

## **OPERATION MANTUS – PUBLIC DECISION CONCERNING PUBLIC AND PRIVATE EXAMINATIONS IN AID OF THE INVESTIGATION**

1. The Law Enforcement Conduct Commission (the Commission) has embarked upon an investigation of allegations that excessive force was used by a member or members of the NSW Police Force at a location in Northern New South Wales in September 2022 during the apprehension and arrest of YPM1, a 14 year old person, together with other issues arising from the detention of that young person in custody following his arrest.

### **Subject Matter of the Investigation**

2. On 14 December 2022, the Commission held a public directions hearing at which applications for leave to appear were made and submissions were made on procedural issues, principally the question whether evidence should be given by witnesses at public or private examinations as part of the Commission's investigation. At the commencement of the Directions Hearing, Mr Lester Fernandez, Counsel Assisting the Commission, made a short opening address which identified the subject matter of the investigation (T5-6):

*“Operation Mantus arises out of an incident which occurred in September 2022 in northern New South Wales. The incident involved a young person who sustained injuries during the course of being apprehended by police and after which he was arrested. The young person was treated by ambulance and in hospital for a short period.*

*The incident took place at night. The young person was with other young people. Police were conducting proactive policing activities and they were in plain clothes. Police did not wear body worn video at the time. As a consequence, if there is any dispute about what took place when police apprehended and then arrested the young person, that dispute will not be assisted by electronic evidence, and one of the issues which it is expected will be examined at this hearing and in examinations is why police were not wearing body worn video at the time of the incident. After being treated in hospital, the young person was taken to a police station. Police wished to interview him. He contacted a solicitor. His solicitor advised police*

*in writing that the young person did not wish to be interviewed. However, police did interview the young person. An adult was present during the interview.*

*This second period of time in the chronology leads to other issues which may be expected to be examined during the course of this hearing, including: what procedures were followed or were not followed in the conducting of the interview by police; and the young person's management in custody."*

3. On 14 December 2022, the Commission directed pursuant to s 176 *Law Enforcement Conduct Commission Act 2016* (LECC Act) that there be no publication of the name or image of nominated police officers and YPM1 and that they be identified by pseudonyms, together with a direction that there be no publication of the location where relevant events occurred in September 2022. The Commission will continue to use those pseudonyms in this decision. The reasons for taking this course are noted in the separate Confidential Decision dated today.

### **Submissions on Use of Public and Private Examinations**

4. Counsel Assisting made oral submissions on the discretionary question as to whether evidence should be taken from witnesses at public or private examinations (T6-15). Thereafter, Mr Ryan Coffey, Counsel for the Commissioner of Police, addressed on the question of public and private examinations by reference to written submissions which he had furnished that day on behalf of the Commissioner of Police (Exhibit MTS2) (T17-33). Short oral submissions were made by Mr Hall, Solicitor for Officer MTS1 (T33-34), Ms Lee, Solicitor for YPM1 (T34-37), Mr Nagle, Counsel for the Police Association of NSW (PANSW) (T37-39), Mr Taylor, Solicitor for Officer MTS3 (T39), Mr Willis, Solicitor for Officer MTS5 (T39-40), Mr Jones, Counsel for Officer MTS2 (T40) and Mr White, Counsel for Officer MTS4 (T40-41).
5. At the conclusion of the directions hearing, the proceedings were adjourned to a date to be fixed for examinations to be held. It was indicated that a decision on the use of public and private examinations would be published and made public in due course.
6. Pursuant to leave of the Commission, written submissions on the issue of public and private examinations were provided on 22 December 2022 by Mr Nagle, Counsel for the PANSW (Exhibit MTS3) and by Ms Lee solicitor for YPM1, on 21 December 2022

(Exhibit MTS4). Mr Nagle furnished reply submissions on 20 January 2023 on behalf of the PANSW to those made by Ms Lee for YPM1 (Exhibit MTS5). Finally, Counsel Assisting made written submissions, dated 1 February 2023 in reply to all submissions made for other interests (Exhibit MTS6).

7. The oral and written submissions made on behalf of interested persons need not be repeated in this decision. The written submissions on behalf of the Commissioner of Police, the PANSW and YPM1 addressed, amongst other things, issues of statutory construction.
8. Put shortly, the submissions for YPM1 supported the use of public examinations and submissions for the Commissioner of Police, the PANSW and the individual police officers favoured the use of private examinations.

### **Construction of Statutory Provisions**

9. It is appropriate to refer to certain provisions of the LECC Act which bear on the use of public and private examinations by the Commission. Extracts from the LECC Act are set out in Appendix A to this decision. Sections of particular relevance to the use of public or private examinations are distilled in this part of the decision together with reference to principles of statutory construction.
10. The Commission is not a court hearing adversarial civil or criminal proceedings. The Commission is empowered to hold public or private examinations in aid of its investigatory functions under the LECC Act. The principle of open justice, which applies to court proceedings, has no application to Commission examinations: *John Fairfax Publications v Ryde Local Court* (2005) 62 NSWLR 512; [2005] NSWCA 101 at [60]; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at [20] – [27]; *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264 at [46].
11. The Commission will consider the exercise of discretion under s 63 LECC Act concerning the use of public and private examinations in the circumstances of the particular case. What follows is not intended to fetter or narrow the exercise of discretion under s 63. However, an understanding of the terms of s 63, viewed in its statutory context, is fundamental to the operation of the section.

12. The starting point in the process of statutory construction is the text of the provision or provisions in question considered in context, including the surrounding provisions in the legislation and their legislative purpose: *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 269 CLR 507; [2019] HCA 35 at [32]-[37], [124].

### The objects clause in s 3 LECC Act

13. Section 3 LECC Act is a complex and multifaceted objects clause. Objects clauses operate as a source for identifying the purpose or object of legislation to assist statutory construction: s 33 *Interpretation Act 1987*. The objects section may give practical content to an understanding of various terms in the LECC Act and assist the construction and operation of the statute: *ID, PF and DV v Director General, Department of Juvenile Justice* (2008) 73 NSWLR 158; [2008] NSWSC 969 at [255] – [257]; *Lynn v State of NSW* (2016) 91 NSWLR 636; [2016] NSWCA 57 at [54].
14. Of particular relevance to the present question are:
- section 3(b) concerning the role of the Commission in “*the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force*” which “*may have occurred, be occurring, be about to occur or that is likely to occur*”; and
  - section 3(d)(i) concerning the prevention of “*officer misconduct and officer maladministration and agency maladministration within the NSW Police Force*” by “*providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration.*”
15. Whilst parts of s 3 provide for the Commission to carry out independent functions, s 3(f) also recognises the “*primary responsibilities of the NSW Police Force to investigate and prevent officer misconduct and officer maladministration and agency maladministration while providing for oversight of those functions*” by the Commission. Section 3(c) and (h) make express provision for “*oversight*” by the Commission.
16. Section 3(f) constitutes ongoing recognition that the primary responsibility for the investigation and prevention of misconduct and maladministration rests with the

NSW Police Force. This was a central message of the Royal Commission into the NSW Police Service in its 1996 Interim Report and 1997 Final Report.

17. At the same time, the Commission is empowered to undertake independent detection, investigation and exposure of, in particular, serious misconduct and agency maladministration and this extends to individual incidents as well as systemic issues.
18. As Counsel Assisting submitted, for the objects of the LECC Act to be achieved, there needs to be a substantial degree of public confidence in the work of the Commission. One way in which public confidence is achieved is by the work of the Commission being carried out in public. At the same time, public confidence may be served by the work of the Commission, when necessary, being done in private.

#### Some Statutory Concepts – “*Serious Misconduct*” and “*Agency Maladministration*”

19. The term “*serious misconduct*” is defined in s 10 of the Act and includes:
  - conduct of a police officer that could result in prosecution of the officer for a “*serious offence*” or “*serious disciplinary action*”: s 10(1)(a); or
  - a pattern of officer misconduct or agency maladministration “*carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force*”: s 10(1)(b).
20. A “*serious offence*” means a serious indictable offence, being an offence punishable by 5 years imprisonment or more: s 4(1) *Crimes Act 1900* (Crimes Act).
21. For present purposes, the offence of assault occasioning actual bodily harm under s 59 Crimes Act is a serious indictable offence. It is alleged that YPM1 suffered a head injury in the incident which is capable of constituting actual bodily harm: *McIntyre v R* [2009] NSWCA 305; 198 A Crim R 549 at [44].
22. The term “*agency maladministration*” is defined relevantly in s 11 LECC Act to include conduct of the NSW Police Force that is unlawful or, if not unlawful, is (amongst other things) unreasonable, unjust or oppressive or that is engaged in in accordance

with a law or established practice that is unreasonable, unjust, oppressive or improperly discriminatory in its effect.

### Investigation by the Commission

23. Section 51 LECC Act provides for the exercise of investigation powers by the Commission.
24. For present purposes, s 51(1) provides that the Commission may exercise its investigative powers in respect of conduct:
- if the conduct involves a police officer and “*the Commission has decided that the conduct concerned is (or could be) serious misconduct... and should be investigated*”: s 51(1)(a);
  - if “*the conduct concerned is (or could be) agency maladministration*” s 51(1)(d).
25. Section 51(3) expands the power to investigate conduct in certain respects. Significantly, s 51(4) provides for the Commission to investigate if the conduct “*is (or could be) indicative of a systemic problem involving the NSW Police Force generally, or a particular area of the NSW Police Force, and the Commission considers it in the public interest to do so*”. In those circumstances, the investigation by the Commission may extend “*to the NSW Police Force generally*” and “*to other police officers*”.
26. Issues are likely to arise in the present investigation as to whether management of YPM1 in custody, and the approach taken by police officers in proceeding to interview YPM1 despite being told of legal advice that he did not wish to be interviewed, may (when taken with other cases) constitute “*serious misconduct*” and “*agency maladministration*” under s 10(1)(b), s 11(1) and s 51(1)(d), (3) and (4) of the LECC Act.

### Sections 61 and 62 – Examinations May be Held

27. Section 61 provides that the Commission may hold an examination for the purpose of “*an investigation of conduct that the Commission has decided is (or could be) serious misconduct or serious maladministration*”. The term “*serious misconduct*” is pertinent and the expanded meaning given to the term in ss 10, 11 and 51 is

important.

28. Section 62 provides for the announcement of the general scope and purpose at an examination.

### Section 63 LECC Act

29. Section 63 now arises for direct examination.
30. It is the task of the Commission to construe and apply s 63 LECC Act which includes the “*appropriate*” test in s 63(2).
31. Section 63(1) and (2) should be read together. Although the Commission may hold an examination in public or private, an examination may only be held in public “*if the Commission decides that it is appropriate.*” In deciding whether an examination should take place in public, the Commission is exercising a broad discretion which takes into account the non-exhaustive list of factors in s 63(5) of the Act.
32. Although it may be said that the starting or default position under s 63 is the use of a private examination, the test of “*appropriateness*” for holding a public examination is not especially onerous.
33. The word “*appropriate*” in s 63 LECC Act should bear its ordinary meaning. According to the Macquarie Dictionary, the word “*appropriate*” means “*suitable or fitting for a particular purpose, person, occasion etc.: an appropriate example*”. Parliament has not used the word “*necessary*” or “*essential*” in stating the criteria for a public examination under s 63(2). The word “*appropriate*” involves a less demanding test than if the word “*necessary*” had been used. The word “*necessary*” has been described as a strong word involving a test of necessity: *Rinehart v Walker* [2011] NSWCA 403 at [27]-[31]; *A v Crime and Corruption Commissioner* [2013] WASCA 288 at [61]-[82].
34. The wording in s 63(2) LECC Act was not contained in the predecessor statute, the *Police Integrity Commission Act 1996* (PIC Act). Section 33(1) and (3) PIC Act provided that a hearing may be held in public or private as decided by the Police Integrity Commission (PIC) and that in reaching that decision, the PIC “*is obliged to*

have regard to any matters that it considers to be related to the public interest.” A non-exhaustive list of factors was contained in s 33(3A) PIC Act which was in similar terms to s 63(5)(a) to (d) LECC Act.

35. The origin of the “appropriate” test in s 63(2) LECC Act is not known. As noted, it did not appear in the PIC Act. The second reading speech and the explanatory memorandum for the Law Enforcement Conduct Commission Bill 2016 said nothing on this issue. In the second reading speech, Mr Troy Grant, the Deputy Premier and Minister for Justice and Police (Hansard, Legislative Assembly, 13 September 2016) stated that the Government accepted the recommendations of Mr Andrew Tink in his Report of August 2015 concerning oversight of the NSW Police Force. In his Report (page 121), Mr Tink expressed agreement with the Report of the *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* (30 July 2015) where the Hon Murray Gleeson AC and Mr Bruce McClintock SC (at paragraphs 9.4.3 - 9.4.10) considered the use of public hearings by the ICAC and addressed the provisions in s 31 ICAC Act without criticism.
36. In construing a statute, use may be made of extrinsic material for certain defined purposes: s 34 *Interpretation Act 1987*. It may be permissible to consider, amongst other things, the second reading speech, the explanatory memorandum and a relevant report specified in s 34. It must be kept in mind, however, that words contained in extrinsic material must not be substituted for the text of the law: *Re Bolton; Ex parte Beane* (1987) 16 CLR 514 at 518; [1987] HCA 12; Pearce, *Statutory Interpretation in Australia*, Lexis Nexis, 9<sup>th</sup> edition, 2019, paragraph 3.26. To the extent that written submissions referred to other statements made by Mr Tink in his Report, it is necessary to keep in mind that the construction of s 63 LECC Act is to be undertaken by reference to the words in that section, together with other parts of the LECC Act which provide context, and to permissible aids to construction available under ss 33 and 34 *Interpretation Act 1987*.

### Provisions in other Statutes

37. The “appropriate” test in s 63(2) LECC Act may be contrasted with analogous provisions in statutes regulating other investigatory commissions:
- Section 31(1) *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) provides that, for the purposes of an investigation, the Independent



Commission Against Corruption (ICAC) “*may if it is satisfied that it is in the public interest to do so, conduct a public inquiry*”;

- Section 117(1) *Independent Broad based Anti-Corruption Act 2011* (Vic) (IBAC Act) provides that examinations before the Independent Broad-based Anti-Corruption Commission (IBAC) are not open to the public unless the IBAC considers on reasonable grounds that there are exceptional circumstances and it is in the public interest to hold a public examination;
- Section 73(1) and (2) *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) provides that a hearing before the National Anti-Corruption Commission must be held in private unless the Commissioner decides to hold the hearing in public – the Commissioner may decide to hold a hearing in public if satisfied that exceptional circumstances justify holding the hearing in public and it is in the public interest to do so.

### Some Factors Relevant to the s 63(2) Discretion

38. In considering whether to conduct public or private examinations, the Commission should keep in mind the range of reports which may be made following an investigation:

- where a matter has been or is the subject of an examination by way of a public hearing, the Commission must prepare a public report to be furnished to the Presiding Officers of each House of Parliament: s 132(2) and (3); s 134; s 142 LECC Act;
- where a s 132 public report is not issued following an investigation, a private report must be prepared and provided to the Commissioner of Police and the Minister for Police as well as the complainant and the affected police officer: s 135 LECC Act.

39. In some circumstances, the Commission may consider that the making of a public s 132 report may occur without use of any public examinations. The public exposition of issues may be undertaken sufficiently in a public report. There is, of course, no fixed approach to be taken in this respect.

40. It is a relevant factor in a s 63 LECC Act decision to consider the maintenance and advancement of public confidence in the Commission. This may be done by use of private and public examinations in appropriate cases. Public confidence in the

thoroughness of examination of the issues by an investigatory commission has been recognised as a relevant consideration in cases dealing with the ICAC and IBAC: *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21 at 30 (Gleeson CJ). In that case, Mahoney JA (at 53) observed in this context that “*the scrutiny of impugned conduct in public has a disinfectant effect*” with reference being made to “*the disinfectant effect of sunlight*”. Mahoney JA noted that “*scrutiny in public rather than behind closed doors is a traditional check upon abuse of both administrative and judicial power*”.

41. The garnering of public acceptance of an investigation was accepted as a relevant factor in the exercise of discretion under s 117 IBAC Act: *R and Anor v Independent Broad-based Anti-Corruption Commissioner* [2015] VSC 374; 253 A Crim R 35 at [145] - [146] (Riordan J). This approach was not criticised by the Court of Appeal (*R and Anor v Independent Broad-based Anti-Corruption Commissioner* [2015] VSCA 271; 255 A Crim R 99) or the High Court (*R and Anor v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459; [2016] HCA 8).
42. It is necessary to keep in mind the policing context affecting the great bulk of the Commission’s work. Unlike the ICAC and the IBAC, the Commission is only concerned with two agencies, the NSW Police Force and the NSW Crime Commission. The principal focus of the Commission’s attention is the NSW Police Force. The ICAC and the IBAC consider a very wide range of issues arising from the action or inaction of many agencies, public officials, Members of Parliament and others including (in the case of IBAC) the Victorian Police Force.
43. Apart from sensitivities which may relate to disclosure of operational and investigative strategies and practices through the use of public examinations, there is the further risk of damage to policing and individuals if public disclosure of events takes place. Where police officers are located in different areas, metropolitan, regional and rural, the disclosure of matters through public examinations may serve to harm the public interest in effective policing in the area, as well as the interests of individual persons.
44. Considerations of this type loom large where the Commission is considering a particular incident and the conduct of police officers surrounding that incident. This is especially so where there is significant factual dispute so that findings, opinions

and conclusions will be expressed ultimately in a public report, which has regard to all the evidence. This process may serve the purpose of allowing appropriate public assessment of the incident without the use of public examinations.

45. On the other hand, public examinations may be especially appropriate where systemic issues are under consideration under s 10(1)(b) or s 51(1)(d), (3) and (4) LECC Act. By that stage, the Commission would have considered whether there was a “*pattern*” indicative of “*systemic issues that could adversely reflect on the integrity and good reputation of the NSW Police Force*” (s 10(1)(b)) and whether conduct “*could be indicative of a systemic problem*” and whether it is “*in the public interest*” to investigate the NSW Police Force generally (s51(3) and (4)).
46. The courts have emphasised that the term “*public interest*” is a broad concept and that the question whether a matter is “*in the public interest*” imports to an extent a discretionary value judgment and that there is a fundamental distinction between matters which may be “*of public interest*” and a matter which is “*in the public interest*”: *R v IBAC* [2015] VSC 374; 255 A Crim R 99 at [90] to [91] (Priest, Beach and Kaye JJA). The term “*public interest*” has no precise meaning – it is protean and will take its possible meanings from the context in which it is used: *AB v Judicial Commission of NSW (Conduct Division)* at [54].
47. In *R v IBAC*, the Court of Appeal observed (at [92] – [94]) that it was said to be a systemic issue as to whether there was a “*culture*” at a Victorian police station of violent behaviour towards women and of “*tolerance within the police station in respect of such behaviour*”.
48. It may be seen that conduct of that type, if alleged, may be capable of being a systemic issue under s 10(1)(b) or s 51(4) LECC Act. In such circumstances, the conduct of public examinations is more likely under s 63(2) LECC Act.
49. These observations are not intended to be prescriptive. Rather, they serve to illustrate circumstances where public examinations are more likely to be “*appropriate*” and to serve the legislative purpose of s 63 LECC Act, viewed in its statutory context.

## The Factors Specified in s 63(5) LECC Act

50. It is appropriate now to turn to the non-exhaustive factors referred to in s 63(5).

Some assistance can be derived in construing these provisions from the judgment of Basten JA (Bathurst CJ agreeing) in *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (*Cunneen v ICAC*) where consideration was given (in obiter comments) to the mandatory considerations in s 31(2) ICAC Act, a provision with close similarity to s 63(5)(a)-(d) LECC Act. Basten JA's analysis of these provisions was not affected by the decision of the High Court dismissing an appeal from the Court of Appeal: *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14.

51. Before moving to examine the factors in s 31(2) ICAC Act, Basten JA made a general observation (at [95]) which is pertinent:

*"...there is a value in the privacy of investigations into unproven allegations which deserves to be considered by an investigative body with powers to undertake either private or public inquiries. Particularly is that so where the potential damage to reputation (and intrusions on personal privacy) result not from the considered assessment and reporting of an investigation but from public examination, often involving questions put in colourful terms and denials which are disregarded."*

52. Assistance is provided as well by the Public Examination Decision dated 16 March 2018 which is Annexure 1 to the Commission's Report in Operation Tumbora (the Tumbora Decision). It should be kept in mind that Operation Tumbora involved a single issue being an allegation of excessive use of force. As the opening of Counsel Assisting made clear, Operation Mantus involves a wider range of issues.

*Section 63(5)(a) – the benefit of exposing to the public and making it aware of serious misconduct*

53. When considering the equivalent factor in s 31(2)(a) ICAC Act, Basten JA observed (at [100]) that whilst exposure at a public inquiry may be open, it is appropriate to keep in mind that a public report may be prepared with respect to an investigation. Basten JA stated (at [100]):

*“In considering whether to conduct a public inquiry, with potential adverse effects on individuals whose conduct is under investigation, consideration will be given to whether the functions of exposing, and educating about, corruption may best be served by the publicity attendant upon a report involving considered findings and recommendations.”*

54. Several of the factors referred to earlier in this decision are relevant to s 63(5)(a) of the Act. There is a powerful public interest in the community being aware of investigations undertaken by the Commission. At the same time, where there are contested allegations of serious misconduct, there is a risk of community misunderstanding of the investigatory process. The Commission is not conducting a trial as a form of adversarial criminal litigation. Rather, the process is investigatory and inquisitorial with significant work being undertaken by the Commission before a public or private examination takes place.

55. The Commission should keep in mind the role of a s 132 public report in exposing to the public, and making it aware of serious misconduct.

*Section 63(5)(b) – the seriousness of the allegations or misconduct matter being investigated*

56. In *Cunneen v ICAC*, Basten, JA said with respect to the ICAC equivalent of s 63(5)(b) (at [101]):

*“The second consideration, namely the seriousness of the subject matter of the investigation, has a number of facets. An allegation or complaint may be treated seriously because of its source, because of its subject matter or because of the potential consequences of the conduct complained of. In some circumstances the seriousness of the allegation may militate in favour of a public inquiry but in others, perhaps where the allegation is of very serious misconduct but of a highly contestable kind, this factor may militate against taking that step.”*

57. There is a serious allegation of excessive use of force in this case. In addition, there are substantial issues concerning, in particular, custody management and interviewing of suspects which are to be investigated.

*Section 63(5)(c) – any risk of undue prejudice to a person's reputation (including by not holding the examination in public)*

58. With respect to the ICAC equivalent of s 63(5)(c), Basten JA said in *Cunneen v ICAC* (at [102]):

*“So far as par (c) is concerned, the risk of "undue prejudice" to a person's reputation will usually arise from holding an inquiry rather than not holding one, although the latter possibility is recognised. How it will operate in a particular case is obviously a matter for discretionary judgment.”*

59. In the Taborra Decision (at paragraphs 30 – 31), the Commission observed that there was no risk of *“undue prejudice”* to the reputation of a police officer simply because that officer is identified as having used violence in the course of their duties. The public would well understand that police may be required to use force, with the question being whether the use of force was lawful: ss 230-231 *Law Enforcement (Powers and Responsibilities) Act 2002*.

*Section 63(5)(d) - whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned*

60. In *Cunneen v ICAC* , Basten JA said of s 31(2)(d) ICAC Act (at [103]):

*“Paragraph (d) requires what will usually be obvious, namely the need to weigh the public interest in exposing the matter, against the competing public interest of protecting the privacy and reputations of those who may be adversely affected by public exposure of their affairs.”*

61. The words *“privacy of the persons concerned”* in s 63(5)(d) are capable of extending to police officers, members of the public involved in the particular incident under investigation and residents in the community where the events occurred. In the Taborra Decision (at paragraph 35), the Commission observed that *“the preservation of privacy has particular poignancy because of the relatively small communities in which the officers work and their families live”*.

62. This aspect is pertinent to Operation Mantus where the events under consideration unfolded in a regional area with relatively small communities encompassing the police officers and their families, as well as YPM1 and his family and other residents.

63. As the Commission observed in the Tambora Decision (at paragraph 36), *“the relationship between the two public interests referred to in [s 63(5)(d)] is a dynamic one and incapable of being the subject of a bright line analysis”*.

64. The term *“public interest”* appears twice in s 63(5)(d). As noted earlier in this decision, the term *“in the public interest”* appears in s 51(4) LECC Act. The *“public interest”* is a recurring theme in the LECC Act, an understandable feature in a statute creating an investigatory commission entrusted to, amongst other things, investigate allegations of serious misconduct and agency maladministration in a policing context.

*Section 63(5)(e) – whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation concerned to appear before the examining Commissioner or to otherwise assist the Commission’s investigation*

65. There is no equivalent to s 63(5)(e) in the ICAC Act.

66. When addressing this factor in the Tambora Decision (at paragraph 37), the Commission noted that the incident of alleged excessive use of force occurred in a public space and that a number of witnesses had already been identified. The Commission observed with respect to the prospect of witnesses coming forward:

*“Whether the announcement of a public hearing is likely to encourage one or more of those persons to come forward must be somewhat speculative. We think it is fair to conclude that some witnesses are more likely to come forward if their evidence were to be taken publicly since that would give them some basis for thinking that the process is aboveboard and they would be fairly treated. It may be that some witnesses would be more likely to come forward if their evidence were to be taken privately. This matter is essentially imponderable but we think that an announcement of a public hearing would be somewhat more likely to encourage witnesses to come forward than would be the case if the hearings were to be private.”*

67. Having regard to the investigations already undertaken and the time and location where police apprehended YPM1, it appears unlikely that the holding of a public examination will encourage another person or persons to come forward to assist the Commission's investigation.
68. It is possible that the holding of public examinations concerning the issues of custody management and the interviewing of suspects may lead to other persons coming forward with information to assist the Commission.

### A Specific Incident and Possible Systemic Issues

69. As noted in the short opening by Counsel Assisting on 14 December 2022, Operation Mantus raises the following issues:
- (a) whether excessive force was used in the apprehension and arrest of YPM1;
  - (b) the absence of body worn video by police officers which would otherwise have served as a means of recording electronically the apprehension and arrest of YPM1;
  - (c) the management of YPM1 in custody at a police station after his return from hospital and the role of the custody manager in that respect;
  - (d) the fact that police officers proceeded to conduct an electronically recorded interview of 14 year old YPM1 despite his receiving and accepting legal advice that he did not wish to be interviewed.
70. The LECC Act does not refer expressly to systemic issues in the list of factors contained in s 63(5) LECC Act. Section 31 ICAC Act does not refer to systemic issues in the list of factors which bear upon the discretion to hold a public inquiry, although s 12A ICAC Act provides for the ICAC to direct its attention to "*serious corrupt conduct and systemic corrupt conduct*": *Knightsbridge North Lawyers Pty Ltd v Independent Commission Against Corruption* [2018] NSWSC 387.
71. However, s 117(1)(d)(ii) and (4)(a)(iv) of the IBAC Act makes express reference to "*systemic corrupt conduct*" and "*systemic police personnel misconduct*" as being relevant to the exercise of discretion by IBAC to hold a public examination with reference being made to "*whether conduct relates to an individual or an isolated*



*incident or systemic in nature”.*

72. Section 73 of the NACC Act provides for the Commissioner to have regard to the extent to which the corruption issue could involve corrupt conduct that is “*serious and systemic*” in deciding whether a public hearing should take place.
73. Reference was made earlier (at paragraph 47) to *R v IBAC* where a systemic issue arose concerning alleged use of excessive force at a particular Victorian police station. In Operation Mantus the allegation is of use of excessive force confined to an individual in an isolated incident. There is no aspect which presently suggests that this is a systemic issue for the purpose of Operation Mantus.
74. However, other issues involve the use or non-use of body worn video , the custody management of YPM1, a 14 year old person, and the process which saw YPM1 being interviewed by police despite his acceptance of legal advice that he not be interviewed. These are capable of being systemic issues where the LECC Act itself points to their significance, and the importance of the Commission being able to investigate them.
75. Where systemic issues are to be explored, there is a powerful case for the use of public examinations whilst guarding against unnecessary identification of individuals and locations. This approach may be justified under s 63 LECC Act once the particular circumstances of the case have been identified, usually by evidence taken at private examinations.

## **Conclusion**

76. This Public Decision has sought to identify principles and a range of factors which may be relevant to the exercise of discretion to hold public examinations under s 63 LECC Act.
77. Issues have been addressed in this Public Decision at a level of generality. A separate Confidential Decision refers directly to a range of considerations (some of them unusual) as to whether it is appropriate to hold public examinations as part of Operation Mantus. The Commission will invite submissions from legal representatives for interested persons as to whether the Confidential Decision may

be made public in whole or in part.

78. Having regard to all the factors relevant to the exercise of discretion under s 63 LECC Act, the Commission is satisfied that, in the first instance, private examinations should be held of witnesses on issues of fact. I note that private examinations were held with respect to Officers MTS1, MTS2, MTS3 and MTS5 on 9 and 10 February 2023.
79. Given the point that has been reached in the investigation, it is proposed that all legal representatives granted leave to appear for interested persons (together with legal representatives who may be granted leave to appear) will be present at the private examinations to be held as part of Operation Mantus in the near future. This step will assist the orderly progress of the investigation including the identification of evidence on systemic issues which may be suitable for public examination.
80. It is foreshadowed that the Commission will hold public examinations with respect to systemic issues after the private examinations have been held.
81. In reaching this decision, I confirm that I have consulted with Commissioner Anina Johnson for the purpose of s 19(2)(a), (b) and (c) of the LECC Act.

A handwritten signature in black ink, appearing to be 'PJ', with a long, wavy horizontal line extending to the right.

The Hon Peter Johnson SC  
Chief Commissioner  
3 March 2023

## Appendix A – Relevant Statutory Provisions

1. Section 3 LECC Act sets out the objects of the statute:

### **“3 Objects of Act**

*The objects of this Act are as follows—*

*(a) to promote the integrity and good repute of the NSW Police Force and the Crime Commission by ensuring that they properly carry out their functions and responsibilities in relation to the handling of complaints (and information that the Commission becomes aware of otherwise than through a complaint that indicates or suggests conduct is (or could be) officer misconduct or officer maladministration or agency maladministration),*

*(b) to provide for the independent detection, investigation and exposure of serious misconduct and serious maladministration within the NSW Police Force and the Crime Commission that may have occurred, be occurring, be about to occur or that is likely to occur,*

*(c) to provide for independent oversight and review (including, where appropriate, real time monitoring and review) of the investigation by the NSW Police Force of misconduct matters concerning the conduct of its members and the Crime Commission concerning its officers,*

*(d) to prevent officer misconduct and officer maladministration and agency maladministration within the NSW Police Force and the Crime Commission by—*

*(i) providing for the identification of systemic issues that are likely to be conducive to the occurrence of officer misconduct, officer maladministration and agency maladministration, and*

*(ii) assessing the effectiveness and appropriateness of their procedures relating to the legality and propriety of activities of their members and officers, and*

*(iii) encouraging collaborative evaluation of opportunities for, and implementation of, desirable changes in such procedures, and*

(iv) making recommendations with respect to education and training about prevention of officer misconduct, officer maladministration and agency maladministration,

(e) to ensure that agencies work collaboratively to support and promote the prevention of officer misconduct, officer maladministration and agency maladministration and to improve their processes and systems,

(f) to recognise the primary responsibilities of the NSW Police Force and Crime Commission to investigate and prevent officer misconduct and officer maladministration within those agencies and agency maladministration while providing for oversight of those functions,

(g) to foster an atmosphere in which complaints, provision of other information about misconduct and independent oversight are viewed positively as ways of preventing officer misconduct, officer maladministration and agency maladministration,

(h) to provide for independent oversight and real time monitoring of critical incident investigations undertaken by the NSW Police Force,

(i) to provide for the scrutiny of the exercise of powers by the Law Enforcement Conduct Commission and its officers by an Inspector and for the Commission and for the Inspector to be accountable to Parliament,

(j) to provide for the oversight by the Inspector of the use of covert powers under various Acts.”

2. The term ‘police misconduct’ is defined in s 9(1) LECC Act in the following way:

**“9 Police misconduct, administrative employee misconduct and Crime Commission officer misconduct**

**(1) Definition — police misconduct** For the purposes of this Act, **police misconduct** means any misconduct (by way of action or inaction) of a police officer —

(a) whether or not it also involves participants who are not police officers,  
and

(b) whether or not it occurs while the police officer is officially on duty, and

(c) whether or not it occurred before the commencement of this subsection,  
and

(d) whether or not it occurred outside the State or outside Australia.

...

**(4) Examples** Police misconduct, administrative employee misconduct or Crime Commission officer misconduct can involve (but is not limited to) any of the following conduct by a police officer, administrative employee or Crime Commission officer respectively—

(a) conduct of the officer or employee that constitutes a criminal offence,

(b) conduct of the officer or employee that constitutes corrupt conduct,

(c) conduct of the officer or employee that constitutes unlawful conduct  
(not being a criminal offence or corrupt conduct),

(d) conduct of the officer or employee that constitutes a disciplinary  
infringement.

...”

3. Section 10 defines the term ‘serious misconduct’:

#### **“10 Meaning of “serious misconduct”**

(1) For the purposes of this Act, **serious misconduct** means any one of the following—

(a) conduct of a police officer, administrative employee or Crime Commission officer that could result in prosecution of the officer or

employee for a serious offence or serious disciplinary action against the officer or employee for a disciplinary infringement,

(b) a pattern of officer misconduct, officer maladministration or agency maladministration carried out on more than one occasion, or that involves more than one participant, that is indicative of systemic issues that could adversely reflect on the integrity and good repute of the NSW Police Force or the Crime Commission,

(c) corrupt conduct of a police officer, administrative employee or Crime Commission officer.

(2) In this section –

**serious disciplinary action** against an officer or employee means terminating the employment, demoting or reducing the rank, classification or grade of the office or position held by the officer or employee or reducing the remuneration payable to the officer or employee.

**serious offence** means a serious indictable offence and includes an offence committed elsewhere than in New South Wales that, if committed in New South Wales, would be a serious indictable offence.”

4. Section 11 defines several concepts including “agency maladministration”:

**“11 Maladministration**

(1) For the purposes of this Act, **agency maladministration** means any conduct (by way of action or inaction) of the NSW Police Force or the Crime Commission other than excluded conduct –

(a) that is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

(b) that, although it is not unlawful –

- (i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or
- (ii) arises, wholly or in part, from improper motives, or
- (iii) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or
- (iv) arises, wholly or in part, from a mistake of law or fact, or
- (v) is conduct of a kind for which reasons should have (but have not) been given, or

(c) that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.

(2) For the purposes of this Act, **officer maladministration** means any conduct (by way of action or inaction) of a police officer, administrative employee or Crime Commission officer that, although it is not unlawful (that is, does not constitute an offence or corrupt conduct) —

(a) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or

(b) arises, wholly or in part, from improper motives, or

(c) arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or

(d) arises, wholly or in part, from a mistake of law or fact, or

(e) is conduct of a kind for which reasons should have (but have not) been given.

(3) For the purposes of this Act, agency maladministration or officer maladministration is **serious maladministration** —

(a) in the case of an agency — if the conduct involved is unlawful (that is, constitutes an offence or is corrupt conduct or is otherwise unlawful), or

*(b) in the case of an agency or officer — if the conduct involved is of a serious nature and, although it is not unlawful —*

*(i) is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*

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

*(4) In this section —*

**excluded conduct** means any of the following —

*(a) conduct of the Crime Commission in relation to a decision that could be the subject of an application for review by the Supreme Court under section 33 of the Crime Commission Act 2012,*

*(b) conduct of the Crime Commission or Crime Commission officers in relation to the carrying on or determination of a hearing under Division 4 of Part 2 of the Crime Commission Act 2012 or any proceeding relating to an investigation conducted by the Crime Commission,*

*(c) conduct of the Crime Commission or its officers where acting as a legal advisor to a public authority or as a legal representative of a public authority (including as counsel assisting a public authority),*

*(d) conduct of the Crime Commission or its officers relating to the carrying on of any proceedings before a court (including a coronial inquiry and committal proceedings before a magistrate) or before any other person or body before whom witnesses may be compelled to appear and give evidence,*

*(e) conduct in carrying out the functions of an executive officer or member of the Management Committee of the Crime Commission.”*



5. Section 51 concerns the Commission's exercise of investigation powers:

**"51 Exercise of investigation powers**

*(1) The Commission may exercise its investigation powers in respect of conduct —*

*(a) if the conduct concerned involves a police officer, administrative employee or Crime Commission officer and the Commission has decided that the conduct concerned is (or could be) serious misconduct or officer maladministration that is serious maladministration and should be investigated, or*

**Note —**

*See section 19 (2) in relation to the making of a decision under this provision.*

*(b) if the conduct concerned involves the Commissioner of Police or a Deputy Commissioner of Police and is (or could be) police misconduct or officer maladministration, or*

*(c) if the conduct concerned involves the Crime Commissioner or an Assistant Commissioner of the Crime Commission and is (or could be) Crime Commission officer misconduct or officer maladministration, or*

*(d) if the conduct concerned is (or could be) agency maladministration, or*

*(e) if both Houses of Parliament refer the conduct concerned to the Commission for investigation under section 196.*

*(2) The investigation powers may be exercised —*

*(a) on any complaint made or referred to the Commission under this or any other Act, or*

*(b) on the Commission's own initiative on the basis of misconduct information provided to it in a report or of which it otherwise becomes aware.*

(3) *The power to investigate conduct under this section includes the power —*

*(a) to investigate conduct that could be, but is not, the subject of a complaint, and*

*(b) to investigate the actions of another person or body in relation to the conduct concerned and any related issues, and*

*(c) to refer the matter for investigation or other action under section 162.*

(4) *Without limiting subsection (3), if the misconduct matter or conduct is (or could be) indicative of a systemic problem involving the NSW Police Force generally, or a particular area of the NSW Police Force, and the Commission considers it in the public interest to do so, the investigation by the Commission may extend beyond any police officer or administrative employee to whom the misconduct matter or conduct relates —*

*(a) to the NSW Police Force generally, or that particular area of the NSW Police Force, and*

*(b) to other police officers and administrative employees.*

(5) *Without limiting subsection (3), if the misconduct matter or conduct is (or could be) indicative of a systemic problem involving the Crime Commission generally, or a particular area of the Crime Commission, and the Commission considers it in the public interest to do so, the investigation by the Commission may extend beyond any Crime Commission officer to whom the misconduct matter or conduct relates —*

*(a) to the Crime Commission generally, or that particular area of the Crime Commission, and*

*(b) to other Crime Commission officers.*

(6) *For the purposes of subsection (1), conduct that is (or could be) indicative of both officer misconduct or officer maladministration and agency maladministration is to be treated as officer misconduct or officer maladministration."*

6. Sections 61 and 62 LECC Act concern examinations to be held by the Commission:

**“61 When may an examination be held**

*The Commission may hold an examination under this Division, for the following purposes—*

- (a) an investigation of conduct that the Commission has decided is (or could be) serious misconduct or serious maladministration,*
- (b) investigation of conduct referred to it by Parliament under section 196.*

**Note—**

*See section 19 (2) in relation to the making of a decision under this provision.*

**62 Examinations**

*(1) An examination must be held by the Chief Commissioner, Commissioner or an Assistant Commissioner, as determined by the Chief Commissioner (the **examining Commissioner**).*

*(2) At an examination, the examining Commissioner must announce the general scope and purpose of the examination.*

*(3) A person appearing at an examination is entitled to be informed of the general scope and purpose of the examination, unless the examining Commissioner is of the opinion that this would seriously prejudice the investigation concerned.”*

7. Section 63 is of particular importance to the holding of public or private examinations. Section 63 states:

**“63 Public and private examinations**

(1) An examination (or part of an examination) may, subject to subsection (2), be held in public or in private.

(2) An examination (or part of an examination) may only be held in public if the Commission decides that it is appropriate.

**Note —**

See section 19 (2) (c) in relation to the making of a decision under this provision.

(3) Despite the Commission deciding to hold an examination (or part of an examination) in public, the examining Commissioner may decide to hear closing submissions or any other part of a hearing in private.

(4) Subsection (3) extends to a closing submission by a person appearing before the examining Commissioner or an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.

(5) Without limiting the factors that the Commission may take into account in determining whether or not to hold an examination (or part of an examination) in public, the Commission is to consider the following —

(a) the benefit of exposing to the public, and making it aware of, serious misconduct,

(b) the seriousness of the allegation or misconduct matter being investigated,

(c) any risk of undue prejudice to a person's reputation (including by not holding the examination in public),

(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned,

(e) whether holding the examination (or part of the examination) in public may encourage a person with information relevant to the investigation

*concerned to appear before the examining Commissioner or to otherwise assist the Commission's investigation.*

*(6) The examining Commissioner may give directions as to the persons who may be present at an examination when it is being held in private. A person must not be present at an examination in contravention of any such direction."*