



Australian Government
Attorney-General's Department

November 2016

**Submission to the Parliamentary Joint
Committee on Intelligence and Security
Inquiry into the Law Enforcement Legislation Amendment
(State Bodies and Other Measures) Bill 2016**

Overview of the Bill

The NSW Government has requested a range of legislative amendments to support the creation of a new police oversight body, the Law Enforcement Conduct Commission (LECC), and its oversight body, the Inspector of the Law Enforcement Conduct Commission. The NSW Government intends that these bodies commence in January 2017.

The establishment of the LECC responds to the recommendations of the 2015 Tink *Review of Police Oversight*. The LECC will replace the existing NSW Police Integrity Commission (PIC) and fulfil the police oversight functions of the NSW Ombudsman and the oversight functions of the Inspector of the Crime Commission.

The powers provided in this Bill are comparable to the investigative powers currently available to the PIC and other anti-corruption and integrity bodies in Australia, such as the Independent Commissioner Against Corruption in NSW, the Independent Broad-based Anti-corruption Commission in Victoria, and the Corruption and Crime Commission in Western Australia.

The Inspector of the LECC will be responsible for monitoring the LECC's compliance with NSW legislation, investigating complaints against LECC officers and undertaking audit functions relating to the use of covert powers. The Bill will enable the Inspector of the LECC to receive lawfully intercepted information from interception agencies in order to carry out this oversight function.

Amendment to section 110A of the *Telecommunications (Interception and Access) Act 1979*

Subsection 110A(1) lists 'criminal law enforcement agencies' for the purposes of the *Telecommunications (Interception and Access) 1979* (TIA Act). The Bill will amend section 110A of the TIA Act to facilitate the abolition of the PIC and include its replacement, the LECC, as a criminal law-enforcement agency. Section 110A(11) of the TIA Act provides that if a Bill is introduced into Parliament that includes an amendment to section 110A(1), then the responsible Minister must refer the amendment to the Parliamentary Joint Committee on Intelligence and Security for review. This submission focuses on this particular aspect of the Bill.

Investigative jurisdiction

Compared to the PIC, the LECC will have additional investigative functions in relation to administrative officers of the NSW Police Force and officers of the NSW Crime Commission.

The PIC is currently able to investigate both misconduct and corrupt conduct by a police officer, but only corrupt conduct by an administrative officer of the NSW Police Force. Corrupt conduct includes criminal offences or conduct such as misconduct, irregularity or neglect of duty, which may constitute grounds for disciplinary action.

The LECC will be able to investigate both serious misconduct and serious maladministration by a police officer or an administrative officer of the NSW Police Force. Specific restrictions and

preconditions on the PIC's oversight of NSW Crime Commission officers have also been removed. These changes will bring the LECC's oversight of administrative officers of the NSW Police Force and officers of the NSW Crime Commission into line with its oversight of police officers. Serious maladministration will be limited to conduct of a serious nature that is unlawful, unreasonable, unjust, oppressive, improperly discriminatory or arises out of improper motives.

By virtue of the amendment to section 110A of the TIA Act, the LECC will be able to apply for a stored communications warrant, issue preservation notices and authorise the disclosure of telecommunications data in relation to investigations for serious misconduct or serious maladministration by an administrative officer of the NSW police force or officers of the NSW Crime Commission, consistent with the PIC's current oversight of police officers. However, the powers afforded to criminal law enforcement agencies in the TIA Act are also subject to minimum thresholds, as detailed below.

Stored communications warrants

The Bill would permit officers of the LECC to apply to an independent issuing authority for a warrant to access stored communications (such as email or SMS messages) to support an investigation of a serious contravention. A serious contravention, as a general rule, carries a maximum penalty of least 3 years imprisonment (see section 5E of the Act). The LECC will be responsible for investigating 'serious misconduct' by employees of the NSW Police Force and NSW Crime Commission, which covers corrupt conduct and offences punishable by at least five years of imprisonment.

Preservation notices

Chapter 3 of the TIA Act establishes a system of preserving stored communications held by carriers for the investigation of serious contraventions. As above, a serious contravention, as a general rule, carries a maximum penalty of least 3 years imprisonment (see section 5E of the Act). The aim of a preservation notice is to prevent stored communications from being destroyed before they can be accessed under a warrant.

Once listed as a 'criminal law-enforcement agency', officers of the LECC would be able to issue a preservation notice to a carrier requiring the carrier to preserve all communications it holds which relate to the person or telecommunications service specified in the notice. A preservation notice may only be issued if the agency intends that a stored communications warrant will be applied for to access those communications.

Telecommunications data

The Bill will enable an authorised officer of the LECC to authorise the disclosure of telecommunications data either on a historical or prospective basis. Telecommunications data includes information about a communication, but not the content of a communication (e.g. subscriber information, the date, time or location of a call). Prior to making an authorisation for access to data,

the authorising officer must be satisfied on reasonable grounds that any interference with privacy is justifiable and proportionate.

Under sections 178 and 179 of the TIA Act, an authorised officer can authorise the disclosure of historical telecommunications data where it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty or for the protection of the public revenue. An authorisation may only be made where the privacy impact of the authorisation has been considered to be justified and proportionate.

Under section 180 of the TIA Act, an authorised officer can authorise the disclosure of telecommunications data on a prospective basis for a period no longer than 45 days from the day on which the authorisation is made. Authorisations for prospective data may only be made to assist in the investigation of criminal offences punishable by at least 3 years imprisonment.

The LECC will need to obtain a journalist information warrant prior to authorising disclosure of a journalist's telecommunications data to identify a source.

Oversight

The LECC would be subject to oversight requirements relating to agency use of stored communications and telecommunications data. The TIA Act requires that agencies keep records pertaining to their use of these powers. The Commonwealth Ombudsman is required to inspect those records and has powers to obtain relevant information in connection to its inspections. The Ombudsman must report to the Attorney-General each year about the results of his or her inspections, and the Attorney-General must table that report in Parliament.

Criminal law enforcement agencies are also required to report each year to the Attorney-General on their use of stored communications and telecommunications data. The Attorney-General then reports to Parliament annually about the number of stored communications warrants issued or revoked, the number of authorisations made and the offence categories against which data was disclosed.

Possible Government amendment

The NSW Government has indicated that a government amendment to the definition of 'permitted purpose' may be needed to support the use of intercepted information by the Inspector of the LECC. The Australian Government will consider this request. It will not impact on the powers available to the LECC under section 110A of the TIA Act.