

**Agreement between the
Law Enforcement Conduct Commission
and
the Commissioner of Police
Pursuant to s 14 of the
Law Enforcement Conduct Commission Act 2016**

1. Parties

This Agreement is made between:

The Commissioner of Police for and on behalf of the New South Wales Police Force of 1 Charles Street, Parramatta, NSW 2150 ('the NSWPF')

and

The Chief Commissioner of the Law Enforcement Conduct Commission for and on behalf of the Law Enforcement Conduct Commission of Level 3, 111 Elizabeth Street, Sydney NSW 2000 ('the Commission').

2. Background

The responsibilities of the NSWPF under the *Police Act 1990* ('the Police Act') include the investigation of allegations of police misconduct.

The responsibilities of the Commission under the *Law Enforcement Conduct Commission Act 2016* ('the Act') include the investigation of allegations of police misconduct and oversight of police misconduct investigations.

3. Agreement

Pursuant to s 14 of the Act the Parties agree that guidelines will be issued reflecting agreements entered into concerning the following:

- (a) the kinds of misconduct matters that should be investigated by the Commission,
- (b) the kinds of misconduct matters that should not be investigated by the Commission,
- (c) the kinds of misconduct matters required to be notified to the Commission ('*notifiable misconduct matters*'),
- (d) the kinds of misconduct matters that are ordinarily to be investigated by the Commissioner of Police,
- (e) the kinds of misconduct matters that are ordinarily to be investigated by the Commission,
- (f) the kinds of misconduct matters that should be the subject of oversight by the Commission under Part 7 and the form of such oversight,
- (g) the kinds of misconduct matters that should not be the subject of oversight

by the Commission and the manner of dealing with such matters,

- (h) the level of detail required in notifying or referring a misconduct matter to the Commission or the Commissioner of Police,
- (i) the giving of notice with respect to misconduct matters to the Commission, the Commissioner of Police, the officer the subject of the misconduct matter, complainants and referring authorities,
- (j) arrangements with respect to the monitoring by the Commission under s 101 of police investigations of misconduct matters,
- (k) the kind of misconduct information that is required to be registered in the NSWPF misconduct matters information system.

The guidelines to be issued pursuant to this Agreement are to be signed on behalf of the parties by their nominated delegates.

4. Definitions

In this Agreement and all guidelines issued pursuant thereto, except where a contrary intention appears:

- (1) **Agency maladministration** means any conduct, by way of action or inaction, of the NSW Police Force other than excluded conduct:
 - (a) that constitutes an offence or is corrupt conduct or is otherwise unlawful, or
 - (b) that, although it is not unlawful:
 - (i) is one that no decision maker, acting reasonably, would make,
 - (ii) is unjust, oppressive or improperly discriminatory in its effect,
 - (iii) arises, wholly or in part, from improper motives,
 - (iv) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration,
 - (v) arises, wholly or in part, from a mistake of law or fact,
 - (vi) is conduct of a kind for which reasons should have, but have not, been given, or
 - (c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

NOTE: Such conduct may be the conduct of an individual officer of the NSWPF which might be adopted as a course of conduct by other NSW police officers, a course of conduct by a number of officers of the NSWPF or an operational policy of the NSWPF. Maladministration would arise if the conduct or policy may produce an effect that is unreasonable, unjust, oppressive or improperly discriminatory.

- (2) **c@ts.i** means the customer assistance tracking system database used by the NSWPF to manage complaints made against serving NSW Police Officers.
- (3) **Complaint** means an allegation that any conduct:
- (a) of a police officer (whether or not named or identified) is, or could be, conduct that falls within the description of police misconduct or officer maladministration (a 'police complaint'), or
 - (b) of an administrative employee (whether or not named or identified) is (or could be) conduct that falls within the description of administrative employee misconduct or officer maladministration (an 'administrative employee complaint'), or
 - (c) of the NSW Police Force is (or could be) conduct that falls within the description of agency maladministration (an 'agency complaint').
- (4) **Misconduct information** means a mandatory or other report or other information contained in any other document that the Commission or Commissioner of Police becomes aware of, otherwise than through a complaint, that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration and includes:
- (a) letters of demand, statements of claim or other pleadings or particulars where the State of New South Wales, the Commissioner of Police, the NSWPF or a police officer is named as defendants or proposed defendants, which alleges, expressly or impliedly, an act or omission capable of constituting serious misconduct, or
 - (b) Any judgement ordering the informant to pay a defendant's costs where the reason for the order includes criticism of the truth or reliability of a police officer's evidence or the inadequacy or competence of a police investigation.
- (5) **Misconduct matter** means:
- (a) a complaint, or
 - (b) misconduct information.
- (6) **Misconduct matters information system** is the system required to be kept under s 128 of the *Police Act 1990*.
- (7) **Officer maladministration** means any conduct (by way of action or inaction) of a police officer or administrative employee that, although it is not unlawful in that it does not constitute an offence or corrupt conduct:


- (a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect,
 - (b) arises, wholly or in part, from improper motives,
 - (c) arises wholly or in part, from a decision that has taken irrelevant matters into consideration,
 - (d) arises, wholly or in part, from a mistake of law or fact, or
 - (e) is conduct of a kind for which reasons should have (but have not) been given.
- (8) **Serious misconduct** means any one of the following:
- (a) conduct of a police officer or administrative employee that could result in prosecution of the officer or employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,
 - (b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,
 - (c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.
- (9) **Serious disciplinary action** against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the officer or position held by the officer or employee or reducing the remuneration payable to the officer or employee.
- (10) **Serious offence** means a serious indictable offence. A serious indictable offence is an indictable offence that is punishable by imprisonment for life or for a term of five years or more. A serious offence includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.
- (11) **Disciplinary infringement** includes any misconduct, irregularity, neglect of duty, breach of discipline or substantial breach of a code of conduct or other matter that constitutes or may constitute grounds for disciplinary action under any law.
- (12) **Serious maladministration** means:
- (a) in the case of an agency – if the conduct involved is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or
 - (b) in the case of an agency or officer – if the conduct involved is of a serious nature and, although it is not unlawful:
 - (i) is unreasonable, unjust, oppressive or improperly discriminatory in its

- effect, or
(ii) arises, wholly or in part, from improper motives.

Execution

This Agreement is executed on:

**Signed by Michael Fuller APM
the Commissioner of the New
South Wales Police Force:**



Signature of Commissioner of Police

**Signed by the Hon. Michael
Adams QC, the Chief
Commissioner of the Law
Enforcement Conduct
Commission:**



Signature of Chief Commissioner of LECC

24/11/2017

Guidelines issued pursuant to the s 14 Agreement between the Law Enforcement Conduct Commission and the Commissioner of Police

1. Notifiable misconduct matters

(1) Misconduct matters required to be notified to the Commission (LECC) (notifiable misconduct matters) are:

- a) criminal conduct except those matters as outlined in paragraph 5,
- b) corrupt conduct,
- c) failure by a police officer or administrative employee to report police officer misconduct in accordance with s 211F of the *Police Act 1990*,
- d) conduct which might warrant the following action under the *Police Act 1990*:
 - (i) s 181D removal from the NSWPF, or
 - (ii) s 173 reviewable action,
- e) until the present NSWPF c@ts.i system is replaced, notification by manual means, of the conduct of an administrative employee which might warrant the following action under the *Government Sector Employment Act 2013*:
 - (i) termination of employment without giving the employee an opportunity to resign,
 - (ii) termination of employment after giving the employee an opportunity to resign,
 - (iii) impose a fine on the employee (which may be deducted from the remuneration payable to the employee),
 - (iv) reduce the remuneration payable to the employee, or
 - (v) reduce the classification or grade of the employee,
- f) upon commencement of the replacement system for c@tsi, conduct of an administrative employee which might warrant the following action under the *Government Sector Employment Act 2013*:
 - (i) termination of employment without giving the employee an opportunity to resign,

- (ii) termination of employment after giving the employee an opportunity to resign,
 - (iii) impose a fine on the employee (which may be deducted from the remuneration payable to the employee)
 - (iv) reduce the remuneration payable to the employee, or
 - (v) reduce the classification or grade of the employee,
- g) allegations against the Commissioner of Police or a Deputy Commissioner that are (or could be) officer misconduct,
- h) allegations of improper association,
- i) failure to report in writing to the relevant officer as nominated by the NSWPF policy, statements by a judicial officer, whether in a judgment or otherwise in court, critical of:
 - (i) the conduct of a prosecution,
 - (ii) the adequacy of an investigation, or
 - (iii) the integrity of police witnesses,
- j) detrimental action or reprisal (including any possible payback complaint) against a police officer or other person making a protected disclosure or allegation about an officer,
- k) any unauthorised use, misuse or failure to comply with safe keeping of police firearms; or any unauthorised use of any other police appointments, namely Tasers, OC Spray, batons or handcuffs.
- l) any serious departure from the NSWPF standard operating procedures, guidelines or policies concerning vehicle pursuits,
- m) any serious failure to follow the NSWPF Critical Incident Investigation Guidelines without adequate explanation being provided as to why such guidelines were not followed,
- n) any failure to comply with policies and procedures in regards to Declarable Associations Policy, Conflicts of Interest Policy and Procedure and Secondary Employment Policy,
- o) any falsifying of official records including but not limiting to COPS, motor vehicle diary and notebook/duty book entries for the purpose of fraud or obtaining benefit by deception,
- p) any incompetent or inadequate investigation falling significantly short of NSWPF guidelines,

- q) allegations of misconduct arising from the exercise of police powers under the *Law Enforcement (Powers and Responsibilities) Act 2002*, including search, arrest and detention powers,
- r) unauthorised release of confidential police information or unauthorised or improper disclosure of information,
- s) conduct which is or might be serious maladministration by an officer or the NSWPF,
- t) Letters of demand, Statements of Claim, originating process or other pleadings or particulars where the State of New South Wales, Commissioner of Police, or a police officer or administrative employee is named as a defendant or proposed defendant within the body of the document, and that alleges, expressly or impliedly, an act or omission capable of constituting serious misconduct on the part of any police officer, or administrative or temporary employee of the NSWPF.

2. **Dealing with serious misconduct and serious maladministration matters**

- (1) The factors that the LECC may take into account in deciding whether to investigate serious misconduct or serious maladministration include:
 - a) the apparent level of criminality or systemic nature of the conduct,
 - b) the primary responsibility of the NSWPF to investigate and prevent officer misconduct, officer maladministration and agency maladministration within the NSWPF,
 - c) the availability of the LECC or any other public authority or official with the responsibility, jurisdiction or power to investigate conduct of the kind concerned,
 - d) if the conduct is related to conduct that the LECC is already investigating, the relationship to any other on-going investigation of the LECC,
 - e) the complexity of the matter,
 - f) the number and seniority of police officers, administrative employees or temporary employees involved.

3. Dealing with misconduct matters generally

- (1) In determining whether matters will or will not be investigated by the LECC, the LECC consideration will include whether:
 - a) other action has or is being taken to remedy the subject matter of the complaint,
 - b) the subject matter is trivial, frivolous, vexatious or not made in good faith,
 - c) the relevant conduct occurred too long ago to justify investigation,
 - d) there is, or was, available an alternative and satisfactory means of redress in relation to the relevant conduct,
 - e) the complainant does not, or could not have, an interest or a sufficient interest in the conduct complained of,
 - f) civil, coronial, disciplinary or criminal proceedings relating to the subject matter of the misconduct matter are pending or reasonably in contemplation.
- (2) For the purposes of this clause, a matter which can be dealt with under the provisions of Part 9 of the *Police Act 1900*, will fall within cl 3(1)(a) and cl 3(1)(d).
- (3) If any one or more of the considerations mentioned in cl 3(1) are present, the LECC will not investigate the matter or refer it for investigation unless the circumstances are exceptional or the public interest otherwise requires.
- (4) A decision by the LECC to investigate a misconduct matter will only be made if, in the opinion of the LECC, the conduct concerned:
 - a) is (or could be) serious misconduct,
 - b) serious officer maladministration,
 - c) involves the Commissioner or a Deputy Commissioner, or
 - d) is or could be agency maladministration.

- (5) Where it is considered by the LECC that, if the misconduct is established, the likely outcome will be disciplinary action other than dismissal or reduction in rank or pay, the LECC will refer the matter to the Commissioner of Police for investigation unless the circumstances are exceptional or subject to paragraph (i) it is in the public interest that it should conduct the investigation.
 - a) Alleged misconduct that involves the use of significant force or involves significant dishonesty in connection with the investigation of, or proceedings concerning, an offence may justify investigation by the LECC in the public interest.
- (6) The LECC will investigate conduct that is referred to it by both Houses of Parliament.
- (7) Where a notifiable misconduct matter is referred to the Commissioner of Police under cl 3(1) the LECC will oversee the investigation in accordance with Part 7 of the Act if it decides that it is in the public interest to do so. The LECC may or may not, , give notice to the Commissioner of Police of those investigations which it has decided to oversee.
- (8) Where a misconduct matter may appropriately be dealt with under the provisions of Part 9 of the *Police Act 1990* ("Management of conduct within NSW Police Force"), the police investigation will not be the subject of oversight by the LECC.
- (9) At such times as may be specified by the LECC, the Commissioner of Police is to inform the LECC of the outcome of all such management action taken by the Commissioner of Police and providing the name, rank and station of the officer.
- (10) If the LECC considers it is appropriate to do so, it may at any time, on reasonable notice, resume the investigation.

4. Notice of misconduct matters to be given by the LECC

- (1) This clause concerns misconduct matters otherwise than notifiable misconduct matters recorded on the misconduct matters information system.
- (2) As soon as practicable after receiving or becoming aware of a misconduct matter concerning a police officer or administrative employee, the LECC is to give the Commissioner of Police notice of it with such available information as to indicate the nature of the alleged misconduct.
- (3) The LECC may withhold notice if it is of the opinion that it is in the public

interest to do so.

5. **Misconduct matters that need not be investigated by the LECC or the NSWPF**

(1) Misconduct matters that need not be investigated by the LECC or NSWPF are matters that involve conduct or behaviour that is inconsistent with or prohibited by the terms of an officer's employment, including the Commissioner of Police's instructions or constitutes a breach of discipline, but which does not involve serious dishonesty or serious incompetence and can be dealt with under the provisions of Part 9 of the *Police Act 1990*. These include but are not limited to :

- (a) allegations that an officer was not ill while claiming sick leave,
- (b) allegations of minor misuse of police assets,
- (c) complaints about the issuing of traffic and parking infringement notices that do not raise any allegations involving or implying a lack of integrity,
- (d) traffic offences, unless the offence raises other notifiable issues concerning a lack of integrity,
- (e) allegations of minor misuse of email, such as forwarding emails with non-work related content and documents that take advantage of an officer's membership of the NSWPF but does not otherwise amount to misconduct,
- (f) allegations of embellishments in police promotion applications,
- (g) Misconduct matters about police officer incompetence that are otherwise not notifiable,
- (h) performance management matters that have not resulted in a notifiable misconduct matter, for example, lack of punctuality, unsatisfactory completion of a performance agreement or poor work output, or
- (i) any allegations of a trivial nature.

(2) These misconduct matters must be recorded by the NSWPF in the appropriate misconduct matters information system and made available to the LECC on request.

6. Form of oversight

- (1) Where a misconduct matter is to be investigated by the Commissioner of Police subject to oversight by the LECC:
 - a) the investigation is to be recorded on the misconduct matters information system in sufficient detail to permit the LECC to assess the adequacy of the investigation,
 - b) a Commissioner or another officer of the LECC authorised in writing by a Commissioner may:
 - (i) be present as an observer during interviews conducted by police officers for the purpose of the investigation,
 - (ii) confer with the officers conducting the investigation about that conduct, and
 - (iii) obtain, by request of the nominated contact for the purposes of the investigation, reports as to its progress,
 - c) The Commissioner of Police is to provide, on the request of the LECC:
 - (i) an explanation of the policies, procedures and practices of the NSWPF (in writing if so requested) pertaining or relevant to the conduct complained of,
 - (ii) documentary or other information (including records of interviews) with respect to inquiries by police into the matter,
 - (iii) to the extent to which the Commissioner of Police is able to do so, any explanation, comment or information sought by the LECC in the connection with the matter,
 - d) Where the Commissioner of Police objects to providing what has been requested and the LECC is satisfied that the grounds of the objection are well founded, the LECC will withdraw the request unless it is in the public interest not to do so,
 - e) Where the LECC is satisfied that an investigation is not being conducted in a timely manner, the Commissioner of Police must provide information that demonstrates it is being investigated or explains why it is not being investigated, in a timely manner.
- (2) If the LECC is satisfied that an investigation is not being properly investigated, the LECC may request further investigation to be conducted specifying what are, in the LECC's opinion, the deficiencies in the earlier investigation.

- (3) The Commissioner of Police may but is not obliged to cause a further investigation to be conducted but must inform the LECC of the decision and, if it is to decline to cause a further investigation to be conducted, of the reasons for so doing:
 - a) The further investigation is to be dealt with as though it were an original investigation.
- (4) The NSWPF will comply with s137 of the Police Act 1990 and notify the LECC when final reports, in notifiable matters, are made available on the misconduct matters information system.

7. Action taken on a misconduct matter

- (1) If the LECC is not satisfied with the Commissioner of Police's decision concerning any action to be taken as a result of a police investigation, including a decision to take disciplinary action or to take no further action, it may request the Commissioner of Police to review the decision.
- (2) The Commissioner of Police may, but is not obliged to, change the decision but, in either case is to notify the LECC of the decision and, if it is not to change the decision, the reasons for not doing so.

8. Discontinuance of oversight

- (1) The LECC may at any time decide to discontinue oversight of an investigation.

9. Exercise of LECC's functions

- (1) In exercising its oversight functions, the LECC will not control, supervise or direct the Commissioner of Police or any officer in respect of any police investigation.
- (2) It is the duty of members of the NSWPF to cooperate with the LECC in the exercise of its oversight functions and any other functions of the LECC.

10. Request for information

- (1) When the LECC requests information concerning a misconduct matter the NSWPF shall provide documents available in electronic form within five business days of receipt of such request. All explanations of policies, procedures and practices, comment or other information shall be provided as soon as practicable or at least within 21 days, unless another timeframe is agreed to by the relevant Director or Commissioner of Oversight.

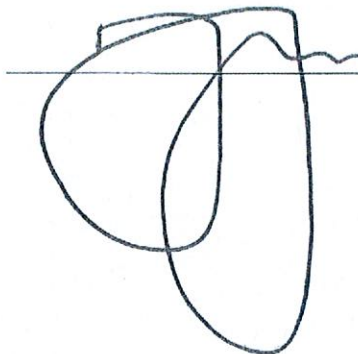
11. Exceptional circumstances and public interest

- (1) The existence of exceptional circumstances and what is in the public interest is for the LECC to decide.

12. Maladministration

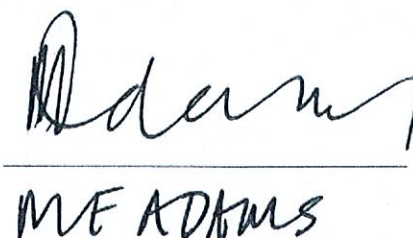
- (1) Neither agency nor serious maladministration will be taken to be unreasonable if the conduct in question is, in the LECC's view, reasonably open to the officer or administrative employee to take in the exercise of their duty or functions.
- (2) For the purposes of this clause, the mere fact that the LECC considers that different conduct would have been appropriate is not sufficient to establish that agency or serious maladministration has occurred.
- (3) Where the conduct in question arises, wholly or in part from a NSWPF decision that has taken irrelevant matters into account, and where the LECC considers it likely that the decision would have been the same or substantially the same had the irrelevant matters not been taken into account, the LECC may bring the matter to the attention of the NSWPF for the purpose of taking such action as the NSWPF thinks appropriate or otherwise for information.
- (4) Where the conduct in question arises, wholly or in part from the NSWPF making a mistake of law or fact, and where the LECC considers it likely that the decision would have been the same or substantially the same had the mistake not been made, the LECC may bring the matter to the attention of the NSWPF for the purpose of taking such action as the NSWPF thinks appropriate or otherwise for information.
- (5) Where the conduct is serious maladministration the LECC will not itself investigate unlawful conduct (otherwise than corrupt or criminal) which is likely to be adequately dealt with by the provisions of Part 9 of the Police Act. In these circumstances, LECC will refer the matter to the NSWPF for appropriate action.

Signed by the Commissioner of
the New South Wales Police Force
or his delegate:



11/12/17
Date

Signed by the Chief
Commissioner of the Law
Enforcement Conduct
Commission or his delegate:


ME ADAMS

24/11/17
Date