operations may be used by the largest number of law enforcement agencies. That has particular significance for the discussion which appears in the next section.

## 4.2 The need for greater external scrutiny of AIs

### 4.2.1 The current situation in NSW

In chapter 3 it was observed that there is only limited information available about the use of AIs by those law enforcement agencies which are entitled to authorise their use. This Office's enquiries reveal that the last year in which data about this subject was publicly available in respect of each of those agencies was the 2018-19 financial year when the reports required by section 35 of the Act were tabled in Parliament. What those reports reveal is that the NSW Police Force granted many more authorisations (187) and cancelled many more authorities (99) during that financial year than any other agency. LECC granted the next most (15) (it also cancelled 1 authority). Such a disparity is hardly surprising given the size and resources available to the NSWPF as compared with other agencies.

The bare figures which are furnished in those reports are neither particularly informative nor revealing. Importantly, they do not provide a reliable indicator as to the actual use of AIs because, for example, no information is furnished about how many AIs are actually in existence within any particular agency at any one time. Nor is there any indication as to whether, within a particular reporting period, there are AIs in existence that had been granted during an earlier reporting period but which had not been cancelled. Furthermore, there is no information about the extent and frequency of the use of any particular AI within the reporting period in question. A rather more useful metric would be for agencies to be required to include in the report, details about the number of AIs that were active and/or actually used during the reporting period. Moreover, the requirement that there be "a general description of the activities undertaken by authorised persons when using AIs under this Act during a year" is met with only the most generic and anodyne of responses by the relevant agencies.

Notwithstanding the deficiencies that there may be concerning as to what the relevant agencies are required to report under section 35, the information which is available suggests that the number of AIs granted on an annual basis is sufficiently high as to warrant much greater scrutiny of their use than currently exists.

Moreover, all agencies depend for their effectiveness upon the internal systems which they have implemented. There is always scope for those systems to fail or for human error to occur. In that context, it is worth noting the disclosure made by the Chief Commissioner of ICAC in a letter dated 8 December 2020 to the Minister. That letter was tabled in Parliament together with several of ICAC's section 35 reports. In the letter, the Chief Commissioner revealed that ICAC had inadvertently failed to provide the required section 35 reports for a period of years dating back to the 2010-11 reporting period. The Chief Commissioner, who is to be commended for taking appropriate remedial action, explained that the relevant information had nonetheless been provided in the agency's own Annual Reports in accordance with an equivalent provision of the 1998 AI Act which had been, as has been observed, repealed in 2010.

Before leaving the question of the section 35 reporting requirement, it will be recalled that in chapter 2 there was also reference to the review which is required by section 10 and the audit which is required by section 37 for each of the agencies which may authorise the use of AIs. As that latter material is not publicly available, it is not possible to know whether those obligations are being met by agencies other than LECC and, if they are, what form they take. The data so far as LECC's activities are concerned, which is set out in chapter 3, was made available to this Office upon request, although as has already been indicated, OILECC was entitled to receive that material pursuant to its audit powers. Even a cursory glance at that data reveals that considerably more detail about the administration and use of AIs by LECC is provided as a result of the section 37 audits than emerges from the scant information that is provided in the section 35 report.

It is convenient to now review some other features of the current system concerning the use of the various covert powers available to law enforcement agencies in NSW. As table 2 reveals, it is only in respect of the use of controlled operations and AIs that the decision to grant the authority for such use is made internally (that is within the agency itself) rather than externally (that is by a judicial officer or an administrative tribunal).

**Table 2**

	<b>Authorisation process for use of power - internal or external</b>
<b>Assumed Identities</b>	Internal
<b>Controlled Operations</b>	Internal
<b>Covert Search Warrants</b>	External
<b>Covert Search Warrants (Terrorism Powers)</b>	External
<b>Criminal Organisation Search Warrants</b>	External
<b>Surveillance Devices</b>	External
<b>Telecommunications Interceptions</b>	External

Table 3 identifies the particular dedicated agency that is authorised to provide external scrutiny which takes the form of the assessment of compliance with the relevant legislation in respect of the activities of the various law enforcement agencies which exercise covert powers. With the exception of the covert search warrants (terrorism powers) and the Witness Protection Act, which are both the subject of scrutiny by LECC, Parliament has determined that the external scrutiny is to be performed by OILECC. What Table 3 also reveals, and it is of critical significance so far as this report is concerned, is that the only covert investigative activity for which there is legislative provision, but in respect of which there is no dedicated agency which provides external scrutiny, is the use of AIs.

**Table 3**

	Dedicated agencies that provide external scrutiny
<b>Assumed Identities</b>	Nil
<b>Controlled Operations</b>	OILECC
<b>Covert Search Warrants</b>	OILECC
<b>Covert Search Warrants (Terrorism Powers)</b>	LECC
<b>Criminal Organisation Search Warrants</b>	OILECC
<b>Surveillance Devices</b>	OILECC
<b>Telecommunications Interceptions</b>	OILECC
<b>Witness Protection</b>	Nil*

(Note: \* - LECC may review certain decisions made by the NSWPF under the Witness Protection Act in relation to the protection of an individual. It does not however have a specific power to monitor the NSWPF's overall compliance with the Act.)

The absence of any such dedicated agency means that there is no mechanism available to independently calculate the risks that may be associated with the use of AIs or indeed to assess the magnitude of those risks.

As was noted earlier, the inspection powers vested in this Office were previously exercised by the Office of the NSW Ombudsman. It was in that capacity that the Ombudsman made a submission to the 2013 statutory review (to which reference was made earlier). During the course of that submission, it was pointed out that

although the Ombudsman had the responsibility for inspecting the records of each agency under the LECO Act together with audit and annual reporting functions, it had no similar functions under the AI Act. Accordingly, it was contended that there should be an amendment to the AI Act to provide for external independent oversight of the use of AIs by law enforcement agencies.

The statutory review did not accede to the Ombudsman's submission and recommended that there should be no change to the prevailing system. In doing so, it accepted the position recommended by the Police Ministers Council Joint Working Group on National Investigation Powers (JWG) and determined that "audits of these records should be conducted internally by the law enforcement agency, because the risk of disclosure of undercover operatives' real identities to persons outside the law enforcement agency is unacceptable and may put undercover operatives' lives at risk." (At 11-12.)

#### **4.2.2 Instances of misuse of AIs and related powers**

Something that has entered the public domain in recent years are instances of the serious misuse of AIs, albeit in jurisdictions outside of NSW.

One particularly troubling example emerged from an investigation conducted by the then Western Australian Parliamentary Inspector, The Honourable Michael Murray AM QC. The Inspector delivered a report about the investigation on 4 December 2015 entitled "Report on Activities in the Corruption and Crime Commission Relating to Assumed Identities, Traffic Infringement Notices and Special Constable Appointments". It concerned the activities of certain members of the Operations Support Unit (OSU) of the Corruption and Crime Commission of Western Australia. The Inspector reported that:

*[t]he means by which the abuses were carried out were the misrepresentation to licencing agencies in the Australian Capital Territory, and in Tasmania, of the powers of the Commission and of the legal effect of a Commonwealth statute, in order to induce the issuing of driver's licences from those agencies in the assumed identity of Commission officers; and the presentation of those driver's licences to the licencing authority in this State under the pretext of changing domicile to this State to induce the issuing of driver's licences in this State under the assumed identity.*

*No law authorised the Commission to use either means to achieve the outcome of a driver's licence issued in this State under a Commission officer's assumed identity.*

*...Upon investigation it was discovered that some OSU officers had accumulated, and continued to accumulate, demerit points for traffic offences in excess of the 12 point total necessary to trigger the suspension of a driver's licence, but were using simultaneously held multiple driver's licences possessed under multiple assumed identities to avoid the point accumulation being attributed to any one driver's licence.*

*This systemic abuse of the assumed identity power resulted in a situation where OSU officers would have been driving Commission vehicles on the State's roads without the legal right to do so had the accumulated demerit points been attributed to the officer's driver's licence held in the officer's natural name. Further, the OSU and the Commission failed to have any records or means by which the OSU's middle, and the Commission's executive, management could instantly*

*assess any OSU officer's total of accumulated demerit points, and therefore the officer's legal right to drive on the State's roads.*

*During my investigation I discovered that non-OSU Commission officers also possessed multiple assumed identities in the form of driver's licences. (At 2.)*

Later the Inspector observed that:

*It was the possession by OSU officers of two or more driver's licences under assumed identities which facilitated the distribution of accumulated demerit points between them, and it was this distribution which camouflaged the totality of an officer's accumulated points – and therefore that officer's legal right to be driving a motor vehicle in this State. In four instances the Police investigation established the probability that a Commission officer continued to drive Commission motor vehicles when the officer's accumulated total of points exceeded the statutory number of 12 in any three year period. (At 21.)*

A further example arose in the United Kingdom in the context of the Undercover Policing Inquiry (UCPI) which was established in 2015. One purpose of the Inquiry, which is ongoing, is “to inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968.” The Inquiry, which has yet to provide any findings, was established following a series of allegations including claims that undercover police had used the names of deceased children to conceal their true identity and had engaged in intimate relationships with people who were the subject of undercover investigations through reliance on a false identity.

The reference to undercover police operations obviously includes the use of human sources, who are also known as police informants or informers. A human source is a person who has been recruited to secretly provide information about a crime or criminal activity to police and/or other law enforcement agencies. The use of human sources is a matter which has considerable contemporary significance in the Australian context following the revelations of the Royal Commission into the Management of Police Informants. The Royal Commission made recommendations relating to the use and oversight of human sources in Victoria, and as such it provides an excellent review of the dangers associated with this area of law enforcement activities. The following observations from the Final Report are particularly pertinent and apply equally to issues surrounding the acquisition and use of AIs:

*Concerns may also arise about systemic issues or problems in the use of human sources by police. Because their use is ordinarily hidden from the public, it is difficult to determine whether police recruitment and management of them is appropriately mitigating the risks involved and is complying with relevant laws, policies and guidelines. Powers that are exercised in secret tend to be more susceptible to misuse, and there is a strong public interest in independently scrutinising their use. (At 69.)*

Those comments should be steadily borne in mind whenever there is a discussion about the contribution which the use of covert powers, including particularly AIs, provide to law enforcement agencies in the performance of their functions. As important as their use as an investigative tool clearly is, so too is the need to be constantly aware of the risks of their misuse.

One further example (albeit of much lesser significance), emerged during the course of this Office's routine inspections in respect of the LECO Act. An issue was identified concerning the use of assumed names by civilian participants in controlled operations in contravention of the legislation. That concerned the activities of an agency other than LECC and a more comprehensive summary of the steps that were taken to address that issue appear in this Office's Annual Report under the LECO Act for the period ending 30 June 2020.

The examples set out above amply demonstrate the existence of the risks and the damage that they can create. Moreover, of particular relevance in the present context, is the fact that the revelations which those examples provide only came to light as the result of scrutiny of the particular agency's activities by a duly appointed external agency.

In addition to those considerations, the very existence of some form of external scrutiny can operate to significantly enhance an agency's performance of its functions, particularly if the relationship between it and the oversight body is conducted in an appropriately professional manner. Given that the agency in question is almost certainly going to be in possession of highly confidential information (in respect of which there will be provisions designed to protect its confidentiality), it may well very much appreciate having the benefit of the perspective of an oversight body (that is an outside agency) which can, in appropriate circumstances, act as a "sounding board". In any event, to be truly effective the oversight agency should be empowered to conduct reviews on a regular basis with complete independence. The significance of that aspect of its role is particularly important, given the high likelihood that the agency which is being oversighted will undergo regular changes in its personnel, both at the leadership and at the operational level.

#### **4.2.3 Legislative developments in other Australian jurisdictions**

As several jurisdictions have already determined to introduce legislation which provides for some level of external scrutiny, it is therefore convenient to provide a description of those schemes.

##### **Australian Capital Territory (ACT):**

The use and acquisition of AIs in the ACT is regulated by the *Crimes (Assumed Identities) Act 2009* (ACT).

Section 8 of that Act permits a 'law enforcement officer' of a 'law enforcement agency' to make an application to the 'chief officer' of the agency for an authority. The relevant law enforcement agencies are the Australian Federal Police, the Australian Crime Commission and the ACT Integrity Commission.

There is an external inspection power under the Act. The ACT Ombudsman has the power to inspect the AI records of law enforcement agencies under section 41, which is in the following terms:

*(1) The ombudsman may inspect the records of a law enforcement agency to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.*

*(2) For the purpose of an inspection under this section, the ombudsman—*



*(a) after notifying the chief officer of the law enforcement agency, may enter at any reasonable time premises occupied by the agency; and*

*(b) is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection; and*

*(c) may require a member of staff of the agency to give the ombudsman any information that the ombudsman considers necessary, being information that is in the member's possession, or to which the member has access, and that is relevant to the inspection.*

*(3) The chief officer must ensure that members of staff of the agency give the ombudsman any assistance the ombudsman reasonably requires to enable the ombudsman to exercise functions under this section.*

*(4) The ombudsman must give a written report prepared under the Annual Reports (Government Agencies) Act 2004, on the results of each inspection under this section in the preceding financial year.*

*(5) The report must include a report on the comprehensiveness and adequacy of the records of the agency and the cooperation given by the agency in facilitating the inspection by the ombudsman of those records.*

*(6) The report must not include any information that, if made public, could reasonably be expected to –*

*(a) endanger a person's safety; or*

*(b) prejudice an investigation or prosecution; or*

*(c) compromise any law enforcement agency's operational activities or methodologies.*

In its 2020-21 Annual Report, the ACT Ombudsman provided the following information about the exercise of the relevant inspection power:

***Assumed identities***

*The Crimes (Assumed Identities) Act 2009 (the Assumed Identities Act) facilitates investigations and intelligence-gathering regarding criminal activity by providing for the lawful acquisition and use of assumed identities in the ACT. Our Office may inspect ACT Policing's records to assess the extent of compliance with the Assumed Identities Act.*

*To date, we have not conducted any inspections under the Assumed Identities Act because ACT Policing advised it has not applied any of the provisions. (At 39.)*

**Northern Territory (NT):**

The use and acquisition of AIs in the Northern Territory is regulated by Part 3 of the *Police (Special Investigative and Other Powers) Act 2015* (NT).

Section 40 of that Act permits a 'law enforcement officer' of a 'law enforcement agency' to make an application to the 'chief officer' of the agency for an authority. 'Law enforcement agency' is defined by section 3 as meaning 'the Police Force' (of the NT), the Australian Crime Commission and 'the ICAC' (of the NT).

Section 71A of the Act provides for external oversight of the ICAC's use of AIs by the ICAC Inspector. That section is in the following terms:

- (1) The Inspector must arrange for the records kept under section 70 by the ICAC for each authority in relation to the ICAC to be audited:*
  - (a) at least once every 6 months while the authority is in force;*
  - and*
  - (b) at least once in the 6 months after the cancellation or expiry of the authority.*
- (2) The audit is to be conducted by a person appointed by the Inspector.*
- (3) The person appointed to conduct the audit:*
  - (a) may be a member of ICAC staff; and*
  - (b) must not be a person:*
    - (i) who granted, varied or cancelled any of the authorities to which the records under section 70 relate; or*
    - (ii) who is or was an authorised person under any of the authorities to which those records relate.*
- (4) The results of an audit are to be reported to the Inspector.*
- (5) In this section:*  
*member of ICAC staff, see section 4 of the ICAC Act.*

## **Queensland:**

The use and acquisition of AIs in Queensland is regulated by Chapter 12 of the *Police Powers and Responsibilities Act 2000* (Qld).

Section 282 of that Act permits a 'law enforcement officer' of a 'law enforcement agency' to make an application to the 'chief officer' of the agency for an authority. The relevant law enforcement agencies are the Queensland Police Service and the Crime and Corruption Commission (CCC).

In Queensland there is an external inspection function, but it is limited to the records kept by the CCC. Section 316 of that Act is in the following terms:

- (1) The chief executive officer of a law enforcement agency must have the records kept under section 315 for each authority granted in relation to the agency audited—*
  - (a) at least once every 6 months while the authority is in force; and*
  - (b) at least once in the 6 months after the cancellation or expiry of the authority.*

*(2)The parliamentary commissioner must audit the records kept by the CCC.*

*(3)The chief executive officer of a law enforcement agency, other than the CCC, must appoint a person to audit the records kept by the agency.*

*(4)The person appointed under subsection (3) —*

*(a)may, but need not, be an officer of the law enforcement agency; and*

*(b)must not be a person —*

*(i)who granted, varied or cancelled any of the authorities to which the records under section 315 relate; or*

*(ii)who is or was an authorised person under any of the authorities to which the records relate.*

*(5)A person who conducts an audit under this section for a law enforcement agency must give the chief executive officer of the agency a written report of the results of the audit.*

## **The Commonwealth:**

The use and acquisition of AIs in the Commonwealth jurisdiction is regulated by Part IAC of the *Crimes Act 1914* (Cth).

Section 15KA of that Act permits a ‘law enforcement officer’ of a ‘law enforcement agency’, and an ‘intelligence officer’ of an ‘intelligence agency’ to make an application to the ‘chief officer’ of the relevant agency for an authority. ‘Law enforcement agency’ is defined in section 15K of that Act as the Australian Federal Police (AFP), the Immigration and Border Protection Department, the ACC, the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Taxation Office (ATO) and any other Commonwealth agency specified in the regulations. ‘Intelligence agency’ is defined in section 15K as the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS) and the Office of National Intelligence (ONI).

So far as the Commonwealth is concerned, there is a limited external inspection function which is confined to the activities of the intelligence agencies. That is provided for in section 15LE of the Act, which is in the following terms:

### ***15LE Reports about authorities for assumed identities etc. — intelligence agencies***

*As soon as practicable after the end of each financial year, the chief officer of an intelligence agency must submit a report to the Inspector-General of Intelligence and Security (the **Inspector-General**) that includes the following information for the year:*

*(a) the number of authorities granted during the year;*

*(b) a general description of the activities undertaken by authorised civilians and authorised intelligence officers when using assumed identities under this Part during the year;*

*(c) the number of applications for authorities that were refused during the year;*

*(d) the number of authorities of which control was transferred by the chief officer under section 15KV during the year;*

- (e) the number of authorities of which control was transferred to the chief officer under section 15KV during the year;*
- (f) a statement whether or not any fraud or other unlawful activity was identified by an audit under section 15LG during the year;*
- (g) any other information relating to authorities and assumed identities and the administration of this Part that the Inspector-General considers appropriate.*

#### **4.2.4 The next step**

Earlier there was reference to the concerns expressed by the JWG that the true identity of a person who has an AI (or indeed who is working undercover or as a human source) will be disclosed in the event that there is external oversight. That risk, which is both real and ever present, is not something that should be lightly discounted.

Nevertheless, under the current system that prevails in NSW, OILECC can inspect the records of law enforcement agencies relating to the use of an assumed name under the LECO Act for the purpose of ascertaining compliance with the legislation, but it is unable to do so in respect of the records of assumed identities under the AI Act. While it is recognised that an assumed name may be used for only a limited purpose whereas an AI may be used for an extended period, the fact that there are different levels of oversight of those two comparable covert powers appears to be rather anomalous. However, the fact that there is a regime in place in respect of the inspections of records of the use of assumed names under the LECO Act should provide some comfort that the perceived risk in respect of the AI Act could be similarly managed. Whilst referring to the LECO Act, the code of conduct of the kind for which it provides could be used as a model which could then be included as part of the AI Act.

The recommendations of the Royal Commission into the Management of Police Informants provide a further example of a situation in which such a risk has been closely considered. The Royal Commission was well and truly aware of the risks associated with the disclosure of a person's true identity if it was to propose a form of external oversight of the use of human sources. Nevertheless, it proceeded to propose an elaborate external oversight model for the use of human sources by Victoria Police in its Final Report. The Royal Commission also observed that, although it was outside the scope of its terms of reference, the external oversight regime that it recommended could equally apply to the other Victorian agencies that use human sources.

It is this Office's view that the question of the need to make legislative provision for a dedicated agency which is authorised to provide external scrutiny of the use of AIs should be revisited. Not only is it important to address the issue in view of the various matters that have been identified in this report, but it is timely to do so given that nearly a decade has passed since the last statutory review which, as has been observed, was conducted in 2013. Moreover, there are risks which could potentially arise from not taking any action. What is being urged is that it is far preferable to undertake proactive steps in order to address the situation, rather than waiting for actual incidents of the misuse of AIs to occur (which could be very damaging), before taking any action.

### **4.3 The need for a comprehensive review of the legal framework concerning the use and oversight of covert investigative powers in NSW**

Reference has already been made to various apparent anomalies and inconsistencies which exist within the current legal framework which operates in NSW concerning the use and oversight of covert investigative powers. First, there is a divergence as to the agencies that are entitled to use a particular covert power. Secondly, in relation to the decision to authorise the use of a particular covert strategy, it is apparent that whilst for most such activities the decision is made externally to the agency in question, in some instances the decision is made within the agency itself. Thirdly, there is a lack of consistency as to which external authority, if any, has responsibility for the oversight of the exercise of the covert power in question. Those are not however, isolated examples. A review of the various legislative provisions also reveals differences in respect of the following matters concerning the inspection functions that are performed by the relevant dedicated external inspection agency:

- i. the frequency with which inspections are to be conducted
- ii. the matters that are to be inspected
- iii. the powers that are available in order to conduct inspections
- iv. the timing of any report to Parliament (where such a requirement exists)
- v. the content of any such reports
- vi. to whom the report is to be submitted and
- vii. whether the report is to be tabled in Parliament.

Tables 4 and 5 which appear below endeavour to capture the essential features of the current system in respect of the inspection and reporting functions respectively.

Table 4

	INSPECTION FUNCTIONS		
	Frequency of inspections	Matters to be inspected	Powers to inspect
<b>Assumed Identities</b>	Nil	Nil	Nil
<b>Controlled Operations</b>	Inspector is to be notified of certain matters and Inspector must conduct inspections at least once every 12 months and may conduct inspections at any time	Whether or not the requirements of the Act are being complied with	Same powers as are available in relation to Telecommunications Interceptions
<b>Covert Search Warrants</b>	At least every 12 months after 28 May 2017	Whether or not the requirements of the relevant Part of the Act are being complied with	The Inspector may require the Commissioner of Police, Commissioner for the NSWCC and the Chief Commissioner of the LECC to provide access to records
<b>Covert Search Warrants (Terrorism Powers)</b>	Not specified	Keep under scrutiny the exercise of powers conferred on members of the NSW Police Force by the relevant Part of the Act	LECC 'may require the Commissioner of Police or the Secretary of the Department of Justice to provide information about the exercise of those powers'
<b>Criminal Organisation Search Warrants</b>	Every 2 years after 7 August 2017	Whether or not the requirements of the relevant Part of the Act are being complied with	The Inspector may require the Commissioner of Police to provide access to relevant records
<b>Surveillance Devices</b>	From time to time	Determine the extent of compliance with the Act	After notifying the chief officer of the authority the Inspector may: <ul style="list-style-type: none"> <li>- enter premises occupied by the authority,</li> <li>- have full and free access to all records,</li> <li>- require the giving of necessary and relevant information</li> </ul>
<b>Telecommunications Interceptions</b>	At least twice during each financial year	Ascertain the extent to which the authority's officers have complied with Part 2 of the <i>Telecommunications (Interception and Access) (New South Wales) Act 1987</i> since the last inspection	After notifying the chief officer of the authority the inspecting officer may: <ul style="list-style-type: none"> <li>- enter premises occupied by the authority,</li> <li>- have full and free access to all records,</li> <li>- make copies of and take extracts from the records,</li> <li>- require the giving of necessary and relevant information</li> </ul>
<b>Witness Protection</b>	Nil	Nil	Nil

Table 5

	REPORTING FUNCTIONS			
	Timing of reports	Content of reports	To whom report is submitted	Report tabled in Parliament
<b>Assumed Identities</b>	Nil	Nil	Nil	Nil
<b>Controlled Operations</b>	As soon as practicable after 30 June in each year	The Inspector's work and activities for the preceding 12 months together with particulars identified in section 23(2)	Presiding Officer of each House of Parliament	Yes
<b>Covert Search Warrants</b>	As soon as practicable after 28 May 2017 and as soon as practicable after the expiration of each subsequent year	The Inspector's work and activities in performing the inspection function	Attorney General and Minister for Police	Yes
<b>Covert Search Warrants (Terrorism Powers)</b>	Every 3 years	The exercise of the covert search warrant powers	Attorney General and Minister for Police	Yes
<b>Criminal Organisation Search Warrants</b>	As soon as practicable after 7 August 2017 and as soon as practicable after the expiration of each subsequent 2-year period	The Inspector's work and activities in performing the inspection function	Attorney General and Minister for Police	Yes
<b>Surveillance Devices</b>	6-monthly intervals	The results of an inspection under section 48	Attorney General	Yes
<b>Telecommunications Interceptions</b>	As soon as practicable, and in any event within 3 months after the end of each financial year	The results of the inspections under section 10(1) during that financial year	Attorney General	No
<b>Witness Protection</b>	Nil	Nil	Nil	Nil

As a general proposition, it may be accepted that some of the differences in the various legislative schemes in relation to the inspection and reporting functions in tables 4 and 5 are capable of explanation. The difficulty is that there does not presently exist, so far as this Office is aware, any publicly available material that provides that explanation. Moreover, legislative changes which have occurred in this area have tended to be ad hoc and piecemeal responses to particular issues as they have arisen.

Accordingly, it is recommended that there should be a comprehensive review of the current legal framework. The need to do so is particularly acute given, as has been indicated, there are areas of considerable overlap and also because any particular agency may simultaneously use more than one of the covert powers that is available to it. One particular issue that could be usefully addressed arises from the different terminology that is employed to describe a person who has been provided with a false identity. For the purposes of the AI Act, the terminology that is used is an “assumed identity” whereas in the LECO Act the reference is to an “assumed name”. The review could usefully examine the question as to whether there is any purpose to be served by, or any practical significance that flows from, the distinction as to the terminology that is used.

There have been statutory reviews which have been conducted at reasonably regular intervals, in relation to the operation of the system which regulates each of the individual covert powers in question. Table 6 summarises when, and by whom, those reviews were most recently conducted. As helpful and useful as each of those reviews undoubtedly are, what is completely missing is a comprehensive review which would enable the entire landscape of covert powers to be examined with a view to providing a best practice model. Such a review should be designed to ensure that the most robust and effective system for overseeing the activities of the law enforcement agencies in question is established, an essential feature of which would be subjecting those agencies to regular external monitoring. Canvassing the views of the law enforcement agencies themselves together with those of other interested parties, would form a critical part of the work of any agency undertaking such a review. The issues which have been raised in this report would hopefully also be considered as part of such a review.



**Table 6**

<b>Power</b>	<b>Title of the most recent statutory review in NSW</b>	<b>Date of the most recent statutory review in NSW</b>
<b>Assumed Identities</b>	<i>Statutory Review of the Law Enforcement and National Security (Assumed Identities) Act 2010, Ministry for Police and Emergency Services</i>	<i>January 2013</i>
<b>Controlled Operations</b>	<i>Review of the Law Enforcement (Controlled Operations) Act 1997, Ministry for Police and Emergency Services</i>	<i>August 2011</i>
<b>Covert Search Warrants</b>	<i>Review of the Law Enforcement (Powers and Responsibilities) Act 2002, NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services</i>	<i>2013</i>
<b>Covert Search Warrants (Terrorism Powers)</b>	<i>Statutory Review of the Terrorism (Police Powers) Act 2002, Department of Justice</i>	<i>June 2018</i>
<b>Criminal Organisation Search Warrants</b>	<i>Review of the Law Enforcement (Powers and Responsibilities) Act 2002, NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services</i>	<i>2013</i>
<b>Surveillance Devices</b>	<i>Statutory Review of the Surveillance Devices Act 2007, Department of Justice</i>	<i>October 2018</i>
<b>Telecommunications Interceptions (NSW TIA Act)</b>	<i>Nil.</i>	<i>Nil.</i>
<b>Witness Protection</b>	<i>Review of the Witness Protection Act 1995, Minister for Police</i>	<i>December 2001</i>

This Office is not aware of there ever having been a review in NSW of the kind which is now proposed. However, in a submission to the 2006 Parliamentary Inquiry conducted by the then Committee on the Office of the Ombudsman and the Police Integrity Commission which was concerned with “Scrutiny of NSW Police counter-terrorism and other powers”, the then PIC Inspector, The Honourable James Wood QC, made an observation which was to broadly similar effect. Having referred to a number of inconsistencies in the exercise of the covert powers that were then available (to Police), the Inspector observed:

*My one concern, which I consider worthy of raising, however, is that there is now a formidable body of legislation governing or empowering the exercise of police investigative powers. The extent of this legislation and the differences which exist concerning the deployment of the various powers is potentially capable of causing Police uncertainty and difficulty in managing their functions. There would, in my view, be some merit in giving consideration to a further rationalisation and consolidation of these provisions, in the course of which greater attention could possibly be given to some coordination or unification of the:*

- *Approval mechanism required for the exercise of the relevant powers,*
- *Availability of and appropriate form of independent oversight in relation to their exercise.*

*It is my understanding that some concern is already entertained in Police circles by reason of the complexity and different regimes which do exist in relation to the available powers, however that is a matter which the Committee may wish to explore further itself.*

In its final report, the Committee referred to that submission and made the following recommendation:

*Recommendation 6: The Committee recommends that the Attorney General refer the codification of legislation providing for police powers, including counter-terrorism-related powers, to the Law Reform Commission for consideration, with particular reference to issues of consistency regarding approval, authorisation and accountability regimes. However codification should only be considered if the rigour of the current approval and oversight systems are maintained.*

It is not known what, if any, response the Government made to the recommendation. There is no mention on the NSW Parliament webpage dedicated to that inquiry of any response and nor is there any record on the NSW Law Reform Commission website of it having published any such report.

The Royal Commission into the Management of Police Informants in Victoria expressed similar views about the oversight regime which exists in Victoria. It observed that:

*The Commission heard that to some extent, the current configuration of the oversight system is not underpinned by principle or a sound policy rationale. Rather, to reiterate IBAC’s view quoted above, the current oversight system:*

*... contains elements of fragmentation caused by a lack of role clarity around some areas of oversight, as well as inconsistencies in the type and level of oversight exercised by each agency. Broadly, this reflects a lack of [a] cohesive framework based on established oversight principles, the*

*expansion of law enforcement powers and the ad hoc development of the integrity system as a check and balance on those increased powers. (At Volume III, Chapter 13, page 234.)*

It then recommended that the Victorian government, within two years, undertake “a review of institutional and legislative structures for the oversight of Victoria Police’s exercise of powers, to ensure that Victoria’s police oversight system is consistent and coherent and contributes to improved police accountability, including through outcome-focused monitoring of police decisions and actions” (Recommendation 61 at Volume III, Chapter 13, page 235).

The issue of law enforcement powers is something that has also attracted the attention of the Commonwealth Government. It has expressed a commitment to instituting reforms in respect of electronic surveillance powers. That commitment followed a review conducted by Mr Dennis Richardson AM that was released publicly in December 2020 and which was entitled the “Comprehensive Review of the Legal Framework of the National Intelligence Community”. The Review made a large number of recommendations which were designed to encourage consistency, simplicity and robust oversight in any future legislative reforms. To give practical effect to the Government’s position, the Department of Home Affairs (DHA) released a discussion paper in December 2021 entitled “Reform of Australia’s Electronic Surveillance Framework”. The matters which it is reviewing are “activities such as intercepting phone calls, remotely accessing a person’s computers or using a listening or tracking device”. Fulfilling similar objectives should be the focus of the comprehensive review which is presently being proposed for NSW.

There is another aspect of the DHA discussion paper which demonstrates the timeliness of the comprehensive review that is being proposed. In it the Commonwealth Government indicated that the Commonwealth Ombudsman should assume responsibility for all inspection functions in relation to particular kinds of electronic surveillance, including those currently conducted by State and Territory law enforcement agencies. So far as this State is concerned, if such a proposal was to be implemented, that would mean that certain of OILECC’s inspection functions would then be conducted by the Commonwealth Ombudsman. The merits of such a proposal would be best examined against the background of having a clear view as to how the entire system might usefully operate across the country.

## 5. RECOMMENDATIONS

1. That the NSW Government give consideration to undertaking a comprehensive review of the legal framework concerning the use and external oversight of covert powers by law enforcement agencies in NSW.
2. That the NSW Government give consideration to making legislative provision for a dedicated agency which is authorised to provide external oversight of the use of AIs by law enforcement agencies in NSW.
3. That OILECC conduct regular audits of the use of AIs by LECC.