

Additional supplementary questions received on 4 July 2024 from the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission

1. **Would the Law Enforcement Conduct Commission (LECC) be assisted in its function by having oversight, review and proactive monitoring functions in the rollout of new police powers included under the *Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Bill 2024*?**

(a) How would this assist?

(b) How could these functions be implemented?

The Commission notes that the *Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Act 2024* (the Knife Crime Act 2024) received assent on 20 June 2024 but has not yet commenced. What follows is based upon the Commission's past experiences and the powers likely to be exercised under the Knife Crime Act 2024.

The best outcome for the community and the NSW Police Force is that any issues with the rollout of new police powers are corrected as early as possible.

The most effective oversight of new powers

The Commission can most effectively play its role if it has ready access to police information so that it can work with police to promptly identify any issues and allow police to address them.

This could include the Commission being provided with information such as:

- the proposed Standard Operating Procedures to review
- the proposed police training packages to review
- prompt access to any records about the use of the new powers held in police databases, so that the Commission can undertake a quantitative and qualitative review of the exercise of the new powers.

If this information is provided as it becomes available, the Commission could alert the NSW Police Force to any potential concerns as the rollout is progressing. The NSW Police Force has the benefit of independent review and the community can trust that any new powers are being given timely scrutiny. Problems can be identified early and fixed.

This would be a better outcome for the NSW Police Force and the public and is preferable to waiting for issues to be identified in a formal report, which inevitably involves a delay of months or years.

A case study – the consorting warning legislative review

The Commission took this approach in previous legislative reviews, such as its *Review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (February 2023). In undertaking that review, the Commission:

- reviewed COPS entries, body worn video footage, police training materials and court transcripts; and
- consulted NSW Police Force Commands and stakeholders.

As part of this process, the Commission identified some instances where consorting warnings appeared to have been unlawfully issued. These instances were raised promptly with the NSW Police Force, well before the report was tabled. The Commission had not received any complaints about these warnings and the issues are unlikely to have been identified without the Commission's statutory review.

The Commission also noted that despite legislative changes, Aboriginal people continued to be overrepresented as subjects of consorting warnings. The Commission raised this issue with the NSW Police Force, who adapted their guidance on issuing consorting warnings. This was done during the review process and before the report was published.

Current statutory framework

The Commission has several statutory mechanisms for accessing NSW Police Force information. All have limitations or prerequisites. None allow the Commission to have the kind of role just outlined.

- The Commission has a general power to consider and make recommendations about policies or procedures which might lead to agency maladministration by the NSWPF under s 27 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act).

There are two difficulties. First, the NSWPF do not have to provide the Commission with information under s27. Secondly, information provided under s 27 must be de-identified, so as not to breach the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*. De-identification is time consuming for the NSWPF and limits the research work of the Commission. A review of new police powers under s 27 would generally be limited to data analytics.

- The Commission's powers to obtain information in an investigation under Part 6 of the LECC Act, is broad. Operation Tepito was undertaken as a Part 6 investigation. However, before the Commission starts a Part 6 investigation, it must be satisfied that an officer or the NSW Police Force may be engaged in serious misconduct or serious maladministration. Whilst the Commission could start an investigation into an individual use of new police powers, it would be harder for the Commission to

explore potential systemic concerns until the new powers had been used for a while and the Commission had evidence (either through complaints or academic enquiry) that there were general issues of concern. This would impact on the Commission's capacity to provide timely suggestions.

- The Commission can also assess and oversee police investigations of individual complaints, and ensure that they are properly investigated by police. However, this does not resolve systemic issues of concern.

Potential legislative changes

There are at least two approaches which would allow the Commission to undertake a timely review of the rollout of new police powers:

- Include specific provisions providing for Commission oversight if significant new police powers are granted; or
- Amend s 27 of the LECC Act to allow the Commission to collect identified data for a specific purpose and to require the NSW Police Force to give it access to documents and databases.

Each approach has its own merits.

2. Will the Ministerial Review that is included in the Bill, along with standard police record-keeping processes, provide adequate oversight of new powers introduced by the *Law Enforcement (Powers and Responsibilities) and Other Legislation Amendment (Knife Crime) Bill 2024*?

(a) Does the LECC consider that any other oversight measure could be valuable?

i. What additional oversight measures could be valuable?

3. What does independent, statutory review by the LECC discover that a Ministerial Review and police record-keeping could not?

It is easier to answer questions 2 and 3 together.

The Commission is an independent statutory body with expertise in understanding policing and the exercise of police powers. It benefits from receiving complaints from the public (including police officers) and can use these complaints to identify specific and general issues of concern. If appropriate, it has a range of powers and capabilities that allow for a thorough investigation.

The Commission's concern is that neither the police obligation to keep records nor the Ministerial Review under the Knife Crime Act 2024 will provide the community with a timely assessment of the implementation of the new police powers.

Good record keeping is vital to a proper assessment of the way in which the new powers are being used. However, reporting in the NSW Police Force Annual Report will not:

- Identify if the record keeping is accurate. This requires a different kind of scrutiny, and the Commission has undertaken this kind of scrutiny in the past.¹
- Offer an assessment of the lawfulness of the exercise of new police powers, which needs access to COPS records, body worn video and engagement with stakeholders.
- Explore any practical impediments to lawfully implementing the new laws, which can be achieved through interviews with police on the ground.²

The Ministerial Review under the Knife Crime Act 2024 is focussed on whether the policy objectives remain valid and the legislation is appropriate for securing the objectives. The review must be undertaken as soon as possible after the period of 12 months from the assent date (20 June 2024). A report on the review must be tabled within 2 years after the assent date. The policy objectives of the legislation are not issues for the Commission to consider. However, a Ministerial review will not:

- Provide for timely and iterative feedback to the NSW Police to allow them to correct their course if there are issues with the rollout of the new powers.
- Scrutinise the operational implementation of the powers to see if there are practical concerns about their implementation, covering issues such as the adequacy of Standard Operating Procedures and training.
- Assess if any sectors of the community (young persons, First Nations people, people from culturally and linguistically diverse backgrounds) are over-represented and if so, whether the over-representation can be lawfully explained.

The Commission has the expertise to do a review that addresses these issues. It would benefit from some additional statutory powers, as noted above. However, even under the existing statutory regime, the Commission's powers of review are broader than either of the statutory monitoring functions included in the Knife Crime Act 2024.

4. Could the conferral of review functions and powers on the LECC operate in cooperation with and enhance other review functions?

As set out earlier, the Commission has existing investigation powers and a prevention function which it can use to oversee allegations of misconduct in the implementation of the Knife Crime Act 2024 is implemented.

¹ See for example *Review of a sample of NSW Police Force strip search records 2021 – 2022* (September 2023), *The New South Wales Child Protection Register: Operation Tuskett Final Report* (October 2019); *An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people: Operation Tepito Final Report* (October 2023); *Review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (February 2023); *Review of NSW Police Force responses to domestic and family violence incidents* (June 2023).

² See for example *The New South Wales Child Protection Register: Operation Tuskett Final Report* (October 2019); *Review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900* (February 2023); *Covert Search Warrants & Preventative Detention Orders Review under the Terrorism (Police Powers) Act 2002 (NSW) January 2017* (June 2020)

The Commission is aware of community concern about the impact of these new powers and takes a keen interest in their implementation. The Commission will consider whether there is a need for it to exercise its existing powers to keep the legislation under scrutiny.

5. Does the LECC consider that the new powers introduced by the Bill could result in outcomes similar to those found by Operation Tepito?

6. Is the LECC concerned that the rollout of new, warrantless search powers could amount to, as Operation Tepito found of the continued operation of the Suspect Target Management Plan?

It is easiest to answer questions 5 and 6 together.

In the 2 trial sites evaluated by Griffith University in its *Review of the Queensland Police Service Wanding Trial* (August 2022) there was 'evidence of inappropriate use of stereotypes and cultural assumptions by a small number of officers in determining who to select for wanding'. The Review also noted that the Queensland Police database did not reliably record First Nations status or other cultural background, so that conclusive findings on this topic were not possible.

The NSW Police Force have routinely recorded a person's First Nations status in the COPS database since January 2022, so reliable access to that data should not be an issue in NSW.

One of the concerns raised by the investigation in Operation Tepito was that general duties officers were confused about the legal scope of their powers, when undertaking activities to enforce a Suspect Targeting Management Plan. There are risks that the same problem could arise when powers are exercised under the Knife Crime Act 2024. The Knife Crime Act 2024 gives the NSW Police Force the power to use a wand to scan individuals but does not alter the police's power to search without a warrant under Part 4 of *Law Enforcement (Powers and Responsibilities) Act 2002*. No doubt the NSW Police Force will be alive to the risks of general duties officers confusing their power to wand with their power to search more broadly. However, scrutiny of the exercise of these powers would be useful to avoid misconduct and ensure public trust.

The Commission is concerned that there is potential for young persons, First Nations or other communities to be overrepresented as subjects of the Knife Crime Act 2024 powers.

The Commission will seek to work cooperatively with the NSW Police Force to review any training materials or SOPS to limit the opportunities for unconscious bias to influence the police exercise of discretion. Training in the proper exercise of officer discretion will also be important. The Commission would welcome the opportunity to review the NSW Police Force training when it is developed.

7. Are the NSW Police cooperating fully with LECC investigations?

8. Are there any actions that could be taken to improve cooperation between the NSW Police and the LECC?

It is best to answer questions 7 and 8 together.

The LECC and the NSW Police Force are both working towards the same goal – which is a Police Force of integrity, trusted by the public. The Commissioner of Police agrees that this is a shared goal and is interested in a cooperative relationship.

The Commission has good working relationships with many staff in the NSW Police Force. The Commissioners and the Commission’s staff regularly review how they can build better cooperation with the NSW Police Force and improve police trust of the Commission.

The NSW Police Force carefully scrutinises any exercise of the Commission’s powers before providing information to the Commission, and challenge perceived overreach by the Commission.

Where the Commission is exercising its powers under Part 6 of the LECC Act, the NSW Police Force consider the validity of Notices issued by the Commission, but comply with Notices that they agree are valid.

Where the Commission exercises powers under Part 7 and Part 8 of the LECC Act, the NSW Police Force will provide information in response to Notices, but have claimed public interest immunity or legal professional privilege over some documents. The issue of whether the NSW Police Force can claim public interest immunity when the Commission is monitoring a critical incident investigation was the subject of a decision by the Court of Appeal: *Commissioner of Police v Attorney General for New South Wales* [2024] NSWCA 150. The NSW Police Force have now filed an application for special leave to the High Court.

Where the Commission has no statutory power to require information, the NSW Police Force often voluntarily provide the Commission with documents and briefings. However, there are also times when the Commission’s request for information is refused.

9. Are the Premier and Cabinet responsive to recommendations and requests made by the LECC?

- (a) **How would the LECC describe the responsiveness in terms of:**
- i. **timeliness?**
 - ii. **accuracy?**
 - iii. **receptiveness?**

The Commission has a cooperative relationship with The Cabinet Office. The Cabinet Office has regularly consulted the Commission on issues related to the Commission’s functions, as well as providing the Commission with useful advice on issues of government process. The Cabinet Office has been available for urgent consultation when needed.

The Commission corresponds with the Special Minister of State on issues of importance to the Commission.

In September 2023, the Commissioners met with the Special Minister of State. Suggestions for legislative reform were raised with the Minister. The Commission understands that these suggestions remain under consideration by the Government.

Government has also provided formal responses when the Commission has made recommendations to government, such as in its recent *NSW Police Force Aboriginal Strategic Direction 2018–2023 Monitoring Report* (October 2023). The Government response has been published on the Commission's website.

10. How could cooperation between the Premier and Cabinet and the LECC be improved, without compromising the independence of the LECC?

The Cabinet Office has been careful to consult and inform the Commission about issues that impact the Commission's work, whilst ensuring that the Commission's independence is not compromised.

The Commission acknowledges that there are times when legislation needs to be urgently introduced. However, where there is a proposal to expand police powers or make changes to police practices, the Commission would appreciate the opportunity to be consulted about the proposed changes. As the independent police oversight body, it may have a contribution to make. Equally, if the Commission does not have concerns about the proposed legislative changes, this may reassure the Parliament and the community.

11. Would the LECC be better able to fulfil its duties with the introduction of statutory, mandatory LECC consultation for any proposed legislation introducing new powers for police?

The Commission would be comfortable with a government practice of consulting the Commission, rather than making consultation a mandatory, statutory, pre-requisite.

12. Would the LECC be better able to fulfil its duties with the introduction and resourcing of statutory, mandatory LECC review of any legislation that included expanded powers for police?

Not every expansion of police powers would warrant a mandatory statutory review. If the Commission were to be consulted prior to any new police powers being introduced, it would give the Commission an opportunity to consider the proposed expansion of police powers and (where appropriate) seek additional powers and resources.