LECC
Law Enforcement
Conduct Commission

OPERATION MANTUS

A report under section 132 of *Law Enforcement Conduct Commission Act 2016* concerning alleged excessive use of force and issues concerning police interviews of young persons in custody

December 2023

LECC
Law Enforcement
Conduct Commission

Level 3, 111 Elizabeth Street
Sydney NSW 2000
Email: *contactus@lecc.nsw.gov.au*

Postal address
GPO Box 3880
Sydney NSW 2001
Phone: (02) 9321 6700
Toll free: 1800 657 079
Fax: (02) 9321 6799

ISBN 978-1-74003-063-2

The Law Enforcement Conduct Commission acknowledges and pays respect to the Traditional Owners and Custodians of the lands on which we work, and recognises their continuing connection to the lands and waters of NSW. We pay our respects to the people, the cultures, and the Elders past and present.

LECC
Law Enforcement
Conduct Commission

Phone: 02 9321 6700 Fax: 02 9321 6799
Level 3, 111 Elizabeth Street, Sydney NSW 2000
Postal address: GPO Box 3880, Sydney NSW 2001
www.lecc.nsw.gov.au

11 December 2023

The Hon Ben Franklin, MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Operation Mantus – A report under section 132 of *Law Enforcement Conduct Commission Act 2016* concerning alleged excessive use of force and issues concerning police interviews of young persons in custody

Under section 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission provides you with a copy of its report in relation to its investigation in Operation Mantus.

Under section 142(2) of the Act, I recommend that this report be made public immediately.

Yours sincerely

The Hon Peter Johnson SC
Chief Commissioner

Executive Summary

In September 2022, a community in Northern New South Wales was under great stress from the impact of record breaking floods which occurred earlier that year. There had been significant community disruption and local police had been relocated and redeployed. The social disruption had contributed to an increase in crime committed by young people, with elderly members of the community being particular targets. There was a public call for a police response.

On 11 September 2022, a small strike force of plain clothes police officers targeted one community. The aim was to identify, and if necessary, arrest young offenders. The police officers were not using body-worn video (BWV). During the patrol, a 14 year old Aboriginal young person was chased and tackled by a police officer. He was handcuffed. His head was bleeding and he said that he'd been punched. His family arrived, expressing their concern for his wellbeing. He was taken to hospital by ambulance and later taken to a police station after discharge from hospital.

The custody manager arranged for a telephone call with the Aboriginal Legal Service (NSW/ACT) Ltd (ALS) to give him legal advice about being interviewed by police. The ALS advised the young person about his right to silence. The young person said that he wanted to exercise his right to silence. The ALS lawyer informed the custody manager of these instructions in a conversation and in an email. Despite this, the young person was interviewed by two NSW Police officers later that morning.

Complaints

A complaint about the young person's treatment was made by his lawyer. Later, the NSW Director of Public Prosecutions (DPP) also made a complaint to the Commission. The DPP's complaint highlighted a number of cases where NSW Police officers had interviewed vulnerable people, even after those people had said, following legal advice, that they did not want to be interviewed.

Issues

The Commission's investigation explored a number of issues, including:

- Was the young person's arrest lawful?
- Was excessive force used during that arrest?
- Why was BWV not used on the night of the arrest?
- Should the young person have remained handcuffed?
- Was the police interview of a young person after they had received legal advice and declined an interview unique to this case, or was it a systemic issue?
- What were the arrangements for the custody manager to record a vulnerable person's wishes about being interviewed, and tell interviewing police what the person had decided?

The evidence

The Commission took evidence in public and private examinations, beginning in February 2023. All of the officers involved, the young person and the NSW Commissioner of Police were legally represented and made submissions to the Commission.

The Commission heard from the police officers who were part of the arrest on 11 September 2022. It also heard from senior police within that Command. The young person gave evidence about what had occurred and the Commission also received the account of a member of the community who was an eye witness to the arrest. The Commission also heard from 2 Assistant Commissioners who gave evidence about the use of BWV and police interviewing and custody management practices. Police who were involved in delivering training also gave evidence. Finally, the Commission heard evidence from solicitors from Legal Aid NSW and the ALS and received submissions from these agencies and the Justice Advocacy Service. This evidence and submissions addressed systemic issues which saw the rights of vulnerable persons in custody being compromised in various respects by police officers.

Findings

The Commission found that the young person's arrest was lawful and that the force used was not excessive. The young person was not punched but sustained injuries when he hit his head on the gravel while being tackled by the police. The Commission was critical

of the non-use of BWV by police officers, as this could have avoided the need for the investigation of this issue.

The Commission found that the officers should have considered removing the handcuffs, once the young person's identity had been established and the situation contained. The officers should have considered diversionary options under the *Young Offenders Act 1997*. Arrest for a young person should have been the last resort.

The Commission noted that the custody manager did not seem to be aware of some of her legal obligations, and nor were the two officers who interviewed the young person. However, the Commission concluded that the NSW Police Force had not provided sufficient guidance to these officers and that responsibility for these failures lay with the NSW Police Force and not the individual officers.

Systemic issues

The Commission found that there was a systemic problem of police officers interviewing vulnerable people (including Aboriginal people and young people) after they had received legal advice and said that they did not wish to be interviewed.

In 2004 and 2005, the then Commissioner of Police had approved directions that if a young person exercised their right to silence, the investigating officer and the custody manager should record that the young person had declined an interview and the person should not be interviewed.

These protocols seem to have been forgotten by the NSW Police Force. The Commission found that the current NSW Police practice was to ask the vulnerable person to confirm that they had declined an interview in an electronically recorded interview. Too often, this request turned into an interview despite the person invoking their right to silence.

There were systemic problems with custody managers not recording a person's decision to decline an interview, support persons not being told that a suspect had declined to be interviewed on legal advice, investigating officers not being told that vulnerable people had declined an interview and investigating officers proceeding to interview the person regardless.

Some investigating officers also discussed bail with young persons in a way that suggested that participating in an interview would lead to a grant of police bail.

These practices continued despite numerous court judgments over several years concluding that they were improper. The Commission found that the NSW Police Force do not have an effective mechanism for identifying court decisions that criticise police practices or for changing those practices as a result. This has contributed to ongoing systemic problems.

Despite undertaking to review the situation urgently in April 2023, no relevant action has been taken by the NSW Police Force.

Recommendations

The Commission made 19 recommendations, including that:

- The Standard Operating Procedures (SOPs) for BWV should also apply to plain clothes officers.
- Police should urgently advise custody managers to make a record in the custody management record when a young person declines to be interviewed either directly or through the lawyer. A young person should not be asked to confirm this decision in an interview. If the young person says that they have changed their mind about the interview, they should be offered further legal advice before any interview proceeds.
- The custody management SOPS should be amended so that only custody managers, and not investigating officers, can discuss bail with a suspect in custody.
- The NSW Police Force should urgently develop a system so that Court decisions concerning policing are brought promptly to the attention of the Executive of the NSW Police Force to ensure appropriate steps are taken to assist operational police and for training purposes.
- Training for custody managers should be improved, and should cover the rights of suspects in custody to refuse an interview.
- Documents provided to support people for suspects in custody should be rewritten using plain English.
- The *Law Enforcement (Powers and Responsibilities) Regulation 2016* (LEPRA Regulation) should be amended so that the responsibilities of a custody manager are clear.

Table of Contents

Recommendations

Recommendation 1 – The NSW Police Force is to urgently advise all police officers that the procedures agreed to by the Commissioner of Police in the Protocol established in 2004 between Legal Aid NSW and the Commissioner of Police continue to operate (taking into account the current but effectively identical statutory scheme) pending any considered response of the NSW Police Force to recommendations made in this Report concerning the questioning of young persons. The practical effect of this recommendation is that custody managers should record in the custody management record 'Interview declined' where the young person declines to be interviewed either directly or through the lawyer communicating their client's instructions to that effect.

Recommendation 2 – The NSW Police Force is to urgently advise all police that the procedures laid down in the 2005 Circular continue to operate (taking into account the current but effectively identical statutory scheme) pending any considered response of the NSW Police Force to recommendations made in this Report concerning the questioning of young persons. The practical effect of this recommendation is that a young person who declines to be interviewed either directly, or through their lawyer communicating on their behalf, is not to be asked to confirm this electronically. Should a young person indicate that they have changed their mind about being interviewed, police should arrange for the young person to speak to a solicitor again. The young person should be directed to the ALS or Legal Aid NSW telephone advice system by which the young person received their original advice. Police should only interview the young person after they have received further advice and confirmed that they wish to be interviewed.

Recommendation 3 – Any parts of the NSW Police Force Handbook concerning the questioning of witnesses which is or are inconsistent with the 2005 Circular concerning the questioning of young persons should be deleted. In particular, that part of the NSW Police Handbook under the heading 'Questioning Suspects' has no application to the questioning of children and young persons.

Recommendation 4 – The Standard Operating Procedures regarding charge room and custody management of the NSW Police Force should be amended to include the procedures adopted by the Commissioner of Police in the 2004 Protocol and 2005 Circular concerning telephone legal advice being given to young persons, by Legal Aid NSW, the ALS or otherwise, with appropriate modifications being made to refer to

contemporary legislative provisions in place of the equivalent provisions which operated at that time.

Recommendation 5 – If, in what ought be exceptional circumstances, police do proceed to interview a person suspected of criminal offences after the person has received legal advice and has indicated he or she does not wish to be interviewed, a statement should be included in the police facts explaining how this came about including whether an opportunity had been provided to the suspect to receive further legal advice before proceeding with an interview.

Recommendation 6 – The BWV Standard Operating Procedures should be amended to make clear that they apply to police conducting operational duties in plain clothes.

Recommendation 7 – The BWV Standard Operating Procedures of the NSW Police Force should be amended to provide that where a suspect has informed investigating police (through a lawyer or otherwise) that the suspect does not wish to be interviewed by police, the police should not proceed to informally interview the suspect including the use of BWV to record such a conversation.

Recommendation 8 – People suspected of criminal offences should not be interviewed by informal means, such as when they are in a dock area of a police station, unless there are strong reasons to do so.

Recommendation 9 – The NSW Police Force should make express provision in the NSW Police Force Handbook and relevant Standard Operating Procedures that only the custody manager, and not investigating police, should discuss bail with a suspect in custody. Investigating police should not indicate that a person will be more likely to be given bail if the person takes part in a recorded interview with police.

Recommendation 10 – A system should be set up as a matter of urgency within the NSW Police Force to enable decisions of Courts in areas concerning policing to be brought promptly to the attention of the Executive of the NSW Police Force and all operational police officers.

Recommendation 11 – The NSW Police Force should take urgent action to implement a system to enable Police Prosecutors to advise the NSW Police Force Executive about recurring or systemic issues in prosecutions so that the Police Executive may take timely and effective action to assist police officers for operational and training purposes.

Recommendation 12 – Amendments should be made to NSW Police Force training and ongoing education materials with respect to use of force to include specific content and guidance concerning the handcuffing of persons, and in particular children and young persons, with the need for ongoing assessment as to whether it is appropriate to leave the person handcuffed after the arrest.

Recommendation 13 – Police should be made aware that they have a power to postpone the making of a *Young Offenders Act 1997* determination for up to 14 days pursuant to s 9(2B) of the Act. Police should be made aware that this power is still available after arrest. This information should be included in any relevant Standard Operating Procedures and Police Guideline relating to the custody management of children and diversion under the *Young Offenders Act 1997*.

Recommendation 14 – Specific training should be provided by the NSW Police Force to custody managers:

(a) about their role in relation to people who have been arrested

(b) that arrests which result in injury and/or which could be understood as indicating excessive use of force should be noted in the custody management records

(c) that they must speak to investigating police before any interview takes place with the person in custody

(d) that any refusal by a person to be interviewed (whether communicated directly or through a lawyer) must be clearly communicated to investigating police

(e) that any refusal to be interviewed must be recorded in custody management records

(f) that if a person changes their mind in relation to being interviewed, the custody manager should allow the person to receive further legal advice before any interview goes ahead

(g) that the custody manager has a legal responsibility to take steps to protect vulnerable persons in custody with training to address expressly the need to guard against any police practice of proceeding to interview children and

other vulnerable persons following refusal to participate in an interview on legal advice (whether communicated directly or through a person's lawyer)

(h) by way of cultural competency training in relation to cross cultural communication styles, training about the risk of unreliability of admissions by children and other vulnerable people in police custody and disability awareness training.

Recommendation 15 – Urgent steps should be taken by the Attorney General and the Commissioner of Police to revise the documents under Part 9 of LEPRA to ensure they are written in plain English and in a form which will permit fair and effective implementation of the protective procedures and practices under LEPRA and the LEPRA Regulation.

Recommendation 16 - The Commission recommends to the Attorney General that clause 29 of the LEPRA Regulation be amended so as to provide:

29(3) If a detained person or protected suspect in police custody who is a vulnerable person

(a) has declined to participate in an interview following legal advice, and

(b) purportedly changes their mind about participating in an interview during the same period of detention,

the custody manager for that person must notify the legal representative who provided the advice and allow the person in custody to confirm their legal advice and their position prior to any interview taking place.

Recommendation 17 - The Commission recommends to the Attorney General that clause 29 of the LEPRA Regulation should be amended to include a provision to the following effect:

If there has been a purported change of mind by a vulnerable person in relation to participating in an interview, and the person has been allowed the opportunity to obtain further legal advice prior to any interview taking place (whether or not an interview does subsequently take place) this must be stated in the police facts.

Recommendation 18 – The Commission recommends that the NSW Police Force have regard to the 'Use of Force Overview' of the New Zealand Police in expanding its Use of Force Manual to provide more detailed guidance concerning possible use of force on vulnerable persons.

Recommendation 19 – It is recommended that a review of NSW Police Force policies and procedures be undertaken to emphasise the need for police officers to obtain prompt medical attention for people who have sustained injuries following the use of force by police officers.

1. Introduction

A community in distress

1.1. The events considered in this report occurred in September 2022 at a location in Northern NSW which had been ravaged by severe and extraordinary floods in February – March 2022. These natural disasters, coming on top of the continuing COVID-19 pandemic, placed communities under great stress and had adverse effects upon police officers and the broader community. There was dislocation of homes and businesses and impacts upon policing including temporary relocation of police stations.

1.2. There was an increase in some types of crime involving juvenile offenders and with members of the local elderly community being victimised. Public calls were made for a police response.

1.3. The police took action on the evening of 11 September 2022. Their actions led to the arrest and charging of a 14 year old boy (who will be referred to as "YPM1"). The arrest and detention of that youth, and steps taken by the police concerning his interviewing, have raised important factual and legal questions. These include systemic issues, with respect to the arrest, detention and interviewing of young persons and the practices and standards applied by the New South Wales Police Force (NSWPF) in that context.

1.4. These issues will be examined in this Report. The Commission recommends reform in a number of areas to improve policing practices where young persons are engaged in the criminal justice system.

2. The Commission's Statutory Functions

2.1. The relevant provisions of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act) are set out in Appendix 1 to this Report.

2.2. The Commission does not sit as a criminal or civil court. It does not determine the rights of any person. However, the Commission may make findings which are adverse to persons and their reputation. The standard of proof to be applied by the Commission in making findings of fact is the civil standard of proof, proof on the balance of probabilities, being qualified having regard to the gravity of the

questions to be determined. The test is whether the facts have been proved to the reasonable satisfaction of the Commission.[1]

2.3. An important function for the Commission is to determine whether any police officer has engaged in 'serious misconduct' as defined in s 10 LECC Act. In addition, the Commission may make findings, express opinions or make recommendations under s 133 LECC Act.

3. The Commission's Investigation

3.1. As a result of a complaint made to the Commission concerning the apprehension and arrest of YPM1 at a location in Northern NSW on 11 September 2022 the Commission determined to investigate an allegation that excessive force was used by a member or members of the NSWPF in that event together with other issues arising from the detention of that young person in custody following his arrest.

Decisions concerning public and private examinations

3.2. On 14 December 2022, the Commission held a public directions hearing at which applications for leave to appear were made and submissions were made on procedural issues. This principally considered the question of whether evidence should be given by witnesses at public or private examinations as part of the Commission's investigation. Written and oral submissions were made on behalf of those granted leave to appear and be represented before the Commission in Operation Mantus.

3.3. The Commission decided that it was appropriate to give a written decision on when public and private examinations would be used in this investigation. On 3 March 2023, the Commission published a decision concerning the use of public and private examinations in aid of the investigation (referred to as the Public Decision and contained in Appendix 2 to this Report). On the same day, the Commission issued a confidential decision concerning the use of public and private examinations in aid of the investigation and this decision was

[1] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; [1938] HCA 34; *Rejfek v McElroy* (1965) 112 CLR 517 at 521; [1965] HCA 46; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171-172; [1992] HCA 66.

subsequently made public in an amended form on 3 April 2023 (referred to as the Confidential Decision and contained in Appendix 3 to this Report).

3.4. Applying the principles set out in these decisions, the Commission decided to begin by holding private examinations of witnesses on issues of fact. The Commission decided that public examinations would be used for other aspects of the investigation and, in particular, on a number of systemic issues. These included the use of BWV by police officers, custody management and the role of custody managers and the interviewing of suspects (in particular vulnerable young persons) who have received legal advice concerning proposed questioning by police.

Use of pseudonyms in the Report

3.5. The Commission has determined that pseudonyms be used in this Report for persons who have given evidence at private examinations (unless varied by further order of the Commission). The real names of persons will be used for witnesses who gave evidence in public examinations. In adopting this approach, the Commission had regard to matters contained in the Public and Confidential Decisions as well as the Guidelines on the use of pseudonyms and non-publication orders in Commission reports published by the Commission in November 2023.

Private examinations on factual issues

3.6. On 9 February 2023, private examinations took place to take evidence from:

- a Senior Constable (referred to as Officer MTS1)
- a Sergeant (referred to as Officer MTS2).

3.7. The following officers gave evidence at private examinations on 10 February 2023:

- a Senior Constable (referred to as Officer MTS3)
- a Senior Constable (referred to as Officer MTS5).

3.8. As foreshadowed in paragraph 79 of the Public Decision, the transcripts of each of the witnesses who gave evidence at private examinations on 9 and 10 February 2023 were then provided to the legal representatives for each person who had been granted leave to appear for the purpose of the investigation. The

Commission said that it would conduct further private examinations at which all legal representatives would be present. This would allow for examination and cross examination of those witnesses and facilitate the identification of evidence on systemic issues which may be suitable for public examination.

Further private examinations at which all legal representatives were present

3.9. Between 13 and 17 March 2023, the following persons gave evidence in private examinations at which all legal representatives were present and had an opportunity to cross examine each witness:

- a Superintendent (referred to as Officer MTS6)
- a Detective Inspector (referred to as Officer MTS7)
- YPM1
- Officer MTS1
- Jonathan Whitting, Solicitor, ALS
- a Senior Constable (referred to as Officer MTS8)
- a Senior Constable (referred to as Officer MTS9)
- a Senior Constable (referred to as Officer MTS10)
- concurrent evidence from James Clifford, Solicitor ALS, Alex Burkitt, Solicitor, ALS and Ronald Frankham, Solicitor and Manager of Childrens Legal Service, Legal Aid NSW.

The investigation in April 2023

3.10. At the next public hearing, on 3 April 2023, Mr Lester Fernandez, Counsel Assisting the Commission, gave a detailed summary of the investigation including a summary of evidence given at private examinations.[2] There were limited areas of factual dispute. The summary of Counsel Assisting represents the findings of the Commission on the factual matters which are not in dispute. Mr Fernandez said:[3]

> The investigation relates to an incident which occurred in September 2022 in northern New South Wales. The incident involved a young person, known as [YPM1], who was 14 years old at the time. He sustained injuries during the course of being apprehended by a police officer known as

[2] T9-37, 3 April 2023.
[3] T9-10, 3 April 2023.

[MTS1]. [YPM1] was treated by ambulance close to the scene and then taken to hospital, where he stayed overnight.

The apprehension took place at night. [YPM1] was with other young people. Police were conducting proactive policing activities, and they were in plain clothes. None of the police involved wore body-worn video.

[YPM1] says he was chased by the apprehending officer and another officer, [MTS2].

Officer [MTS1], the apprehending officer, agrees he tackled [YPM1] in order to arrest him. [YPM1] says after being apprehended by [MTS1], he was thrown on the ground and punched by [MTS1].

I should correct an error I made: [YPM1] was not chased by [MTS2].

[YPM1] says that he was later punched by another officer, [MTS2]. Officers [MTS1] and [MTS2] deny any punching.

Because of injuries noted by ambulance officers at the scene, [YPM1] was taken to hospital and was treated. He was under arrest.

The catastrophic floods in 2022 and their adverse social impact

3.11. Counsel Assisting summarised the evidence concerning the catastrophic floods in 2022 and their impact on local communities as well as describing the relevant police district and events leading up to the evening of 11 September 2022:[4]

> Officers MTS6 and MTS7, both senior officers in the relevant police district, described the background as follows: the district covers a very large geographical area and there are a large number of police officers and administrative staff. There are also youth engagement officers or youth officers and Aboriginal community liaison officers working within the police district. There are a number of discrete Aboriginal communities, as well as larger Aboriginal communities within some of the bigger locations in the district.

[4] T11-13, 3 April 2023.

Northern New South Wales suffered an extraordinary period of flooding in February and March 2022. Approximately 60 per cent of houses were uninhabitable. 8,000 people were without a home immediately after the floods. More than 15,500 people were in evacuation centres across the region. They went into temporary accommodation in motels, caravans and Winnebagos. Police provided caravans and on-site caravan programs across the district.

Police had to bring in demountables for temporary housing. A lot of people in the community who did not own their own homes were moved into what was called pod villages. Support services were stretched to the limit.

In the first week after the floods, some towns were completely cut off by floodwater. Police had to use helicopters to fly in food and medicine.

An Aboriginal youth strategy was under way by police before the floods. Police had convened the first meeting a week before the floods, and were due to have a second meeting on the day of the first flood.

3.12. Counsel Assisting referred to the dislocation caused by the floods and its impact on crime including the need for a police response:[5]

> The floods fractured communities as well because a lot of petty theft or looting occurred. This had not been a major problem before the floods. In particular, property crime, break and enters, aggravated break and enters, stolen cars, steal from persons or steal from dwellings were taking place. They increased quite dramatically after the floods. Police stations in smaller communities were closed by the floods, so there was a significantly reduced local police presence.
>
> Police wanted to stop the offending, protect the victims and make the community safe. A high visibility police approach was adopted, with a number of extra police patrolling at various times of the day and night. Police also engaged with the community to show there was a presence.

[5] T12-13, 3 April 2023.

> Police also undertook a proactive policing approach in August and September of 2022. One part of this was a plain clothes police operation put together to investigate the offences and to identify and prosecute offenders. This strike force included a covert, plain clothes operation to identify offenders. Police were expected, if they detected something, to act. This would not necessarily involve arrest. The action required would depend on a variety of circumstances.
>
> Body-worn video and how it was to be used was discussed by police in the lead-up to the night in question. This discussion included opportunities in relation to compliance checks, capturing young people police were doing bail checks on, and making comparisons to CCTV footage that police had previously reviewed or may capture in the future, so there were opportunities for investigation as well as checking on compliance.
>
> Although body-worn video had been discussed as part of the planning for the strike force and, in fact, was carried by one officer on the night of the incident, it was not used. [YPM1] says after being apprehended, he was thrown on the ground and punched. Officers [MTS1] and [MTS2] deny any punching. The dispute in the evidence will not be assisted by electronic evidence, as none of the police present on the night wore body-worn video.

3.13. Counsel Assisting then summarised relevant parts of the evidence of the police officers and YPM1, together with other evidence including the transcript of the police VKG calls for Ambulance assistance to attend the scene to assist the young person YPM1.[6] Counsel Assisting referred to evidence of observations and treatment of YPM1 at the hospital:[7]

> [YPM1] was taken to hospital. He was treated for ongoing pain to his temples or the sides of his skull, and had multiple grazes on his face. The discharge summary noted a "head injury with concerning mechanism of injury". The injuries noted were "Small subgaleal haematoma" – that is, bleeding between the skull and the skin on the scalp. The head wound was cleaned. The discharge summary notes that there were no lacerations

[6] T26, 3 April 2023.
[7] T26, 3 April 2023.

or cuts seen at the time of discharge. [YPM1] was then taken to a police station.

Legal advice to YPM1 and the actions of police after advice was given

3.14. Mr Fernandez referred to evidence given concerning the actions of the Custody Manager and the provision of legal advice to YPM1 by Mr Whitting, a solicitor from the ALS:[8]

> When [YPM1] arrived at the police station soon after 6am the custody manager was Officer [MTS8]. A custody manager is a police officer who has specific responsibilities for people in custody, including ensuring the person's rights are protected. Officer [MTS8] had responsibility for [YPM1]. Officer [MTS8]] tried to arrange for a support person to go to the police station to stay with [YPM1] while he was in custody. Officer [MTS8] tried unsuccessfully over a number of hours to arrange this.
>
> During [YPM1]'s time in custody, Officer [MTS8] arranged for [YPM1] to have a telephone call with the Aboriginal Legal Service to advise him of his legal rights and give him legal advice about being interviewed by police. The Aboriginal Legal Service runs a telephone legal advice service which operates 24 hours a day, seven days a week. It enables Aboriginal people in custody to speak to a solicitor.
>
> [YPM1] spoke to the solicitor on call at the time, Mr Jonathan Whitting, who recorded the following:
>
> He gave [YPM1] advice about the right to silence.
> He told [YPM1] that he did not have to, and should not, go into an interview room.
> He told [YPM1] not to discuss the allegation with a support person.
>
> He gave [YPM1] advice not to do a recorded interview.
>
> He gave [YPM1] advice not to give a written or notebook statement to police.

[8] T26- 27, 3 April 2023.

> [YPM1] told Mr Whitting he wished to exercise the right to silence, and his solicitor could disclose his instructions to the police.
>
> Mr Whitting confirmed [YPM1]'s instructions that:
>
> There would be no electronically recorded interview or statement;
>
> [YPM1] was not to be taken into an interview room;
>
> [YPM1]'s instructions were to be recorded in the custody management records;
>
> Mr Whitting would send an email to police.

Police conduct ERISP with YPM1 despite his instructions not to be interviewed

3.15. Counsel Assisting then referred to extracts from the evidence of Mr Whitting before noting that a support person (STM4) came to the police station and stayed with YPM1 while he was in custody. Mr Fernandez summarized the evidence concerning investigating police officers who interacted with YPM1 at the police station that morning:[9]

> During the morning, two investigating police officers, [MTS9] and [MTS10], spoke to [MTS8], the custody manager, [YPM1] and [STM4], the support person. They arranged for [YPM1] to be interviewed in an interview room on camera with [STM4] present. The evidence is unclear about what [MTS8] told [MTS9] and [MTS10] about whether [YPM1] wanted to be interviewed, and whether [MTS9] and [MTS10] even asked about this.
>
> In a statement made to the Commission, the support person, [STM4], said he went to the police station to act as a support person for [YPM1] while he was in custody. [STM4] was not told by the custody manager or by investigating police [YPM1] had been given legal advice. [STM4] was present when investigating police spoke to [YPM1] about being interviewed. [YPM1] agreed to being interviewed.

[9] T29-30, 3 April 2023.

Early in the interview, [YPM1] was asked the following questions and gave the following answers:

Q. Um, so do you agree to be interviewed on this machine by video?

A. No.

Q. You don't want to be interviewed?

A. What?

Q. Do you agree, are you happy to be interviewed on this machine?

A. Yeah.

The interview then went ahead. There was no further clarification of whether [YPM1] wanted to be interviewed. The interview was not paused to enable [YPM1] to get further legal advice.

During the interview, [YPM1] confirmed what happened when he was apprehended by [MTS1]. He said this to the police:

A. And one of 'em chased the other guys and one of 'em chased me. Then he bashed me, then yeah.

Q. And what happened after that?

A. That's all.

Q. And when they were chasing you what did you do?

A. Stopped.

Q. Mmhm.

A. And I slipped.

Q. You slipped?

A. Yeah.

Q. Yep. What happened when you slipped?

A. He started bashing me.

Q. Yep, so you slipped, did ya fall over.

Q. Yeah.

Q. Yep. Did you hurt yourself when you

fell over?

A. Nup.

Q. No? And then so they started bashing you?

A. Yeah.

Q. What happened there?

[YPM1] did not explain what happened when he was bashed. Neither [MTS9] or [MTS10] asked him again to explain what happened.

Neither officer made any report after the interview about [YPM1] saying he had been bashed by police.

Evidence from Aboriginal Legal Service and Legal Aid NSW solicitors concerning systemic issues surrounding the giving of telephone legal advice to young persons in custody

3.16. Counsel Assisting then referred to evidence from the solicitors from the ALS and Legal Aid NSW concerning the system for provision of legal advice to young persons in custody by those agencies and the experiences of those agencies with members of the NSW Police Force over a number of years:[10]

> Three witnesses gave evidence at the private examinations about systemic issues regarding young people being interviewed by police even when they refused to take part in an interview and police had been advised of this refusal. They were Ms Alex Burkitt and Mr James Clifford, solicitors from the Aboriginal Legal Service, and Mr Ron Frankham from the Children's Legal Service at Legal Aid NSW.

[10] T30-34, 3 April 2023.

Ms Burkitt was previously the manager of the CNS - Custody Notification Service - within the Aboriginal Legal Service between August 2019 and March 2020. She had taken approximately 2,900 telephone calls from Aboriginal people in custody.

Mr Clifford is managing solicitor for New South Wales and the ACT of the Children's Criminal Law practice at the Aboriginal Legal Service.
Mr Frankham is the manager of the Children's Legal Service within Legal Aid NSW.

The Children's Legal Service provides legal advice and representation to children, as well as a legal hotline for young people in custody, called the Legal Aid Youth Hotline.

Mr Frankham gave evidence about a protocol between the Commissioner of Police and Legal Aid NSW regarding children getting legal advice in custody. The protocol includes this section:

> If the young person exercises their right to silence, the investigating officer should record this in COPS event as "interview declined". The custody manager should also record in the general comments of the custody management record that the young person declined an interview.

Mr Frankham's experience was this protocol was inconsistently applied. There were many instances when it did happen, but also many when it did not.
Mr Frankham described examples of conversations with custody managers as follows:

> It can involve - I should say it can involve a conversation either with the custody manager or the officer in charge of the investigation. There are often, I guess, back and forth conversations where generally our solicitor will say, "The young person wishes to exercise their right to silence, they don't wish to participate in an interview, they don't wish to have their refusal to participate in an interview recorded either on ERISP or other tape."

> And that's where we sometimes fall into disagreement, where you'll get either a custody manager or an officer investigating the alleged offences saying they either want to record the refusal or they want to interview the young person, often we gets comments like, "in fairness to put the allegation to them", and comments like that, and we have an example as recently as last night.

Ms Burkitt gave this evidence:

> I have personally experienced some issues with this, with making these requests of custody managers or officers in charge of a matter through my work on the CNS. You are often met with resistance where some officers can be uncooperative. When asking for these instructions to be recorded in the [custody management records], comments are sometimes made like, "It's my custody management record. You can't tell me what to add to it", or, "No, I won't be doing that", when we ask for it to be recorded.
>
> We also have within our CNS form information that if those instructions are given, that we should pass on to the custody manager to call the ALS back if the instructions change. And so that mostly, in my experience, never happens, and it is only when you get to the court process that you realise that the instructions have subverted or the interview has taken place.

Ms Burkitt explained:

> It's at that point where there are some officers, be it the custody manager or an officer in charge, who will essentially disagree with that piece of information and say, "Well, I'm going to be offering them the opportunity to be interviewed out of fairness", or, "It's my own practice that I offer them the opportunity to be interviewed. I'm just going to take them into the interview room or film them for the purpose of refusal, put them on camera or ask them to sign a notebook statement as well."

> And that's when you do get into a conversation with the officers or an argument about the fact that you have been provided advice by the young person that they specifically do not wish to do that. This is something - they say - the opportunity for them to hear the allegations is another reason that I've heard, and these comments are so frequent that, in my own practice, or it is general practice at the ALS to teach junior solicitors how to deal with those comments on the CNS during their initiation, during that process.

Ms Burkitt also stated:

> In my experience on the CNS, I have had officers suggest that young people may get bail if they do an interview, and this is often said directly to me in a way where the young person in the station can hear it, or where I've heard it being said to the young person through the phone, "Oh, you know, we can't consider bail unless you do the interview. We don't know what happened. We want to hear your side of the story." And it's sort of used as a carrot for these young people where they think that they are not getting out of custody unless they comply with these requests.

The situation was so bad in one location in New South Wales that Mr Clifford wrote to its Superintendent. The Superintendent's reply included the following:

> There have been circumstances when young people are ultimately interviewed and based on our advice/practice, Police have conducted interviews appropriately. Ultimately the Court determines fairness of admissions at that time in a relevant forum.

Mr Frankham said:

> I've been told personally things to the effect of, "In fairness to the young person, I just want to put the allegation to them." I've been told things such as, "It's my standard practice to have the recording of a person's refusal to do an interview, whether that be in an ERISP room or on body-worn camera." And in addition to

personally, I've also been told by many staff that they have experienced similar situations.

Mr Frankham gave evidence about a police circular issued by NSW Police in 2005. Part of that circular states that police do not have the power to compel a suspect to participate in an interview.

Each of these three solicitors who gave evidence ran hearings where an ERISP was conducted despite a young person having expressed the desire to exercise their right to silence, and that desire having been conveyed in writing to a custody manager or officer in charge.

Role of the custody manager

3.17. Mr Fernandez referred to a further systemic issue concerning the role of the custody manager in police stations together with the use of force in arresting young persons:[11]

> As a result of the evidence given at the private examinations, a further systemic issue has been identified, which is the following relating to NSW Police custody managers:
>
> - Their training.
> - Their role, which is to protect people in custody and particularly vulnerable people.
> - Their understanding of their role.
> - Recording their interactions with people in custody, particularly vulnerable people.
> - Recording and conveying of the instructions of people in custody to investigating police.
>
> Another issue which has come about in this investigation is the degree of force used in [YPM1]'s arrest.

[11] T34-35, 3 April 2023.

Evidence to be given at April 2023 public examinations

3.18. Counsel Assisting then foreshadowed the evidence to be given in public examinations to take place that week:[12]

> The evidence in the coming week will focus primarily on systemic issues which have been identified. Legal Aid NSW and the Aboriginal Legal Service have made submissions in writing about the issue of young people in custody being interviewed even after legal advice has been given and they do not agree to being interviewed.
>
> Both organisations have highlighted that the majority of police and custody managers carry out their investigative role and custody management functions properly. However, the issue of young people in custody being interviewed even after legal advice has been given and they do not agree to being interviewed is one that frequently comes up.
>
> This frequency and consequent systemic nature of the problem is evident in a number of cases which have been before the Children's Court, District Court and Supreme Court, where admissions obtained by police from young people have been excluded. These cases continue to come before the courts.
>
> Concern about this issue has also been raised with the Law Enforcement Conduct Commission by the New South Wales Director of Public Prosecutions, Sally Dowling SC, in February 2023.
>
> At least two Assistant Commissioners of Police are expected to give evidence this week. They are Assistant Commissioner Cotter, giving evidence particularly about custody management; and Assistant Commissioner Crandell, relating to the use of body-worn video.
>
> They will be asked questions on a number of topics including:
>
> - Custody management;
> - Standard operating procedures relating to custody management; The role of the custody manager;

[12] T35-36, 3 April 2023.

- How the role is regulated;
- What happens when a person arrives at the station in police custody;
- Communications between the custody manager and investigating police;
- What communications and recording are undertaken if investigating police want to interview a person in custody;
- Direct contact between investigating police and the vulnerable person before, during and after legal advice has been given;
- Understanding of the obligations to contact a solicitor if a person in custody changes their decision regarding being interviewed;
- Support persons;
- Keeping of custody management records;
- How records are created and kept;
- What is to be recorded in custody management records;
- Allegations against police regarding use of force and other specific entries which should be made in custody management records;
- What is to be recorded about legal advice received and sought by people in custody;
- Recording of discussions with the person's solicitor;
- Interviewing vulnerable persons in custody;
- Refusals to be interviewed, why these are recorded and why they are necessary; and
- The use of body-worn video.

There will also be an examination of reasonable force used in arrest.

The following will also give evidence at the public examinations: Ms Keisha Hopgood, the acting principal legal officer of the Aboriginal Legal Service, and Mr Ron Frankham, the head of Legal Aid NSW Children's Legal Service.

They will give evidence of their experience and the experience of their legal services with police, particularly regarding speaking to police when young people are in custody and whether children should be interviewed or not.

Evidence concerning the approach of police to interviewing young persons who had provided instructions that they did not wish to be interviewed

3.19. Following this opening Counsel Assisting called Mr Frankham, the head of Legal Aid NSW Children's Legal Service, to give evidence at a public hearing.

3.20. It should be noted that, although Mr Frankham was examined by Counsel Assisting and the legal representatives for a number of affected persons, counsel for the Commissioner of Police did not seek to ask questions of Mr Frankham so that there was no challenge on behalf of the NSW Police Force to Mr Frankham's evidence.

3.21. On 4 April 2023, Assistant Commissioner Anthony Crandell gave evidence at a public hearing about the use of BWV by police officers.[13]

3.22. Assistant Commissioner Peter Cotter then gave evidence about a range of issues including the arrest and detention of young persons and the interviewing of young persons by police officers.[14] Assistant Commissioner Cotter recognised the need for prompt action to clarify the NSW Police Force's position and provide updated guidance to officers about the interviewing of young people who had received legal advice from the services operated by Legal Aid NSW and the ALS.[15]

3.23. Observations made at the public hearing emphasised the Commission's concern with respect to the approach by the NSW Police Force over a number of years

[13] T86-117, 4 April 2023.
[14] T118-182, 4 April 2023.
[15] T127-128, 4 April 2023.

with a significant contrast being apparent between the procedure accepted by then Commissioner Moroney in 2004 and the state of affairs revealed in the evidence from solicitors from the ALS and Legal Aid NSW concerning events in recent years.

3.24. Counsel for the Commissioner of Police acknowledged during the public hearing what appeared to be the degree of urgency with which the Commissioner of Police proposed to address these issues.[16] However, as will be seen, this matter did not progress with any degree of urgency during the balance of the investigation and the submissions phase, at least insofar as the provision of information to the Commission as to modification or amendment of the police approach.

3.25. On 5 April 2023, evidence was given at the public hearing by Keisha Hopgood (as her Honour then was), then the Acting Principal Legal Officer of the ALS.[17] Once again, although Ms Hopgood was examined and cross examined by Counsel Assisting and legal representatives for a number of interested persons, no questions were asked by Counsel for the Commissioner of Police.

3.26. The transcript of the concurrent evidence given by Mr Clifford, Ms Burkitt and Mr Frankham at the private examination on 17 March 2023 was also tendered as an exhibit in the public hearing. No application was made by the Commissioner of Police to cross examine those witnesses.[18]

3.27. The evidence given by solicitors from Legal Aid NSW and the ALS was not challenged at all by the Commissioner of Police. This aspect should be kept in mind when considering submissions later made on behalf of the Commissioner of Police with respect to these topics.

Evidence concerning training of custody managers

3.28. The public hearing continued on 6 April 2023 with evidence from Sergeant Stuart Edgell with respect to the role of custody managers, their training and practices.[19]

[16] T140-142, 181-182, 4 April 2023.
[17] T186-232, 5 April 2023.
[18] PT446, 17 March 2023.
[19] T238-273, 6 April 2023.

Resumed public hearing on 25 May 2023

3.29. The public hearing resumed on 25 May 2023 with Counsel Assisting summarising what had occurred at the public examinations in April 2023 and then stating:[20]

> Since the time of the public hearings, the Commission has continued its investigation. Further information has been provided from NSW Police in relation to the use of body-worn video equipment.
>
> It was anticipated, as I indicated, that at this resumed public hearing, the Commission would hear evidence about the issue of interviewing children and what steps have been taken at a high level of NSW Police concerning that issue.
>
> By way of a letter to the Commission dated 19 [May] 2023, the Commission was advised that the NSW Police Force would not be making any witness available to this investigation to speak to that issue …
> The Commission has continued its investigation on that very issue and has spoken to a person by the name of Ms Judy Harper, who works for the Justice Advocacy Service, who has provided a submission particularly in relation to her service, which supports people with cognitive impairments and interviewing by police. At this resumed hearing, witnesses will be called to give evidence on the following issues: powers of arrest, alternatives to arrest; discontinuation of arrest; and use of force by police.
>
> Three witnesses will be called, and their evidence is going to be taken concurrently - that is, at the same time. Each is from the NSW Police Force and each is responsible for aspects of training of police. The witnesses who will be called today are: Senior Sergeant Leanne Weston, who is the coordinator of education and operational skills; Senior Sergeant Andrew Pocock, who is the coordinator of the Associate Degree in Policing Practice; and Senior Sergeant Phillip Clarke, who is the coordinator of learning, development and delivery.

[20] T281-283, 25 May 2023.

Discussion on 25 May 2023 with counsel for Commissioner of Police concerning the interviewing of young persons issue

3.30. Counsel Assisting tendered a number of documents including a letter dated 21 April 2023 from the Commission to the NSW Police Force,[21] and a letter dated 19 May 2023 from Andrew Reid, Acting General Counsel, with the NSW Police Force.[22] A discussion then ensued between the Chief Commissioner and Mr Coffey, Counsel for the Commissioner of Police, concerning this correspondence which commenced as follows:[23]

> [Chief Commissioner] Could I just raise with you some aspects of the letter from Mr Reid, Mr Coffey? I'm conscious that the line of correspondence, of which this was the latest, arose from some questions and answers of Assistant Commissioner Cotter at the April public hearing. I'm also conscious that there are ongoing issues to be considered with respect to the issue of interviewing of children.
>
> The particular topic that was raised with Mr Cotter, and was going to be the subject of prompt consideration at a senior level within the NSW Police Force, was whether, whilst there was consideration of the broader and varied topics relating to interviewing of children, there might be put back in place an arrangement that had been agreed to in a protocol between the then Commissioner of Police, Mr Moroney, and Legal Aid back in about 2005 and in a police circular that followed the next year, and that that may be the status quo pending any further reforms.
>
> Assistant Commissioner Cotter agreed in general terms that that could be a type of carve-out to allow some clear identification of the status quo pending further developments. Is that a fair summary of what happened at the public hearing?
>
> MR COFFEY: That's a fair summary, yes, Chief Commissioner.
>
> THE CHIEF COMMISSIONER: The concern that the Commission had was that the evidence from Legal Aid witnesses and ALS witnesses and their written submissions was of a range of events occurring on a regular basis,

[21] Exhibit MTS102.
[22] Exhibit MTS103.
[23] T284-285, 25 May 2023.

in different parts of the state, which, it was said, tended to compromise the right to silence of the clients in different ways. The idea of the proposal of restoring the 2005 arrangement as the status quo was to provide certainty for police throughout New South Wales, at least for the time being. Has anything been communicated to the members of the NSW Police Force throughout the state about this issue since the last public hearing?

MR COFFEY: Not in response to the way in which - no, the short answer is no.

THE CHIEF COMMISSIONER: So is the position, then, that the police in the field throughout the state - and that's both metropolitan, regional and rural - are effectively left in the same position as to what guidance they have or don't have on this topic?

MR COFFEY: Yes, Chief Commissioner.

3.31. The discussion between the Chief Commissioner and Counsel for the Commissioner of Police continued and concluded in the following way (emphasis added):[24]

THE CHIEF COMMISSIONER: Yes. Well, I'm conscious of a number of things. Firstly, the events in Operation Mantus occurred in September 2022. This issue has been raised with the Commission from a number of sources.

As you've noted, there was a complaint by the Director of Public Prosecutions of New South Wales, who was sufficiently concerned about this practice manifesting itself in a number of cases, reported and unreported, that the Director brought the matter to the attention of the Commission.

In addition, Legal Aid NSW and the Aboriginal Legal Service did, and there have been assembled a number of decisions, both reported and unreported, of courts - Supreme Court, District Court, Children's Court - and as the submissions of Legal Aid and the ALS said, they only find out

[24] T290-292, 25 May 2023.

that this has happened, sometimes, that someone is interviewed, despite the person having accepted advice that they didn't want to be interviewed, down the track. They may not always find out. So if the police force wishes to advance some pool of decisions that shed more light on all of this, then it's open to the Commissioner to do so. But what is said to be a systemic issue has been illustrated in the manner identified in the evidence.

The door is not closed, this inquiry is ongoing, but we are about to finish the evidence tomorrow and move into submissions. Does the Commissioner propose to provide anything more of an evidentiary type beyond what is in this letter or will it be effectively submissions?

MR COFFEY: At the present time that I stand before you I don't have those instructions, but during the anticipated break in a moment could I get some instructions?

THE CHIEF COMMISSIONER: Yes.

I should make it clear too that I'm conscious this is an ongoing process. We have not finished the evidence.

This was raised as an issue and the Commission has taken a significant proactive approach on this, partly because Assistant Commissioner Cotter seemed to accept the proposal. He, of course, was speaking for himself at the time.

MR COFFEY: Yes.

THE CHIEF COMMISSIONER: And the Commission has continued to correspond with you, or with the NSW Police Force, on the question.

The concern that exists is that conduct of this type or related to this seems to be not uncommon, ongoing, and we now have the submission of Ms Harper from the Justice Advocacy Service which raises some other aspects.

On one view of it, this aspect is a quite urgent one for the police force to consider identifying for the benefit of police officers a position to be

followed consistently throughout the state pending further consideration, so I am having this discussion with you partly just to bring to a head again where we were up to in April when we last had a discussion along these lines.

Is there anything further you wanted to say at the moment about this?

MR COFFEY: No, thank you, Chief Commissioner.

THE CHIEF COMMISSIONER: I'm grateful for your involvement in this matter and what your involvement was on the last occasion, but this is a matter of real significance to the administration of justice. It goes to the exercise of the right to silence by young persons, using the only practical scheme of getting legal advice, which is by telephone, and in circumstances where the young person is in the custody of the police and, therefore, it is very important for the police to have a clear understanding of what they should be doing and not doing in the circumstances. The Commission has ongoing concerns on this issue.

Having said that, the hearing is not over and there will be an opportunity for submissions.

I would invite you to make sure that those instructing you have access to both the transcript of this discussion and, in due course, the recording of it, which will be available on the Commission website. This is a matter of ongoing importance.

MR COFFEY: I'm grateful. Thank you, yes, Chief Commissioner.

THE CHIEF COMMISSIONER: Thank you, Mr Coffey, for your assistance.

3.32. As will be seen, Counsel for the Commissioner of Police returned to this topic on the following day.

Concurrent evidence on training issues

3.33. The Commission then proceeded to take evidence concurrently at a public hearing from Senior Sergeant Phillip Clarke, Senior Sergeant Leanne Weston

and Senior Sergeant Andrew Pocock, each of whom was involved in the training of police officers in various areas of policing.[25]

The interviewing of young persons issue is raised again

3.34. On 26 May 2023, Counsel for the Commissioner of Police informed the Commission of certain steps that were being taken concerning the interviewing of young persons which would be communicated to the Commission (emphasis added):[26]

> MR COFFEY: Thank you, Chief Commissioner. Senior police officers have met in relation to this matter. I had instructions to let you know this yesterday so I just want to be clear, it is not overnight as a result of the conversation that you and I had yesterday. The reason I didn't raise it was I needed to clarify some information about whether I was going to hand you a draft document. I unfortunately don't have that document.
> The short point is senior police have met, they have discussed this matter. There are a number of proposals that are to be advanced and presented to the Commissioner's executive team hopefully next week, if not the following week. One of the reasons for the delay might just be about the availability of some of the substantive executive, rather than just presenting it to acting executive members.
>
> That will then get corporate endorsement to be circulated amongst the organisation for feedback and consultation, and that takes into account the very important differences of metropolitan, say, the Sydney Police Centre, versus Blacktown, then versus, as you recognised yesterday, regional versus rural, and then to come back.
>
> It is anticipated that a draft of some proposals will then be provided to the Commission, not specifically in accordance with this timetable, hopefully even in advance of that, to provide some opportunity for the Commission to give some feedback because it is a very important matter and the Commissioner of Police - although it hasn't happened as fast as I think everyone in this room would like, it is an important topic and it is moving forward.

[25] T294-385, 25 May 2023.
[26] T387-390, 26 May 2023.

THE CHIEF COMMISSIONER: Thank you for that indication, Mr Coffey. As would have been clear from our discussion yesterday, and indeed earlier discussions in April when the evidence was being given, this is a matter of significance and currency.

Having heard the evidence from the lawyers in the field, from the ALS, from Legal Aid, and indeed the statement from Ms Harper that was received yesterday, the submission from Ms Harper, it struck the Commission as being something that called for some prompt consideration in the interests of everyone - in the interests of young persons who have been in police custody and who may be sought to be interviewed; the lawyers who give them advice using the telephone advice system, which is of great importance in this state as a practical way of assisting persons in custody; and the police, because the police, in the end, may end up doing things which become not just controversial, but possibly have adverse consequences for them and certainly for the police force as an institution, and thus, the concern of the Commission in this inquiry, which raises a wide range of issues, but this was one which lent itself to a suggestion for some prompt action.
So the Commission will appreciate being informed at the earliest opportunity when action along the lines that you have foreshadowed is taken.

When you say it might be a little quicker than the timetable, just for those who may not be aware of it, the timetable that will be made shortly is: counsel assisting's submissions by 23 June; submissions by all parties by 7 July; submissions in reply by counsel assisting by 14 July.
So just thinking of those dates, are you able to say approximately when you think there may be something that can be received by the Commission in documentary form about this?

MR COFFEY: I'm hoping that early next week the briefing will happen to the Commissioner's executive team and that the draft that is to be circulated amongst the organisation for consultation - that draft will be provided to the Commission for, if I could call it, some preliminary feedback, with a view that we still need to get internal feedback, but

starting to have more of a dialogue, open conversation, rather than just waiting until, for example, 7 July.

I am hoping that - it might be a moving feast – a number of different versions go back and forth and the Commission might also provide feedback.

THE CHIEF COMMISSIONER: Yes.

MR COFFEY: Whether you wish to make that restricted to what's in your timetable, or hopefully the parties can have a more open dialogue about that, I think that will be more fruitful.

THE CHIEF COMMISSIONER: I will shortly make the orders I think as sought, unless there's any controversy about them, but it will be on the basis that this is a separate stream.

MR COFFEY: Thank you.

THE CHIEF COMMISSIONER: This is an issue which is progressing, and if you would please ensure that the Commission is kept aware through counsel assisting, the solicitor assisting, and we will be very keen on seeing how it progresses and playing a part in that, as I am sure will, at some point, be Legal Aid NSW and the Aboriginal Legal Service who would want to know what is happening in this area, too.

MR COFFEY: Of course. I think that description, Chief Commissioner, of "separate stream" is very helpful. Yes, separate stream would be good, thank you.

THE CHIEF COMMISSIONER: Perhaps I will just ask, is there anything you want to say about that?

MR FERNANDEZ: No, Commissioner, thank you.
THE CHIEF COMMISSIONER: All right. The idea of a separate stream for this issue - it won't be forgotten, it will clearly be observed, but rather than picking dates that may be randomly selected now, we've heard what has been said by Mr Coffey and we can monitor the progress of that issue.

MR FERNANDEZ: Yes, we can, Chief Commissioner.

THE CHIEF COMMISSIONER: All right. Yes, thank you for that, Mr Coffey, and please thank those who have instructed you for that additional information which is very much in the public interest.

MR COFFEY: May it please.

3.35. Despite that indication given at the public hearing on 26 May 2023, the NSW Police Force did not provide the material that it had foreshadowed during the investigation or submission phase of Operation Mantus. However, one document was provided on 21 November 2023, which will be addressed later in this Report.

Private hearing on 26 May 2023

3.36. A private hearing took place on 26 May 2023 to receive the recorded interview taken by Commission Officers with STM3, a resident of the area where the arrest of YPM1 took place. STM3 witnessed the incident from the front of his residence in the relevant township and was able to provide an account of events to the Commission. STM3 indicated that he did not wish to give evidence because of health issues affecting him so his account of events was not given on oath or affirmation.

3.37. At the conclusion of hearings on 26 May 2023, the Commission fixed a timetable for written submissions in aid of the completion of the investigation and the preparation of a report to Parliament.

Provision of written submissions

3.38. Written submissions were furnished to the Commission with respect to Operation Mantus as follows:

(a) Confidential submissions of Counsel Assisting regarding findings of fact, received on 29 June 2023.

(b) Submissions of Counsel Assisting regarding systemic issues, received on 29 June 2023.

(c) Confidential submissions on behalf of the Commissioner of Police concerning findings of fact, received on 23 July 2023.

(d) Closing submissions on behalf of Commissioner of Police concerning systemic issues, received on 23 July 2023.

(e) Confidential submissions on behalf of YPM1 regarding findings of fact, received on 13 July 2023.

(f) Submissions from the Redfern Legal Centre (RLC) (acting for YPM1) on systemic issues, received on 13 July 2023.

(g) Submissions on behalf of Officer MTS1, received on 4 July 2023.

(h) Submissions on behalf of Officer MTS10, received on 13 July 2023.

(i) Submissions on behalf of Officer MTS9, received on 13 July 2023.

(j) Submissions on behalf of Officer MTS8, received on 17 July 2023.

(k) Submissions on behalf of the ALS (NSW/ACT) Ltd regarding systemic issues, received on 7 July 2023.

(l) Submissions on behalf of Legal Aid NSW on systemic issues received on 13 July 2023.

(m) Confidential submissions in reply of Counsel Assisting regarding findings of fact, received on 27 July 2023.

(n) Submissions in reply of Counsel Assisting regarding systemic issues, received on 27 July 2023.

(o) Submissions in reply on behalf of Officer MTS10, received on 3 August 2023.

(p) Confidential submissions in reply on behalf of the Commissioner of Police concerning findings of fact, received on 8 August 2023.

(q) Submissions in reply on behalf of the Commissioner of Police concerning systemic issues, received on 8 August 2023.

3.39. The written submissions addressed issues of fact and matters of police practice and procedure with respect to the range of systemic issues identified in the evidence. Areas of factual dispute were noted and addressed in the various

submissions exchanged over the submission phase of the investigation. Counsel Assisting proposed a number of recommendations concerning systemic issues and these recommendations were addressed in other submissions with further proposals being advanced for additional recommendations to be made by the Commission.

3.40. The procedure whereby written submissions were made by Counsel Assisting and other interested persons granted leave to appear in the investigation served the purpose of providing procedural fairness to those whose conduct may be the subject of potential adverse findings or criticisms in the Report of the Commission.

4. Factual Matters

4.1. The factual matters which arise for consideration occurred in and around the arrest of YPM1 on 11 September 2022 and his subsequent detention and interviewing at a police station.

4.2. There are limited areas of factual dispute and resolution of areas of controversy is not required with respect to every disputed event. There are, however, significant events which are in dispute and as to which submissions were made by the parties.

Setting the scene for events in September 2022

4.3. The relevant police district covers a large geographical area. In 2022, there were about 206 police officers and 20 administrative staff. There were youth engagement officers or youth officers and Aboriginal Community Liaison Officers working within the police district. There are a number of discrete Aboriginal communities, as well as larger communities within some of the bigger locations. An Aboriginal youth strategy was under way before the floods. Police had convened the first meeting a week before the floods, and were due to have a second meeting on the day of the first flood.

4.4. Northern New South Wales suffered an extraordinary period of flooding in February and March 2022. Approximately 60% of houses were uninhabitable. 8,000 people were without a home immediately after the floods. More than 15,500 people were in evacuation centres across the region. They went into

temporary accommodation in motels, caravans and Winnebagos. Police provided caravans and on-site caravan programs across the district. Some towns were completely cut off by floodwater. Police had to use helicopters to fly in food and medicine.

4.5. Twenty of the 206 police themselves lost their homes. An extra 1,500 police came into the district in the 6 months after the floods to help. The principal police station was also flooded, and facilities had to be moved to other locations.

4.6. The impact of flooding in the township where the arrest occurred (and surrounding suburbs) presented many challenges, such as displaced persons, challenges with accessing services, infrastructure issues, and changes in criminal behaviour. From February 2022 onwards, there were substantial increases in property crime offences and a shift in targeted victims. Break and enter offences increased by 78.8% and stolen cars increased by 23.1% between comparative timeframes in 2021 and 2022. This social disturbance in the township is evident from several confidential exhibits including property crime statistics and TikTok videos relating to offences in this period.

The police response to crime arising from social dislocation relating to the floods

4.7. Police undertook a proactive policing approach in August and September of 2022 (the operation). One part of the operation was a plain clothes police strategy put together to investigate offending and to identify and prosecute offenders. This Strike Force included a covert plain clothes operation in the township.

4.8. A number of emails were sent between police officers with respect to criminal activity in the township and the steps which the police proposed to take to respond.

4.9. In an email of 5 September 2022, a senior police officer said to police in the Command:[27]

> The behaviour of these crooks is escalating. If you need an example have a read of the below narrative from last Saturday night. Bear in mind that

[27] Exhibit MTS15C, T 34, 13 March 2023.

these victims have been targeted numerous times. Imagine if it was one of your relatives who suffered.

4.10. In an email of 9 September 2022, a police officer stated (original emphasis):[28]

> The persons suspected of committing these offences are all very young. As result there is limited photographic and forensic evidence on these young persons. However, some of these young persons are on are on [*sic*] Conditional Bail with a curfew. It is essential that we ensure we conduct bail compliance checks on these young persons every day! Please ensure when conducting bail checks or interacting with these young persons or any young person in [the township] that you have **activated and are using your BWV**. This will assist in both identifying the young persons and also capture what they are wearing at the time police speak with them. Make sure to link the BWV to the event. The capturing of evidence of these interactions may be the evidence we need to confirm the young person's identification to execute a search warrant and eventually successfully prosecute these offenders.

4.11. Another police officer sent an email on 14 September 2022 which stated (bold emphasis in original; further emphasis added):[29]

> Most importantly, if you identify an offender for an offence, deal with it immediately and charge them. There is no need to 'hold off' dealing with them until such time as we get them for further offences (unless there is a specific reason to do so which we can discuss). **Please just take some initiative and ownership and charge them**. *It is imperative there is a zero tolerance approach for all of these YP's.* If they have an implement on them during a search then that needs to be dealt with. *We really need to look at bail refusing them, particularly those that are on bail and continue to re-offend*. I will look at preparing a detailed set of antecedents for all the nominated targets in the event they are charged. *It is imperative the Court is fully aware of the circumstances of the offending and the risk the YP's pose to the community etc*.

[28] Exhibit MTS16C.
[29] Exhibit MTS59C.

4.12. It may be seen that arrest and court proceedings were anticipated outcomes of the operation. Officer MTS1 confirmed this:[30]

> Q. In briefings or emails, was there discussion about what that would actually lead to?
>
> A. Not that I recall, no.
>
> Q. Were you going there just to watch? To see what happened?
>
> A No, no, if something was — something — we detected something, like, we would have provided response of some sort, yes.
>
> Q. What was that response going to be?
>
> A. If a crime was being detected, an arrest would take place and — yeah.
>
> Q. You talk about covert. That means being in cars that are not identified as police cars?
>
> A. Yes.
>
> Q. What else was going to be in that duty belt that you had?
>
> A. My handcuffs, my firearm, spare magazine, ammunition, and I had my OC spray in my backpack.
>
> Q. All of which are relevant to the — I'm sorry, I'll start again. You had those items because of the possibility that you were going to be arresting young people?
>
> A. Yes.

4.13. The police officers divided up into pairs and went to different locations within the township.

4.14. At one point Officers MTS1 and MTS2 observed a group of young persons on foot in the street. Officer MTS2 described following the group and thinking they had

[30] T 15, 9 February 2023.

entered premises at a particular point. He and Officer MTS1 followed the group. Eventually, all 4 police officers came across the group of young persons. The group included YPM1. On seeing the men in the street (the plain clothed police officers) YPM1 and his companions commenced to run away. YPM1 said in evidence that he did not know they were police officers at that time. This was understandable as the men were dressed in casual clothes with no apparent signs of their status as police officers. At this point, Officer MTS1 chased YPM1. It was around 9:45-10pm on this Sunday evening.

Account of YPM1 concerning the arrest

4.15. In an interview with a Commission investigator conducted on 5 October 2022, YPM1 described what happened after he commenced to run away and was chased by a man who turned out to be a police officer:[31]

Investigator: Where abouts was his badge?

YPM1: In their pockets.

Investigator: In their pocket?

YPM1: Yep.

Investigator: Yep. Did they show you any of that as they were walking towards you?

YPM1: Huh?

Investigator: Did they show you

YPM1: No.

Investigator: Anything? Nup. And, so what, what made you guys run?

YPM1: Because he was walkin' and then, he started runnin' to us so we ran.

Investigator: Was that the guys from the garage end or the guys from behind you?

[31] Exhibit MTS17C at pages 11 – 15, 19 and 21.

YPM1: The guys with the garage, started runnin' to us.

Investigator: So the guys that were coming past

YPM1: Yeah.

Investigator: the garage, they were the ones that um, started to run towards you. And then so you guys felt that you were going, so what happened then, so you thought, you didn't know it was the cops?

YPM1: Nah.

Investigator: And you started running?

YPM1: Yeah.

Investigator: Right. So, tell me what happened then.

YPM1: Then he chased, one of the guys chased the other boys, the other three or four boys

Investigator: Yep.

YPM1: and one of em chased me, and I tried to go round the tree but I slipped and then that's when he bashed me.

Investigator: Alright so you tried to run around a tree?

YPM1: Yeah.

Investigator: Is, was that to escape him?

YPM1: Yep

Investigator: Yeah. And then you've tripped over you said?

YPM1: Yeah.

Investigator: Where abouts did you trip over?

YPM1: On the gravel.

Investigator: So there was gravel there?

YPM1: Yeah.

Investigator: Yeah. Was it loose?

YPM1: What?

Investigator: So was the, was the gravel loose, is that what caused you to slip?

YPM1: Yeah.

Investigator: Yep. And you were wearing, what were you wearing? Did you have sneakers on mate or?

YPM1: Um I was wearing converses.

Investigator: Converse sneakers? Yep. Um, and okay so tell me what happened then.

YPM1: Then I slipped on my back and just.

Investigator: So you, so you, when you slipped, you fell backwards?

YPM1: Yeah, and I looked at him and, and he got down and start bashin' me.

Investigator: Right. Did you, did you get back to your feet and keep running?

YPM1: No.

Investigator: No, so where you slipped over is where the police officer caught you?

YPM1: Yeah.

...

Investigator: No? And what else did he do?

YPM1: He bashed me.

Investigator: So, I understand but can yo-, you're gonna have to explain, when you say he bashed me

YPM1: Yeah.

YPM1's cousin: Before we come down, what did he do to you?

YPM1: Punched me.

Investigator: Yep, so are you on your back still or on your front?

YPM1: Front.

Investigator: You're now on your front?

YPM1: Yeah.

...

Investigator: And you're pointing up inside your hair line.

YPM1: Yeah.

Investigator: Yep, you felt pain there?

YPM1: Yeah.

Investigator: Yep. And can you tell me how, what caused that pain?

YPM1: When he lift me up.

Investigator: He lifted you?

YPM1: Yeah slammed me.

Investigator: And when you say slammed you, can you remember where he grabbed you?

YPM1: He just grabbed me by the shirt like on the back.

Investigator: On, so he grabbed you by your tee shirt?

YPM1: Yeah.

Investigator: Yep. And what'd he do?

YPM1: And that's when he slammed me.

Investigator: So he slammed you, so can you describe what you mean by slamming so he's picked you up by the shirt.

YPM1: Yeah, like that.

Investigator: So you've just grabbed both your hands held them up and then just, f-, he

YPM1: Yeah.

Investigator: Forcefully threw you into the ground. And this was your, your front was hitting the ground, is that right?

YPM1: Yeah.

Investigator: Okay. And what else did he do?

YPM1: That's when he put handcuffs, pulled me down.

...

Investigator: And there's loose gravel around there as you said and you said that you tried to run around the tree and that's where you slipped?

YPM1: Yeah.

Investigator: So um, what did he, and you said you didn't, he didn't say anything to you whilst he was doing this?

YPM1: Nah he just said, my name is Constable [MTS1], you're under arrest.

Investigator: Right. Did he s-, did he introduce himself.

YPM1: Yeah and he said [MTS1].

...

Investigator: he um, you said that he picked you up and slammed you into the ground.

YPM1: Yeah.

Investigator: How many, how many times did he do that?

YPM1: Only once.

Investigator: Yep and then he, you said that um, he hit you?

YPM1: Yeah.

Investigator: Yep. Do you, are you, did you happen to see which hand he used or?

YPM1: No.

Investigator: Did i-, did it feel like a closed fist or an open hand or?

YPM1: Closed fist.

Investigator: Felt like a closed fist, yep. And where, s-, do you know, how your head came into contact with the ground?

YPM1: Um, face like that (ui).

Investigator: Yep, so was it in the process of slamming you,

YPM1: Yeah.

Investigator: Or was it a result of being hit?

YPM1: Slammin' me.

Investigator: So the slam onto the ground is what caused the, your head to bleed?

YPM1: Yeah.

Investigator: Is that right? Yep. So then, you, how long were you on the ground for there? Do you think?

YPM1: Um. Minute, two.

Investigator: Yep. And then what'd he do then?

YPM1: Picked me up, and moved me.

4.16. During an interview with police on 12 September 2022, YPM1 said:[32]

Officer MTS9: And when they were chasing you what did you do?

YPM1: Stopped.

Officer MTS9: Mm hm.

YPM1: And I slipped.

Officer MTS9: You slipped?

YPM1: Yeah.

Officer MTS9: Yep. What happened when you slipped?

YPM1: He started bashing me.

4.17. In evidence at the private examination on 15 March 2023, YPM1 said:[33]

Q. What happened when you got towards this tree? You talked about being behind a tree. Did something happen behind the tree?

A. No. He just tackled me, started punching me and that.

Q. Before you got tackled, did you ever fall to the ground, or was the first time you –

A. Yeah.

Q. -- went to the ground when you got tackled?

A. I — what?

Q. So when you got tackled by this person, did you fall to the ground?

[32] Exhibit MT28C at pg 12.
[33] PT 135-140, 15 March 2023.

A. Fall to the ground.

Q. Did you fall on the ground when he tackled you?

A. Yeah.

Q. Before he tackled you, did you fall on the ground at all?

A. Nah.

Q. When this person tackled you, how did that happen? What did he do?

A. He just dived and hit me in the leg and then tripped.

Q. Were you facing towards him when he dived or were you facing –

A. No.

Q. -- in the other direction?

A. Facing the other direction.

Q. And before you tripped, what was it that you were doing?

A. Nothing.

Q. Were you running away at that time?

A. Nah. I couldn't.

Q. Why is that?

A. Because he had me on the ground.

Q. Before he had you on the ground, after diving at your leg and tripping you over, did you ever fall on the ground before that time or was that the first time you fell on the ground?

A. That's the first time.

Q. When you say he dived at your leg, did you see what it was that he did?

A. No.

Q. What happened when you fell on the ground?

A. Hit my head.

Q. Where did you hit your head?

A. On-huh?

Q. You hit your head. What did you hit your head on?

A. Gravel.

Q. After you hit your head, what was the next thing that happened?

A. Started punching me.

Q. When you say he started punching you, how many times did he punch you?

A. Four.

Q. Four times?

A. Yes.

Q. Which parts of your body did he punch you?

A. Just around my body.

Q. You just showed with your hand, you just motioned towards your chest — is it the left side of your chest?

A. Yeah.

Q. Did he punch you anywhere else?

A. Nah. He picked me up and slammed me to the ground.

Q. Was that before he punched you or after he punched you?

A. After.

Q. When he was punching you, did he say anything?

A. No. He just said, “You’re under arrest.”

Q. Was that before he was punching you, after he was punching you or while he was punching you?

A. After.

Q. So while he was punching you, did he say anything to you?

A. No.

Q. Did you say anything to him?

A. No.

Q. While he was punching you, did you know who he was?

A. No.

Q. After he punched you those four times, what happened next?

A. He walked me up to the street and one of the other officers punched me in the belly once.

Q. Now, you mentioned that the person who punched you four times picked you up and slammed you; is that right?

A. Yes.

Q. How did that happen? What did –

A. He picked me up from the back — picked me up from the back and then chucked me on to the ground.

Q. When you say he picked you up from the back, which part of your body did he touch, or your clothes?

A. Just at the back here (indicating).

Q. So you’ve just touched the back of your jumper. Did you have a hold of something when he picked you up?

A. Nah.

Q. How did he pick you up? What was it that he did?

A. He just grabbed me.

Q. How many hands did he grab you with?

A. Two.

Q. Were you facing towards him at that time, just before picked you up, or were you facing in another direction?

A. Facing the other direction.

Q. How do you know that he picked you up with two hands?

A. Because I could feel it.

Q. How far up did he pick you up off the ground? Were you able to tell?

A. Huh?

Q. How far up off the ground were you picked up? Were you able to tell?

A. Nah.

Q. When you say you were slammed on the ground, what was it that happened?

A. He just slammed me on to ground.

Q. How hard did you hit the ground?

A. Hard.

Q. Which part of your body hit the ground?

A. My head.

Q. Which part of your head, are you able to say, hit the ground?

A. About over here (indicating).

Q. You're just showing on the right-hand side of your head, just up at the top of your head; is that right?

A. Yeah.

Q. Did it hurt you when you hit the ground and hit that side of your head?

A. Yeah.

Q. And did anything happen to that side of your head after you hit the ground?

A. It was bleeding.

Q. Did you notice that side of your head was bleeding at any time before you hit the ground?

A. No.

Q. After your head had hit the ground, what was the next thing that happened?

A. He walked me up to the side of the road and one officer punched me in the belly once, and then my aunty pulled up.

Q. You mentioned that that person said, "You're under arrest", at some time. How long after you were slammed to the ground did that person say that you were under arrest?

A. Huh?

Q. Do you remember saying that that person who slammed you to the ground said to you, "You're under arrest"?

A. Yeah.

Q. You talked about being punched and then slammed to the ground. How long after you were slammed to the ground did that person tell you that you were under arrest?

A: Can't remember.

Q. Was that person, after you were slammed to the ground, was he holding you down on the ground in any way?

A. Yeah.

Q. How was he doing that?

A. He just had one leg on my legs and one hand on my back.

Q. Where was your face at the time he had his leg on your leg and a hand on your back?

A. On the grass.

Evidence of Officer MTS1 concerning the arrest of YPM1

4.18. Officer MTS1 said in evidence:[34]

Q. And what happened when you came across them?

A. They indicated that they had seen the group coming out of the backyard of the house on the corner there, which I think is number [xx].

Q. What was the reason you were following this group?

A. Initially, just to see what they were up to, where they were going, but then from that point, from the point that the guys said that they had seen them in the backyard as well, we were concerned that they had maybe done a break and enter or something had occurred.

Q. Was this at [address]?

A. Yes.

Q. At that point in time, you were thinking that it's possible they had done a break and enter; is that right?

[34] PT 31-36, 9 February 2023.

A. Possible, yes.

...

Q. How long, in distance, did you chase [YPM1] for?

A. Oh, it would have — it was no more than probably 30, 30 metres, I'd say.

Q. During that 30 metres, did you say anything?

A. As he initially ran and I started running, I said "Stop. It's the police."

Q. After running for about 30 metres, what happened?

A. So I was — I was sort of — we crossed the road. I followed him. We crossed the road and he — he sort of got to a tree and he slipped over. It felt like to me he went to turn around the tree and he slipped over, and that was the point that I was able to really gain on him and catch up to him at that point.

Q. Just describe what happened there?

A. As I said, it appeared to me he — there was a tree out the front of the house there, one of those — the council strip. It appeared to me he might have been trying to loop around that, and as he's done that, his feet slipped out from underneath him.

4.19. Officer MTS1 described YPM1 tripping over and then tackling him:[35]

Q: When you said he tripped over, can you describe what actually happened to him?

A. As I say, just like his feet sort of slipped out from under him. It just — as he turned, he slipped over. It wasn't — it wasn't a — he didn't trip on anything, I didn't see him trip on anything, it was just more of a slip.

...

[35] PT38-41, 9 February 2023.

Q. What did he do after getting up?

A. And then I — I had closed at that point and as he got up, he went to run again and I managed to grab hold of his jacket, or jumper, and he — I don't know whether it was just him running or him twisting, but it pulled through my hands. It was one of those waterproof sort of jackets, jumpers and it just — that pulled out through my hand and he kept running back sort of looping around the tree.

...

Q: Was there a point in time when you had another piece of contact with him?

A: Yes, as we — as he sort of got around the tree, I managed to get close enough and tackled him.

Q. When you say ''tackled'', what do you mean?

A. Just I just — shoulder into sort of his upper region and tackled him to the ground, like a rugby league tackle.

Q. Did you actually put both of your arms around his body in that tackle or was it like a shoulder charge?

A. No, no, it would have — I — yeah, it wasn't — certainly wasn't a shoulder charge; it was both arms around him.

Q. Why did you do that?

A. To apprehend him, to bring him — to stop him from running away and apprehend him.

...

Q. What happened when you tackled him?

A. We fell to the ground. He was under me and I was on top. Just in that position over the top. I managed to get his left arm out I think it was, and I had hold of that behind his back, and I said to him, "Mate, it's the police. Don't be silly, it's the police." And then he

was — originally he had his other hand tucked under his body, he wouldn't pull it out. I managed to get it out. I don't know if he just released it or I managed to get it out. I got it out and then cuffed him. He was on his stomach and I cuffed him.

4.20. Officer MTS1 rejected YPM1's allegations concerning the arrest:[36]

Q. The community was calling out for arrests, weren't they?

A. I believe so, from the email I received from [a senior officer] and that, yes.

Q. And there was [YPM1], or a young person — you found out his name was [YPM1] later —

A. Yeah.

Q. -- running away from you, correct?

A. Mmm-hmm, yes.

Q. To the point where you had to tackle him, however you did it, to get him to the ground?

A. Yes.

Q. Correct? When you got him to the ground, it was just you and he behind a tree. Do you agree?

A. I — well, we were next to a tree. Behind the tree — depends what side of the tree you're standing on.

Q. Was there anyone else around?

A. Not at that point in time that I believe, no.

Q. Any other lights?

A. No, no, not —

[36] PT38-41, 9 February 2023.

Q. No other members of the public around at the time?

A. Not at that point in time that — at that point the tackle was made, I don't believe so, no.

Q. You punched [YPM1] four times to his chest, didn't you?

A. No.

Q. You grabbed him by the back of his jumper and lifted him off his feet and threw him on to the ground, didn't you?

A. No.

Q. It must have been — he was very small, wasn't he, [YPM1]?

A. Yes.

Q. You were at least two times larger than him; would you agree with that?

A. Oh — I'm larger than him.

Q. Once you had [YPM1], you made clear to him that he had been — that you were there on behalf of the members of the community — do you agree with that — people whose houses had been broken into?

A. I made it clear to him?

Q. That's the life lesson you gave him, wasn't it?

A. Oh, I guess so, that's —

Q. As you walked [YPM1] back to where other police were, you came across [MTS2]; is that right?

A. I don't know if [MTS2] arrived just as I was picking [YPM1] up or whether we come across him but at some point [MTS2] joined us, yes.

Q. It was a ‘‘massive beat-up”?

A. No.

Q. Was that your view, as you were looking at [YPM1]?

A. No.

Q. It was a massive beat-up?

A. No.

Q. Over the course of time, and in fact on the night, was your view that [YPM1] was putting on an act?

A. Probably — oh, I think at first, but the more it went on, I – probably become more — more concerning.

Q. "At first"; what point in time are you referring to?

A. When he — we walked him up, he was there, he was fine, and then — and then he — we sat him down, and then, yeah, I think — I don't — I don't recall exactly, but — my concerns weren't there immediately, but as it flowed on, the time went on, then more family turned up, that — my concerns, yeah, certainly rose.

Q. Because you did see[YPM1] on the ground, you saw he was not in a good way—

A. Yep.

Q. -- is that correct?

A. Yep.

Q. The injury was, as you saw with [YPM1], him falling in and out of consciousness; is that fair enough?

A. Yeah.

Q. Did you see that?

A. Yeah.

Account of STM3 a nearby resident

4.21. In addition to the evidence of YPM1 and Officer MTS1, the account of a nearby resident, STM3, is also in evidence as part of the investigation. As noted earlier, STM3 did not give evidence at a public or private examination. However, he provided a detailed account in a statement to police and in a later recorded interview with Commission officers.

4.22. It is clear that STM3 was in a position to observe the interaction between the young person and the police officer at the time of the arrest so that his account is of considerable importance in the investigation.

4.23. In a statement dated 20 January 2023 to police (Exhibit MTS13C), STM3 described how he woke during the night of 11 September 2022 as a result of hearing yelling from across the road from his house. He continued in his statement:[37]

> I got up out of bed and went outside to the front gate. I saw about four or five people on the opposite side of my road. I watched the people run across the road toward the front of my house. There was a lot of yelling going on, but I could not make out the words being spoken. By this time my whole family was out the front of the house watching what was going on. The area at the front of my house is not directly lit by any street lighting only a sensor light affixed to my house. *There is a streetlight on each corner of the street.* At this time, I could not make out exactly what was going on, but it was clear that there were two young aboriginal boys running who were being chased by another two people.
>
> 6. They continued running toward the nature strip of my house when one of boys was tackled to the ground. I remember the person on the ground putting up a fight. They were kicking and screaming and trying to run away. The other boy was on the roadway calling out to the others. I cannot remember what he was saying but think someone had a hold of his arm. The two people stood up the two boys and I touched one of them on the arm and said, 'What's going on?' One of them replied 'It's okay mate, we are undercover.' They were wearing just normal clothes, but I immediately

[37] Exhibit MTS13C.

concluded that they were police. I am sure one of them showed me what was a police badge. They had removed the hood from the boys by this time … I saw he had long black, slightly curly hair. I could also see his face; it did not look like he was injured or anything, but the area was only lit by the sensor light on my house.

7. The police walked the two boys who were handcuffed up the road to the corner of [name of street] and [name of street], on the opposite side of the road from my house. I didn't understand why they did this at the time but there is a bright streetlight on that corner, so I assumed this was why. They stayed there for a decent time; I would estimate it was more than half an hour. Carloads of people started turning up and were yelling abuse at the police. Whilst I can't remember everything, they said I do recall them saying 'Let them go, you have already done enough damage' and 'they are only kids.' They also called out a few times 'we want Dean' which I assumed was referring to the police officer who works in the area.

4.24. STM3 gave further details to Commission investigators:[38]

Investigator: … um, where we came up, um, could you describe what you saw when you were at that point? Was the security light on at this stage or still off?

STM3: Yeah, it was, because um, they were up against, you've only gotta walk past the front um gate and that light,

Investigator: Pretty sensitive.

STM3: Yeah yeah yeah. Um, and by the time I got to the landing and started to run down the stairs, um, they were already, it was, I, I could see another guy across the road in their front yard, whether or not there was another kid with this other kid, um, but I think he got away, um, but I could see a guy tackling this other guy on the, in the kerb and guttering.

Investigator: Yep.

[38] Exhibit MTS106C and MTS107C, at 21-22, 25, 28, 30, 32, 34, 37, 38-41.

STM3 In front of my place.

Investigator: And you said that,

STM3: And they scuffled up against the fence and then back and sort of,

Investigator: I was gonna say, can you take me through that,

STM3: Yeah.

Investigator: interaction, so, from, you know you say, you said that you saw the tackle?

STM3: Yeah.

Investigator: Can you describe everything from that point for me?

STM3: It was just desperation, just trying to, obviously they're pretty nimble these young kids um, and he was just trying to, in the dark too, trying to apprehend him, and um, it was like a game of touch footy when the kid sidesteps and he's trying to get away, and um,and, at one stage I think they were up against my fence, and they've, he, actually got him, apprehended him in the kerb and guttering and um handcuffed him um, can't remember if he handcuffed him in the back or the front, I didn't take any notice of all that stuff, but um but he was definitely sitting under my tree.

Investigator: Mm.

STM3: When they got their breath back together um they marched him down the street um, sat him under the light down there, an' waited for ah, um, first respondents.

Investigator: And when you say your tree, um, directly out the front of,

STM3: Yeah.

Investigator: Your property there's a,

STM3: Yeah.

Investigator: Tree there isn't there?

STM3: Yep, yep, well it happened, it hap-, that's where it happened, right between that tree and my fence, yeah.

Investigator: And, um, you described or used the term 'like a rugby tackle', is that how you'd describe it?

STM3: Ah, I wouldn't say a rugby tackle, it was just desperation, trying to get him so he wouldn't get away um, I didn't see anything untoward, nothing, nothing he did that I wouldn't have done to try and apprehend someone.

Investigator: Yep.

STM3: Um, yeah.

Investigator: Could you, could you describe it to me? Um, I mean, just for an example, was he able to grab hold of his jacket?

STM3: Oh no I don't,

Investigator: Did he grab hold of his arm, did he, did he,

STM3: Oh, I don't remember that.

Investigator: Sort of, did you see him like bear hug him and take him to the ground or, was it anything like that or?

STM3: That was, that was in the later, sort of when he had him down, tried to handcuff him, but before that, it was just a big, because it was fairly dark, and even though the sensor light was on, still dark, I'm half asleep, um. Didn't take much notice of that.

Investigator: Mm hm.

STM3: But I did notice that the kid was trying, he was, fearful and trying to get away from, as much as he could, um. But, I think these coppers were pretty fit. Um.

Investigator: And what, what did you hear at this particular point?

STM3: Just yellin' and screamin' um.

Investigator: Yeah any idea what was said?

STM3: Ah, no, not really. Um, I could hear this other, there was another kid, but he got away, um, he, he was, as he's running away, he's tauntin' the police, ah, fuck you, you know, an' all this sort of, um, and I dunno if the other copper chased him or not but I think, they both they both stayed with this other kid I'm pretty sure, and then, um, another copper come from, another undercover guy come from 'round the corner, a guy with a beard, I dunno who he was, but he was definitely undercover and he was with them, um, but he turned up after they'd um up put him in cuffs an' or whatever they did, marched him up the road here and, yeah.

Investigator: But when, when did you form the opinion that they were police?

STM3: Well when um he spoke to me, um he was still on the ground trying to um hold him down after he'd apprehended him, and he was sort of half kneeling and half sorta standing at the time, holding him down, and um I said-, and I remember grabbing the guy, and I said what's going on and he goes it's all good mate, undercover. And I went oh, righto.

Investigator: And did you happen to notice um if there was anything wrong with the person that'd been arrested at all?

STM3: Nah he looked fine to me. He had a bit of, um, he must have been running for a while 'cause he was covered in sweat. And when they must have tackled him on the ground um, he

had grass and crap on his face, um but, no, no blood or anything. Unless, he mighta grazed himself and bled later or whatever but I didn't see anything wrong with him, no.

Investigator: Um, aside from, so would it be fair to say aside from the tackle, did you see any other um sort of interaction that would um suggest it was, out of line or?

STM3: No. No. No. I would have done it a lot worse I can tell you, if it was me, trying to apprehend him. But nah, it was very quick, swift, yeah. Nah. And I'd have remembered that. I woulda said something to [STM3's wife] like holy shit, you know, that's a bit rough or, but no. It was just, they were just trying their best to grab him, and he's trying his best to get away. And you can image the heat of the moment, you know, trying to apprehend someone, they're trying to get out here, and he's trying to hold him, but um yeah. Apart from that.

...

Investigator2: So you said as well that when they got to out front, um, you heard a bit of a bang on the fence,

STM3: Yep.

Investigator2: um, and there was a period of time between when you started seeing them and when the-, the tackle occurred?

STM3: Yeah, it wasn't long it was like I said it happened quickly, um, it's like a game of footy, um, yeah, it happened very quickly, um, yeah, um, but it was yeah, it was like a game of footy, it was, they were, there seemed to be someone running this way and then that way. And obviously they're trying to apprehend this kid. Um, I didn't take that much notice on, on all that stuff, but I, I can still remember them getting him on the ground, handcuffing him, sitting him up on his bum um, they're trying to get their breath back an'

they've regrouped um, I think the two officers regrouped. Um, and then they stood him up and walked him up to the corner where the bright lights are up there and waited there. Backup and um first respondents, um.

...

Investigator: Police have regrouped and then you've said they've walked down the road, and they've walked sort of a easterly direction along [name of street] to the,

STM3: South east,

Investigator: south east to the corner of [name of street].

STM3: Yep.

Investigator: Did you observe them that whole way?

STM3: The whole way, I,

Investigator: Right

STM3: I walked out onto the street and stood out there the whole time trying to figure out what the hell just happened.

...

Investigator: So when you say you saw them walk all the way down there you stayed on the street,

STM3: Yep,

Investigator: until they got down,

STM3: yep.

Investigator: to the streetlight?

STM3: Yep yep.

Investigator: And,

STM3: We were out there for a fair while after that.

Investigator: And uh I'm interested in um what you observed as they walked down towards the corner,

STM3: Yep.

Investigator: um how many police were walking the young person down there?

STM3: Two I think, yeah.

Investigator: And, was one of them the same officer that arrested him?

STM3: Yes yes, yeah.

Investigator: Yep. And the other officer, um, can you just was that the officer that,

STM3: I'm sure the guy that come around the corner went down with them, um.

Investigator: Was that the bigger guy,

STM3: Yeah the bigger guy.

Investigator: the thicker set guy?

STM3: Yeah yep,

Investigator: Yep and,

STM3: it could've been three it could've been two I can't remember,

Investigator: No worries.

STM3: but I remember watching them the whole way, just walking him down slowly, down to the corner and as soon as they got to the corner they sat him under the, under the streetlight, and they were um, I thi-, at that stage I think they were um, um, I don't know if they were trying to

administer first aid ‘cause he obviously had a bit of a scuffle on his face which is, didn’t look like anything in the video,

Investigator: Mm.

STM3: um, but um, yeah.

Investigator: Did you um see so you had the two police officers and the young person, did you see anybody else, um, approach that group as they were walking down towards the corner?

STM3: No I didn’t, no. Nup.

Investigator: Um, did you see any interaction between the police and the young person that would suggest, um, you know so, as opposed to just walking down the road, um, did you get the impression that there was any sort of physical interaction between the officers and the young person?

STM3: No I think I think they were just, as he wa-, the young fella was walking they were standing behind him obviously holding yeah they were holding his jumper or his hands behind him and staying close to him holding him the whole time,

Investigator: Yep.

STM3: walking him down um, and as soon as they got like I said as soon as they got down there they sat him down.

Investigator: Yep and how well lit is the street here?

STM3: Real well lit,

Investigator: Right okay.

STM3: I could see everything as plain as day.

Investigator: Right okay so,

STM3: Plain as day from here.

Investigator: right so even though you're down here you mentioned before that it was pretty dark,

STM3: Yeah.

Investigator: and your security light.

STM3: lights down there are like a streetlight in a provincial town where you know they've got those yell-, bright yellow lights,

Investigator: Mm hmm.

STM3: that light up all the roundabouts,

Investigator: Yep.

STM3: that's what that intersection's like.

Investigator: Right okay,

STM3: Yeah.

Investigator: So, and how far do you think it would be from your house to that corner?

STM3: To that corner? Probably, oh, a hundred and thirty metres,

Investigator: Mm hm.

STM3: Maybe a little bit less.

Investigator: Yep. And you you you could quite clearly see,

STM3: Yeah, yeah,

Investigator: The officers escorting,

STM3: Yeah

Investigator: The young person down there. Were they, were they both holding onto him or was this the one of the them or,

STM3: Can't remember if it was one either side,

Investigator: Did they kind of make him walk on his own?

STM3: Um.

Investigator: One either side?

STM3: I can't remember that, no. I remember them walking him down there. They were obviously either holding his jumper or holding his handcuffs or whatever they were doing.

YPM1 states he was punched by Officer MTS2

4.25. YPM1 said that he had been punched in the chest by Officer MTS2:[39]

Q. What happened when you saw this other person?

A. He just punched me in the belly.

Q. Punched you in the belly?

A. Yes.

Q. How hard was that punch?

A. Hard.

Q. Did you say anything?

A. No.

Q. Did the other person say anything, the one who punched you in the belly?

A. He said, "You're under arrest" too.

4.26. Officer MTS1 said Officer MTS2 did not punch YPM1 to the chest.[40]

Hospital records concerning examination of YPM1 on 11 September 2022

4.27. The legal representative for YPM1 submitted that YPM1's injuries were consistent with an excessive use of force during his arrest. Given this submission, it is

[39] PT 141, 15 March 2023.
[40] PT 213, 15 March 2023.

appropriate to consider the medical records created on the night of YPM1's arrest.[41]

4.28. YPM1 was taken to hospital by ambulance after his arrest. The hospital records noted that YPM1 had 'ongoing temporal pain with multiple grazes to face' and 'no other injuries other than left ankle tenderness, generalized – likely sprain'. In relation to YPM1's head, it was noted that there were 'no fractures or intra-cranial bleeds. Head wound cleaned, with no lacerations visualized…nothing that needs sutured'. The records concluded that there was 'no acute intracranial hemorrhage, facial bone or C-spine fracture'.

4.29. The ambulance records stated that YPM1 'does not present with any neuro, sensory or motor deficits. Pupils are PEARL, nil visual disturbances. Nil c-spine tenderness, collar applied due to mechanism of injury. Nil other signs of injuries on H2T and chest sounds clear, Vss within normal limits, nil [further] changes on route'.[42]

Factual dispute concerning arrest of YPM1

4.30. It may be seen then that there is a direct conflict in the evidence whereby YPM1 alleges that he was punched by Officer MTS1 in the course of his arrest and soon after by Officer MTS2. This evidence is disputed by Officer MTS1 and Officer MTS2. The account provided by the local resident, STM3, generally supports the account of the police officers and not that of YPM1. The hospital records do not provide any independent support for the version given by YPM1.

4.31. It will be obvious that had the police officers (and in particular Officer MTS1) been using BWV at the time of these events, there would have been an electronic visual record of what occurred. This would have reduced, if not eliminated, the controversy which now exists and requires to be resolved as part of the investigation.

4.32. It is appropriate to consider submissions made with respect to the facts and make findings in that respect before applying the law to the facts as found.

[41] Exhibit MTS39C.
[42] Exhibit MTS38C.

Resolving the factual dispute

4.33. Counsel Assisting submitted that each of YPM1, Officer MTS1 and Officer MTS2 were credible witnesses who did their best to answer questions. He submitted that YPM1 seemed to genuinely believe what he described as having taken place. Counsel Assisting drew attention to a substantial inconsistency between the account given by YPM1 to Commission investigators on 5 October 2022 and his account in evidence with respect to the actions of Officer MTS1. Counsel Assisting noted that, while no expert medical evidence was adduced, the injuries observed were not consistent with YPM1 being slammed on his head, punched in the chest and punched in the mouth with it being said that, if these things had happened, the injuries would have been different and far more serious.

4.34. Counsel Assisting submitted that the head injury suffered by YPM1 can be explained by his tripping over on the gravel on the side of the road as he was running away from Officer MTS1. Both YPM1 and Officer MTS1 agreed that the young person had tripped over while being chased. It was submitted that YPM1's injuries being sustained in this way was consistent with the medical records.

4.35. Counsel Assisting submitted that the account given by STM3 was significant. He was independent of the other witnesses and observed all the important events from an unobstructed position including the end of the incident when YPM1 was walked away by police from the front of STM3's home. Counsel Assisting submitted the account of STM3 supported that of Officer MTS1 and Officer MTS2.

4.36. In addition, Counsel Assisting noted that the letter of complaint dated 16 September 2022[43] did not contain any detail about the number of times YPM1 was allegedly punched by Officer MTS1. Further, the letter of complaint did not allege that Officer MTS2 had punched YPM1. Rather, the letter stated that Officer MTS2 had attempted to assist YPM1 however the young person was fearful when the officer approached him.

4.37. For these reasons Counsel Assisting submitted that the Commission should not be satisfied to the requisite standard that the account of YPM1 should be accepted as to alleged assaults upon him by Officer MTS1 and Officer MTS2.

[43] Exhibit MTS42C.

4.38. Counsel for the Commissioner of Police submitted that the evidence of YPM1 should not be accepted as to the interaction alleged by him with police officers including alleged assaults. It was submitted that the Commission should find that YPM1 and other young persons were observed by police officers in the yard of a residence in the township where a short foot pursuit then commenced. During that foot pursuit, YPM1 slipped and injured himself as a result of his impact with the ground. He rose from the ground and continued to run to a point where he was physically detained and handcuffed with the involved police officers then requesting medical assistance. In this way, counsel for the Commissioner of Police submitted that YPM1's account contrary to this version should not be accepted.

4.39. The Solicitor for Officer MTS1 submitted that the evidence of YPM1 should not be accepted. A submission was advanced that sought to challenge YPM1's understanding of the process of giving evidence.

4.40. Having observed YPM1 giving evidence at the private examination, and taking into account what he said and how he said it on other occasions when he was questioned concerning these events, the Commission is satisfied that YPM1 had an understanding of the process involved. The submission made on behalf of Officer MTS1 that YPM1 appeared to lack cognitive understanding and to lack an understanding of the legal process should be rejected.

4.41. Counsel for YPM1 submitted that his account of the events, including alleged assaults by Officer MTS1 and Officer MTS2, should be accepted. It was submitted that YPM1 had stated that he had been bashed by police from an early stage of the events and that this was an accurate characterisation of what had happened. It was submitted that the injuries sustained by YPM1 were not consistent with a person merely tripping over whilst running. It was submitted that the evidence of STM3 did not foreclose the possibility of the young person being assaulted by Officer MTS2. With respect to the submission of Counsel Assisting by reference to the medical records, Counsel for YPM1 submitted that not every punch may result in a cut and that the existence of temporal pain (as noted in the medical records) was consistent with being punched in the mouth.

4.42. It was submitted for YPM1 that the Commission should find to the requisite standard that, in accordance with YPM1's account, he was assaulted by Officer

MTS1 and by Officer MTS2 during the course of the events on the evening of 11 September 2022.

Findings concerning arrest of YPM1

4.43. Plain clothes police officers attended the township on the evening of 11 September 2022 to carry out a planned operation arising from property and other offences which had been committed in the neighbourhood in the preceding weeks. The lawfulness of this approach, in circumstances where police officers expected to engage with young persons will be considered later. For the moment, the issues to be decided relate to the factual dispute surrounding the arrest of YPM1 in the street.

4.44. YPM1 was in the street with a number of other young persons. The group of young persons were observed by police officers. The officers were in plain clothes and it would not have been readily apparent to the young persons that they were police officers. I accept that YPM1 did not know that they were police officers at the time when he commenced to run away from the men. A foot pursuit took place with Officer MTS1 chasing YPM1.

4.45. The Commission is satisfied that, when in the vicinity of STM3's home, YPM1 tripped and fell in a gravelly area near a tree with his head making contact with the ground. He got up and was tackled by Officer MTS1 thereby forcing him again to the ground. The injury to the head was caused by the young person's head striking the ground in the gravelly area.

4.46. There is a clear dispute between the accounts given by Officer MTS1 and STM3 on the one hand, and YPM1 on the other hand, as to alleged blows being struck by the police officer to the young person. This was a fast-moving and dynamic process involving interaction between the young person and the police officer. It is necessary to keep in mind the fact that arrests are frequently made in circumstances of excitement, turmoil and panic so that a hindsight analysis of events must take into account the rapid and fluid nature of events surrounding an arrest such as this.[44]

4.47. Having considered the totality of the evidence on these issues, the Commission is not satisfied to the requisite standard that Officer MTS1 assaulted YPM1 by

[44] *Woodley v Boyd* [2001] NSWCA 35 at [37].

striking him to the face and body. Rather, there was physical interaction between the police officer and the young person as part of the tackling process and subsequent contact which did not involve punches. A question remains as to the lawfulness of the action taken by Officer MTS1 even on his version and this is an issue to which the Commission will shortly turn.

4.48. Having considered all the evidence, the Commission is not satisfied to the requisite standard that any blow was struck by Officer MTS2 to YPM1 in the manner alleged by the young person.

The lawfulness of the arrest of YPM1

4.49. The Commission is satisfied that the arrest of YPM1 occurred essentially in the manner described by Officer MTS1. It is necessary to consider the associated question of the lawfulness of that arrest. Submissions were made in this respect by Counsel Assisting, Counsel for the Commissioner of Police and Counsel for YPM1 as well as the Solicitor for Officer MTS1.

Evidence concerning the reasons for arresting YPM1

4.50. In evidence, Officer MTS1 said that he reasonably suspected that YPM1 had committed an offence at the time 'whether it be trespass or break and enter.'[45] He said that he did not know who YPM1 was until he had him on the ground and acknowledged that the young person said to him 'I've done nothing wrong' to which Officer MTS1 replied 'not this time, we caught you beforehand'.[46]

4.51. Officer MTS1 said that he placed the young person in handcuffs 'to prevent his escape, he tried to escape... from the police'.[47]

4.52. Officer MTS1 stated that he told YPM1 he was under arrest but did not say why he was under arrest other than observing 'this is what happens when you go around breaking into houses and stealing cars'.[48]

4.53. Officer MTS1 said it was reasonably necessary for him to arrest the young person for trespass 'to identify who he was' and that he reasonably suspected he committed a trespass and 'there was suggestion as well from [other police

[45] PT40, 9 February 2023.
[46] PT40, 43, 9 February 2023.
[47] PT43, 9 February 2023.
[48] PT44, 9 February 2023.

officers] that there perhaps could have been a break and enter at that same trespassing address'.[49]

4.54. Counsel Assisting asked Officer MTS1:[50]

> Q. Did you in your mind think about other ways that you might apprehend this young person, [YPM1], other than throwing your arms around him in the form of a tackle?
>
> A. Not at that point in time, no.
>
> Q. Did you think that there might be a later opportunity to apprehend him?
>
> A. Well, once I confirmed who he was.
>
> Q. Where was he going to go to, do you think, if you didn't --
>
> A. I don't know.
>
> Q. -- apprehend him right there next to the tree? Where did you think he was going to go to?
>
> A. Don't know. I'm not sure.
>
> Q. And what did you think would actually happen when you met up with this group?
>
> A. In an ideal world it would have been good if he'd said, "Guys, just come here. Stop. We're the police", obtained details and have a chat to them and then organise someone to go back to that address and confirm whether a break in has or hasn't occurred.

4.55. Counsel for YPM1 asked Officer MTS1:[51]

> Q. When you first started - I'm just going to move on to questions about the arrest, Chief Commissioner. This was asked this morning

[49] PT45, 9 February 2023.
[50] PT 45, 9 February 2023.
[51] PT 245-246, 16 March 2023.

but I just want to make sure I got it right in my mind. When you first started running after the child in the red shorts --

A. Yes.

Q. -- had you made the decision to arrest him?

A. I - yes, well, I - I'm going to - my intention was to catch him and detain him, so that defines an arrest, yes.

Q. And detain him for what purpose?

A. I reasonably suspected he'd been committing crime.

Q. The crime being entering enclosed lands?

A. And perhaps the break and enter which hadn't been confirmed.

Q. Well, the break and enter hadn't been confirmed?

A. Not at that point, no, but there was -information to suggest that it could have occurred.

...

Q. When you came to arrest [YPM1], or the boy in the red shorts at that stage, and he said, "But I've done nothing", and you said, "Maybe not tonight because we caught you" --

A. Yes.

Q. -- by saying "Maybe not tonight", you accepted that he may not have committed an offence?

A. No, I was more so referring to the fact that there was no cars stolen tonight or --

Q. And when you arrested him - sorry, sorry. You were mainly referring to there was no car stolen tonight?

A. Yeah. The offences that were being committed during that night were multiple break and enters and stealing of cars and things like that, so --

Q. But you said, "Maybe not tonight." Surely that's a reference to him

A. No, not - no.

Submissions concerning the lawfulness of the arrest

4.56. Counsel Assisting submitted that if Officer MTS1 reasonably suspected YPM1 of having committed a trespass offence, he did not need to arrest him. Trespass is a fine only offence.[52] Counsel Assisting noted that the evidence of Officer MTS1 was that he had a reasonable suspicion that a break and enter offence had occurred or was about to occur. In these circumstances, it was submitted that this gave the Officer a reasonable suspicion to arrest YPM1.

4.57. Counsel for the Commissioner of Police submitted that the arrest of YPM1 was lawful. A submission to the same effect was made by the Solicitor for Officer MTS1.

4.58. Prior to police officers attending the township on the evening of 11 September 2022, there had been emails planning the operation which foreshadowed the use of arrest of young persons. Counsel for YPM1 submitted that this planned approach was contrary to the requirements of the *Young Offenders Act 1997*. Counsel submitted that certain consequential findings should be made in that respect including that the planned approach was unreasonable, unjust and arguably oppressive, and that it arose at least in part from a mistake of law so as to meet the definition of 'officer maladministration' and 'serious maladministration' in s 11 LECC Act. At a minimum, it was submitted that the Commission ought note that police were directed to arrest without consideration of their obligations under the *Young Offenders Act 1997*, and that a finding should be made that this direction was contrary to law with a recommendation to be made by the Commission that such directions ought not be given in the future.

[52] Section 4 *Inclosed Lands Protection Act 1901.*

Sidelining the *Young Offenders Act 1997*

4.59. The *Young Offenders Act 1997* forms an important part of the statutory framework for dealing with young offenders in the criminal justice system in this State. It's existence and potential application must always be acknowledged by police officers when there is the prospect of contact with young persons including the possibility of initiation of criminal proceedings including by way of arrest.

4.60. The background to the present events involved serious offences being committed against persons in the region, apparently by young persons, with the prospect of repetition of offending giving rise to the police operation implemented on the evening of 11 September 2022. In the circumstances envisaged by that police operation, the use of arrest was understandably under consideration. That said, the circumstances which would actually be encountered by the police were unknown prior to their attendance at the township.

4.61. An approach which essentially sidelined the possible use of the *Young Offenders Act 1997* was problematic. It may have been that the Young *Offenders Act 1997* arose for consideration for a particular young person that evening who was outside the scope of the group of young persons whom it was anticipated may be present.

4.62. Speaking generally, caution is required before police officers effectively sideline a statute such as the *Young Offenders Act 1997* in advance of police action involving young persons.

The power of arrest in this case

4.63. The power of arrest is governed by provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and well known principles stated by courts with respect to exercise of that power.[53] To arrest without warrant, a police officer must suspect on reasonable grounds that the person is committing, or has committed an offence and also be satisfied that the arrest is reasonably necessary for one or more purposes including to stop the person fleeing from a police officer or to enable inquiries to be made to establish the person's identity.

[53] *State of New South Wales v Robinson* [2019] HCA 46: *Jankovic v Director of Public Prosecutions* [2020] NSWCA 31.

4.64. In circumstances where YPM1 was running away from the police officer who was unaware of his identity, the Commission accepts that the officer was entitled to arrest the young person, using reasonable force, given his reasonable suspicion that the young person had been involved in, or was planning an offence of break and enter. In addition, the officer was entitled to take steps to ascertain the identity of the young person by way of an arrest.

4.65. Section 99(1)(b) LEPRA requires an arresting officer to engage in a process of evaluative judgment and be satisfied that an arrest is 'reasonably necessary' for a reason stated in the provision. The term 'reasonably necessary' connotes more than convenient but does not mean essential or indispensable. The section imports a requirement of proportionality into a police officer's decision-making – the officer must consider proportionate responses including alternatives to arrest.[54]

4.66. All of this must be assessed in the dynamic context of the events on the evening of 11 September 2022. A form of armchair retrospective analysis is to be guarded against when considering issues of this type.

4.67. Having regard to the evidence, the Commission is satisfied that the arrest of YPM1 was lawful, at least initially, given the reasonable suspicion of Officer MTS1 and the need to determine the identity of the young person who had been arrested. It was quickly identified that the young person was YPM1.

4.68. Section 231 of LEPRA provides that a police officer who exercises a power of arrest may use such force as is 'reasonably necessary' to make the arrest.[55] In the fluid and dynamic circumstances of this event, a tackle of YPM1 was reasonably necessary.

4.69. The Commission finds that Officer MTS1's arrest of YPM1 was lawful and the tackle was reasonably necessary. No adverse findings are made against Officer MTS1 on this issue.

[54] *Jankovic v Director of Public Prosecutions* at [53] – [62].
[55] *DPP v Greenhalgh* [2022] NSWSC 980 at [186]; *Owlstara v State of NSW* [2020] NWCA 217 at [9] – [11]; [66] – [68].

The use of handcuffs on YPM1

4.70. Following the arrest of YPM1, Officer MTS1 and Officer MTS2 were responsible for placing the young person in handcuffs. Counsel Assisting asked Officer MTS1 concerning the handcuffing of YPM1:[56]

> Q. While [YPM1] was with - was being spoken to by his family and he was on the ground, was he still in handcuffs at that time?
>
> A. He was, yes.
>
> Q. When he started falling in and out of consciousness, was he still in handcuffs at that time?
>
> A. I've seen the video. Yes, he was.
>
> Q. When he was starting to fall in and out of consciousness, was he back to back with[YPM9, sibling of YPM1]?
>
> A. When he started falling in and out of consciousness?
>
> Q. Yes.
>
> A. I thought he was laying down when he was - when that started.
>
> Q. [YPM9] also was handcuffed; is that right?
>
> A. [YPM9] was – [YPM9] wasn't handcuffed, no. [YPM9] was sitting nearby, when he got brought back.
>
> Q. When you brought [YPM1] back, did you take the handcuffs off him at any stage?
>
> A. No.
>
> Q. While he was with his family and they were getting quite distressed, did he remain in his handcuffs?
>
> A. My understanding is yes, he did.

[56] PT61-62, 9 February 2023.

Q. While you saw him in that state where you thought he was falling in and out of consciousness, was he still in his handcuffs at that time?

A. Yeah. From the video, yes. I was away and I - I didn't know that the cuffs were on or off. I didn't have my cuffs back. But from the video, I can see that he --

Q. Did he have his hands behind his back?

A. I cuffed him to the rear but from the video it's evident that they'd been moved to the front.

Q. Did you say anything about taking his handcuffs off while you saw [YPM1] in that state?

A. No.

Q. Even though you were alarmed at what was happening to him?

A. I - as I said, I was - I sort of took some steps back and was away from it. There were other - other officers there and people --

Q. But you were still looking at [YPM1] the whole time, weren't you?

A. I could see he was laying there, yes.

Q. Did you take any steps for either you or anyone else, any other police, to take those handcuffs?

A. I actually thought the cuffs were gone, I didn't think they were on at that point in time. It wasn't until I saw, was refreshed from the video, that I realised they were still on.

Q. While he was on the ground in those handcuffs he was under arrest, though, [YPM1], wasn't he?

A. Yes.

Q. And he was in your custody?

A. Yes.

Q. You had responsibility for him?

A. Yes.

4.71. Counsel Assisting submitted that the police officers should have acted more quickly in removing the handcuffs from YPM1 especially when they observed him falling in and out of consciousness.

4.72. Counsel for YPM1 submitted that keeping the young person in handcuffs amounted to an assault.

4.73. Counsel for the Commissioner of Police submitted that the police officers had exercised discretion to use handcuffs and that it was pertinent that YPM1 had run from the police prior to his arrest. It was noted that YPM1 was under arrest and was not free to leave the custody of Officer MTS1 until the arrest was discontinued. It was submitted that it was not unreasonable for the police to suspect that he may again attempt to flee. Counsel submitted that the suggestion that handcuffs should have been removed earlier was contrary to the position stated in *Woodley v Boyd* and should be rejected.

4.74. The Commission accepts that the use of handcuffs following the arrest of YPM1 was reasonable given the circumstances of his arrest and the need to confine him for a period at least to confirm his identity and determine what steps ought then be taken.

4.75. The application of handcuffs is capable itself of being an assault if the use of that form of restraint is unreasonable.[57] It is the case that YPM1 had been identified and that, in addition, it was observed that he had suffered a head injury which required medical attention. It is difficult to see how it was reasonable to continue his handcuffing at that time. The risk of flight by that time was minimal. The identity of YPM1 was known and members of his family were, by that time, arriving on the scene.

4.76. YPM1 was 14 years of age and the continued use of handcuffs on a young person was itself a matter which required ongoing assessment. On the evidence, it does not appear that any such assessment was undertaken. The evidence indicates that YPM1 was seated or lying on the ground awaiting the arrival of an

[57] *Makri v State of New South Wales* [2015] NSWDC 131 at [136]- [142].

ambulance or other first aid attention. It was not reasonable to leave him handcuffed at that time, in particular, given his age.

4.77. The Commission is satisfied that it was unreasonable to continue the handcuffing of YPM1 and the handcuffs ought to have been removed by police officers after he had been identified.

Should the arrest of YPM1 have been discontinued?

4.78. Section 105 LEPRA provides that a police officer may discontinue an arrest at any time. Discontinuance of an arrest may occur in circumstances including if it was more appropriate to deal with the matter in some other manner including, for example under the *Young Offenders Act 1997*.[58]

4.79. In addition, s 8 *Children (Criminal Proceedings) Act 1987* states that criminal proceedings should not be commenced against a child otherwise than by way of a court attendance notice. A reading of this provision, together with ss 99 and 105 of LEPRA, reinforces the need for police officers to consider the use of the power of arrest concerning young persons as well as the possible discontinuance of an arrest in circumstances where the reason for the power of arrest being exercised has been satisfied.

4.80. It is not at all clear that police officers involved in the arrest of YPM1 on the evening of 11 September 2022 turned their minds to any of these considerations.

4.81. Having regard to the reason for the arrest of YPM1, it is an open question as to whether a reasonable foundation existed for his continued arrest once he had been identified in the township that evening. He was taken by ambulance to the hospital whilst under police escort. When examined and treated at the hospital, YPM1 remained in police custody.

4.82. The justification for his continued custody at that time is difficult to understand. It contributed to a course of conduct which saw the discharge of YPM1 back into police custody leading to his transfer to the police station at about 6am on 12 September 2022.

[58] Section 105(2)(b) LEPRA.

4.83. It remains the case that the only matter arising from the arrest of YPM1 on the evening of 11 September 2022 which proceeded before the Children's Court was a charge of trespass to which he pleaded guilty.

Events after YPM1 arrived at the police station

4.84. After YPM1 was taken to the police station on the morning of 12 September 2022, he was subject to the laws and practices applicable to young persons held in custody in police stations pursuant to LEPRA, the *Young Offenders Act 1997*, the *Children (Criminal Proceedings) Act 1987* and well established common law principles.

4.85. It fell to the custody manager, Officer MTS8, to ensure that YPM1 was dealt with properly and lawfully whilst at the police station including his interaction with investigating police, Officer MTS9 and Officer MTS10.

4.86. The way in which police should interview young persons is subject to important provisions and practices which are contained in both statute and other procedural provisions . These provisions and practices also cover the giving of legal advice to young persons.

Children and young persons treated differently to adults in the criminal justice system

4.87. In a recent Report,[59] the Commission referred to the statutory and common law framework for the management of young offenders in NSW. In that analysis, the Commission considered provisions in the *Young Offenders Act 1997*, the *Children (Criminal Proceedings) Act 1987*, the *Bail Act 2013* and Children's Court Bail Guidelines as well as court decisions which serve to explain why children and young persons should be treated differently to adults in the criminal justice system.

4.88. In *TM v R*,[60] Yehia J (Payne and Stern JJA agreeing) said:

> 51. In JA v R [2021] NSWCCA 10 at [56], this Court, citing R v Elliott and Blessington [2006] NSWCCA 305 (Kirby J) at [127], referred to

[59] Operation Tepito Final Report – An investigation into the use of the NSW Suspect Targeting Management Plan on children and young people (October 2023), para 4.3.1.
[60] [2023] NSWCCA 185 at [51]. See also Judge P Johnstone, 'The grey matter between right and wrong: neurobiology and young offending', 11 October 2014, Children's Court of NSW Resources Handbook, Judicial Commission of NSW.

psychological studies in relation to young offenders, demonstrating the important distinctions between adults and children:

> [127] A jurisprudence has developed in the context of sentencing young offenders, which recognises the important differences, in terms of responsibility, between adults and children. The reasons for the distinction were well explained in a report by a psychologist which the New Zealand Court of Appeal reproduced and appeared to accept in *Slade v The Queen* [2005] NZCA 19:
>
> > '[43] It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent'.

4.89. A similar theme was expressed recently in the United Kingdom in *ZA v R*,[61] where the Court of Appeal (Criminal Division) said:

> 52. It has been recognised for some time that the brains of young people are still developing up to the age of 25, particularly in the

[61] [2023] EWCA Crim 569 at [52]; [2023] Crim LR 617.

areas of the frontal cortex and hippocampus. These areas are the seat of emotional control, restraint, awareness of risk and the ability to appreciate the consequences of one's own and others' actions; in short, the processes of thought engaged in by, and the hallmark of, mature and responsible adults. It is also known that adverse childhood experiences, educational difficulties and mental health issues negatively affect the development of those adult thought processes. Accordingly very particular considerations apply to sentencing children and young people who commit offences. It is categorically wrong to set about the sentencing of children and young people as if they are "mini-adults". An entirely different approach is required.

4.90. These decisions, which concern sentencing principles, provide a helpful background generally to the way children and young persons should be dealt with in the criminal justice system at the investigation stage and at the time when diversionary measures are being considered as well as charge selection. As was noted in *ZA v R* it is wrong to treat young people as if they are 'mini-adults'.

Special provisions concerning police interviewing of young persons

4.91. Appendix 4 contains extracts from LEPRA, the LEPRA Regulation, the *Young Offenders Act 1997* and the *Children's (Criminal Proceedings) Act 1987*. The immaturity and vulnerability of young persons (as noted in TM v R and ZA v R) serve to explain why these special protections exist in our law.[62]

4.92. Part 9 of LEPRA (ss 109 - 132) concerns investigations and questioning of suspects. Division 3 of Part 9 of LEPRA (ss 122 – 132) contains safeguards relating to persons under arrest and protected suspects. Section 112 of LEPRA provides that the LEPRA Regulation may make provision for or with respect to the modification of provisions in Part 9 to persons under the age of 18 years, Aboriginal persons or Torres Strait Islanders, persons of non-English speaking background or persons who have a disability (whether physical, intellectual or otherwise).

[62] In *R v KS (No 2)* [2023] NSWSC 1475, Yehia J explained the safeguards for children in s 13 *Children (Criminal Proceedings) Act 1987* (at [74] – [110]) and Part 9 of LEPRA (at [119] – [154]).

4.93. The effect of s 112 is that the relevant provisions in the LEPRA Regulation have full statutory force. Clauses 15 – 20 of the LEPRA Regulation provide for the obligations and responsibilities of custody managers. Clauses 23 – 26 concern custody records. Importantly, clauses 27 – 40 relate to vulnerable persons who are defined in clause 28 of the LEPRA Regulation as being persons falling within one or more of categories including children and persons who are Aboriginal persons or Torres Strait Islanders.

4.94. YPM1 was both a young person and an Aboriginal person so as to be a vulnerable person for the purpose of LEPRA and the LEPRA Regulation. An elaborate set of requirements applied in these circumstances including an obligation under clause 37 of the LEPRA Regulation to take steps to facilitate legal assistance for Aboriginal persons.

The role of the ALS and Legal Aid NSW in providing advice to young persons in police custody

4.95. The evidence of solicitors from the ALS and Legal Aid NSW provided a detailed account of the important work of those agencies in the provision of legal advice to young persons in police custody in NSW. In addition to the oral evidence of the witnesses from these agencies, there were helpful submissions provided on behalf of Legal Aid NSW[63] and on behalf of the ALS.[64]

4.96. The work of the ALS and Legal Aid NSW in providing telephone advice to young persons in custody in police stations throughout the State is of fundamental importance to the fair and proper administration of criminal justice in NSW. There is a statutory foundation for this work with respect to young persons and Aboriginal persons and Torres Strait Islander persons by operation of LEPRA and the LEPRA Regulation. The advice given by the ALS and Legal Aid NSW extends to all relevant aspects affecting young persons including the *Young Offenders Act 1997* and the use of the Protected Admissions Scheme.

4.97. The origin of the Custody Notification Service (CNS) conducted by the ALS can be traced back to the Report of the Royal Commission into Aboriginal Deaths in Custody which was tabled in the Commonwealth Parliament in 1991. The Royal Commission recommended that Police Services, Aboriginal Legal Services and

[63] Exhibit MTS65.
[64] Exhibit MTS96.

relevant Aboriginal organisations at a local level should consider agreeing upon a protocol setting out the procedures and rules in certain areas including notification of when Aboriginal people were taken into custody.[65]

4.98. The ALS submission explained the CNS:[66]

> The ALS operates a free, 24-hour telephone hotline known as the Custody Notification Service ('CNS'). The CNS operates 7 days per week, 365 days per year. The purpose of the CNS is to provide welfare support and legal advice to Aboriginal and Torres Strait Islander people in police custody in NSW and the ACT, and to enable police to meet their regulatory obligations under relevant statutory frameworks.
>
> In the 2022 calendar year, the CNS received a total of 27,807 custody notifications for Aboriginal and Torres Strait Islander people. Of these notifications, 4,742 (approximately 17%) related to children and young people aged between 10-17 ('children').

4.99. The ALS submission emphasised the importance of the statutory scheme under LEPRA and the LEPRA Regulation which operates to establish protective mechanisms for Aboriginal persons in police custody. With respect to children and young persons, the ALS submission said (references omitted):[67]

> Children, by virtue of their stage of physical, psychological and emotional development, are especially vulnerable in police custody due to the extreme power imbalance between adult police officers and a detained child. Research indicates that children are ordinarily more vulnerable to interrogative pressure and more likely to confess, and to confess falsely, than adults. When deprived of their liberty and confronted with unfamiliar processes, Aboriginal and Torres Strait Islander children, in particular, may adopt a strategy of always agreeing or saying what an authority figure wants them to say in an effort to expedite their departure from police custody. Further, as Professor Diana Eades has observed, '[o]nce a

[65] Recommendation 223-224, Report of Royal Commission. A fuller history of the CNS is contained in the ALS submission, Systemic Issues relating to Police Practices of Interviewing Children Following Refusal of Interview.
[66] Exhibit MTS96, p 4.
[67] Exhibit MTS96, p 10.

person has agreed to a proposition in a context such as a police interview, it can have life-changing implications'.

In addition, the way in which a child perceives the unfairness of police decision-making, deprivation of their autonomy or disrespectful treatment by police during a period of custody can lead to lasting resentment and negative views about the legitimacy of police. Contemporary relations between Aboriginal and Torres Strait Islander peoples and police cannot be viewed divorced from the legacy of profound distrust many communities feel towards police and other government agencies, flowing from the central role police have played in implementing overtly racist and discriminatory government policies during the processes of colonisation.

Recognising this history and legacy, the robustness of legislative protections for Aboriginal and Torres Strait Islander children in custody is critical, both for the protection of the legal rights and welfare of our clients, and to promote Aboriginal and Torres Strait Islander community confidence in the institutions of the legal system, including the police.

4.100. The Legal Aid NSW submission outlined the work of the Children's Legal Service and the Legal Aid Youth Hotline:[68]

> Through the Youth Hotline, our solicitors have regular opportunity to observe the practices and approach of NSW Police across the State to the arrest, custody management and investigation of children and young people (children). We provided over 4,000 Youth Hotline advice services in 2021-2022, nearly 3000 advice services in 2020-2021, and approximately 3,000 services in 2019-2020.

Approach of NSW Police Force to interviewing of young persons since 2000

4.101. Against this background, it is helpful to refer to evidence concerning the approach of the NSW Police Force to interviewing of children by police officers since the early 2000's.

[68] Operation Mantus Systemic issues and practices in police interviews with children and young people (March 2023), Exhibit MTS65, p 5.

4.102. Prior to the insertion into LEPRA and the LEPRA Regulation of provisions with respect to the interviewing of persons and the role of custody managers, the provisions were contained in the Crimes (Detention After Arrest) Regulation 1998. It is apparent from examination of those provisions that they constituted the predecessors for provisions now contained in Part 3 of the LEPRA Regulation concerning custody managers, custody records and vulnerable persons.

2004 Protocol between Commissioner of Police and Legal Aid NSW

4.103. By 2004, Legal Aid NSW operated the Legal Aid Youth Hotline for the purpose of providing telephone advice to young persons in custody. As a result of communications between the NSW Police Force and Legal Aid NSW, the Legal Aid Youth Hotline Protocol was executed on behalf of the NSW Police Force and Legal Aid NSW in September 2004 by the then Commissioner of Police Ken Moroney and the then Chief Executive Officer of Legal Aid NSW, Bill Grant (the 2004 Protocol).

4.104. It was both highly desirable and commendable that such a document was brought into existence to clarify the operation of the Legal Aid Youth Hotline and its interaction with police officers investigating offences involving young persons.

4.105. As will be seen, the 2004 Protocol referred as well to the ALS and their role in giving advice to Aboriginal and Torres Strait Islander young persons. The 2004 Protocol described its purpose in the following way:[69]

> PURPOSE OF THE PROTOCOL
>
> This Protocol was established to clarify the obligations of the Police and Legal aid solicitors in the provision of Legal Aid Youth Hotline services to young people in custody.
>
> The Protocol is intended as a guide to best practice.

4.106. The 2004 Protocol explained its background in the following way:[70]

[69] Exhibit MTS54C.
[70] Exhibit MTS54C.

The Legal Aid Youth Hotline was set up in October 1998 as a response to introduction of *Young Offenders Act*. The Hotline is staffed by solicitors from the Children's Legal Service of Legal Aid. It provides confidential legal advice to young people under 18 in all criminal law matters, not just those matters covered by the Young Offenders Act. Priority is given to young people in police custody.

4.107. The 2004 Protocol then explained the legislative requirements of the *Young Offenders Act 1997* and the *Crimes (Detention After Arrest) Regulation 1998* before setting out a model of best practice for police officers described in the following way (emphasis added):

MODEL OF BEST PRACTICE – POLICE

1. Investigating officer arrests young suspect and brings to station.

2. The custody manager enters the young person into custody and complies with the requirements of Part 10A (Caution & Summary Form P693). The custody manager is to inform the young person of the availability of the Legal Aid Hotline and indicate that they will arrange for a call to be made to the Hotline. The Custody Manager is to provide the young person with the form: "Your rights under the Young Offenders Act".

3. The custody manager / investigating police will arrange for a support person to attend. For young people under 16, this will be the parents or other people responsible for the child (or their nominee). For young people over 16, this will be an adult chosen by the child or a lawyer chosen by the child. (*Young Offenders Act* s 10). The custody manager will inform the support person of the availability of the Hotline and ensure the support person is supplied with a copy of the form: "Your rights under the Young Offenders Act".

4. Under Clause 26 *Crimes (Detention After Arrest) Regulation 1998*, the Custody Manager is to inform the support person that a support person (Form P692 Role of the support person) is not restricted to acting merely as an observer at an interview and may, among other things:

    (a) assist and support the person being interviewed, and

(b) observe whether or not the interview is being conducted properly and fairly;

(c) identify communication problems with the person being interviewed.

5. The custody manager will arrange to call any solicitor nominated by the young person or the Legal Aid Youth Hotline as soon as possible after the child arrives at the police station. If this has not been possible by the time the support person arrives, it should be done as soon as possible after their arrival.

6. When the custody manager / investigating officer calls the Youth Hotline, they should request the name of the solicitor, the location of their office and telephone number. These details should be recorded in the Custody Management Record. The custody manager / investigating police should tell the solicitor their name, station and contact number. This information will allow the solicitor to call back if required. The officer should also tell the solicitor the nature of the charge, the alleged facts and provide details of the young person's criminal history, including whether they have been dealt with under the Young Offenders Act previously.

7. The custody manager / investigating officer should also indicate whether the young person has special communications needs so appropriate arrangements can be made, for example, telephone interpreters or face to face legal advice for young people with physical or intellectual disabilities.

8. When an Aboriginal young person is taken into custody, the custody manager / investigating officer should contact the Aboriginal Legal Service (ALS) Hotline so that the Aboriginal Legal Service can be notified that the young person is in custody. It the ALS is not available or the young person does not wish to speak to the ALS, the custody manager/investigating officer should contact the Youth Hotline.

9. The custody manager / investigating officer should ensure that as far as practicable the young person is able to talk to the solicitor on duty in

private. For example, by moving the young person as far a way as possible from the custody area while maintaining visual supervision.

10. **If the young person exercises their right to silence, the investigating officer should record this in COPS event as "interview declined". The custody manager should also record in the general comments of the custody management record that the young person declined an interview.**

11. **If the young person declines to be interviewed, cannot contact their solicitor or the Hotline is not available, the investigating police do not have to finalise the investigation then and there. Arrangements could be made to have the young person return to the station after having received legal advice. Investigating police are encouraged to consider options eg. the Young Offenders Legal Referral system (YOLR) in consultation with the SYO.**

    If investigating officers or custody managers have concerns about the operation of the Legal Aid Youth Hotline, please call the NSW Police Operational Policy and Programs, Youth Senior Programs Officer on [xxxx].

4.108. Of particular significance for present purposes are clauses 10 and 11 of the Model of Best Practice for police officers in the 2004 Protocol which nominated the approach to be followed where the young person exercised their right of silence. It may be taken that the requirement of the custody manager to record in COPS 'interview declined' arose whether the custody manager was informed of this by the solicitor or the young person that the young person wished to exercise their right to silence.

4.109. The 2004 Protocol stated that it would be reviewed by the NSW Police Force and Legal Aid NSW 12 months after it came into operation. The evidence does not disclose the course taken thereafter.

4.110. Assistant Commissioner Cotter was unaware of this document and the legal representatives for the Commissioner of Police have not taken steps to provide the Commission with information concerning what occurred between 2004 and 2022 with respect to this document.

4.111. What may be said is that the document constituted a formal and significant measure adopted by the Commissioner of Police and the Chief Executive Officer of Legal Aid NSW with the steps contained in the document to apply unless revoked or amended in some way. The document was intended to be a "model of best practice" and clearly served that purpose.

4.112. The fact that the legislation referred to in the 2004 Protocol has been overtaken by LEPRA and the LEPRA Regulation does not alter the substance of the position which had been settled and formalised in this way in 2004. The intention behind the 2004 Protocol was to provide clarity for persons who may enter custody, their legal representatives and police officers with this state of affairs to enhance the fair and efficient administration of this aspect of the criminal justice system.

2005 Circular concerning refusal of suspects to be interviewed

4.113. On 28 March 2005, Police Circular PC05/02 (the 2005 Circular)[71] was issued by the NSW Police Force under a heading 'Recording refusals by suspects to participate in an ERISP interview'. The Legal Aid NSW submission explained that the 2005 Circular was published in response to concerns raised by practitioners on the NSW Law Society Criminal Law Committee that some investigating police had been implying to suspects that police had the power to compel participation in an ERISP for the purpose of recording their refusal.[72]

4.114. The 2005 Circular noted that the following words had been added to the Code of Practice for CRIME (Custody Rights, Investigation, Management and Evidence) (emphasis added):[73]

> **However, you do not have the power to compel or intimate to the suspect that they must participate in an electronic recorded interview for the purpose of recording their refusal. Record the refusal in your notebook and if appropriate, on the facts sheet.**
>
> There are Acts of Parliament that may impose an obligation on a person to give certain information to police.

[71] Exhibit MTS90.
[72] Exhibit MTS65, pp 9-10.
[73] Exhibit MTS90.

> The right to silence is only lost to the extent that the person is obliged to give certain information. For example, under Road Transport legislation a driver is required to give their name and place of abode, etc.; the owner is to give information about a person in charge of their vehicle; any person is to give information as to the identity of the driver alleged to have committed an offence and a driver is to give their version of an accident, etc.
>
> The particular Act may provide for the information to be given orally or in writing. However, no Act imposes an obligation on that person to provide that information in an electronic interview.

4.115. Assistant Commissioner Cotter was unaware of the 2005 Circular when he gave evidence at the Public Hearing in April 2023. As with the 2004 Protocol, the position is that the NSW Police Force has not explained what happened with respect to the 2005 Circular in the period between 2005 and 2022.

4.116. In submissions, Counsel for the Commissioner of Police has noted that the 2004 Protocol and 2005 Circular relate to outdated legislation so that they are, in effect, incapable of having application in 2022 and at the present time. In the Commission's view, this approach begs the question as to what the NSW Police Force has been doing since 2004 in this important area to assist police officers in the field and also legal practitioners engaged by Legal Aid NSW and the ALS in the discharge of their important duties in giving advice to young persons in custody. The Commission investigation moved through the evidentiary stage and the submission stage without the NSW Police Force informing the Commission as to the relevant history between 2004 and 2022.

4.117. This aspect has particular significance because, as will be seen, a number of decisions of Courts have dealt with the actions or inactions of police officers in and around the management and interviewing of young persons in police custody with Courts speaking in emphatic terms with respect to the propriety or impropriety of police conduct in this area.

4.118. The fact that the NSW Police Force has not provided to the Commission a complete history including what rules and procedures have operated and what guidance has been provided to police officers in the field, is a troubling state of

affairs which provides a background to what occurred with YPM1 in September 2022 in the events under investigation in Operation Mantus.

Systemic issues concerning police interviewing of young persons

4.119. The systemic issue submissions made on behalf of Legal Aid NSW and the ALS placed in context their concern with respect to police interviewing of young persons. The Legal Aid NSW submission stated:[74]

> We acknowledge that many serving police officers, and particularly Custody Managers, discharge their functions and responsibilities with care and integrity, in accordance with relevant legislation. However, the observations of our solicitors, many of whom have practised in children's criminal law across the state and over many years, demonstrate that the interviewing of children, following explicitly communicated advice that they do not wish to participate, is a frequent occurrence. It often leads to contested hearings, where the interview is excluded from evidence.
>
> This practice is, in our estimation, sufficiently common that it could be described as a widespread pattern of improper conduct that constitutes a serious systemic issue. It is problematic not only in a strictly legal sense, but because it has the capacity to undermine trust and confidence in police among already vulnerable and over-policed communities.

4.120. The ALS systemic issues submission said in this respect:[75]

> In our experience, the majority of CNS calls proceed as they should: information provided to police that a client does not wish to participate in an interview is recorded in the Custody Management Record and the client is not interviewed. We recognise this and we recognise and appreciate the current, ongoing efforts of the NSW Police Youth Command to increase police diversion of children under the Protected Admissions Scheme.
>
> However, it is also our experience that police across NSW frequently interview children after receiving explicit instructions that the child does

[74] Exhibit MTS65, p 5.
[75] Exhibit MTS96, p 3.

not wish to be interviewed. In our experience, this practice is long standing.

The ALS submits that given the frequency of this widespread practice, its impact on the individual children involved, and its undermining of fundamental principles of criminal law and community confidence in police, it is a practice that is both systemic and extremely concerning. We support a comprehensive investigation into this issue by the Commission.

4.121. The ALS submission explained the sources for the submission:[76]

The ALS is not resourced to routinely collect data about the incidence or frequency of police interviewing children they have been advised do not wish to be interviewed. However, for the purposes of this submission, we conducted an audit of 58 randomly selected open Children's Court files at a single ALS office. Of these 58 files, 9 cases were identified in which police proceeded to question or interview a child after the child had asserted that they wished to exercise their right to silence through a lawyer. This represents 15.5% of the children whose files were examined.

This supports the experience of ALS solicitors as outlined in this submission. The observations below are drawn from the experience of ALS solicitors of all levels of seniority who have worked CNS shifts. They are also drawn from the experience of solicitors who represent children at court and obtain the relevant CNS form following a child's instructions that they were interviewed when they didn't wish to be. Further, it is drawn from the experience of Managing Solicitors who receive complaints or communications from solicitors about this police practice.

While these staff experiences do not provide a numerical measure of the extent police interview children following interview refusal, they do indicate it is regular and widespread and why its eventuality is considered a significant risk during a child's period of detention by police.

4.122. Mr Frankham, Ms Burkitt and Mr Clifford gave evidence about their experiences of police non-compliance with the 2004 Protocol as did Ms Hopgood. Ms Harper described similar issues relating to clients of her service, the Justice Advocacy

[76] Exhibit MTS96, p 11.

Service (JAS) which is a service of the Intellectual Disability Rights Service.[77] As noted earlier, the evidence given by the ALS and Legal Aid NSW witnesses was not challenged by the Commissioner of Police.

4.123. Despite the 2004 Protocol and the 2005 Circular, young persons who are suspected of committing offences are regularly put in front of cameras and interviewed. The non-compliance with the 2004 Protocol and the 2005 Circular appears to be prevalent, systemic and continuing right up to the present.

4.124. Assistant Commissioner Cotter could not explain how this continues to be the case when asked by reference to the 2005 Circular:[78]

> Q. Could we zoom in, please, on the right-hand side. This is the part I took you to previously, Assistant Commissioner. What it tells police very clearly is that they do not have the power to put a suspect in front of a camera to record a refusal of interviews. You are aware, aren't you, that that practice exists even up until now? Police are putting suspects, including children, in front of cameras to record refusals?
>
> A. Yes. The last week has given me some clarity around that, that's for sure.
>
> Q. Are you able to explain how that could be, given the very clear direction from NSW Police about that practice not being permitted?
>
> A. No, I can't answer generically or specifically. All I can say is that clearly, there has been some custom and practice which has moved away from this clear direction, and it's - and through custom and practice it's got a bit of momentum.

4.125. A further NSW Police Force document examined during the investigation was the document titled 'Questioning Suspects' from the NSW Police Force intranet which states:[79]

[77] Exhibit MTS104.
[78] T128, 4 April 2023.
[79] Exhibit MTS79.

> Once a suspect makes it clear that they will not answer any more questions, as a matter of fairness to them, put the details of the allegations to them (e.g.: "In fairness to you I am going to put the allegation to you. Do you understand that?").
>
> If the suspect comments and answers the allegations you may continue to ask questions until the suspect objects. However, once you put the allegation/s in full, don't continue questioning suspects if they make it clear they are not prepared to answer your questions.

4.126. Assistant Commissioner Cotter was also taken to this extract from the NSWPF Handbook concerning questioning witnesses:[80]

> Once a suspect makes it clear that they will not answer any more questions, as a matter of fairness to them, put the details of the allegations to them (e.g.,: "In fairness to you I am going to put the allegation to you. Do you understand that?").

4.127. And then questioned as follows:

> Q. The next paragraph, for completeness, goes on to refer to: if the suspect comments and gives answers, questions can continue to be asked. You can see that there in front of you?
>
> A. Yes.
>
> Q. The question I'm going to ask you is about this. I put a situation to you that it is taking place where children are being told, in fairness to them, they're going to have allegations put to them. What you can see in a slightly different situation - not relating to children but relating to suspects - is this view in a document by NSW Police that even if the suspect makes it clear they won't answer any more questions, as a matter of fairness, the allegations should still be put to them. Can you see that?
>
> A. I can see the words in front of me. Yes, I can see what you're saying, yes.

[80] T130-131, 4 April 2023.

Q. Do you know why that particular part that I have taken you to forms a part of this policy or direction or guidance on questioning of suspects?

A. Well, this is the first time I have seen this document, and nor have I had any input in its formation or drafting. But clearly if you say it's on our website, then I accept that.

That again is a - like, probably a few things that will fall out of this hearing are things that need to be taken away and absolutely scrutinised and worked on to deliver what fairness really looks like.

4.128. As Counsel Assisting submitted, the answering of 'any more' questions in an interview is equally applicable to whether any questions are asked at all when a person does not wish to be interviewed. This section of the NSW Police Force Handbook is inconsistent with the 2005 Circular. It is especially fraught when questions are put to a young person, purportedly as a matter of fairness, which are intended to provoke a response from a vulnerable person who has exercised their right to silence.

4.129. The investigation heard evidence of police not stating in police facts that they interviewed children after the child received legal advice, which communicated to them, that the child did not wish to be interviewed.[81] If police do interview a person suspected of criminal offences after the person has received legal advice and has indicated he or she does not wish to be interviewed, this should be stated in the police facts. It will then be clear that the 2004 Protocol and 2005 Circular have been breached. This provides accountability and transparency.

The Commission raises the need for prompt action by the police

4.130. Reference was made earlier to the evidence of Assistant Commissioner Cotter and indications given on instructions by Counsel for the Commissioner of Police concerning the urgent need for clarification in this area. It is appropriate to note parts of the evidence of Assistant Commissioner Cotter concerning this issue. In doing so, the Commission expresses its gratitude to Assistant Commissioner Cotter for his frank and constructive approach to these issues in his evidence.

[81] Ms Hopgood, T210-211, 5 April 2023; Mr Frankham, T64, 3 April 2023.

Any criticism by the Commission on this aspect is not directed at Assistant Commissioner Cotter.

4.131. The Chief Commissioner raised the urgency of communication within the NSW Police Force of the 2004 Protocol and 2005 Circular with Assistant Commissioner Cotter:[82]

> Q. Isn't this a clear situation that calls for some decisive statement now, reinforcing what Commissioner Moroney said in 2004 as being the status quo, reinforced by the 2005 circular pending any further developments? It could be said this is an unusual situation where, in the absence of that, these events will keep recurring from day to day with Legal Aid and the ALS having to grapple with it.
>
> A. I agree with you, Chief Commissioner.

4.132. Assistant Commissioner Cotter agreed with Counsel Assisting concerning the urgency to advise all police:[83]

> Q. When you heard some conversation between the Chief Commissioner and Mr Coffey and history of the matters, what was referred to is that these issues are continuing, perhaps not every day. We heard evidence during the private examinations from Mr Frankham from Legal Aid who reviewed a number of cases and, in fact, got a call the night before that related to the very issue of his evidence, children being interviewed when they have been given legal advice and had refused to be interviewed. The question I'm asking is can you see that there is some urgency for clarity to be provided to NSW Police on these issues that I'm taking you to?
>
> A. Yes.
>
> Q. Will that urgency be communicated to whoever it needs to be communicated to in terms of amendments to Standard Operating Procedures and other documents?

[82] T127, 4 April 2023.
[83] T148-149, 4 April 2023.

A. Absolutely.

4.133. Counsel Assisting asked Assistant Commissioner Cotter to comment about whether it was appropriate for the 2004 Protocol and 2005 Circular to be placed in the relevant SOPs:[84]

Q. I'm going to take you shortly to the fact that what is contained in the memorandum and the police circular is not contained in the standard operating procedures. Can you see a benefit in these very agreements that I've taken you to - Memorandum of Understanding and the Circular contents being placed into the Standard Operating Procedures?

A. I absolutely agree with what you said and on reading this document, the charge room custody management operating procedures most recently in preparation for this hearing, it did occur to me and strike me that there was enormous invisible ink, if not silence, on some of these really entrenched rights that I think should be in there in a lot more prescription than what they are at the moment, which is I don't think sufficient enough.

4.134. Assistant Commissioner Cotter said:[85]

A. ... But I will stick with my previous statement, as I said, that once ERISP is declined, right to silence is accepted and communicated as the instructions of the suspect, or the young person in this case, and then if there was something else like body-worn video used as a quasi-interview process, then I would deem that to be unfair in a generic fact situation. I can't really comment more about this because I don't know what came first.

Q. Can you see the benefit in specific direction, guidance or instruction being placed in the standard operating procedures to address this very issue?

A. I do.

[84] T125-126, 4 April 2023.
[85] T134, 4 April 2023.

4.135. It is apparent from the evidence that Assistant Commissioner Cotter saw the benefit of prompt action being taken by the NSW Police Force to address these issues at the time when evidence was given by him in April 2023. The Commission is conscious that the evidence given by Assistant Commissioner Cotter represented his views on the matters raised in evidence. That said, he is a very senior police officer and was called at the suggestion of the NSW Police Force to answer questions on this subject matter. He was the evidentiary spokesperson selected by the NSW Police Force on this topic.

4.136. The Commission was and remains entitled to proceed upon the basis that his evidence constituted the institutional response on behalf of the NSW Police Force to the issues raised. It should be kept in mind as well that the evidence of Assistant Commissioner Cotter and the statements made by Counsel for the Commissioner of Police all occurred at public hearings before the Commission. However, what was said on the public record was not followed by any urgent action by the NSW Police Force.

4.137. The first action that the Commission is aware of was brought to the Commission's attention on 21 November 2023. The Commission was told that on 20 November 2023, the Commissioner's Executive Team approved new procedures for interviewing children. Those procedures are reproduced at Appendix 5.

4.138. The new procedures appear to be a summary of the position adopted by the NSW Police Force as it stood at the commencement of Operation Mantus. It contains no changes based upon the evidence adduced and submissions made in Operation Mantus. The document does not address the question of whether a person's lawyer can state on behalf of the client that the interview is to be declined. Nor is there any provision, let alone requirement, for a young person who has received legal advice but changes their mind so as to be interviewed to have an opportunity to obtain further legal advice of the type proposed by Counsel Assisting, ALS and Legal Aid NSW in their submissions.

YPM1 at the police station on 12 September 2022

4.139. It is appropriate to return to the events of 12 September 2022 which saw YPM1 being in custody at the police station. At 6:31am, YPM1 spoke to Mr Whitting of the ALS by telephone. The custody manager had taken steps to arrange this

contact in accordance with the provisions of the LEPRA Regulation. Mr Whitting completed a Call Form Record as part of the process utilised by the ALS.[86]

4.140. Mr Whitting was informed that YPM1 was in custody for breach of bail, trespass, break and enter, goods in custody and possess house breaking implements. Mr Whitting's records confirm that he spoke to YPM1 and explained his right to silence with YPM1 giving instructions that he wished to exercise his right to silence and asked that his instructions be disclosed to police and that he wished the ALS to be his lawyer. Mr Whitting confirmed these matters in a telephone conversation with the custody manager, Officer MTS8. Thereafter, Mr Whitting sent an email at 6:43am to the email addresses of Officer MTS1 and Officer MTS8. The email stated:[87]

> Dear [Officer MTS1] and [Officer MTS8],
>
> As requested in our telephone conversation, please accept this formal confirmation on behalf of [YPM1] DOB [...] that they do not want to do an interview with police.
>
> I confirm that I have verbally advised you of these instructions and asked it to be noted in the Custody Management Record.
>
> If there is a problem or change to these instructions, then please contact the ALS Custody Notification Hotline.
>
> Thank you for your assistance.

4.141. Mr Whitting was not contacted again concerning the possible interviewing of YPM1. By this stage, Mr Whitting had spoken to the custody manager, Officer MTS8, and emailed the custody manager and Officer MTS1 stating clearly that YPM1 did not want to do an interview with police with a request that it be noted in the Custody Management Record. In addition, and importantly, Mr Whitting asked that if there is any change to these instructions, then contact should be made with the ALS Custody Notification Hotline.

4.142. In all of this it is necessary to keep in mind that YPM1 was a 14 year old boy. The question of any possible change of mind concerning the exercise of the right to

[86] Exhibit MTS48C.
[87] Exhibit MTS62.

silence was a sensitive issue requiring caution on the part of all concerned, and in particular police officers, given the vulnerable status of young persons as recognised in legislation governing the conduct of police officers.

4.143. As Counsel Assisting observed in submissions, sometimes people change their minds about being interviewed after they speak to parents or support persons. This seems to have happened in the investigation before the Commission, where YPM1 told his support person (STM4) he wished to take part in the interview after YPM1 received legal advice, which was accepted, that he should not take part in an interview. There were, however, clear gaps in STM4's knowledge of what had occurred before he came to the police station.

4.144. Ms Hopgood gave evidence of this happening:[88]

> Q: …What you note in the submission is that:
>
> Any change of mind about participating in an interview during [that] same period [in] police custody should lead the police to contact the … lawyer and confirm whether that, in fact, reflects the child's instructions.
>
> Is that correct?
>
> A: Absolutely. Can I just add to that because, on reflection and when I started to look at some of these matters again in detail, what I saw was sometimes it is - it's not so much a change of mind to conduct an interview, to participate in an interview; it might be a failure to object to being taken into an interview room, and let's say we did - let's say we say that's consenting, consent to be taken into an interview room, and then the interview just happens. So I actually think I would now include on that any change of mind in regards to what we put in that email - participating in an interview, recording a refusal on an ERISP, being taken into the interview room - I think requires a further phone call.

4.145. The Legal Aid NSW systemic issues submission addressed this issue:[89]

[88] T205, 5 April 2023.
[89] Exhibit MTS65, page 15.

> While police may have a vested interest in securing admissions, and be reluctant to engage legal representatives (on an understanding that their advice may result in a child maintaining their right to silence), such a significant change in position about the exercise of that fundamental right should be approached with circumspection and caution. This is particularly so when, in the face of such change in position, there exists some prospect that the child is not exercising that decision in an informed and voluntary way.

4.146. In a situation such as this, the young person should be given the opportunity to get further legal advice before an interview takes place. Otherwise what is acquiescence by a young person (without the benefit of legal advice) may be taken as a form of consent, when that would be an entirely inaccurate description of the position.

4.147. Assistant Commissioner Cotter was asked about this:[90]

> Q. Assume a situation where a child speaks to a support person and there might be a change of mind or a change of circumstances. You would accept that what should take place then is the young person should be given another opportunity to speak to a solicitor. Do you agree with that?
>
> A. Yes, I think that's - I think that has got some fairness to it.
>
> Q. It should happen, though, shouldn't it?
>
> A. Oh, yes, it most definitely should happen. And that's - when I say that's the status of this, that we need prescription around it, more clarity, to step absolutely everyone through, so everyone knows their rights, both the young person, the vulnerable person, clearly, and there is nothing wrong I think - and sometimes this - you know, your questioning is not allowing that sometimes people do change their minds, and this is accepting that there has to be another step in this protocol, that if there is going to be a change of mind, I am 100 per cent behind that further legal advice is provided.

[90] T124, 4 April 2023.

4.148. The evidence concerning YPM1's apparent change of mind about being interviewed was unsatisfactory. It is clear that Mr Whitting made the custody manager, Officer MTS8, aware of the position with an express request that the ALS be contacted if there was said to be a change of mind. The support person, STM4 arrived at the police station. It seems that he was not informed that YPM1 had instructed the ALS that he did not wish to be interviewed and that those instructions should be passed on to police officers.

4.149. It does not appear that the custody manager informed the investigating officers Officer MTS9 and Officer MTS10 of the oral and email communications with Mr Whitting in which the instructions of YPM1 were communicated to the custody manager. YPM1, an immature and vulnerable youth, agreed to be interviewed and the support person was so informed.

4.150. Officer MTS9 was asked about whether he was satisfied YPM1 actually agreed to take part in the interview because of answers at the start of the interview:[91]

> Q. I'm going to read the questions and answers that [Officer MTS10] asked. She asked this:
>
> > Um, so do you agree to be interviewed on this machine by video?
>
> And YPM1's answer was:
>
> > No.
>
> The next question was:
>
> You don't want to be interviewed?
>
> And YPM1 said:
>
> > What?
>
> And next question was:
>
> > Do you agree, are you happy to be interviewed on this machine?

[91] PT402-403, 17 March 2023.

And YPM1 said:

> Yeah.

You know that the interview continued from that point?

A. Yes.

Q. Having heard those answers by [YPM1] with initially a ‘‘No’’ and then a ‘‘Yeah’’, did you think to yourself that there might be some misunderstanding or confusion by [YPM1] about him wanting to be interviewed?

A. Of the question asked, and then it was clarified.

Q. Right. Did you think to yourself that this might be a good point in time to pause the interview and give YPM1 the chance to speak to a solicitor for some legal advice?

A. Well, [Officer MTS10] clarified the question.

Q. So the answer is no?

A. No.

4.151. The answers given by YPM1 at the start of the interview raised questions in themselves as to whether he had made an informed change of mind about being interviewed. There had been no further conversation between YPM1 and Mr Whitting or any other ALS solicitor. Nor had YPM1 discussed this issue with the support person STM4. The custody manager, Officer MTS8, was aware of the position as a result of her communications from Mr Whitting but did not disclose those matters to the investigating police or the support person, let alone make contact again with the ALS.

4.152. This state of affairs was more than regrettable in circumstances where the custody manager had a statutory duty to assist and protect the interests of the young person in police custody.

4.153. As Counsel Assisting submitted, the preferable course to be taken early in the interview, when the confusing responses were provided by YPM1 would have

been for the police officers to pause the interview and allow YPM1 to get further legal advice about whether he wished to take part in the interview. It is no answer to this to suggest that YPM1 had been advised of his right to remain silent but that he had elected to answer questions in any event, despite his earlier communication to Mr Whitting to the contrary. It is the type of situation which required clarity and certainty to ensure that the interests of the vulnerable young person were protected in accordance with the statutory obligations upon police officers and the general requirements of the law for fairness in circumstances such as this.

4.154. It must be said that the clarity and certainty which emerged from the 2004 Protocol and the 2005 Circular would have constituted a clear and complete response to the unsatisfactory state of affairs which emerged on the morning of 12 September 2022. However, those formal procedures (which had been accepted at the highest level within the NSW Police Force) appear to have disappeared in the fog of history, so that the practices were not being applied, and indeed memories of the existence of the practices had faded entirely. Once again, this state of affairs is highly unsatisfactory to say the least.

Other problematic police behaviour concerning the questioning of young persons

4.155. It is appropriate at this point to refer to other aspects raised in evidence and the systemic issues submissions of the ALS and Legal Aid NSW and the submission of Ms Harper on behalf of the JAS. It should be kept in mind that what was said in this evidence and submissions was not challenged by the Commissioner of Police.

4.156. The ALS systemic issues submission referred to informal police questioning despite instructions being given by the young person that they did not wish to be interviewed:[92]

> ‘Informal’ interviews and questioning in relation to doli incapax
>
> In our experience, it is common for police to question children ‘informally’ prior to contact with the CNS. This questioning is usually recorded on body-worn video or hand-held devices, often at a child’s home or in a

[92] Exhibit MTS96, p 14.

public place. In one example supplied by a solicitor, a 14-year-old boy was questioned in relation to an alleged offence on the side of a riverbank without a support person prior to any contact with the CNS.

4.157. A similar situation took place in the circumstances of this investigation, where Officer MTS2 noted (emphasis added):[93]

> [YPM9] at [xxxx] station **refused to be interviewed based on legal advice however admitted to committing a break, enter and steal offence in the dock which we confirmed**.
>
> ...
>
> [YPM9] also confirmed that himself, [YPM10], [YPM1] and [YPM11] are responsible for the offences committed at [xxxx] recently. [YPM9] has been charged and is now on conditional bail with a curfew.

4.158. As Counsel Assisting submitted, informal interviewing undermines the process of interview and does not enable the protections afforded to people, and in particular vulnerable young persons, to be exercised.

4.159. A further practice raised in the ALS systemic issues submission concerned the promise of bail in the context of possible interviewing of a suspect. The ALS submission stated:[94]

> *Using bail and the Young Offenders Act to incentivise participation in interviews*
>
> Police will sometimes suggest to a client in custody (or within hearing of or directly to the CNS solicitor) that the client may be granted bail or that police may not proceed to charge if they participate in an interview. This is a sufficiently common occurrence that CNS solicitor training includes recommendations about how to respond to these suggestions by police.
>
> Solicitors are aware that, at the time investigating police are proposing to interview a suspect under arrest, they have often gathered sufficient evidence to support the commencement of criminal proceedings, and that the purpose of an interview under caution is to obtain further admissible

[93] PT48, 9 February 2023.
[94] Exhibit MTS96, p 14.

evidence to strengthen the prosecution case. Although solicitors will endeavour to advise clients accordingly, in circumstances where a child is in custody, often scared, and desperate to go home, suggestions by investigating police that participation in an interview will improve their chances of being released can be extremely persuasive:

> **"I have spoken to clients on the CNS charged with serious offences who insist on participating in formal questioning anyway because police have told them they won't get bail if they refuse to interview. A young person who is desperate to get out of a charge room won't always be receptive to legal advice about this."**

In other cases, police have informed CNS solicitors that they are unwilling to use the Protected Admissions Scheme[95] when obtaining an admission to minor offences for the purposes of diversion under the *Young Offenders Act* because it will prevent them from acting on any admissions to more serious offences which may be made during the course of interview:

> **"Police notified us about a 14-year-old in custody for common assault and malicious damage allegations. The OIC indicated they would do a youth justice conference in this case but refused to use the PAS on the basis that if the young person admitted to more serious offences in the interview they could not act on those admissions. I asked if she understood there to be any cases where the form should be used and she advised that she had been told by her superiors never to use the form because of the above reason."**

4.160. Counsel Assisting asked Ms Hopgood about this practice:[96]

> Q. Another issue that this investigation has received evidence about is the potential use of bail as something which will give a child an incentive to take part in an interview. That's something you

[95] An explanation of the PAS can be found at paragraph 4.197.
[96] T211-21, 5 April 2023.

yourself and solicitors at the Aboriginal Legal Service have had experience with; is that right?

A. So I haven't had someone directly, as far as my recollection - it was a long time ago that I was doing hotline calls at Legal Aid - specifically say to me about bail. But I have had numerous examples of solicitors coming to me about, "How do we deal with this? Police suggested that the young person would only get bail if they conducted an interview."

Interestingly, as part of that short-term remand work I do, what has come through from the two - actually, I won't name them, but some of the pilot locations we're working at, is police saying, one of the barriers to bail is young people not being interviewed. And I don't understand how that could operate. When I've investigated it a little bit more, I think it's when police have thought that not being interviewed means they can't say who they live with or who they would be going home to if they got bail. But it does seem to be an attitude that police might actually put to young people in practice quite frequently, that bail is connected to interviewing.

...

A. ... Young people are concerned with the immediacy of the situation before them and they want to go home, and so if someone has suggested to them this is how they get bail, that is front and centre.

4.161. There is the real possibility of young persons being unfairly enticed to take part in interviews, believing it would assist them in getting bail. The custody manager should be the person to have discussions about bail with arrested people. There is then a built-in protection against the possibility of promises being made regarding interviews and bail.

4.162. It is the fact that YPM1 proceeded to participate in a Record of Interview with police despite his earlier acceptance of advice from Mr Whitting that he would exercise his right to silence. The apparent change in approach was completely unassisted by any adult advice or guidance from a solicitor or the support person.

It remains a completely open question as to whether the change in mind manifested by YPM1 constituted an informed choice on his part. He was, of course, an immature and vulnerable 14 year old person who had been arrested the previous evening and sustained an injury. He then spent several hours at the hospital to assess his injury before being taken by police officers in custody to the police station.

4.163. It is clear that fair and proper police practice should have led to contact with an ALS solicitor to allow YPM1 to obtain further advice before any interview proceeded on the morning of 12 September 2022.

4.164. Other disturbing police practices were identified by Ms Harper who explained that as part of JAS support, people are able to access free legal advice from trained volunteer lawyers. Ms Harper referred to police practices relating to interviews of people with cognitive impairment following a refusal to be interviewed:[97]

> **Police practices of concern relating to interviews with people with cognitive impairment following refusal of interview**
>
> JAS staff have always, and continue to, experience instances where a person they are supporting at the Police Station is asked to record their refusal of interview. Most often this is put to the person as they "need to record their refusal" and "for fairness" they will "put the facts or allegations to them". This occurs after the person has received legal advice and exercised their right to remain silent and not be interviewed. People with cognitive impairment have increased vulnerability during this time due to their capacity to understand the implications. It is also more difficult for them to refrain from entering into dialogue and providing information when allegations are put to them.
>
> Due to this practice, JAS staff and volunteer training focusses on ensuring people are equipped with the knowledge about the person's rights and that a refusal does not need to be recorded. JAS has modified our support processes to ensure that when a person we are supporting receives legal advice and indicates they will exercise those rights, that the lawyer

[97] Exhibit MTS104, pp 3-4.

providing the advice also speaks to Police and indicates the outcome. Therefore, the person under arrest and the lawyer have both told the Police the outcome.

Training and ongoing development also includes skilling staff to be able to intervene appropriately when these instances arise. At all times we try to prompt the person with cognitive impairment to speak for themselves and re-iterate that they don't want to be interviewed, or to remind Police that the lawyer has also indicated to them the outcome of the advice. On most occasions the recorded interview will not go ahead.

However, there is real risk in these Police practices as not all people with cognitive impairment do get a trained support person from JAS in the Police station. This is mostly due to their disability not being identified, or they have a family member/friend with them as a support person who does not understand their rights. It would be rare in these instances that the person would get access to legal advice either.

A systemic issue emerges in Operation Mantus concerning police interviewing of young persons

4.165. The investigation by the Commission in Operation Mantus gave rise to reports concerning police proceeding to interview persons, including young persons, despite the fact that the person had apparently accepted legal advice not to be interviewed and requested that that position be passed on to investigating police.

4.166. What had the initial appearance in Operation Mantus of being an isolated incident at a Police Station in Northern NSW in September 2022 became just another example of conduct which had occurred in various police stations throughout NSW over a number of years. The fact that this apparent pattern of conduct had occurred emphasised the movement of the NSW Police Force away from the 2004 Protocol and 2005 Circular referred to earlier in this Report.

4.167. Other examples of police conduct of this type were brought to the attention of the Commission as a result of complaints made by the Director of Public Prosecutions (NSW) in December 2022 and February 2023 with respect to other proceedings. The Commission determined to examine these other matters as

part of an apparent systemic issue under the umbrella of Operation Mantus. The Commission's reasoning in this respect was explained further in the Public Decision on the use of Public and Private Examinations (Appendix 2).

4.168. The approach taken by the Commission was to consider the judgments of Courts where evidence of this type was subject to objection and usually excluded. As will be seen there are a number of examples of Court rulings of this type extending back at least a decade. The Commission did not investigate all the factual circumstances and conduct of individual police officers with respect to these other matters as part of Operation Mantus.

4.169. It is appropriate to refer to these various Court decisions for at least two reasons. Firstly, the fact that decisions have been made by Courts dealing with broadly similar conduct (and with evidence being excluded) raises a significant question concerning the practices of the NSW Police Force in this context extending back to 2004.

4.170. The second issue is what processes, if any, the NSW Police Force has to consider Court rulings and identify potential problems with police procedures? Once any problems are identified, what are the arrangements to ensure that the procedures are changed and training is given. In short, how does the NSW Police Force guard against the development of adverse police practices?

Decisions of Courts concerning police questioning of young persons extending back to 2001

4.171. The law in this area extends back to the judgment of Wood CJ at CL in *R v Phung and Huynh* [2001] NSWSC 115, a decision which considered provisions including s 13 *Children (Criminal Proceeding) Act 1987*, Part 10A of the *Crimes Act 1900* and the *Crimes (Detention After Arrest) Regulation 1998*. Wood CJ at CL said at [27] - [29]:

> 27 Compliance with the requirements of the law as to the interview process in the case of this accused, who was a juvenile and a vulnerable person, needs to be examined relevantly in the light of:
>
> 28 a) Section 13 of the *Children (Criminal Proceedings) Act 1987* ("the Proceedings Act") as that provision has been interpreted in Kerry Ann Dunn NSW CCA 15 April 1992, and H (1996) 85 A Crim R 481;

b) Part 10A of the *Crimes Act 1900*, and in particular sections 356C, 356D, 356G, 356M, 356N and 356P;

c) The *Crimes (Detention After Arrest) Regulation 1998* ("the regulations") made under section 356X of the Crimes Act, and in particular regulations 4, 20, 21, 22, 25, 26, 27, and 29).

29 In addition, attention needs to be given relevantly in this case to the provisions of the Evidence Act, in particular sections 84, 85, 90, 138 and 139, in determining the admissibility of the records of interview so far as they may contain admissions; and in so far as any of the circumstances in which they were obtained may give rise to questions as to whether their truth was adversely affected, or to questions as to whether there would be any unfairness if they were used, or of them having been obtained improperly, illegally, or in circumstances of oppression.

4.172. His Honour referred to the purpose of the legislative regime and role of support persons and custody managers at [34] - [39]:

34 It may be accepted that the purpose of the legislative regime, that now applies to the interview of children, and particularly those in custody following arrest, is to protect them from any disadvantage inherent in their age, as well as to protect them from any form of police impropriety. As to the former, what is required is compliance with the procedure laid down so as to prevent the young or vulnerable accused from being overawed by the occasion of being interviewed, at a police station, by detectives who are likely to be considerably older and more experienced than they are.

35 This principle derives from what was said by Lee J in **Warren** (1982) 2 NSWLR 360; by Roden J in **Williams** NSW Supreme Court 9 August 1982; by Hunt J in **Cotton** (1990) 19 NSWLR 593; by Carruthers J in **Dunn** NSW CCA 15 April 1992; and also by Hidden J in H (supra).

36 The role of the support person is to act as a check upon possible unfair or oppressive behaviour; to assist a child, particularly one

who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appears to be out of his or her depth, or in need of advice; and also to provide the comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give appropriate advice if it appears the child needs assistance in understanding his or her rights.

37 That position is reinforced by the requirements of the regulations so far as they apply in relation to vulnerable persons, of which a child is one. In particular regulation 20 requires the custody manager to assist a vulnerable person in exercising that person's rights, and regulation 26 requires the custody manager to explain to a support person that his or her role is not confined to acting merely as an observer, but also extends to doing the other things specified.

38 It is important that police officers appreciate that the regime now established is designed to secure ethical and fair investigations, as well as the protection of individual rights, of some significance, which attach in particular to children. Those rights, obviously, are of great importance when a child is facing a charge as serious as murder or armed robbery.

39 The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law.

4.173. The statements of Wood CJ at CL were very significant and no doubt played a part in the determination of the NSW Police Force to enter into the 2004

Protocol which was executed by the then Commissioner of Police, Commissioner Moroney. As Wood CJ at CL observed, the statutory regime was 'designed to secure ethical and fair investigations' and this purpose has continued in the contemporary statutory regime. The decision of Wood CJ at CL has been applied by the Court of Criminal Appeal.[98]

4.174. The principles in *R v Phung and Huynh* were applied by his Honour Judge Nicholson SC in the course of excluding records of interview in *R v APCR*; *R v CP* [2006] NSWDC 12 at [51] - [89].[99]

4.175. The judgment of Adamson J (as her Honour then was) in *R v FE* [2013] NSWSC 1692[100] is of considerable importance to this investigation. The judgment has been publicly available on Caselaw since late 2013. It has been available to lawyers and others within the NSW Police Force for the purpose of training, prosecutions and investigatory practice. The catchwords on the title page of the decision capture the essence of its subject matter in a way which ought to have led to close scrutiny of the judgment by the NSW Police Force. The catchwords state:

> *EVIDENCE - s 138 and s 139 Evidence Act 1995 - improperly obtained evidence- failure to caution the accused- interview conducted notwithstanding initial refusal to answer questions- s 90 Evidence Act 1995 - unfair deprivation of right to silence- advantage taken of vulnerable person- 15-year-old girl*
>
> *CRIMINAL LAW - right to silence- requirement for caution- provisions relating to juveniles*

4.176. In a passage which has relevance to the present investigation, Adamson J said at [64]:

> I reject the Crown submission that I should infer from the advice Ms Hopgood gave that the accused understood that she had a right to silence and could exercise it and that because the accused did not insist on it again in the interview room, I should infer that she was prepared to forego

[98] *R v Tang* [2001] NSWCCA 210; (2001) 122 A Crim R 206 at [59]; *R v Duncan and Perre* [2004] NSWCCA 431 at [259].
[99] Exhibit MTS69.
[100] Exhibit MTS70.

> it. This submission is an unattractive one. The exercise of the right to silence ought be respected and not undermined, as it was in the present case, in the expectation that its holder will be unaware of its parameters and will, as a result, be dissuaded from continuing to insist upon it.

4.177. Adamson J, at [111], adopted what had been said by Wood CJ at CL in *R v Phung and Huynh* at [34], [38] - [39].

4.178. Her Honour emphasised the fundamental importance of the right to remain silent at [113] :

> I regard these improprieties as very grave. The accused's right to remain silent and not be compelled to answer questions that might tend to incriminate her in the commission of the crime of murder has been described as a "fundamental . . . bulwark of liberty", which is not merely a rule of evidence but a basic and substantive common law right: *Reid v Howard* (1995) 184 CLR 1 at 11 per Toohey, Gaudron, McHugh and Gummow JJ. In *Petty v The Queen* (1991) 173 CLR 95 at 99 the plurality (Mason CJ, Deane, Toohey and McHugh JJ) described the following principle as a "fundamental rule of the common law":
>
> > A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played.

4.179. Her Honour concluded that the relevant interviews should be excluded under ss 90 and 138 of the *Evidence Act 1995*.

4.180. The judgment of Adamson J in *R v FE* has been cited in subsequent published decisions including *R v Taleb* [2019] NSWSC 241 at [126][101] and *R v Archer (No 1)* [2021] NSWSC 569 [51] – [52].[102] In circumstances where it was held that the accused had sought to exercise his right to silence but there was continued questioning by police with the accused being drowsy and affected by drugs, Hamill J (in *R v Archer (No 1)*) excluded the interview holding that the evidence

[101] Exhibit MTS71.
[102] Exhibit MTS74.

had been improperly obtained for the purpose of s 138 *Evidence Act 1995*. That case involved an adult accused and not a young person. In considering whether the impropriety was reckless or deliberate, Hamill J held that the impropriety was at least reckless and, probably, at least in part, deliberate with his Honour observing *"it may even be systemic. Cases such as the present are not uncommon."* (at [69]).

4.181. In *R v ABC* (Bourke Children's Court, 6 July 2021),[103] objection was taken to the tender of a record of interview where a 15 year old young person had accepted advice from an ALS solicitor not to participate in a record of interview and these instructions were conveyed to the custody manager. Thereafter, the young person was the subject of a record of interview in the presence of his grandmother as a support person. In the course of a judgment excluding the record of interview, Magistrate Hamilton said:[104]

> In relation to this matter the circumstances do bear a fairly striking resemblance to those in The *Queen v FE*. I note in that matter that it was the prosecution submission that the fact that the young person in that case had, after receiving advice, accepting advice not to take part in an interview, did take part in an interview indicated that the young person had changed her mind. And the Court rejected that submission and said that it was in fact fanciful to suggest that the young person had through the exercise of free will changed instructions instantaneously and participated voluntarily in an interview where she had previously been advised and accepted advice not to take part.
>
> In considering the circumstances of the young person being interviewed the Court noted that there was a failure on the part of one police officer to disclose to the others that the accused instructions that had been communicated that the accused did not wish to take part in an interview. And the judge concluded on the basis of the officers not having been told that and carrying on as they did that the young person would have formed the view that she was obliged to participate in the interview.

[103] Exhibit MTS75.
[104] Exhibit MTS75, p 31-32.

4.182. Before ruling that the record of interview should be excluded from evidence, the presiding Magistrate in *R v ABC* said:[105]

> Obviously in respect of vulnerable persons the legislation had taken a number of steps to try to ensure that their will is not overpowered. It is true that anybody in a police interview situation is going to feel a little overborne but I think it is particularly so where you have a young person and an Aboriginal person.

4.183. In *R v Lindsay* (Parramatta District Court, 1 April 2022),[106] her Honour Judge Herbert excluded a record of interview upon the basis that it had been improperly obtained for the purpose of s 138 *Evidence Act 1995*. The case did not involve a young person but an adult who had instructed the ALS by telephone that he did not wish to be interviewed by police. The accused was an Aboriginal person and thus a vulnerable person for the purpose of LEPRA and the LEPRA Regulation.

4.184. Her Honour found that the accused had sought to exercise his right to silence with his instructions being communicated to police by his solicitor. The presiding judge found impropriety in a number of respects in the context of police proceeding to interview the accused despite the fact that his solicitor had informed them that he did not wish to participate in an interview. In the course of finding impropriety so as to warrant exclusion of the interviews, her Honour Judge Herbert said:[107]

> There is, at times, deliberate impropriety. The investigating officer was told directly by the accused's lawyer, Ms Fard, that the accused was exercising his right to silence. The interview should not have occurred. The accused was not offered the assistance of a support person, as was required. The accused is a vulnerable person because he is an Aboriginal person. The vulnerable are legally entitled to additional protective measures under the legislation to ensure that they have the capacity to exercise their legal rights to protect them from any disadvantage inherent in their vulnerability. The accused's intellectual limitations would have increased his vulnerability.

[105] Exhibit MTS75, p 32.
[106] Exhibit MTS76.
[107] Exhibit MTS76, pp 39-40.

4.185. In *Police v DEF* (Children's Court, 18 May 2022)[108] objection was taken to the admissibility of a record of interview conducted with a young person. The Magistrate found that the young person accepted advice from the ALS solicitor not to participate in a record of interview and that these instructions were passed on to the police. Despite this, investigating police proceeded to interview the young person. The presiding Magistrate found impropriety but, after carrying out the necessary balancing exercise, determined to admit the record of interview into evidence.

4.186. In *R v DN* [2019] NSWDC 492,[109] Grant DCJ excluded a record of interview and other admissions upon the basis that they had been improperly obtained for the purpose of s 138 *Evidence Act 1995*. Grant DCJ summarised the circumstances in which the interview took place as follows at [29] – [32] :

> 29 A 12 year old boy was about to be interviewed by police about sexual penetration of a person under 10 years. The offence is held to be of such seriousness that parliament has mandated a statutory maximum penalty the same as murder, namely life imprisonment.
>
> 30 Any accused person has the right to remain silent. The young person wished to exercise that right after he had sought legal advice. His lawyer made it clear to the custody officer that the young person was not to be interviewed. His lawyer further stated, "No questioning interview or recording takes place with this young person if there is any problem or change to these instructions then please contact the legal aid youth hotline as any change must be confirmed after further legal advice."
>
> 31 There was a discussion between the young person and the grandmother who had previously delivered an exhortation to the young person and the mother who had insisted he write an admission against his interests that was to be used against the young person. After that discussion he submitted to an interview.

[108] Exhibit MTS77.
[109] Exhibit MTS72.

32 No attempts were made by the police as a result of the change of his position to contact the legal aid youth hotline to confirm such a change after further legal advice. The police were aware of this requirement but pressed ahead without attempting to contact legal aid. The young person should have been afforded the ability to seek further advice before the interview commenced.

4.187. Grant DCJ proceeded to exclude the record of interview in light of the findings made at [33] - [36]:

33 Obtaining evidence in a deliberate, wilful or even reckless disregard of an individual's rights is a strong factor against the exercise of the discretion to admit the evidence. I find contrary to the legal aid request that they be contacted due to any change and their requirement to give further legal advice to the young person that this was not done. It was done so recklessly without thinking through the consequences. It disentitled the young person to exercise his important right of the right to silence. The police acted improperly. This was not a mere oversight.

34 Section 138 is designed to think through and balance those consequences when an individual's rights have not been adhered to due to improper conduct on the part of the police. It is a balancing exercise and I take into account s 138(3) and all of the matters listed therein and more particularly the following matters,

(1) The age of the young person. He was 12, he was a child.

(2) The seriousness of the charges.

(3) As to the importance of the evidence I have over objection ruled in the admissions made by the accused to his mother and grandmother as to his purported criminal conduct to AB and the admission contained in the document found by SB.

35 As I have previously stated the actions of the police were reckless but they denied the young person of a fundamental and important right to remain silent. Such a right should not be eroded by

conduct that was reckless or any other form of conduct. The right is so significant and even more so when a 12 year old child is involved. Children require protection and that is why we have statutory safeguards. As a minimum standard our society expects that a child should not lose his rights by those we entrust with powers of law enforcement. The conduct of the police was clearly inconsistent with those standards.

36 Accordingly I exclude the record of interview.

4.188. In *R v Nean* [2023] NSWDC 34,[110] Buscombe DCJ declined to admit into evidence a record of interview. The accused was a young adult Aboriginal person and thus a vulnerable person for the purpose of LEPRA and the LEPRA Regulation. Buscombe DCJ found at [108] – [109]:

> 108 The evidence, in my opinion, establishes on the balance of probabilities that by 9.40 am on 10 June 2021 the custody manager, SC Taylor, knew the following:
>
> The Accused was an 18 year old Aboriginal male and was therefore a vulnerable person in custody in so far as the regulation under LEPRA was concerned. That the Accused had spoken to a solicitor from the ALS and had instructed that solicitor that he did not want to be taken to an interview room, be interviewed by the police or engage in a forensic procedure. The evidence also establishes that by 11am both detectives Crossingham and Harding knew the Accused was an 18 year old Aboriginal person.
>
> 109 That despite the above, at about 11 am that day, SC Taylor permitted detectives Crossingham and Harding to take the Accused from the dock area of Burwood Police Station and engage in a conversation with the Accused about the allegations they were making against him. That conversation had a degree of formality to it as Crossingham said in evidence that during the conversation, he had administered a caution to the Accused. It was, therefore, in essence, an unrecorded interview with the Accused. The evidence

[110] Exhibit MTS78.

> is that during that conversation the Accused was questioned by the investigating police about the matters the subject of the trial and told that at that point, the police considered that they had insufficient evidence to charge the Accused. Despite the conversation with the Accused having a degree of formality attaching to it and occurring in an interview room at a police station where it clearly could have been recorded, the police made no attempt to record the conversation. I do not consider, as the Crown submitted, it is correct to describe this conversation as an "off the record conversation". The Accused was cautioned and the police made reference to it in their police statements and in a statement of facts that was provided to the Local Court.

4.189. It will be seen that several features of *R v Nean* resemble events in the Operation Mantus investigation although there are distinguishing features as well.

4.190. Buscombe DCJ at [132] referred to the judgment of Wood CJ at CL in *R v Phung and Huynh*:

> In considering the approach to be taken to the issue of whether the police complied with their obligations in relation to a regulation intended to assist vulnerable persons, such as an Aboriginal person, I have had regard to what Wood CJ at Common Law said more than 20 years ago about the predecessor of the regulation under consideration in *R v Phung and Huynh* [2001] NSWSC 115. Although the observations His Honour made were in the context of their application to a vulnerable person who was a child, I consider they have equal application to a consideration of the position of an Aboriginal teenager who was 18 years of age.

4.191. His Honour recited paragraphs [60] – [63] of *R v Phung and Huynh* and then continued at [133]:

> My review of the evidence of the police as to their understanding of the requirements in relation to the Accused, demonstrates that they had adopted an approach consistent with the type of approach disapproved of by Wood CJ at Common Law, i.e. one of seeing the regulation concerning vulnerable persons in custody as involving no more than the ticking of a box, or a rote reading of a Part 9 statement to the Accused and the

> obtaining of a signature upon it. It is also concerning that no regard was had to the observations His Honour made all those years ago about a custody manager recording in a detailed way what was said to a vulnerable person and their support person, and their response, to ensure it could be determined that their obligations under the regulation had been fulfilled.

4.192. Buscombe DCJ made a further important observation which resonates in the context of the present investigation as well. His Honour said at [159]:

> I have also considered the fact that it is important that law enforcement officials understand that the rights of Aboriginal persons in custody must be properly understood and given effect to and should not be viewed as an impediment to a proper police investigation. It is a notorious fact that many Aboriginal people are held in police custody, and it is fundamental to a fair Australian society that the rights the Parliament has given them are properly enforced.

Continuing relevance of *R v Phung and Huynh*

4.193. It would be apparent immediately that the fact that *R v Phung and Huynh* was considering predecessor legislation did not stand in the way of Judges in more recent decisions relying upon the analysis of Wood CJ at CL. This is because the statutory scheme as it stood in 2001 is so similar to the current statutory scheme that the analysis from that case remains good.

4.194. To the extent that counsel for the Commissioner of Police has responded to parts of the submissions of Counsel Assisting by observing that the 2004 Protocol and 2005 Circular were dealing with outdated legislation, that response fails to grapple with the reality that the legislation operates in the same space and to substantially the same effect. If the attitude of the NSW Police Force to these issues is that cases which have considered earlier legislation are not relevant, then such an approach is misconceived and fails to grapple with the obligation of the NSW Police Force to properly assist police officers in their understanding of the law and their obligations in dealing, in particular, with vulnerable persons under LEPRA and the LEPRA Regulation.

4.195. Counsel Assisting submitted that the NSW Police Force has failed to address the issues emerging from these decisions since the 2013 judgment in *R v FE*.

4.196. There was, however, some evidence that at least one police prosecutor recognised the legal and ethical concerns in this area. Assistant Commissioner Cotter was asked:[111]

> Q. This investigation heard evidence during private examinations about one particular district, police district, where the prosecutor in that district didn't even attempt to put evidence before a court, Children's Court, where interviews were obtained after a refusal by the young person.
>
> A. Mmm-hmm.
>
> Q. How does something like that come to the organisation so that changes can be made?
>
> A. As I sort of indicated before lunch, there's going to be a lot of really meaningful recommendations, I'm sure, and certainly hope, will flow from this hearing, and I have no doubt one or two might be around the point we're talking here. I think that is a really good time to set in place a structure and a protocol around those sorts of failings, perceived or real, at least be scrutinised and then, if there is a failing, then that be fixed up, be corrected and amended, whether that, as I said, be by policy, process, academia, education, training, whatever the case is.

Further Court decisions since May 2023

4.197. Since the public hearings in Operation Mantus, there have been other Court decisions where police interviewing of vulnerable persons has been criticised with evidence being excluded. In a decision of 21 June 2023 in *R v Jai* [2023] NSWChC 9,[112] Children's Magistrate Hayes, in an unusual step, provided an introduction to the judgment as follows:

[111] T145, 4 April 2023.
[112] Exhibit MTS115.

(a) This is the third hearing this week where issues of 'protected admissions' and 'doli interviews' have arisen.

(b) The Protected Admission Scheme ('PAS') is operated by NSW Police, Legal Aid NSW and the Aboriginal Legal Service in order to facilitate admissions for the purpose of diverting young people under the *Young Offenders Act 1997* (NSW) ('YOA').

(c) The PAS apparently involves the young person ('YP') signing an agreement after an interview with Police.

(d) The PAS is not legislated. The Court has not been presented with any details of the PAS.

(e) A 'doli interview' is a series of unofficial questions designed to establish that the child's development is such that he or she knew that it was seriously wrong to engage in various types of conduct. The questions typically list offences. The YP is then asked whether the act is seriously wrong or naughty – often informed by the consequence that may flow.

(f) The first such hearing finalised on Wednesday. That matter involved a Police interview with a 10-year-old. The Police contacted the Custody Notification Service ('CNS') so the YP could obtain legal advice from an Aboriginal Legal Service solicitor. The solicitor gave advice to participate in an interview believing the matter was to be dealt with under the YOA. The YP participated in an interview. The Prosecution sought to admit the interview. The Prosecution argued that there was never any intention to deal with the matter under the YOA and the admission was not a protected admission.

(g) On Thursday there was a protected admission involving a Police interview with an 11-year-old. Because the YP did not attend the Conference, the Prosecution sought to admit the interview at the hearing.

(h) On Friday, in this matter, the interview sought to be admitted was a previous interview for a different offence that occurred over 9 months

prior to these allegations. That interview was for a stealing offence. In that matter, the YP was to be dealt with under the YOA. There was an electronically recorded interview ('ERISP') that involved a series of questions where the YP was asked whether actions were seriously wrong or naughty. The YP signed a document at the end of the interview.

(i) At the end of this hearing the Court advised the parties that it would prepare a written judgment reflecting more fully the Court's decision on the voir dire for the benefit of both parties.

4.198. Thereafter Children's Magistrate Hayes delivered judgment which culminated in the exclusion of an ERISP as improperly obtained evidence under s 138 *Evidence Act 1995*. His Honour noted that the ERISP would have been excluded in any event on the basis of unfairness under s 90 *Evidence Act 1995*. The Magistrate's reasons referred to provision in LEPRA and the LEPRA Regulation, the *Young Offenders Act 1997* and decisions including the judgment of Wood CJ at CL in *R v Phung and Huynh*. In finding impropriety on the part of the police officer, his Honour said at [65] – [75]:

63. The YP was 12.

64. The caution was delivered quickly.

65. The two distinct aspects of the caution namely:

- you do not have to say or do anything – and,
- but that anything you do say or do may be used in evidence

were not broken down; and should have been.

66. The Police Officer did not ask the YP to explain back, in his own words, what the caution meant; and should have.

67. The Police Officer did not explain to the Uncle his role so he could assist in explaining the caution; and should have.

68. The terms of the caution were unclear. The Police Officer said if you don't do the Youth Justice Conference, then this recording can be

used in Court. It was unclear as to whether this meant in any Court proceeding relating to this offence or any other future Court proceedings regarding any possible future allegation. The terms of the caution should be clear.

69. The Police Officer did not take an appropriate step of informing the YP about his right to obtain legal advice and be given an opportunity to obtain that advice.

70. The intention of the CNS is that young people know that it exists, that it is accessible and that the YP may obtain legal advice; fundamental to that advice is the caution. Had legal assistance been provided it is almost certain that the YP would have had the caution explained and the terms of the interview clarified.

71. In this matter, relevant to s 138 *EA*, the minimum requirement is for Police to comply with the principle in s 7(b) of the *YOA*.

72. If s 7(b) was complied with but no legal advice was provided to the YP - all steps referred to in paragraphs 67, 68, 69, and 70 would be minimum requirements.

73. I am satisfied on the balance of probabilities, having regard to the test in *Briginshaw*, that the conduct of the police officer was improper by not complying with Clause 38 of *LEPRR* and not complying with s 7(b) of the *YOA*.

4.199. The decision in *R v Jai* identifies difficulties in police questioning in the area of doli incapax, a topic referred to in submissions of the ALS and Legal Aid NSW.

4.200. On 11 October 2023, the Court of Criminal Appeal gave judgment in *Mann v R* [2023] NSWCCA 256[113] in which an appeal was allowed and an ERISP with a vulnerable person was excluded under s 138 *Evidence Act 1995* on the basis that it had been improperly obtained. The applicant was an adult Indigenous man with an intellectual impairment. The Court (Kirk JA, N Adams J, and RA Hulme AJ) described the applicant as a '*classically vulnerable person*'.

[113] Exhibit MTS113.

4.201. What occurred concerning the ERISP with the appellant was described by Kirk JA at [86] to [87]:

> 86. In the context of this evidence, and in the context of his related findings, Madgwick ADCJ's finding that Detective Gibson effectively required the applicant to undergo the interview can be understood as follows. Detective Gibson had been told by Senior Constable McSweeney that the ALS solicitor had told her that on the solicitor's advice the applicant did not want to be interviewed. Detective Gibson at no stage asked the applicant himself whether he wished to be interviewed, but instead asked the applicant's mother, thus recognising that the applicant's "capacity for autonomy and his understanding were limited". Ms Mann told him that the applicant did not want to be interviewed. Despite what he had been told by Senior Constable McSweeney, and despite being told that the applicant would not be interviewed by the person he implicitly recognised as having decision-making responsibility, he proceeded to lead the applicant into the interview room without explanation. He then commenced the interview. During the interview he did not ask either Ms Mann or the applicant if they were content for the applicant to participate.
>
> 87. It is perhaps more apposite to describe this course of events as "de facto requiring the accused to go to the interview room and commencing to question the accused" (one of his Honour's formulations) rather than the shorter formulation of "did effectively require the accused to undergo the interview". But the difference is not significant.

4.202. In passages of considerable importance for this Report, Kirk JA identified features of the matter which called for a finding of 'substantial impropriety'. His Honour said at [110] – [116]:

> 110. The conduct of Detective Gibson acted to nullify the protective effect of cll 31, 34, 36 and 37 of the LEPRA Regulation. The applicant was a vulnerable person in the sense employed in the LEPRA regulation both as an Aboriginal person and because he has

an intellectual impairment. Detective Gibson was aware of those matters, having been told by Senior Constable McSweeney. Clause 37 of the LEPRA Regulation is directed towards facilitating Indigenous individuals having access to legal advice following their detention, and that was availed of here. Yet Detective Gibson ignored the fact, which had been communicated to him, that the applicant and his mother had accepted the advice of the ALS and had expressed that they did not want to be interviewed.

111. Clause 36 of the LEPRA Regulation requires that the person responsible for the welfare of a detained person with impaired functioning be notified, and that occurred. Clause 31 entitles a vulnerable person to have a support person present during an investigative procedure. Ms Mann attended the Police station in that context. Detective Gibson sought to persuade her to let the applicant be interviewed, thus recognising that in practice she was the responsible decision-maker on the issue. She said no.

112. Despite his knowledge of what had been communicated to ALS, and despite what he had been told by the applicant's mother, he took the applicant into an interview room and commenced an interview without explanation, and without asking either Ms Mann or the applicant if they wished to do the interview. No doubt Detective Gibson considered – correctly – that given the applicant's earlier admissions, the applicant would likely respond to questioning in frank terms. The motivation of an investigator to try to get the applicant talking on the record is understandable. It does not justify undermining the legal protections of vulnerable people.

113. It would have been reasonable for Detective Gibson to confirm with Ms Mann that the applicant was not to be interviewed. But having done so, and been told no, it was quite improper to commence the interview anyway, without explanation or further checking, in order to get the applicant talking. In so doing Detective Gibson undermined the operation of cll 31, 36 and 37 of the LEPRA Regulations.

114. The seriousness of the impropriety is aggravated by the fact that this conduct occurred shortly before 4:48am (when the interview commenced) in circumstances where the applicant had been arrested at 10:50pm the night before, without any warning; where he was tired after manual labouring that day; and where Ms Mann had herself only arrived at the station after a long drive.

115. There was further impropriety in the way the interview was conducted. Detective Gibson did not properly facilitate Ms Mann's role as support person during the interview. She was given information as to her role. However, cl 34(1) of the LEPRA Regulations provides that a support person may assist and support the suspected person, observe whether the interview is being conducted properly and fairly, and identify communication problems. These protections were undermined as she was effectively sidelined in the interview process, in particular by being "placed in the room in a way that would indicate she was not on an equal footing with the other people in the room" (to quote Madgwick ADCJ).

116. Taken as a whole, the conduct of Detective Gibson involved impropriety in the sense employed in s 138. Indeed, here the conduct is appropriately characterised as being substantially improper.

4.203. Kirk JA continued at [119] – [125]:

119. The third step of the process is to consider whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained, taking account of the factors listed in s 138(3). The burden of persuasion falls on the Crown.

120. As regards par (a), the probative value of the evidence was high – the ERISP included admissions of the charged conduct. As regards (b), the evidence was of great importance in the proceeding. Counts 21-38 depended upon that evidence being admitted, and the admissions were also invoked as tendency evidence by the

Crown in relation to the other counts. As regards par (c), all of the charges were serious, and some were very serious. Notably, five of the 13 charges which depended upon the admissions were of sexual intercourse with a child under 10 years contrary to s 66A(1) of the Crimes Act 1900 (NSW), for which the maximum penalty is life imprisonment. All of these matters are significant and militate in favour of the ERISP being admitted.

121. That being said, the weight of these points should not be overstated. The factors in pars (a)-(c) relate to the importance and utility of the evidence. The requirement to consider such matters does mean that the Court needs to consider the benefit of the end of using the evidence, to be weighed against the improper or unlawful means used to obtain it. Sometimes that benefit will be sufficient to render it more desirable that the evidence be admitted even given the means employed. But it does not mean that evidence obtained by such means will always be admissible if it is the only evidence available to prove very serious charges. A balancing process is still required. In criminal proceedings where the prosecution seeks to adduce evidence illegally or improperly obtained by law enforcement agencies, courts are required "to balance the desirable goal of convicting wrongdoers against the undesirable effect of giving curial approval, or even encouragement, to the unlawful conduct of those whose task it is to enforce the law": Kadir at [12], see also [13]. The end benefit will not always outweigh the detriment of the means.

122. Turning then to par (d) and par (e), the conduct was deliberate. And, as indicated above, it is appropriately regarded as involving impropriety to a substantial degree. In fairness it should be noted that Detective Gibson, too, was operating in the early hours of the morning. That may offer some limited mitigation for the conduct. But neither that factor, nor the temptation to try to get the applicant talking, justifies the conduct.

123. As to par (f), the applicant did not seek to place any particular reliance on rights contained within the International Covenant on Civil and Political Rights.

124. Just as for Madgwick ADCJ (see above at [100]), there is nothing before the Court to suggest that any other proceeding will be taken against Detective Gibson, thus par (g) is a neutral factor in this case – that is to say, there is no other suggested proceeding which would reduce the need for deterrence.

125. As to par (h), this factor militates against the evidence being treated as admissible for the reasons discussed above at [103]-[104].

4.204. Kirk JA concluded at [126]:

126. In sum, there are significant factors militating in favour of admitting the ERISP. But where the impropriety directed to a vulnerable person was deliberate and very serious, and in circumstances where obtaining such evidence without impropriety or illegality was likely to be difficult, I consider it clear that the desirability of admitting the evidence does not outweigh undesirability of admitting it in light of the manner in which it was obtained. My view, thus, is that the evidence is inadmissible pursuant to s 138 of the *Evidence Act*.

4.205. The ERISP excluded in *Mann v R* had been undertaken in 2017 at the Taree Police Station. The case provides another example of police conduct where, despite a solicitor for Mr Mann conveying to police his instructions that he did not wish to be interviewed, police proceeded to interview him anyway. Although there are some factual differences between the various cases considered in this Report, there is a common theme of not accepting and acting upon a statement from a legal representative that the client did not wish to be interviewed. A very clear and concerning systemic issue has emerged.

4.206. The Commission is aware through its complaint assessment system of another case where evidence was excluded in April 2023, as it was improperly obtained upon the basis that questions were asked as a matter of fairness 'of a person

who had otherwise invoked their right to silence'. The prosecution was then withdrawn and costs were awarded to the defence in a sum of $73,000. A failed prosecution report recorded the history of those proceedings. The judgment of the Local Court is not available to the Commission. However, the matter constitutes a further example of controversial police conduct where it was held that the defendant's right to silence was undermined.

4.207. The decisions of Courts referred to in this part of the Report involve recurring findings of unfairness and impropriety in the conduct of police officers arising from the interviewing of vulnerable persons. The decisions of Courts in public judgments are capable of giving rise to reputational damage to the NSW Police Force so as to point to the existence of a systemic problem which needed to be addressed by the NSW Police Force.

No evidence of system in NSW Police Force to inform police officers of Court decisions concerning questioning of young persons

4.208. In relation to the Court decisions referred to recently in this report, Assistant Commissioner Cotter was asked:[114]

> Q. Can you explain why it's taken this investigation to bring these matters to the attention of the NSW Police Force, when these issues have been prevalent for at least 20 years, going back over the cases including in the Supreme Court?
>
> A. I accept that, and probably perhaps even before 20 years. I can't answer that exactly, can I? All I can say is that every action or compilation of actions has a reaction, and this is, again, another point in all our history of policing and all our history of legal engagement where we will walk away, have a really good reflective look on how we do things, make some amendments, no doubt, and hopefully, things will be better.

4.209. Assistant Commissioner Cotter was asked whether there was a system for court decisions to be brought to the attention of senior police:[115]

[114] T146, 4 April 2023.
[115] T 143, 4 April 2023.

Q. The Commission has cases from 2006 onwards where, among other things, cases such as FE, from 2013, the Supreme Court judge in that case referred to the exercise of the right to silence ought to be respected and not undermined, and a number of other judgments have referred to ongoing problems, in fact, systemic problems, with the way that police obtain evidence, particularly from children after they have refused to be interviewed. Is that something that goes back to the Commissioner of Police, the outcome of these cases?

A. Largely I would probably say no. I think there is a number of different prosecutors who clearly are in touch with the investigating bodies, so in the Local Court or Children's Court, primarily, police prosecutors, clearly as the offence goes up in gravity, the DPP and the like. There are liaison meetings, and I have sat on that panel over the years with the DPP as the organisation's liaison member, and I've got to say, some of these issues that you have raised - so I am actually experienced to talk about this - have never been raised. Those meetings have agendas that are more around, I suppose, operabilities and inter-operabilities. They never go to the core of, perhaps, for one side or the other, for better or for worse, a significant issue that has emerged or has been repeatedly or systemically spoken to.

So if I say this comment: the relationship clearly between the police force and the DPP, and every other agency, whether it be Legal Aid, is clearly one where we need to work together, but we equally need to have real conversations about emerging issues before they become almost watershed moments. So I think there is a lot of work to do with a liaison.

4.210. The points being emphasised in this part of the Report were identified in questions asked by the Chief Commissioner of Assistant Commissioner Cotter:[116]

THE CHIEF COMMISSIONER: Could I just ask you some questions which touch on some of the things that Mr Fernandez has asked

[116] T163 – 164, 4 April 2023.

you, and I am conscious that we're heavily taxing you on many of these issues, Assistant Commissioner, but you're in the hot seat, in a sense, and therefore I need to ask you some additional questions just to assist my understanding of it.

The decisions of courts that we have seen fall broadly into two categories - some of them which got published by the judge and put on Caselaw, and others which are effectively unreported Children's Court decisions, one District Court decision. Unless they're brought to the attention of the police, or indeed someone in the court system, they won't really know about them because they're really on the court file or in the hands of the parties. But just confining myself for the moment to judgments that got placed on Caselaw, in 2013 Justice Adamson put her judgment in R v FE on Caselaw and I ask that the first page of the judgment be brought up. It's exhibit MTS70, but it has the barcode 8543630. It should just come up on the screen, I hope.

Could we expand the catchwords in the middle of the page. The first thing I wanted to ask is: are you aware whether, as at 2013 or in subsequent years, there was any system within the police force where someone, perhaps in the legal area, would be keeping an eye on judgments that come out which may touch on areas of policing and, therefore, need to be taken into account?

A. I can't answer absolutely, Chief Commissioner, except to say that, as I sort of touched on before with Mr Fernandez' questioning, if it was of - clearly there's a lot of judgments and a lot of decisions that make their way into law enforcement and how we do things, and clearly the four hours detention after arrest, which is now six hours and all those sorts of things and all that case law going back 30 years - so those big marquee cases, yes, clearly have ripple effects into law enforcement and prosecuting and so forth.

I don't know if there's an exact process then, in 2013, or now for that matter, but potentially there needs to be a more robust conduit, where these certain - and I take your point, Local Court,

Children's Court, but principally these stated cases now really need to be brought out and touched on.

So unless there's a complaint about the propriety of a police officer or the DPP make a complaint about whatever it was, the behaviour at the time or during the court, a lot of these things probably are not brought, they don't have the visibility that they probably could or should.

Q. And I'm conscious that this may be testing the outer limits of what you can speak of, but say within the police force, a large organisation there is the Office of General Counsel on the legal side, there would also be the police prosecutors, there may be other areas of persons looking out for developments in the law in that general sense, as you understand it, was the position in 2013 and in subsequent years that it really depended on someone picking this up and deciding that it's something that called for further attention?

A. Yes. Of course, you would very much understand that the police prosecuting side of the business and the Office of General Counsel - two very different and distinct areas with different remits completely and totally. So I can't speak for necessarily - I've never commanded either, I've never been a part of either, per se. So they're questions best left with them about how they scour the judicial judgments and identify what's hot and what's not.

Q. I mean, in the world of criminal law, if I could put it that way, barristers and solicitors who specialise in the area would have had immediate interest in Justice Adamson's judgment, I don't think that's undue speculation, and indeed judicial officers as well, in seeing it.

Perhaps I could just take you to the catchwords. When you look at the catchwords, "improperly obtained evidence failure to caution the accused- interview conducted notwithstanding initial refusal to answer questions ... unfair deprivation of right to silence advantage

taken of vulnerable person- 15-year-old girl", They're catchwords that tend to draw attention in the current context.

A. They're not beautiful headlines, Chief Commissioner.

Q. No.

A. And I do take your point, absolutely take your point. They are red flags that, if seen, should have caused at least some review of it. Notwithstanding a judge has - she has made a decision there. That's within the confines of the courtroom. There might be other things that, you know, in the reality, might mitigate or otherwise of that. But it needs to be reviewed, I suppose, is what I'm getting to, yes.

Q. And if this is picked up, it might be thought there were at least two purposes that could be served. One is to check whether there is any police practice that may be contributing to this outcome which ought be addressed; and the second being for training purposes, that if you are training detectives and police generally in interviewing techniques, then a decision like this would be quite important to emphasise this type of problem, wouldn't it?

A. Agree.

Q. I am conscious I have put two propositions in the one question, but –

A. I agree with both, Chief Commissioner.

Q. The judgment of Justice Adamson has been referred to in a number of the later decisions, which I won't stop to take you to, but it has been treated as being one of recurring application.

In the body of the judgment, her Honour referred, at paragraph 111, which is at barcode 8543653, if that could be brought up, to the decision of Justice Wood in *R v Phung and Huynh* [2001].

This has been regarded as a seminal case about the responsibility of custody managers. It gets referred to quite frequently in the

context of judges who may find that the custody manager, in a particular context, was really going through a box-ticking exercise rather than something that was more substantial.

I'm not inviting you to read the whole of that now, but it occurs to me that the decision in *Phung and Huynh* is something that should be part of the training of persons who may become custody managers. Even though it is now more than 20 years old, it is still the correct application. Is there any - do you have knowledge of what may be done in selecting cases such as this to be included in training materials?

A. Personally, no, I haven't, and no, I don't. It sounds, reading the words of Chief Justice Wood there at 34, it is pretty plain English, as he was known to do, and, yes, it's pretty good words that could have a break-out box in any type of training, I would have thought, that'd have real impact. That said, the spirit and intent of what Justice Wood there said is the core of what our education around vulnerable persons are.

Q. This decision was referred to most recently at the end of January this year, when his Honour Judge Buscombe in the District Court gave reasons for excluding an interview and said the problems identified by Justice Wood were still manifest in that case, but –

A. Is that the case of Nean?

Q. Nean.

A. I have read it, Chief Commissioner.

4.211. As Counsel Assisting submitted correctly, there appears to be a lack of information about local and state-wide developments in the law being provided by local Police Prosecutors to the Police Executive. There is also a lack of information flowing to police officers in training and those in the field about recent and ongoing issues developing in the law. The evidence of Senior

Sergeant Clarke and Senior Sergeant Pocock did not indicate there was a system for disseminating court judgments of importance within the NSW Police Force.

4.212. The absence of any clear system for disseminating significant Court decisions within the NSW Police Force appears to have contributed to systemic problems which have manifested in the area of questioning of young persons and compliance with important obligations under LEPRA and the LEPRA Regulation.

BWV and operational plain clothes policing

4.213. A further issue in this investigation concerns the plain clothes police officers failing to use BWV to record their interaction with young persons and in particular YPM1.

4.214. The investigation heard evidence concerning the lack of information about when BWV was to be worn as part of plain clothes policing. Officer MTS2 stated:[117]

> Q. With your time in general duties, over how many years have you had experience wearing body worn video?
>
> A. I'm trying to remember when body worn video was introduced. I remember the training. I believe I haven't really worked in general duties since body worn video was introduced.
>
> Q. In your work in the proactive crime team, is there a general practice about the use of body worn video?
>
> A. There's no general practice, no....
>
> Q. In your time in the proactive crime team, which is coming up to about two and a half years, is that right, do you regularly or generally use body worn video?
>
> A. I haven't regularly used it, no.
>
> Q. What situations do you use body worn video in? And all the questions I'm going to ask you about now relate to your time in the proactive crime team.

[117] T7, 9 February 2023.

A. Okay.

Q. What situations do you use body worn video in?

A. Generally I would say, and general terms, if I was doing a vehicle stop, there would be times where I would activate a body worn video to talk to a driver, or if we anticipate doing a search of a person.

...

Q. Are there any operational, practical or any other reasons that you're aware of why body worn video is not used routinely in the team that you're in?

A. No.

Need for clarification of 'operational' policing concerning use of BWV

4.215. The BWV SOPs issued in November 2022[118] say little about when BWV should be worn by police in plain clothes. The BWV SOPs state that they 'apply to operational police'. Express reference is made to 'all police officers wearing police uniform whilst engaged in duties of operational response'. The BWV SOPs state that use of BWV must be 'overt'.

4.216. Assistant Commissioner Crandell was asked about whether further guidance could be given concerning 'operational' duties by plain clothes police. He stated:[119]

Q: "Operational" is a word that comes up a number of times in the standard operating procedures. Can I ask you now, just before I go to the detail of those procedures, what does "operational" mean?

A: So "operational" is generally in uniform but not necessarily, and responding to calls for assistance from members of the community. It does not necessarily include police officers that may well be performing duties inside a police station, but certainly when they're outside performing duties, interacting with the

[118] Exhibit MTS81.
[119] T92, 4 April 2023.

community, whether for the purposes of investigation or other policing functions, then that would be considered "operational".

Q: The subject matter of this investigation involved proactive policing at night-time in plain clothes with cars not identified as police cars, with the goals including to observe if anything took place, any criminal offences, and, if necessary, to arrest people involved.

A: Yes.

Q: Does that come within the definition of "operational policing"?

A: Yes.

4.217. Assistant Commissioner Crandell stated:[120]

Q: Just in terms of that term "operational policing", and "operational police" is used elsewhere, isn't there a benefit to actually defining what "operational policing" is?

A: Yes, I think so. I think "operational response" is more restrictive than "operational policing", I think that's a broader term. I think "operational policing" is used in the SOPs because that's a term that's commonly used in policing, but I think it would be helpful to have a "Definition" section.

Q: Is that something that could be considered?

A: Certainly.

Q: Particularly as later on in the standard operating procedures there's reference to "overt policing", which would be clearly understood as "operational policing", but there's also mention of being in plain clothes, which might not be understood in that same way?

A: Yes.

Q: Do you agree with that?

[120] T96, 4 April 2023.

A: Yes, I do.

4.218. There seems to be no real impediment to BWV being activated by plain clothes police once it is necessary. Assistant Commissioner Crandell stated:[121]

Q: If a police officer in plain clothes did not want to make it overt, for operational reasons –

A: Yes.

Q: -- the camera can be carried in a pocket or somewhere else –

A: Yes.

Q: -- is that right?

A: Yes, it can.

Q: And then it can be taken out and then activated?

A: Yes. And that would be the process, I think, that would be appropriate.

4.219. Assistant Commissioner Crandell was asked by reference to a passage in the BWV SOPs:[122]

Q: The next sentence is at follows:
Police engaged in proactive and/or investigative duties should also take and use [body-worn video] cameras in support of their policing activities.
Can you see that?

A: Yes, I can.

Q: Does that include the situation of police engaging in proactive or investigative duties while in plain clothes?

A: Yes.

[121] T98, 4 April 2023.
[122] T 100, 4 April 2023.

Use of BWV when covert policing becomes overt

4.220. Assistant Commissioner Crandell was asked by the Chief Commissioner:[123]

> Q: Does that amount to this, that if officers in the field who are plain clothes but who may well interact with members of the public, whether for the purpose of questioning, arrest, and in that sense change from covert to overt - that when that point is reached, it is more than highly desirable that the officer extract the body-worn video if it is in the pocket, attach it and turn it on?
>
> A: Yes.
>
> Q: Which will immediately back-capture the past 30 seconds as well as what follows?
>
> A: Yes.
>
> Q: And in that way, there's no compromise of the covert phase, but there's the benefit of the camera for the overt phase. And an issue in this particular investigation, of course, is a physical interaction between a plain clothes police officer and a young person is not assisted by any electronic evidence, and that's a difficulty in itself.
>
> A: Yes. I think, your Honour, there could be occasions where they may, for whatever reason, not wish to record something, but if that's the case, then there needs to be reasons provided as to why they have chosen not to do that.

4.221. In relation to clarifying what was expected of police in the BWV SOPs Assistant Commissioner Crandell said:[124]

> Q: Can I take you back to the second paragraph. Given that last sentence about police being in engaged in proactive and/or investigative duties, would you consider that there would be some benefit in making clear in the standard operating procedures that police engaged in proactive and/or investigative duties, including

[123] T109-110, 4 April 2023.

[124] T101, 4 April 2023.

being in plain clothes, should also take and use body-worn video cameras? Would that be a useful clarification?

A: Yeah, look, I can certainly consider that clarification, albeit the understanding in the organisation, at an operational level, of proactive and investigative duties, would draw that conclusion, but to be crystal clear, I see no problem in adding that clarification.

Q: What you say "the understanding in the organisation" - there's about 17,000 police or thereabouts; is that right?

A: Yes.

Q: There are going to be different understandings between different police about what is required, in terms of the use of a body-worn video camera; would that be correct to say?

A: There's inevitably differences of interpretation. The body-worn video SOPs have been carefully constructed after a great deal of consultation to make it as clear as possible.

Q: Is that a clarification that you take on notice to consider its benefit

A: Yes, I will, yes.

4.222. Assistant Commissioner Crandell agreed with the benefits of having these details contained in the BWV SOPs:[125]

Q. Just to come back to a question I asked you earlier, this illustrates, doesn't it, that different police have different understandings about when it's appropriate to use the body-worn video camera?

A. Yes.

Q. And it's preferable not to have an operational understanding but to make it clear in the standard operating procedures what the situation should actually be?

A. Yes.

[125] T104, 4 April 2023.

Q. Would you agree?

A. Yes, I would agree.

4.223. It is apparent from evidence during the investigation that there is a proper place for extension of the BWV SOPs to plain clothes officers in an operational setting who may come into contact with members of the public.

4.224. Here, the plain clothes police officers involved in the events on 11 September 2022 anticipated that they would come into contact with young persons and probably arrest one or more of them. This is the very scenario where the capturing of electronic evidence concerning the actions and words of members of the public, and of any physical interaction between those persons and police officers, is of great importance.

4.225. Without electronic evidence of that type, courts (if there are criminal proceedings) and this Commission are left to resolve factual disputes by reference to oral evidence. The evidence of Assistant Commissioner Crandell pointed to the capacity to extend the BWV SOPs to plain clothes officers in operational settings. Recommendations to that effect will be made in this Report.

Arresting Children

4.226. In *R v DB*; *R v AP* [2020] NSWDC 472[126] Yehia SC DCJ (as her Honour then was) considered the powers of arrest without warrant concerning young persons. In that context, her Honour observed that it has long been recognised by the Courts that arrest is to be a measure of last resort (at [76]) and that the legislature has recognised this principle in respect of children with s 8 *Children (Criminal Proceedings) Act 1987* creating a presumption that criminal proceedings against children should be commenced without resort to arrest (at [77]).

4.227. Her Honour said at [127]:

> The legislature of this State has recognised that the detention of a young person is not in the best interests of the young person. So much is clear from the enactment of statutory provisions which provide guidelines for the exercise of powers of arrest and detention in relation to children, such as s 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) which

[126] Exhibit MTS73.

emphasises that arrest is to be a measure of last resort in the commencement of criminal proceedings against children.

Availability of *Young Offenders Act 1997* after arrest

4.228. All police need to be aware that *Young Offenders Act 1997* outcomes are still available after arrest. Ms Hopgood explained the reason why, based upon her extensive knowledge and expertise in this area:[127]

> Q. Just a practical question. Once the police have charged, so that there is a matter that is going before the court, does that mean that the Young Offenders Act is off the table for all purposes, that it's a once and for all opportunity for it to be dealt with; or if the matter is adjourned for a couple of weeks, does the statutory scheme allow for the prospect that it becomes a Young Offenders Act matter after all?
>
> A. Yes, a really good question. The court can give Young Offenders Act diversionary options, so the court can caution and conference and, indeed, they have actually wider powers than the police do, because they can also provide a diversionary option for damage by fire offences, for example. Police can't do that.
>
> So that option is still open from the court. It is still open, and I've done this myself before, where a young person has been charged, gone before the court, the police facts sheet had indicated they were considering a Young Offenders Act option but couldn't locate a support person, where I've then written to police and said, "Okay, well, let's set that process up. Could you please withdraw the charges", and had the charges withdrawn. So it doesn't go away in that sense, either. There is that option.
>
> The legislation also provides for, very importantly, a kind of an adjournment process, so to speak, at the time, when a young person is in police custody. So I've had many matters where police have said, "Look, we want to utilise the Young Offenders Act. We don't have a support person", or the young person has said, "I don't

[127] T220, 5 April 2023.

know, I just don't know", they're too stressed out, they can't make a decision. So we have said to police, and it's built into our training, "Don't make you decision now then. You know, you've done this investigation, you're willing to deal with them under the Young Offenders Act, which means you're not going to be putting bail on them, you're not going to be charging them, you've indicated that willingness, so why don't we have - let's make an appointment for one week's time. The young person will see us in the interim, come back to you on Tuesday and can make the relevant admissions with mum present, or a support person present, or they'll have a chance to consider it and consider what they want - you know, what they want to do."

I have had a really good police officer do that with me for a young person who was terrified of police, she had been removed as a child, and they allowed a process whereby they went through me, sent me the relevant paperwork. I met with her at a Legal Aid office, went through what the allegations were, went through the protected admissions scheme form, sent that back to police, and we did it that way, outside of the police station and the police process. So, you know, there is some flexibility there to get the right outcome.

Q. The custody notification form we're looking at, which is annexure A to the statement, just on the first page there is the heading, "Protected Admissions Scheme", underneath that:

Postponement of police determination: If appropriate to do so, will police postpone their determination for 14 days?

Is that an example of postponing the decision as to whether the Young Offenders Act may be involved?

A. Exactly.

4.229. The *Young Offenders Act 1997* plays an important role in the administration of the criminal justice system for children and young people. It is highly desirable that the legislative scheme be utilised at all appropriate times to advance the

statutory objects contained in s 3. These include the establishment of a scheme that provides an alternative process to court proceedings for dealing with children who commit offences,[128] and to address over representation of Aboriginal and Torres Strait Islander children in the criminal justice system.[129]

4.230. The Commission accepts the evidence of Ms Hopgood concerning the use of the *Young Offenders Act 1997*. This aspect requires clarification for the assistance of police officers and a recommendation will be made to that effect later in this Report.

Potential use of excessive force should be noted in the custody management records

4.231. It is important for any aspect of arrest which results in injury or which could be understood as excessive force to be noted in the custody management records. Assistant Commissioner Cotter stated:[130]

> Q. I'm going to ask you about another issue that this investigation is dealing with, and that is the use of excessive force. The particular respect that I want to ask you a question about is recording of potential uses of force or uses of force by police in custody records or custody management records. Are you aware of what the situation is if a police officer is involved in a forceable apprehension where there's an injury to someone who has been arrested, what recording needs to be made of that circumstance or that fact?
>
> A. Again, the custody management record is essentially the platform where all things are recorded. I mean, we've touched on that before. Clearly, the health, you know, the level of intoxication, the health, any medical needs, whether it be medicine, whether it be use of force, whether it be visible injuries, whether it be impairment - whatever the case is - are all recorded. There is an enormous requisition of questions that are answered.

[128] Section 3(a) *Young Offenders Act 1997*.
[129] Section 3(d) *Young Offenders Act 1997*.
[130] T158-159, 4 April 2023.

> The other responsibility for the custody manager is to do that medical assessment, right up there with explaining of the legal rights when somebody comes into their domain. And this also goes to the point of when I say they own the ground and they make the decision. If they deem the person is not medically well in a variety of ways, psychologically or essentially physically, whether it be by use of force or whatever, then their duty is to call medical help in or, alternatively, have that person escorted to a medical centre, hospital, whether that be via ambulance or as a last resort by police, and things like that, and that is done literally on a daily basis across this state and done very diligently. Nobody wants a hurt suspect, a hurt prisoner, on their patch. And this is sometimes where there might be a little bit of conflict, but again, this is why I say the decision on these sorts of grounds, the decision - the recording and the decisions to get medical assistance is the responsibility of the custody manager.

4.232. As was made clear in the evidence of Assistant Commissioner Cotter, it is important that matters concerning excessive force should be noted in Custody Management Records as well as in compliance with the obligation to report use of force in the relevant COPS Entry.[131] A recommendation to this effect will be made later in this Report.

Using handcuffs

4.233. The use of handcuffs, in particular on children and young persons, was an important issue considered during the investigation. The police training witnesses were asked about the use of handcuffs during their concurrent evidence.

4.234. Senior Sergeant Pocock explained that issues of arrest, use of force and discontinuation of arrest were not taught in isolation during police training.[132]

4.235. Senior Sergeant Weston gave evidence about the use of force and how it is taught. A definition is contained in the Australian and New Zealand Policing and

[131] See the Commission's Review of NSW Police Force Use of Force Reporting (February 2023).
[132] T310-313, 25 May 2023.

Advisory Agency (ANZPAA) Use of Force Principles. 'Force' is defined in the Use of Force Manual as follows:

> Force includes, but is not limited to, firearms (including draw and cover), handcuffs (during a detention or arrest), taser (including draw and cover), OC spray (including draw and cover), baton, weaponless control.

4.236. Senior Sergeant Weston explained the term defensive tactics:[133]

> MR FERNANDEZ: Can I just pause you - when you say "defensive tactics", what do you mean?
>
> SR SGT WESTON: So defensive tactics will include weaponless control, weaponless control of physical skill-sets involving the body without the use of a mechanical device such as an appointment. Also involved in the defensive tactics will be ground defence, again, weaponless control. Firearms is stand-alone in the 60 hours. Handcuffs will be included in the 114 hours, as too, baton and OC spray.
>
> MR FERNANDEZ: What training is there, guidance or anything else, about the use of handcuffs, when it should be used, when it should stop being used, any other situations in which it might be used?
>
> SR SGT WESTON: Yes, so our handcuffing - do you mind if I just break down our content list for you --
>
> MR FERNANDEZ: Yes, please.
>
> SR SGT WESTON: -- just so I can give you an exact overview, if you don't mind? Okay, so our handcuffing, we have a four-hour lesson at the - sort of towards the start of our training, and that will cover justification for use of handcuffs. It will also include nomenclature, so we have two different types of handcuffs, so we'll go through and define both. We'll talk about theoretical components, mainly focusing on the justification, the decision-making to handcuff, before we move into the physical skill-sets.
>
> Then we have a second four-hour lesson. But in relation to the physical skill-sets in handcuffing, a student will be taught to become competent in

[133] T339-351, 25 May 2023.

what we will refer to as compliant handcuffing, so handcuffing to the front. And when we talk about a compliant person and determining whether or not I will handcuff a person to the front, again, I'm having to conduct a behavioural or a threat assessment and I'll determine whether or not they are resistive or resistant. If they're resisting, then if they're passively resistant or if they're aggressively resistant will determine whether or not I'm going to be able to handcuff to the front or to the rear. So that plays a fair part in that.

...

MR FERNANDEZ: Is there any training about situations where it's not necessary to either use handcuffs or not necessary to continue with the use of handcuffs?

SR SGT WESTON: Well, the decision with handcuffs rests with you. That's a part of our justification, and by the word "you", that is the person that's making the decision to handcuff. So the decision to handcuff rests with you. Generally you're justified in handcuffing prisoners when they've tried to escape, to prevent escape or injuries to themselves or others.

4.237. Senior Sergeant Weston was asked about the use of handcuffs on young persons:[134]

THE CHIEF COMMISSIONER: Coming back to handcuffs, is there any training of police about the use or non-use of handcuffs with young persons or any different approaches that may be taken in the use of handcuffs if it's a young person? That's an open question to all three of you.

SR SGT WESTON: For a physical application of handcuffs, we'll still go through the exact same officer safety procedures, talking about our stance, application, applying front or rear. There is reference to hand sizes, because of the actual fixed and swinging arm on both handcuffs, if you have a very small person, it could be an adult even, and both - and even with the handcuffs on as tight as possible, before moving through to full ratchet, we don't have security of the wrist, there is a technique where

[134] T356-357, 25 May 2023.

we can apply both hands together with the two handcuffs over the top, which alleviates that problem. But that's not directly in reference to a small child, it can also be to an adult.

SR SGT POCOCK: In our academic component we don't have, specific to young persons, we just teach them that it needs to be reasonable, necessary, proportionate and appropriate, and we go through those four points and if it doesn't meet any one of those, then it's an incorrect use of force.

SR SGT CLARKE: Just to finish off, the use of force manual refers to that in all the circumstances - and we've already looked at part 4 of that which talks about the circumstances including the age and the size of the person as well, which is a consideration for what force and what level of force is used.

4.238. The Commission accepts that hard and fast rules cannot be put in place concerning the use of handcuffs by police. However, the law approaches children and young persons differently to adults for reasons explained earlier in this Report.

4.239. Specific guidance should be given in the SOPs about when it is appropriate to use handcuffs with respect to children and young persons. A recommendation to this effect is to be made later in this Report.

Role of the Custody Manager

4.240. The custody manager has an important statutory role under LEPRA and the LEPRA Regulation which is intended to assist and protect vulnerable persons in custody.[135]

4.241. Officer MTS8 gave evidence about the training she received to become a custody manager:[136]

> Q. You have performed the role of custody manager in the course of being employed by NSW Police; is that correct?

[135] Section 3(a) LEPRA defines 'custody manager' as meaning 'the police officer having from time to time responsibility for the care, control and safety of a person detained at a police station or other place of detention'.
[136] T294, 16 March 2023.

A. Yes.

Q. Did you do a custody manager's workshop in around August of 2012?

A. Yes.

Q. How long does the custody manager's workshop last?

A. Indefinitely.

Q. Was there a formal period of training which was back in August of 2012 where you went and were taught about the role of the custody manager?

A. No.

Q. So what is the training? What is the training you got to be a custody manager?

A. A one-day workshop.

Q. After that one-day workshop, you attended a custody awareness course in October of 2019; is that correct?

A. No. It's an online training PowerPoint.

Q. That was on the topic of custody awareness; is that right?

A. Yes.

Q. That was a PowerPoint presentation. What does that mean?

A. It's just a PowerPoint presentation you watch online.

Q. You said that the training to be a custody manager was an indefinite one. What training, other than attending the one-day workshop and watching the PowerPoint, have you received?

A. That's it.

Q. After having completed the training in August of 2012, were you able, by virtue of completing that training, to start working in the role of custody manager straight away?

A. Yes.

...

Q. In the training you were given for the - back in August of 2012, were you told about the NSW Police Force standard operating procedures for custody managers, for people in custody?

A. It was a long time ago but I assume that would have been part of the training.

Q. Since your training back in 2012, have you yourself ever looked at the NSW Police Force standard operating procedures for the charge room and custody management?

A. Yes.

Q. Why? What circumstances have you looked at that - those standard operating procedures in?

A. If I ever need to refer to it for something I'm unsure of, and I've had another look at it leading up to this.

Q. Is it a fairly unusual occurrence – is it something you do rarely, to actually go back and look at the standard operating procedures?

A. Yes.

Q. After doing the workshop, was there any examination for you in terms of becoming a custody manager?

A. No.

Q. Is there any ongoing - is there any training? Did you go and sit in with other custody managers to see what they do after you did the workshop?

A. I don't recall.

4.242. It is necessary for custody managers to be trained effectively and to be aware of their important role in assisting people in custody, in particular vulnerable young persons. YPM1 was a 'vulnerable' young person as he was a child and also an Aboriginal person.[137] The evidence in this particular investigation indicates Officer MTS8 was not fully aware of her obligations.

4.243. Based on the evidence of Mr Frankham, Ms Burkitt, Mr Clifford, Ms Hopgood and Ms Harper, this appears to be a widespread issue. A recommendation is made later in the Report to address the training of custody managers.

A recording of 'interview declined' must be made in custody management records

4.244. Although the 2004 Protocol required custody managers to note an interview is declined, this appears to have been applied inconsistently in practice. Indeed, as observed earlier, police witnesses who gave evidence during the investigation were unaware of the 2004 Protocol and the 2005 Circular.

4.245. Officer MTS8 gave this evidence at a private hearing:[138]

Q. What did you say when Mr Whitting asked you [to make a record in the custody management records]?

A. I didn't say that I would or wouldn't. It was just, "I would like it recorded in the custody management record,"

Q. Did you ever record that in the custody management record?

A. No.

Q. Why is that?

A. That's his private legal advice. I don't believe it's something for the record.

Q. But his private legal advice was relevant to whether he wished to be interviewed by police; do you understand that?

[137] Clause 28(a) and (d) LEPRA Regulation.
[138] PT307, 16 March 2023.

A. Yes.

Q. It's important, isn't it, to make a note in the custody management records that here, [YPM1] did not wish to be interviewed by police. Do you agree with that?

A. It's not something that, I've ever done, no.

Q. You've never done that at any time while you have been a custody manager? You've never made a note of whether the person wishes to be interviewed or not interviewed; is that what you are saying?

A. Yes, that's what I'm saying. I don't ever record their legal advice in the custody management record.

...

Q. Are you aware that the custody management records that you are responsible for are relevant both to the care of the person there at the time with you, as well as later, as a record of what took place when that person was under your responsibility? Are you aware of that?

A. Yes.

Q. Doesn't that mean, then, that you need to put as much information as you possibly can so that other people, other police, can have access to that information, and other people if necessary; do you agree with that?

A. Yes.

4.246. Addressing the importance of a custody manager's decisions being recorded, Assistant Commissioner Cotter stated:[139]

A. What I do know about, I suppose, decision-making, recording of decision and equally importantly the recording of rationale and the timing and dating of that, to put it in true chronology, is really

[139] T150-151, 4 April 2023.

important, whether that be when you're running a command centre, a command post, or equally, when you have someone in custody.

So I dare say that the custody management system – and these sorts of things are digital and technology, so the two words that jump into my head there are "money" and "time", but what is needed is perhaps a review of the system and perhaps even ultimately the purchasing of a system that gives more opportunity and is user friendly to the creation of records and the decision made by the officer as opposed to, "If you click that box automatically it jumps to another screen", for example. There's an automation side to – no doubt that's just the way technology runs. But I think we need to pull it back to a system where the decision of the decision-maker is recorded, the rationale and the timing of that – not the time they press the print button but the timing of the decision is locked and loaded in certain parts of the system.

4.247. Assistant Commissioner Cotter agreed that a record should be made where an interview was declined. He was asked:[140]

Q. Is one way of providing clarity to the particular part of the memorandum of understanding which I've taken you to, instead of using the word "should", as in "the investigating officers should record interview declined", and "the custody manager should also record", is replacing the "should" with "must" – do you agree with that?

A. Yes, I think – I believe, me, but I also think the organisation would accept that, at first blush, if the advice comes back, "Going to exercise right to silence", then it must be recorded. I do agree with that. And thereafter, if it's changed and then there's further legal advice and that changes, clearly that outcome must be recorded. And with enormous prescription. Even the "I saids", the "He saids", and so forth.

[140] T125, 4 April 2023.

Q. In terms of the review of these documents and the standard operating procedures, is it your evidence, then, that you do support the changing of the word "should" to "must"? Is that correct – for clarity?

A. I sit here personally and say it should be "must". Like anything in this, when we take away our homework from this hearing, we will scrutinise all of the recommendations, and clearly the evidence of people like me, and discuss what these words should look like. But I have no issue, myself, with the word "must".

4.248. The evidence demonstrates the need for a notation of 'interview declined' to be mandatory in the custody management record of the person in custody. This was the established and accepted procedure as at 2004 – 2005 and there is no reason for departing from that procedure. Where a lawyer representing a person informs the custody manager that their client does not wish to be interviewed, this is sufficient to trigger the requirement to record 'interview declined'. This is especially so where the client is a child or young person.

4.249. To the extent that the evidence reveals that this is not an established and consistently applied practice of the NSW Police Force, a recommendation is made later in this Report to require such a practice. This is not merely a 'box ticking exercise' to use the words of Wood CJ at CL in *R v Phung and Huynh*. This is an important part of the legal responsibility of a custody manager who has obligations under LEPRA and the LEPRA Regulation to ensure that proper action is taken with respect to a vulnerable person in custody.

Speaking to investigating police about whether a child or young person wishes to be interviewed

4.250. It is the custody manager who should advise investigating police whether a person wishes to be interviewed or not. If the custody manager does not do this, there is a significant risk that an interview will be conducted in circumstances which are unfair and unjust, especially for a child or young person.

4.251. In this investigation, Officer MTS9 (one of the investigators) gave this evidence:[141]

[141] T396-407, 17 March 2023.

Q. At any course during this morning, did you talk to [Officer MTS8] about whether [YPM1] had been given legal advice?

A. Yes, I asked if he spoke to ALS.

Q. What did [Officer MTS8] say?

A. That he had.

Q. Was this on the telephone or was this in person at the charge room?

A. In person.

Q. Did you ask anything more about the legal advice?

A. No.

Q. So how did you know whether [YPM1] wanted to be interviewed or not?

A. Well, at that stage I didn't offer him the opportunity. There was no support person there, so paperwork began after that period.

Q. I appreciate legal advice is something between [YPM1] and the ALS solicitor, but at the end, there's actually – is this your understanding – an outcome, the custody manager is actually told what it is that [YPM1] wishes to do. Is that your understanding?

A. No, just they speak to legal advice.

Q. So is the whole of your conversation about [YPM1] being interviewed that you asked [Officer MTS8] whether he had legal advice?

A. There was other conversation about a support person as well.

Q. I'm just trying to distinguish between the fact of the legal advice, because at some stage you understand, don't you, that the solicitor would speak to the custody manager when you're talking about a child; is that your understanding?

A. If someone, especially children, speak to that, obviously the custody manager arranges that.

Q. Did [Officer MTS8] tell you at any time whether [YPM1] told her, or it was conveyed to her, that [YPM1]'s wishes were that he did want to be in an interview or did not want to be in an interview?

A. No.

Q. Did you ask her?

A. No.

Q. Was it important for you to know about that?

A. My – I knew that he had spoken to ALS and been read his rights under part 9, which was the important aspects of him being in custody.

Q. What if [YPM1] had told the custody manager his wishes, that he not be interviewed, wouldn't you want to check on that?

A. In my experience, the custody manager arranges that call and then the officer in charge or the investigating officer asks that question.

Q. In the interview?

A. Prior.

Q. Did you ask that before the interview, whether [YPM1] wished to be interviewed?

A. Yes.

Q. What were you told?

A. That he was happy to be interviewed.

Q. Who told you that?

A. [YPM1].

Q. When was that?

A. After the support person [who was STM4] arrived and after I asked for him to be part 9-ed with the new support person.

Q. That was in a direct conversation with [YPM1]; is that right?

A. For offering the interview?

Q. Yes.

A. Yes. And [STM4] was present as well.

Q. [STM4] was present. Did you say to him at that time, when you asked [YPM1] whether he wanted to be interviewed – did you say - did you confirm what [YPM1]'s legal advice was? Did he say, ''I spoke to a solicitor before"?

A. No.

Q. Did you make any inquiry about that?

A. No.

Q. Wouldn't it be important for you to know, before you offered [YPM1] an interview, when you're talking directly to him, what [YPM1]'s wishes were, as conveyed by the solicitor to the custody manager? Would that be something important for you to know?

A. I knew that he had spoken to ALS, which was important.

Q. This is a different question. He spoke to ALS. But what I'm referring you to is what, in fact, had been conveyed by the ALS solicitor to the custody manager. Was that something that was important for you to know?

A. Not that conversation, just [YPM1] speaking to ALS.

4.252. If a young person has had legal advice and does not wish to be interviewed, this should be recorded by the custody manager in the Custody Management Record. That is the custody manager's duty under LEPRA and the LEPRA Regulation.

4.253. Where a solicitor requests the custody manager to make such a notation it should be mandatory for that record to be made. It should be mandatory that the custody manager passes on that information to investigating police.

4.254. This is a simple and straightforward process which is consistent with the statutory obligations of the custody manager and the expectation that police will follow fair and proper practices when dealing with vulnerable persons in police custody.

4.255. It is well known that vulnerable persons in police custody, including young persons, are at a significant situational disadvantage and power imbalance when detained in a custodial setting surrounded by police officers in uniform and otherwise.[142] Once again, a requirement to make an accurate and informative record in the custody management records, is consistent with the 2004 Protocol and 2005 Circular which should remain the touchstone of proper police practice in this area. A recommendation to this effect is made later in the Report.

Part 9 Documents need to be written in plain English

4.256. A support person[143] can play an important role assisting in fairness of an interview, particularly to a vulnerable person. But many support persons have little training as to their role, and what they are able to do to assist a person at a police station.

4.257. In some cases, the support person will have fundamentally different ideas about "*what is best*" for the child, that do not align with their role or consider the full range of legal consequences.[144] Unlike a solicitor, who acts on direct instructions and with full understanding about the range of legal implications, a support person will sometimes exhort the child to make admissions against interest and against legal advice.[145]

4.258. Ms Hopgood said with respect to support persons:[146]

---

[142] *Collins and Others v R* (1980) 31 ALR 257 at 320 (Brennan J); *R v APCR* [2006] NSWDC 12 at [35] (Nicholson SC DCJ); *R v Nean* at [159] (Buscombe DCJ) (reproduced at paragraph 4.192 above); V. Kemp and Others *Examining the Impact of PACE on the Detention and Questioning of Child Suspects*, Final Report, May 2023, Exhibit MTS111, pp 15, 55, 93; *R v KS (No 2*) [2023] NSWSC 1475 at [83] (Yehia J).
[143] The functions of a support person are set out in clauses 30 – 34 of the LEPRA Regulation. The importance of the role of a support person was emphasised in *R v KS (No 2)* [2023] NSWSC 1475 at [143] – [148] (Yehia J).
[144] Mr Frankham, T76, 3 April 2023.
[145] Mr Frankham, T77, 3 April 2023.
[146] T198, 5 April 2023.

Q. What do you speak to support persons about? What does the solicitor talk to the support person about?

A. So we talk to them again within the parameters of that consent, so you might have a young person that says, you know, "Yes", you know, "Talk to them but don't tell them about ABC", but within those parameters you would ordinarily talk to them about what our role is and why we're talking to them; talk to them about why the young person is there and what police have told us about the allegations and about how they propose to deal with it; talk to them about how the young person at this point has said they want to deal with it; talk to them about any questions or concerns they may have and what their role is in that process.

4.259. Ms Hopgood gave an example of problems occurring with the support person in an interview of a young person:[147]

Q. What do you mean by "unable to exercise agency"?

A. So again, unfortunately, for a lot of our clients, if they've got a family member that may be there as a support person, that family member may also be feeling very overwhelmed by the process. The example that comes to mind is an interview where a very young person, about 11, was being called "Boy" throughout the interview. He was asked if he was born in Australia, he was a young Aboriginal boy from a regional area, asked if he was born in Australia, implied that he might have his jacket taken off him but it was cold. At the end, him and his sister were asked whether they had anything to whinge about in the way the interview was conducted and she said, "No", now, she answered "No, no, no. There were no problems with the interview." That's an example of why someone may not feel that they've got agency in performing that role, because of - you can take it right back to, you know, the historical context of colonisation and police, historical policing relationships with community, Aboriginal communities.

[147] T203, 5 April 2023.

4.260. In this context, Ms Hopgood had in mind that the inability to exercise agency was a form of passive acquiescence.

4.261. Ms Hopgood referred to the use in practice of the Part 9 document:[148]

> Q. I'm not going to read out this form. That sets out what you've just described as information, although information that might not be easily understood by everyone.
>
> A. Easily understood and engaged with. Often when police – again I've seen it so many times on footage spoken to the support person and told them about why young person is being arrested, the support person often turns to the young person and says, "Did you do it?" You know, they're straightaway into that role of, you know, parent, and shock. So I think it's both understand it, but even the way the process happens, actually engage with it and consider it and consider the significance of their role and take off their parent hat or their council worker [sic] hat or their police informant hat perhaps and engage with the process.

4.262. Police should also understand the role of the support person. Assistant Commissioner Cotter said:[149]

> Q. Have you yourself ever heard of a support person, a person who is present at an interview supporting a child, who is legally trained?
>
> A. No, I'm not aware of it, no.
>
> Q. Why is the NSW Police Force position that the support person needs to be factored in, in terms of the child's understanding of the right to silence?
>
> A. They play an integral role in providing that support role to the person, whether it be a family member, most often or quite often a parent, or alternatively some other member of the – respected member of the community.

[148] T203, 5 April 2023.
[149] T123, 4 April 2023.

Q. But as you can see, the relevant part of the memorandum of understanding, what this envisages is that the child receives legal advice from a solicitor?

A. Yes.

Q. If the child wishes to accept that legal advice --

A. Correct.

Q. -- and that legal advice is communicated to police, that investigating police and the custody manager should make a recording in the COPS event and the custody management records that the interview is declined. Can you see that?

A. Yes. I agree in totality with that. But all I was saying is that there is another side to this, particularly with a parent.

Q. I'm just not understanding what that other side is. The child has had legal advice from a solicitor, and the legal advice has been communicated, and the memorandum relates to what notes are made by police of the child's wishes.

A. This is the child exercising their right to silence, accepting that advice and their instructions, being, "I wish to exercise my right to silence and not be interviewed."

Q. Yes. What's the problem with that?

A. There is no problem with that.

4.263. Support persons are told about their role by the custody manager. The Part 9 documents are not easy to understand. Ms Hopgood explained why it would be helpful if Part 9 documents were in plain English:[150]

Q. You've talked about the form that people are given, which is in "high-level legalistic language", as you've described. What could

[150] T202-203, 5 April 2023.

be done to improve that form in order to make it more understandable to people?

A. Yeah, plain English is a start. I should say that, again, there's a variety of working groups that have been working on this very issue for many, many years. I'm part of a Justice Advocacy Service working group, which has been looking at that issue and has put through to police - gosh, I can't think how long ago now, maybe 18 months ago - some suggestions around how it could be more appropriate, both in terms of people being able to understand it, culturally safe and actually more akin to what the courts have said is the role of the support people in terms of speaking up and assisting the young person.

4.264. There is a powerful case for revision and simplification of the Part 9 documents. The evidence during the Operation Mantus investigation indicated that this proposal had been under consideration for some time but that it had not reached a conclusion. The documents are intended to provide information for the person in custody, including vulnerable persons. They are also meant to assist their support person who is at the police station to perform an important statutory function.

4.265. Part 9 documents are designed by the State for this purpose and should comply with contemporary expectations so that they assist the fair and lawful process expected to be undertaken in accordance with LEPRA and the LEPRA Regulation. A recommendation is made later in this Report in an effort to achieve these ends.

5. Recommendations arising from Operation Mantus

The Commission's power to make recommendations

5.1. Section 133(1) LECC Act authorises the Commission to include in a s 132 report statements as to any findings, opinions and recommendations of the Commission together with statements of the Commission's reasons for any findings, opinions or recommendations.

5.2. Where the Commission makes a number of recommendations in a s 132 report, it is necessary to keep in mind the statutory scheme for responding to Commission reports. In this respect, the Commission said recently:[151]

> 8.15 Section 146(1) LECC Act provides that the Commissioner of Police, as soon as practicable after receiving a Commission report, must notify the Commission of "the nature of the action taken, or to be taken, as a result of the report". This obligation relates to recommendations made in a report including (in the case of a police officer) statements made under s 133(2)(b), (c), or (d). Section 146(2) makes clear that both the Commissioner of Police and the Commission are obliged to take timely action with respect to recommendations and s 133 statements in Commission reports. If there is disagreement between the Commissioner of Police and the Commission the matter may be taken up with the Minister for Police and Counter-terrorism under s 146(3) and (4). The issue may be made subject of a Commission special report under s 138: s 146(5) LECC Act. In these ways, the statutory scheme in s 146 requires timely attention to be given and action taken arising from a Commission report.
>
> 8.16 Because of s 146, it should not be taken that the Commission reaches the end of its statutory processes with the issue of a report. The public interest is served by a process of timely consideration and appropriate action being taken arising from a Commission report. This statutory feature is an important point of distinction between a standing investigatory body (such as the Commission) and an ad hoc Royal Commission appointed under the *Royal Commissions Act 1923*, whose functions are spent once a report is provided by the Royal Commission to the Government of the day and it's commission has expired.
>
> 8.17 There is an expectation that the NSWPF and the Commission should work collaboratively with respect to, amongst other things, the education of police officers about police misconduct and the

[151] Operation Venti s 132 Report (July 2023) at paragraphs 8.15 – 8.17.

support and promotion of initiatives of the NSWPF directed at the prevention and elimination of such misconduct.

5.3. In his primary written submissions, Counsel Assisting proposed that the Commission make 15 recommendations. Those 15 recommendations and submissions corresponding to them are set out below, as well as the Commission's final recommendations.

Proposed recommendations 1, 2 and 3

5.4. Proposed Recommendation 1*:*

The NSW Police Force is to urgently advise all police of the Protocol established in 2004 between Legal Aid NSW and itself, pending further developments.

5.5. Proposed Recommendation 2:

The NSW Police Force is to urgently advise all police of the 2005 Circular, pending further developments.

5.6. Proposed Recommendation 3:

Any parts of the NSWPF Handbook concerning questioning witnesses inconsistent with the Circular should be deleted.

Submissions made

5.7. Based upon the evidence, including the evidence of Assistant Commissioner Cotter, Counsel Assisting submitted that there was an urgent need to advise all police officers of the arrangements implemented by the then Commissioner of Police in 2004 which did not appear to have been revoked. The intention of the proposed recommendations was to put in place the clear guidance laid down in 2004 whilst allowing the NSW Police Force time to respond to recommendations made in this Report given the unsatisfactory state of affairs revealed in the evidence concerning police questioning of young persons.

5.8. Counsel for the Commissioner of Police disagreed with each of recommendations 1, 2 and 3. It was submitted that the 2004 Protocol and 2005 Circular were based upon repealed and replaced legislation and regulations. It was submitted that the NSW Police Force would work with Legal Aid NSW and the ALS to develop an updated protocol and that, if procedures are changed, this information would be

conveyed to all police officers. It was submitted that the document 'Questioning Suspects' from the NSWPF Intranet[152] clearly reflected the position of the NSW Police Force and this information superseded the 2005 Circular.

5.9. Both the ALS and Legal Aid NSW supported each of proposed recommendations 1, 2 and 3.

5.10. The RLC, representing YPM1, indicated that it supported all concerns and recommendations outlined in the written submissions of the ALS and Legal Aid NSW. This approach will be kept in mind without the submission being repeated in connection with each recommendation.

The Commission's view

5.11. It is necessary to keep in mind the purpose for which proposed recommendations 1, 2 and 3 were intended. The 2004 Protocol and 2005 Circular were formal documents which identified in an authoritative way the approach which police officers were expected to follow when seeking to interview young persons and where an interview was declined.

5.12. The fact that the legislative provisions have changed did not make the 2004 Protocol and 2005 Circular inapplicable. In the same way as Courts have applied reasoning from decisions such as *R v Phung and Huynh* in more recent times, the purpose or object sought to be achieved by the 2004 Protocol and the 2005 Circular remained clear.

5.13. It was no doubt for this reason that Assistant Commissioner Cotter acknowledged that there was considerable force in the suggestion that those authoritative statements made by the then Commissioner of Police should be repeated to serving police officers at the present time as being the practices to be followed pending any considered reform to the rules and practices which may take place in response to recommendations made in this Report. This was the purpose sought to be achieved in these three recommendations.

5.14. It is no response to these proposed recommendations to state that the NSW Police Force would seek to reach agreement with the ALS and Legal Aid NSW or to point to the 'Questioning Suspects'[153] document which makes no provision with

[152] Exhibit MTS79, set out at paragraph 175 of the Report.
[153] Exhibit MTS79.

respect to the questioning of vulnerable persons including young persons. That document begs the question concerning proper police practice in this area. It provides no assistance to operational police officers when considering an interview of a young person.

5.15. Indeed, the 'Questioning Suspects' document (see paragraph 4.125) exposes police officers to the risk of findings by Courts of impropriety. If a young person declines an interview, either directly or through their lawyer, it would be perilous for police officers to proceed to put allegations to the young person. The suggestion in the 'Questioning Suspects' document that allegations should be put 'in fairness' to the interviewee is questionable to say the least, especially in the case of vulnerable persons including young people. The Commission recommends that the relevant part of this document should be withdrawn by the NSW Police Force to remove the use of this problematic phrase in the context of children and young persons.

5.16. It is disappointing that the practical and constructive approach adopted by Assistant Commissioner Cotter in this respect in his April 2023 evidence was not reflected in the formal response to the proposed recommendations made on behalf of the Commissioner of Police.

5.17. To the extent that it is appropriate to avoid the type of technical argument advanced on behalf of the Commissioner of Police, these recommendations will be reworded to make clear that the procedures settled upon by the Commissioner of Police in 2004 should continue to operate, with appropriate modifications, to reflect the different legislation which seeks to achieve the same purpose as the then applicable legislative scheme.

The Commission's recommendations 1, 2 and 3

5.18. The Commission makes the following recommendations:

Recommendation 1 – The NSW Police Force is to urgently advise all police officers that the procedures agreed to by the Commissioner of Police in the Protocol established in 2004 between Legal Aid NSW and the Commissioner of Police continue to operate (taking into account the current but effectively identical statutory scheme) pending any considered response of the NSW Police Force to recommendations made in this Report concerning the questioning of

young persons. The practical effect of this recommendation is that custody managers should record in the custody management record 'Interview declined' where the young person declines to be interviewed either directly or through the lawyer communicating their client's instructions to that effect.

Recommendation 2 – The NSW Police Force is to urgently advise all police that the procedures laid down in the 2005 Circular continue to operate (taking into account the current but effectively identical statutory scheme) pending any considered response of the NSW Police Force to recommendations made in this Report concerning the questioning of young persons. The practical effect of this recommendation is that a young person who declines to be interviewed either directly, or through their lawyer communicating on their behalf, is not to be asked to confirm this electronically. Should a young person indicate that they have changed their mind about being interviewed, police should arrange for the young person to speak to a solicitor again. The young person should be directed to the ALS or Legal Aid NSW telephone advice system by which the young person received their original advice. Police should only interview the young person after they have received further advice and confirmed that they wish to be interviewed.

Recommendation 3 – Any parts of the NSW Police Force Handbook concerning the questioning of witnesses which is or are inconsistent with the 2005 Circular concerning the questioning of young persons should be deleted. In particular, that part of the NSW Police Handbook under the heading 'Questioning Suspects' has no application to the questioning of children and young persons.

Proposed Recommendation 4

5.19. Proposed Recommendation 4:

The Protocol and the Police Circular should be included in the Standard Operating Procedures regarding Charge Room and Custody Management.

Submissions made

5.20. Counsel Assisting submitted that recommendation 4 should be made for reasons linked with the first 3 recommendations. It was noted that Assistant Commissioner Cotter saw the value in including these matters in SOPs regarding charge room and custody management.

5.21. The Commissioner of Police disagreed with this recommendation in light of the matters advanced with respect to proposed recommendation 2.

5.22. The ALS supported this recommendation and submitted that it should be made clear in the SOPs that these protections apply equally to persons in custody who speak to a lawyer via the ALS Custody Notification Service Hotline and are not limited in their application to persons spoken to via the Legal Aid NSW Youth Hotline.

The Commission's view

5.23. Consistent with the approach taken with respect to the first 3 recommendations, the Commission considers that it is appropriate that the procedures adopted by the Commissioner of Police as reflected in the 2004 Protocol and the 2005 Circular, should be included in the SOPs regarding charge room and custody management.

5.24. The Commission does not accept the submission of the Commissioner of Police that it is inappropriate to incorporate these matters in the SOPs because there have been some legislative changes since 2004 and 2005. The point is that current NSW Police Force procedures should reflect the position formally adopted by the Commissioner of Police in 2004 and 2005 with those procedures being operative pending any considered response of the NSW Police Force to recommendations made in the Report concerning the questioning of young persons.

5.25. The SOPs should also reflect the fact that procedures are not confined to the Legal Aid NSW Youth Hotline and apply in all circumstances where young persons are receiving telephone legal advice in particular from the ALS and Legal Aid NSW.

The Commission's recommendation 4

5.26. The Commission makes the following recommendation:

Recommendation 4 – The Standard Operating Procedures regarding charge room and custody management of the NSW Police Force should be amended to include the procedures adopted by the Commissioner of Police in the 2004 Protocol and 2005 Circular concerning telephone legal advice being given to

young persons, by Legal Aid NSW, the ALS or otherwise, with appropriate modifications being made to refer to contemporary legislative provisions in place of the equivalent provisions which operated at that time.

Proposed recommendation 5

5.27. Proposed Recommendation 5:

> If police do interview a person suspected of criminal offences after the person has received legal advice and has indicated he or she does not wish to be interviewed, this should be stated in the police facts.

Submissions made

5.28. Counsel Assisting proposed this recommendation upon the basis that the investigation heard evidence of police not stating in police facts that they interviewed a child or young person after the child or young person's lawyer told them that the child did not wish to be interviewed. It was submitted that if police interviewed a person suspected of criminal offences after the person had received legal advice and had indicated that he or she did not wish to be interviewed, this should be stated in the police facts. In this way, it was submitted that it would then be clear that the 2004 Protocol and the 2005 Circular had been breached and that this would provide accountability and transparency.

5.29. Counsel for the Commissioner of Police opposed this recommendation noting that it overlooked that, following receipt of legal advice, a child or young person is entitled to change their mind and may participate in an interview with a police officer with or without receiving a further opportunity to speak with a lawyer. The Commissioner of Police accepted that best practice may involve providing a further opportunity for a young person to speak with a lawyer, but there is no legal requirement for this to occur. The Commissioner of Police accepted that if any person (adult or young person) in custody wished to have further contact with a lawyer all reasonable steps should be taken to facilitate this.

5.30. It was submitted for the Commissioner of Police that it is important to acknowledge that the law in NSW did not involve a statutory prohibition against a child participating in an interview with police officers following receipt of legal advice. It must be understood, it was submitted, that the decision about whether

to participate is to be made by the child or young person in conjunction with their support person.

5.31. The ALS supported a recommendation that police must be transparent about proceeding to interview a person following their refusal of an interview on legal advice. However, it was submitted that the recommendation, as drafted, risked indicating that it was acceptable to interview suspects following refusal of an interview as a matter of course.

5.32. The ALS submitted that the recommendation, if it was to be made, should be worded in such a way as to make clear that it is expected that it would be exceptional for a person to be interviewed following the refusal of an interview on legal advice.

5.33. Legal Aid NSW supported the submissions of the ALS concerning proposed recommendation 5.

5.34. In written submissions in reply, dated 27 July 2023, Counsel Assisting was critical of the negative approach in the submission for the Commissioner of Police to the proposed recommendation.

5.35. In written submissions dated 8 August 2023, counsel for the Commissioner of Police took issue with the submissions of Counsel Assisting which were critical of the police response to proposed recommendations.

The Commission's view

5.36. The approach adopted in written submissions for the Commissioner of Police (both principal submissions and submissions in reply) and during the course of the hearings for the purpose of the investigation, has not sought to explain what has happened within the NSW Police Force since 2005 with respect to the practices adopted and implemented by the Commissioner of Police as reflected in the 2004 Protocol and the 2005 Circular.

5.37. To the extent that the Commission is entitled to expect practical and constructive cooperation from the NSW Police Force during an extended investigation such as this, in a manner outlined in the helpful evidence of Assistant Commissioner Cotter, that process of constructive engagement by the NSW Police Force was not apparent after April 2023. Although the Commission

understands that some process is underway within the NSW Police Force with respect to these issues, the Commission was not provided with information concerning any change in practices and procedures until 21 November 2023 (referred to at paragraph 4.137), which was a significant period after the conclusion of evidence and the time for making submissions.

5.38. The Commission considers it is a fair characterisation of the response of the Commissioner of Police to proposed recommendation 5 that it was not supported.

5.39. The Commission accepts the submissions made by Counsel Assisting and on behalf of the ALS and Legal Aid NSW. Where police have been told by the person, either directly, or through the person's lawyer, that the person does not wish to be interviewed, a statement to that effect should be included in the facts sheet. If there is a change of circumstances after legal advice and an interview takes place, that fact should be recorded in the facts sheet.

5.40. With respect to the submission for the Commissioner of Police that there is no statutory prohibition upon police seeking to interview a child or young person who has accepted advice not to be interviewed, the relevant law is found in provisions concerning the fairness and propriety of police conduct which, when contravened, may see exclusion of evidence under ss 90 or 138 *Evidence Act 1995*. It is these provisions which have been applied repeatedly to exclude evidence in the cases considered in this Report.

5.41. Further, the *Police Act 1990* contains a statement of values to be followed by police officers, which includes upholding the rule of law (s 7(b)), preserving the rights and freedoms of individuals (s 7(c)) and ensuring that authority is exercised responsibly (s 7(h)). Section 7 Police Act 1990 has been described as an indication of expectations or goals which are aspirational in nature.[154] Clearly, it is the responsibility of the NSW Police Force to assist and support police officers in seeking to meet these goals or expectations.

The Commission's recommendation 5

5.42. The Commission makes the following recommendation:

[154] *State of NSW v Tyszyk* [2008] NSWCA 107 at [74] – [75]; *AD v State of NSW* [2023] NSWCA 115 at [101] – [102].

Recommendation 5 – If, in what ought be exceptional circumstances, police do proceed to interview a person suspected of criminal offences after the person has received legal advice and has indicated he or she does not wish to be interviewed, a statement should be included in the police facts explaining how this came about including whether an opportunity had been provided to the suspect to receive further legal advice before proceeding with an interview.

Proposed recommendation 6

5.43. Proposed Recommendation 6:

The Body-Worn Video Standard Operating Procedures should be amended to make clear the SOPs apply to police conducting operational duties in plain clothes.

Submissions made

5.44. Counsel Assisting referred to the evidence mentioned earlier in this Report including evidence of Assistant Commissioner Crandell concerning the use of BWV by operational plain clothes police.

5.45. The Commissioner of Police disagreed that this was an appropriate or necessary recommendation in circumstances where the NSW Police Force was separately responding to the Commission's Observations Paper with respect to BWV (July 2023).

5.46. The ALS and Legal Aid NSW supported recommendation 6.

The Commission's view

5.47. There is a separate process underway where the Commission has provided to the *NSW Police Force an Observations Paper: NSW Police Force use of Body Worn Video* (July 2023) in relation to which certain responses were provided by the NSW Police Force in October 2023.

5.48. The Commission's July 2023 Observations Paper referred to aspects of the evidence given in Operation Mantus.

5.49. The Commission is satisfied that the BWV SOPs should make clear that they apply to police conducting operational duties in plain clothes. There is a

sufficient evidentiary foundation for this in the evidence of Assistant Commissioner Crandell. It is not necessary to delay this recommendation until a future Commission report which will deal with a wide range of matters concerning BWV.

The Commission's recommendation 6

5.50. The Commission makes the following recommendation:

Recommendation 6 – The BWV Standard Operating Procedures should be amended to make clear that they apply to police conducting operational duties in plain clothes.

Proposed recommendation 7

5.51. Proposed Recommendation 7:

Body worn video should not be used as an alternative or substitute to recorded interviews, and should not be used for taking informal interviews unless there are strong reasons to do so. This should be included in the Body-Worn Video Standard Operating Procedures.

Submissions made

5.52. Counsel Assisting proposed this recommendation in light of evidence from Mr Frankham concerning police using BWV as an alternative means to interview suspects.

5.53. The Commissioner of Police disagreed that this was an appropriate or necessary recommendation in circumstances where the Commission had sought responses from the NSW Police Force with respect to the BWV Observations Paper. It was submitted, in any event, that the matters raised by Counsel Assisting by reference to Mr Frankham's evidence were not contrary to any statutory provision and could not be regarded as improper.

5.54. The ALS supported recommendation 7 in principle as did Legal Aid NSW. It was submitted further by the ALS that the recommendation should be framed more broadly to encompass informal interviews that are not recorded on BWV such as informal interviews that are recorded on other police mobile devices as illustrated in case studies in the ALS written submission (Exhibit MTS96).

5.55. In reply submissions on behalf of the Commissioner of Police, the ALS submission was opposed. The Commissioner of Police submitted that subject to compliance with other legislative provisions (such as the requirement for support persons and/or contact with a lawyer), there was no proper basis to restrict or constrain interviews with suspect persons using other technology. It was submitted that there has been no evidence about why interviews should be restricted to an interview room at a police station.

The Commission's view

5.56. In considering this recommendation, the Commission should keep in mind the context arising from the Operation Mantus investigation. The investigation has not extended to a thorough examination of investigatory techniques and the use of technology to record conversations. It must be said that the use of technology to record conversations between police and suspects is a development which the law has encouraged since the days of controversy with respect to alleged verbal admissions and unsigned records of interview.[155]

5.57. What is important, however is the requirement for fairness in interviewing procedures. In particular, in circumstances where police have been informed that a suspect does not wish to be interviewed, police should not undertake an informal interview which is recorded by BWV which subverts the suspect's invocation of the right to silence.

5.58. Once again, the Commission does not consider it appropriate to defer consideration of this issue until a further general Report of the Commission concerning BWV.

The Commission's recommendation 7

5.59. The Commission makes the following recommendation:

Recommendation 7 – The BWV Standard Operating Procedures of the NSW Police Force should be amended to provide that where a suspect has informed investigating police (through a lawyer or otherwise) that the suspect does not wish to be interviewed by police, the police should not proceed to informally interview the suspect including the use of BWV to record such a conversation.

[155] *R v Morley* [2021] NSWDC 681 at paragraphs [53], [73] (Haesler SC DCJ).

Proposed recommendation 8

5.60. Proposed Recommendation 8:

> People suspected of criminal offences should not be interviewed by informal means, such as when they are in a dock area of a police station, unless there are strong reasons to do so.

Submissions made

5.61. Counsel Assisting supported this recommendation by reference to part of the ALS submission[156] and a notation made by Officer MTS2.

5.62. The ALS and Legal Aid NSW supported recommendation 8 and submitted that this recommendation should be given effect through the insertion of clear guidance into all relevant NSW Police Force SOPs and Guidelines. It was submitted that this should include specific guidance about what would constitute "*strong reasons*" and what will not (such as seeking to circumvent Part 9 protections or to expedite investigations in the absence of a support person). It was submitted that specific training should be provided to investigating police and custody managers in relation to this recommendation.

5.63. The Commissioner of Police disagreed that this was an appropriate or necessary recommendation in circumstances where the Commission was examining the use of BWV through the BWV Observations Paper.

5.64. It was submitted for the Commissioner of Police that the evidence did not demonstrate that this was a "common practice" and did not explore the circumstances of examples provided to warrant such a recommendation. It was submitted further by the Commissioner of Police that the adoption of the term "informal interviews" is unhelpful and misleading. While there is a convention that an interview takes place by way of an ERISP in a dedicated room in a police station, it was submitted that there is no legislative impediment to an interview being conducted while a person is seated or located in a holding dock or cell. It was submitted that there was, in fact, substantial advantage to this audio-visual recording being made to protect the suspect or detained person.

[156] Exhibit MTS96.

The Commission's view

5.65. Once again, it is appropriate to keep in mind the context in which this proposed recommendation has arisen as part of the Operation Mantus investigation. In particular, where a suspect (including a young person) has indicated through a lawyer or otherwise that the suspect does not wish to be interviewed by police, there should not be an interview by informal means conducted at all, whether in the dock area of a police station or elsewhere.

5.66. If the suspect has reconsidered his or her position and decided to answer questions after all (after there has been an opportunity for legal advice to be obtained), then there may be a proper foundation for an interview or conversation between a police officer and the suspect to take place and to be appropriately recorded electronically. Ordinarily such an interview or conversation would take place in an interview room by way of an ERISP.

5.67. In the exceptional circumstance where that procedure was not to be utilised, it would be necessary for the investigating police officer to obtain by way of electronic recording the fact that the suspect had previously declined to be interviewed but had now decided to agree to an interview with the subject matter of the interview then being recorded electronically. It is important that such a significant step should not take place in a part of the police station (such as the dock area or a cell) which may give the impression to the suspect that this was an informal and less significant step being taken by the police officer than if the conversation was taking place in an interview room.

5.68. The rationale for this recommendation is to ensure that suspects are dealt with fairly by police with the suspect only speaking to the police officer in circumstances where it has been made clear and understood to the suspect that the conversation is for the purpose of obtaining evidence against the suspect.

5.69. It is noted that this issue extends beyond the Commission's Observations Paper on the use of BWV and it is not appropriate to defer any recommendation until that separate process is complete and a subject of a Commission Report.

5.70. To the extent that the submission for the Commissioner of Police relies upon the absence of a statutory provision prohibiting police form conducting such an interview, it is important once again to keep in mind that issues of fairness and

impropriety are addressed in ss 90 and 138 *Evidence Act 1995*, provisions which had been applied repeatedly where objection is taken to the interviewing of young persons. In addition, the statement of values to be followed by police officers as contained in s 7(b), (c) and (h) *Police Act 1990* should be kept in mind. As noted earlier in this Report (at paragraph 5.41), it is the responsibility of the NSW Police Force to assist and support police officers in seeking to meet the goals or expectations contained in s 7 *Police Act 1990* by guarding against circumstances which do not uphold the rule of law or do not preserve the rights or freedoms of individuals or ensure that authority is exercised responsibly.

The Commission's recommendation 8

5.71. The Commission makes the following recommendation:

Recommendation 8 – People suspected of criminal offences should not be interviewed by informal means, such as when they are in a dock area of a police station, unless there are strong reasons to do so.

Proposed recommendation 9

5.72. Proposed Recommendation 9:

People suspected of criminal offences should discuss bail with the custody manager and not with investigating police. Investigating police should not indicate a person will be more likely to be given bail if the person takes part in a recorded interview.

Submissions made

5.73. In proposing this recommendation, Counsel Assisting referred to the evidence of Ms Hopgood and the ALS Submission[157] in support of a submission that persons suspected of criminal offences should discuss bail with the custody manager and not with investigating police.

5.74. The ALS and Legal Aid NSW supported this recommendation. It was submitted that this recommendation should be given effect through the insertion of clear guidance into all relevant SOPs and Guidelines and that specific training ought be provided to investigating police and custody managers.

[157] Exhibit MTS96.

5.75. The Commissioner of Police accepted the premise that offering a person bail (or similar) in exchange for participating in an interview is an inducement that could result in an admission being held to have been unlawfully or improperly obtained and be excluded during a hearing or trial. Further, the Commissioner agreed that a bail determination is a matter for a custody manager or other senior police officer authorised by the *Bail Act 2013*.

5.76. It was submitted for the Commissioner of Police that this issue was raised in submissions by the ALS but that no evidence was led during the Operation Mantus hearings that it had occurred or that it is a widespread issue requiring the intervention of the Commission. It was noted that the NSW Police Force Handbook provides guidance to police on what is an inducement and the effect an inducement may have on the admissibility of admissions in criminal proceedings where the person is a defendant.

The Commission's view

5.77. The Commission should have regard to the evidence of Ms Hopgood as well as the matters raised in the ALS Submission. The Commissioner of Police agrees, in effect, that conduct of the type addressed by proposed recommendation 9 should not occur. There is no controversy with respect to the subject matter. Rather, Counsel for the Commissioner of Police submits that there is no evidentiary foundation for there being a problem in this area which the Commission should address by way of a recommendation.

5.78. The Commission is satisfied that there is a sufficient evidentiary basis for this aspect to be addressed in a recommendation. The Commission is not bound by the rules of evidence and can inform itself in such manner as the examining Commissioner considers appropriate.[158] The matter was raised in evidence from Ms Hopgood as well as in the ALS Submission which is in evidence. The Commissioner of Police did not seek to challenge the evidence of Ms Hopgood in this (or any) respect. The ALS evidence indicates that there have been examples of this occurring as reported by their solicitors. It is appropriate to make an express recommendation in this regard based upon this evidence.

[158] LECC Act, s 70(1).

The Commission's recommendation 9

5.79. The Commission makes the following recommendation:

> **Recommendation 9** – The NSW Police Force should make express provision in the NSW Police Force Handbook and relevant SOPs that only the custody manager, and not investigating police, should discuss bail with a suspect in custody. Investigating police should not indicate that a person will be more likely to be given bail if the person takes part in a recorded interview with police.

Proposed recommendation 10

5.80. Proposed Recommendation 10:

> A system should be set up within the NSWPF to enable decisions of the Courts to be brought to the attention of the Executive of the NSWPF and all police.

Submissions made

5.81. In support of this recommendation, Counsel Assisting referred to the extensive evidence with respect to decisions of courts concerning the interviewing of young persons and the apparent absence of a system within the NSW Police Force to bring these judgments to the attention of police officers for both training and operational purposes. The evidence included that of Assistant Commissioner Cotter as well as Senior Sergeant Clarke and Senior Sergeant Pocock.

5.82. The ALS and Legal Aid NSW supported proposed recommendation 10.

5.83. The Commissioner of Police disagreed that this recommendation was appropriate or necessary. It was noted, however, that the Commissioner of Police and the Director of Public Prosecutions are working together to develop a memorandum of understanding concerning these kinds of matters.

The Commission's view

5.84. The evidence adduced during the Operation Mantus investigation presents a disturbing picture. Since at least 2013 (*R v FE*), there have been a series of decisions concerning impropriety on the part of police officers in the approach to interviewing young persons. Those decisions have drawn on earlier cases such as the 2001 decision of Wood CJ at CL n *R v Phung and Huynh*. There have been

decisions in the District Court, the Local Court and the Children's Court where findings of impropriety have been made leading to the exclusion of interviews under ss 90 or 138 *Evidence Act 1995*.

5.85. The evidence from ALS and Legal Aid NSW witnesses and the submissions made by the ALS and Legal Aid NSW point to practices by police officers in different parts of the State of New South Wales which have compromised and breached established laws designed to protect young persons.

5.86. The Commissioner of Police did not challenge any of this evidence by cross examination or by adducing other evidence to seek to establish that the evidence of ALS and Legal Aid NSW witnesses (and the submissions made on behalf of those agencies) was wrong.

5.87. The evidence of Assistant Commissioner Cotter acknowledged the problems in this respect and the need for organisational action to be taken to correct the position and to assist serving police officers.

5.88. The Commission is aware that lawyers work with the NSW Police Force in various areas including the Office of General Counsel, the Operational Legal Advice Unit, Police Prosecutors and with trainers being legally qualified as well.

5.89. It is a minimum expectation that an agency such as the NSW Police Force would have a system for capturing pertinent decisions which are published on Caselaw and bringing those decisions to the attention of operational police by way of training and updates to assist the work of police in the community. There is no evidence which has been furnished to the Commission as part of Operation Mantus of any steps taken in this regard before or after the evidence of Assistant Commissioner Cotter in early April 2023.

5.90. Discussions which may be taking place between the NSW Police Force and the Director of Public Prosecutions may be addressing a number of areas of concern between those two agencies. However, there is a larger and more fundamental problem which is raised by proposed recommendation 10 and that is an agency-wide problem which, on the evidence in the present investigation, remains unremedied.

The Commission's recommendation 10

5.91. The Commission makes the following recommendation:

> **Recommendation 10** – A system should be set up as a matter of urgency within the NSW Police Force to enable decisions of Courts in areas concerning policing to be brought promptly to the attention of the Executive of the NSW Police Force to ensure appropriate steps are taken to assist operational police and for training purposes.

Proposed recommendation 11

5.92. Proposed Recommendation 11:

> A system should be put in place within NSWPF to enable Police Prosecutors to advise the NSWPF Executive about recurring issues in prosecutions.

Submissions made

5.93. In support of recommendation 11, which is connected to recommendation 10, Counsel Assisting pointed to what appeared to be a lack of information about local and statewide developments in the law being provided by local Police Prosecutors to the Police Prosecutors Executive, and the lack of information flowing to police officers in training and those in the field about recent and ongoing issues developing in the law. It was submitted that the evidence of Senior Sergeant Clarke and Senior Sergeant Pocock demonstrated the need for action in this respect with the consequence of this lack of information being shared within the organisation being significant.

5.94. The ALS and Legal Aid NSW supported recommendation 11.

5.95. The Commissioner of Police disagreed that there is an absence of a system in the NSW Police Force which enables Police Prosecutors to bring matters to the attention of the Senior Executive. Reference was made to the structure within the Police Prosecutions Command and the reporting line to the upper echelons of the NSW Police Force including the Commissioner's Executive Team (CET).

The Commission's view

5.96. The purpose underlying proposed recommendation 11 relates not to the structure of the NSW Police Force but the evidence concerning what had been occurring (or not occurring) in practice as revealed in the evidence.

5.97. The evidence reveals a recurring issue with respect to police interviewing young persons despite the fact that the lawyer for the young person had informed at least the custody manager that the young person did not wish to be interviewed.

5.98. The evidence given by the ALS and Legal Aid NSW witnesses, and as contained in the ALS and Legal Aid NSW submissions, pointed to issues of this type occurring in different parts of the State, including both metropolitan and regional areas.

5.99. The decisions of Courts to which reference has been made bear this out. The evidence included the fact that a Police Prosecutor in a particular regional area was not prepared to adduce evidence of interviews with young persons obtained in this way. That approach by a Police Prosecutor was understandable and consistent with the obligation of a prosecutor as contained in well known rules which apply to Police Prosecutors as well as Crown Prosecutors. Added to this is the apparent lack of a system for public court decisions in this area to be harnessed by the NSW Police Force and for otherwise unreported decisions in the Local Court or the Children's Court to be reported by Police Prosecutors up the line to senior police to allow appropriate consideration to be given to changes to assist operational police officers.

5.100. The procedure whereby a failed prosecution report may be prepared by the Police Prosecutor is no substitute for a proper and effective process where systemic issues of this type are brought to the attention of senior officers in a timely and orderly way. The simplest change would have been to remind all police officers of the 2004 Protocol and 2005 Circular accompanied by a declaration that those practices remained the operable practices and procedures to be followed unless and until they were amended after further consideration.

5.101. In short, this recommendation is directed to the substance and not the form so that the submission on behalf of the Commissioner of Police does not address the real issue.

The Commission's recommendation 11

5.102. The Commission makes the following recommendation:

> **Recommendation 11** – The NSW Police Force should take urgent action to implement a system to enable Police Prosecutors to advise the NSW Police Force Executive about recurring or systemic issues in prosecutions so that the Police Executive may take timely and effective action to assist police officers for operational and training purposes.

Proposed recommendation 12

5.103. Proposed Recommendation 12:

> NSWPF training and ongoing education on use of force should include specific content on the circumstances in which people should be handcuffed.

Submissions made

5.104. Counsel Assisting submitted that this recommendation should be made by reference to evidence concerning the use of handcuffs. It was submitted that specific guidance should be given in the SOPs about when it is appropriate to use handcuffs and when it is appropriate to consider other alternatives.

5.105. The ALS and Legal Aid NSW supported this recommendation by submitting that specific reference should be made to the use of handcuffs with children in the content developed for training and education.

5.106. The Commissioner of Police disagreed with this recommendation and submitted that there was sufficient guidance provided concerning the training of police officers relating to the use of handcuffs or alternatives. It was submitted that the recommendation was not supported by evidence, nor did it consider the powers of individual police officers to use handcuffs and the requirement to justify their use.

5.107. In submissions in reply to the ALS Submissions, the Commissioner of Police submitted that it was not appropriate to impose a formulaic prescription as to when or who should or might be handcuffed. It was submitted that this approach overlooks the obligation of the individual police officer to justify the use of handcuffs on each occasion and, in addition, the training provided to police

officers which is developed following other investigations and inquiries such as inquests.

5.108. Further, it was submitted that the specific reference to children or young persons overlooks the individual characteristics of the child or young person and the circumstances that handcuffs might be used.

The Commission's view

5.109. It is necessary to keep in mind the context in which this proposed recommendation has arisen.

5.110. The evidence reveals that YPM1, a slightly built 14 year old youth, was arrested and handcuffed on the evening of 11 September 2022. Although the Commission accepts that the use of handcuffs was warranted initially and until his identity had been confirmed, there was simply no justifiable reason to leave the young person in handcuffs whilst on the ground in an injured state. The police officers engaged in the arrest provided no sensible reason as to why it was necessary to leave the young person handcuffed at that time. There were a number of people present including police and members of the public. It is not clear where it could be suggested the young person may have attempted to go in any effort to escape. The practical reality was he was on the ground waiting for medical attention to be provided given his head injury in a location where several officers were present.

5.111. It may be accepted that a wide variety of circumstances will exist in which handcuffs can be used by police so that any training or police procedures cannot prescribe a particular approach in an inflexible way. However, the evidence in this investigation reveals a type of formulaic approach on the part of police officers where the young person was handcuffed and the handcuffs were left on without any consideration as to the appropriateness of that course having regard to the age and physical state of the young person.

5.112. It is to that type of scenario that NSW Police Force training and ongoing education can reinforce the need for police to consider, and reconsider, the need for handcuffs to be used and maintained.

5.113. To the extent that the use of handcuffs to restrain a person constitutes, in the absence of lawful excuse, an assault,[159] it is necessary for police officers to have good reason for handcuffing a person and leaving the person handcuffed having regard to s 230 of LEPRA and other relevant police rules. On the evidence adduced in the Operation Mantus investigation, the Commission is satisfied that a recommendation should be made concerning the use of handcuffs in particular with respect to young persons.

The Commission's recommendation 12

5.114. The Commission makes the following recommendation:

Recommendation 12 – Amendments should be made to NSW Police Force training and ongoing education materials with respect to use of force to include specific content and guidance concerning the handcuffing of persons, and in particular children and young persons, with the need for ongoing assessment as to whether it is appropriate to leave the person handcuffed after the arrest.

Proposed recommendation 13

5.115. Proposed Recommendation 13:

Police should be made aware that *Young Offenders Act* outcomes are still available after arrest.

Submissions made

5.116. Counsel Assisting sought this recommendation by reference to the evidence of Ms Hopgood concerning the use of the *Young Offenders Act 1997*.

5.117. The ALS and Legal Aid NSW submitted that this recommendation should be reframed. It was submitted that, as currently drafted, the proposed recommendation may be prone to suggest that police may simply proceed to charge a child in the event that a suitable support person cannot be located to permit the taking of an admission enabling a *Young Offenders Act 1997* disposition as the Children's Court can simply make orders under the *Young Offenders Act 1997* for diversion at a later date. It was submitted that this was an unacceptable proposition.

[159] *Makri v State of New South Wales* [2015] NSWDC 131 at [136] – [143].

5.118. To accurately reflect the evidence provided in the public examinations, the ALS and Legal Aid NSW submitted that the recommendation should be reframed as follows:

> Police should be made aware that they have a power to postpone the making of a *Young Offenders Act 1997* determination for up to 14 days pursuant to s 9(2B) of the Act. Police should be made aware that this power is still available after arrest. This information should be included in any relevant Standard Operating Procedures and Police Guidelines relating to the custody management of children and diversion under the *Young Offenders Act 1997*.

5.119. The Commissioner of Police disagreed that the evidence supported a finding that there is an absence of, or lack of awareness, by police officers about the operation of the *Young Offenders Act* 1997 and the options or outcomes available after an arrest. However, the Commissioner of Police accepted that, as part of any review consideration should be given to what additional guidance may be provided to police officers.

5.120. With respect to the redrafted recommendation proposed by the ALS, the Commissioner of Police recognised the value in the redrafted recommendation and considered this to be an opportunity to provide further assistance to police officers.

The Commission's view

5.121. The Commission considers that there is a proper foundation for a recommendation to be made concerning this topic. The more detailed recommendation proposed by the ALS, and supported by Legal Aid NSW and the Commissioner of Police, is appropriate to meet the present circumstances.

The Commission's recommendation 13

5.122. The Commission makes the following recommendation:

> **Recommendation 13** – Police should be made aware that they have a power to postpone the making of a *Young Offenders Act 1997* determination for up to 14 days pursuant to s 9(2B) of the Act. Police should be made aware that this power is still available after arrest. This information should be included in any relevant

Standard Operating Procedures and Police Guideline relating to the custody management of children and diversion under the *Young Offenders Act 1997*.

Proposed recommendation 14

5.123. Proposed Recommendation 14:

Specific training should be provided to custody managers:

(a) About their role in relation to people who have been arrested.

(b) That arrests which result in injury and / or which could be understood as indicating the excessive use of force should be noted in the custody management records.

(c) That they must speak to investigating police before any interview takes place.

(d) That any refusal by a person to be interviewed must be clearly communicated to investigating police.

(e) That any refusal to be interviewed must be recorded in Custody Management Records.

(f) That if a person changes their mind in relation to being interviewed the custody manager should allow the person to receive further legal advice before any interview goes ahead.

Submissions made

5.124. Counsel Assisting proposed recommendation 14 which has several components all relating to the training of custody managers. It was submitted that the evidence in the investigation provided a clear foundation for a recommendation to be made along these lines.

5.125. The ALS and Legal Aid NSW supported a recommendation that specific training should be provided to custody managers on the matters outlined, in addition to cultural competency training in relation to cross-cultural communication styles, training about the risk of unreliability of admissions by children and other vulnerable persons in police custody and disability awareness training.

5.126. However, the ALS did not consider that custody manager training alone would be sufficient to meaningfully address what was said to be the widespread and long standing police practice of proceeding to interview children and other vulnerable persons following refusal to participate in an interview on legal advice. The ALS and Legal Aid NSW proposed additional recommendations 16 and 17 to which reference will be made shortly.

5.127. The Commissioner of Police disagreed that the evidence supported a finding that there is an absence of information contained in the training provided to custody managers as identified in the sub-paragraphs of the proposed recommendation. However, the Commissioner of Police accepted that, as part of any review, consideration is to be given to what additional guidance may be provided.

5.128. The Commissioner of Police submitted that the ALS submission concerning cultural competency training was not supported by any evidence. In essence, it was said that the investigation did not specifically consider this area so that it would not be appropriate to make such a recommendation without consideration of all training provided to police officers concerning cultural competency.

The Commission's view

5.129. The Commission is satisfied that the matters proposed by Counsel Assisting are all appropriate for a recommendation to be made by the Commission.

5.130. It is correct that the evidence in the investigation did not extend expressly to the areas advanced by the ALS and Legal Aid NSW concerning cultural competency training. That said, it might be thought that training of this type was necessary for the NSW Police Force which operates in a jurisdiction with a variety of cultural groups represented, including the Aboriginal and Torres Strait Islander communities in different parts of the State. The need for cultural competency training for the NSW Police has also been recently recommended by the Coroner.[160] The Commission is satisfied that a recommendation should be made on that topic as well.

The Commission's recommendation 14

5.131. The Commission makes the following recommendation:

[160] Inquest into the death of Stanley Russell, DSC Forbes, findings delivered 14 April 2023.

Recommendation 14 – Specific training should be provided by the NSW Police Force to custody managers:

(a) about their role in relation to people who have been arrested

(b) that arrests which result in injury and/or which could be understood as indicating excessive use of force should be noted in the custody management records

(c) that they must speak to investigating police before any interview takes place with the person in custody

(d) that any refusal by a person to be interviewed (whether communicated directly or through a lawyer) must be clearly communicated to investigating police

(e) that any refusal to be interviewed must be recorded in custody management records

(f) that if a person changes their mind in relation to being interviewed, the custody manager should allow the person to receive further legal advice before any interview goes ahead

(g) that the custody manager has a legal responsibility to take steps to protect vulnerable persons in custody with training to address expressly the need to guard against any police practice of proceeding to interview children and other vulnerable persons following refusal to participate in an interview on legal advice (whether communicated directly or through a person's lawyer)

(h) by way of cultural competency training in relation to cross cultural communication styles, training about the risk of unreliability of admissions by children and other vulnerable people in police custody and disability awareness training.

Proposed recommendation 15

5.132. Proposed Recommendation 15:

A review should be conducted of the content of the Part 9 documents and they should be written in plain English.

Submissions made

5.133. In support of this recommendation, Counsel Assisting pointed to evidence which was critical of the content of Part 9 documents which were intended to be read and understood by vulnerable persons in custody and support persons. It was submitted that there was a strong need for these documents to be written in plain English.

5.134. The ALS and Legal Aid NSW supported recommendation 15. It was noted that work to develop plain English documents had been ongoing for a number of years by a variety of justice stakeholders including the ALS and Legal Aid NSW and was currently being led by stakeholders represented on the Short Term Remand Project Working Group. It was said that Support Person Guidelines have been developed and approved by the Steering Committee with work to develop support person communication materials and training soon to commence. It was submitted that implementation of this recommendation required commitment from the NSW Police Force for the plain English support person form to be developed and implemented as a matter of urgency. The ALS would welcome a recommendation by the Commission to that effect.

5.135. In a separate submission, Legal Aid NSW noted that work to update the support person form had been ongoing for several years. Shortcomings with the current Part 9 support person form had been raised specifically with the NSW Police Force in August 2018 at which time a redrafted document was provided to them for consideration. Since then, it was submitted that consistent efforts had been made to progress development of a plain English document that more fully and simply stated the law. The issue has been raised in a variety of justice working groups in recent years.

5.136. Legal Aid NSW noted that while NSW Police Force have previously indicated willingness to review the document, and have frankly acknowledged problems with its form and content, the Part 9 Role of a Support Person document remains unchanged. Legal Aid NSW agreed with the ALS that implementation of this recommendation required commitment from the NSW Police Force for a revised plain English support person form to be developed and implemented as a matter

of urgency. A recommendation was sought by Legal Aid NSW from the Commission to this effect to assist progress on this issue.

5.137. With respect to proposed recommendation 15, the Commissioner of Police noted that any review or amendment to the document provided in accordance with Part 9 of LEPRA will require amendment to clause 20 of the LEPRA Regulation. The Commissioner of Police considered that this recommendation should be directed to the Attorney General.

5.138. In reply submissions, the Commissioner of Police observed that this was a piece of work requiring input from a range of entities and that it is the subject of an existing working group and that recommendations of that working group will presumably be provided to the Attorney General.

The Commission's view

5.139. It is true that the documents with respect to support persons and vulnerable persons under Part 9 of LEPRA are statutory documents for which the Attorney General is ultimately responsible.

5.140. The evidence discloses that there have been processes to review these documents on foot for some time. It is apparent that the NSW Police Force plays a pivotal role with respect to documents of this type. They concern the management and assistance provided to vulnerable persons in custody as well as support persons who play a most important role under LEPRA and the LEPRA Regulation in so far as the protection and assistance of vulnerable persons in police custody.

5.141. The NSW Police Force should be at the forefront of positive consultation and proposals for change, including the use of plain English documents which police officers will use as part of the protective functions under LEPRA and the LEPRA Regulation for vulnerable persons and support persons.

5.142. The Operation Mantus investigation has involved the direct evidence of solicitors from the ALS and Legal Aid NSW with great expertise in this area. They are motivated by a desire for practical and helpful change in the interests of the members of the community who are vulnerable persons or support persons and who are entitled to assistance and protection, including by police officers who are custody managers, under the LEPRA and LEPRA Regulation.

The Commission's recommendation 15

5.143. The Commission makes the following recommendation:

> **Recommendation 15** – Urgent steps should be taken by the Attorney General and the Commissioner of Police to revise the documents under Part 9 of LEPRA to ensure they are written in plain English and in a form which will permit fair and effective implementation of the protective procedures and practices under LEPRA and the LEPRA Regulation.

Additional submissions

5.144. The ALS, Legal Aid NSW and RLC also made submissions for additional recommendations. These proposed recommendations, their submissions and the Commission's views are set out below.

Proposal for recommendation 16

5.145. The ALS and Legal Aid NSW joined in a submission that the Commission should make an additional recommendation 16 that clause 29 of the LEPRA Regulation be amended by adding a subclause as emphasised below:

> **29 Custody manager to assist vulnerable person**
>
> (1) The custody manager for a detained person or protected suspect who is a vulnerable person must, as far as practicable, assist the person in exercising the person's rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person.
>
> (2) In particular, the custody manager must ensure that the caution and summary required by section 122(1) of the Act is given to the person.
>
> **(3) If a detained person or protected suspect in police custody who is a vulnerable person**
>
> **(a) has declined to participate in an interview following legal advice, and**

(b) purportedly changes their mind about participating in an interview during the same period of detention,

the custody manager for that person must notify the legal representative who provided the advice and allow the person in custody to confirm their legal advice and their position prior to any interview taking place.

5.146. In support of this recommendation, the ALS submitted:[161]

a. The Commission has received extensive evidence of the concerning and widespread police practice of proceeding to interview children and other vulnerable persons following the refusal of an interview on legal advice. As noted above, we do not consider that police training alone will be sufficient to address this systemic issue.

b. It is apposite to refer to the contents of the letter dated 19 May 2023 from Andrew Reid A/General Counsel, Office of General Counsel, NSW Police Force (**Exhibit MTS103**). We submit that the view advanced in this letter misapprehends the position of the ALS. We refer in particular to the following statements:

> *"Legal Aid and the Aboriginal Legal Service's position is that following receipt of legal advice by a young person or child and the notification to the involved police officers (whether arresting, interviewing, charging or custody manager) that they do not wish to participate in an interview, a child or young person cannot and/or must not participate in an interview.*
>
> *Respectfully, this position is not contained in legislation. Accordingly, it is entirely possible that a child or young person, accompanied by their parent or guardian, may subsequently decide to participate in an interview with police officers."*

c. This is not an accurate summation of the position adopted in our written submission (**Exhibit MTS96**), nor in our evidence in the public examinations.

[161] ALS Submission, 7 July 2023, pp 4-6.

d. Our position is that a child's purported decision to be interviewed following acceptance of legal advice a short time prior cannot be taken to necessarily represent an independent and fully informed change of mind. This much is clear from the numerous court judgments in evidence, and the evidence of Mr Clifford, Ms Burkitt, Ms Hopgood and other witnesses in the public examinations.

e. The research cited at 9–10 of our written submission, including findings of the Australian Law Reform Commission *Pathways to Justice* Inquiry (2017), also sets out many of the well-known factors which may render a purported 'change of mind' or admission by a vulnerable person in police custody unreliable.

f. In relation to children, these include the extreme power imbalance between adult police officers and children, and the vulnerability of children to interrogative pressure by virtue of their stage of physical, psychological and emotional development. In relation to Aboriginal and Torres Strait Islander people and other vulnerable persons in custody, these include historical and contemporary relations between police and Aboriginal and Torres Strait Islander communities; poor cultural awareness by police in relation to matters such as 'gratuitous concurrence'; and poor disability awareness.

g. We agree that, where a vulnerable person has genuinely reconsidered and changed their mind about participating in an interview, both police and the person's lawyer would be equally bound by their instructions to this effect – however, for the reasons outlined, we submit it would be unsafe if the default position were that voluntary consent can be assumed by police where there has been an apparent change of mind by a child who has previously declined an interview through their lawyer.

h. We do not understand the existing legislative regime to limit the obligation of custody managers to assist any vulnerable person in custody in exercising their rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, to the making of a single telephone call:

- *s 123(1)(b) of the Law Enforcement (Powers and Responsibilities) Act 2002* (‘*LEPRA*’) (headed ‘Right to communicate with … an Australian legal practitioner’) provides:

> “Before any investigative procedure in which a detained person or protected suspect is to participate starts, the custody manager for the person must inform the person orally and in writing that he or she may … communicate, or attempt to communicate, with an Australian legal practitioner of the person’s choice and ask that Australian legal practitioner to do either or both of the following — attend at the place where the person is being detained to enable the person to consult with the Australian legal practitioner, be present during any such investigative procedure.”

- *cl 29 of the LEPRA Regulation provides:*

> “The custody manager for a detained person or protected suspect who is a vulnerable person must, as far as practicable, assist the person in exercising the person’s rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person.”

- cl 37 of the LEPRA Regulation provides for the mandatory notification of the Custody Notification Service 24-hour telephone hotline that an Aboriginal or Torres Strait Islander person is in police custody.

- s 90 of the *Evidence Act 1995* operates to render inadmissible any admissions obtained unfairly. Courts have considered the relevant systemic issues in policing practices to be unfair and have excluded admissions obtained in this way, as is in evidence in some of the judgments tendered in Operation Mantus.

i. We submit that, in combination, the above safeguards and statutory rights and protections impose a continuing obligation on custody managers to facilitate access to legal advice beyond any initial custody notification call, on the basis of the obligation imposed by cl 29 to assist vulnerable persons in custody to exercise their Part 9 rights. This has been the

subject of recent judicial consideration, received into evidence by the Commission (e.g. Nean).

5.147. The ALS submitted that the requirement contained in proposed recommendation 16 should be set out in the Charge Room and Custody Management SOPs in addition to specific training being provided to custody managers in accordance with draft recommendation 13.

5.148. In support of proposed recommendation 16, Legal Aid NSW submitted (footnotes omitted):[162]

a. Legal Aid NSW supports the ALS recommendation (Submission at [26]) that the *Law Enforcement (Powers and Responsibilities) Regulation 2016* ('LEPRR') be amended to include a positive obligation on a Custody Manager to notify the vulnerable person's legal representative of any change of mind about participation in an interview, and to facilitate a further legal call prior to any interview taking place.

b. We note the contents of the letter dated 19 May 2023 from Andrew Reid, A/General Counsel, Office of General Counsel, NSW Police Force (Exhibit MTS103), and oral submissions on behalf of NSW Police made on 25 May 2023, which asserted that the position of ALS and Legal Aid NSW is "*…that once that advice has been provided, ultimately, the position doesn't change. Once they have provided advice, the decision has been made, therefore, there can be no interview."* This is not the position adopted by Legal Aid NSW in written submissions (Exhibit MTS65), or our evidence in the public examinations.

c. Our position remains consistent with that of the ALS: a child's purported decision to participate in an interview shortly after giving instructions to the contrary cannot necessarily be taken to represent an independent and fully informed change of mind. Such a significant change in position, about the exercise of a fundamental right, should be approached with circumspection and caution because the child may not be waiving that right in an informed and voluntary way.

[162] Legal Aid NSW Submission, 13 July 2023, paragraphs 8 – 18.

d. As the Chief Commissioner observed in public hearings, "*this is not a new development*." The case of *R v FE* [2013] NSWSC 1692, addressed in our previous submissions at p.16-17, was handed down 10 years ago. Despite this, evidence to the Commission, including case studies and several published and unpublished decisions, indicates that these interviewing practices have continued. The issue was also of sufficient concern to the Director of Public Prosecutions as to warrant a referral to the Commission.

e. In terms of a prospective police-led policy solution to the issue, the following evidence was given by Assistant Commissioner Cotter on 4 April 2023 in answer to questions from Counsel Assisting:

> Q: Assume a situation where a child speaks to a support person and there might be a change of mind or a change of circumstances. You would accept that what should take place then is the young person should be given another opportunity to speak to a solicitor. Do you agree with that?
>
> A. Yes, I think that's - I think that has got some fairness to it.
>
> Q. It should happen, though, shouldn't it?
>
> A. Oh, yes, **it most definitely should happen**. And that's - when I say that's the status of this, that we need more prescription around it, more clarity, to step absolutely everyone through, so everyone knows their rights, both the young person, the vulnerable person, clearly, and there is nothing wrong I think - and sometimes this - you know, your questioning is not allowing that sometimes people do change their minds, and this is accepting that there has to be another step in this protocol, that if there is going to be a change of mind, I am 100 per cent behind that further legal advice is provided... (Emphasis added)

f. Regarding steps that could be taken to amend police Standard Operating Procedures (SOPs) to ensure consistency with, and

awareness of, the 2004 Youth Hotline Protocol and 2005 Police Circular (Exhibit MTS91), A/Commissioner Cotter said:

> A. I think at the completion of this hearing, it can be taken away as one of the priority areas for us to look at and no doubt amend and put more prescription down. What exact words go in there, I'm not going to commit to that, but let me be clear and say that I support every assertion that you have put to me.
>
> A … I wasn't thinking months, Chief Commissioner; I was thinking much more quicker than that.

g. Following this evidence, and prior to resumption of public hearings in May 2023, NSW Police declined to make any witness available to the investigation to speak to the systemic issues raised about the interviewing of children. Further, no action was taken by NSW Police to amend the SOPs or to educate police about the 2005 Police Circular and Memorandum, with the Chief Commissioner observing *"…that the police in the field throughout the state…both metropolitan, regional and rural – are effectively left in the same position as to what guidance they have or don't have on [the] topic*".

h. In relation to the prospect of urgent policy change to facilitate follow up advice to children where there is a change of mind about exercise of the right to silence, the letter of Mr Reid dated 19 May 2023 (Exhibit MTS103) stated:

> "I am instructed that NSWPF will not make significant changes to its practises at this stage without exploring all sides of the issue. **Statute does not require police officers to provide the child or young person an opportunity to obtain further legal advice**. This issue will be **one of the various** procedures considered by the NSWPF as part of the review project. (Emphasis added)."

i. We note the oral submissions from Mr Coffey in relation to this evidence:

"What this letter is suggesting is that there is no obligation within the legislation to provide them an opportunity. As a matter of fairness and a matter of going forward, I see there is benefit, and I think the police force will accept **at some time**, recognising a further opportunity to speak to a lawyer, **but as the law currently states, there is no obligation to provide that**." (Emphasis added)

j. While Legal Aid NSW is supportive of broad stakeholder consultation and welcomes ongoing engagement with NSW Police in relation to children's criminal justice issues, we submit that the additional recommendation for legislative amendment proposed by ALS is appropriate. That the absence of any such statutory requirement is relied upon (at least in part) by NSW Police as an answer to this investigation may be regarded as demonstrative of the need for legislative safeguard.

k. Such an amendment could support more informed decision making by children, minimise the risk of unfair or inadmissible interviews, and facilitate greater consistency in policing practices. A recommendation from the Commission, which has considered the systemic issue question at length, would be welcomed by Legal Aid NSW.

5.149. In submissions in reply, Counsel Assisting supported proposed recommendation 16. It was submitted that proposed recommendation 16 adds clarity to the role and specific responsibilities of custody managers and makes clear (including to other police) their obligation to ensure fairness to a vulnerable person who is being interviewed. Counsel Assisting submitted that proposed recommendation 16 was consistent with concessions and submissions made on behalf of the NSW Police Force.

5.150. The Commissioner of Police, in reply submissions, noted ALS proposed recommendation 16 involving an amendment to clause 29 of the LEPRA Regulation. It was submitted that the drafting of any amendment should not be restricted to "the legal representative who provided the advice" as, on a practical basis, that lawyer may not be available because, for example, it may be the end of a shift.

5.151. The Commissioner of Police did not otherwise oppose or make any submission with respect to recommendation 16.

The Commission's view

5.152. The evidence given in this investigation provides a powerful foundation for an amendment as advanced by the ALS and Legal Aid NSW in proposed recommendation 16. The submissions advanced in support of the recommendation by the ALS and Legal Aid NSW have been set out above. They accurately state the position which has been reached in the investigation. The Commissioner of Police did not oppose this recommendation.

5.153. In the Commission's view, the requirements sought in this proposed recommendation should have been applied, as a matter of fair and proper policing practice, without the need for an express statutory provision. However, to put the issue beyond doubt, the Commission accepts that there is an urgent need for a statutory amendment of this type to be made for the reasons advanced by the ALS and Legal Aid NSW which are accepted in their entirety.

The Commission's recommendation 16

5.154. The Commission recommends to the Attorney General that clause 29 of the LEPRA Regulation be amended so as to provide:

29(3) If a detained person or protected suspect in police custody who is a vulnerable person

(a) has declined to participate in an interview following legal advice, and

(b) purportedly changes their mind about participating in an interview during the same period of detention,

the custody manager for that person must notify the legal representative who provided the advice and allow the person in custody to confirm their legal advice and their position prior to any interview taking place.

Proposal for recommendation 17

Submissions made

5.155. The ALS submitted that recommendation 17 should be made by the Commission to the following effect:[163]

> If there has been a purported change of mind by a vulnerable person in relation to participating in an interview, and the person has been allowed the opportunity to obtain further legal advice prior to any interview taking place (whether or not an interview does subsequently take place) this should be stated in the police facts.

5.156. The ALS referred to the submission of Counsel Assisting concerning draft recommendation 5 and argued that this recommendation would provide accountability and transparency. It was said that a requirement to record that this procedure had been complied with would also serve as a reminder for custody managers and investigating police, and has the potential to support the integrity of police investigations documenting that they have been conducted properly and in accordance with relevant regulations.

5.157. In reply submissions, Counsel Assisting supported proposed recommendation 17. It was submitted that this additional safeguard for children would provide accountability and transparency with almost no impact on police resourcing. Counsel Assisting submitted that to make the necessity of this obligation on police absolutely clear, the clause should be amended to read that the police **must** note this event in police facts as opposed to **should** note it.

5.158. The Commissioner of Police noted the proposed recommendation 17 made by the ALS and agreed that this is an appropriate recommendation to be made by the Commission.

The Commission's view

5.159. The Commission is satisfied that this recommendation should be made. As the evidence in the investigation and the contents of this lengthy report demonstrate, this is an area where police practice should be clear and fair. This approach operates in the interests of vulnerable persons, police officers and the

[163] Operation Mantus Submissions by the Aboriginal Legal Service (NSW/ACT) Limited Regarding Systemic Issues, 7 July 2023 at 28.

community. Clarification of this type will serve the proper administration of justice.

The Commission's recommendation 17

5.160. The Commission recommends to the Attorney General that clause 29 of the LEPRA Regulation should be amended to include a provision to the following effect:

> If there has been a purported change of mind by a vulnerable person in relation to participating in an interview, and the person has been allowed the opportunity to obtain further legal advice prior to any interview taking place (whether or not an interview does subsequently take place) this must be stated in the police facts.

Redfern Legal Centre proposed recommendation 1

5.161. The written submissions of RLC for YPM1 raised a number of additional proposed recommendations. Some of these proposed recommendations extend beyond the scope of the matters examined in Operation Mantus while some were at least indirectly raised in that investigation.

5.162. The first recommendation raised by the RLC was:[164]

> Recommendation 1: It is recommended that the NSW Police Use of Force Manual include clear guidance about the term "such force as is reasonably necessary" and that police be required to consider certain factors when contemplating or using force, including the seriousness of the situation and the age, gender, cultural background and any disabilities of the person(s) involved, including mental illness.

5.163. The Commissioner of Police submitted that the matters raised in this proposed recommendation have been subject to the Commission's Report concerning Use of Force Reporting and that Operation Mantus did not investigate these matters. The Commissioner of Police accepted that any review of the Use of Force Manual should consider whether further guidance is required concerning the matters raised in the proposed recommendation. However, it was submitted that it is not appropriate for this kind of recommendation to be made at this time.

[164] Operation Mantus Submissions: Redfern Legal Centre Systemic Issues, 13 July 2023, p 2.

5.164. The issues raised by the RLC in this proposed recommendation are of significance. However, one of the difficulties with attempting to provide clear guidance about the term 'such force as is reasonably necessary' in ss 230 and 231 of LEPRA is that the factual context in which this concept is to be applied can vary in very many respects. Court decisions have construed this statutory phrase in a manner which provides guidance as to the limits of force which the police may lawfully use.[165]

5.165. The NSW Police Force Use of Force Manual is under regular review, and it is important that this procedural document provides real assistance to police in the field to the extent to which such a procedural document can do so. In this respect, the 'Use of Force Overview' utilised by the New Zealand Police provides some assistance:[166]

> **People who may be more vulnerable to the use of force**
>
> There are risks associated with the use of force on potentially vulnerable people. The greater the degree of force used and the more vulnerable the subject is, the greater the risks.
>
> **Note:** You will not necessarily be aware that a person on whom force may be used, is potentially more vulnerable to the use of force. If safe and practicable to do so, you should listen to any relevant information provided by a subject, and/or seek information from them and/or their associates to ascertain whether the subject may be more vulnerable to the use of force.
>
> **Factors affecting subject vulnerability**
>
> Exercise judgement as to the degree of vulnerability (and threat) a subject(s) poses when considering whether to use force and what force to use. People who may be more vulnerable to the use of force include:
>
> - people under the influence of alcohol and/or other drugs/medication

[165] Cases include *Woodley v Boyd* [2001] NSWCA 35, *Owlstara v State of New South Wales* [2020] NSWCA 217, *Director of Public Prosecutions v Greenhalgh* [2022] NSWSC 980.
[166] Exhibit MTS84, p 32.

- people with:

    - mental health issues, e.g. depression, anxiety disorders, bipolar disorder, attention deficit hyperactivity disorder (ADHD), autism spectrum disorder (including Asperger's disorder), schizophrenia, and personality disorders

    - intellectual disabilities

    - brain injuries

    - excited delirium

    - a hearing or visual impairment

    - asthma or other respiratory illnesses (risks associated with OC spray)

    - epilepsy

    - implanted defibrillators and pacemakers (risks associated with TASER discharge)

- children and young people, especially those of small stature

– elderly people - overweight people (risks associated with positional asphyxiation)

- underweight people and people of small stature (risks associated with TASER discharge) - pregnant women

- refugees, who often come from backgrounds characterised by extreme violence and trauma of war, and who may be vulnerable, traumatised, and speak little English.

The Commission's recommendation 18

5.166. The Commission recommends that the NSW Police Force have regard to the 'Use of Force Overview' of the New Zealand Police in expanding its Use of Force Manual to provide more detailed guidance concerning possible use of force on vulnerable persons.

RLC proposed recommendation 2

5.167. The RLC proposed the following further recommendation:[167]

> Recommendation 2: It is recommended that the NSW Police Force conduct an audit of civil tort claim against police for assault, battery and/or false imprisonment (over the last 10 years) to assist in identifying systemic issues surrounding the use of force.

5.168. The Commissioner of Police submitted that the matters raised in this proposed recommendation do not arise from the material or evidence as part of the Operation Mantus investigation. It was said that the RLC had not made an application to the Commission to consider this kind of matter. The Commissioner of Police submitted that the Commission should decline to make this kind of recommendation as part of its investigation.

5.169. The Commission has considered the role of the NSW Police Force in detecting and disseminating court decisions with respect to the interviewing of young persons where objection has been taken successfully to the admission of that evidence upon the basis that it had been improperly or illegally obtained under s 138 *Evidence Act 1995*. This systemic issue has been the subject of recommendations made by the Commission.

5.170. This proposed recommendation is beyond the scope of the matters investigated in Operation Mantus. The Commission's recommendation-making power under s 132 LECC Act requires some nexus or link between the subject matter of the investigation and the recommendation. The Commission declines to make this recommendation.

RLC proposed recommendation 3

5.171. The RLC seeks the following further recommendation:

> Recommendation 3: It is recommended that the Bureau of Crime Statistics and Research publish an annual report about the use of force by NSW Police.

5.172. The Commissioner of Police submits that this matter does not arise from the material or evidence as part of the Operation Mantus investigation and that no

[167] Operation Mantus Submissions: Redfern Legal Centre Systemic Issues, 13 July 2023 page 2.

application was made to the Commission to consider these kinds of matters. The Commissioner of Police submitted that the Commission should decline to make this recommendation as part of this investigation.

5.173. As with RLC proposed recommendation 2 this recommendation has emerged at the end of the investigation in closing submissions.

5.174. The use of force by members of the NSW Police Force is a matter of ongoing interest to the Commission and is considered in a range of contexts. However, there is no proper foundation laid for the Commission to consider a recommendation that the Bureau of Crime Statistics and Research should take up this issue on an annual basis or otherwise. The Commission declines to make this recommendation.

RLC proposed recommendation 4

5.175. The RLC proposed the following further recommendation:

> Recommendation 4: It is recommended that the NSW Police Force Use of Force Manual include a separate chapter on the use of force against children which directs police officers to consider their special vulnerabilities.

5.176. The Commissioner of Police notes that this recommendation is in similar terms to proposed recommendation 12 advanced by Counsel Assisting. The Commissioner of Police repeated submissions made with respect to proposed recommendation 12 in response to this proposed recommendation.

5.177. The Commission is of the view that this subject matter is considered in sufficient detail to address the question in light of the evidence in the Operation Mantus investigation.

5.178. There is force in the proposition that the NSW Police Force Use of Force Manual should provide more specific guidance concerning the use of force against children having regard to the special vulnerabilities of children and the different ways in which the law applies to children as opposed to adults. The Commission is satisfied that recommendation 12 and recommendation 18 achieve that end.

RLC proposed recommendation 5

5.179. The RLC proposes the following further recommendation:

Recommendation 5: It is recommended that a review of policy and procedures be undertaken to ensure prompt attention to any injuries is a priority following the use of force by police officers.

5.180. The Commissioner of Police submits that this recommendation is in similar terms to proposed recommendation 12 and repeats submissions made with respect to that topic.

5.181. The duties of police officers under statute and at common law require officers to seek prompt attention for injuries sustained by a person following use of force against that person by police officers. To the extent that this aspect is not sufficiently emphasised already in NSW Police Force policy and procedures, it is appropriate to make a recommendation to the effect sought by the RLC.

The Commission's recommendation 19

5.182. The Commission makes the following recommendation as recommendation 18:

Recommendation 19 – It is recommended that a review of NSW Police Force policies and procedures be undertaken to emphasise the need for police officers to obtain prompt medical attention for people who have sustained injuries following the use of force by police officers.

RLC proposed recommendation 6

5.183. The RLC seeks the following further recommendation:

Recommendation 6: It is recommended that the NSW Police Force not use handcuffs when a child has suffered a head injury or any injury to the body that the use of handcuffs could potentially cause greater injury."

5.184. The Commissioner of Police submitted that this recommendation is not supported by evidence in the present investigation and otherwise repeats the submissions made concerning proposed recommendation 12.

5.185. The Commission has addressed the use of handcuffs during the arrest of a child or young person in recommendation 12. It is not considered necessary to make any additional recommendation as sought in this proposed recommendation.

RLC proposed recommendation 7

5.186. The RLC seeks the following further recommendation:

> Recommendation 7: It is recommended that the parliamentary inquiry be established to examine the use of force by NSW Police.

5.187. The Commissioner of Police submitted that no foundation had been established in the evidence for such a recommendation and that the Commission should decline to make it.

5.188. The Commission has considered aspects of the use of force in the context of the present investigation with recommendations being made arising from the circumstances of this case.

5.189. It is not appropriate for the Commission to make a recommendation as to the course which the NSW Parliament may take exercising its own powers. The Commission declines to make this recommendation.

RLC proposed recommendation 8

5.190. The RLC submitted that the Commission should make the following recommendations concerning the use of BWV:

> Recommendation 8(a): It is recommended that the police discretion to activate [the cameras] should be removed and for there to be robust operational guidelines around activation, tagging, retention and release to promote greater police accountability.
>
> Recommendation 8(b): It is recommended that all plain and uniform wearing police should be required to wear and turn on BWV.
>
> Recommendation 8(c): It is recommended that it be made clear within the BWV SOPS that the device should not be used as an identification device for children aged 10-17 years. Such use of the device for these purposed could be a breach of the Forensic Procedures Act.

5.191. The Commissioner of Police opposed the making of these recommendations noting that the Commission should consider BWV as part of its review of the use of BWV being carried out separately. With respect to the proposed

recommendation 8(c), the Commissioner of Police took issue with the suggestion that the use of the device could be 'a breach of the Forensic Procedures Act'.

5.192. The Commission addressed BWV issues in Recommendation 6 which picks up the subject matter in RLC Recommendation 8(b).

5.193. The Commission is of the view that recommendations concerning BWV should be considered in the context of the Commission's separate BWV investigation which will be subject of a separate and later report. The recommendations sought as recommendations 8(a) and (c) will not be made in the Operation Mantus Report.

6. Affected Persons

6.1. In Appendix 1 to this Report the Commission sets out the provisions of s 133 of the LECC Act dealing with the contents of reports to Parliament. Subsections (2), (3) and (4) relate to an '*affected person*'.

6.2. The Commission is of the opinion that Officers MTS1 and MTS2 are affected persons within the meaning of s 133(3) of the LECC Act, being a person against whom, in the Commission's opinion, substantial allegations have been made in the course of the investigation.

Consideration of affected persons under s 133(2) LECC Act

6.3. Section 133(1) authorises the Commission to include in a s 132 report statements as to any findings, opinions and recommendations of the Commission together with statements of the Commission's reasons for any findings, opinions and recommendations.

6.4. Section 133(2) requires the Commission to include in a report, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given (relevantly) to the following:

(a) obtaining the advice of the DPP with respect to the prosecution of the person for a specified criminal offence

(b) the taking of action against the person for a specified disciplinary infringement

(c) the taking of action including the making of an order under s 181D of the *Police Act 1990* against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the police officer

(d) the taking of reviewable action within the meaning of s 173 of the *Police Act 1990* against the person as a police officer.

6.5. Some observations should be made about the various steps contained in s 133(2).

6.6. Firstly, it is mandatory that the Commission give consideration to such measures in s 133(2) as may be relevant to the particular affected person.

6.7. Secondly, in considering whether to obtain advice of the DPP under s 133(2)(a), it is necessary for the Commission to disregard evidence given under objection by the person being considered for referral. The evidence of that person is not admissible in any criminal proceedings against that person: ss 57, 74, 75 LECC Act. Evidence given under objection should not be provided to the DPP in the event of a s 133(2)(a) referral. However, the evidence given under objection by one person may be taken into account by the Commission in determining whether another person should be referred to the DPP for advice as to prosecution under s 133(2)(a).

6.8. Thirdly, in considering whether a s 133(2)(b) recommendation ought to be made, regard should be had to the definition of 'disciplinary infringement' in s 4(1) LECC Act:

> **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.

6.9. The term 'disciplinary infringement' is used in ss 9 and 10 of the LECC Act. The Commissioner of Police may issue instructions to members of the NSWPF with respect to the management and control of the NSWPF. Instructions to members of the NSWPF under s 8(4) of the *Police Act 1990* may include instructions and guidelines with respect to the exercise of police officers of functions conferred under LEPRA. The terms "misconduct", "neglect of duty" and "breach of

discipline" in the definition of "disciplinary infringement" are capable of picking up alleged breaches of Commissioner's Instructions issued under the *Police Act 1990*.

6.10. Fourthly, the various steps in s 133(2) are not mutually exclusive, They are not expressed as alternatives although, as noted earlier, not all will be capable of application in a particular case. Clearly, s 133(2)(e) has no application in the case of a police officer.

6.11. Fifthly, the Commission is not bound to select one or other of the steps contained in s 133(2)(c) and (d). They are not expressed as alternatives. In some cases, a s 133(2)(c) recommendation for action under s 181D of the *Police Act 1990* may be the clear course of action to be recommended. In other cases, action under s 173 of the *Police Act 1990* may seem the clearly appropriate course to be recommended. There will undoubtedly be cases where factors may bear upon the exercise of judgment by the Commissioner of Police in the choice between s 181D or s 173 action, and those factors may not be fully known to the Commission. Reviewable action under s 173 of the *Police Act 1990* involves more serious disciplinary action falling short of dismissal from the NSWPF.

6.12. It is open to the Commission under s 133(2) to state that consideration be given to the taking of action under s 181D or s 173 with an opinion being expressed that one of these steps is supported more strongly than the other. The Commission's reasons given under s 133(1)(b) will explain the thought processes which have led to the s 133(2) steps being addressed in this way.

6.13. Against this background, it is appropriate to turn to the circumstances of the present investigation.

Section 133 consideration concerning Officer MTS1

6.14. Although there have been certain criticisms made of the conduct of Officer MTS1, namely that the handcuffs ought to have been removed once YPM1 was identified and that there was a question raised as to whether the arrest should have continued, no finding of serious misconduct has been made.

6.15. Having regard to the evidence, the Commission is of the opinion that there is no need to consider taking action against Officer MTS1 under s 133(2)(a), (b), (c) or (d) of the LECC Act.

Section 133 consideration concerning Officer MTS2

6.16. Having considered the evidence, the Commission is not satisfied to the requisite standard that any blow was struck by Officer MTS2 to YPM1 in the manner alleged by the young person. The Commission is of the opinion that there is no need to consider taking action against Officer MTS2 under s 133(2)(a), (b), (c) or (d) of the LECC Act.

Section 133 consideration concerning Officers MTS8, MTS9 and MTS10

6.17. There are aspects of evidence and conduct of Officers MTS8, MTS9 and MTS10 which have come under scrutiny in this Report. Some comments made in this Report are critical of what they did or did not do as custody manager (Officer MTS8) or as interviewing police officers (Officers MTS9 and MTS10). However, the Commission is of the view that the NSW Police Force has not provided sufficient guidance in these areas. The Commission considers that responsibility for this state of affairs lies with the NSW Police Force and not the individual officers.

6.18. The onus lies on the NSW Police Force to address the recommendations made in this Report to assist police officers to act lawfully and properly and in accordance with the statement of values contained in s 7 *Police Act 1990*.

7. Conclusion

7.1. Operation Mantus began as an investigation into allegations of excessive use of force in the arrest of an Aboriginal young person. It was extended to explore a range of systemic issues impacting the work of the NSW Police Force.

7.2. The Commission heard from 21 witnesses across 8 days of public hearings and 7 days of private hearings. Submissions were received from the young person who was arrested, affected police officers, the NSW Commissioner of Police and legal stakeholders.

7.3. The Commission did not make findings of serious misconduct against any individual police officer.

7.4. However, the Commission identified significant areas where the NSW Police Force has failed to provide sufficient guidance to police officers concerning the

role of custody managers and the interviewing of young persons whilst in police custody.

7.5. The Commission observed that each member of the NSW Police Force is required to act in accordance with the statement of values contained in s 7 *Police Act 1990* which includes upholding the rule of law (s 7(b)), preserving the rights and freedoms of individuals (s 7(c)) and ensuring that authority is exercised responsibly (s 7(h)). The Commission stated that it is the responsibility of the NSW Police Force to assist and support police officers in meeting these goals or expectations with respect to custody management and the interviewing of young persons whilst in police custody.

7.6. The Commission has made 19 recommendations to the Commissioner of Police and the Attorney General. Those recommendations cover issues such as:

- The SOPs for BWV should also apply to plain clothes officers.
- Police should urgently advise custody managers to make a record in the custody management record when a young person declines to be interviewed either directly or through the lawyer. A young person should not be asked to confirm this decision in an interview. If the young person says that they have changed their mind about the interview, they should be offered further legal advice before any interview proceeds.
- The custody management SOPS should be amended so that only custody managers, and not investigating officers, can discuss bail with a suspect in custody.
- The NSW Police Force should urgently develop a system so that Court decisions concerning policing are brought promptly to the attention of the Executive of the NSW Police Force to ensure appropriate steps are taken to assist police and for training purposes.
- Training for custody managers should be improved, and should cover the rights of suspects in custody to refuse an interview.
- Documents provided to support people for suspects in custody should be rewritten using plain English.

- The *Law Enforcement (Powers and Responsibilities) Regulation 2016* should be amended so that the responsibilities of a custody manager are clear.

7.7. Under s 146 of the LECC Act, the Commissioner of Police must notify the Commission of the nature of the action which she has taken, or which will be taken, as a result of the report. The Commission will closely monitor the NSW Police Force response to the recommendations in this report.

Appendix 1 - The Commission's Statutory Functions

1. The *Law Enforcement Conduct Commission Act 2016* (the LECC Act) lists among the Commission's principal functions the detection and investigation of serious misconduct and serious maladministration: s 26.

2. Section 9 of the LECC Act defines 'police misconduct', 'administrative employee misconduct' and 'Crime Commission Officer misconduct':

> **9 Police misconduct, administrative employee misconduct and Crime Commission officer misconduct**
>
> **(1) Definition — police misconduct** For the purposes of this Act, **police misconduct** means any misconduct (by way of action or inaction) of a police officer —
>
> (a) whether or not it also involves participants who are not police officers, and
>
> (b) whether or not it occurs while the police officer is officially on duty, and
>
> (c) whether or not it occurred before the commencement of this subsection, and
>
> (d) whether or not it occurred outside the State or outside Australia.
>
> **(2) Definition — administrative employee misconduct** For the purposes of this Act, **administrative employee misconduct** means any misconduct (by way of action or inaction) of an administrative employee —
>
> (a) whether or not it also involves participants who are not administrative employees, and
>
> (b) whether or not it occurs while the administrative employee is officially on duty, and
>
> (c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

(3) Definition — Crime Commission officer misconduct For the purposes of this Act, **Crime Commission officer misconduct** means any misconduct (by way of action or inaction) of a Crime Commission officer —

(a) whether or not it also involves participants who are not Crime Commission officers, and

(b) whether or not it occurs while the Crime Commission officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

(4) Examples Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively —

(a) conduct of the officer or employee that constitutes a criminal offence,

(b) conduct of the officer or employee that constitutes corrupt conduct,

(c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),

(d) conduct of the officer or employee that constitutes a disciplinary infringement.

(5) Former police officers, administrative employees and Crime Commission officers Conduct may be dealt with, or continue to be dealt with, under this Act even though any police officer, administrative employee or Crime Commission officer involved is no longer a police officer, administrative employee or Crime Commission officer (but only in relation to conduct occurring while he or she was a police officer, administrative employee or Crime Commission officer). Accordingly, references in this Act to a police officer, administrative employee or

Crime Commission officer extend, where appropriate, to include a former police officer, administrative employee and Crime Commission officer, respectively.

3. Section 10 of the LECC Act defines 'serious misconduct':

> (1) For the purposes of this Act, **serious misconduct** means any one of the following:
>
> (a) conduct of a police officer, administrative employee or Crime Commission officer 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.
>
> (2) In this section:
>
> **serious disciplinary action** against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.
>
> **serious offence** means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.

4. 'Officer maladministration' and 'agency maladministration' are both defined in s 11 of the LECC Act. 'Officer maladministration' is defined in s 11(2) in these terms:

> (2) Officer maladministration means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer

that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct):

(a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(b) arises, wholly or in part, from improper motives, or

(c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(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.

5. The conduct of an officer or agency is defined as "serious maladministration" if the conduct, though not unlawful, is conduct of a serious nature which is unreasonable, unjust, oppressive or improperly discriminatory in its effect or arises wholly or in part from improper motives: LECC Act, s 11(3).

6. The Commission may hold an examination for the purpose of an investigation into conduct that it has decided is (or could be) serious misconduct or serious maladministration: s 61 (a).

7. Section 29 provides the authority for the Commission to make findings and express opinions:

(1) The Commission may:

(a) make findings, and

(b) form opinions, on the basis of investigations by the Commission, police investigations or Crime Commission investigations, as to whether officer misconduct or officer maladministration or agency maladministration:

(i) has or may have occurred, or

(ii) is or may be occurring, or

(iii) is or may be about to occur, or

(iv) is likely to occur, and

(c) form opinions as to:

(i) whether the advice of the Director of Public Prosecutions should be sought in relation to the commencement of proceedings against particular persons for criminal offences against laws of the State, or

(ii) whether the Commissioner of Police or Crime Commissioner should or should not give consideration to the taking of other action against particular persons, and

(d) make recommendations as to whether consideration should or should not be given to the taking of action under Part 9 of the Police Act 1990 or under the Crime Commission Act 2012 or other disciplinary action against, particular persons, and

(e) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject-matter or opinions or the results of any such investigations.

(2) Subsection (1) does not permit the Commission to form an opinion, on the basis of an investigation by the Commission of agency maladministration, that conduct of a particular person is officer maladministration unless the conduct concerned is (or could be) serious maladministration.

(3) The Commission cannot find that a person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

(4) An opinion or finding that a person has engaged, is engaging or is about to engage in:

(a) officer misconduct or serious misconduct or officer maladministration or serious maladministration (whether or not specified conduct), or

(b) specified conduct (being conduct that constitutes or involves or could constitute or involve officer misconduct or serious misconduct or officer maladministration or serious maladministration), and any recommendation concerning such a person is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit, a criminal offence or disciplinary infringement.

(5) Nothing in this section prevents or affects the exercise of any function by the Commission that the Commission considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the Police Act 1990.

(6) The Commission must not include in a report under Part 11 a finding or opinion that any conduct of a specified person is officer misconduct or officer maladministration unless the conduct is serious misconduct or serious maladministration.

(7) The Commission is not precluded by subsection (6) from including in any such report a finding or opinion about any conduct of a specified person that may be officer misconduct or officer maladministration if the statement as to the finding or opinion does not describe the conduct as officer misconduct or officer maladministration.

8. This report is made pursuant to Part 11 of the **LECC Act**. Section 132(1) provides that the Commission may prepare reports "*in relation to any matter that has been or is the subject of investigation under Part 6*".

9. Section 133 (Content of reports to Parliament) provides that:

(1) The Commission is authorised to include in a report under section 132:

(a) statements as to any of the findings, opinions and

recommendations of the Commission, and

(b) statements as to the Commission's reasons for any of the Commission's findings, opinions and recommendations.

(2) The report must include, in respect of each affected person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following:

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary infringement,

(c) the taking of action (including the making of an order under section 181D of the Police Act 1990) against the person as a police officer on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the police officer,

(d) the taking of reviewable action within the meaning of section 173 of the Police Act 1990 against the person as a police officer,

(e) the taking of action against the person as a Crime Commission officer or an administrative employee on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the Crime Commission officer or administrative employee.

Note. See section 29 (4) in relation to the Commission's opinion.

(3) An "**affected person**" is a person against whom, in the Commission's opinion, substantial allegations have been made in the course of or in connection with the investigation (including examination) concerned.

(4) Subsection (2) does not limit the kind of statement that a report can contain concerning any affected person and does not prevent a report from containing a statement described in that subsection in respect of any other person.

10. Section 146 provides:

146 Notification of proposed action on reports

(1) As soon as practicable after the Commissioner of Police or Crime Commissioner receives a report under section 27, 32, 132, 134, 135 or 136 or a copy of the report is laid before a House of Parliament, the Commissioner of Police or Crime Commissioner, respectively, must notify the Commission of the nature of the action taken, or to be taken, as a result of the report.

(2) If the Commission has provided a copy of the report to the Commissioner of Police or Crime Commissioner and the Commission is of the opinion —

(a) that the Commissioner of Police or Crime Commissioner has unreasonably delayed notifying the Commission of the nature of the action taken, or to be taken, as a result of the report, or

(b) that the nature of the action taken, or to be taken, as a result of the report is, in the circumstances of the case, unreasonable or inadequate, or

(c) that the Commissioner of Police or Crime Commissioner has unreasonably delayed taking action as a result of the report,

the Commission is to advise the Commissioner of Police or Crime Commissioner accordingly by notice in writing served on that Commissioner.

(3) If the Commission and the Commissioner of Police do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Police Act 1990 that the issue is unresolved.

(4) If the Commission and the Crime Commissioner do not, within 28 days, resolve any issue the subject of a notice under subsection (2), either or both of them may notify the Minister administering the Crime Commission Act 2012 that the issue is unresolved.

(5) The issue may be the subject of a Commission's special report under section 138.

Appendix 2 – Operation Mantus – Public Decision concerning public and private examinations in aid of the investigation

1. The Law Enforcement Conduct Commission (the Commission) has embarked upon an investigation of allegations that excessive force was used by a member or members of the NSW Police Force at a location in Northern New South Wales in September 2022 during the apprehension and arrest of YPM1, a 14 year old person, together with other issues arising from the detention of that young person in custody following his arrest.

Subject Matter of the Investigation

2. On 14 December 2022, the Commission held a public directions hearing at which applications for leave to appear were made and submissions were made on procedural issues, principally the question whether evidence should be given by witnesses at public or private examinations as part of the Commission's investigation. At the commencement of the Directions Hearing, Mr Lester Fernandez, Counsel Assisting the Commission, made a short opening address which identified the subject matter of the investigation (T5-6):

> *"Operation Mantus arises out of an incident which occurred in September 2022 in northern New South Wales. The incident involved a young person who sustained injuries during the course of being apprehended by police and after which he was arrested. The young person was treated by ambulance and in hospital for a short period.*
>
> *The incident took place at night. The young person was with other young people. Police were conducting proactive policing activities and they were in plain clothes. Police did not wear body worn video at the time. As a consequence, if there is any dispute about what took place when police apprehended and then arrested the young person, that dispute will not be assisted by electronic evidence, and one of the issues which it is expected will be examined at this hearing and in examinations is why police were not wearing body worn video at the time of the incident.*
> *After being treated in hospital, the young person was taken to a police station. Police wished to interview him. He contacted a solicitor. His solicitor advised police*

in writing that the young person did not wish to be interviewed. However, police did interview the young person. An adult was present during the interview.
This second period of time in the chronology leads to other issues which may be expected to be examined during the course of this hearing, including: what procedures were followed or were not followed in the conducting of the interview by police; and the young person's management in custody."

3. On 14 December 2022, the Commission directed pursuant to s 176 *Law Enforcement Conduct Commission Act 2016 (*LECC Act) that there be no publication of the name or image of nominated police officers and YPM1 and that they be identified by pseudonyms, together with a direction that there be no publication of the location where relevant events occurred in September 2022. The Commission will continue to use those pseudonyms in this decision. The reasons for taking this course are noted in the separate Confidential Decision dated today.

Submissions on Use of Public and Private Examinations

4. Counsel Assisting made oral submissions on the discretionary question as to whether evidence should be taken from witnesses at public or private examinations (T6-15). Thereafter, Mr Ryan Coffey, Counsel for the Commissioner of Police, addressed on the question of public and private examinations by reference to written submissions which he had furnished that day on behalf of the Commissioner of Police (Exhibit MTS2) (T17-33). Short oral submissions were made by Mr Hall, Solicitor for Officer MTS1 (T33-34), Ms Lee, Solicitor for YPM1 (T34-37), Mr Nagle, Counsel for the Police Association of NSW (PANSW) (T37-39), Mr Taylor, Solicitor for Officer MTS3 (T39), Mr Willis, Solicitor for Officer MTS5 (T39-40), Mr Jones, Counsel for Officer MTS2 (T40) and Mr White, Counsel for Officer MTS4 (T40-41).

5. At the conclusion of the directions hearing, the proceedings were adjourned to a date to be fixed for examinations to be held. It was indicated that a decision on the use of public and private examinations would be published and made public in due course.

6. Pursuant to leave of the Commission, written submissions on the issue of public and private examinations were provided on 22 December 2022 by Mr Nagle, Counsel for the PANSW (Exhibit MTS3) and by Ms Lee solicitor for YPM1, on 21 December 2022

(Exhibit MTS4). Mr Nagle furnished reply submissions on 20 January 2023 on behalf of the PANSW to those made by Ms Lee for YPM1 (Exhibit MTS5). Finally, Counsel Assisting made written submissions, dated 1 February 2023 in reply to all submissions made for other interests (Exhibit MTS6).

7. The oral and written submissions made on behalf of interested persons need not be repeated in this decision. The written submissions on behalf of the Commissioner of Police, the PANSW and YPM1 addressed, amongst other things, issues of statutory construction.

8. Put shortly, the submissions for YPM1 supported the use of public examinations and submissions for the Commissioner of Police, the PANSW and the individual police officers favoured the use of private examinations.

Construction of Statutory Provisions

9. It is appropriate to refer to certain provisions of the LECC Act which bear on the use of public and private examinations by the Commission. Extracts from the LECC Act are set out in Appendix A to this decision. Sections of particular relevance to the use of public or private examinations are distilled in this part of the decision together with reference to principles of statutory construction.

10. The Commission is not a court hearing adversarial civil or criminal proceedings. The Commission is empowered to hold public or private examinations in aid of its investigatory functions under the LECC Act. The principle of open justice, which applies to court proceedings, has no application to Commission examinations: *John Fairfax Publications v Ryde Local Court* (2005) 62 NSWLR 512; [2005] NSWCA 101 at [60]; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [20] – [27]; *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264 at [46].

11. The Commission will consider the exercise of discretion under s 63 LECC Act concerning the use of public and private examinations in the circumstances of the particular case. What follows is not intended to fetter or narrow the exercise of discretion under s 63. However, an understanding of the terms of s 63, viewed in its statutory context, is fundamental to the operation of the section.

12. The starting point in the process of statutory construction is the text of the provision or provisions in question considered in context, including the surrounding provisions in the legislation and their legislative purpose: *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 269 CLR 507; [2019] HCA 35 at [32]-[37], [124].

The objects clause in s 3 LECC Act

13. Section 3 LECC Act is a complex and multifaceted objects clause. Objects clauses operate as a source for identifying the purpose or object of legislation to assist statutory construction: s 33 *Interpretation Act 1987*. The objects section may give practical content to an understanding of various terms in the LECC Act and assist the construction and operation of the statute: *ID, PF and DV v Director General, Department of Juvenile Justice (*2008) 73 NSWLR 158; [2008] NSWSC 969 at [255] – [257]; *Lynn v State of NSW* (2016) 91 NSWLR 636; [2016] NSWCA 57 at [54].

14. Of particular relevance to the present question are:
    - section 3(b) concerning the role of the Commission in "*the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force*" which "*may have occurred, be occurring, be about to occur or that is likely to occur*"; and
    - section 3(d)(i) concerning the prevention of "*officer misconduct and officer maladministration and agency maladministration within the NSW Police Force*" by "*providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration.*"

15. Whilst parts of s 3 provide for the Commission to carry out independent functions, s 3(f) also recognises the "*primary responsibilities of the NSW Police Force to investigate and prevent officer misconduct and officer maladministration and agency maladministration while providing for oversight of those functions*" by the Commission. Section 3(c) and (h) make express provision for "*oversight*" by the Commission.

16. Section 3(f) constitutes ongoing recognition that the primary responsibility for the investigation and prevention of misconduct and maladministration rests with the

NSW Police Force. This was a central message of the Royal Commission into the NSW Police Service in its 1996 Interim Report and 1997 Final Report.

17. At the same time, the Commission is empowered to undertake independent detection, investigation and exposure of, in particular, serious misconduct and agency maladministration and this extends to individual incidents as well as systemic issues.

18. As Counsel Assisting submitted, for the objects of the LECC Act to be achieved, there needs to be a substantial degree of public confidence in the work of the Commission. One way in which public confidence is achieved is by the work of the Commission being carried out in public. At the same time, public confidence may be served by the work of the Commission, when necessary, being done in private.

Some Statutory Concepts – "Serious Misconduct" and "Agency Maladministration"

19. The term "*serious misconduct*" is defined in s 10 of the Act and includes:
    - conduct of a police officer that could result in prosecution of the officer for a "*serious offence*" or "*serious disciplinary action*": s 10(1)(a); or
    - a pattern of officer misconduct 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*": s 10(1)(b).

20. A "*serious offence*" means a serious indictable offence, being an offence punishable by 5 years imprisonment or more: s 4(1) *Crimes Act 1900* (Crimes Act).

21. For present purposes, the offence of assault occasioning actual bodily harm under s 59 Crimes Act is a serious indictable offence. It is alleged that YPM1 suffered a head injury in the incident which is capable of constituting actual bodily harm: *McIntyre v R* [2009] NSWCA 305; 198 A Crim R 549 at [44].

22. The term "*agency maladministration*" is defined relevantly in s 11 LECC Act to include conduct of the NSW Police Force that is unlawful or, if not unlawful, is (amongst other things) unreasonable, unjust or oppressive or that is engaged in in accordance

with a law or established practice that is unreasonable, unjust, oppressive or improperly discriminatory in its effect.

Investigation by the Commission

23. Section 51 LECC Act provides for the exercise of investigation powers by the Commission.

24. For present purposes, s 51(1) provides that the Commission may exercise its investigative powers in respect of conduct:
    - if the conduct involves a police officer and "*the Commission has decided that the conduct concerned is (or could be) serious misconduct… and should be investigated*": s 51(1)(a);
    - if "*the conduct concerned is (or could be) agency maladministration*" s 51(1)(d).

25. Section 51(3) expands the power to investigate conduct in certain respects. Significantly, s 51(4) provides for the Commission to investigate if the conduct "*is (or could be) indicative of a systemic problem involving the NSW Police Force generally, or a particular area of the NSW Police Force, and the Commission considers it in the public interest to do so*". In those circumstances, the investigation by the Commission may extend "*to the NSW Police Force generally*" and "*to other police officers*".

26. Issues are likely to arise in the present investigation as to whether management of YPM1 in custody, and the approach taken by police officers in proceeding to interview YPM1 despite being told of legal advice that he did not wish to be interviewed, may (when taken with other cases) constitute "*serious misconduct*" and "*agency maladministration*" under s 10(1)(b), s 11(1) and s 51(1)(d), (3) and (4) of the LECC Act.

Sections 61 and 62 – Examinations May be Held

27. Section 61 provides that the Commission may hold an examination for the purpose of "*an investigation of conduct that the Commission has decided is (or could be) serious misconduct or serious maladministration*". The term "*serious misconduct*" is

pertinent and the expanded meaning given to the term in ss 10, 11 and 51 is important.

28. Section 62 provides for the announcement of the general scope and purpose at an examination.

Section 63 LECC Act

29. Section 63 now arises for direct examination.

30. It is the task of the Commission to construe and apply s 63 LECC Act which includes the "*appropriate*" test in s 63(2).

31. Section 63(1) and (2) should be read together. Although the Commission may hold an examination in public or private, an examination may only be held in public "*if the Commission decides that it is appropriate*." In deciding whether an examination should take place in public, the Commission is exercising a broad discretion which takes into account the non-exhaustive list of factors in s 63(5) of the Act.

32. Although it may be said that the starting or default position under s 63 is the use of a private examination, the test of "*appropriateness*" for holding a public examination is not especially onerous.

33. The word "*appropriate*" in s 63 LECC Act should bear its ordinary meaning. According to the Macquarie Dictionary, the word "*appropriate*" means "*suitable or fitting for a particular purpose, person, occasion etc.: an appropriate example*". Parliament has not used the word "*necessary*" or "*essential*" in stating the criteria for a public examination under s 63(2). The word "*appropriate*" involves a less demanding test than if the word "*necessary*" had been used. The word "*necessary*" has been described as a strong word involving a test of necessity: *Rinehart v Walker* [2011] NSWCA 403 at [27]-[31]; *A v Crime and Corruption Commissioner* [2013] WASCA 288 at [61]-[82].

34. The wording in s 63(2) LECC Act was not contained in the predecessor statute, the *Police Integrity Commission Act 1996* (PIC Act). Section 33(1) and (3) PIC Act provided that a hearing may be held in public or private as decided by the Police

Integrity Commission (PIC) and that in reaching that decision, the PIC "*is obliged to have regard to any matters that it considers to be related to the public interest.*" A non-exhaustive list of factors was contained in s 33(3A) PIC Act which was in similar terms to s 63(5)(a) to (d) LECC Act.

35. The origin of the "*appropriate*" test in s 63(2) LECC Act is not known. As noted, it did not appear in the PIC Act. The second reading speech and the explanatory memorandum for the Law Enforcement Conduct Commission Bill 2016 said nothing on this issue. In the second reading speech, Mr Troy Grant, the Deputy Premier and Minister for Justice and Police (Hansard, Legislative Assembly, 13 September 2016) stated that the Government accepted the recommendations of Mr Andrew Tink in his Report of August 2015 concerning oversight of the NSW Police Force. In his Report (page 121), Mr Tink expressed agreement with the Report of the *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* (30 July 2015) where the Hon Murray Gleeson AC and Mr Bruce McClintock SC (at paragraphs 9.4.3 - 9.4.10) considered the use of public hearings by the ICAC and addressed the provisions in s 31 ICAC Act without criticism.

36. In construing a statute, use may be made of extrinsic material for certain defined purposes: s 34 *Interpretation Act 1987*. It may be permissible to consider, amongst other things, the second reading speech, the explanatory memorandum and a relevant report specified in s 34. It must be kept in mind, however, that words contained in extrinsic material must not be substituted for the text of the law: *Re Bolton; Ex parte Beane* (1987) 16 CLR 514 at 518; [1987] HCA 12; Pearce, *Statutory Interpretation in Australia*, Lexis Nexis, 9th edition, 2019, paragraph 3.26. To the extent that written submissions referred to other statements made by Mr Tink in his Report, it is necessary to keep in mind that the construction of s 63 LECC Act is to be undertaken by reference to the words in that section, together with other parts of the LECC Act which provide context, and to permissible aids to construction available under ss 33 and 34 *Interpretation Act 1987*.

Provisions in other Statutes

37. The "*appropriate"* test in s 63(2) LECC Act may be contrasted with analogous provisions in statutes regulating other investigatory commissions:

- Section 31(1) *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) provides that, for the purposes of an investigation, the Independent Commission Against Corruption (ICAC) "*may if it is satisfied that it is in the public interest to do so, conduct a public inquiry*";
- Section 117(1) *Independent Broad based Anti-Corruption Act 2011* (Vic) (IBAC Act) provides that examinations before the Independent Broad-based Anti-Corruption Commission (IBAC) are not open to the public unless the IBAC considers on reasonable grounds that there are exceptional circumstances and it is in the public interest to hold a public examination;
- Section 73(1) and (2) *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) provides that a hearing before the National Anti-Corruption Commission must be held in private unless the Commissioner decides to hold the hearing in public – the Commissioner may decide to hold a hearing in public if satisfied that exceptional circumstances justify holding the hearing in public and it is in the public interest to do so.

Some Factors Relevant to the s 63(2) Discretion

38. In considering whether to conduct public or private examinations, the Commission should keep in mind the range of reports which may be made following an investigation:
    - where a matter has been or is the subject of an examination by way of a public hearing, the Commission must prepare a public report to be furnished to the Presiding Officers of each House of Parliament: s 132(2) and (3); s 134; s 142 LECC Act;
    - where a s 132 public report is not issued following an investigation, a private report must be prepared and provided to the Commissioner of Police and the Minister for Police as well as the complainant and the affected police officer: s 135 LECC Act.

39. In some circumstances, the Commission may consider that the making of a public s 132 report may occur without use of any public examinations. The public exposition of issues may be undertaken sufficiently in a public report. There is, of course, no fixed approach to be taken in this respect.

40. It is a relevant factor in a s 63 LECC Act decision to consider the maintenance and advancement of public confidence in the Commission. This may be done by use of private and public examinations in appropriate cases. Public confidence in the thoroughness of examination of the issues by an investigatory commission has been recognised as a relevant consideration in cases dealing with the ICAC and IBAC: *Independent Commission Against Corruption v Chaffey (*1993) 30 NSWLR 21 at 30 (Gleeson CJ). In that case, Mahoney JA (at 53) observed in this context that "*the scrutiny of impugned conduct in public has a disinfectant effect*" with reference being made to "*the disinfectant effect of sunlight*". Mahoney JA noted that "*scrutiny in public rather than behind closed doors is a traditional check upon abuse of both administrative and judicial power*".

41. The garnering of public acceptance of an investigation was accepted as a relevant factor in the exercise of discretion under s 117 IBAC Act: *R and Anor v Independent Broad-based Anti-Corruption Commissioner* [2015] VSC 374; 253 A Crim R 35 at [145] - [146] (Riordan J). This approach was not criticised by the Court of Appeal (*R and Anor v Independent Broad-based Anti-Corruption Commissioner* [2015] VSCA 271*;* 255 A Crim R 99*)* or the High Court *(R and Anor v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459; [2016] HCA 8).

42. It is necessary to keep in mind the policing context affecting the great bulk of the Commission's work. Unlike the ICAC and the IBAC, the Commission is only concerned with two agencies, the NSW Police Force and the NSW Crime Commission. The principal focus of the Commission's attention is the NSW Police Force. The ICAC and the IBAC consider a very wide range of issues arising from the action or inaction of many agencies, public officials, Members of Parliament and others including (in the case of IBAC) the Victorian Police Force.

43. Apart from sensitivities which may relate to disclosure of operational and investigative strategies and practices through the use of public examinations, there is the further risk of damage to policing and individuals if public disclosure of events takes place. Where police officers are located in different areas, metropolitan, regional and rural, the disclosure of matters through public examinations may serve to harm the public interest in effective policing in the area, as well as the interests of individual persons.

44. Considerations of this type loom large where the Commission is considering a particular incident and the conduct of police officers surrounding that incident. This is especially so where there is significant factual dispute so that findings, opinions and conclusions will be expressed ultimately in a public report, which has regard to all the evidence. This process may serve the purpose of allowing appropriate public assessment of the incident without the use of public examinations.

45. On the other hand, public examinations may be especially appropriate where systemic issues are under consideration under s 10(1)(b) or s 51(1)(d), (3) and (4) LECC Act. By that stage, the Commission would have considered whether there was a "*pattern*" indicative of "*systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force*" (s 10(1)(b))and whether conduct "*could be indicative of a systemic problem"* and whether it is "*in the public interest*" to investigate the NSW Police Force generally (s51(3) and (4)).

46. The courts have emphasised that the term "*public interest*" is a broad concept and that the question whether a matter is "*in the public interest*" imports to an extent a discretionary value judgment and that there is a fundamental distinction between matters which may be "*of public interest*" and a matter which is "*in the public interest*": *R v IBAC* [2015] VSC 374; 255 A Crim R 99 at [90] to [91] (Priest, Beach and Kaye JJA). The term "*public interest*" has no precise meaning – it is protean and will take its possible meanings from the context in which it is used: *AB v Judicial Commission of NSW (Conduct Division)* at [54].

47. In *R v IBAC*, the Court of Appeal observed (at [92] – [94]) that it was said to be a systemic issue as to whether there was a "*culture*" at a Victorian police station of violent behaviour towards women and of "*tolerance within the police station in respect of such behaviour*".

48. It may be seen that conduct of that type, if alleged, may be capable of being a systemic issue under s 10(1)(b) or s 51(4) LECC Act. In such circumstances, the conduct of public examinations is more likely under s 63(2) LECC Act.

49. These observations are not intended to be prescriptive. Rather, they serve to illustrate circumstances where public examinations are more likely to be

"*appropriate*" and to serve the legislative purpose of s 63 LECC Act, viewed in its statutory context.

The Factors Specified in s 63(5) LECC Act

50. It is appropriate now to turn to the non-exhaustive factors referred to in s 63(5). Some assistance can be derived in construing these provisions from the judgment of Basten JA (Bathurst CJ agreeing) in *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (*Cunneen v ICAC*) where consideration was given (in obiter comments) to the mandatory considerations in s 31(2) ICAC Act, a provision with close similarity to s 63(5)(a)-(d) LECC Act. Basten JA's analysis of these provisions was not affected by the decision of the High Court dismissing an appeal from the Court of Appeal: *Independent Commission Against Corruption v Cunneen (*2015) 256 CLR 1; [2015] HCA 14.

51. Before moving to examine the factors in s 31(2) ICAC Act, Basten JA made a general observation (at [95]) which is pertinent:

> *"…there is a value in the privacy of investigations into unproven allegations which deserves to be considered by an investigative body with powers to undertake either private or public inquiries. Particularly is that so where the potential damage to reputation (and intrusions on personal privacy) result not from the considered assessment and reporting of an investigation but from public examination, often involving questions put in colourful terms and denials which are disregarded."*

52. Assistance is provided as well by the Public Examination Decision dated 16 March 2018 which is Annexure 1 to the Commission's Report in Operation Tambora (the Tambora Decision). It should be kept in mind that Operation Tambora involved a single issue being an allegation of excessive use of force. As the opening of Counsel Assisting made clear, Operation Mantus involves a wider range of issues.

Section 63(5)(a) – the benefit of exposing to the public and making it aware of serious misconduct

53. When considering the equivalent factor in s 31(2)(a) ICAC Act, Basten JA observed (at [100]) that whilst exposure at a public inquiry may be open, it is appropriate to

keep in mind that a public report may be prepared with respect to an investigation. Basten JA stated (at [100]):

> *"In considering whether to conduct a public inquiry, with potential adverse effects on individuals whose conduct is under investigation, consideration will be given to whether the functions of exposing, and educating about, corruption may best be served by the publicity attendant upon a report involving considered findings and recommendations."*

54. Several of the factors referred to earlier in this decision are relevant to s 63(5)(a) of the Act. There is a powerful public interest in the community being aware of investigations undertaken by the Commission. At the same time, where there are contested allegations of serious misconduct, there is a risk of community misunderstanding of the investigatory process. The Commission is not conducting a trial as a form of adversarial criminal litigation. Rather, the process is investigatory and inquisitorial with significant work being undertaken by the Commission before a public or private examination takes place.

55. The Commission should keep in mind the role of a s 132 public report in exposing to the public, and making it aware of serious misconduct.

Section 63(5)(b) – the seriousness of the allegations or misconduct matter being investigated

56. In *Cunneen v ICAC,* Basten, JA said with respect to the ICAC equivalent of s 63(5)(b) (at [101]):

> *"The second consideration, namely the seriousness of the subject matter of the investigation, has a number of facets. An allegation or complaint may be treated seriously because of its source, because of its subject matter or because of the potential consequences of the conduct complained of. In some circumstances the seriousness of the allegation may militate in favour of a public inquiry but in others, perhaps where the allegation is of very serious misconduct but of a highly contestable kind, this factor may militate against taking that step."*

57. There is a serious allegation of excessive use of force in this case. In addition, there are substantial issues concerning, in particular, custody management and interviewing of suspects which are to be investigated.

Section 63(5)(c) – any risk of undue prejudice to a person's reputation (including by not holding the examination in public)

58. With respect to the ICAC equivalent of s 63(5)(c), Basten JA said in *Cunneen v ICAC* (at [102]):

> *"So far as par (c) is concerned, the risk of "undue prejudice" to a person's reputation will usually arise from holding an inquiry rather than not holding one, although the latter possibility is recognised. How it will operate in a particular case is obviously a matter for discretionary judgment."*

59. In the Tambora Decision (at paragraphs 30 – 31), the Commission observed that there was no risk of "*undue prejudice*" to the reputation of a police officer simply because that officer is identified as having used violence in the course of their duties. The public would well understand that police may be required to use force, with the question being whether the use of force was lawful: ss 230-231 *Law Enforcement (Powers and Responsibilities) Act 2002.*

Section 63(5)(d) - whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned

60. In *Cunneen v ICAC* , Basten JA said of s 31(2)(d) ICAC Act (at [103]):

> *"Paragraph (d) requires what will usually be obvious, namely the need to weigh the public interest in exposing the matter, against the competing public interest of protecting the privacy and reputations of those who may be adversely affected by public exposure of their affairs."*

61. The words "*privacy of the persons concerned*" in s 63(5)(d) are capable of extending to police officers, members of the public involved in the particular incident under investigation and residents in the community where the events occurred. In the Tambora Decision (at paragraph 35), the Commission observed that "*the*

preservation of privacy has particular poignancy because of the relatively small communities in which the officers work and their families live".

62. This aspect is pertinent to Operation Mantus where the events under consideration unfolded in a regional area with relatively small communities encompassing the police officers and their families, as well as YPM1 and his family and other residents.

63. As the Commission observed in the Tambora Decision (at paragraph 36), "*the relationship between the two public interests referred to in [s 63(5)(d)] is a dynamic one and incapable of being the subject of a bright line analysis*".

64. The term "*public interest*" appears twice in s 63(5)(d). As noted earlier in this decision, the term "*in the public interest*" appears in s 51(4) LECC Act. The "*public interest*" is a recurring theme in the LECC Act, an understandable feature in a statute creating an investigatory commission entrusted to, amongst other things, investigate allegations of serious misconduct and agency maladministration in a policing context.

Section 63(5)(e) – whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation concerned to appear before the examining Commissioner or to otherwise assist the Commission's investigation

65. There is no equivalent to s 63(5)(e) in the ICAC Act.

66. When addressing this factor in the Tambora Decision (at paragraph 37), the Commission noted that the incident of alleged excessive use of force occurred in a public space and that a number of witnesses had already been identified. The Commission observed with respect to the prospect of witnesses coming forward:

> *"Whether the announcement of a public hearing is likely to encourage one or more of those persons to come forward must be somewhat speculative. We think it is fair to conclude that some witnesses are more likely to come forward if their evidence were to be taken publicly since that would give them some basis for thinking that the process is aboveboard and they would be fairly treated. It may be that some witnesses would be more likely to come forward if their evidence were to be taken privately. This matter is essentially imponderable but we think*

that an announcement of a public hearing would be somewhat more likely to encourage witnesses to come forward than would be the case if the hearings were to be private."

67. Having regard to the investigations already undertaken and the time and location where police apprehended YPM1, it appears unlikely that the holding of a public examination will encourage another person or persons to come forward to assist the Commission's investigation.

68. It is possible that the holding of public examinations concerning the issues of custody management and the interviewing of suspects may lead to other persons coming forward with information to assist the Commission.

A Specific Incident and Possible Systemic Issues

69. As noted in the short opening by Counsel Assisting on 14 December 2022, Operation Mantus raises the following issues:

    (a) whether excessive force was used in the apprehension and arrest of YPM1;

    (b) the absence of body worn video by police officers which would otherwise have served as a means of recording electronically the apprehension and arrest of YPM1;

    (c) the management of YPM1 in custody at a police station after his return from hospital and the role of the custody manager in that respect;

    (d) the fact that police officers proceeded to conduct an electronically recorded interview of 14 year old YPM1 despite his receiving and accepting legal advice that he did not wish to be interviewed.

70. The LECC Act does not refer expressly to systemic issues in the list of factors contained in s 63(5) LECC Act. Section 31 ICAC Act does not refer to systemic issues in the list of factors which bear upon the discretion to hold a public inquiry, although s 12A ICAC Act provides for the ICAC to direct its attention to "*serious corrupt conduct and systemic corrupt conduct*": *Knightsbridge North Lawyers Pty Ltd*

v Independent Commission Against Corruption [2018] NSWSC 387.

71. However, s 117(1)(d)(ii) and (4)(a)(iv) of the IBAC Act makes express reference to "*systemic corrupt conduct*" and "*systemic police personnel misconduct*" as being relevant to the exercise of discretion by IBAC to hold a public examination with reference being made to "*whether conduct relates to an individual or an isolated incident or systemic in nature*".

72. Section 73 of the NACC Act provides for the Commissioner to have regard to the extent to which the corruption issue could involve corrupt conduct that is "*serious and systemic*" in deciding whether a public hearing should take place.

73. Reference was made earlier (at paragraph 47) to *R v IBAC* where a systemic issue arose concerning alleged use of excessive force at a particular Victorian police station. In Operation Mantus the allegation is of use of excessive force confined to an individual in an isolated incident. There is no aspect which presently suggests that this is a systemic issue for the purpose of Operation Mantus.

74. However, other issues involve the use or non-use of body worn video , the custody management of YPM1, a 14 year old person, and the process which saw YPM1 being interviewed by police despite his acceptance of legal advice that he not be interviewed. These are capable of being systemic issues where the LECC Act itself points to their significance, and the importance of the Commission being able to investigate them.

75. Where systemic issues are to be explored, there is a powerful case for the use of public examinations whilst guarding against unnecessary identification of individuals and locations. This approach may be justified under s 63 LECC Act once the particular circumstances of the case have been identified, usually by evidence taken at private examinations.

Conclusion

76. This Public Decision has sought to identify principles and a range of factors which may be relevant to the exercise of discretion to hold public examinations under s 63

LECC Act.

77. Issues have been addressed in this Public Decision at a level of generality. A separate Confidential Decision refers directly to a range of considerations (some of them unusual) as to whether it is appropriate to hold public examinations as part of Operation Mantus. The Commission will invite submissions from legal representatives for interested persons as to whether the Confidential Decision may be made public in whole or in part.

78. Having regard to all the factors relevant to the exercise of discretion under s 63 LECC Act, the Commission is satisfied that, in the first instance, private examinations should be held of witnesses on issues of fact. I note that private examinations were held with respect to Officers MTS1, MTS2, MTS3 and MTS5 on 9 and 10 February 2023.

79. Given the point that has been reached in the investigation, it is proposed that all legal representatives granted leave to appear for interested persons (together with legal representatives who may be granted leave to appear) will be present at the private examinations to be held as part of Operation Mantus in the near future. This step will assist the orderly progress of the investigation including the identification of evidence on systemic issues which may be suitable for public examination.

80. It is foreshadowed that the Commission will hold public examinations with respect to systemic issues after the private examinations have been held.

81. In reaching this decision, I confirm that I have consulted with Commissioner Anina Johnson for the purpose of s 19(2)(a), (b) and (c) of the LECC Act.

The Hon Peter Johnson SC
Chief Commissioner
3 March 2023

Appendix A – Relevant Statutory Provisions

1. Section 3 LECC Act sets out the objects of the statute:

"3 Objects of Act

The objects of this Act are as follows—

(a) to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission 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),

(b) to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,

(c) to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,

(d) to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by—

(i) providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration, and

(ii) assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and

(iii) encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and

(iv) making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,

(e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,

(f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,

(g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,

(h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,

(i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to Parliament,

(j) to provide for the oversight by the Inspector of the use of covert powers under various Acts."

2. The term '*police misconduct'* is defined in s 9(1) LECC Act in the following way:

*"**9 Police misconduct, administrative employee misconduct and Crime Commission officer misconduct***

*(1) **Definition — police misconduct** For the purposes of this Act, **police misconduct** means any misconduct (by way of action or inaction) of a police officer —*

(a) whether or not it also involves participants who are not police officers, and

(b) whether or not it occurs while the police officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection, and

(d) whether or not it occurred outside the State or outside Australia.

…

***(4) Examples** Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively —*

(a) conduct of the officer or employee that constitutes a criminal offence,

(b) conduct of the officer or employee that constitutes corrupt conduct,

(c) conduct of the officer or employee that constitutes unlawful conduct (not being a criminal offence or corrupt conduct),

(d) conduct of the officer or employee that constitutes a disciplinary infringement.

…"

3. Section 10 defines the term '*serious misconduct*':

"10 Meaning of "serious misconduct"

*(1) For the purposes of this Act, **serious misconduct** means any one of the following —*

(a) conduct of a police officer, administrative employee or Crime Commission officer 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.

(2) In this section —

***serious disciplinary action** against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.*

***serious offence** means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence."*

4. Section 11 defines several concepts including "*agency maladministration*":

"11 Maladministration

*(1) For the purposes of this Act, **agency maladministration** means any conduct (by way of action or inaction) of the NSW Police Force or the Crime Commission other than excluded conduct —*

(a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

(b) that, 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, or

(iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(iv) arises, wholly or in part, from a mistake of law or fact, or

(v) 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.

(2) For the purposes of this Act, ***officer maladministration*** *means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct)—*

(a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(b) arises, wholly or in part, from improper motives, or

(c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(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.

(3) For the purposes of this Act, agency maladministration or officer maladministration is ***serious maladministration****—*

(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.

(4) In this section —

***excluded conduct** means any of the following —*

(a) conduct of the Crime Commission in relation to a decision that could be the subject of an application for review by the Supreme Court under section 33 of the Crime Commission Act 2012,

(b) conduct of the Crime Commission or Crime Commission officers in relation to the carrying on or determination of a hearing under Division 4 of Part 2 of the Crime Commission Act 2012 or any proceeding relating to an investigation conducted by the Crime Commission,

(c) conduct of the Crime Commission or its officers where acting as a legal advisor to a public authority or as a legal representative of a public authority (including as counsel assisting a public authority),

(d) conduct of the Crime Commission or its officers relating to the carrying on of any proceedings before a court (including a coronial inquiry and committal proceedings before a magistrate) or before any other person or body before whom witnesses may be compelled to appear and give evidence,

(e) conduct in carrying out the functions of an executive officer or member of the Management Committee of the Crime Commission."

5. Section 51 concerns the Commission's exercise of investigation powers:

"51 Exercise of investigation powers

(1) The Commission may exercise its investigation powers in respect of conduct—

(a) if the conduct concerned involves a police officer, administrative employee or Crime Commission officer and the Commission has decided that the conduct concerned is (or could be) serious misconduct or officer maladministration that is serious maladministration and should be investigated, or

Note—
See section 19 (2) in relation to the making of a decision under this provision.

(b) if the conduct concerned involves the Commissioner of Police or a Deputy Commissioner of Police and is (or could be) police misconduct or officer maladministration, or

(c) if the conduct concerned involves the Crime Commissioner or an Assistant Commissioner of the Crime Commission and is (or could be) Crime Commission officer misconduct or officer maladministration, or

(d) if the conduct concerned is (or could be) agency maladministration, or

(e) if both Houses of Parliament refer the conduct concerned to the Commission for investigation under section 196.

(2) The investigation powers may be exercised—

(a) on any complaint made or referred to the Commission under this or any other Act, or

(b) on the Commission's own initiative on the basis of misconduct information provided to it in a report or of which it otherwise becomes aware.

(3) The power to investigate conduct under this section includes the power—

(a) to investigate conduct that could be, but is not, the subject of a complaint, and

(b) to investigate the actions of another person or body in relation to the conduct concerned and any related issues, and

(c) to refer the matter for investigation or other action under section 162.

(4) Without limiting subsection (3), if the misconduct matter or conduct is (or could be) indicative of a systemic problem involving the NSW Police Force generally, or a particular area of the NSW Police Force, and the Commission considers it in the public interest to do so, the investigation by the Commission may extend beyond any police officer or administrative employee to whom the misconduct matter or conduct relates—

(a) to the NSW Police Force generally, or that particular area of the NSW Police Force, and

(b) to other police officers and administrative employees.

(5) Without limiting subsection (3), if the misconduct matter or conduct is (or could be) indicative of a systemic problem involving the Crime Commission generally, or a particular area of the Crime Commission, and the Commission considers it in the public interest to do so, the investigation by the Commission may extend beyond any Crime Commission officer to whom the misconduct matter or conduct relates—

(a) to the Crime Commission generally, or that particular area of the Crime Commission, and

(b) to other Crime Commission officers.

(6) For the purposes of subsection (1), conduct that is (or could be) indicative of both officer misconduct or officer maladministration and agency maladministration is to be treated as officer misconduct or officer maladministration."

6. Sections 61 and 62 LECC Act concern examinations to be held by the Commission:

"61 When may an examination be held

The Commission may hold an examination under this Division, for the following purposes—

(a) an investigation of conduct that the Commission has decided is (or could be) serious misconduct or serious maladministration,

(b) investigation of conduct referred to it by Parliament under section 196.

Note—
See section 19 (2) in relation to the making of a decision under this provision.

62 Examinations

(1) An examination must be held by the Chief Commissioner, Commissioner or an Assistant Commissioner, as determined by the Chief Commissioner (the ***examining Commissioner****).*

(2) At an examination, the examining Commissioner must announce the general scope and purpose of the examination.

(3) A person appearing at an examination is entitled to be informed of the general scope and purpose of the examination, unless the examining Commissioner is of the opinion that this would seriously prejudice the investigation concerned."

7. Section 63 is of particular importance to the holding of public or private examinations. Section 63 states:

"63 Public and private examinations

(1) An examination (or part of an examination) may, subject to subsection (2), be held in public or in private.

(2) An examination (or part of an examination) may only be held in public if the Commission decides that it is appropriate.

Note —
See section 19 (2) (c) in relation to the making of a decision under this provision.

(3) Despite the Commission deciding to hold an examination (or part of an examination) in public, the examining Commissioner may decide to hear closing submissions or any other part of a hearing in private.

(4) Subsection (3) extends to a closing submission by a person appearing before the examining Commissioner or an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.

(5) Without limiting the factors that the Commission may take into account in determining whether or not to hold an examination (or part of an examination) in public, the Commission is to consider the following —

> *(a) the benefit of exposing to the public, and making it aware of, serious misconduct,*
>
> *(b) the seriousness of the allegation or misconduct matter being investigated,*
>
> *(c) any risk of undue prejudice to a person's reputation (including by not holding the examination in public),*
>
> *(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned,*
>
> *(e) whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation*

concerned to appear before the examining Commissioner or to otherwise assist the Commission's investigation.

(6) The examining Commissioner may give directions as to the persons who may be present at an examination when it is being held in private. A person must not be present at an examination in contravention of any such direction."

Appendix 3 – Operation Mantus – Confidential decision concerning public and private examinations in aid of the investigation (made public in an amended form on 3 April 2023

1. This Confidential Decision is to be read together with the Public Decision, dated 3 March 2023 concerning the use of public and private examinations in Operation Mantus.

2. Pursuant to s 176 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act), the Commission directs that the Confidential Decision is to be provided only to legal representatives who have been, or will be, granted leave to appear at examinations for the purpose of Operation Mantus. Its contents must not be used or disclosed to any person except for the purpose of instructions being taken by the legal representatives from their clients.[168]

3. There are a range of factors under s 63 LECC Act which call for the holding of private examinations in Operation Mantus. The Commission has already held private examinations of Officers MTS1, MTS2, MTS3 and MTS5 on 9 and 10 February 2023.

4. The factors which called for, and continue to call for the use of private examinations concerning the specific facts of Operation Mantus are the following:

    (a) the arrest of YPM1 occurred in a small rural community in Northern NSW where there is a significant First Nations population;

    (b) the allegation of excessive use of force by police is extremely serious with a head injury being sustained by YPM1 which is capable of constituting actual bodily harm;

    (c) there is a factual dispute as to the circumstances in which YPM1 sustained injuries during his apprehension by police;

[168] The s 176 direction was varied on 3 April 2023 to allow unrestricted publication of the Confidential Decision in an amended form.

(d) it is not expected that YPM1 will give evidence as part of the investigation;[169]

(e) on the current state of the investigation, the alleged excessive use of force on YPM1 involves an individual and isolated case and does not appear to be representative of a systemic issue involving excessive use of force by police officers in the geographical area;

(f) public examinations of witnesses, including police officers, will likely have a significant adverse effect on the local communities, including the First Nations community and their relationships with police in circumstances where it appears that significant steps have been taken to improve the relationships between the First Nations community and police;

(g) there is a need to protect the privacy and safety of YPM1 and the family of YPM1;

(h) [redacted]

(i) there is a need to protect the safety and privacy of the police officers who have been called and will be called, as well as those of their families, who live in the local community;

(j) the [redacted] [relevant] regions were stricken by severe floods in early 2022 and those floods have had a devastating and ongoing effect on the entire community with consequential adverse effects on all members of the community, police and non-police – the holding of public examinations will be likely to magnify the adverse consequences of the floods on the local community;

(k) there is a need at this stage to protect the reputations of police involved relating to the alleged excessive use of force;

(l) in regard to the issues of use by police of body worn video, custody management and the interviewing of suspects in custody, it may be less likely that reputational damage will be caused to police officers;

[169] On 9 March 2023, the legal representative for YPM1 informed the Commission that he was prepared to give evidence as part of the investigation and legal representatives for other interests were informed on 10 March 2023 that YPM1 would give evidence at a private examination on 15 March 2023.

(m) the use of body worn video, custody management and interviewing suspects in custody are issues of broader significance and appear to raise systemic issues of concern;

(n) the use of public examinations concerning the use of body worn video, custody management and the interviewing of suspects in custody may encourage members of the community to come forward with relevant information to assist the Commission.

5. Having regard to these factors, private examinations will be used with respect to all witnesses (including police officers and civilians) giving evidence about the factual circumstances concerning the arrest of YPM1 on 11 September 2022 and his detention and interviewing in custody on 12 September 2022.

6. In light of that evidence, the Commission will hear legal representatives on any application that a witness or witnesses should give evidence at a public examination.

7. In particular, the Commission will consider the use of public examinations on apparently systemic issues including use of body worn video, custody management and the role of custody managers and the interviewing of suspects (in particular vulnerable persons) who have received legal advice concerning proposed questioning by police. Public examinations on these issues are likely to involve senior police officers giving evidence on the present practice of the NSW Police Force in these areas and consideration of reform in light of evidence to be given at private and public examinations as part of Operation Mantus.

8. In considering the issue concerning the interviewing of suspects who have received legal advice, the Commission has taken into account decisions of Courts including *R v FE* [2013] NSWSC 1692, *R v Taleb* [2019] NSWSC 241, *R v Archer (No 1)* [2021] NSWSC 569 and *R v Nean* [2023] NSWDC 34 together with other unreported decisions of the Children's Court (in 2021 and 2022) and the District Court (in 2022).

9. At any public examinations, the Commission will continue to utilise pseudonyms already given, and additional pseudonyms to protect the identity of individuals, as well as the location where relevant events took place. The factors referred to in

paragraph 4 of this decision serve to explain as well why the Commission continues to take this course.

10. In reaching this decision, I confirm that I have consulted with Commissioner Anina Johnson for the purpose of s 19(2)(a), (b) and (c) LECC Act.

The Hon Peter Johnson SC
Chief Commissioner
3 March 2023

Appendix 4 – Extracts from relevant legislation

Law Enforcement (Powers and Responsibilities) Act 2002

Part 9–Investigations and questioning

Division 1–Preliminary

109 Objects of Part

(cf *Crimes Act 1900*, s 354)

The objects of this Part are—

(a) to provide for the period of time that a person who is under arrest may be detained by a police officer to enable the investigation of the person's involvement in the commission of an offence, and

(b) to authorise the detention of a person who is under arrest for such a period despite any requirement imposed by law to bring the person before a Magistrate or other authorised officer or court without delay or within a specified period, and

(c) to provide for the rights of a person so detained, and

(d) to provide for the rights of a suspect who is in the company of a police officer in connection with an investigative procedure but who is not so detained.

110 Definitions

(cf *Crimes Act 1900*, s 355)

(1) In this Part—

"detention warrant" means a warrant issued under section 118.

"investigation period" means the period provided for by section 115.

"permanent Australian resident" means a person resident in Australia whose continued presence in Australia is not subject to any limitation as to time imposed by or in accordance with law.

"protected suspect" means a person who is in the company of a police officer for the purpose of participating in an investigative procedure in connection with an offence if—

(a) the person has been informed that he or she is entitled to leave at will, and

(b) the police officer believes that there is sufficient evidence that the person has committed the offence.

(2), (3) (Repealed)

(4) For the purposes of this Part, a person ceases to be under arrest for an offence if the person is remanded in respect of the offence.

(5) For the purposes of this Part, a reference to the place where a protected suspect is detained is a reference to the place where the person is participating in the relevant investigative procedure.

111 Persons to whom Part applies

(cf *Crimes Act 1900*, s 356)

(1) This Part applies to a person, including a person under the age of 18 years, who is under arrest by a police officer for an offence or who is a protected suspect in connection with an offence. It is immaterial whether the offence concerned was committed before or after the commencement of this Part or within or outside the State.

(2) This Part does not apply to a person who is detained under Part 16.

112 Modification of application of Part to certain persons

(cf *Crimes Act 1900*, s 356A)

(1) The regulations may make provision for or with respect to the modification of the application of this Part to—

(a) persons under the age of 18 years, or

(b) Aboriginal persons or Torres Strait Islanders, or

(c) persons of non-English speaking background, or

(d) persons who have a disability (whether physical, intellectual or otherwise).

(2) Without limiting subsection (1), the regulations may provide for an investigation period for a person or class of persons referred to in that subsection that is shorter than the period provided for by section 115.

112A Application of Part in connection with execution of search warrants

(1) This Part applies to a person in the company of a police officer for the purpose of an investigative procedure at premises that are being searched under a search warrant issued under this Act or under a provision specified in Schedule 2 if —

(a) the person has been arrested and is in custody at those premises, or

(b) the person is at the premises and is a protected suspect.

(2) For that purpose —

(a) the functions of the custody manager under this Part are exercisable by a police officer who is at the premises but who is not connected with the investigation concerned and who does not participate in the execution of the search warrant, and

(b) the police officer exercising the functions of the custody manager is not required to comply with any obligation under this Part relating to communication with a friend, relative, guardian or independent person if the police officer suspects on reasonable grounds that doing so may result in bodily injury to any other person, and

(c) the custody record for the detained person or protected suspect may form part of a video recording of the execution of the search warrant, and

(d) this Part applies with such other modifications as are prescribed by the regulations.

113 Effect of Part on other powers and duties

(cf *Crimes Act 1900*, s 356B)

(1) Existing powers relating to arrest and other matters This Part does not —

(a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested, or

(b) prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (for example, the power to require a person to submit to a breath analysis under Division 2 of Part 2 of Schedule 3 to the *Road Transport Act 2013*), or

(c) independently confer power to carry out an investigative procedure.

(2) Certain evidentiary matters and rights not affected Nothing in this Part affects —

(a) the operation of —

(i) the following provisions of the *Evidence Act 1995* —

section 84 (Exclusion of admissions influenced by violence and certain other conduct)

section 85 (Criminal proceedings: reliability of admissions by defendants)

section 90 (Discretion to exclude admissions)

section 138 (Exclusion of improperly or illegally obtained evidence)

section 139 (Cautioning of persons), or

(ii) any other provision of that Act, or

(b) any law that permits or requires a person to be present at the questioning of another person who is under arrest or is a protected

suspect (for example, the presence of a parent at the questioning by a police officer of the parent's child), or

(c) the right of a person to refuse to participate in any questioning of the person or any other investigative procedure unless the person is required by law to do so, or

(d) the right of a person to leave police custody if the person is not under arrest, or

(e) the rights of a person under the *Bail Act 2013*.

Division 2–Investigation and questioning powers — persons under arrest

114 Detention after arrest for purposes of investigation

(cf *Crimes Act 1900*, s 356C)

(1) A police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115.

(2) A police officer may so detain a person for the purpose of investigating whether the person committed the offence for which the person is arrested.

(3) If, while a person is so detained, the police officer forms a reasonable suspicion as to the person's involvement in the commission of any other offence, the police officer may also investigate the person's involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State.

(4) The person must be —

(a) released (whether unconditionally or on bail) within the investigation period, or

(b) brought before an authorised officer or court within that period, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

(5) A requirement in another Part of this Act, the *Bail Act 2013* or any other relevant law that a person who is under arrest be taken before a Magistrate or other authorised officer or court, without delay, or within a specified period, is affected by this Part only to the extent that the extension of the period within which the person is to be brought before such a Magistrate or officer or court is authorised by this Part.

(6) If a person is arrested more than once within any period of 48 hours, the investigation period for each arrest, other than the first, is reduced by so much of any earlier investigation period or periods as occurred within that 48 hour period.

(7) The investigation period for an arrest (the **"earlier arrest"**) is not to reduce the investigation period for a later arrest if the later arrest relates to an offence that the person is suspected of having committed after the person was released, or taken before a Magistrate or other authorised officer or court, in respect of the earlier arrest.

115 Investigation period

(cf *Crimes Act 1900*, s 356D)

(1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.

(2) The maximum investigation period is 6 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

116 Determining reasonable time

(cf *Crimes Act 1900*, s 356E)

(1) In determining what is a reasonable time for the purposes of section 115(1), all the relevant circumstances of the particular case must be taken into account.

(2) Without limiting the relevant circumstances that must be taken into account, the following circumstances (if relevant) are to be taken into account —

(a) the person's age, physical capacity and condition and mental capacity and condition,

(b) whether the presence of the person is necessary for the investigation,

(c) the number, seriousness and complexity of the offences under investigation,

(d) whether the person has indicated a willingness to make a statement or to answer any questions,

(e) the time taken for police officers connected with the investigation (other than police officers whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation) to attend at the place where the person is being detained,

(f) whether a police officer reasonably requires time to prepare for any questioning of the person,

(g) the time required for facilities for conducting investigative procedures in which the person is to participate (other than facilities for complying with section 281 of the *Criminal Procedure Act 1986*) to become available,

(h) the number and availability of other persons who need to be questioned or from whom statements need to be obtained,

(i) the need to visit the place where any offence concerned is believed to have been committed or any other place reasonably connected with the investigation of any such offence,

(j) the time during which the person is in the company of a police officer before and after the person is arrested (including any period during which the person was a protected suspect),

(k) the time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation (including any search of the person or any other investigative procedure in which the person is to participate),

(l) the time required to carry out any other activity that is reasonably necessary for the proper conduct of the investigation.

(3) In any criminal proceedings in which the reasonableness of any period of time that a person was detained under this Part is at issue, the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable.

117 Certain times to be disregarded in calculating investigation period

(cf *Crimes Act 1900*, s 356F)

(1) The following times (to the extent that those times are times during which any investigative procedure in which a person who is detained under this Part is to participate is reasonably suspended or deferred) are not to be taken into account in determining how much of an investigation period has elapsed—

(a) any time that is reasonably required to convey the person from the place where the person is arrested to the nearest premises where facilities are available for conducting investigative procedures in which the person is to participate,

(b) any time that is reasonably spent waiting for the arrival at the place where the person is being detained of police officers, or any other persons prescribed by the regulations, whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation,

(c) any time that is reasonably spent waiting for facilities for complying with section 281 of the *Criminal Procedure Act 1986* to become available,

(d) any time that is required to allow the person (or someone else on the person's behalf) to communicate with a friend, relative, guardian, independent person, Australian legal practitioner or consular official,

(e) any time that is required to allow such a friend, relative, guardian, independent person, Australian legal practitioner or consular official to arrive at the place where the person is being detained,

(f) any time that is required to allow the person to consult at the place where the person is being detained with such a friend, relative, guardian, independent person, Australian legal practitioner or consular official,

(g) any time that is required to arrange for and to allow the person to receive medical attention,

(h) any time that is required to arrange for the services of an interpreter for the person and to allow the interpreter to arrive at the place where the person is being detained or become available by telephone for the person,

(i) any time that is reasonably required to allow for an identification parade to be arranged and conducted,

(j) any time that is required to allow the person to rest or receive refreshments or to give the person access to toilet and other facilities as referred to in section 130,

(k) any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs,

(l) any time that is reasonably required to prepare, make and dispose of any application for a detention warrant or any application for a search warrant or crime scene warrant that relates to the investigation,

(m) any time that is reasonably required to carry out charging procedures in respect of the person,

(n) any time that is reasonably required to carry out a forensic procedure on the person under the *Crimes (Forensic Procedures)*

Act 2000, or to prepare, make and dispose of an application for an order for the carrying out of such a procedure,

(o) any time that is reasonably required for the person to undertake a breath test or breath analysis or to provide a blood or urine sample under Division 4 of Part 10.

(2) In any criminal proceedings in which the question of whether any particular time was a time that was not to be taken into account because of this section is at issue, the burden lies on the prosecution to prove on the balance of probabilities that the particular time was a time that was not to be taken into account.

118 Detention warrant to extend investigation period

(cf *Crimes Act 1900*, s 356G)

(1) A police officer may, before the end of the investigation period, apply to an authorised officer for a warrant to extend the maximum investigation period beyond 6 hours.

(2) The person to whom an application for a detention warrant relates, or the person's legal representative, may make representations to the authorised officer about the application.

(3) The authorised officer may issue a warrant that extends the maximum investigation period by up to 6 hours.

(4) The maximum investigation period cannot be extended more than once.

(4A) When determining an application for a detention warrant, the authorised officer is to take into account any period for which the person to whom the application relates was a protected suspect in relation to the investigation.

(5) An authorised officer must not issue a warrant to extend the maximum investigation period unless satisfied that —

(a) the investigation is being conducted diligently and without delay, and

(b) a further period of detention of the person to whom the application relates is reasonably necessary to complete the investigation, and

(c) there is no reasonable alternative means of completing the investigation otherwise than by the continued detention of the person, and

(d) circumstances exist in the matter that make it impracticable for the investigation to be completed within the 6-hour period.

(6) As soon as reasonably practicable after a detention warrant is issued, the custody manager for the person to whom the warrant relates —

(a) must give the person a copy of the warrant, and

(b) must orally inform the person of the nature of the warrant and its effect.

119 Detention warrants

(1) An application for a detention warrant may be made by the applicant in person or by telephone.

[Note: For provisions relating generally to applications for detention warrants and other matters, see section 59.]

(2) In any criminal proceedings, the burden lies on the prosecution to prove on the balance of probabilities that the warrant was issued.

(3) In the case of an application made for a detention warrant by telephone, the applicant for the warrant must, within one day after the day on which the warrant is issued, give or transmit to the authorised officer concerned an affidavit setting out the information on which the application was based that was given to the authorised officer when the application was made.

120 Information in application for detention warrant

(cf *Crimes Act 1900*, s 356I)

(1) An authorised officer must not issue a detention warrant unless the application for the warrant includes the following information—

(a) the nature of any offence under investigation,

(b) the general nature of the evidence on which the person to whom the application relates was arrested,

(c) what investigation has taken place and what further investigation is proposed,

(c1) the period (if any) during which the person has been a protected suspect in relation to the investigation,

(d) the reasons for believing that the continued detention of the person is reasonably necessary to complete the investigation,

(e) the extent to which the person is co-operating in the investigation,

(f) if a previous application for the same, or substantially the same, warrant was refused, details of the previous application and of the refusal and any additional information required,

(g) any other information required by the regulations.

(2) The applicant must provide (either orally or in writing) such further information as the authorised officer requires concerning the grounds on which the detention warrant is being sought.

(3) Nothing in this section requires an applicant for a detention warrant to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person.

121 Detention after arrest for purposes of investigation may count towards sentence

(cf *Crimes Act 1900*, s 356W)

In passing sentence on a person convicted of an offence, a court may take into account any period during which the person was detained under this Part in respect of the offence and may reduce the sentence it would otherwise have passed.

Division 3–Safeguards relating to persons under arrest and protected suspects

122 Custody manager to caution, and give summary of Part to, person under arrest or protected suspect

(cf *Crimes Act 1900*, s 356M)

(1) As soon as practicable after a person who is detained under this Part (a **"detained person"**) comes into custody at a police station or other place of detention or after a person becomes a protected suspect, the custody manager for the person must orally and in writing—

(a) caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and

(b) give the person a summary of the provisions of this Part in the form prescribed by the regulations.

(2) The giving of a caution does not affect a requirement of any law that a person answer questions put by, or do things required by, a police officer.

(3) After being given the information referred to in subsection (1) orally and in writing, the person is to be requested to sign an acknowledgment that the information has been so given.

123 Right to communicate with friend, relative, guardian or independent person and Australian legal practitioner

(cf *Crimes Act 1900*, s 356N)

(1) Before any investigative procedure in which a detained person or protected suspect is to participate starts, the custody manager for the person must inform the person orally and in writing that he or she may —

(a) communicate, or attempt to communicate, with a friend, relative, guardian or independent person —

(i) to inform that person of the detained person's or protected suspect's whereabouts, and

(ii) if the detained person or protected suspect wishes to do so, to ask the person communicated with to attend at the place where the person is being detained to enable the detained person or protected suspect to consult with the person communicated with, and

(b) communicate, or attempt to communicate, with an Australian legal practitioner of the person's choice and ask that Australian legal practitioner to do either or both of the following —

(i) attend at the place where the person is being detained to enable the person to consult with the Australian legal practitioner,

(ii) be present during any such investigative procedure.

(2) If the person wishes to make any communication referred to in subsection (1), the custody manager must, as soon as practicable —

(a) give the person reasonable facilities to enable the person to do so, and

(b) allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

(3) The custody manager must defer for a reasonable period any investigative procedure in which the person is to participate —

(a) to allow the person to make, or attempt to make, a communication referred to in subsection (1), and

(b) if the person has asked any person so communicated with to attend at the place where the person is being detained —

(i) to allow the person communicated with to arrive at that place, and

(ii) to allow the person to consult with the person communicated with at that place.

(4) If the person has asked a friend, relative, guardian or independent person communicated with to attend at the place where the person is being detained, the custody manager must allow the person to consult with the friend, relative, guardian or independent person in private and must provide reasonable facilities for that consultation.

(5) If the person has asked an Australian legal practitioner communicated with to attend at the place where the person is being detained, the custody manager must —

(a) allow the person to consult with the Australian legal practitioner in private and must provide reasonable facilities for that consultation, and

(b) if the person has so requested, allow the Australian legal practitioner to be present during any such investigative procedure and to give advice to the person.

(6) Anything said by the Australian legal practitioner during any such investigative procedure is to be recorded and form part of the formal record of the investigation.

(7) An investigative procedure is not required to be deferred under subsection (3)(b)(i) for more than 2 hours to allow a friend, relative, guardian, independent

person or Australian legal practitioner that the person has communicated with to arrive at the place where the person is being detained.

(8) An investigative procedure is not required to be deferred to allow the person to consult with a friend, relative, guardian, independent person or Australian legal practitioner who does not arrive at the place where the person is being detained within 2 hours after the person communicated with the friend, relative, guardian, independent person or Australian legal practitioner. This does not affect the requirement to allow an Australian legal practitioner to be present during an investigative procedure and to give advice to the person.

(9) The duties of a custody manager under this section owed to a detained person or protected suspect who is not an Australian citizen or a permanent Australian resident are in addition to the duties of the custody manager owed to the person under section 124.

(10) After being informed orally and in writing of his or her rights under this section, the person is to be requested to sign an acknowledgment that he or she has been so informed.

124 Right of foreign national to communicate with consular official

(cf *Crimes Act 1900*, s 356O)

(1) This section applies to a detained person or protected suspect who is not an Australian citizen or a permanent Australian resident.

(2) Before any investigative procedure in which a person to whom this section applies is to participate starts, the custody manager for the person must inform the person orally and in writing that he or she may —

(a) communicate, or attempt to communicate, with a consular official of the country of which the person is a citizen, and

(b) ask the consular official to attend at the place where the person is being detained to enable the person to consult with the consular official.

(3) If the person wishes to communicate with such a consular official, the custody manager must, as soon as practicable —

(a) give the person reasonable facilities to enable the person to do so, and

(b) allow the person to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

(4) The custody manager must defer for a reasonable period any investigative procedure in which the person is to participate—

(a) to allow the person to make, or attempt to make, the communication referred to in subsection (2), and

(b) if the person has asked any consular official so communicated with to attend at the place where the person is being detained—

(i) to allow the consular official to arrive at that place, and

(ii) to allow the person to consult with the consular official.

(5) If the person has asked a consular official communicated with to attend at the place where the person is being detained, the custody manager must allow the person to consult with the consular official in private and must provide reasonable facilities for that consultation.

(6) An investigative procedure is not required to be deferred under subsection (4)(b)(i) for more than 2 hours to allow a consular official that the person has communicated with to arrive at the place where the person is being detained.

(7) An investigative procedure is not required to be deferred to allow the person to consult with a consular official who does not arrive at the place where the person is being detained within 2 hours after the person communicated with the consular official.

(8) After being informed orally and in writing of his or her rights under this section, the person is to be requested to sign an acknowledgment that he or she has been so informed.

(9) This section does not apply if the custody manager did not know, and could not reasonably be expected to have known, that the person is not an Australian citizen or a permanent Australian resident.

125 Circumstances in which certain requirements need not be complied with

(cf *Crimes Act 1900*, s 356P)

(1) A requirement imposed on a custody manager under section 123 relating to a friend, relative, guardian or independent person need not be complied with if the custody manager believes on reasonable grounds that doing so is likely to result in—

(a) an accomplice of the detained person or protected suspect avoiding arrest, or

(b) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or

(c) hindering the recovery of any person or property concerned in the offence under investigation, or

(d) bodily injury being caused to any other person.

(2) Further, in the case of a requirement that relates to the deferral of an investigative procedure, a requirement imposed on a custody manager under section 123 relating to a friend, relative, guardian or independent person need not be complied with if the custody manager believes on reasonable grounds that the investigation is so urgent, having regard to the safety of other persons, that the investigative procedure should not be deferred.

126 Provision of information to friend, relative or guardian

(cf *Crimes Act 1900*, s 356Q)

(1) The custody manager for a detained person or protected suspect must inform the person orally of any request for information as to the whereabouts of the person made by a person who claims to be a friend, relative or guardian of the detained person or protected suspect.

(2) The custody manager must provide, or arrange for the provision of, that information to the person who made the request unless—

(a) the detained person or protected suspect does not agree to that information being provided, or

(b) the custody manager believes on reasonable grounds that the person requesting the information is not a friend, relative or guardian of the detained person or protected suspect, or

(c) the custody manager believes on reasonable grounds that doing so is likely to result in—

(i) an accomplice of the detained person or protected suspect avoiding arrest, or

(ii) the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or

(iii) hindering the recovery of any person or property concerned in the offence under investigation, or

(iv) bodily injury being caused to any other person.

127 Provision of information to certain other persons

(cf *Crimes Act 1900*, s 356R)

(1) The custody manager for a detained person or protected suspect must inform the person orally of any request for information as to the whereabouts of the person made by a person who claims to be—

(a) an Australian legal practitioner representing the detained person or protected suspect, or

(b) in the case of a detained person or protected suspect who is not an Australian citizen or a permanent Australian resident, a consular official of the country of which the detained person or protected suspect is a citizen, or

(c) a person (other than a friend, relative or guardian of the detained person or protected suspect) who is in his or her professional

capacity concerned with the welfare of the detained person or protected suspect.

(2) The custody manager must provide, or arrange for the provision of, that information to the person who made the request unless—

(a) the detained person or protected suspect does not agree to that information being provided, or

(b) the custody manager believes on reasonable grounds that the person requesting the information is not the person who he or she claims to be.

128 Provision of interpreter

(cf *Crimes Act 1900*, s 356S)

(1) The custody manager for a detained person or protected suspect must arrange for an interpreter to be present for the person in connection with any investigative procedure in which the person is to participate if the custody manager has reasonable grounds for believing that the person is unable—

(a) because of inadequate knowledge of the English language, to communicate with reasonable fluency in English, or

(b) because of any disability, to communicate with reasonable fluency.

(2) The custody manager must ensure that any such investigative procedure is deferred until the interpreter arrives.

(3) However, the custody manager need not—

(a) arrange for an interpreter to be present if the custody manager believes on reasonable grounds that the difficulty of obtaining an interpreter makes compliance with the requirement not reasonably practicable, or

(b) defer any such investigative procedure if the custody manager believes on reasonable grounds that the urgency of the

investigation, having regard to the safety of other persons, makes such deferral unreasonable.

(4) If an interpreter is not available to be present for the person in connection with any investigative procedure in which the person is to participate, the custody manager must instead arrange for a telephone interpreter for the person.

(5) The custody manager must ensure that any such investigative procedure is deferred until a telephone interpreter is available.

(6) However, the custody manager need not —

(a) arrange for a telephone interpreter if the custody manager believes on reasonable grounds that the difficulty of obtaining such an interpreter makes compliance with the requirement not reasonably practicable, or

(b) defer any such investigative procedure if the custody manager believes on reasonable grounds that the urgency of the investigation, having regard to the safety of other persons, makes such deferral unreasonable.

129 Right to medical attention

(cf *Crimes Act 1900*, s 356T)

The custody manager for a detained person or protected suspect must arrange immediately for the person to receive medical attention if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager.

130 Right to reasonable refreshments and facilities

(cf *Crimes Act 1900*, s 356U)

(1) The custody manager for a detained person or protected suspect must ensure that the person is provided with reasonable refreshments and reasonable access to toilet facilities.

(2) The custody manager for a detained person or protected suspect must ensure that the person is provided with facilities to wash, shower or bathe and (if appropriate) to shave if —

(a) it is reasonably practicable to provide access to such facilities, and

(b) the custody manager is satisfied that the investigation will not be hindered by providing the person with such facilities.

131 Custody records to be maintained

(cf *Crimes Act 1900*, s 356V)

(1) The custody manager for a detained person or protected suspect must open a custody record in the form prescribed by the regulations for the person.

(2) The custody manager must record the following particulars in the custody record for the person —

(a) the date and time —

(i) the person arrived at the police station or other place where the custody manager is located, and

(ii) the person came into the custody manager's custody,

(b) name and rank of the arresting officer and any accompanying officers,

(c) the grounds for the person's detention,

(d) details of any property taken from the person,

(e) if the person participates in any investigative procedure, the time the investigative procedure started and ended,

(f) details of any period of time that is not to be taken into account under section 117,

(g) if the person is denied any rights under this Part, the reason for the denial of those rights and the time when the person was denied those rights,

(h) the date and time of, and reason for, the transfer of the person to the custody of another police officer,

(i) details of any application for a detention warrant and the result of any such application,

(j) if a detention warrant is issued in respect of the person, the date and time a copy of the warrant was given to the person and the person was informed of the nature of the warrant and its effect,

(k) the date and time the person is released from detention,

(l) any other particulars prescribed by the regulations.

(3) The custody manager is responsible for the accuracy and completeness of the custody record for the person and must ensure that the custody record (or a copy of it) accompanies the person if the person is transferred to another location for detention.

(4) The recording of any matters referred to in this section must be made contemporaneously with the matter recorded in so far as it is practicable to do so.

(5) As soon as practicable after the person is released or taken before a Magistrate or authorised officer or court, the custody manager must ensure that a copy of the person's custody record is given to the person.

Division 4–Regulations

132 Regulations

(cf *Crimes Act 1900*, s 356X)

The regulations may make provision for or with respect to the following —

(a) guidelines to be observed by police officers regarding the exercise of functions conferred or imposed on police officers (including custody managers) by this Part,

(b) police officers who may act as custody managers,

(c) the keeping of records relating to persons who are detained under this Part, including the formal record of the conduct of investigative procedures in which such persons participate.

Law Enforcement (Powers and Responsibilities) Regulation 2016

Part 3 Investigations and questioning

Division 1 Custody managers

15 Designation of police stations and other places to be used for detaining persons

(1) The Commissioner of Police is to designate police stations, and other places in the State, for the purpose of detaining persons under Part 9 of the Act.

(2) A police station or other place is not to be designated unless it appears to the Commissioner to provide, or have access to, sufficient facilities for that purpose.

(3) Police stations and other places of detention designated under this clause are referred to in this Division as ***designated police stations*** and ***designated places of detention***, respectively.

Note —

Section 31 of the *Police Act 1990* enables the Commissioner of Police to delegate any function conferred on the Commissioner, including the functions set out in this and the next clause.

16 Appointment of custody managers for designated police stations and designated places of detention

The Commissioner of Police is to appoint one or more police officers (***appointed custody managers***) to act as custody managers at each designated police station and each designated place of detention.

17 Order of preference in relation to places of detention

(1) A police station or place of detention to which a person is taken to be detained under Part 9 of the Act must be a designated police station, or

designated place of detention, at which there is an appointed custody manager who is available to act as the custody manager for the person.

(2) If it is not reasonably practicable to comply with subclause (1), the person may be detained at a designated police station, or designated place of detention, at which there is a police officer who (while not an appointed custody manager) is available to act as the custody manager for the person.

(3) If it is not reasonably practicable to comply with subclause (1) or (2), the person may be detained at any police station or place of detention at which there is a police officer who is available to act as the custody manager for the person.

(4) If it is not reasonably practicable to comply with subclause (1), (2) or (3), the person may be detained at any place of detention.

(5) This clause does not apply if the person is detained by a police officer in the officer's capacity as a member of the staff of the New South Wales Crime Commission or a member of the staff of the Australian Crime Commission, as referred to in clause 19.

18 Order of preference in relation to custody managers

(1) Except as provided by subclause (2), if a person is detained under Part 9 of the Act at a designated police station or designated place of detention, only an appointed custody manager may act as the custody manager for the person.

(2) If an appointed custody manager is not available to act as the custody manager for the person under subclause (1) or the person is taken to a police station that is not a designated police station, the following police officers may act as the custody manager for the person—

(a) any police officer of or above the rank of Sergeant (or the officer for the time being in charge of the police station or designated place of detention (as the case may be)),

(b) if no such police officer is available to act as the custody manager for the person—any other police officer.

(3) The arresting or investigating officer for the person is not to act as the custody manager for the person under subclause (2) unless —

(a) no other police officer is available to act as the custody manager for the person, and

(b) a police officer holding one of the following positions has given written permission to the arresting or investigating officer to act as the custody manager for the person —

(i) duty officer at a designated police station,

(ii) District Inspector,

(iii) Officer in Charge of a Police Sector.

(4) Written permission for the purposes of subclause (3) may be obtained by facsimile.

(5) This clause does not apply if the person is detained by a police officer in the officer's capacity as a member of the staff of the New South Wales Crime Commission or a member of the staff of the Australian Crime Commission, as referred to in clause 19.

19 Custody managers for New South Wales Crime Commission or Australian Crime Commission investigations

(1) A police officer who is a member of the staff of the Commission or a member of the staff of the ACC may act as the custody manager for a detained person who is the subject of an investigation conducted by the Commission or the ACC respectively.

(2) The arresting or investigating officer for the person is not to act as the custody manager for the person unless —

(a) no other police officer who is a member of the staff of the Commission or a member of the staff of the ACC is available to act as the custody manager for the person, and

(b) written permission has been obtained in accordance with subclause (3).

(3) For the purposes of subclause (2), the written permission must be obtained from—

(a) in the case of Commission investigations—a person holding the position of Commissioner, Director, or Assistant Director, Investigations, of the Commission, or

(b) in the case of ACC investigations—a person holding the position of General Manager, National Operations, of the ACC.

(4) Written permission for the purposes of subclause (2) may be obtained by facsimile.

(5) In this clause—

ACC means the Australian Crime Commission established under the *Australian Crime Commission Act 2002* of the Commonwealth.

a member of the staff of the ACC has the same meaning as in the *Australian Crime Commission Act 2002* of the Commonwealth.

a member of the staff of the Commission has the same meaning as in section 74 of the *Crime Commission Act 2012*.

Commission means the New South Wales Crime Commission established under the *Crime Commission Act 2012*.

20 Form of summary of Part 9 of Act

For the purposes of section 122(1)(b) of the Act—

(a) Form 31 is the form of the summary of Part 9 of the Act in the case of a detained person, and

(b) Form 32 is the form of the summary of Part 9 of the Act in the case of a protected suspect.

21 Custody managers not prevented from exercising other functions

The provisions of this Division are not to be construed so as to prevent a police officer who is acting as the custody manager for a detained person or protected suspect from also exercising —

(a) any function in connection with the identification of the person, or

(b) any function under the provisions of Schedule 3 to the *Road Transport Act 2013* in relation to the person (such as carrying out a breath analysis of the person).

22 Guidelines for custody managers and other police officers

Custody managers and all other police officers must have regard to the guidelines set out in Schedule 2 in the exercise of their functions under Part 9 of the Act and this Part.

Division 2 Custody records

23 Meaning of "custody record"

In this Division —

custody record means the record required to be kept under section 131 of the Act.

24 Separate record for each detained person

(1) A separate custody record must be opened, as soon as practicable, for each person who is detained under Part 9 of the Act.

(2) A custody record may be in writing or in electronic form.

(3) All entries in a custody record must include the time at which the entry is made.

(4) The time of an event to which an entry in the custody record relates must also be included if the entry is not made within a reasonable time of the occurrence of the event.

25 Additional matters to be recorded in custody record

(1) In addition to the matters specified in section 131 of the Act, the custody manager must record the following particulars in the custody record for a detained person —

(a) in the case of a person who has been arrested during the previous 48 hours —

(i) the offence or offences for which the person was arrested during that previous 48 hours, and

(ii) the investigation period that remains after reduction by so much of any earlier investigation period or periods as occurred within that previous 48 hours,

(b) if an application is made for a detention warrant, and the person declines to make representations (either personally, or by his or her legal representative) to the authorised officer, the fact that the person so declined,

(c) if a detention warrant is issued, a copy of the warrant or form of detention warrant, as the case may be,

(d) the time of any request to make a communication, and the time of any communication, under section 123 or 124 of the Act,

(e) the time of any request for information, or provision of information, pursuant to section 126 or 127 of the Act, together with the nature of such information,

(f) any request by the person, and any arrangement by a police officer (including under section 128 of the Act) for an interpreter, and the time that any such request or arrangement is made,

(g) any request by the person, and any arrangement by a police officer (including under section 129 of the Act) for medical treatment or medication, and the time at which the request or arrangement is made,

(h) any request by the person for refreshments, toilet facilities, washing, showering or bathing facilities,

(i) if the person's clothing or personal effects are withheld, the reasons for withholding those items.

(2) The custody manager must request the person to sign an acknowledgment as to the correctness of any entry made in the custody record in relation to the matters referred to in section 131(2)(d) of the Act and subclause (1)(b).

26 Inspection of custody record

(1) A detained person must be permitted to inspect the custody record for the person on request unless the request is unreasonable or cannot reasonably be complied with.

(2) While the detained person is in police custody, a legal representative of the detained person, a support person for the detained person and a consular official must each be permitted to inspect the custody record for the detained person as soon as practicable after the legal representative, support person or consular official arrives at the place of detention.

(3) After the detained person has been released from police custody, the detained person's legal representative or any other person authorised by the detained person must be given a copy of the custody record if they give reasonable notice of their request to do so.

Note —

Section 131(5) of the Act also requires a copy of a detained person's custody record to be given to the person.

(4) Despite subclauses (2) and (3), a support person or consular official may inspect the custody record only with the authorisation of the detained person.

Part 3- Investigations and questioning

Division 3- Vulnerable persons

27 Interpretation

(1) In this Division—

child means a person who is under the age of 18 years.

impaired intellectual functioning, in relation to a person, means—

(a) a total or partial loss of the person's mental functions, or

(b) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or

(c) a disorder, illness or disease that affects the person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Note—

See clause 3 of Schedule 2 for guidance to custody managers on whether paragraph (a) or (b) applies to a person.

impaired physical functioning, in relation to a person, means—

(a) a total or partial loss of the person's bodily functions or of part of a person's body, or

(b) a presence in the person's body of organisms causing or capable of causing disease or illness, or

(c) a malfunction, malformation or disfigurement of part of the person's body.

(2) For the purposes of this Division, a detained person who has impaired physical functioning is taken not to have impaired physical functioning if the custody manager for the person reasonably believes that the person's impairment is so minor that the person will not be significantly disadvantaged with respect to the person's participation in any investigative procedure (in comparison with members of the community generally).

28 Vulnerable persons

(1) A reference in this Division to a vulnerable person is a reference to a person who falls within one or more of the following categories —

(a) children,

(b) persons who have impaired intellectual functioning,

(c) persons who have impaired physical functioning,

(d) persons who are Aboriginal persons or Torres Strait Islanders,

(e) persons who are of non-English speaking background,

but does not include a person whom the custody manager reasonably believes is not a person falling within any of those categories.

Note —

If a person falls within more than one of the above categories, each provision of this Division relating to any category within which the person falls applies in relation to the person.

(2) Pursuant to section 112(1) of the Act, the application of Part 9 of the Act to vulnerable persons is modified by this Division.

29 Custody manager to assist vulnerable person

(1) The custody manager for a detained person or protected suspect who is a vulnerable person must, as far as practicable, assist the person in exercising the person's rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person.

(2) In particular, the custody manager must ensure that the caution and summary required by section 122(1) of the Act is given to the person.

Note —

Section 122(1) of the Act provides that a custody manager for a person who is a detained person or protected suspect must, as soon as practicable after the person comes into custody or becomes a protected suspect, caution the person

that the person does not have to say or do anything but that anything the person does say or do may be used in evidence. It also requires the manager to give the person a summary of the provisions of Part 9 of the Act.

30 Support person

A person may be a support person for a detained person or protected suspect who is a vulnerable person for the purposes of this Division only if the first-mentioned person is aged 18 years or over and is —

(a) in the case of a detained person or protected suspect who is a child —

(i) a parent or guardian, or a person who has the lawful custody of the child, but not a parent of the child if the parent has neither guardianship nor custody of the child, or

(ii) a person who is responsible for the care of the child, or

(iii) an adult (other than a police officer) who has the consent of a person referred to in subparagraph (i) or (ii) to be the support person for the child, or

(iv) if the child is aged 14 years or over — an adult (other than a police officer) who has the consent of the child to be the support person for the child, or

(v) a legal practitioner of the child's own choosing, or

(b) in the case of a detained person or protected suspect who is not a child —

(i) a guardian or any other person who is responsible for the care of the detained person or protected suspect, or

(ii) a relative, friend or any other person (other than a police officer) who has the consent of the detained person or protected suspect to be the support person for the detained person or protected suspect, or

(iii) if none of the persons mentioned in subparagraph (i) or (ii) are applicable or readily available — a person (other than a police officer) who has expertise in dealing with vulnerable persons of the category, or a category, to which the detained person or protected suspect belongs.

31 Support person may be present during investigative procedure

(1) A detained person or protected suspect who is a vulnerable person is entitled to have a support person present during any investigative procedure in which the detained person or protected suspect is to participate.

(2) However, a detained person or protected suspect who is a vulnerable person solely as a result of being a person of non-English speaking background is entitled to have a support person present only if an interpreter is not required to be arranged under section 128(1) of the Act solely because of section 128(3)(a) of the Act.

(3) Before any such investigative procedure starts, the custody manager for the detained person or protected suspect must inform the person that the person is entitled to the presence of a support person during the investigative procedure.

(4) If the detained person or protected suspect wishes to have a support person present, the custody manager must, as soon as practicable —

(a) give the detained person or protected suspect reasonable facilities to enable the person to arrange for a support person to be present, and

(b) allow the detained person or protected suspect to do so in circumstances in which, so far as practicable, the communication will not be overheard, and

(c) if the person has asked a friend, relative, guardian or independent person communicated with to attend at the place where the person is being detained — allow the person to consult with the friend, relative, guardian or independent person in accordance with section 123(4) of the Act.

Note —

Section 123(4) of the Act requires a custody manager to allow the person to consult with the friend, relative, guardian or independent person in private and must provide reasonable facilities for that consultation.

(5) The custody manager must defer for a reasonable period any such investigative procedure until a support person is present unless the detained person or protected suspect has expressly waived his or her right to have a support person present.

(6) An investigative procedure is not required to be deferred under subclause (5) for more than 2 hours to allow a support person to arrive at the place of detention.

(7) A custody manager is not required to comply with subclauses (3)–(5) if the custody manager believes on reasonable grounds that —

(a) doing so is likely to result in an accomplice of the detained person or protected suspect avoiding arrest, or

(b) doing so is likely to result in the concealment, fabrication, destruction or loss of evidence or the intimidation of a witness, or

(c) doing so is likely to result in hindering the recovery of any person or property concerned in the offence under investigation, or

(d) doing so is likely to result in bodily injury being caused to any other person, or

(e) the safety of other persons requires that the investigative procedure be carried out as a matter of urgency.

32 Relationship between entitlement to support persons and entitlement to consult

(1) A detained person or protected suspect who is a vulnerable person is entitled to a support person under clause 31 or to consult with a friend, relative, guardian or independent person under section 123(4) of the Act, but not both.

(2) However, a friend, relative, guardian or independent person of the detained person or protected suspect who, under section 123(1)(a)(ii) of the Act, attends the place of detention is not prevented by this clause from acting as a support person if the detained person or protected suspect requests it.

33 Child cannot waive entitlement to support person

A detained person or protected suspect who is a child cannot waive the child's entitlement under this Division to have a support person present during an investigative procedure.

34 Role of support persons during interview

(1) The custody manager for a detained person or protected suspect who is a vulnerable person is to inform any support person for the detained person or protected suspect that the support person is not restricted to acting merely as an observer during an interview of the detained person or protected suspect and may, among other things —

(a) assist and support the detained person or protected suspect, and

(b) observe whether or not the interview is being conducted properly and fairly, and

(c) identify communication problems with the detained person or protected suspect.

(2) The custody manager is to give a copy of the summary referred to in section 122(1)(b) of the Act, to —

(a) the support person, and

(b) any interpreter for the detained person or protected suspect who attends in person at the place of detention.

(3) If the support person or the detained person's or protected suspect's legal representative is present during an interview of the detained person or protected suspect, the support person or legal representative is to be given an opportunity to read and sign any written interview record.

(4) Any refusal by the support person or legal practitioner to sign a written interview record when given the opportunity to do so must itself be recorded.

35 Exclusion of support person from investigative procedure

(1) A support person may be excluded from an investigative procedure if the support person unreasonably interferes with the procedure.

(2) If the support person is excluded under subclause (1), the detained person or protected suspect concerned is entitled to have another support person present during the investigative procedure.

36 Person responsible for welfare of certain detained persons or protected suspects to be contacted

(1) If a detained person or protected suspect is a child or a person with impaired intellectual or physical functioning, the custody manager for the person must, as soon as practicable, attempt —

(a) to ascertain the identity of the person responsible for the welfare of the detained person or protected suspect, and

(b) to contact the person so responsible and advise the person of the detained person's or protected suspect's whereabouts and the grounds for the detention.

(2) If a detained person or protected suspect has impaired physical functioning, the custody manager must, as soon as practicable, attempt to determine any specific physical care needs of the person and, if reasonably practicable to do so, arrange for those needs to be provided for.

37 Legal and other assistance for Aboriginal persons or Torres Strait Islanders

(1) If a detained person or protected suspect is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must —

(a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified —

(i) that the person is being detained in respect of an offence, and

(ii) of the place at which the person is being detained, and

(b) notify such a representative accordingly.

(2) If an Aboriginal person or Torres Strait Islander (the detainee) is detained under Part 16 of the Act in an authorised place of detention, the custody manager or other relevant detention officer must —

(a) immediately inform the detainee that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified —

(i) that the detainee is being detained under Part 16 of the Act, and

(ii) of the place at which the detainee is being detained, and

(b) notify such a representative accordingly.

38 Cautions

(1) If a detained person or protected suspect who is a vulnerable person is given a caution, the custody manager or other person giving the caution must take appropriate steps to ensure that the detained person or protected suspect understands the caution.

(2) If the detained person or protected suspect is given a caution in the absence of a support person, the caution must be given again in the presence of a support person, if one attends during the person's detention.

(3) A reference in this clause to the giving of a caution is a reference to the giving of a caution that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

39 Times to be disregarded in calculating investigation period

(1) In addition to any time referred to in section 117 of the Act, the following times are to be disregarded in determining how much of an investigation period has elapsed if the detained person concerned is a vulnerable person —

(a) any time that is required to allow for the person (or someone else on the person's behalf) to arrange for a support person to attend at the place of detention,

(b) any time that is required to allow the support person to arrive at the place of detention.

(2) However, those times are to be disregarded only to the extent that they are times during which the investigative procedure concerned is reasonably suspended or deferred.

40 Additional information to be included in detention warrant application

If an application for a detention warrant is made in respect of a vulnerable person, the application for the warrant must include —

(a) reference to the fact that the person is believed to be a vulnerable person, and

(b) the nature of the person's vulnerability, and

(c) the identity and relationship to the person of any support person who is present during the investigative procedure concerned, and

(d) any particular precautions that have been taken in respect of the vulnerable person.

Young Offenders Act 1997

3 Objects of Act

The objects of this Act are —

(a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences

through the use of youth justice conferences, cautions and warnings, and

(b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and

(c) to establish and use youth justice conferences to deal with alleged offenders in a way that—

(i) enables a community based negotiated response to offences involving all the affected parties, and

(ii) emphasizes restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and

(iii) meets the needs of victims and offenders, and

(d) to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

7A Persons in relation to whom Act applies

(1) This Act applies in relation to a person who—

(a) is or was a child when an offence covered by this Act is or was committed or alleged to have been committed, and

(b) is under the age of 21 years when being dealt with under this Act.

(2) Subject to subsection (3), if a person in relation to whom this Act applies is no longer a child when he or she is being dealt with under this Act, a reference to a child in another provision of this Act concerning how a child is to be, or may be, dealt with is to be read as including, where appropriate, a reference to an individual who is of or under the person's age.

(3) The following provisions of this Act do not apply to a person in relation to whom this Act applies if the person is no longer a child—

(a) section 10 (which relates to who is to be present with a child when he or she makes admissions for the purposes of this Act),

(b) section 22 (2) (which relates to who is to be present with a child when an explanation concerning a caution is given),

(c) section 29 (3) (which relates to who is to be present with a child when a caution is given),

(d) section 39 (2) (which relates to who is to be present with a child when an explanation concerning a conference is given),

(e) any other provision that requires the presence or consent of, or consultation with, a person responsible for a child,

(f) any provision (or any provision belonging to a class of provisions) prescribed by the regulations.

8 Offences covered by Act

(1) The offences covered by this Act are, except as provided by this Act—

(a) summary offences, and

(b) indictable offences that may be dealt with summarily under Chapter 5 of the Criminal Procedure Act 1986 or another prescribed law,

committed, or alleged to have been committed, by children.

(2) Despite subsection (1), an offence is not covered by this Act if—

(a) the principal person who investigates the offence is not an investigating official within the meaning of this Act, or

(b) the offence is a traffic offence committed by a child who was, when the alleged offence occurred, old enough to obtain a learner licence under the Road Transport Act 2013 to drive the motor vehicle to which the offence relates, or

(c) the offence results in the death of any person, or

(d) the offence is an offence under section 61E, 61KC, 61KD, 61KE, 61KF, 61L, 61M, 61N, 61O (1), (1A) or (2), 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 80, 81A or 81B of the Crimes Act 1900, or

(e) the offence is an offence under the Crimes (Domestic and Personal Violence) Act 2007, or

(e1) the offence is an offence under Division 1 of Part 2 of the Drug Misuse and Trafficking Act 1985 other than an offence to which subsection (2A) applies, or

(f) the offence is an offence under Division 2 of Part 2 of the Drug Misuse and Trafficking Act 1985 other than—

(i) an offence under section 23 (1) (a) or (c) of that Act to which subsection (3) applies, or

(ii) an offence under section 27 or 28 of that Act of aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence under section 23 (1) (a) or (c) to which subsection (3) applies, or

(g) the offence is prescribed by the regulations for the purposes of this section.

(2A) An offence under Division 1 of Part 2 of the Drug Misuse and Trafficking Act 1985 is covered by this Act if in the opinion of the investigating official or prosecuting authority—

(a) in relation to an offence relating to a prohibited drug other than cannabis leaf within the meaning of the Drug Misuse and Trafficking Act 1985—the offence involves not more than the small quantity applicable to that drug under that Act, or

(b) in relation to an offence relating to cannabis leaf—

(i) the offence involves not more than half the small quantity of cannabis leaf within the meaning of the Drug Misuse and Trafficking Act 1985, or

(ii) there are exceptional circumstances in that—

(A) the offence involves more than half, but not more than the total, small quantity of cannabis leaf within the meaning of that Act, and

(B) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under this Act.

(3) An offence under section 23 (1) (a) or (c) of the Drug Misuse and Trafficking Act 1985 is covered by this Act if in the opinion of the investigating official or prosecuting authority—

(a) the offence involves not more than half the small quantity applicable to the prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985, or

(b) there are exceptional circumstances in that—

(i) the offence involves more than half, but not more than the total, small quantity applicable to the prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985, and

(ii) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under this Act.

9 Procedures under scheme

(1) The procedures available for dealing with children who have committed, or are alleged to have committed, offences covered by this Act are as follows—

(a) a warning may be given, including a warning in accordance with Part 3,

(b) a caution may be given, but only if it is a caution given in accordance with Part 4,

(c) a conference may be held, but only if it is a youth justice conference held in accordance with Part 5.

(2) An investigating official dealing with a child who has committed, or is alleged to have committed, an offence must, before issuing a summons or attendance notice or otherwise commencing criminal proceedings against the child, determine—

(a) whether the offence is one covered by this Act, and

(b) in the case of such an offence, whether the child should be dealt with under Part 3 or 4 or the matter should be referred to a specialist youth officer under Part 5 to determine whether a youth justice conference should be held.

(2A) In the case of an offence prescribed by the regulations, an investigating official must also determine the matters referred to in subsection (2) (a) and (b) before issuing a penalty notice for the offence.

(2B) In determining whether a child should be dealt with under Part 3 or 4 or referred to a specialist youth officer under Part 5, an investigating official is (if the official considers it practicable) to make that determination within the period of 14 days after the official becomes aware of the offence or alleged offence.

(2C) A failure of an investigating official to comply with subsection (2B)—

(a) does not prevent action being taken under this Act, or

(b) invalidate any action taken under this Act.

(3) An investigating official may, at any time after commencing proceedings and before the proceedings are heard, decide to deal with a child alleged to have committed an offence under Part 4 or consider whether the matter should be referred to a specialist youth officer under Part 5, if the investigating official forms the opinion that the child is entitled to be dealt with under Part 4 or Part 5.

10 Admission of offences

An admission by a child of an offence is not an admission for the purposes of this Act unless it takes place in the presence of —

(a) a person responsible for the child, or

(b) an adult (other than an investigating official) who is present with the consent of a person responsible for the child, or

(c) if the child is 14 years or over, an adult chosen by the child, or

(d) an Australian legal practitioner chosen by the child.

11 Relationship with other legislation

(1) This Act does not affect any jurisdiction conferred on the Children's Court under the Children (Criminal Proceedings) Act 1987 or on any other court under any other law.

(2) This Act is in addition to, and does not limit, the requirements of any law relating to evidence.

12 Relationship with other procedures

This Act does not affect the functions of any person dealing with an offence or alleged offence, to give a warning for, or take any other action in relation to, an offence or alleged offence if —

(a) the person is not an investigating official, or

(b) the offence is not an offence covered by this Act, whether or not the person is an investigating official.

Part 3 Warnings

13 Offences for which warnings may be given

A warning may be given for a summary offence covered by this Act, other than a graffiti offence or any other offence prescribed by the regulations for the purposes of this section.

Note —

Section 8 sets out offences covered by this Act.

14 Entitlement to be dealt with by warning

(1) A child who has committed or is alleged to have committed an offence in respect of which a warning may be given is entitled to be dealt with by warning.

(2) Despite subsection (1), the child is not entitled to be dealt with by warning if —

(a) the circumstances of the offence involve violence, or

(b) in the opinion of the investigating official, it is more appropriate to deal with it by another means because it is not in the interests of justice for the matter to be dealt with by warning.

(3) A child is not precluded from being given a warning merely because the child has previously committed offences or been dealt with under this Act.

(4) If an investigating official is of the opinion that it is not in the interests of justice to deal with a matter by warning a child and that it is appropriate to deal with it by other means, the investigating official must consider whether to deal with the matter under Part 4 or to refer it to a specialist youth officer under section 21 (2) for consideration of whether action should be taken under Part 5.

15 Giving of warnings

(1) A warning is to be given by the investigating official and may be given at any place, including a place where the child is found.

(2) An investigating official who gives a warning to a child must not —

(a) attach any conditions to the giving of a warning, or

(b) impose any additional sanctions on a child to whom a warning is given.

(3) A warning may be given to more than one child at the same time.

16 Explanation of warnings

An investigating official who gives a warning to a child must take steps to ensure that the child understands the purpose, nature and effect of the warning.

16A Parents of child may be notified of warning

(1) An investigating official who gives a warning to a child, or a youth liaison officer, may notify the parents of the child (whether in writing, verbally or in person) that a warning has been given to the child in respect of an offence committed by the child.

(2) However, an investigating official or youth liaison officer may not notify a parent of a child under subsection (1) if the official or officer is of the opinion that the disclosure of the giving of the warning would pose an unacceptable risk to the safety, welfare or well-being of the child.

17 Records of warnings

(1) An investigating official must make a record of any warnings given by the official under this Part.

(2) The record is to contain the matters prescribed by the regulations for the purposes of this section.

(3) Despite anything to the contrary in the State Records Act 1998 or any other law, the Commissioner of Police is to ensure that any record made under this section of a warning is destroyed or expunged (as the case requires) as soon as is reasonably practicable after the person to whom the record relates reaches the age of 21 years.

Note—

The Commissioner of Police may delegate this function. See section 31 of the Police Act 1990.

(4) This section does not require that a record made under this section be destroyed or expunged if the record is held by one of the following—

(a) the Australian Bureau of Statistics,

(b) the Australian Institute of Criminology,

(c) the Bureau of Crime Statistics and Research,

(d) the Ombudsman.

Division 2 Cautions by courts

31 Cautions by courts

(1) A child may be given a caution by a court if—

(a) the offence is one for which a caution may be given under Division 1 or is a graffiti offence, and

(b) the child admits the offence.

(1A) If a court gives a caution under this section, the court must dismiss the proceedings for the offence in respect of which the caution is given.

(1B) A court giving a caution may—

(a) allow any victim of the offence concerned to prepare a written statement that describes the harm occasioned to the victim by the offence, and

(b) if it considers it appropriate to do so, may permit all or part of the statement to be read to the child when giving the caution.

(1C) The regulations may make provision for or with respect to the content and form of written statements under subsection (1B).

(2) This Part (other than this section and sections 32 and 33) does not apply to a caution given by a court.

(3) Nothing in this Part affects the power of a court to give a caution under section 33 of the Children (Criminal Proceedings) Act 1987.

(4) A court that gives a caution under this section must notify, in writing, the Area Commander of the local police area in which the offence occurred of its decision to give the caution and must include the reasons why the caution was given.

(5) Despite any other provision of this section, a court may not give a caution to a child in relation to an offence if the child has been dealt with by caution on 3 or more occasions —

(a) whether by or at the request of a police officer or specialist youth officer under section 29 or by a court under this section, and

(b) whether for offences of the same or of a different kind.

Children (Criminal Proceedings) Act 1987

6 Principles relating to exercise of functions under Act

A person or body that has functions under this Act is to exercise those functions having regard to the following principles —

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

8 Commencement of proceedings

(1) Criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice.

(2) Subsection (1) does not apply —

(a) if the offence for which proceedings are being commenced consists of —

(i) a serious children's indictable offence,

(ii) an indictable offence under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985*, or

(iii) an offence (whether indictable or otherwise) prescribed by the regulations for the purposes of this paragraph,

(b) if, in the opinion of the person by whom the proceedings are commenced, there are reasonable grounds for believing that —

(i) the child is unlikely to comply with a court attendance notice, or

(ii) the child is likely to commit further offences,

if the proceedings were to be commenced by court attendance notice, or

(c) if, in the opinion of the person by whom the proceedings are commenced —

(i) the violent behaviour of the child, or

(ii) the violent nature of the offence,

indicates that the child should not be allowed to remain at liberty.

(3) (Repealed)

13 Admissibility of certain statements etc

(1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless —

(a) there was present at the place where, and throughout the period of time during which, it was made or given —

(i) a person responsible for the child,

(ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,

(iii) in the case of a child who is of or above the age of 14 years — an adult (other than a member of the police force) who was present with the consent of the child, or

(iv) an Australian legal practitioner of the child's own choosing, or

(b) the person acting judicially in those proceedings —

(i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and

(ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.

(2) In this section—

(a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and

(b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child, and

(c) a reference to a person responsible for a child does not include a member of the police force (unless he or she has parental responsibility for the child).

(3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.

Appendix 5 – NSW Police Force document provided to the Commission on 21 November 2023 titled 'Interviewing young persons'[170]

Interviewing young persons

General

Police do not have any power to detain or arrest someone merely to question them.

All people have a common law right to silence, except where the law requires them to provide information.

Legislative Requirements

Section 7(b) of the Young Offenders Act 1997 provides that young people who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and have an opportunity to obtain that advice.

Clause 29 of the Law Enforcement (Powers and Responsibilities) Regulation 2016 (LEPRA Regulation) requires a custody manager to assist a young person in custody to call a legal practitioner.

Clause 30 of the LEPRA Regulation requires the Custody Manager to arrange for a support person to attend. For a young person under 14 years, the support person will be the parent or other person responsible for the care of the young person (or their nominee) or a legal practitioner of their choosing. If the young person is 14 years or older, the support person is to be an adult chosen by the young person or a legal practitioner chosen by the young person.

Clause 33 of the LEPRA Regulation requires a young person in custody to have a support person present during an investigation period.

Clause 36 of the LEPRA Regulation requires the Custody Manager, as soon as is practicable, to ascertain the identity of the person responsible for the welfare of the

[170] The Commission was informed that this document had been approved by the Commissioner's Executive Team on 20 November 2023 and was to be distributed to all of the NSW Police Force by the NEMESIS system including in the NSW Police Force Police Handbook and be provided to Education and Training to amend their relevant training material and lessons with an article to be included in the Police Monthly (an internal monthly publication).

young person, contact that person and advise that person of the young person's whereabouts and the ground for the detention.

Section 123(2) of Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA) states that the communication must be in circumstances in which, as far as is practicable, the communication will not be overheard.

Procedure when young person arrested

When a young person is arrested and taken to a police station they are to be, as soon as is practicable, introduced to the Custody Manager. The Custody Manager is to enter the young person into custody and comply with the requirements of Part 9 of LEPRA. The Custody Manager is to inform the young person of the availability of the Legal Aid Youth Hotline (in the case of First Nations young people ALS) and indicate that they will arrange for a call to be made to the Hotline (or ALS). The Custody Manager is to provide the young person with the form: "Your rights under the Young Offenders Act".

The Custody Manager will ascertain the identity of the person responsible for the welfare of the young person and notify that person of the young person's whereabouts and the reason for their detention.

The Custody Manager will then make arrangements for a suitable support person to attend the police station.

The Custody Manager will then make arrangements for the young person to speak to the Legal Aid Hotline (or ALS) in the company of the support person in an area, as far as is practicable, where the conversation cannot be overheard.

After the young person receives the legal advice, police are to speak to them in company of the support person and offer them the opportunity to participate in the ERISP. Police are entitled to explain the protected admissions scheme at this time but are not to make any threat, promise or inducement to the young person in an attempt to persuade them to participate in any interview.

If the young person indicates they do not want to participate in an ERISP, they are not to be taken to the interview room for an interview. The Custody Manager is to ensure a record of the refusal is made on the custody records.

If the young person indicates they wish to participate in an ERISP, they can then be taken to an interview room and an interview can be conducted. If a young person initially indicates they do not wish to be interviewed, they can change their mind and be interviewed.

At the commencement of the interview police should ensure they adopt all conversations had with the young person after they received the legal advice. This is important to show police did not make any threat, promise or inducement to the young person to persuade them to participate in the interview. In the case of a young person who initially indicated they did not wish to be interviewed and then changed their mind, police should ask them to clarify why they changed their mind.

Role of the support person

The support person is not merely an observer. The support person must be someone capable of advocating on behalf of the young person and must ensure the support person speaks English or that an interpreter is available to assist. Clause 34(1) of the LEPRA Regulation provides that a support person may assist and support the suspected person, observe whether the interview is being conducted properly and fairly, and identify communication problems. Police are to ensure the support person is not sidelined in the interview process, including by ensuring the support person is placed in a position to show they are on equal footing with the other participants.

Doli incapax

Doli Incapax is a Latin term which means there is a presumption that young persons are incapable of forming the criminal intent necessary for the commission of a criminal offence. In other words, they do not understand the consequences of their actions so they cannot be held criminally liable.

For a child under 10 years section 5 of the *Children (Criminal Proceedings) Act 1987* sets out they lack the guilty knowledge necessary to commit a criminal offence.

For a young person aged between 10 and 14 years the presumption they cannot form the criminal intent is rebuttable. This means, for a court to find the young person formed the criminal intent, there must be evidence to prove that at the time the offence was committed, the young person knew the act was seriously wrong and not merely mischievous or naughty.

When interviewing a young person aged between 10 and 14 years, police should ensure they always address the issues of doli incapax and ask questions to adduce evidence as to whether or not the young person had the necessary criminal intent at the time the offence was committed. Some of the ways this can be done includes evidence of admissions during the interview process.

Law Note 28 of 2004 is available on the intranet and provides sample questions police should ask when interviewing a young person suspect aged between 10 and 14 years.

LECC
Law Enforcement
Conduct Commission