

OPERATION HARRISDALE

A report under section 132 of *Law Enforcement Conduct Commission Act 2016*

A car crash in the NorthConnex and allegations of a cover-up by senior police

LECC

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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.



18 July 2024

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 Harrisdale

**A report under section 132 of *Law Enforcement Conduct Commission Act 2016*
A car crash in the NorthConnex and allegations of a cover-up by senior police**

In accordance with s 132(3) of the *Law Enforcement Conduct Commission Act 2016* (the Act), the Commission provides you with a copy of its Report:

Operation Harrisdale

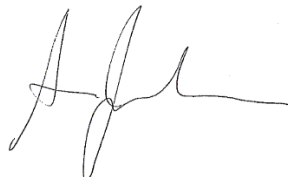
A report under section 132 of *Law Enforcement Conduct Commission Act 2016*
A car crash in the NorthConnex and allegations of a cover-up by senior police

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

Yours sincerely



The Hon Peter Johnson SC
Chief Commissioner



Anina Johnson
Commissioner

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1. A car crash and allegations of a cover up

- 1.1. On Friday 12 May 2023 a NSW Police Force Officer, Officer AB, went out with fellow officers in the CBD. Officer AB, an Inspector, occupied a prestigious position in a Specialist Command within the NSW Police Force.
- 1.2. Officer AB expected to be drinking alcohol. He had booked a hotel room for himself in the city and arranged for another colleague to take his shift on an on-call roster.
- 1.3. Officer AB arrived at the first hotel at about 4:00pm. Later that evening, Officer AB and his fellow officers moved to a second hotel. Officer AB left the second hotel at 12:26am on 13 May 2023. CCTV footage shows Officer AB had consumed a significant number of alcoholic drinks while at these hotels.
- 1.4. After leaving the second hotel, Officer AB purchased some takeaway food, collected his bag from the hotel where he'd planned to stay the night and got in his unmarked police car to drive home. Officer AB was the driver and sole occupant of the vehicle.
- 1.5. At about 1:46am on 13 May 2023, whilst driving home, Officer AB hit a concrete safety barrier in the NorthConnex tunnel. The impact damaged the front of the car and both airbags inflated.
- 1.6. Officer AB reversed the car off the barrier and drove it into a side street. He parked it and left it there.
- 1.7. The incident was seen and recorded on the CCTV operated by NorthConnex. The NorthConnex tunnel operator alerted the NSW Police Force radio room and a police investigation commenced.
- 1.8. Officer AB was not present when the on-duty members of the NSW Police Force arrived at the scene.
- 1.9. Once it was confirmed that the driver of the vehicle at the time of the incident was Officer AB, the State Coordinator at the radio room contacted the on-call Inspector of the Professional Standards Command (PSC).

- 1.10. The PSC had initial carriage of the investigation. However, within 3 days the criminal investigation was transferred to the Local Police Area Command where the accident occurred, which was Ku-ring-Gai.
- 1.11. There was confusion amongst the NSW Police Force about who should be responsible for handling the internal decisions which flowed from the car accident. These decisions included interim risk management, conducting the Safe Driving Panel and a decision about any disciplinary consequences. For a range of reasons, there were delays in dealing with these issues.
- 1.12. Some months after the incident on 13 May 2023, the Commission received several anonymous complaints alleging that senior police were attempting to interfere with the criminal investigation of Officer AB and shield him from disciplinary measures.
- 1.13. The Commission began by monitoring the police investigation of Officer AB under s 101 of the *Law Enforcement Conduct Commission Act 2016* (NSW) (LECC Act). This allowed the Commission to keep up to date with how the criminal investigation and departmental issues were progressing, and to make suggestions to the officers involved. At the same time, an investigation under Part 6 of the LECC Act was commenced by the Commission.
- 1.14. Between 8 November 2023 and 10 November 2023, Officer AB was charged with:
- 1 x drive a vehicle under the influence of alcohol contrary to s 112(1)(a) of the *Road Transport Act 2013*.
 - 1 x drive a vehicle with high range prescribed concentration of alcohol contrary to s 110(5)(a) of the *Road Transport Act 2013*.
- 1.15. The NSW Police Force did not issue a media release at the time that Officer AB was charged, although this is the usual practice. Despite this, the media began to report on Officer AB's accident, including allegations of interference in the investigation. At this point, the Commissioner of Police also asked the Commission to investigate.
- 1.16. Broadly speaking, the Commission's investigation considered whether any NSW police officer tried to, or succeeded in, improperly influencing:
- The police investigation of the car crash.

- Interim risk management decisions about Officer AB.
- Decisions made by the Safe Driving Panel.
- The decision not to issue a media release when Officer AB was charged.

2. The Commission's statutory functions

- 2.1. The relevant provisions of the 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 individuals and their reputation.
- 2.3. 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
- 2.4. An important function for the Commission is to determine whether any police officer has engaged in 'serious misconduct' as defined in s 10 of the LECC Act. In addition, the Commission may make findings, express opinions or make recommendations under s 133 of the LECC Act.

3. Limits on disclosure and identification of officers in this Report

- 3.1. The context for this Report raises some unusual challenges for the Commission when deciding how to document its investigation.

Identifying Officer AB

- 3.2. The criminal charges against Officer AB have not been finalised and are listed for a Local Court summary hearing in November 2024. The Commission has been cautious about including any evidence that might tend to interfere with the criminal process.

¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362; *Rejcek v McElroy* (1965) 112 CLR 517 at 521; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171-172.

- 3.3. In addition, after criminal charges were laid against Officer AB, the Commissioner of Police applied to the Local Court for orders under s 7 of the *Court Suppression and Non-publication Orders Act 2010* suppressing the identity of Officer AB.
- 3.4. On 1 December 2023, the Local Court made the following orders:
1. There shall be no disclosure, including by way of publication, of any information that identifies, or tends to identify, the defendant, except for the proper purposes of these proceedings.
 2. For the purposes of order 1, information that identifies or tends to identify the defendant includes, but is not limited to:
 - a) The defendant's name;
 - b) The defendant's image or any physical description of the defendant; and
 - c) The defendant's address or any other personal contact information.
 3. The defendant is to be known by the pseudonym "AB" for the purposes of these proceedings.
- 3.5. A full discussion of the Commission's investigation into the events which followed Officer AB's crash in the NorthConnex tunnel would disclose information that identifies or tends to identify Officer AB. However, those events also concern matters of considerable public interest. They have been the subject of public discussion and media interest. Concerns have been raised about a cover-up by the NSW Police Force. There is therefore a public interest in providing as much information about the Commission's investigation as possible, without breaching the Local Court orders.
- 3.6. This Report is tabled under s 132 of the LECC Act, with a recommendation to Parliament that it be made public forthwith. It describes the outcomes of the Commission's investigation as fully as possible, without breaching the Local Court orders. Before finalising this Report, the Commission sought the advice of the NSW Police Force about whether the contents of this Report were likely to identify Officer AB.

Naming other officers

- 3.7. Under its *Guidelines on the use of pseudonyms and non-publication orders in Commission reports*, the Commission generally uses pseudonyms for officers and civilians referred to in a report which is to be tabled under s 132 of the LECC Act.
- 3.8. However, a large number of documents related to the circumstances of the NorthConnex crash by Officer AB have been produced to the Legislative Council under Standing Order 52 (SO52). The non-privileged documents have been made publicly available. The Commission considered whether the documents tabled under SO52 should prompt it to depart from its usual practice of using pseudonyms.
- 3.9. On balance the Commission decided that the police officers involved should not be identified by name in this Report. The Commission has weighed up the following factors:
- The SO52 documents are only part of the evidence that was before the Commission. The Commission examined 17 witnesses, and had access to many other documents relevant to its investigation.
 - Some of the evidence given by witnesses amounts to a witness public interest disclosure.²
 - Where this investigation explores issues of process and procedure, naming officers does not assist the public to better understand those issues.
 - Where the investigation explores the importance of dealing equitably and impartially with an officer holding a prestigious position within the NSW Police Force, naming officers may discourage future complaints.
 - This is not a case where naming the officers would encourage other concerned persons to come forward.
- 3.10. In referring to evidence of witnesses in the Report, use will be made of plural terms ('they' and 'their') as reference to the gender of the witness (considered in context) may tend to identify them and, importantly, identify Officer AB.
- 3.11. The Commission has made directions pursuant to s 176 of the LECC Act that there be no publication of the name or image of the police officers involved in this investigation and that they be identified by pseudonyms.

² *Public Interest Disclosures Act 2022 (NSW)* s 22.

4. Monitoring and investigation by the Commission

- 4.1. On 20 July 2023, the Commission decided to simultaneously monitor this matter under Part 8 of the LECC Act and investigate it under Part 6 of the LECC Act.
- 4.2. The investigation was given the name of Operation Harrisdale, and considered whether any NSW Police Force officer and/or civilian employee:
- Misused their position and/or improperly interfered with or attempted to influence the police investigation of the motor vehicle accident on 13 May 2023 involving Officer AB.
 - Failed to comply with NSW Police Force policy and procedure in relation to the recording on NSW Police Force databases of the police motor vehicle accident on 13 May 2023 involving Officer AB, including creating a record on the Safe Driver System and convening a Safe Driving Panel in a timely fashion and in accordance with usual policy and procedure.
 - Failed to properly investigate any breaches of NSW Police Force policy and procedure by Officer AB in relation to the motor vehicle accident on 13 May 2023, including consideration of an interim risk management plan.
 - Failed to comply with NSW Police Force policy and procedures following the decision to commence criminal proceedings against Officer AB in relation to the motor vehicle accident on 13 May 2023, including not issuing a media release in circumstances when one usually would be issued.
 - Failed to meet disclosure obligations with respect to the insurance claim relating to the motor vehicle accident on 13 May 2023 involving Officer AB.
- 4.3. The Commission conducted private examinations of 17 witnesses. These examinations took place between November 2023 and February 2024. Chief Commissioner Peter Johnson SC and Commissioner Anina Johnson presided. They sat both separately and together.
- 4.4. Mr Rob Ranken of counsel acted as Counsel Assisting the Commission for the private examinations conducted in 2024.

Notices to affected officers

- 4.5. Section 143 of the LECC Act requires the Commission to inform a person of the substance of the grounds of any adverse comments and to give that person an opportunity to make submissions if they wish to do so.

- 4.6. Where possible, each officer had any concerns or allegations put to them in evidence. However, the Commission's findings are a synthesis of the evidence of all witnesses, so that some issues arose only after a witness had given their evidence. One witness was recalled but most were not.
- 4.7. To fulfill its obligations under s 143, the Commission issued Notices to those officers who were at risk of being the subject of adverse comments. Notices were issued to officers who were at risk of a finding of serious misconduct, referral of conduct to the NSW Director of Public Prosecutions (DPP) and officers whose conduct might be criticised by the Commission, which may in turn damage their reputation.
- 4.8. Each Notice outlined the evidence against the officer in detail, including references to the transcript or exhibits relied on. The officers were informed of the potential findings that the Commission considered were open to it. Each officer was given 4 weeks to make submissions.
- 4.9. Responses to these Notices are incorporated into this Report.

5. Background to the allegations of special treatment

- 5.1. From time to time, the Commission receives complaints which allege that misconduct by senior NSW police officers is dealt with more leniently than if the same misconduct is committed by junior officers. The Commission also receives complaints alleging that senior officers give favourable treatment to their staff or friends. The Commission was alive to these types of allegations during its monitoring and investigation of the police response to the motor vehicle accident on 13 May 2023.
- 5.2. At the time of the accident on 13 May 2023, Officer AB held the rank of Inspector and held a prestigious position in a Specialist Command. The evidence before the Commission was that the prestige of the position held by Officer AB elevated his status beyond that of an Inspector.
- 5.3. The Commission considered whether Officer AB was dealt with differently to a member of the public, a lower ranking officer or an officer holding a different position in the NSW Police Force.

- 5.4. On 11 February 2024, the NSW Police Force media unit issued a press release attributing the following statements to Acting Superintendent Donaldson of the Traffic and Highway Patrol:

Those who drive while under the influence are not just putting their lives at risk but the lives of their fellow drivers.

It is criminal behaviour, and it won't be tolerated on NSW roads.

We intend to continue to run these operations throughout the year to catch those drivers who still don't understand how their stupid decisions can ruin lives.

Driving after consuming alcohol or drugs is a choice. Your choice can lead to serious injury or death of yourself, the people in your car, or other innocent road users. As a driver, you have the responsibility to ensure that everybody gets home safe.

These people who have been caught have made a selfish decision to drive and put themselves and other road users at risk.

- 5.5. This media release formed the basis of a number of propositions which were put to senior officers in evidence. They were asked for their views on the risk of reputational damage to the NSW Police Force where senior officers are involved in criminal conduct, such as drink driving. The officers were also asked about potential damage to the morale of the NSW Police Force if senior officers are perceived to be treated more favourably than junior officers.

6. Motor vehicle crashes involving police

- 6.1. When investigating a motor vehicle crash, the NSW Police Force draws a distinction between a major crash and a minor crash. These definitions are set out in the NSW Police Force Handbook (the Police Handbook).
- 6.2. The Indicia of a Major Traffic Crash are:
- Someone is killed or injured, or
 - A party fails to stop or exchange particulars, or
 - A driver is allegedly under the influence of intoxicating liquor or a drug.
- 6.3. Police are to attend and investigate crashes meeting the Major Traffic Crash criteria.

- 6.4. A Minor Traffic Crash is described as a collision between two or more vehicles, or any other incident involving a vehicle, on a road or road related area where:
- A vehicle involved in the crash is towed or carried away by another vehicle, or
 - A person involved in the crash seeks medical treatment for an injury sustained in the crash more than 24 hours after the crash, that does not meet the criteria of a Major Traffic Crash.
- 6.5. Police are not required to investigate crashes meeting the 'Minor Traffic Crash' criteria.
- 6.6. These distinctions are important because the Police Handbook requires police to contact their supervisor and advise the police radio room (VKG) if they are involved in a crash where:
- One or more of the drivers appears to be under the influence of alcohol or drugs.
 - One or more of the vehicles needs towing.

7. Immediate response to the crash

Locating Officer AB

- 7.1. The crash occurred at 1:46am on 13 May 2023. The investigation determined that Officer AB was the driver and sole occupant of the unmarked police vehicle.
- 7.2. At about 2:05am on 13 May 2023 a person working in the NorthConnex control room contacted the NSW Police Force radio room. They said that a vehicle had hit a concrete crash cushion inside the NorthConnex tunnel. The driver of the car had left the scene on foot in a northerly direction.
- 7.3. Ku-ring-Gai Police Area Command (PAC) have responsibility for the NorthConnex and arrived at the crash scene by 2:22am. They found the vehicle on a side street, where it had been left locked. As the driver could not be found and there were concerns for their welfare, a search using a dog from the Dog Squad was arranged. The driver was not located.
- 7.4. By 2:27am the State Coordinator on duty that night was told that a police vehicle had crashed. Initially it was not clear who the driver of the vehicle was and there were concerns that the vehicle had been stolen. By looking at the digital vehicle

diaries, the State Coordinator established that Officer AB was likely to have been driving the vehicle. It was also apparent that Officer AB was an Inspector holding a prestigious role in a Specialist Command.

- 7.5. At 2:44am the State Coordinator called senior staff from the Specialist Command. The State Coordinator reported the accident, including that the vehicle was undrivable and 'the person had done a runner' but that the police dogs were looking for him.
- 7.6. There were a number of early morning phone calls between senior staff at the Specialist Command and the State Coordinator. Those officers knew that Officer AB had been at a function the night before, so considered the possibility that the crash was caused by Officer AB being drunk or fatigued. They were also very concerned that he may be injured or dead. It was decided that the PSC should either investigate the crash or at least oversight the investigation, for reasons including the possibility that Officer AB may have been driving whilst under the influence of alcohol.
- 7.7. For more than an hour, phone calls were made by various senior police in an effort to locate Officer AB. Calls were made to Officer AB's work and personal mobile phones. At least two of the calls were made using the Signal app. Officer HAR07 gave evidence that they have configured their Signal settings to one-day delete, so they no longer have a record of the time of the phone call.
- 7.8. At 3:48am, Officer AB finally answered a call from his Commander, Officer HAR12. There was a call of 2 minutes and 37 seconds. Officer HAR12's evidence was that Officer AB said, 'I stuffed up', and then explained that he had fallen asleep and crashed the car. He explained that his phone had gone flat, but it was now charged. Officer HAR12 did not ask Officer AB how much he had to drink or why Officer AB had not stayed at the accommodation that he had booked.
- 7.9. Officer HAR12 immediately called the other senior officer in the Specialist Command, Officer HAR07. Officer HAR12 told Officer HAR07 that they had spoken to Officer AB, who was safe. Officer HAR07 then spoke with Officer AB via Signal just before 4:00am.
- 7.10. Officer HAR07's recollection of the conversation was that they only checked on the welfare of Officer AB. However, when taken to the VKG recordings with the

State Coordinator, where they referred to information about Officer AB's drinking apparently relayed by them, they agreed they must have discussed with Officer AB how much he had had to drink. They could not remember any more of that conversation.

- 7.11. Officer AB was asked about his conversations with Officer HAR07 and Officer HAR12 in the early hours of 13 May 2023. He said both officers were simply concerned for his welfare. He did not recall discussing his alcohol consumption with either officer. Officer AB was shown the transcript of the VKG recording where the State Coordinator says:

He told them he had, about eight or nine, eight, about eight mid-strength beers during the whole day and decided to drive home ... um but he, he wasn't pissed, he just fell asleep.

- 7.12. Officer AB then accepted that he must have spoken to Officer HAR07 about his alcohol consumption.
- 7.13. Officer HAR12's recollection was that Officer AB told them he had drunk 8 mid-strength beers when they spoke at the office on Monday 15 May 2023.

Professional Standard Command's involvement

- 7.14. At 4:20am the State Coordinator rang Officer HAR03, who was the on-call officer from the PSC. They described the crash and the prestigious position held by Officer AB, and that the driver had left the scene. The State Coordinator said that Officer HAR07 had spoken to Officer AB. Officer AB told Officer HAR07 that he had 8 mid-strength beers all day and he fell asleep at the wheel. The State Coordinator also said that Officer AB had spoken to Officer HAR12. The State Coordinator and Officer HAR03 discussed the possibility that 'he's pissed and hit the post'.
- 7.15. Officer HAR03 and the State Coordinator discussed the fact that now that Officer AB was at home, and it was more than two hours since the accident, he could not be breathalysed.³ Both officers clearly contemplated that alcohol could have contributed to the accident.
- 7.16. If the driver of a motor vehicle is alleged to have committed an offence against the road transport legislation and the driver has left the scene before police

³ Sch 3 Pt 2 cl 2 *Road Transport Act 2013*.

arrive, the usual practice is for the police to conduct a Form of Demand under s 177 of the *Road Transport Act 2013*.

- 7.17. Officer AB's home address was obtained. Officer HAR03 decided that the most efficient course would be for local police to conduct the Form of Demand. Local police initially had some difficulty raising Officer AB. However, when he answered the door at about 7:53am, a standard Form of Demand was conducted.
- 7.18. The Commission has seen the video footage of that Form of Demand. Officer AB acknowledged that he was the driver of the vehicle and said that he had fallen asleep and run into a barricade. He was not asked about whether he had drunk any alcohol on the night before the accident. The officer who conducted the Form of Demand said in an email to PSC that they did not push Officer AB on the question of alcohol, as they did not want to trespass on the PSC investigation.

Officer AB's evidence

- 7.19. Using call charge records, the Commission was satisfied that Officer AB was driving his work car by 1:29am on 13 May 2023. The car which Officer AB was driving had a set of lights that could be attached to the roof but did not have a mobile data terminal or police radio installed.
- 7.20. During his drive, Officer AB made a number of phone calls, including a call to his partner which finished 26 seconds before the point at which the car collided with a concrete crash cushion.
- 7.21. Officer AB was able to drive the car off the crash cushion and up an exit ramp.
- 7.22. Photographs from the scene show both airbags had deployed and the front of the car was trailing on the ground. Officer AB told the Commission that as he drove up the exit ramp, he realised that the car was not safe to drive home and found a safe place to park it. Officer AB said that he intended to return the following day and deal with the car.
- 7.23. Officer AB initially said that at the time of the crash he did not consider the car to be undriveable but intended to come back and assess the situation in the morning. He later agreed that if he had seen a member of the public driving a car in the condition of his vehicle, he would have pulled the car over. He acknowledged that the car was likely to need towing.

- 7.24. At 1:53am, Officer AB phoned his partner and asked them to come and pick him up. He knew that the drive would take some time. He then walked away from the car and towards the Pacific Highway.
- 7.25. Police were advised by the NorthConnex control room at 2.05am and the VKG broadcast was issued at 2:12am. By 2:22am the first police vehicle was on scene. Police had arrived on scene before Officer AB's partner collected him. Officer AB did not contact police to tell them of the crash, where he was, or where the vehicle was located. Had Officer AB stayed with the car, he would have been there when police arrived. The Commission considers that it is likely that he would have been breath tested.
- 7.26. Officer AB was pressed on why he had decided to leave the car. He said he thought the crash was a minor motor vehicle accident or what police used to call a 'P5'. That category of crash involves a collision where no cars need to be towed. Those crashes do not need to be reported to police. He did not consider if there had been damage to the NorthConnex concrete crash cushion.
- 7.27. Officer AB said that whilst he was driving home with his partner, his work phone ran out of charge. However, he did not realise that his phone was out of charge until he had arrived home.
- 7.28. Officer AB says that this is why he did not answer the calls made to his work phone. However, Officer HAR12 tried both Officer AB's personal and work mobile phone numbers. None of the calls were answered. Officer AB said that his work phone was off, as it had run out of charge. He could not explain why he did not answer his personal phone.
- 7.29. The first phone call that Officer AB answered was from Officer HAR12 at 3:48am to his work phone. Officer AB says that by this time, he was at home.
- 7.30. The Commission finds it difficult to accept that Officer AB's work phone conveniently ran out of charge at some point between being collected by his partner and when he arrived home. If his work phone battery was so low in charge, one would expect he would use his personal phone to call his partner (which was the phone his partner had used to call him). Even if his work phone was out of charge, Officer AB could not explain why he did not answer the call from Officer HAR12 to his personal phone. The Commission draws the inference

that Officer AB did not wish to speak to police that morning, at least until he was home.

- 7.31. Officer AB was aware that a person cannot be lawfully breath tested more than 2 hours after an accident or if they are at their own home. This leaves open an inference that Officer AB deliberately decided not to stay with the car because he wanted to limit the risk that he would be breath tested. This was also the reason why he did not answer the calls on his way home. These propositions were put to Officer AB, which he denied.

Sensitivity because of the identity of the driver

- 7.32. It was clear to the Commission that the senior police officers contacted on the morning of 13 May 2023 considered that the prestigious position held by Officer AB made this crash a sensitive topic.
- 7.33. When the State Coordinator woke Officer HAR03 of the PSC, they said 'you're not gonna like this at all'.
- 7.34. Officer HAR13 was a senior officer at PSC. They had a text exchange with Officer HAR03, which showed they were aware of the possibility of criticism of police investigating one of their own. Officer HAR13 said:
- ...The efforts to locate him early with dog etc will also become relevant when looking back on this so no allegation of letting him run to avoid prosecution.
- 7.35. Officer HAR13's evidence was that it was unnecessary for PSC to have been contacted on the night. They suggested that by involving PSC, it immediately confused all involved police into thinking that the issue was more significant than a simple drink driving offence.
- 7.36. Officer HAR13 was not aware of the information that is now available to the Commission. The VKG recordings show that even before the PSC became involved, this investigation was seen as sensitive. That had two aspects: the prestigious nature of the position held by Officer AB together with a suspicion that alcohol may have been involved in the crash.
- 7.37. The Commission accepts that it was reasonable for Officer HAR07 to ask that the PSC be involved in this instance.

Was there interference in the investigation?

- 7.38. The Commission considered whether there was any evidence that the investigation was interfered with at this early stage.
- 7.39. In several recorded VKG conversations, the State Coordinator reiterated the importance of letting the investigation unfold in the way that it usually would. This is illustrated by the State Coordinator's conversation with the Ku-ring-Gai Duty Officer at the scene of the crash, at 2:53am:
- ... But mate as far as you're concerned, as far as what you're doing there, mate you're doing everything you need to do um, and that we don't change the response because of what we know.
- 7.40. A similar instruction was given by Officer HAR03 to the local police who conducted the Form of Demand on Officer AB. They told them 'Treat it as a normal job.'
- 7.41. The police from Ku-ring-Gai PAC acted promptly to try to locate the driver of the vehicle. Once PSC had been contacted, Officer HAR03 acted swiftly to identify which hotels Officer AB had been drinking at and to secure the CCTV footage.
- 7.42. There is no evidence that the seniority or role of Officer AB influenced the approach taken by Ku-ring-Gai PAC or the PSC at this point in the investigation.

Should Officer AB be referred to the Director of Public Prosecutions to consider a charge under s 319 of the *Crimes Act 1900*?

- 7.43. The Commission has considered whether, by leaving the scene, Officer AB could be prosecuted for an offence of engaging in an act 'intending in any way to pervert the course of justice' contrary to s 319 of the *Crimes Act 1900* (NSW) (*Crimes Act 1900*)⁴, an offence punishable by imprisonment for 14 years.
- 7.44. Officer AB gave his evidence with the protection of a declaration under s 75 of the LECC Act. That evidence can be taken into account in considering whether a finding of serious misconduct should be made against Officer AB. However, that evidence cannot be taken into account when considering referral to the DPP under s 133(2)(a) of the LECC Act. So, disregarding his evidence before the Commission, the available evidence of Officer AB's conduct on 12 and 13 May 2023 is:

⁴ *Crimes Act 1900* (NSW) s 319.

- CCTV footage from the two hotels showing Officer AB consuming a considerable quantity of alcohol in the hours prior to the crash.
- Officer AB's statement dated 14 July 2023 where he admits to drinking alcohol on the night of the crash, but that he thought he was alright to drive home.
- CCTV footage of Officer AB driving on the morning of 13 May 2023, including CCTV footage of the crash.
- CCTV footage showing Officer AB moving the vehicle and parking the car in a side street.
- Call charge records showing that Officer AB called his partner on three occasions.
- Call charge records showing that Officer AB had two functioning phones at the time of the crash, but did not call police.
- Officer AB's Form of Demand given on the morning of 13 May 2023, in which he said that after the collision he got back in the car, drove, parked the car and then rang his partner to come pick him up.
- Evidence of Officer AB's address which would show how long it would take for his partner to collect him from the scene of the crash.
- Evidence of police that Officer AB was not at the vehicle when police arrived on the scene at 2:22am.
- Call charge tower records showing that Officer AB had moved away from the location of the vehicle prior to the police arriving.

7.45. The Commission initially considered that this evidence could amount to a prima facie case that Officer AB committed a series of acts with the intention of obstructing the course of justice by, in effect, eliminating the possibility that he would be breath tested by police. The Commission invited Officer AB's submissions on this issue.

7.46. Officer AB submitted that there are no reasonable prospects that he would be convicted for an offence against s 319. He submits that to make such a referral there must be, in a general sense, an act of deliberate deception or subversion and the evidence does not reach that threshold.⁵ Officer AB says that:

⁵ *R v Beaudry* [2007] 1 SCR 190; *R v Spratt* [2007] 3 NZLR 810; *Meissner v The Queen* (1995) 184 CLR 132; *R v Rogerson* (1992) 174 CLR 268; *R v Murray* [1982] 1 WLR 475; *R v Murphy* (1985) 158 CLR 596; *R v Allan* [1995] 2 VR 468; *R v Karageorge* (1998) 146 FLR 100.

- He was not under a legal obligation to stay at the scene and that his duty as a police officer should not be conflated with a legal obligation.
- There was no evidence before the Commission that Officer AB used his rank or authority inappropriately, in contrast to the decision in *Johnston v R* (2019) 99 NSWLR 585; [2019] NSWCCA 108. He did not interact with the police on the night at all.
- The fact that he did not contact police is not analogous to misleading, hindering, or subverting any police investigation. There are other reasonable explanations for Officer AB leaving the scene, including that he had worked all night, then socialised for many hours and was keen to get home.

7.47. It was important that this issue be fully ventilated. The Commission has weighed the likelihood of a charge of attempting to pervert the course of justice contrary to s 319 of the *Crimes Act 1900* being successfully prosecuted. The Commission is conscious that (as will be seen) the DPP provided advice to police concerning the drink driving charges before those criminal proceedings were commenced and that the DPP is prosecuting those alleged offences. On balance, the Commission has decided not to refer Officer AB to the DPP to consider a charge under s 319 of the *Crimes Act 1900*.

Should a finding of serious misconduct be made concerning Officer AB for leaving the scene of the crash?

- 7.48. If Officer AB's police vehicle needed towing, then Officer AB was obliged to contact VKG to advise them of the accident and stay with the vehicle until investigating police had arrived. Officer AB said that he was unaware of this requirement in the Police Handbook.
- 7.49. There were different views about whether Officer AB's car 'needing towing'. Officer AB agreed that after the crash, his police vehicle was towed from where he had parked it on a side street. However, the fact that the car could be driven a short distance from the point of impact in the NorthConnex led both Officer AB and HAR04 to say from the perspective of a police motor vehicle crash investigation, it did not need towing.
- 7.50. The Commission considers that the ordinary person would say that with both airbags inflated and the front of the car seriously damaged, the car needed to be towed. The fact that it could be driven a short distance and out of the path of

traffic does not change this. As such, even if Officer AB was unaware of a particular provision in the Police Handbook, logic dictates that as a senior police officer, he would alert the VKG to the fact that he had crashed a police vehicle, that the vehicle was now parked and would need to be towed. As a senior police officer, the logical and appropriate course of action was to stay with the vehicle and to assist attending police with information about the crash.

- 7.51. Officer AB was unable to give a convincing explanation as to why he left the car. The car was parked near the on and off ramps for the NorthConnex tunnel. It would have been an easy point for his partner to collect him. The car clearly needed to be towed and therefore police would need to speak with him. The logical time to do this would have been immediately after the accident. Instead, Officer AB said he walked around the suburban streets, waiting for his partner to arrive.
- 7.52. The Commission is satisfied that Officer AB did not comply with his obligations in the Police Handbook to:
- a) stay with the vehicle; and
 - b) call VKG to advise of the crash and his location.
- 7.53. The sensible and logical thing for Officer AB to do was to wait with the car. The evidence before the Commission is that Officer AB deliberately left the scene of the crash. He did so without making any attempt to contact either VKG or his superior and advise them of the crash. He has given no explanation as to why. He knew he had been drinking alcohol before the crash.
- 7.54. The Commission finds that Officer AB deliberately left the scene of the crash and did so to avoid being breath tested.
- 7.55. The Commission is satisfied that this conduct of Officer AB could result in serious disciplinary action against Officer AB and that a finding of serious misconduct⁶ should be made.

⁶ LECC Act ss 10(1)(a) and 10(2).

8. The process when police are criminally investigated

- 8.1. The NSW Police Force's response to allegations of criminal conduct by an officer follows two pathways. First, the criminal offence is investigated by the Command where the offence is alleged to have occurred (the Local Command). In this instance, the offence is alleged to have occurred in Pennant Hills, which comes within the area of the Ku-ring-Gai PAC. It was officers from Ku-ring-Gai PAC who were first at the scene of the crash. Ordinarily, they would keep carriage of the criminal investigation.
- 8.2. When serious (criminal) allegations are made about a police officer's conduct, the NSW Police Force also considers what internal steps it should take. This process is dealt with under Part 8A of the *Police Act 1990* (the *Police Act*). The NSW Police Force considers how to manage the officer while the criminal investigation is ongoing. If charges are laid, other decisions might need to be made. Even if there are no charges laid, the NSW Police Force may decide that there should be internal consequences for an officer's actions. This might include conduct which is not criminal, but which breaches other NSW Police Force requirements. The Command with responsibility for dealing with misconduct under Part 8A of the *Police Act* is the Command where the officer is based/attached (their Home Command).
- 8.3. NSW Police Force procedure (as reflected in a flowchart) says when dealing with a Part 8A misconduct matter the Home Command should consider:
- Welfare and risk identification.
Home Commander to consider subject officer Interim Risk Management Action and Welfare.
 - Subject officer suspension.
Home Commander to complete and submit suspension questionnaire for consideration if required.
 - Monitor IAPro⁷ Investigation progress.

⁷ IAPro is the NSW Police Force Misconduct Matters Information Management System.

The Home Command is to review the triage (criminal allegations only) received from the Local Commander enclose triage and sign as subject officer's delegate.

- 8.4. At the conclusion of any court proceedings, the Home Commander is to review the final investigator's report and endorse it if they agree with it. The Home Commander must also determine any further misconduct allegations and decide any disciplinary action.
- 8.5. Although this division of responsibility seems cumbersome, it reflects a number of practical realities. The Local Command is investigating a criminal allegation that has occurred within its area, in the same way as it ordinarily would. The Home Commander has day to day control over the officer's activities and can manage welfare and risk while the criminal investigation is underway.⁸
- 8.6. When the time comes to make a final decision on the misconduct matter, which the NSW Police Force refer to as 'departmental action', it is the Home Commander who is responsible for the officer and knows their professional and personal background. The Home Commander is able to incorporate these considerations into the final decision. If the decision-making process involves the Internal Review Panel or the Commissioner's Advisory Panel (both comprised of senior police officers who provide advice on misconduct matters) it is the Home Commander who attends to make a recommendation about departmental action.
- 8.7. The final decision on departmental action is usually taken after the criminal process has finished. If the investigation results in court proceedings, then the final departmental decision will be made after the court proceedings have finished. There is also a process for a departmental decision to be fast tracked, where the evidence is clear and the allegations are serious.
- 8.8. The criminal and departmental processes do overlap, and there is a need for the two Commands to exchange information.
- 8.9. The Commission was told that, in practice, as soon as it becomes apparent that the person alleged to have committed an offence is a police officer, the Local Command takes steps to contact the Commander of the officer's Home

⁸ NSW Police Force Standards of Professional Conduct.

Command. Steps would also be taken to inform the Region Commander, who would then brief more senior officers in the chain of command.

- 8.10. The Local Command completes a triage of the misconduct complaint, arising from the allegations of criminal conduct only. This triage is usually done by the Professional Standards Duty Officer (PSDO), who is an Inspector in the Local Command. That triage is considered at a Complaints Management Teams (CMT) meeting at the Local Command. However, the triage then needs to be signed by the Home Commander and returned. At this point, the Home Commander might include additional allegations of misconduct.
- 8.11. This triage is then uploaded onto the police complaints management system called IAPro. Ordinarily it is the PSDO for the Local Command who uploads the triage onto IAPro. Once the matter is on IAPro, the Home Commander may do a further triage assessment of any additional departmental allegations, which were not covered by the triage of the criminal allegations.

When might the Professional Standards Command become involved?

- 8.12. The PSC will consider taking over a criminal or misconduct investigation in circumstances including:
- If it involves high level criminal activity.
 - If the involved officer is of a senior rank.
 - The capability of the local command to investigate the matter.
 - Whether the allegations cross regional command boundaries, making it too difficult for one command to investigate.
 - The capacity of the PSC to investigate the matter.
 - If it is a matter that requires the capabilities of the PSC to properly investigate it.
- 8.13. The PSC may assume control of the investigation from the outset. Officer HAR16's evidence was that the PSC had never retained control of a motor vehicle accident investigation during their time at PSC. Alternatively, a Command might submit a Request for Assistance (RFA) to the PSC, asking that the PSC take over a particular investigation. Thirdly, the PSC might independently decide that a matter lodged on IAPro is appropriate for the PSC to take it over. Finally, a matter may be referred to the PSC from a Deputy Commissioner or the Commissioner of Police.

- 8.14. The criteria for the PSC accepting a RFA are available on the NSW Police Force Intranet. Officer HAR16 noted that the seriousness of the allegation or the position of the officer involved would be considered but would not be conclusive. If the Local Command was able to progress the investigation and it was within their capabilities, the PSC may opt to leave the investigation with that Command but offer additional support as needed.
- 8.15. A RFA would usually be accompanied by a draft triage, and ideally the minutes of the CMT meeting from the Local Command, particularly if the matter had not already been registered on IAPro. Any RFA would be referred to the PSC via the Regional Professional Standards Manager.
- 8.16. If an investigation remains with the Local Command, Officer HAR16 said that the PSC will continue to offer support to the investigators.

9. Professional Standard Command's role in the first three days of this investigation

The first 48 hours

- 9.1. As discussed earlier, the PSC's involvement in this investigation started with a referral from senior officers from the Specialist Command. Officer HAR03 was the on-call officer for the PSC.
- 9.2. At about 8:50am on 13 May 2023, Officer HAR03 was called out to attend another matter. Before departing, they contacted a senior officer who had attended the celebrations on 12 May 2023 and asked for the name of the hotels where the officers had been drinking. Officer HAR03 arranged for another officer from their team to request that the hotel CCTV be secured and the CCTV from NorthConnex obtained.
- 9.3. That evening, Officer HAR03 completed a briefing note on their investigation into the motor vehicle accident to that point in time. They noted that Officer AB had said that he had consumed 8 mid-strength beers prior to the accident and that the accident had occurred due to him falling asleep at the wheel. The PSC's involvement had been requested due to the possibility that Officer AB may have been driving under the influence of alcohol. Officer HAR03 noted that the CCTV footage had been secured and that the CCTV footage from the NorthConnex did not conclusively depict Officer AB 'stumbling around'. They said that it was not

conclusive that the driver was intoxicated. No allegations had been received of Officer AB driving his vehicle whilst intoxicated. Nonetheless Officer HAR03 identified two possible allegations arising from the incident: negligent driving and driving whilst under the influence of alcohol or other drug.

Decision to return the investigation to Ku-ring-Gai Police Area Command

- 9.4. By about 10:00am on 15 May 2023, the PSC had decided that the criminal investigation would be returned to Ku-ring-Gai PAC. There are no records of how the PSC reached this decision. There were no minutes of the discussion, or any record of who was involved. This made it difficult for the officers examined by the Commission to give accurate evidence as to what was discussed.
- 9.5. On 15 May 2023, Officer HAR03 was told by Officer HAR13 that ‘we are not keeping this one. It’s going back to Ku-ring-Gai.’ Officer HAR01, from Ku-ring-Gai PAC made a contemporaneous file note that says that during the course of a 10:00am Teams meeting they were contacted by Officer HAR03 and told that the PSC would no longer be involved in the accident investigation. Officer HAR03’s evidence was that they contacted Ku-ring-Gai PAC and told either Officer HAR01 or Officer HAR11 that the PSC was no longer involved in the matter and that the accident was to be returned to Ku-ring-Gai PAC for investigation.
- 9.6. Officer HAR13 said that they remember discussing the decision to return the investigation to Ku-ring-Gai PAC with Officer HAR16. They described the decision as having been made at a CMT meeting. Officer HAR13 said that they were either involved in the meeting or part of the discussions leading up to it. From the evidence available to the Commission, it seems likely that this decision was made in a series of conversations and not at a formal meeting.
- 9.7. The evidence of both Officer HAR13 and Officer HAR16 was that this investigation was not complex enough for the PSC to retain it. By Monday 15 May 2023, the hotel CCTV footage had been secured. The Form of Demand had been completed. The criminal investigative work that needed to be done was well within the capabilities of a PAC.
- 9.8. Officer HAR13 considered that as Officer AB did not work in Ku-ring-Gai PAC, there would not be a conflict of interest if the matter was investigated by that PAC. Officer HAR03 said that at the time of this incident, the PSC was the busiest

that they could remember. Officer HAR13 gave similar evidence, noting that this investigation was at a comparatively low level of seriousness and complexity.

- 9.9. The evidence before the Commission was that other senior NSW Police, including members of the Specialist Command, also discussed whether the investigation should remain with PSC or be sent to the Ku-ring-Gai PAC. It was agreed that the complexity of the investigation did not require PSC's involvement.
- 9.10. Officer HAR03's view was that the primary focus of the investigation should be whether Officer AB had been driving under the influence or engaged in negligent driving. Departmental issues, such as whether he had left the scene of the crash contrary to the instructions in the Police Handbook, could be added to the misconduct complaint at a later time. Officer HAR03 said that at the time that the investigation was handed over, the triage of the departmental complaints had not been completed or uploaded on to IAPro. They expected that Ku-ring-Gai PAC would complete that paperwork when the investigation was returned to them on Monday 15 May 2023.
- 9.11. In deciding to refer the criminal investigation to Ku-ring-Gai PAC, PSC Officers HAR13 and HAR16 considered that the 'departmental' matters should be decided by Officer AB's Home Command, not Ku-ring-Gai PAC. That meant that the Specialist Command would be responsible for those decisions, including interim risk management and the holding of a Safe Driving Panel.
- 9.12. The Ku-ring-Gai officers who gave evidence to the Commission agreed that the investigation itself was relatively straightforward, and well within their technical capability. However, they were alive to the sensitivity of the matter because of the prestigious position held by Officer AB. Transferring the investigation to Ku-ring-Gai led some officers to believe that there would be no complaint on IAPro and no misconduct decisions about Officer AB. By transferring the investigation out of PSC at least one officer felt this was a sign that 'they wanted [the investigation] to go away'.
- 9.13. Officer HAR13 followed up with a phone call to Officer HAR01 on 17 May 2023. They confirmed that Ku-ring-Gai PAC would be investigating the criminal matter. They told Officer HAR01 that if any further matters were identified then Officer HAR16 had said they should be reported through the chain of command. Officer

HAR01 understood that to mean that they should report any concerns to their regional Assistant Commissioner.

- 9.14. The Commission is satisfied that referring the investigation back to Ku-ring-Gai PAC was not an attempt to bury the investigation. It was a defensible decision to refer a straightforward investigation to an operational command and a very able investigator. There were practical reasons why the PSC did not need to keep the investigation.
- 9.15. On the other hand, the prestige of Officer AB's position meant that it was appropriate to consider if the investigation should stay with the PSC, which is the central Command responsible for professional standards within the NSW Police Force. In the Commission's view, the reasons why the PSC should keep the investigation were not fully explored by the PSC before deciding to hand the investigation back to Ku-ring-Gai.

10. Triaging the complaint and request for Professional Standards Command assistance

- 10.1. The management of a misconduct matter arising out of a criminal investigation begins with the triage of the misconduct allegations. As noted above, the Local Command usually undertakes this triage and uploads it to IAPro.
- 10.2. At the time that the criminal investigation was referred back to Ku-ring-Gai PAC on 15 May 2023, the investigators knew that Officer AB had been at a function the night before the crash. However, they had been told that Officer AB had consumed 8 mid strength beers and fallen asleep at the wheel of his car.
- 10.3. By 20 May 2023, the investigators had reviewed the CCTV footage from the two hotels that Officer AB had attended. This footage showed Officer AB consuming far in excess of 8 standard drinks. By 22 May 2023, Officer HAR11 was able to brief their Commander saying that a review of the CCTV had been conducted and showed that Officer AB had drunk a total of 23.6 standard drinks over an 8.5 hour period. Officer HAR11 estimated Officer AB's blood alcohol concentration using a BAC calculator available on the internet. They estimated Officer AB's BAC to be 0.22 at the time of the accident. On this basis, they considered that a charge of driving under the influence would be available.

- 10.4. One reason for a briefing note was to alert Officer HAR01 to the need for misconduct allegations to be triaged. On 22 May 2023, Officer HAR01 reviewed the briefing note and added the following comment:

The review of CCTV and attached chronology supports an allegation of misconduct and may reach the standard required to support alcohol related driving offences. Further investigation relating to the conduct of [Officer AB] is required in conjunction with the related traffic matters. Forwarded for Triage, recording on IAPRO, and consideration by Professional Standards Command for further investigation.

- 10.5. That same morning, Officer HAR01 forwarded Officer HAR11's briefing note to Officer HAR09, who worked in Professional Standards in the Region office. Officer HAR01 asked Officer HAR09 for their help to generate the triage document and a RFA to be sent through to the PSC.

First triage and request for assistance on 22 May 2023

- 10.6. By that afternoon (22 May 2023), Officer HAR09 had drafted a triage document and a RFA. They emailed those two documents as well as Officer HAR11's briefing note, their chronology of the CCTV recording the drinks consumed by Officer AB, and the BAC calculation to Officer HAR10 at PSC.
- 10.7. The triage was not a final document, but rather a draft that had been prepared for the assistance of the PSC and to accompany the RFA.
- 10.8. The draft triage included an allegation that 'Officer AB had driven the departmental motor vehicle while under the influence of alcohol.' The triage recommended that the matter be referred to a CMT for consideration, noting that the matter is serious and involves a collision. It also noted that the officer is a senior officer and should have known not to drive in the circumstances. The triage includes a summary of the incident together with a photo of the damage to the front of the vehicle. The deployed airbags can be seen in the photo.
- 10.9. Under the heading Interim Risk Management is the following comment:
- Triage officers should determine whether recommendations for interim risk management should be made. Although off duty at the time the incident involves allegation of alcohol use while driving a departmental motor vehicle. Consideration should be given to the subject officers driving status being reviewed pending outcomes of the investigation.
- 10.10. The heading Triage comment referred to the following:

- preliminary inquiries into the CCTV footage shows the subject officer at two licensed premises drinking.
- alcohol use may have led to the collision.
- the officer drove from the scene and could not be located, despite considerable police resources being used.
- it is unknown if a safe driver panel has been convened.

10.11. The Triage concluded:

given the nature of this matter and the seniority and locations involved I believe that an RA to PSC should be completed for the command to take over the investigation of not only the accident and its circumstances but also the conduct identified in this triage.

10.12. The RFA form includes a comment from Officer HAR09 which stated that the Acting Assistant Commissioner had been verbally briefed and agreed that the RA should be submitted.

10.13. The reason why the PSC's assistance was sought was set out in the RFA:

Investigation initially commenced via PSC Investigations. Investigation handed back to Ku-ring-Gai PAC where the SO was involved in an MVA. I would submit the broader implications and investigation is necessary by the organisations lead misconduct unit being PSC. The allegations could implicate other officers at a senior level and the matter is criminal in nature (DUI). Inquiries that require follow up are numerous and involved cross border (Central Met to NWM) lines of inquiry. [deleted] Officer is attached to a sensitive area and if charged and placed before the court could attract adverse media attention [deleted]. PSC already have knowledge of this matter and have made initial inquiries re same. Given scope of inquiries and that if matter proceeds to court and it becomes known to media reputational harm to organisation [deleted]. I would also submit that IRMA may need to be considered and this includes the driving privileges of the SO. Matter as yet not receipted onto IAPRO given that a higher level of security maybe a consideration for PSC [deleted], considering possible conflict of interest matters.

10.14. The covering email from Officer HAR09 to Officer HAR10 said:

Please see attached RA and associated documents. Given the sensitive nature I have not had this placed onto IAPRO yet. I thought some CAVEAT options available to PSC might be in order.

10.15. In their evidence to the Commission, Officer HAR09 said that the PSC has the capacity to limit the people who can access a particular complaint on IAPro. Officer HAR09 thought that the PSC should take over the investigation. They presumed that it would be the PSC who would then upload the triage to IAPro.

10.16. As Officer HAR09 handled this triage, it was not seen by Officer HAR01, and not signed by them.

10.17. However, the PSC declined to accept the RFA. The decision was communicated to Officer HAR09 in an email from Officer HAR10 on 23 May 2023 at 8:38am which said:

The PSC CMT spoke out of session re your RA. The determination was that PSC would not be conducting the investigation on this occasion and it remains with NWMR. Thank you for the referral.

10.18. There was limited evidence about why this decision was made. Officer HAR10 said the decision was made after they discussed the matter with Officer HAR16. Officer HAR16 said that they normally consulted Officer HAR13 in these matters. Officer HAR10 said that Officer HAR16's view was that there was no need for the PSC to be involved in the matter. The criminal investigation could be undertaken by the Ku-ring-Gai Local Command. The PSC would only need to be involved at the conclusion of the court matters. At that point, Officer HAR10 said that the Commander of the PSC would act as the departmental delegate.

10.19. At this stage, neither PSC nor the Region officers uploaded the draft triage to IAPro. The Commission is satisfied that this was not done deliberately. Rather, the misconduct allegations were perceived to be sensitive because of the prestigious position held by Officer AB. As a result the usual record keeping practices were not followed.

Second triage

10.20. Officer HAR01 records that on 26 May 2023, they were told by Officer HAR06 that Ku-ring-Gai PAC were to own the investigation and to triage the criminal matters only. Officer HAR06 says that this advice was provided to them from the PSC, either Officer HAR16 or Officer HAR10. Officer HAR11 drafted a triage to upload to IAPro, unaware that Officer HAR09 already had a draft triage prepared.

10.21. The Triage Summary of Incident said:

On the 12th May, 2023 the SO attended a social function [deleted]. Between 4pm and 11:40pm the SO is seen on CCTV to consume 13 schooners of XXXX Gold and 5 mixed spirit drinks. The SO then attends the [deleted] Hotel from 11:50pm to 12:26am where he is observed to consume a further 3 mixed spirit drinks. On the 13th May, 2023 at 1:47am the SO is involved in a motor vehicle collision whilst driving unmarked police vehicle [deleted]. CCTV footage shows

his vehicle travelling in lane 1 of the northbound carriageway when it veers into a crash barrier at the Hornsby turnoff causing significant damage to both the barrier and the vehicle. The SO manages to extricate the vehicle from the barrier and drive it off the Northconnex, parking it in a nearby street. He is then seen to make a phone call, take a photo of the damaged vehicle and then leave the scene prior to police arrival. Around 7:53am officers from Command attend the SO's home and place a FOD on him. He nominates himself as the driver of the vehicle stating that he "fell asleep" which caused the accident. He further states he called [his partner] to come and pick him up and did not notify anyone else of the accident until the next morning.

10.22. The Triage comment said:

From the information available at the time of triaging the SO has consumed at least 23 standard drinks over a 9 hour period immediately prior to driving. As he was not breath tested after the accident his exact blood alcohol concentration cannot be determined. That said, from observations of the SO behaviour via CCTV and an objective assessment of the alcohol consumed, it is reasonable to believe he was well affected by alcohol at the time of the collision. On this basis, I recommend an evidence based criminal investigation be initiated.

10.23. This second triage referred only to the criminal allegations and did not mention the interim risk issues that may need to be considered. The 'Interim Risk Management' field on the triage form was not ticked.

10.24. Officer HAR01 reviewed the triage on 29 May 2023 and arranged for it to be uploaded to IAPRo by their executive officer. They did not sign the triage, as they were not the delegate for Officer AB.

10.25. There was also some confusion and correspondence generated about who would be the appropriate delegate for these 'departmental' or misconduct matters. Ultimately it was agreed that whoever held the position of Officer AB's Commander would be the delegate for interim risk issues. Interim risk was therefore to be managed by either Officer HAR14 or Officer HAR12 (this is discussed in more detail below). The PSC would hold the delegation to make final decisions under Part 8A of the *Police Act* at the end of any criminal proceedings.

10.26. The second triage was forwarded to Officer HAR14 by Officer HAR06 in an email dated 31 May 2023.

10.27. On 1 June 2023, Officer HAR06 was at a meeting with Officer HAR14 and Officer HAR16. They discussed who should be the delegate. Officer HAR06 reminded Officer HAR14 that they were responsible for issues of interim risk

management. Officer HAR14 expressed some concerns about the content of the triage, which they followed up in an email to Officer HAR06 on 1 June 2023.

10.28. In that email, Officer HAR14 indicated that they were not prepared to sign the triage in its current form. They noted that investigations were already underway, and they set out 8 points that they wanted to have addressed in the triage. These 8 points were:

1. The triage should be clear on whether investigations have already been commenced (this seems undeniable to me).
2. The triage should be clear about whether the evidence collected shows 'consumption' of alcohol or there is an assumption being made based on the counting of 'purchased' drinks.
3. The triage should be clear whether or not the SO can be observed on the CCTV footage continuously or whether there are periods of time when SO is not able to be observed.
4. The triage should be clear on how the "mixed spirits" are identified.
5. The triage should be clear on the observations of the officers who spoke with the SO and placed the FOD on the SO - i.e., their view on sobriety.
6. The triage should articulate the 'objective' basis to conclude that 23 alcoholic drinks were consumed.
7. The comment section in the triage should be reconsidered in respect to the conclusion drawn based on an 'objective view'. The view expressed is clearly 'subjective' there is no articulation of any alternative view, evidence, or circumstance.
8. If the triage officer wishes to maintain the comment is "objective", then the document must include a recognition of an alternative view, any gaps in the information available, and what assumptions are being made. By way of example, to be objective the comment must first recognise, unless it can be proven otherwise, that the drinks purchased may have been for others, may/may not have been consumed, may/may not have been alcoholic etc.

10.29. Officer HAR06 acknowledged that it was unusual to be asked for this level of detail in a triage, which is ordinarily completed at an early stage of an investigation. However, they also said that they were not concerned by the nature of the request.

10.30. However, rather than forwarding the email to Officer HAR01 for them to address, Officer HAR06 asked Officer HAR01 to come into the office early, before another meeting, to discuss the request. They then copied and pasted the 8 dot points on to a blank page and handed it to Officer HAR01 at their meeting on 2 June 2023. Officer HAR06 did this as they felt that the language in the email may be perceived by the investigating officers as being critical. So, they opted not to forward the email on to them.

- 10.31. Unfortunately, this unusual step was misunderstood by Officer HAR01 and Officer HAR11. Instead of an email, they were provided with a typed document, unsigned and with no name attached. They were told that it originated from Officer HAR14. Their impression was that the instructions were communicated in this way so that they were not discoverable or traceable back to Officer HAR14.
- 10.32. Officer HAR14 said it is their habit to scrutinise all triages closely. The information initially provided to them only asserted that 23 standard drinks had been consumed. It did not record the detailed nature of the investigation that had been undertaken. That was why they had asked for the additional evidence to be provided in the triage, to satisfy themselves that the alcohol had been consumed by Officer AB and not simply purchased by him.
- 10.33. During the course of their evidence, Officer HAR14 was shown the detailed chronology of the CCTV footage that had been prepared by Officer HAR11 and included with the first triage prepared by Officer HAR09. That first triage included photographs of the damage to the vehicle. Officer HAR14 said that they had not been provided with this material. They said that had they received the first triage and the chronology, they would have had more confidence in the second triage.

Third triage

- 10.34. After receiving the 8 additional questions, Officer HAR11 revised the second triage to include the additional information sought by Officer HAR14. This third triage was forwarded to Officer HAR10 by Officer HAR01 on 6 June 2023. It was signed by Officer HAR14 on 7 June 2023.
- 10.35. When returning the signed triage, Officer HAR10 said they would have the triage uploaded to IAPro. Ultimately, Officer HAR01 arranged for the triage to be uploaded to IAPro.

Impact of the delay in triaging

- 10.36. Within hours of the accident, investigating officers considered the need for misconduct allegations to be considered by Officer AB's Home Command. They were concerned that Officer AB had left the scene of a significant motor vehicle crash, as well as the possibility that they had been driving whilst intoxicated. They expected a triage to be generated and uploaded promptly to IAPro.

10.37. The evidence before the Commission showed that the delay in completing the triaging process and generating a matter on IAPro fuelled suspicions that Officer AB was being protected in a number of ways:

- The delay in uploading the triage to IAPro was seen to be related to the perceived sensitivities surrounding Officer AB's position.
- The PSC's decision to refuse the RFA from Ku-ring-Gai PAC but with no explanation recorded.
- Officer HAR06's well-meaning decision to provide investigators with Officer HAR14's concerns on an unidentified sheet of paper rather than simply forwarding Officer HAR14's email as would ordinarily occur.
- The discussions with Officer HAR14 about the proper content of the triage which led to a 3 week delay in uploading the matter on IAPro.

10.38. There was no evidence that any officers acted improperly in the way in which they dealt with the triage of this matter. However, it reinforces the importance of following the ordinary process when dealing with complaints involving senior officers.

11. Interim risk management

11.1. As discussed above, in the weeks after the crash, there was some discussion and confusion in the Ku-ring-Gai PAC and the PSC as to who was the proper delegate in this matter, and who would take responsibility for departmental issues such as interim risk management.

11.2. However, by the time of the Commission hearing, it was accepted that it was Officer HAR12, who was responsible for interim risk management decisions for Officer AB, or if they were absent, whoever was acting in their position.

11.3. In their evidence to the Commission, Officer HAR12 accepted that they had that responsibility. However, in their submissions to the Commission, Officer HAR12 said that as a potential witness, and having stepped aside from the role of delegate, they should not have been responsible for interim risk. Nonetheless, they agreed they made some interim risk decisions. They took the advice of the PSC in making those decisions. They said that they also consulted their own superior officer. Their superior officer has no recollection of discussing this issue with Officer HAR12 and says that the decision was one for Officer HAR12 as

Officer AB's immediate supervisor. The evidence before the Commission is that responsibility for decisions about an officer's interim risk management rest with the officer's commander, who in this instance was Officer HAR12.

Interim risk management on 15 May 2023

- 11.4. On the morning of Monday 15 May 2023, Officer AB spoke to Officer HAR12 and offered to leave his prestigious role. Officer HAR12 gave him the impression that they were happy for him to stay. As Officer AB said, 'If [they] had told me to go, I would have been gone the next day.'
- 11.5. At this point, Officer HAR12 knew Officer AB had been out for drinks. However, they accepted Officer AB's statement that he drank only 8 mid-strength beers over 8 hours before falling asleep at the wheel.
- 11.6. Officer HAR12 told the Commission that they had decided on 15 May 2023 that no interim risk management steps needed to be put in place. Officer HAR12 said that at this stage, they thought that Officer AB had broken the rules by drinking alcohol and then driving a police car. However, they said that they thought that there was no risk of Officer AB doing a similar thing again, because Officer AB was very remorseful about what had happened.
- 11.7. Officer HAR12 was asked if they thought that there was a risk of fatigue that needed to be managed, given that Officer AB's account was that he had fallen asleep at the wheel. Officer HAR12 said that they did not expect the risk of fatigue to arise again, as they had never seen Officer AB drive whilst tired before. The fact that Officer AB had then had a serious traffic accident whilst fatigued did not change their view.
- 11.8. If risk arises from a police officer's use of a motor vehicle, it is possible for interim risk strategies to include immediate decertification of an officer's right to drive a police vehicle. Officer HAR12 did not consider changing Officer AB's right to drive as part of interim risk measures. On the contrary, within days of writing off a police car while driving fatigued and having consumed alcohol, Officer AB was back behind the wheel of another police car.
- 11.9. Officer HAR12 remained of this view in their written submissions to the Commission. They said:

Interim risk management relates to action taken on a temporary basis to manage identified risks to an individuals' impact on a workplace'. Options for interim risk management include:

- **Increased supervision**
- **Temporary relocation from substantive workplace**
- **Temporary change of duties**
- **Auditing data information accesses**
- **Assigning a monitoring officer**
- **Temporary restriction of duties**
- **Suspension from duty**

The intent of interim risk management is to ensure behaviour is not repeated until the originating incident is resolved. I do not see any of these options as being viable in negating the subject officer in potentially driving again after having consumed alcohol – either in a police vehicle or private vehicle. None of these actions would have prevented the subject officer from engaging in similar behaviour before his court matter is determined.

11.10. Officer HAR12 went on to say that given the interim risk management options available, any actions they could have taken would have been punitive not risk management. They would be contrary to the welfare needs of Officer AB. They said that as no further similar behaviour had been identified since the incident, this is 'surely some form of vindication for this approach.'

11.11. Officer HAR12 said that they saw no need to record their decision not to take interim risk management action on 15 May 2023.

Officer HAR14's assessment of interim risk

11.12. Officer HAR14 acted in the role of Officer HAR12 at various points between the date of the accident and the date on which Officer AB was ultimately charged. Whilst Officer HAR14 was acting in the role of Officer HAR12, they also considered the issue of interim risk. When first taking on this acting role, they were aware that Officer AB had not stayed with the car on the night of the crash. They were also aware that investigators had formed the view that Officer AB had drunk 23 standard drinks, although Officer HAR14 remained unconvinced of the veracity or reliability of that evidence. Officer HAR14's view was:

In this particular case, I considered interim risk and I didn't see any need for any further restrictions or controls to be put in place beyond [the existing supervision].

11.13. Officer HAR14 also considered it 'very unlikely' that Officer AB would engage in the same behaviour and crash. When asked how they formed this view, they said:

I'm not sure that Mr [AB] would be that daft, given what had occurred, to even possibly engage in that kind of conduct. I think that I never saw Mr [AB] behave anything other than properly in the workplace.

I never saw Mr [AB] misbehaving in the workplace, and albeit I only had limited exposure to Mr [AB] in that sense. I could not understand - given what I was reading, you know, in terms of the quantity of alcohol, I don't understand how he would have been standing let alone driving.

11.14. Officer HAR14 was asked:

Q. Before 13 May, would you ever have expected that he might have driven having drunk that quantity of alcohol?

A. No. I don't know why he would have done that.

11.15. Officer HAR14's evidence was that they remained unconvinced by what the triage document described as Officer AB's potential conduct. Yet, they went on to say that even if it were true, 'I could not foresee him repeating that in any way, shape or form, given the circumstances, and so in considering what risk I'm trying to mitigate, the only risk that I could see potentially was reputational damage.'

11.16. Officer HAR14 did not record their reasons for not taking any interim risk management action anywhere.

Officer HAR12's assessment of interim risk in June 2023

11.17. The issue of interim risk arose again after Officer HAR12's return to their role in June 2023. By this time, Officer HAR12 had read the email that Officer HAR14 had sent to Officer HAR06 raising their concerns about the second triage. That email mentioned the allegation that Officer AB had consumed 23 standard drinks.

11.18. Officer HAR12 was asked whether the allegation that Officer AB had consumed 23 standard drinks in the 8 hours before the crash caused them to reconsider the question of how to manage the interim risk for Officer AB. They said that it did not. They acknowledged that interim risk was a dynamic process that could change with changing circumstances and information. Nonetheless, Officer HAR12 said:

A. In my mind, it's immaterial whether 23 drinks or 8 drinks. The risk, as I've said previously, I didn't think there was a risk of the same or similar behaviour committed by [Officer AB], whether it's 23 or 8.

Q. And that's just based on the fact that you thought he was a good bloke, is it, and wouldn't do it because he felt sorry about the fact that he'd crashed a car?

- A. No, it's not; it's based on the fact that how much contrition he had shown, how much trouble he believed he was in. I didn't think the behaviour would be repeated and attention drawn to himself even further than it already had.
- 11.19. In their written submissions, Officer HAR12 said they had not seen the email sent to HAR14. They thought the amount of alcohol consumed by Officer AB remained in dispute. They had never seen the third triage, documenting the available evidence and signed by Officer HAR14, as they were not the delegate.
- 11.20. As just outlined, Officer HAR12's evidence to the Commission was that they thought the number of drinks consumed by Officer AB was irrelevant to their decision making. As such, it is unnecessary for the Commission to reach a firm view about how much Officer HAR12 knew about the quantity of alcohol Officer AB was alleged to have consumed. On Officer HAR12's own evidence, it would not have changed their decision making.
- 11.21. Officer HAR12 was asked if they were aware of circumstances where a police officer expresses remorse for problems brought about by their drinking, but nonetheless, binge drinks again. Officer HAR12 answered:
- He [Officer AB] took this exceptionally hard, the fact that this had happened, coupled with the fact that it would be - it's going to be very expensive for him, I would suggest, potentially the outcome for this - all those things put together, and the contention that he had shown in relation to it, I didn't have any fears that he would reoffend in this way. And I still don't. Rightly or wrongly, I don't have that concern.
- 11.22. Again, Officer HAR12 did not document any of these considerations. They said in evidence, that, with hindsight, they should have.
- 11.23. Officer HAR12 explained their thinking as follows:
- But one of the biggest issues -is that we're managing people through a process, not as humans. That we're not treating them like humans and people, because that's what they are. They are staff, they are our most valuable - we keep saying the buzz words, "They are our most valuable resources", and as soon as the ice cream hits the fan, we run away from it, and I wasn't going to run away from him.
- 11.24. In their evidence and written submissions, Officer HAR12 said that their superior officer and those in the Specialist Command knew that no interim risk management steps had been taken. The investigators did not suggest through their chain of command that interim risk management steps should be taken. No one raised an issue with them. Officer HAR12 also noted that this Commission

was monitoring the investigation and did not advise that interim risk should be considered.⁹

- 11.25. Officer HAR12 is a senior police officer. They were the officer responsible for making interim risk management decisions. It was not the responsibility of other officers to enquire whether they had done so. They were entitled to presume that Officer HAR12 had the matter in hand. The only officer who ought to have positively asked Officer HAR12 if interim risk was being managed was Officer HAR16. This is discussed in more detail in the next part of this Report.
- 11.26. Officer HAR12 also told the Commission that on 15 May 2023, they were not concerned about reputational risk to the organisation. In their written submissions, they agreed that there was reputational damage done when the NSW Police Force did not issue a media release at the time that Officer AB was charged. However, arranging for the media release was not their responsibility. They said that further reputational damage was done by the media leaks in November 2023.

Were any risk mitigation strategies put in place for Officer AB?

- 11.27. It was only after the charges had been laid in November 2023 that an interim risk management plan was introduced for Officer AB. Even then, the plan did not identify either the risks to be managed or the strategies to be adopted to mitigate those risks. Officer HAR12 agreed that the existing Interim Risk Management Plan is deficient.

Did the Professional Standards Command make any suggestions about how to manage interim risk?

- 11.28. Officer HAR12 says that they discussed interim risk with Officer HAR16 on 15 May 2023. Officer HAR12 told Officer HAR16 that they had considered interim risk management and were happy for Officer AB to continue to work in the Specialist Command. Officer HAR12 did not elaborate on the factors that they had considered as part of that decision and Officer HAR16 did not question them further.
- 11.29. The Commission asked Officer HAR16 if they had considered the reputational risk to the organisation from Officer AB continuing to drive a police car, despite

⁹ As discussed in Part 17 of this Report, the Commission asked in July 2023 if interim risk management steps had been put in place, and was told in August 2023 that they had not.

being investigated for drink driving offences. Officer HAR16 said that they thought the reputational risk was limited. Only a small group of officers knew about the accident, so there was a limited risk that the matter would be discussed in the media.

- 11.30. Officer HAR12 expressed a similar view, saying that they didn't believe that the investigation was so well known that 'ranks' would know about it.
- 11.31. Officer HAR16 agreed that the investigating officers knew that Officer AB was still working in the Specialist Command, despite being under investigation for serious offences. They agreed that this could lead to the perception on the part of those officers that Officer AB was being given favoured treatment. They also agreed that this could lead those officers to perceive that their career prospects would be jeopardised if the investigation led to adverse outcomes for Officer AB.
- 11.32. The PSC is responsible for providing advice on managing allegations of police misconduct in the NSW Police Force. Officer HAR12 asked Officer HAR16, who worked in the PSC for advice. The Commission's view is that Officer HAR16 should have alerted Officer HAR12 to the need to thoroughly consider the issue of risk management, including the risks to the organisation's morale and reputation by failing to take clear steps in circumstances where serious allegations had been made.
- 11.33. In the event that Officer HAR12 or Officer HAR14 persisted in not implementing risk management measures, then at the very least, those decisions should have been documented. Officer HAR16 should have reminded Officer HAR12 of this obligation.

Findings

- 11.34. The Commission acknowledges the importance of Officer HAR12's sentiment that police officers should be treated with compassion when they have made a mistake. Interim risk plans should genuinely address issues of risk and not be punitive.
- 11.35. But in this instance, the Commission considers that Officer HAR12 let their partiality for and loyalty to Officer AB blind them from making an impartial decision. Even after June 2023, when there was cogent evidence that Officer AB had drunk a substantial quantity of alcohol before driving, Officer HAR12

remained firmly of the view that Officer AB's remorse would be an effective safeguard against Officer AB making poor decisions under the influence of alcohol in the future. In their written submissions, Officer HAR12 repeated their view that to stop Officer AB from driving would be punitive rather than a risk mitigation strategy. They said 'these possible measures would be seen as a punishment rather than managing any residual risk from a one-off vehicle accident which was still under investigation and from what he had told me, he was not intoxicated.'

11.36. The Commission considers it is unlikely that similar forbearance would have been extended to other officers, particularly if they were of a junior rank. In fact, the evidence before the Commission included several examples of junior officers being swiftly de-certified from driving a police car.

11.37. Other police officers knew about the crash. They were watching to see if Officer AB was treated equitably. Neither Officer HAR12 nor Officer HAR16 considered this equally important audience when weighing the risk of reputational damage. The lack of transparent decision making on this issue meant that it was easy for others to conclude that Officer AB was getting favoured treatment.

11.38. The Commission considers that Officer HAR12:

- Failed to properly and impartially consider appropriate interim risk management action for Officer AB.
- Failed to document any decisions that he made about interim risk management action for Officer AB.

11.39. The actions of Officer HAR12 fell short of the standards of impartiality expected of a senior officer. However, their conduct could not result in prosecution for a serious offence or serious disciplinary action as defined in s 10 of the LECC Act. Therefore, their conduct does not amount to serious misconduct.

11.40. Officer HAR14 was acting in Officer HAR12's role on two occasions in the relevant period. By the end of Officer HAR14's first period of relieving, it was clear that there was evidence that investigators believed Officer AB had consumed a significant amount of alcohol before driving. Officer HAR14 remained sceptical about the value of the evidence, although that alone should not have prevented them from acting. However, the Commission accepts that by

the time this evidence was properly available to them, Officer HAR12 was returning from leave within a day or two. In the circumstances, the Commission accepts that it was appropriate for Officer HAR14 to leave the question of any changes to interim risk management action to Officer HAR12 to make on their return.

- 11.41. On the second occasion, there were no substantial changes in the information known about Officer AB's driving and so no obligation on Officer HAR14 to change the status quo in terms of interim risk management.
- 11.42. Officer HAR16 should have provided clear advice on the factors to be considered in making a risk management decision and the importance of documenting it. However, as there is no procedure that requires this of Officer HAR16, the Commission makes no formal finding on this issue.

12. Safe Driver System entry and insurance claim

The Safe Driver System

- 12.1. The Safe Driver System is a standalone NSW Police Force database. It is used to document any incidents involving a police vehicle, from minor damage to vehicle write off. It serves as a record of a police officer's driving incidents and is also used as the starting point for an insurance claim for police vehicles.
- 12.2. The evidence before the Commission was that this is an older system, with limited functionality.
- 12.3. The Police Handbook says that for any accident resulting in damage of more than \$300, the Safe Driver System entry (SDS entry) should be completed within 24 hours. The process is set out in the NSW Police Force Safe Driver System Guidelines, issued by iCare. Those Guidelines provide that following an incident, the police officer should return to the station and lodge the incident details into the Safe Driver System. That incident is then checked and verified by a supervisor or manager. The claim form is automatically sent to the verifying officer's Safe Driver System mailbox. The verifying officer then prints the claim form, the driver or claimant completes the diagram showing the damage to the vehicle, signs the form and provides it to their manager or commander. The manager or commander reviews the form. The officer then emails the claim form,

including the diagram to Gallagher Bassett, a claims management firm who manage insurance claims for the NSW Police Force.

- 12.4. The Commission heard evidence that it is usual practice for a SDS entry to be completed as soon as possible after a police officer returns to the station following an accident or incident with a police vehicle. That may be the same day or when the officer is next on shift.

Officer AB's Safe Driver System entry

- 12.5. On his return to work on Monday 15 May 2023, Officer AB unilaterally decided that he would not complete the SDS entry straight away. He did not want to take any action that might interfere with the criminal investigation. He said that he did not realise that the SDS entry triggered a Safe Driving Panel. He was concerned that anything he said in the SDS entry might be used in the criminal investigation, and by not completing the entry, he was exercising his right to remain silent.
- 12.6. Officer HAR12 says that they told Officer AB to be accurate about what he included in the SDS entry, as it was a permanent record. Officer HAR12 said that on or about 15 May 2023, they anticipated that Officer AB would receive, at the very least, a penalty notice for negligent driving. For this reason, Officer HAR12 said that they were comfortable with Officer AB delaying the completion of his SDS entry until after that penalty notice was received. That would allow the penalty notice to be included as part of the SDS entry. Officer HAR12 said that they spoke to Officer AB about completing the entry within the week of his return to work.
- 12.7. Officer AB's evidence was that 'everyone' at the Specialist Command where he worked knew that he had been involved in an accident, but no one asked if he had completed the SDS entry.
- 12.8. By 18 July 2023, Officer AB knew that investigators had sent the brief of evidence for a legal advice on sufficiency of evidence. He was asked whether, once he knew the investigation had reached this stage (and he had provided his own statement to investigators), he ought to have completed a SDS entry. He said that he was still reluctant to complete the entry in writing whilst the investigation was ongoing.

12.9. Officer AB completed the SDS entry on 10 August 2023, nearly 3 months after the crash. The prompt to complete the form came from an email from the insurers of the NorthConnex tunnel, asking the NSW Police Force fleet management for a claim number. Officer AB signed the claim form on 29 August 2023.

12.10. The form is headed 'Insurance Claim Form'. It includes the following declaration:

1. DECLARATION OF DRIVER/CLAIMANT

I declare that the particulars contained in this form, relating to Incident No. [deleted] are true in every respect and no information has been withheld or misrepresented.

12.11. Part 2 asks Officer AB to give some details about his place of work and employee identity.

12.12. Part 2 then asks a series of yes/no questions. His replies to those questions were as follows:

Did you undergo a Breath Test?	No
Did you undergo a Breath Analysis?	No
Did you undergo a Blood Test?	No
Did you undergo a Blood/Urine Test?	No

12.13. Part 3 asks questions about the incident. Officer AB describes the claim type as a 'collision with property' and describes the location. He says that he was not engaged in urgent duties or a pursuit.

12.14. In Part 4, Officer AB describes the damage to the vehicle using a diagram. He then gives the following answers:

Vehicle towed?: NO Vehicle at repairer?: NO

12.15. In Part 6, Officer AB describes the property damage as being to a 'crash cushion' owned by North Western Roads.

12.16. In Part 7 there are questions about whether the collision was reported to police. His answers are:

Collision Investigated? :	Yes
Action taken :	Further inquiries to [sic]
Against whom? :	Police driver

Reported to : [Officer HAR12]
Station : [Specialist Command]

12.17. In Part 9, Officer AB is asked if he considers himself to be at fault. He gives the answer 'yes'.

12.18. In Part 10, there is a narrative section, where the form asks for a description of the collision. Officer AB says:

TRAVELLING NORTH BOUND THROUGH THE NORTH CONNEX AT NORMANHURST WHEN THE DRIVER [AB] FELL ASLEEP. VEHICLE VEERED OFF ROAD WAY, COLLIDING WITH A CRASH CUSHION. VEHICLE WAS STILL DRIVEABLE SO VEHICLE DRIVEN FROM THE SCENE. NO PERSONS INJURED.

12.19. Officer AB was asked why he had answered 'no' to the question 'did you arrange for the vehicle to be towed?' He said that he had answered 'no' because, the vehicle was not towed from the crash site. He then added that as he did not personally arrange for the vehicle to be towed from the scene, he was entitled to answer 'no' to this question. He acknowledged that the vehicle was in fact undriveable and therefore was towed from the side street where he had parked it. He said that he did not consider this when answering 'no' to the question.

12.20. Officer AB was asked about the answers that he gave in the narrative section of the SDS entry. He acknowledged that it would have been accurate to say that the vehicle was able to be driven from the tunnel but was otherwise not driveable or that the airbags had deployed, or any description of the substantial damage to the front of the vehicle. Nonetheless, Officer AB said that the answer he gave, which was 'vehicle was still driveable so vehicle driven from the scene' was an honest and factual one.

12.21. Officer HAR04 has lengthy experience in the Traffic and Highway Command. They said that from a police investigation point of view, a vehicle that can be driven from the point of impact can be properly described as 'not being towed'. They reiterated this in their written submissions. However, they also said that Officer AB's vehicle ought not to have been driven. Officer HAR04 was also of the opinion that it was false, or at the very least, misleading of Officer AB not to mention his alcohol consumption in the narrative.

12.22. Officer AB waited 3 months from the time of the accident until he took steps to complete the SDS entry. He knew that it was his responsibility to complete the

SDS entry. However, he decided not to do it immediately because the matter was being criminally investigated and he did not want to make that entry until he had been spoken to by the investigators. Officer AB did not consider that the NSW Police Force might also have an interest in the circumstances of the collision, management of risk, and the damage to their property.

Was Officer AB truthful when he completed the Safe Driver System entry?

12.23. In completing the SDS entry, Officer AB declared that the particulars were ‘true in every respect and no information has been withheld or misrepresented.’

12.24. After the accident, both airbags in the vehicle had deployed and the front was seriously damaged. Although Officer AB managed to reverse it away from the crash cushion and off the exit ramp, the vehicle was effectively undriveable. Officer AB conceded in his evidence that the vehicle would require towing.

12.25. Yet, Officer AB answered questions about the driveability of the vehicle as follows:

Was the vehicle towed? - NO

Is the vehicle at repairer? – NO

12.26. Officer AB’s evidence before the Commission was evasive. He first said that he could answer ‘no’ to this question because he was able to drive the vehicle to a side street. He later said he could answer ‘no’ because he did not arrange for the tow truck. On the other hand, Officer HAR04’s evidence supports the view that the usual approach of investigating police was that if a vehicle is driven from the point of impact it is not considered to need towing. The Commission’s view is that on a reasonable approach to this question, Officer AB should have said ‘yes’ to the question of whether the vehicle was towed. However, the Commission acknowledges Officer HAR04’s evidence that a police officer may take a different perspective on the question.

12.27. Officer AB was also aware that the vehicle was towed to a holding yard, and yet answered ‘NO’ to the question ‘Is the vehicle at repairer?’

12.28. Officer AB was entitled to answer ‘NO’ to the questions about whether he underwent breath or blood testing. These narrow questions are clearly designed to elicit answers about alcohol or drug use prior to driving but did not specifically

ask if the driver had consumed alcohol or drugs prior to driving. Officer AB acknowledged this in his evidence to the Commission.

- 12.29. Officer AB's completion of the narrative portion of the entry misrepresented the truth. He described the circumstances of the crash as 'driver [AB] fell asleep'. This may or may not have been true. However, Officer AB did not refer to the fact that he had consumed alcohol in the hours leading up to the accident. Any member of the public, but particularly a police officer, must be aware that the consumption of alcohol prior to driving is relevant information for an insurance claim. The inclusion of the questions about breath testing and blood analysis which preceded the narrative portion of the entry reinforced the relevance of this information.
- 12.30. His failure to mention that he had consumed alcohol, and that it may (at the very least) have been a factor in the crash, meant that Officer AB's SDS entry was not 'true in every respect, with no information withheld or misrepresented.' He had withheld a critical piece of information concerning the circumstances of the crash.
- 12.31. There was a second instance of dishonesty in Officer AB's completion of the narrative. Officer AB said, 'Vehicle was still driveable so vehicle driven from the scene.' Yet, in his evidence before the Commission he conceded that the vehicle was not driveable. It was driven from the scene only far enough to prevent immediate danger to other road users. Officer AB's answer that the vehicle was driveable is untrue.

Should Officer AB be referred to the Director of Public Prosecutions because of his completion of the Safe Driver System entry?

- 12.32. The Commission considered whether there was sufficient evidence to refer Officer AB to the DPP for consideration of a charge of attempt to obtain financial advantage contrary to s 192G of the *Crimes Act 1900*, an offence punishable by imprisonment for 5 years. Section 192G provides:

192G Intention to defraud by false or misleading statement

A person who dishonestly makes or publishes, or concurs in making or publishing, any statement (whether or not in writing) that is false or misleading in a material particular with the intention of —

- (a) obtaining property belonging to another, or
- (b) obtaining a financial advantage or causing a financial disadvantage,

is guilty of an offence.

12.33. As noted earlier, in considering a referral to the DPP, the Commission cannot have regard to any of the evidence given by Officer AB before the Commission because a declaration was made under s 75 of the LECC Act.

12.34. The evidence that would be available to the DPP is:

- Officer AB completed the insurance claim form on 29 August 2023.
- In that form he said 'no' to the question 'is the vehicle at repairer?'
- He said 'yes' to the question 'is collision investigated?'
- However, in the narrative portion of the form, he said that the vehicle was driven from the scene. He made no mention of the fact that it was only driven a short distance and was then towed. He made no mention of the fact that he had been drinking alcohol in the lead up to the crash and was being investigated for drink driving offences at the time that he completed the form.

12.35. Officer AB submitted that this possible charge should not be referred to the DPP as there is insufficient evidence that Officer AB had an intention to defraud the insurer or anyone else. Officer AB says that there is no evidence that he knew that he might be personally liable if the insurance claim was rejected. Furthermore, he positively disclosed the fact that the crash was under ongoing investigation.

12.36. A charge under s 192G of the *Crimes Act 1900* would involve a circumstantial case against Officer AB concerning the mental element of the offence. On the available admissible evidence and considering whether there are reasonable prospects of a successful prosecution, the Commission will not refer Officer AB to the DPP to consider a charge under s 192G.

Findings on serious misconduct

12.37. In completing the insurance claim form, Officer AB verified that his answers were 'true in every respect and no information has been withheld or misrepresented.' As a police officer he also has an obligation under s 7 of the *Police Act* to act with integrity. The NSW Police Force Code of Conduct requires officers to 'behave honestly and in a way that upholds the values and the good reputation of the NSW Police Force whether on or off duty.'

12.38. The Commission finds that Officer AB was deliberately dishonest in his answers to the insurance claim form as follows:

- a) In answering 'NO' to the question 'Is the vehicle at repairer?'
- b) In completing the narrative portion of the SDS entry.

12.39. The Commission considers that by completing the SDS entry in this way, Officer AB's actions are a breach of his obligations to act honestly and with integrity. The Commission considers that the serious and deliberate nature of this action warrants consideration of serious disciplinary action against Officer AB. The Commission finds that this conduct amounts to serious misconduct.

Other aspects of the insurance claim

12.40. The Commission also explored whether there were any attempts by other NSW Police Force officers to conceal from the insurer that Officer AB was under investigation for drink driving offences arising out of the crash.

12.41. About 2 weeks after the insurance claim was submitted, it became apparent that the vehicle was still in the holding yard and had not been repaired.

12.42. An email was sent which asked if the vehicle needed to remain in the holding yard or could be released. The inquiry went to Officer HAR01, as the Commander of the PAC conducting the investigation. Officer HAR11 said that they did not think that the vehicle needed to be kept. However, they also asked Officer HAR02 to check with Officer HAR06 for their views.

12.43. Officer HAR06 initially texted Officer HAR02 to say:

Due to the sensitivities of this matter and the possible concerns Re the safe driver entry pending advice from DPP let's keep the vehicle secured!

However, Officer HAR06 was reassured by Officer HAR02 that the email request related only to the fact that SDS entry had been made and the Command was keen for the vehicle to be repaired.

12.44. This correspondence alerted Officer HAR11 to the fact that the Safe Driver System entry made no mention of the role that alcohol might have played in the accident. They were concerned that it was misleading to pursue the insurance claim without disclosing it. Their concerns were shared by Officer HAR01. On the advice of Officer HAR01, Officer HAR11 contacted the insurance company on 21 September 2023 and advised them that consumption of alcohol was being

considered as part of the investigation. This led to the claim initially being refused by the insurance company.

12.45. These issues eventually made their way to Officer HAR14 who was acting in Officer HAR12's role. In email correspondence, Officer HAR14 referred to the fact that there had been no proof that Officer AB was intoxicated at the time of the crash, and that the insurance company were alerted to the claims of intoxication by the investigating officer.

12.46. Officer HAR14's views on this issue are illustrated in their email of 12 October 2023 to administrative staff within the NSW Police. That email said:

The vehicle was towed and stored by Ku Ring Gai Police following the accident which is currently being investigated by Ku Ring Gai Command as a misconduct matter - this has now dragged out for a number of months.

The officer in charge of the investigation has told the insurance company that the driver was intoxicated - which unfortunately has not been shown/proved - but nonetheless the insurance company has now refused the claim.

The vehicle is sitting at a smash repairer and unable to be used and so we are incurring more costs whilst the local police continue the investigation.

The [Specialist Command] needs the vehicle back and I am seeking your advice as to the process we can get the car fixed and sort out who pays later.

12.47. Officer HAR14 said that at this point, they did not know where the investigation was up to, and they did not intend to do anything other than to point out that the investigation had not been finalised.

12.48. Officer HAR12 continued to deal with this matter on their return to their role. Officer HAR12's view was that as the insured client, the NSW Police Force should be entitled to have the car repaired. If alcohol was later proven to be a factor in the accident, the insurer could then seek compensation from the driver of the car. It was not for the insurer to refuse the NSW Police Force's claim.

12.49. Officer HAR12 acknowledged that the investigators may have thought they were doing the right thing by alerting the insurance company to the role that alcohol may have played. However, they considered that it was inappropriate for them to contact the insurance company directly. The Commission accepts that by becoming involved in the issue of storage of the vehicle, Officer HAR14 did not intend to interfere with the insurance process. Again, senior police officers seem to have been unaware that their comments about the investigation and the

insurance issue could be construed by other officers as an attempt to interfere with the handling of the investigation or the insurance claim itself.

Recommended changes to the insurance form

- 12.50. The questions asked in the insurance form allowed Officer AB to avoid disclosing his alcohol consumption before driving. There was no positive requirement to disclose alcohol, illicit or prescription drug use before driving. The only questions were about testing for these substances.
- 12.51. The Commission recommends that the Commissioner of Police review and amend the Safe Driver System entry form so that it positively asks if the driver had consumed alcohol, prescribed or unprescribed drugs in the 12 hours prior to the accident. If the answer is 'yes', the form should require the officer to disclose the quantity of these substances consumed.
- 12.52. The Commission recognises that the same form may be used by all NSW government agencies, and may not be within the Commissioner of Police's power to change. If this is the case, the Commission recommends that the Commissioner of Police issue guidance to officers that they should disclose any consumption of alcohol, prescribed or unprescribed drugs in the 12 hours prior to the accident in the narrative portion of the form.

13. Safe Driving Panel

- 13.1. The rules governing police use of motor vehicles are set out in the Safe Driving Policy.

Safe Driving Panels generally

- 13.2. The Safe Driving Panel is to convene as soon as possible to adjudicate each driving incident. The way in which a Safe Driving Panel is to be conducted is set out in Part 4 of the Safe Driving Policy.

- 13.3. The Safe Driving Policy says that:

When a police officer comes under notice as the result of a motor vehicle collision, an assessment must be undertaken and a determination made as to any necessity for immediate retraining, reduction of classification or decertification. This is an interim measure until the Safe Driving Panel is convened.

- 13.4. A Safe Driving Panel is to consist of the Commander of a Specialist Command or their delegate, a supervisor, a Field Training Instructor (Driver Development) (FTI (DD)), and where available a Local Area Traffic Officer, and a Traffic and Highway Patrol Command Cluster Supervisor.
- 13.5. A Safe Driving Panel is to meet as required, and at a minimum every 3 months. The panel reviews police pursuits and local Safe Driver System incident/police collisions. The panel must also review any In Car Video material from a vehicle involved in a pursuit or other driving incident.
- 13.6. Amongst other things, the panel is to identify any problem or pattern in driver behaviour; identify training and or education requirements; and ensure that the Safe Driver System is updated.
- 13.7. The Safe Driving Panel is required to:
- Recommend reducing the officer's RESPONSE CLASSIFICATION (if training is not appropriate) or removing the officer's DRIVING CERTIFICATION (as a last resort). [Capitals in the original]
- 13.8. The Safe Driver Policy provides at clause 4.7.3 that any police driver subject to a charge for a serious driving offence (being an offence amounting to driving in a manner or speed dangerous to the public, menacing driving, or a driving offence involving grievous bodily harm or death) will automatically have their response classification reduced to bronze. This will remain in place until the court matters have been heard and determined or the driver's civilian license is suspended, cancelled or disqualified. If a police officer loses their civilian driving license, they automatically lose their police driving certification.
- 13.9. Any matters which constitute 'misconduct' under the *Police Act* are to be referred to a CMT. If a driving matter is dealt with exclusively under the complaints management system (IAPro), commanders or their delegates are to ensure that any sustained complaint matters are also accurately recorded within the Safe Driver System.
- 13.10. Commanders or managers are entitled to reduce a driver's response classification at any time. The policy provides that reduction should take preference to the removal of certification. The matters to be addressed in deciding whether to consider a reduction in response classification include:

- The circumstances of the incident.
 - The severity including actual and potential danger.
 - The prior driving experience, driving history recorded on the Safe Driver System, and length of service of the driver.
 - The likelihood of this type of incident recurrence.
 - Recommendations from the Safe Driving Panel.
 - Advice from the FTI (DD).
- 13.11. The policy does not specifically set out the circumstances in which a driver's certification to drive a police vehicle might be removed.
- 13.12. The default position of the Safe Driving Policy is that the response to any police driving incident should be to reduce the driver's certification. Decertification appears to be a last resort and should only occur where a program of driver development is insufficient or where the driver loses their civilian license.
- 13.13. Consideration of the Safe Driving Policy was supplemented by evidence before the Commission about how the Safe Driving Policy works in practice. In every Command, including Specialist Commands, a senior officer, usually an Inspector, is responsible for convening Safe Driving Panels. In an operational Command, a Safe Driving Panel would be held every 2 to 3 months. This panel could deal with non-urgent issues, such as incidental or accumulated damage to vehicles. Safe Driving Panels can also be convened quickly when there is an urgent need to consider a police officer's conduct while driving. A collision that has resulted in significant damage to a police vehicle should result in an immediate Safe Driving Panel.
- 13.14. An officer's right to drive can also be considered as part of interim risk management measures. Officer HAR04 said that an interim measure could be a removal of all driving certifications so that the person involved could not drive police vehicles until the Safe Driving Panel had an opportunity to meet. Alternatively, an officer's driver classification could be reduced to bronze which removes the officer's ability to engage in pursuits or urgent duty. Officer HAR04 confirmed that removal of certification altogether was a last resort.
- 13.15. Officer HAR04's evidence to the Commission was that if a police officer was breath tested and had been driving a police vehicle with a high range prescribed concentration of alcohol, they would recommend the immediate removal of that

officer's driving certification. The decision to remove the officer's driving certification should be taken immediately, and before any criminal proceedings had been finalised. After any criminal matter was finalised, the Safe Driving Panel would reconvene to consider a final recommendation to the officer's Commander.

- 13.16. In their submissions to the Commission, Officer HAR04 clarified that this is the decision they would take if they were the Commander of the officer. As a member of the Safe Driving Panel, they felt that the only decision the Panel could recommend under clause 4.7.3 was to reduce Officer AB's classification to bronze. Officer HAR04 said in their submissions that the Panel was not a punitive process. As Officer AB had not been convicted of any offence, the correct decision under the Safe Driving Policy was a classification reduction.

Whose responsibility was it to organise a Safe Driving Panel?

- 13.17. Although the SDS entry is the foundation document for a Safe Driving Panel, completing a SDS entry does not generate a workflow that would prompt a Safe Driving Panel to be convened.
- 13.18. The evidence before the Commission was that for reasons related to the structure of the Specialist Command where Officer AB worked, no officer had responsibility for organising a Safe Driving Panel. As such, it appeared that no one turned their mind to the need for a Safe Driving Panel to deal with the circumstances of Officer AB's collision until the PSC was prompted by an email from the Commission on 30 July 2023.

Makeup of the Safe Driving Panel

- 13.19. Officer HAR08 was then given the task of convening the Safe Driving Panel. Their recollection is that they were asked to convene the panel in July or maybe August 2023. Officer HAR08 had never convened a Safe Driving Panel before and had only been a member of two panels previously.
- 13.20. Officer HAR08 said in evidence that they read the Safe Driving Policy and worked out that the panel needed to include a Traffic and Highway representative and a FTI (DD) Officer.
- 13.21. Officer HAR08 knew Officer HAR04 from other activities in the NSW Police Force, and knew that they had extensive experience in the Traffic and Highway

Command. Officer HAR04 has participated in a lot of Safe Driving Panels over many years, including as the FTI (DD), cluster supervisor and chair of the Panel.

13.22. Officer HAR08 was also aware that Officer HAR15, who also worked in the Specialist Command, was a FTI (DD). Although they were a FTI (DD), Officer HAR15 had never sat on a Safe Driving Panel.

13.23. Officer HAR08 and Officer HAR15 both considered Officer HAR04 to be the expert on Safe Driving Panels. Officer HAR04 assumed that they had been chosen to sit on the Safe Driving Panel because of their experience and knowledge.

What would ordinarily be considered at a Safe Driving Panel?

13.24. Officer HAR04's evidence was that a Safe Driving Panel would usually consider:

- Details of damage to the vehicle.
- Any COPS entry relating to a collision of a police vehicle or pursuit.
- The SDS entry.
- Whether the officer was certified for urgent duty driving and whether they had the skills and aptitude to drive at that level.
- Whether the officer was in a role that required urgent duty driving or driving a member of the senior executive, so that a higher driving skill set is required.

13.25. The evidence before the Commission was that a Safe Driving Panel is predominantly a risk mitigation strategy to ensure that there are no risks of further incidents occurring. A Safe Driving Panel is primarily focused on the risk to the safety of the public which might arise if a police officer does not have the skills or ability to drive police vehicles. Reputational risk to the NSW Police Force was considered to be a secondary issue. A third role of a Safe Driving Panel is to consider whether the COPS entry accurately reflects what is in the SDS entry/insurance documentation.

What evidence was available to Officer AB's Safe Driving Panel?

13.26. Officer HAR08 knew from their personal conversations with Officer AB that Officer AB had been at a function on 12 May 2023. They acknowledged that it may have crossed their mind that alcohol was involved in the accident. Officer HAR08 spoke with Officer AB in the week after the accident and Officer AB told

them he'd fallen asleep but then drove the car from the scene. In their submissions to the Commission Officer HAR08 said that they had also had the opportunity to observe Officer AB's 'driving ability and sobriety state from May till August of 2023, far greater exposure than any other person involved in this investigation or inquiry.'

- 13.27. In preparation for the Safe Driving Panel, Officer HAR10 had supplied Officer HAR08 with the SDS entry number, the COPS event number, and the vehicle registration number. Officer HAR08 did not look at the COPS event.
- 13.28. Officer HAR01 told the Commission that they could see from the emails which covered the establishment of the Safe Driving Panel that there had been no mention of alcohol being consumed prior to the accident. They could see that the SDS entry did not mention alcohol consumption. They were concerned that the panel members were not aware of the issue. So, they took steps to inform them.
- 13.29. On 21 September 2023, Officer HAR01 spoke with Officer HAR04 about the Safe Driving Panel. That conversation lasted for 33 minutes.
- 13.30. Officer HAR01's evidence was that it immediately became clear to them that Officer HAR04 knew nothing of the circumstances of the accident. Officer HAR01 told them that there was CCTV footage from two hotels which showed Officer AB consuming 23 standard drinks. The investigation had footage showing Officer AB dancing at McDonald's and appearing intoxicated. Officer HAR01 discussed the effect of the expert certificate estimating that Officer AB's blood alcohol level would have been within the high range. Officer HAR01 said that Officer HAR04 said to them words to the effect of 'Are you for real', to which they replied 'Yeah'.
- 13.31. At the time, Officer HAR04 was at a conference. They have no notes of the conversation. Officer HAR04's recollection was that the conversation was a short one, where Officer HAR01 told them that the collision was under investigation. Although Officer HAR04 did not initially recall Officer HAR01 telling them there was evidence that Officer AB had consumed 23 standard drinks, they did not deny that they might have been told that.
- 13.32. Officer HAR04 also initially denied being told there was an expert certificate saying that Officer AB's blood alcohol content would therefore have been in the

high range. They later corrected this evidence to say that they had spoken to Officer HAR01 about the process for obtaining an expert certificate in relation to blood alcohol content. For that reason, they must have been aware that alcohol may have been a factor. However, they remained firm in their evidence that they were not aware that the investigation had evidence that Officer AB was intoxicated, potentially at a high range. In their submissions, Officer HAR04 said that for evidentiary reasons, Officer AB could not be charged with a high range PCA offence as he had not been breath tested. Their written submissions also took issue with the process followed by the investigators for obtaining the expert certificate.

- 13.33. Officer HAR01 made a file note in their Duty Notes that they had spoken with Officer HAR04 on 21 September 2023 about the circumstances of the collision. However, their notes do not record more detail of that conversation. They remembered that Officer HAR04 was away at a conference, but working, at the time of the conversation.
- 13.34. The Commission accepts Officer HAR01's evidence of the topics covered in the conversation. Their evidence is consistent with their expressed concern and the reason for their call to Officer HAR04. It is consistent with those parts of the conversation that Officer HAR04 recalls as well as the recorded length of the conversation. It is also consistent with the email that Officer HAR01 sent shortly after making that call.
- 13.35. Two hours after that conversation, Officer HAR01 sent an email to Officer HAR08 (whom they had not been able to reach by phone) and which was cc'd to Officer HAR04, Officer HAR02 and Officer HAR11. That email said:

I've attempted to call you this morning without luck and I hope my email finds you well.

I understand from an email I was copied into that you sent to [Officer HAR10] on 4 September that you are involved in convening a Safe Driving Panel concerning the Motor Vehicle Collision that occurred on 13 May 2023, in North Connex Tunnel involving [Officer AB]. [Officer AB] was driving NSWPF police serialised vehicle [deleted]. The Safe Driver incident No is [deleted] with Insurance Claim number [deleted].

I ascertained from your email to [Officer HAR10] on 4 September that [Officer HAR04] has agreed to be the THPC representative in the panel and that you needed to fill the rest of the panel and gain sufficient basic accident details. I have spoken with [Officer HAR04] this morning about this matter and I understand that the Safe Driving Panel has not yet convened.

I appreciate that our Safe Driver System, Insurance Claim and processes are very process and procedurally driven and that if you were involved in processing a Safe Driver System Insurance Claim, but not investigating the associated collision that it relates to, you may not be aware of the full circumstances of a particular matter but are then required to adjudicate the matter.

You may or may not be aware, that my Command and my Complaints Management Team, are investigating the collision. As part of that investigation, I have reviewed information and holdings that reveal that [Officer AB] was consuming alcohol prior to driving the Police vehicle and being involved in the collision. Information I have reviewed indicates that his BAC at the time of the collision would have exceeded the legal limit for BAC whilst driving. I am seeking further advice in relation to these circumstances and I appreciate that this information and holdings have not yet been tested in any proceedings, and have not been otherwise adjudicated.

I note from the Safe Driver Entry and insurance claim that there is no mention of alcohol use prior to the collision.

I understand that we (NSWPF) have made an insurance claim for the repair of the vehicle in the normal manner, and that the owner of the roadway or North Connex Tunnel, have made a claim on our insurer for the cost to repair the crash barrier that was damaged. To ensure that the NSWPF meets reporting and good faith requirements in the insurance claims, and to ensure no omissions to the insurance companies, noting that those officers processing and adjudicating the Safe Driver Entry and Insurance including yourself would be otherwise unaware of this information, my Command has informed the insurance provider that the use of alcohol by [Officer AB] and possible influence is a matter under investigation.

Attached to this email are links to a guideline for the Safe Driver System and Insurance and the TMF statement of cover. You may find these resources useful. I make the assumption they are current.

- 13.36. Officer HAR04's evidence was that they had not seen the email and did not recall reading it. Their evidence on this point appeared surprising. However, they later clarified that they had been away at a conference when the email was sent. They were accessing emails on their phone and may have missed it. Alternatively, their staff may have read the email on their behalf.
- 13.37. Officer HAR08 did see the email. Receiving the email did not prompt them to look at the COPS event for more information, nor to contact Officer HAR01 for further information or clarification. In their evidence, Officer HAR08 said that the issue was not the content of the email, but that proper process had not been followed when it was sent. In their evidence and submissions, Officer HAR08 said that because the proper process was not followed, they did not need to respond to the email. Officer HAR08 went further in their submissions and said that they had

no proof of the matters referred to in the email and they were not the investigator.

13.38. In an effort to ensure that NSW Police decision makers were properly informed, Officer HAR01 also asked Officer HAR11 to update the COPS entry with information about the investigation until that point.

13.39. Officer HAR04 and Officer HAR08 acknowledged that by the date of the Safe Driving Panel meeting, the COPS entry included the following information:

- The airbags in the car had deployed after impact, so that the car was not driveable.
- The vehicle was towed from the scene.
- Officer AB had left the scene of the collision and so was not breath tested.
- CCTV footage showed Officer AB consuming 23 standard drinks.
- CCTV footage of Officer AB at McDonalds showed him exhibiting signs of intoxication.
- There was an expert certificate estimating Officer AB's blood alcohol concentration at the time of the collision, including the estimated BAC.

13.40. Officer HAR04 maintained that even if they had read the email from Officer HAR01 on 21 September 2023, it would still have been unusual for them to access the COPS database to find out more information about the results of the investigation. Officer HAR04's evidence on this point was:

[T]he point that is – my role in this is to facilitate a process. So Safe Driving Panels do not decide guilt, they do not decide anything other than an interim risk process. So for me to get involved in this – in this investigation would still be something that is unusual from my path, from my role in this process.

13.41. Officer HAR04 agreed that in assessing interim risk, the panel would necessarily be making decisions that were potentially based on information that had not yet been established. However, they remained of the view that:

there is no evidence of anything other than the fact that he is under investigation. It's a strong belief by [Officer] HAR01 that they are investigating a driver that is impaired by alcohol. The policy states if they are under investigation, we make an interim finding. ... The interim risk is we remove his driving certification to protect him driving at a level where his exempt from certain regulations under the Road Rules.

13.42. Officer HAR08 expressed a similar view. When asked whether the COPS entry documenting the evidence of alcohol consumption would be relevant to the interim risk assessment, their evidence was that:

I don't know what evidence came from - that's - it's obviously - information they've got. I don't know where it came from, that those amount of drinks were consumed, however, I was never going to commence an investigation when I knew there was a high-level one occurring.

13.43. The following exchange with counsel assisting illustrates the tenor of Officer HAR08's evidence:

Q. I'm not asking you whether this would have set you to commence the investigation. This was information that had been obtained as a result of the investigation; correct?

A. Yes, I don't know what supports it, I don't know. So I had nothing more than a document that's written.

Q. Are you suggesting that you, as a safe driving panel, would only be able to take it into account if you could see the underlying evidence?

A. Well, from what I can see, it's been - there's a lot of estimations here, saying "estimated", "estimated", that he had allegedly consumed this. I don't know where the evidence came from. Would have we changed what we did? We downgraded him to bronze. I don't believe we could have done - we could have taken away his certification, potentially taken away his certification.

Q. Yes.

A. However, we took into account the fact that he had been driving for the further five months without incident.

13.44. At the time that they participated in the Safe Driving Panel, Officer HAR15 was not aware that there were allegations that Officer AB had consumed a substantial quantity of alcohol or that he may have been intoxicated whilst driving. They agreed that this would have been relevant information.

What was considered at the Safe Driving Panel for Officer AB?

13.45. The Safe Driving Panel was held on 25 September 2023. Officer HAR08 and Officer HAR15 attended in person and Officer HAR04 attended by a Teams link.

13.46. Officer HAR04 told the Commission that they were not provided with any information regarding Officer AB's accident prior to the Safe Driving Panel meeting. They were made aware that there was an investigation into the collision and that it was a criminal investigation. However, they had no paperwork in front of them or available to them, not even the insurance claim form which had been completed by Officer AB.

- 13.47. Officer HAR04 told Officer HAR08 and Officer HAR15 that as there was an investigation occurring, the decision of the Safe Driving Panel could not be finalised, and they could not be involved in the subject of the investigation. Instead they 'stood back' and took a 'procedural role to provide assistance in the Safe Driving Panel'.
- 13.48. As noted earlier, Officer HAR04 said that the only information that they were provided with by Officer HAR01 was that there was a criminal investigation on foot. Officer HAR01 did not tell them that alcohol may have been a factor in the accident. Officer HAR04 was resolute in their evidence on this point, although they acknowledged that they had spoken to Officer HAR01 about how to obtain an expert certificate to estimate prescribed concentrations of alcohol when a driver has not been breath tested. They did not think to question Officer AB's assertion that he had simply fallen asleep, even though they were aware from Officer HAR01 that a criminal investigation was underway.
- 13.49. Officer HAR04 had no documents in front of them about the circumstances of the incident at the time that they participated in the Safe Driving Panel. They only learnt of the date of the incident during the Panel discussions, and only then became aware that the crash had occurred 4 months beforehand. Officer HAR04 told the Commission that was the only time that they have ever participated in a Safe Driving Panel without any records in front of them.
- 13.50. Officer HAR15 was clear that Officer HAR04 told them that the Safe Driving Panel should only consider the SDS entry.
- 13.51. The consistent evidence of Officer HAR08 was that the Safe Driving Panel needed to limit its consideration to the SDS entry completed by Officer AB. They could not remember who told them this. Officer HAR15 said that they and Officer HAR08 were told by Officer HAR04 that this was all they needed to consider.
- 13.52. As Officer HAR08 said:
- I think we were coming back to the fact that we knew there was an investigation going on and we were not doing that investigation. We were purely assessing the Safe Driving Panel and sticking within our lane.
- 13.53. Officer HAR08 agreed that in conducting the Safe Driving Panel, all that was required of them was to follow a process and tick the box. Officer HAR08

characterised Officer AB's consumption of alcohol before driving as 'information and possibilities' and not 'evidence'.

- 13.54. Officer HAR08 reiterated this position in their submissions to the Commission, noting that they did not have access to the CCTV footage. They noted that the COPS event had described Officer AB as drinking 23 standard drinks, but also referred to the Officer drinking XXXX beer, which is not a standard drink and that this caused them to doubt the information in the COPS event. This submission was at odds with their evidence, which was that they had not considered the COPS event at all, before being shown it in evidence during the Commission hearing.
- 13.55. Officer HAR15's evidence was that they were unaware that Officer AB had consumed alcohol prior to the collision or that there was evidence to suggest that Officer AB was intoxicated at the time of the collision. They did not see the email sent to Officer HAR08 and Officer HAR04. Nor did they see the COPS entry. Officer HAR15 said that the information about alcohol consumption would have been relevant to the Safe Driving Panel's consideration.
- 13.56. In their evidence Officer HAR04 agreed that had they been aware that Officer AB was driving under the influence, they would have recommended that Officer AB's driving certifications be removed entirely. A simple reduction in response classification would not have been sufficient. In their submissions, they clarified this evidence saying that this was the position they would have considered had they been Officer AB's Commander. However, the Safe Driving Policy only allowed them the option of reducing Officer AB's classification to bronze.
- 13.57. The Minutes of the Safe Driving Panel were completed by Officer HAR08 and said:

Incident Number [deleted]

The panel considered the following-

- Officer has been driving without incident since the incident date.
- Officer reports the matter as fatigue related.
- Due to current position needs to remain police certified at all hours and times.
- Internal investigation is currently taking place and may provide direction at completion.
- No person injured accident.
- Vehicle not towed from scene.

Recommendation-

As an interim measure driver reduced to 'Bronze' certification pending outcome of the internal investigation where a final recommendation may be advised.

13.58. Officer HAR04 was asked about why there was no mention of alcohol in the minutes of the Safe Driving Panel meeting. They reiterated that the panel's role is limited to noting that an investigation is underway. The investigation itself is handled by the investigators or referred to a complaint management team.

Was there a deliberate decision to ignore the alcohol consumption of Officer AB?

13.59. By the time the Safe Driving Panel was conducted, Officer HAR04 and Officer HAR08 had ready access to the following information:

- the COPS event which said that Officer AB had left the scene of the crash, and so had not been breath tested, CCTV footage showed Officer AB consuming 23 standard drinks and that the airbags in the car had deployed after impact, meaning that the car could not be driven.
- the email from Officer HAR01 highlighting that alcohol was a factor.
- Officer HAR04 also knew about Officer AB's alcohol concentration and likely intoxication from his conversation with Officer HAR01.
- Officer HAR08 knew that Officer AB had been at a function at a hotel on the night before the collision.

13.60. Officer HAR04 said that as soon as they became aware of the investigation, the role of the Safe Driving Panel changed. It was not the Panel's role to investigate the collision or to get involved in the investigation. Therefore, once they knew that there was a criminal investigation on foot, they would not have accessed the COPS entry, and it was not information that they required.

13.61. For this reason, the panel members only considered the SDS entry completed by Officer AB on 25 August 2023. The SDS entry made no mention of alcohol and said only that Officer AB had fallen asleep. The Commission is satisfied on the evidence outlined earlier that this approach was taken at the direction of Officer HAR04.

13.62. In their evidence to the Commission, Officer HAR04 agreed that without the relevant information in front of it, the Panel was 'flying blind' and that it was their responsibility as the panel expert to ensure that the Panel had the facts. However, in their submission, they said that:

Whilst I may have had legal right to seek the information, my overwhelming intention was to ensure the Safe Driver Panel adhered to its administrative task, a task that is demonstrated by the outcome being compliant with the Safe Driving Policy.

The Commission accepts that the Safe Driving Policy is unclear on this point. However, Officer HAR04 still took an unorthodox approach to this Safe Driving Panel. They had no documents in front of them, not even the Safe Driver System entry. Even if an investigation was on foot, there was nothing in the policy which prevented them from considering the COPS entry (which again is usually considered by Panels). It is difficult to see how a realistic risk assessment could have been made without at least these two documents to hand.

13.63. Officer HAR08 appears to have also taken a blinkered view of the role of the Safe Driving Panel, reassured by the advice from Officer HAR04. Officer HAR08 deliberately ignored the email from Officer HAR01, who tried to alert them to the fact that alcohol was likely to have been a factor in the collision. Officer HAR08 was told where they could find the COPS entry but did not look it up. Even when taken to the COPS entry by counsel assisting, they dismissed the information contained in it, suggesting that it was allegations and estimations.

13.64. Officer HAR08 seems to have completely disregarded the fact that the COPS entry was a document created by a senior police officer from their own Police Force, documenting that officer's observations of their investigations of a serious traffic offence. The COPS entry included evidence of the source of those conclusions (being CCTV footage obtained from a number of premises). Every day, NSW police officers use past COPS entries to justify their decisions to exercise police powers. It was startling to hear Officer HAR08 suggest that an entry of this kind, made by one of their colleagues, was only information and possibilities not evidence.

13.65. Officer HAR04's evidence to the Commission was that a Safe Driving Panel was responsible for:

- ensuring that the SDS entry and the COPS event were consistent and there was no underreporting; and
- dealing with interim risk management.

This Safe Driving Panel failed to complete either task.

Were other officers involved?

- 13.66. The Commission has considered the possibility that other police officers may have directed the Panel's deliberations. However, there was no evidence before the Commission that this occurred.

Safe Driving Panel in November 2023

- 13.67. After Officer AB was charged with driving whilst having a high range prescribed concentration of alcohol, with a driving under the influence offence in the alternative, a further entry was made in the Safe Driver System.
- 13.68. Officer HAR15's evidence was that Officer HAR04 advised that nothing further needed to be done until after the court proceedings had finalised. Officer HAR15 documented their understanding in an email:

Based on the advice from [Officer HAR04], a decision has been made regarding the Safe Driving Panel. It has been determined that, at this juncture, no immediate action is required. The panel will be on hold until the resolution of the ongoing court matter.

- 13.69. Officer HAR15 made a further short entry into the Safe Driver System which was consistent with this email.

Does the Safe Driving Policy need clarification?

- 13.70. The Commission considered recommending a number of possible changes to the Safe Driving Policy. The Commissioner of Police has now approved a NSW Police Force Safe Driving - Public Policy Statement (2024 SDPP), which complements the NSW Police Force Safe Driving – Response and Operations Guideline; and Safe Driving Panel Guidelines (2024 SDPG) which came into effect on 1 July 2024. There is no benefit in making a recommendation to the Commissioner of Police if action has already been taken. So, in considering potential recommendations, the Commission has considered whether the 2024 SDPP (including the associated guideline) and 2024 SDPG answer its concerns.
- 13.71. The first issue of concern to the Commission was the delay in holding a Safe Driving Panel. The Safe Driving Policy should require that a Safe Driving Panel be convened promptly. Here, the delay was partly attributable to the fact that Officer AB did not complete a SDS entry for several months. No one within the Specialist Command took responsibility for ensuring that he had completed that entry. Officer HAR04's evidence is that even if the entry had been completed, it

would not have automatically triggered a Panel. Completion of a SDS entry does not workflow to the officer responsible for convening a Panel.

13.72. Some helpful changes have been made to the NSW Police Force policies. At paragraph 5.4, the 2024 SDPP says:

All police crashes – irrespective of crash type will be subject of an initial triage by the police officers immediate supervisor and will then, be independently assessed by a Local or Regional Safe Driver Panel.

13.73. The 2024 SDPG provides that a Panel should convene monthly. Where a ‘major incident’ has occurred, an extraordinary panel should be held to enable an expedited adjudication of the incident and to consider the need for any interim risk management strategies.

13.74. The 2024 SDPG now makes it clear that a Panel needs to be held promptly and can be held urgently. This clarification is positive.

13.75. It is less clear who is responsible for ensuring that the Panel Convenor is aware of the crash and that an expedited Panel might be needed. The 2024 SDPG provides that the officer’s immediate supervisor is responsible for conducting the initial triage of the crash. Logically, the supervisor would also be responsible for:

- a) ensuring that the driver completes the SDS entry within 24 hours as required by the Police Handbook; and
- b) advising the Panel Convenor if an extraordinary panel is needed.

This is not spelt out in the SDPG.

13.76. Given the confusion as to the allocation of responsibilities in this matter, the Commission recommends that the next iteration of the SDPG should identify who is responsible for:

- a) Ensuring the police driver completes the SDS entry within 24 hours.
- b) Advising the Panel Convenor if an extraordinary panel is needed.

13.77. The second issue of concern to the Commission was the need for the Safe Driving Policy to clearly articulate the circumstances in which a police officer’s driving certificate might be removed as either an interim risk management step or as a temporary measure while the officer is (re)trained.

- 13.78. The 2019 Safe Driving Policy (2019 SDP) emphasises that the removal of certification should be a last resort. The policy provides that a police officer who loses their civilian driving licence will automatically lose their police driving certification.
- 13.79. The 2019 SDP refers to removing an officer's driving certification altogether, but does not clearly set out the circumstances in which this would be appropriate. Here, that meant that the Panel had a fixed view that all they could do was reduce Officer AB's driving certification.
- 13.80. Paragraph 5.10 of the 2024 SDPP still emphasises that decertification is an 'extreme outcome', but now provides that there is an exception where 'the incident involves driving offences for which legal action is taken or pending'. The Commission considers that the terms of the 2024 SDPP are an improvement on the 2019 SDP. The Commission would have preferred stronger guidance on the circumstances where decertifying an officer, even temporarily, would be appropriate. Nonetheless, the Commission considers the 2024 SDPP (including the associated guideline) to be adequate and will not recommend further changes on this issue.
- 13.81. The third issue of concern was that the Safe Driving Panel should have regard to all available information that bears on interim risk assessments, as well as final decisions. The interim assessment is being undertaken in the interest of public safety as well as any considerations relevant to the driver's role within the NSW Police Force. It would be quite wrong to disregard an allegation upon the basis that it is not yet proved. In the same way as a bail determination has regard to a range of factors, whether proved or unproved, a Safe Driving Panel should consider all material for the purpose of its decision concerning the fitness of the officer to retain their police driving certification.
- 13.82. The Commission considered that it would be useful if the Safe Driving Policy contained a non-exhaustive list of documents to be considered by a Panel, to avoid any doubt on this issue.
- 13.83. The 2024 SDPG now provides that the Panel must have regard to the COPS event, the involved officer's driving record and 'all information and holdings'.

13.84. In this matter, there was confusion amongst the panellists about the propriety of considering information from an ongoing criminal investigation, including an investigation that was documented in a COPS event. In their submissions, Officer HAR04 said it would be punitive to use evidence obtained through that criminal investigation to decide to remove Officer AB's certification, even as an interim risk management measure. Given the confusion about the weight and relevance of information gathered as part of a criminal investigation, the Commission is concerned that relevant information may also be disregarded by future Safe Driving Panels. That issue is not addressed by the 2024 SDPP or the 2024 SDPG.

Recommendations

13.85. The Commission recommends that the next iteration of the Safe Driving Policy and/or Safe Driver Panel Guidelines should:

- a) identify who is responsible for ensuring the police driver completes the SDS entry within 24 hours.
- b) identify who is responsible for advising the Panel Convenor if an extraordinary panel is needed.
- c) specifically address the way in which material gathered as part of an ongoing criminal investigation should be considered by a Safe Driving Panel.

Should formal findings be made against any officers?

13.86. Officer HAR04 was the senior officer on the Safe Driving Panel. They were the officer with the most experience of being on Safe Driving Panels and they knew that. Yet, this is the only occasion on which they have ever sat on a panel where no paperwork had been provided beforehand. The Commission accepts their evidence that they did not see the email sent by Officer HAR01. However, they were aware from their conversation with Officer HAR01 that alcohol had been consumed by Officer AB prior to driving but was not mentioned in the SDS entry/insurance claim. It would have been a simple step to check the COPS entry to see if it was consistent with the SDS entry, as is routinely done at Panel meetings. Yet, they did not do that.

13.87. In their submissions, Officer HAR04 pointed out the flaws in Officer HAR01's approach to proving blood alcohol concentration in court through expert evidence. They said:

The level of alcohol consumption at this point was opinion based and not tested at court, nor the matter finalised is a consideration as to the role of the panel. The fact that an investigation into serious driving offences is occurring, is a guiding principle in considerations of the Safe Driver Panel.

13.88. Officer HAR04 challenges the evidence about the quantity of alcohol consumed by Officer AB. But the Commission's concern was that the Panel was asked to genuinely assess issues of risk. It should not have ignored the cogent evidence that Officer AB had driven after consuming a significant number of alcoholic drinks.

13.89. Officer HAR04's evidence is that they were motivated by a desire not to interfere with an investigation. If so, they failed to recognise that simply reading the COPS entry and taking that information into account as part of interim risk management would not amount to interference.

13.90. The Commission accepts Officer HAR04's evidence that they have devoted their career to stopping drink drivers and has no tolerance for that kind of behaviour. Yet, despite Officer HAR01's diligent efforts to bring the real issues to light, Officer HAR04 did not ask for any information about the accident, not even the kinds of information that they would normally expect should be before a Safe Driving Panel, such as the COPS entry. They could not give an adequate explanation for this approach. Officer HAR04 accepted that the Panel was flying blind.

13.91. The Commission considered whether Officer HAR04 failed to diligently participate in the Safe Driver Panel, in breach of the Code of Conduct for NSW Police. Officer HAR04 said in submissions that their personal view was that drink driving by police should not be tolerated, and they may have made a different decision had Officer AB been working in his Command. However, they felt that under the Safe Driving Policy they had only one choice and that was to reduce Officer AB's classification to bronze.

13.92. As noted earlier, the Safe Driver Policy was unclear about:

- What information a Safe Driving Panel should consider.
- How material gathered as part of an ongoing criminal investigation should be considered.

In those circumstances, the Commission has decided that it would be unfair to say that Officer HAR04 did not diligently follow the policy or carry out their duties as a police officer.

13.93. Turning to consider the role of Officer HAR08. They knew that Officer AB was at a hotel on the evening before the crash. They said in their submissions that they were also aware of Officer AB's driving ability and sober state between May and August 2023. Officer HAR08 was told the COPS event number. They received the email from Officer HAR01. Officer HAR08 said in submissions that they were told not to contact Officer HAR01 further, because the proper chain of command was not followed in sending them the email. But that does not mean that the information contained in the email should have been disregarded. When asked by the presiding Commissioner if they were 'just ticking a box' in conducting the Safe Driving Panel, Officer HAR08 agreed that was correct.

13.94. The Commission accepts that Officer HAR08 was not an expert on Safe Driving Panels. But nor are they a junior officer. They could and should have raised with Officer HAR04 whether the information in Officer HAR01's email or the COPS entry was relevant to be considered. They did not.

13.95. The Commission has considered whether Officer HAR08 failed to diligently participate in the Safe Driving Panel as part of performing their duties as a police officer. Again, the Commission thinks that the Safe Driver Policy is sufficiently unclear about what Officer HAR08 should have done, and that it would be unfair to say that Officer HAR08 did not diligently follow the policy.

13.96. Officer HAR15 was the most junior of the panel participants. They had no additional information that might have prompted them to question the approach taken by the panel. They cannot be criticised for following the approach taken by their superior officers who had greater expertise in this area.

14. The criminal investigation and charging of Officer AB

The investigation

14.1. After being allocated responsibility for investigating the crash, Officer HAR11 reviewed the CCTV footage to identify the number of drinks consumed (rather than simply purchased) by Officer AB. Witness statements were obtained. An

expert pharmacological certificate was obtained, to provide evidence of Officer AB's likely blood alcohol concentration at the time of the crash.

- 14.2. On 13 June 2023, Officer AB was offered an opportunity to be interviewed. On 14 July 2023, he provided a written statement prepared with the assistance of his lawyers.
- 14.3. On 17 July 2023, a brief was sent to Officer HAR06, seeking approval under s 139 of the *Police Act* to commence proceedings for the offence of 'use vehicle under the influence of alcohol'.

Legal advice on charges

- 14.4. At this point in time, Officer HAR06 was on leave. Before they left, they had briefed their relieving officer on the investigation and suggested that legal advice should be obtained from the internal police legal advisers, the Operational Legal Advice Unit (OLAU), before charges were laid. As instructed, in mid-July, legal advice was sought from OLAU before charges were laid.
- 14.5. The Commission asked Officer HAR06 about that decision. They acknowledged that it was not necessary to get advice from OLAU before charging an officer or a member of the public. However, they had done so regularly in the past, to be confident that there is sufficient evidence to charge.
- 14.6. The officer relieving Officer HAR06 also asked Officer HAR01 to contact Officer AB and let him know that a brief of evidence was being sent for legal advice to consider commencing proceedings for the offence of driving under the influence. Officer HAR01 made the phone call to Officer AB on 18 July 2023.
- 14.7. Those closely involved in the investigation were aware that any charge for a drink driving offence (a summary offence) needed to be laid within six months of the date of the crash. Otherwise, any charge would be statute barred.
- 14.8. On 21 August 2023, advice was received from the OLAU. That advice was to the effect there was sufficient evidence to charge Officer AB. Officer HAR02 sent the advice on to Officer HAR06 on 22 August 2023.
- 14.9. The evidence before the Commission was that the vast majority of drink driving charges are now brought following a breath analysis. It is unusual for charges to be laid on the basis of CCTV footage which documents a person's consumption of

alcohol. Indeed, some senior and experienced police who gave evidence before the Commission said that it was not possible to charge someone with an offence based on a prescribed concentration of blood alcohol if they had not been breath tested.

- 14.10. Officer HAR06 acknowledged that under the Protocol between the NSW Police Force and the DPP, they did not need to seek DPP advice before charging Officer AB. However, their evidence was that they wanted DPP advice for two reasons. Firstly, because the DPP was the prosecuting authority and this was an unusual drink driving prosecution that relied on CCTV evidence, rather than the usual blood alcohol test result. Secondly, to clarify an aspect of the OLAU advice.
- 14.11. Officer HAR06 discussed this matter with Officer HAR02. In turn, they sent them another email on 24 August 2023 which included a link to the Protocol between the DPP and the NSW Police Force. Officer HAR02 said in the email:
- I've attached the Protocols document which steps out when DPP advice should be sought; in this case the evidence supports the charge matters proceeding, so you could seek DPP advice on discretionary reasons not to proceed if you'd like...
- 14.12. In their evidence to the Commission, Officer HAR02 agreed that they were not aware of any public interest reasons not to charge Officer AB. They simply wanted to give their senior officer the information they might need if they wanted to seek DPP advice. In their view, given the unusual evidence supporting the charges, they thought it was a sensible decision for a delegate to get additional advice.
- 14.13. Officer HAR06 was asked if they wanted DPP advice on whether there were discretionary grounds not to charge Officer AB. They firmly said that they did not. They were interested only in whether there was sufficient evidence to charge.
- 14.14. Officer HAR06 told the Commission that they did not discuss this issue with anyone else. They were asked to what extent Officer AB's prestigious role in a Specialist Command affected their decision. They said that it did not.
- 14.15. Officer HAR06 gave their evidence in a straightforward and careful manner. They were aware of the sensitivities of this matter and were careful to make sure that their decisions were thorough and defensible. None of their decisions

showed any partiality towards Officer AB or appeared to be swayed by the position that he held.

14.16. On 24 August 2023, Officer HAR06 sent a text to Officer HAR02 and asked them to arrange a legal advice from the DPP. This was confirmed in an email of 27 August 2023. Officer HAR06 did not use the phrase 'discretionary grounds' in either of these communications.

14.17. Officer HAR02 then emailed the OLAU and asked that DPP advice be obtained. This request was short and did not include any public interest considerations for or against charging Officer AB.

14.18. Unfortunately when Officer HAR02 emailed Officer HAR01 and Officer HAR11 about the decision to seek legal advice from the DPP they said:

[Officer HAR06] has asked that this matter be forwarded to Operational Legal Advice for them to forward to the ODPP for assessment of any discretionary grounds on proceeding on the criminal matters.

14.19. Although the email sent by Officer HAR02 refers to seeking DPP advice on discretionary grounds not to charge, the Commission accepts that in Officer HAR06's mind the questions were:

- was there sufficient evidence; and
- which charge should be laid.

Laying charges

14.20. The DPP advice took some time, but Officer HAR06 said that was not unusual. On 31 October 2023, about a fortnight before the limitation period was to expire, Officer HAR01 briefed Officer HAR06 on the approaching deadline to lay any charges and the risk that the DPP advice may not be available in time.

14.21. Officer HAR06 had planned leave for a family event in early November 2023. This was close to the expiry of the limitation period. Before going on leave, they gave instructions to the Officer acting in their place, that if DPP advice was not received by 7 November 2023, the charges should be laid in any event. They instructed that the charges should then be withdrawn if NSW Police Force later received DPP advice that there was insufficient evidence to proceed.

14.22. Between 8 and 11 November 2023, Officer HAR11 filed the following charges against Officer AB:

- a) 1 x drive vehicle while under influence of alcohol contrary to s 112(1)(a) of the *Road Transport Act 2013*.
- b) 1 x drive with high range PCA contrary to s 110(5)(a) of the *Road Transport Act 2013*.

14.23. The Commission is satisfied that the decision by Officer HAR06 to seek legal advice from the OLAU and the DPP was sensible and appropriate in these circumstances. Officer HAR02 provided them with the relevant information and arranged for the advice to be obtained. They did not seek to influence their decision. Seeking legal advice from the DPP did mean that it took longer to lay the charges. However, Officer HAR06 took the necessary steps to make sure that this delay did not lead to the charges becoming statute barred.

15. Media release

15.1. Part 4.2.4 of the Police Media Policy deals with the media response when NSW Police Force employees are charged. That Part relevantly provides:

To ensure transparency in the community, the Commissioner has authorised PMU [Police Media Unit] to issue a media release if a NSW Police Force employee (sworn or unsworn) is charged with an offence, regardless of the nature of the offence.

As with any other person charged, the employee's age, sex, occupation, and suburb/town may be disclosed. However, care must be taken not to identify the person more than this, particularly as his/her occupation as a NSW Police Force employee is being disclosed.

...

The media release must be authorised by the relevant Assistant Commissioner/Executive Director.

15.2. Appendix 2 of the Police Media Policy also provides that:

Upon the arrest or charging, the relevant PAC/PD or specialist unit must advise the appropriate Assistant Commissioner or Executive Director. The relevant Deputy Commissioner must also be informed.

15.3. The Commission has investigated why a media release was not issued at the point when Officer AB was first charged, nor when the second charge was laid. That evidence cannot be discussed without potentially identifying Officer AB.

15.4. The evidence does not support a finding of a sinister motive for not issuing the media releases. However, the Commission considers that a media release should have been issued. When identifying lessons to be learned from this matter,

Officer HAR12 readily acknowledged that a media release should have been issued promptly.

16. Suppression order

- 16.1. After Officer AB was charged, the Commissioner of Police asked the Local Court to make orders under the *Court Suppression and Non-publication Order Act 2010* in relation to Officer AB's name and identity. The Commission is not conducting a review of the decision of the Local Court.
- 16.2. However, the Commission has had access to the confidential material provided to the Court. The Court's order is understandable. The foundation for the order is unrelated to the circumstances of the crash on 13 May 2023.
- 16.3. The Commission also explored whether the context for the suppression order also influenced police decision-making following the crash. There was no evidence of this being a factor in police decision-making.

17. Importance of Commission oversight

- 17.1. By 10 July 2023 the Commission had begun monitoring the police investigation of the crash and the way in which the misconduct allegations were handled under s 101 of the LECC Act. An investigation under Part 6 of the LECC Act was commenced at the same time, but formal powers were not exercised until October 2023.
- 17.2. From July 2023, using the Commission's powers under Part 7 of the LECC Act, the Commission Oversight Investigator was able to monitor the steps being recorded on the NSW Police Force Misconduct Matters Information Management System known as IAPro and ask questions about the progress of the criminal investigation and the departmental investigation.
- 17.3. The Commission's investigation showed that a number of ordinary misconduct processes only occurred after questions were asked by the Commission's Oversight Investigator. These included convening of the Safe Driving Panel and Interim Risk Management Plan (IRMP). The Commission's Oversight Investigator also raised questions about the accuracy of the insurance claim made by Officer AB.

17.4. On 30 July 2023, the Commission Oversight Investigator emailed Officer HAR09 stating:

... I was hoping you might be able to field a few questions in relation the [Officer AB] matter for me:

- Have police completed a suspension questionnaire in relation to [Officer AB]?
- Is [Officer AB] subject to an IRMP?
- Has this matter been referred to the Safe Driving Panel for consideration?
- Have police submitted an insurance claim in respect of the vehicle?
- Is it possible to have any available documentation related [to] any of the above uploaded to IAPro?

Lastly, could you please confirm that the entire brief to the DPP is on IAPro?

....

17.5. Officer HAR09 forwarded the Commission's correspondence on to Officer HAR10 noting that it was their understanding that the PSC was holding delegation for Officer AB and asking Officer HAR10 to provide an update about the questions asked by the Commission.

17.6. On 15 August 2023, the Commission received the following response from Officer HAR10:

Have police completed a suspension questionnaire in relation to [Officer AB]?

No

Is [Officer AB] subject to an IRMP? **No**

Has this matter been referred to the Safe Driving Panel for consideration?

Unknown

Have police submitted an insurance claim in respect of the vehicle? **Very likely but cannot confirm yet**

Is it possible to have any available documentation related [to] any of the above uploaded to IAPro? **Yes, I just checked...**

17.7. On 21 August 2023, the Commission's Oversight Investigator emailed Officer HAR10 to express their concerns about the answers provided, including:

- Asking for a copy of the documentation that demonstrated that Officer AB's commander or manager had considered the need to implement interim risk management action, including the reasons for not placing Officer AB on an IRMP; and

- To confirm that the Safe Driving Panel had met to discuss the matter, or would meet in the near term, with a view to seriously considering removing Officer AB's driving certification.
- 17.8. The email from the Commission prompted a discussion between Officer HAR10 and Officer HAR16 in relation to the Interim Risk Management Plan. Officer HAR16's evidence was that these questions from the LECC also prompted the PSC to advise the Specialist Command that they needed to convene a Safe Driving Panel. Officer HAR16 agreed that the Safe Driving Panel should have been done much sooner.
- 17.9. Officer HAR10's evidence was that they were confident that the Safe Driving Panel would not have been organised without the Commission's email.
- 17.10. It was also apparent that the fact that the Commission was monitoring the matter was used by investigating officers to urge action when they were concerned that proper processes may not have been followed.
- 17.11. For example, in the application to commence proceedings which was sent to the OLAU on 17 July 2023, Officer HAR11 included the following paragraph:
- It is also important to note that on the 10th July, 2023 Kuring Gai Command were notified that LECC have elected to monitor this investigation (see attached). They have asked that all documents including CCTV be forwarded to investigator [deleted].
- 17.12. Officer HAR11 and Officer HAR01 were both concerned that the insurance claim form submitted by Officer AB did not disclose his prior alcohol consumption. The involvement of the Commission was raised in subsequent discussions with Officer HAR02.
- 17.13. The Commission also maintained oversight of the criminal investigation. As the time for the statute of limitations for filing the charges came closer, the Commission decided it was appropriate to begin an active examination.
- 17.14. Steps taken by the Commission in its oversight function, prodded the NSW Police Force to take action in significant respects.

18. Deletion of electronic records

- 18.1. During evidence before the Commission, it became apparent that some officers had adopted the practice of deleting messages, records of messages and calls from encrypted applications.
- 18.2. The practice appears to have been partially instituted to avoid the need to produce records under either Standing Order 52s or requests under the *Government Information (Public Access) Act 2009*. Several of the officers involved did not appear to have given any consideration to the question of whether this practice complied with their obligations under the *State Records Act 1998* or might amount to an offence against s 120 of the *Government Information (Public Access) Act 2009*.
- 18.3. However, this issue was not a primary focus of this investigation, and the Commission chose not to spend further time investigating it. The Commission does not make any adverse findings against the officers who adopted the practice.
- 18.4. However, the Commission does recommend that the Commissioner of Police consider whether the practice of (automatically) deleting work related electronic messages is consistent with the provisions of the statutory regime dealing with record retention and issue guidance to her officers on the use of encrypted applications and the deletion of messages from police issued phones.

19. Was Officer AB given special treatment

- 19.1. This investigation began with an allegation that Officer AB was being treated leniently because of the prestigious position that he held. By November 2023, that allegation had also been aired in the media.
- 19.2. There are two audiences watching to see how allegations of criminal conduct by a police officer are dealt with:
 - The most obvious is the general public. The public wants to know if a police officer who is alleged to have been drink driving will be dealt with in the same way as the ordinary citizen.
 - The second audience, less obvious but equally important, are the members of the NSW Police Force and police civilian employees. Are higher ranked

officers dealt with more leniently than junior officers? Are senior officers protecting their friends or proteges from scrutiny?

Officer AB's relationship with senior officers

- 19.3. Officer HAR12 was Officer AB's Commander. They said they would not describe their relationship with Officer AB as 'close' but that they respected Officer AB and had a strong concern for his welfare. They '[weren't] going to walk away from him.' They wanted to make sure that Officer AB 'got through the ordeal with as much support as possible.'
- 19.4. On the morning of 15 May 2023, Officer HAR12 rang the Police Association on behalf of Officer AB and obtained the contact details of a lawyer. They then rang the lawyer and left a message. Officer HAR12 said they did this because Officer AB had already told them he'd consumed 8 mid-strength beers, and Officer HAR12 felt that he needed legal advice. At this point, Officer HAR12 considered that they were likely to be a witness in the matter, rather than the delegate. They were concerned for Officer AB's welfare and thought he needed proper representation.
- 19.5. Officer HAR12 was asked whether this suggested some partial treatment of Officer AB and whether they thought that these actions were inappropriate. Officer HAR12 did not agree with these possible criticisms. They said that they had taken similar steps for others when in previous senior roles. In their submissions to the Commission, Officer HAR12 said 'I do not see affording an individual their legal entitlements as showing favourable treatment.' They repeated that they were unable to provide advice, as Officer AB's Commander and a potential witness. They felt that they were negating criticism by putting Officer AB in contact with people who could provide the appropriate advice.
- 19.6. Officer HAR12 could have achieved the same outcome by suggesting to Officer AB that he contact a lawyer through the Police Association. However, the Commission does not criticise Officer HAR12 for taking the extra step that they did.
- 19.7. Officer HAR12 said that they:
- fully expected criticism for that at some stage in the future...but, as I said, I'm more concerned about his welfare. I'm his boss and I have a responsibility to him as well.

- 19.8. In their written submissions, Officer HAR12 said ‘A cornerstone of being a commander is managing people including their welfare. It is not all about complaints management.’ Having stepped down as delegate because there was a potential conflict of interest, Officer HAR12 said that they focussed on the welfare of Officer AB, a key responsibility of a Commander.
- 19.9. Even though they stepped away from their role as delegate, Officer HAR12’s responsibilities as Officer AB’s Commander continued to include a responsibility for interim risk management. The Commission has expressed concerns about Officer HAR12’s handling of that issue earlier. It is difficult to avoid the conclusion that Officer HAR12 allowed their laudable concern for the welfare of Officer AB to become the dominant consideration in their management of Officer AB after 13 May 2023.

Why is equitable treatment important?

- 19.10. From the time that Officer AB’s identity first became apparent to the duty officer in the State Command Centre in the early hours of 13 May 2023, the fairly routine investigation of a car accident was generally perceived to be a matter of significant sensitivity.
- 19.11. The Commission is satisfied that by virtue of the position that he held, Officer AB was not perceived as being an ordinary Inspector. This perception, even by those of equal or more senior ranks, influenced the investigation at a number of points:
- Officer HAR07 suggested that the PSC should be called out on the night of the accident when that would not ordinarily occur. They did so to ensure that there was an ‘arms length’ investigation.
 - In part because the PSC was involved, investigating officers were conscious of the unusual profile of the matter.
 - When the PSC returned the matter to Ku-ring-Gai PAC to investigate, Ku-ring-Gai PAC felt they were being given a poisoned chalice, even though it would have been unusual for PSC to have kept an investigation of this kind.
 - Concerns about the sensitivity of the matter contributed to the delay in uploading the triage on to IAPro. There were reasonable explanations for this delay, but it fed into perceptions of a cover up.

- Investigating officers became aware that Officer AB maintained his prestigious position after 15 May 2023 and was immediately given access to another police vehicle.
- The Safe Driving Panel was only held after the Commission made enquiries about the topic in July 2023, and was conducted as a tick box exercise rather than a genuine consideration of the risk arising from Officer AB's driving.
- The ordinary processes for issuing a media release were not followed.

Was there special treatment?

19.12. Earlier in this Report, the Commission has concluded that Officer AB was treated as any other police officer, or member of the public would have been when:

- being investigated; and
- charged.

19.13. He was treated differently:

- In his commanding officer's approach to interim risk management;
- In the conduct of a Safe Driving Panel; and
- In the approach taken to the issue of a media release.

19.14. Even where there were good reasons why police deviated from the usual path, the failure to transparently follow the ordinary misconduct processes and document their decisions allowed speculation of special treatment to grow.

19.15. The NSW Police Force is a tight knit organisation. The way in which an officer is treated will eventually become known amongst their colleagues. If there are gaps in the available information (which may sometimes be necessary to protect the officer's privacy or for operational reasons) rumour and suspicion may fill the void. As senior officers acknowledged in their evidence, when police are not treated equitably, it can lead to dissent in the ranks of the police generally.

19.16. The failure to treat Officer AB equitably has resulted in senior officers losing confidence in the integrity of the organisation that they have faithfully served for decades. As one witness said:

from day one [at the Academy] they show you the statement of values... and point one of that statement is to place integrity above all. I've always tried to do that from day one of my service in the cops and its just really disappointing that the people who are the decision-makers ... say one thing and do another.

19.17. The inequitable treatment of Officer AB has also led to reputational damage to the NSW Police Force.

20. Summary of systemic recommendations

20.1. In summary, the Commission makes the following recommendations to the Commissioner of Police:

- a) The next iteration of the Safe Driving Panel and/or Safe Driving Guidelines should:
 - i. identify who is responsible for ensuring the police driver completes the SDS entry within 24 hours.
 - ii. identify who is responsible for advising the Panel Convenor if an extraordinary panel is needed.
 - iii. specifically address the way in which material gathered as part of an ongoing criminal investigation should be considered by a Safe Driving Panel.
- b) Amend the Safe Driver System entry form so that it positively asks if the driver had consumed alcohol, prescribed or unprescribed drugs in the 12 hours prior to the accident. If the answer is 'yes', the form should require the officer to disclose the quantity of these substances consumed. Alternatively, if the Safe Driver System entry form is not owned by the Commissioner of Police, the Commissioner should issue guidance that officers should disclose any consumption of alcohol, prescribed or unprescribed drugs in the 12 hours prior to the accident in the narrative portion of the form.
- c) Consideration should be given to whether the practice of (automatically) deleting electronic messages is consistent with the provisions of the statutory regime dealing with record retention and issue guidance to officers on the use of encrypted applications and the deletion of messages from police issued phones.

20.2. In addition, the Commission will make recommendations in relation to the management of misconduct matters in the Specialist Command which will be communicated to the Commissioner of Police in a separate letter as this aspect would serve to identify Officer AB.

21. Summary of findings against officers

- 21.1. The Commission finds that Officer AB has engaged in serious misconduct by:
- a) Leaving the scene of the accident on 13 May 2023 without contacting VKG or other officers to advise of the crash and without waiting to be breath tested.
 - b) Completing a misleading SDS entry which was then relied on by the Safe Driver Panel and the insurer of the NSW Police Force.
- 21.2. Neither was a split-second decision. Officer AB is a senior and experienced officer. At the time, he held a prestigious position in the NSW Police Force. These were deliberate acts of impropriety. The Commission recommends that the Commissioner of Police consider taking action to terminate Officer AB's employment under s 181D of the *Police Act*.
- 21.3. For the reasons set out at paragraph's 7.43 to 7.47 and 12.32 to 12.36, the Commission does not consider that Officer AB's conduct should be referred to the DPP under s 133 of the LECC Act.
- 21.4. The Commission does not make any findings against any other officers which would warrant recommendations being made under s 133(2) of the LECC Act.

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 reputation 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.

Glossary

Glossary	Description
BAC	Blood Alcohol Concentration
CCTV	Closed-circuit Television
CMT	Complaints Management Team
COPS	NSW Police Force's Computerised Operational Policing System
DPP	NSW Director of Public Prosecutions
FOD	Form of Demand
FTI (DD)	Field Training Instructor (Driver Development)
IAPro	NSW Police Force Misconduct Matters Information Management System
IRMP	Interim Risk Management Plan
LECC	Law Enforcement Conduct Commission
LECC Act	<i>Law Enforcement Conduct Commission Act 2016 (NSW)</i>
OLAU	NSW Police Force's Operational Legal Advice Unit
PAC	Police Area Command
PCA	Prescribed Concentration of Alcohol
PMU	NSW Police Force's Police Media Unit
PSC	NSW Police Force's Professional Standards Command
PSDO	Professional Standards Duty Officer
RA	Request for Assistance
RFA	Request for Assistance
SDS entry	Safe Driver System entry
SO	Subject Officer
S052	Standing Order 52
VKG	NSW Police Force's Radio Operations Network
2019 SDP	2019 version of the NSW Police Force Safe Driving Policy
2024 SDPG	2024 version of the NSW Police Force Safe Driving Panel Guidelines
2024 SDPP	2024 version of the NSW Police Force Safe Driving - Public Policy Statement

