

Hearing: Operation Mantus

Before the Hon P Johnson SC, Chief Commissioner

Held at Level 3, St James Centre,  
Elizabeth Street, Sydney

On Wednesday, 5 April 2023 at 9.30am  
(Day 4)

**WITNESS INDEX**

**Keisha Hopgood**

**186**

1 THE CHIEF COMMISSIONER: Yes, Mr Fernandez?

2

3 MR FERNANDEZ: Chief Commissioner, I tender the following  
4 exhibits.

5

6 I tender a redacted transcript of the evidence given  
7 at private examinations before this Commission on 17 March  
8 this year by Mr Clifford, Ms Burkitt and Mr Frankham. The  
9 barcode commences at 8620410 and ends at 8620441.

10

11 **EXHIBIT #MTS95 REDACTED TRANSCRIPT OF THE EVIDENCE GIVEN AT**  
12 **PRIVATE EXAMINATIONS BEFORE THE COMMISSION ON 17 MARCH 2023**  
13 **BY MR CLIFFORD, MS BURKITT AND MR FRANKHAM, BARCODED**  
14 **8620410-8620441**

15

16 MR FERNANDEZ: I tender an updated and slightly amended  
17 submission by the Aboriginal Legal Service titled "Systemic  
18 Issues Relating to Police Practices of Interviewing  
19 Children Following Refusal of Interview". That's  
20 a submission made in relation to this investigation. It is  
21 dated 30 March 2023. The barcodes are 8620389 through to  
22 8620407.

23

24 **EXHIBIT #MTS96 UPDATED AND SLIGHTLY AMENDED SUBMISSION OF**  
25 **THE ABORIGINAL LEGAL SERVICE, TITLED "SYSTEMIC ISSUES**  
26 **RELATING TO POLICE PRACTICES OF INTERVIEWING CHILDREN**  
27 **FOLLOWING REFUSAL OF INTERVIEW" DATED 30 MARCH 2023,**  
28 **BARCODED 8620389-8620407**

29

30 THE CHIEF COMMISSIONER: It is the case that that report  
31 takes the place of exhibit MTS66, which was the original  
32 form.

33

34 MR FERNANDEZ: It does, yes.

35

36 THE CHIEF COMMISSIONER: There have been a few  
37 alterations. Do they affect the substance of the report in  
38 any way?

39

40 MR FERNANDEZ: No, they don't.

41

42 THE CHIEF COMMISSIONER: As you have indicated, they are  
43 in the nature of some tidying-up type of amendments,  
44 effectively.

45

46 MR FERNANDEZ: Yes, that's so, Chief Commissioner.

47

1 I tender the printout of the Aboriginal Legal Service  
2 custody notification form relating to juveniles. The  
3 barcodes for this document are 8620408 to 8620409.  
4

5 **EXHIBIT #MTS97 PRINT-OUT OF THE ABORIGINAL LEGAL SERVICE**  
6 **CUSTODY NOTIFICATION FORM RELATING TO JUVENILES, BARCODED**  
7 **8620408-8620409**  
8

9 MR FERNANDEZ: I call Ms Keisha Hopgood.

10  
11 <KEISHA HOPGOOD, affirmed: [9.38am]

12  
13 <EXAMINATION BY MR FERNANDEZ:  
14

15 MR FERNANDEZ: Q. Can you please say your name?

16 A. Certainly. Keisha Hopgood.  
17

18 Q. Ms Hopgood, are you the acting principal legal officer  
19 of the Aboriginal Legal Service?

20 A. I am.  
21

22 Q. Just going back a bit over your legal experience, in  
23 your time at the Aboriginal Legal Service were you  
24 previously the principal legal solicitor of the justice  
25 projects, policy and practice area?

26 A. That's correct. Principal solicitor.  
27

28 Q. In that position, you were involved in dealing with  
29 policy issues relating to criminal matters, care and  
30 protection matters and family law, particularly as they  
31 relate to children or involving children; is that right?

32 A. That's correct.  
33

34 Q. Previously, were you the principal solicitor of crime  
35 at the Aboriginal Legal Service?

36 A. Acting principal solicitor of crime, yes.  
37

38 Q. In that role, did you have responsibility for the  
39 whole of the Aboriginal Legal Service's criminal practice  
40 in New South Wales?

41 A. That's correct.  
42

43 Q. Before that, also at the Aboriginal Legal Service,  
44 were you managing solicitor of the Children's Criminal Law  
45 practice for about two and a half years?

46 A. Correct.  
47

1 Q. Before you went to the Aboriginal Legal Service, did  
2 you work for Legal Aid NSW for about eight years?  
3 A. I did.  
4  
5 Q. In the whole of that time, did you work for the  
6 Children's Legal Service?  
7 A. I did.  
8  
9 Q. That involved going to court every day, or  
10 thereabouts?  
11 A. Thereabouts, yes.  
12  
13 Q. As well as working on the Legal Aid Youth Hotline; is  
14 that right?  
15 A. That's correct.  
16  
17 Q. You have represented literally thousands and thousands  
18 of children in courts around the state?  
19 A. That's correct, thousands and thousands and thousands.  
20  
21 Q. In addition to the positions that you've held at Legal  
22 Aid NSW and the Aboriginal Legal Service, are you also the  
23 deputy chair of the Law Society committee on children's  
24 issues?  
25 A. Yes, children's legal issues, yes, I am.  
26  
27 Q. Are you also or have you been previously a member of  
28 the Children's Court advisory committee?  
29 A. That's correct.  
30  
31 Q. To add to those matters, you're also a lecturer in  
32 advanced criminal law at the University of New South Wales?  
33 A. That's correct.  
34  
35 Q. In addition to all the roles that you've held at Legal  
36 Aid and the Aboriginal Legal Service, are you also involved  
37 with dealing directly with NSW Police?  
38 A. I am.  
39  
40 Q. And you deal with several different levels of  
41 NSW Police?  
42 A. I do.  
43  
44 Q. One level that you deal with NSW Police on that you  
45 have meetings yourself with the assistant commissioner at  
46 NSW Police for capability, performance and the youth  
47 command, that's Assistant Commissioner Gavin Wood; is that

1 right?

2 A. That's correct.

3

4 Q. In your dealings with Assistant Commissioner Gavin  
5 Wood, have you worked on a number of projects at a very  
6 high level relating to Aboriginal children?

7 A. Yes, I have.

8

9 Q. Do those projects include identifying barriers at the  
10 point of contact between police and Aboriginal children to  
11 diversionary measures?

12 A. Yes, that's a big focus of ours.

13

14 Q. Have you also worked with Assistant Commissioner Wood  
15 on bail issues as they relate to Aboriginal young people?

16 A. That's correct.

17

18 Q. And have you also worked with Assistant Commissioner  
19 Wood in terms of policing strategies to reduce Aboriginal  
20 young people in custody?

21 A. That's correct.

22

23 Q. In addition to working with Assistant Commissioner  
24 Wood, do you also meet with police commanders from  
25 different districts around New South Wales?

26 A. I do.

27

28 Q. What's the purpose of those meetings?

29 A. The purpose of those meetings would be to cover the  
30 same subject matter, but because - to see those, the  
31 various initiatives that come up or to see the change  
32 happen, we need to also have a more localised approach. So  
33 it involves meeting with people that have - in the chain of  
34 command of police, have the capabilities to actually effect  
35 that change, so that's why we meet with them.

36

37 Q. And a final level at which you meet with police is the  
38 localised level: you actually meet with police on the  
39 ground; is that right?

40 A. That's correct.

41

42 Q. What's the purpose of that?

43 A. So local police, in terms of general police, police  
44 officers, are the ones that have to operationalise these  
45 changes that we're looking for or address these barriers  
46 that we're identifying, or the strengths that we're  
47 identifying, so it's really important that they come along

1 with the journey and they understand what that looks like  
2 on the ground.

3  
4 Q. What are you talking to them about?

5 A. So if we've been looking at an issue of bail, we  
6 might, on the ground, look at what is happening in that  
7 community in regards to specific bail conditions. We might  
8 explain why that might be problematic in terms of seeing  
9 young people unnecessarily bail refused or spending time in  
10 custody, and we might talk to them about how - a process  
11 whereby the ALS could assist in preventing that from  
12 happening.

13  
14 Q. Where have you gone to within the state to talk to  
15 police on the ground?

16 A. Lots of places, but the main ones would be Moree,  
17 where we've got some current work that we're doing;  
18 Walgett, a lot of work there; Dubbo, all the way out to  
19 Boggabilla, lots of different places, but they're the main  
20 ones.

21  
22 Q. And in Sydney?

23 A. But in Sydney, Mount Druitt is a big focus at the  
24 moment, but also South Sydney police as well.

25  
26 Q. I'm going to take you now to the submission which has  
27 been prepared by the Aboriginal Legal Service. You  
28 yourself were substantially involved in the preparation of  
29 this submission; is that correct?

30 A. That's correct.

31  
32 Q. The starting point for the submission is a comment  
33 that you make - and you do have the submission there in  
34 front of you?

35 A. I do.

36  
37 Q. Could I ask you to turn to page 3 of that submission,  
38 please. The submission deals with a number of matters  
39 relating to a specific service conducted by the Aboriginal  
40 Legal Service called the Custody Notification Service; is  
41 that right?

42 A. That's correct.

43  
44 Q. That's a service that was set up so that all  
45 Aboriginal people, children and adults, can get legal  
46 advice from a solicitor every minute and every day of the  
47 week throughout the year; is that correct?

1 A. That's correct. Legal advice, legal support, legal  
2 representation, yes.

3

4 Q. I'll take you to the details of the CNS and training  
5 and related matters very shortly. Can I start, though,  
6 with this comment that you make, and this is at page 3 of  
7 your submission. It is up on the screen and I wonder if  
8 the third-last paragraph might be zoomed in on, please. In  
9 the third-last paragraph you make this comment:

10

11 *In our experience, the majority of CNS*  
12 *calls proceed as they should: information*  
13 *provided to police that a client does not*  
14 *wish to participate in an interview is*  
15 *recorded in the Custody Management Record*  
16 *and the client is not interviewed. We*  
17 *recognise this and we recognise and*  
18 *appreciate the current, ongoing efforts of*  
19 *the NSW Police Youth Command to increase*  
20 *police diversion of children under the*  
21 *Protected Admissions Scheme.*

22

23 Is that right?

24 A. That's correct.

25

26 Q. What you do go on to say in the next paragraph is  
27 this:

28

29 *However, it is also our experience that*  
30 *police across NSW frequently interview*  
31 *children after receiving explicit*  
32 *instructions that the child does not wish*  
33 *to be interviewed. In our experience, this*  
34 *practice is long standing.*

35

36 Is that correct?

37 A. That's correct.

38

39 Q. You go on in the next paragraph, without me reading it  
40 word for word, to describe this practice as being one in  
41 the experience of the Aboriginal Legal Service as being  
42 both systemic and extremely concerning?

43 A. Absolutely.

44

45 Q. Is that correct?

46 A. Absolutely.

47

1 MR FERNANDEZ: Thank you. That can be taken off the  
2 screen.

3

4 Q. The Custody Notification Service was established in  
5 the early 1990s; is that correct?

6 A. That's correct.

7

8 Q. In 2022, as you note on page 4 of your statement -  
9 which doesn't need to be brought up - there were a total of  
10 27,807 custody notifications for Aboriginal people in  
11 custody; is that correct?

12 A. That's correct.

13

14 Q. And of those, 4,742 or approximately 17 per cent  
15 related to children aged between 10 and 17; is that  
16 correct?

17 A. That's correct.

18

19 Q. What you set out in the submission is the information  
20 that solicitors get from a young person when they speak to  
21 them; is that right?

22 A. That's correct.

23

24 Q. Is the process by which that happens that there is a  
25 solicitor who is rostered on for the CNS at all times?

26 A. That's right.

27

28 Q. A custody manager from anywhere in the state will call  
29 that solicitor and let them know that there is an  
30 Aboriginal young person or an Aboriginal person in custody;  
31 is that correct?

32 A. That's correct. They will call the CNS number and  
33 that goes through to the person on the shift.

34

35 Q. So bearing in mind that CNS deals with both adults and  
36 children, I'll focus very much on children because there  
37 are specific questions and specific steps that you take  
38 relating to children; is that right?

39 A. That's correct.

40

41 Q. In fact, there's a form that I will take you to very  
42 shortly. But what happens is the solicitor will then  
43 speak - will speak to the custody manager or the  
44 investigating officer; is that right?

45 A. Or both, ideally, but certainly the custody manager on  
46 each occasion.

47



1 Q. A solicitor will get a number of details and use that  
2 information to then give advice to the child; is that  
3 right?  
4 A. That's correct.  
5  
6 Q. The solicitor will then speak to the child himself or  
7 herself?  
8 A. That's correct.  
9  
10 Q. And will then give advice?  
11 A. Yes.  
12  
13 Q. And will usually ask for permission to pass on the  
14 child's instructions, then, to police and to support  
15 persons; is that correct?  
16 A. Yes, will often then speak to the support person and  
17 then maybe go back to the child, and then confirm again  
18 those instructions to police and then the police.  
19  
20 Q. When you say "the police", that's once again as often  
21 as possible with both the custody manager as well as the  
22 investigating officer?  
23 A. As often as possible, yeah. In my experience, it  
24 would be often the custody manager that those instructions  
25 were conveyed to, and the correspondence might be addressed  
26 to both.  
27  
28 Q. The correspondence is an email that's sent which  
29 confirms the instructions given by the child; is that  
30 correct?  
31 A. That's correct. Can I just clarify, if the OIC, or  
32 officer in charge, is also available at the time the  
33 custody manager is available, speak to both, but sometimes  
34 the officer in charge has gone off to do other things, but  
35 it is the custody manager that we make sure that we speak  
36 to.  
37  
38 Q. Is it frequently the case that if you don't actually  
39 have a chance to speak to the investigating officer, that  
40 you're, in fact, also getting the email address of the  
41 investigating officer so that follow-up notification can be  
42 sent to that person as well as the custody manager?  
43 A. That's correct.  
44  
45 Q. Just before going to the form, can I ask you about  
46 what training is provided to the solicitors who are  
47 rostered on for the Custody Notification Service? Does ALS

1 provide training both within the organisation as well as by  
2 other agencies to those solicitors?

3 A. Absolutely. In terms of the Custody Notification  
4 Service solicitors, they all have specific Custody  
5 Notification Service training, which will involve going  
6 through the handbook with them, work-shopping some  
7 different scenarios, having them watch phone calls, having  
8 someone that's available for their first couple of shifts,  
9 or even ongoing, in which to seek further advice or  
10 support.

11  
12 In terms of additional training, training that's  
13 offered to all our staff, and there are resource  
14 implications, so it's something we're getting better and  
15 better at, that making sure every person has this, but as  
16 well as internal cultural safety training, external  
17 cultural safety training and trauma informed training as  
18 well.

19  
20 Q. What's the trauma informed training about?

21 A. Unfortunately, and I don't think it will come as any  
22 surprise to anyone in this room, a lot of our - the  
23 majority of our clients have backgrounds of trauma and the  
24 trauma informed training is about making sure our  
25 solicitors are equipped to give advice and take  
26 instructions without adding to that trauma. So to do it in  
27 a trauma informed way, so to speak.

28  
29 Q. Are all the solicitors who are rostered on the CNS  
30 solicitors who are actually going to court as well?

31 A. Yes, they are.

32  
33 Q. In addition to the training that's provided to the  
34 solicitors rostering the CNS, is there ongoing supervision  
35 for those solicitors?

36 A. There's ongoing supervision. As I said, it's ongoing  
37 supervision as a CNS coordinator, who plays a role who is  
38 always available, and she's available 24 hours seven days  
39 a week in that role, poor thing. But then also even in my  
40 role, I'm available support. So just before I came in  
41 I got a call from a CNS solicitor about a murder matter, so  
42 I stood out the front and just supported through that.  
43 That's just part of our protocol.

44  
45 Q. What you're saying is there's always access to  
46 someone, to a solicitor who is more experienced, if the  
47 situation calls for it?

1 A. Always.

2

3 Q. I'm going to ask for the custody notification form to  
4 be put up on the screen. This is MTS97, and the barcode is  
5 8620408. Ms Hopgood, is it the case that all solicitors  
6 who are rostered on at the CNS have access to a computer  
7 and they are typing information relating to each call into  
8 a template; is that right?

9 A. That's correct.

10

11 Q. And this is saved for later reference; is that right?

12 A. That's correct.

13

14 Q. Is what you can see in front of you a printout of what  
15 that template looks out if you actually print the document  
16 out?

17 A. I would have to confirm that this is the exact  
18 template but it's the same content as to how it comes out  
19 when it prints - this is the form we created specifically  
20 for juveniles prior to going online, and then all this  
21 content is now reflected in the online version. As to  
22 whether it prints exactly like that, that may be a version  
23 of our paper copy.

24

25 Q. I wonder if we can just focus in on the top part of  
26 that document which contains all the boxes. You can see  
27 that there is information for all the details relating to  
28 the child, including the time of arrest and whether there's  
29 a support person and who that support person is; is that  
30 correct?

31 A. That's correct.

32

33 Q. What you then have are a number of options in terms of  
34 asking police about what it is that they are proposing; is  
35 that correct?

36 A. That's correct.

37

38 Q. Why is that an important detail?

39 A. So that we can give fulsome advice to young people and  
40 take full instructions.

41

42 Q. You talked earlier about diversion at the point of  
43 contact. Under that heading "Police proposing", there is  
44 mention of Young Offenders Act warnings and cautions and  
45 Youth Justice conferences; is that right?

46 A. That's right. And the reason it has the detail around  
47 it being an eligible offence, if it's not excluded will

1 they consider it and if not, why, is because in addition to  
2 providing fulsome advice to young people, we will take the  
3 role of advocating for a diversionary option with police.  
4

5 Q. In terms of the questions that you're asking of  
6 police, is what's set out in this form a guide to the CNS  
7 solicitor as to the order in which they're asking questions  
8 of police?

9 A. On this form it is a guide to the ordering, yes.  
10

11 Q. It's always going to be a matter for the individual  
12 solicitor, but what can be seen is, at the outset, there's  
13 an inquiry about whether there's a diversionary option  
14 available or whether a court attendance notice is going to  
15 be issued?

16 A. Yes. Without being on the call for every solicitor,  
17 I would still be very, very confident that every solicitor  
18 has to ask and begins with police by saying, "How do you  
19 want to deal with this young person today? How are you  
20 proposing to deal with them?" Because we can't proceed to  
21 give advice without knowing that.  
22

23 Q. That has to be the first step?

24 A. It has to be.  
25

26 Q. After asking about those diversionary options, if  
27 police propose a court attendance notice so you know  
28 there's going to be a court proceeding, the questions then  
29 turn to the making of an interview; is that right - whether  
30 police wish to conduct an interview?

31 A. That's right.  
32

33 Q. And then there's a question about bail, whether bail  
34 is to be granted or bail is to be refused or whether it's  
35 unknown?

36 A. That's correct.  
37

38 Q. Why is there an inquiry made at that stage about bail?

39 A. Often it is what young people are most concerned  
40 about. We need to give advice about bail. We need to give  
41 advice about how that process will work. If they're  
42 getting bail, we will be giving advice about the importance  
43 of complying with bail conditions. So again, it's part of  
44 our role of giving fulsome advice to the young person but  
45 also again, at that point, it's an opportunity to advocate  
46 for the young person.  
47

1 Q. When you say "an opportunity to advocate for the young  
2 person", what does that mean?

3 A. So that means that it's an opportunity to - if the  
4 police were looking at bail refusing, and let's say it was  
5 an offence that was an eligible Young Offenders Act  
6 offence, so more of the lower level of offending, but  
7 police weren't willing, for whatever reason, to deal with  
8 it by way of a diversionary option, that might be an  
9 example where we say, "Well, you know, the young person  
10 there, it's an offence, it's less serious, it's likely that  
11 when they go to court they would be granted bail, they're  
12 not looking at a custodial penalty for this offence,  
13 they've got their support person there who is willing to  
14 drive them home, bring them to court the next day, so be  
15 it." We would be putting to the police circumstances that  
16 would mitigate the risk of granting them bail and  
17 advocating for bail to be granted. If police are saying to  
18 us, "Oh, yeah, they're getting bail", then there's not  
19 a whole heap of advocacy going on in that space then.  
20

21 Q. Just to come back to something that I asked you at the  
22 very outset, one of the matters that you deal with at  
23 assistant commissioner level with Assistant Commissioner  
24 Wood is about bail and young people, and specifically about  
25 short-term remand; is that right?

26 A. That's right.  
27

28 Q. That's the difference between, or that's a comparison  
29 between, what would happen to a young person if they're  
30 refused bail by police as opposed to similar outcomes if  
31 refused bail by a court; is that correct?

32 A. That's correct.  
33

34 Q. Frequently, what is the first question that you'll get  
35 from a child when you speak to them? Is it about bail?

36 A. "Am I getting out?"  
37

38 Q. The form continues to then refer to alternatives to  
39 custody under the Young Offenders Act and whether those  
40 alternatives will be available; is that correct?

41 A. That's right. I don't have that up on my screen but  
42 I think I might actually have one on this last page.  
43

44 THE CHIEF COMMISSIONER: It's at the back of the report,  
45 I think, as annexure A.  
46

47 THE WITNESS: Thank you.

1                   Sorry, could you repeat that question?

2  
3           MR FERNANDEZ:   Q.   About halfway down the page there is  
4           mention of Young Offenders Act outcomes and whether they're  
5           available or not. This is the very front page of the  
6           form --

7           A.   Oh, yes.

8  
9           Q.   -- the custody notification form?

10          A.   Yes, thank you.

11  
12          Q.   There's then a referral to the protected admissions  
13          scheme - that's something you've had a lot to do with; is  
14          that right?

15          A.   A lot over the years, yes.

16  
17          Q.   Very briefly, what is the protected admissions scheme?

18          A.   The protected admissions scheme is a scheme that was  
19          developed between NSW Police, Legal Aid and other relevant  
20          stakeholders, I think the ALS also played a role in coming  
21          up with a scheme and a form that provides protection for  
22          young people when they make an admission pursuant to the  
23          Young Offenders Act. It provides that, if they make that  
24          admission, it can't be used against them in any court  
25          proceedings.

26  
27          Q.   If you turn to the next page, please, and if the next  
28          page can be brought up, at the very top of the page, what  
29          is set out is the advice given to the child, once again in  
30          order, and that's to ensure, is it, that all of this advice  
31          is covered in each call?

32          A.   That's right. So even though there's a column for  
33          "Other advice", that includes *doli incapax* advice, it's not  
34          necessary that that comes at the end but it is to make sure  
35          that, yes, you're starting off and you're being very  
36          systematic about going through everything that young person  
37          needs to know.

38  
39          Q.   It's also uniform, which ensures that all solicitors  
40          are giving the same advice to each child; is that correct?

41          A.   That's correct.

42  
43          Q.   Around about the middle of the page you can see  
44          "Instructions". Does that set out what the instructions  
45          are from the child to the solicitor?

46          A.   That's correct.

47

1 Q. Included in the instructions are these entries:  
2 whether the young person wants to exercise their right to  
3 silence; whether the young person consents to the solicitor  
4 speaking to the support person; and whether the child  
5 consents to relaying instructions to police - is that  
6 correct?

7 A. That's correct.

8

9 Q. There's also a box relating to speaking to support  
10 persons and it's to that topic I'll now ask you some more  
11 detailed questions. In addition to speaking to children,  
12 the CNS also is involved in speaking to support persons; is  
13 that right?

14 A. That's right, with the consent of the child,  
15 absolutely.

16

17 MR FERNANDEZ: Thank you. That document can be taken off  
18 the screen now.

19

20 Q. What do you speak to support persons about? What does  
21 the solicitor talk to the support person about?

22 A. So we talk to them again within the parameters of that  
23 consent, so you might have a young person that says, you  
24 know, "Yes", you know, "Talk to them but don't tell them  
25 about ABC", but within those parameters you would  
26 ordinarily talk to them about what our role is and why  
27 we're talking to them; talk to them about why the young  
28 person is there and what police have told us about the  
29 allegations and about how they propose to deal with it;  
30 talk to them about how the young person at this point has  
31 said they want to deal with it; talk to them about any  
32 questions or concerns they may have and what their role is  
33 in that process.

34

35 Q. You could only speak to a support person if the  
36 support person is actually there at the time that you're  
37 speaking to the child; is that correct?

38 A. That's correct.

39

40 Q. What about if the support person is not there at the  
41 time you speak to the child? What will a solicitor say or  
42 do about that?

43 A. So ordinarily, if police call and there's no support  
44 person there as yet, we would ask them to call us back when  
45 the support person is present. As I said, particularly in  
46 the context of advocating for a diversionary option,  
47 a support - someone needs to be present for the young

1 person to make that admission. So it's a necessary part of  
2 the process.

3

4 If it's something, though, let's say it's what is  
5 going to be a young person and it's a serious offence,  
6 still at that point we would speak to the young person and  
7 again explain who we are, that at this point we're waiting  
8 for their support person to come, but check that they're  
9 okay, check on their welfare, and also again, depending on  
10 the situation, might give them some information about what  
11 police have told us and might give them information about  
12 right to silence - or would, in the interim, give them  
13 information about right to silence, while we're waiting on  
14 this process.

15

16 Q. When I have used the term "support person", that could  
17 include parents, carers, guardians, people known to the  
18 child, or possibly total strangers; is that correct?

19 A. Support people in my experience have included all of  
20 the above and have even included a police informant on one  
21 occasion.

22

23 Q. A police informant was used as a support person in a  
24 child's interview?

25 A. That's right.

26

27 Q. It goes without saying, really, that you have no  
28 control over who the support person is; is that correct?

29 A. That's correct. Although we might - again, that would  
30 be an area of advocacy. So if we've had a co-accused  
31 person there as a support - a co-accused parent, for  
32 example, as a support person, sometimes that's been okay in  
33 terms of the scheme of things and not wanting to add to  
34 delay for the young person; but other times it has been  
35 incredibly inappropriate and we have advocated for  
36 a different support person and put on the record with  
37 police that we say it's an inappropriate support person.

38

39 Q. Can you give some examples other than the one you just  
40 gave --

41 A. Yeah.

42

43 Q. -- about when the support person might be  
44 inappropriate?

45 A. Okay, when they might be - or when I have advocated  
46 for --

47



1 Q. Yes.

2 A. So definitely in the context of a co-accused.

3 A victim of an alleged family violence, DV, matter that,  
4 that wasn't appropriate, particularly in the context of  
5 a care placement, if you've got a young person in care and  
6 there's alleged to be an offence that has occurred within  
7 the home and you've got a carer there from that placement,  
8 that's not always appropriate. So they would be the most  
9 common examples that come to mind.

10

11 Q. It's up to the child whether the child accepts your  
12 advice or not. That's always the case, isn't it?

13 A. Absolutely.

14

15 Q. Are you aware through your own calls and cases as well  
16 as those of other solicitors of situations where the child  
17 has spoken to a support person and has then changed their  
18 mind?

19 A. I am aware of that, yes.

20

21 Q. You actually have personal experience through calls  
22 that you've been involved in in terms of one situation  
23 where it might be parents talking to a child and there's  
24 a change of decision made about them taking part in an  
25 interview; is that correct?

26 A. That's correct.

27

28 Q. What are the issues - what are you hearing from  
29 parents when you do find out --

30 A. Yeah, certainly.

31

32 Q. -- about the type of conversation that takes place?

33 A. Certainly, and I should preface it by saying it's  
34 a change of mind but it's not - it's not a young person  
35 coming on the phone and saying, "Look, I've thought about  
36 this, I've considered it, I'm changing my mind", it's, "Mum  
37 wants me to", or, "Well, everyone says I should, I'm doing  
38 it." It's that kind of change of mind. I can't think of  
39 any example where a young person got on the phone and said,  
40 "No, fully considered this and this is what I want to do."

41

42 So it would be when a parent, in my perception, has  
43 felt like it's the right thing to do, and the right thing  
44 to do from a parenting perspective. So it'll be about  
45 telling the truth. "I've raised my children to tell the  
46 truth." And what my first training was in the hotline all  
47 those many, many years ago, was to say to parents, "This is

1 not about good parenting. There is a distinction between  
2 good parenting and what you do at home and protecting  
3 someone's legal interests, and our role is to protect  
4 a young person's legal interests in this circumstance, and  
5 your role as a support person is to do the same." So it's  
6 often that context.

7  
8 I think at the police station, too, parents will say  
9 to me, have said to me on many occasions, "The police have  
10 said to me that they should do it", that the kid should do  
11 it, "my child should do it". So I'll often say, "Well,  
12 then blame me. You go in and you say, 'I would love them  
13 to do the interview but the lawyer has told me not to and  
14 I'm going to follow that legal advice'".

15  
16 I also, just for completion, should let you know that  
17 what I often say in those circumstances as well is, "This  
18 interview does not have to happen today." We really need  
19 to remember, the interview - by saying no, at that time in  
20 a highly-charged environment, doesn't mean that there has  
21 to be no tomorrow. So I will say to parents, "Look, this  
22 is a really hard situation you're in. It's all just  
23 happened. Everything, as I said, is highly charged. You  
24 can say - you can support your child to stick with their  
25 advice and their instructions, which has been not to be  
26 interviewed, and we can organise a meeting for you to come  
27 to our office to talk to our solicitors and then, if the  
28 young person wants to do an interview, they can go and do  
29 an interview. 'No' doesn't mean no for evermore; it means  
30 no at that time."

31  
32 Q. Can I take you to a specific part of the submission  
33 which talks about the role of the support person. If you  
34 have your report, if you could go to page 16, please.  
35 I wonder if this page can be brought up on the screen. It  
36 is 8620404.

37  
38 In the first paragraph on that page, you refer to  
39 a situation where support people are inappropriate, and  
40 you've given some evidence about that?

41 A. Yes.

42  
43 Q. In the second paragraph, what you say is this:

44  
45 *Issues have also arisen where a support*  
46 *person is inadequately informed about their*  
47 *role, or is unable to exercise agency in*

1                    *performing that role effectively.*

2  
3                    What do you mean by "unable to exercise agency"?

4                    A.    So again, unfortunately, for a lot of our clients, if  
5                    they've got a family member that may be there as a support  
6                    person, that family member may also be feeling very  
7                    overwhelmed by the process. The example that comes to mind  
8                    is an interview where a very young person, about 11, was  
9                    being called "Boy" throughout the interview. He was asked  
10                   if he was born in Australia, he was a young Aboriginal boy  
11                   from a regional area, asked if he was born in Australia,  
12                   implied that he might have his jacket taken off him but it  
13                   was cold. At the end, him and his sister were asked  
14                   whether they had anything to whinge about in the way the  
15                   interview was conducted and she said, "No", now, she  
16                   answered "No, no, no. There were no problems with the  
17                   interview." That's an example of why someone may not feel  
18                   that they've got agency in performing that role, because  
19                   of - you can take it right back to, you know, the  
20                   historical context of colonisation and police, historical  
21                   policing relationships with community, Aboriginal  
22                   communities.

23  
24                   That might be one. There might be others that came up  
25                   when I was Legal Aid that have been around English as  
26                   a second language, so in terms of engaging in the process  
27                   and understanding the process. Inadequately informed -  
28                   I would go to, I mean, if you have a look at the form that  
29                   support people get, it's quite high-level legalistic  
30                   language. So again, you know, people sign that, they're  
31                   there. That's what they see their role as, is to be,  
32                   sometimes, compliant in the process. But do I think that  
33                   they're always adequately informed? Absolutely -  
34                   absolutely not.

35  
36                   Q.    You've talked about the form that people are given,  
37                   which is in "high-level legalistic language", as you've  
38                   described. What could be done to improve that form in  
39                   order to make it more understandable to people?

40                   A.    Yeah, plain English is a start. I should say that,  
41                   again, there's a variety of working groups that have been  
42                   working on this very issue for many, many years. I'm part  
43                   of a Justice Advocacy Service working group, which has been  
44                   looking at that issue and has put through to police - gosh,  
45                   I can't think how long ago now, maybe 18 months ago - some  
46                   suggestions around how it could be more appropriate, both  
47                   in terms of people being able to understand it, culturally

1 safe and actually more akin to what the courts have said is  
2 the role of the support people in terms of speaking up and  
3 assisting the young person.  
4

5 Q. The Commission has before it an exhibit which is the  
6 actual form filled out by the support person in the case  
7 before the Commission. I'm going to ask for that to be  
8 placed up on the screen, please. It's MTS64. The barcode  
9 is 8543560. If we could just zoom in on the top part of  
10 that form, please. When you talked about the information  
11 given to a support person, is this the form that you're  
12 referring to?

13 A. That's correct.  
14

15 Q. I'm not going to read out this form. That sets out  
16 what you've just described as information, although  
17 information that might not be easily understood by  
18 everyone.

19 A. Easily understood and engaged with. Often when  
20 police - again I've seen it so many times on footage - have  
21 spoken to the support person and told them about why the  
22 young person is being arrested, the support person often  
23 turns to the young person and says, "Did you do it?" You  
24 know, they're straightaway into that role of, you know,  
25 parent, and shock. So I think it's both understand it, but  
26 even the way the process happens, actually engage with it  
27 and consider it and consider the significance of their role  
28 and take off their parent hat or their council worker [sic]  
29 hat or their police informant hat perhaps and engage with  
30 the process.  
31

32 THE CHIEF COMMISSIONER: Q. Is this actually  
33 a prescribed form under the LEPR Act or regulation, do you  
34 know?

35 A. I think there's a - and I may be wrong - my  
36 understanding is there's a process that's prescribed in the  
37 necessity of a form, but this form itself can be changed.  
38 So we've got a form that we've put forward, as  
39 a suggestion, and there has been no barrier in terms of  
40 actually working on a form.  
41

42 Q. So it's one of those instruments which is less formal  
43 in the sense that it can be amended as a result of  
44 practical suggestions for improvement. How long has it  
45 been in this form, do you know?

46 A. As long as I can remember. Yes. Sorry, I mean, there  
47 might be amendments over the years. I think I'd have to

1 take that on notice, Chief Commissioner, to come back to  
2 you on that.

3

4 Q. No, that's all right. It has been around for a while.  
5 Has it always had the NSW Police logo on it?

6 A. As far as I recall.

7

8 Q. Is any committee or group of which you're presently  
9 a member working on improvements for this document?

10 A. Absolutely. The Justice Advocacy Service group that  
11 I'm part of also has Legal Aid representatives, ALS  
12 representatives. Justice Advocacy is a service that works  
13 with people with cognitive impairments and children with  
14 cognitive impairments in the process. So, yes, that group  
15 has been actively working on this for a significant period  
16 of time. My understanding - I'm now no longer specifically  
17 sitting on that working group - is that when I was on it we  
18 had sent it to the police for their consideration.

19

20 Q. In the end, it's intended to perform a purpose which  
21 is consistent with the legislation. It's a formula  
22 which not just the police but those administering the  
23 courts and the justice system generally should be content  
24 with?

25 A. Correct.

26

27 THE CHIEF COMMISSIONER: Yes.

28

29 MR FERNANDEZ: Q. As an estimate, how long ago was it  
30 that the form from the Justice Advocacy Service was sent  
31 over to police? Is it years?

32 A. It's over 12 months.

33

34 Q. Has there been any contact by NSW Police, the relevant  
35 person, with the Justice Advocacy Service about the  
36 amending of that form?

37 A. Yes, there's a person - there's a representative from  
38 the police on that group as well, I should say. I think,  
39 without getting further clarification, I should check in  
40 terms of being able to share what their response was, in  
41 the confines - you know, I would have to check the terms of  
42 reference of that group, yes, but yes, there is someone on  
43 that, on that group, and I can say that it was provided to  
44 the police and there was an initial response and I would  
45 have to check where that's at now.

46

47 Q. That exhibit can be taken off the screen, please. I'm

1 going to ask that part of page 16 of your submission be  
2 placed back on the screen, please. That's 8620404.

3  
4 In the middle paragraph of the page, as we're now  
5 looking at it, Ms Hopgood, the ALS refers to a case which  
6 is in evidence before this investigation of *Neen*, which is  
7 a case where the court considered the obligations,  
8 statutory, legal obligations on custody managers and what  
9 their requirements were to advise suspects about the scope  
10 of the role of the suspect's support person. That was one  
11 of the matters that was referred to; is that correct?

12 A. That's correct.

13  
14 Q. What you conclude there in the last paragraph relates  
15 to the change of mind - is that right - what happens when a  
16 solicitor has given advice to a child, the child has given  
17 instructions that they don't wish to be interviewed, they  
18 then speak to a support person and there's a change of  
19 mind? What you note in the submission is that:

20  
21 *... any change of mind about participating*  
22 *in an interview during [that] same period*  
23 *[in] police custody should lead the police*  
24 *to contact the ... lawyer and confirm*  
25 *whether that, in fact, reflects the child's*  
26 *instructions.*

27  
28 Is that correct?

29 A. Absolutely. Can I just add to that because, on  
30 reflection and when I started to look at some of these  
31 matters again in detail, what I saw was sometimes it is -  
32 it's not so much a change of mind to conduct an interview,  
33 to participate in an interview; it might be a failure to  
34 object to being taken into an interview room, and let's  
35 say we did - let's say we say that's consenting, consent to  
36 be taken into an interview room, and then the interview  
37 just happens. So I actually think I would now include on  
38 that any change of mind in regards to what we put in that  
39 email - participating in an interview, recording a refusal  
40 on an ERISP, being taken into the interview room - I think  
41 requires a further phone call.

42  
43 Q. What you're referring to is the situation where even  
44 after advice is given and relayed, instructions are relayed  
45 to police, that police still go ahead and take children and  
46 put them in front of a camera and interview them; is that  
47 right?

1 A. That's correct. Or two days ago we got one come  
2 across my desk where they showed photos and the young  
3 person started saying, "Oh, that is me, but" - it was an  
4 interview, it became an interview.

5  
6 MR FERNANDEZ: Thank you. That can be taken off the  
7 screen.

8  
9 Q. I've been asking you questions about the role of the  
10 support person and the variety of people who might take on  
11 that role. Is it the case that you have been involved in a  
12 scheme for training people to be in the role of a support  
13 person?

14 A. We've been involved - we've received funding, we put  
15 forward a proposal, as part of our Closing the Gap  
16 proposals, that included a component to train,  
17 collaboratively train, support people to ensure that that  
18 was a truly independent support person who could act  
19 appropriately in the young person's interests.

20  
21 Q. What stage is that at? Is that really at the very  
22 preparatory stages?

23 A. Very, very preparatory. It was the previous  
24 government as well in terms of - but it was an agreement,  
25 an announcement, so it had been announced as part of the  
26 package of the previous government, and, you know, gone  
27 through contracts and what-not, but yes, in terms of then  
28 the next steps, that hasn't happened yet. And we would be  
29 reaching out to police and other stakeholders, because our  
30 view is that a support person is not - it's not an employee  
31 of the police, it's not an employee of the ALS, it's not an  
32 employee of anyone; it's someone - and that's why that  
33 training needs to be collaborative.

34  
35 THE CHIEF COMMISSIONER: Q. And it's a person who is  
36 performing a type of statutory function?

37 A. Yes.

38  
39 Q. It's not someone for the police to pick or --

40 A. No.

41  
42 Q. It should be someone who can be truly independent and  
43 understand the functions and carry them out in the  
44 circumstances?

45 A. That's right, Chief Commissioner. And the other  
46 thing, I don't think I have mentioned yet, is the Children  
47 (Criminal Proceedings) Act actually provides for a child

1 over 14 to consent to that support person, but I don't  
2 think that that's really part of the process. But it's  
3 there. It's their statutory right.

4  
5 MR FERNANDEZ: Q. I'm about to take you to some case  
6 studies that are referred to in the submission. But just  
7 before I do, you've had a chance to go back and look at the  
8 records relating to Mr Whitting, is that right, in terms of  
9 the number of calls he had taken as part of being on the  
10 CNS up until 12 September last year?

11 A. That's correct.

12  
13 Q. And the records show that by that date, he had taken  
14 556 calls; is that correct?

15 A. That's correct.

16  
17 Q. Ms Hopgood, could I ask you to turn to page 17 of your  
18 submission. I'm not going to ask for it to be brought up  
19 on the screen. This investigation has heard evidence about  
20 the resistance by custody managers to record the refusal of  
21 the interview on the custody management records. Just  
22 looking at what you've set out there, what are some of the  
23 experiences of yourself and other Aboriginal Legal Service  
24 solicitors in terms of having the refusal to be interviewed  
25 recorded on the custody management record?

26 A. Well, again, just to preface it by saying that in the  
27 majority of cases, there isn't an issue. But in those that  
28 there is, it ranges from an attitude of irritation to an  
29 absolute refusal and communicating that refusal to the  
30 solicitor.

31  
32 Q. You referred to a specific example where there has  
33 been an outright refusal --

34 A. Mmm-hmm.

35  
36 Q. -- where the custody manager, in that one particular  
37 case when asked for details, told the solicitor what their  
38 email address was, but would divert any email from the  
39 Aboriginal Legal Service straight to trash; is that  
40 correct?

41 A. That's right, yes.

42  
43 Q. And when asked why, gave this answer, "Because that's  
44 what I do with those emails. I don't care about your  
45 advice. I'm making my own note that he's spoken to you,  
46 you've spoken to someone, to mum, that it's no dramas, but  
47 won't be putting anything in his custody management



1 record"; is that correct?

2 A. That's correct.

3

4 Q. Now, I'm not suggesting that's a common thing or  
5 anything beyond the particular case, but that's an example  
6 of the type of resistance that is experienced; is that  
7 correct?

8 A. That's correct, and the one after that that begins:

9

10 *I understand that you may have wished to*  
11 *communicate to us your advice to your*  
12 *client to somehow influence how we would*  
13 *then go about our duties ...*

14

15 That solicitor came to me - she forwarded that email to me.  
16 She was quite distressed by it, actually. She was - you  
17 know, she was doing her job. And the tone of the whole  
18 email was quite combative, and it was actually from a very  
19 senior officer in that command. So the solicitor - sorry,  
20 the police officer that had taken the call had forwarded  
21 our email to their superiors, and it was the superior that  
22 was writing back.

23

24 Q. One of the issues that you've experienced is, among  
25 some police, a negative attitude by police towards  
26 solicitors both at Legal Aid and the Aboriginal Legal  
27 Service giving advice to children; is that right?

28 A. That's right.

29

30 Q. What have you been told about that?

31 A. So an expectation that it will be, "Don't say  
32 anything", without a fulsome understanding as to why that  
33 may be in a certain case. And again on that point, I've  
34 offered many times to come and talk to police and do a CNS  
35 call - not a real one but workshop a CNS call, talk about  
36 why we might give that advice. So that's one of the  
37 attitudes, that it's a fait accompli that that's what we're  
38 going to say; that we are intervening in them trying to get  
39 their job done in a very unhelpful way.

40

41 That's kind of what comes across a lot. And I was  
42 thinking about it, how it permeates, then, how you relate  
43 to police on those calls. So I couldn't recall a specific  
44 example of someone refusing specifically to me that they  
45 refused to record the advice, but I have had that kind of  
46 attitude come through, and so you find yourself trying to  
47 placate it. So I can think of many - my attitude on the

1 phone would be to be very friendly. I will say things  
2 like, you know, "We've all got a job to do. This is what  
3 my advice is. This is what I'm asking you to do", and kind  
4 of preface, put those kind of comments in, because it is  
5 prevalent enough that you come to - you're waiting for it.  
6

7 Q. Ms Hopgood, this investigation has heard a lot of  
8 evidence about police interviewing children even after the  
9 refusal to be interviewed. I'm going to ask you about that  
10 by reference to a specific case study that's referred to in  
11 the Aboriginal Legal Service submission. This is at  
12 page 12 of your submission.

13 A. Mmm-hmm.  
14

15 Q. I won't ask for the page to be brought up. Can  
16 I summarise this case with the name that you have used  
17 anonymised as being Luke. This was a child who was  
18 10 years old, who lived out in the country; is that right?

19 A. That's correct.  
20

21 Q. What happened is a solicitor from the CNS spoke to  
22 Luke, gave him legal advice, he wished his instructions to  
23 be passed on that he did not wish to be interviewed, and  
24 that was passed on to police as well as - verbally as well  
25 as through an email sent to the custody manager; is that  
26 right?

27 A. That's correct.  
28

29 Q. Looking at your records, you were able to establish  
30 that four and a half minutes after that call and the email  
31 was sent, Luke was actually taken in to the interview room;  
32 is that right?

33 A. I think. I think that's right. I'm just trying to  
34 think of the wording there.  
35

36 THE CHIEF COMMISSIONER: Q. It's the third-last  
37 paragraph in the coloured section, I think.

38 A. Yes, he was taken into the interview room about 11.30,  
39 very soon after. Yes.  
40

41 MR FERNANDEZ: Q. He was then separately asked by the  
42 police officer whether he spoke to Legal Aid and Luke said  
43 he had. And then, in short, the officer said to him, these  
44 words, "That advice is between them and you guys, but  
45 you've come in here by your own free will, so I just want  
46 to make sure that you are happy to talk to us. Are you  
47 happy to talk to us - yes or no." In fact, what Luke said

1 was "No"; is that right?  
2 A. That's correct.  
3  
4 Q. Police then went on, "If we keep asking you questions,  
5 are you going to answer?" And in fact a number of questions  
6 continued after that point in time; is that correct?  
7 A. That's correct.  
8  
9 Q. Ultimately, that interview was excluded when the  
10 matter went to the Children's Court. There are two details  
11 about Luke that you've been able to determine by going back  
12 to the actual records relating to this child; is that  
13 correct?  
14 A. That's correct.  
15  
16 Q. The first relates to a request to make a note in the  
17 custody management records; is that correct, Ms Hopgood?  
18 A. That's correct.  
19  
20 Q. What was the request made?  
21 A. The request was made to record those instructions in  
22 the custody management record, and if I can read what was  
23 actually recorded.  
24  
25 Q. Yes, please.  
26 A. It was a solicitor's name, is the first word, then it  
27 says:  
28  
29 *... from ALS wanted a note made on the CMR*  
30 *confirming the PIC --*  
31  
32 "person in custody" I suggest that stands for --  
33  
34 *wants to exercise his right to silence. He*  
35 *doesn't want to participate in an interview*  
36 *or any other investigative procedure. She*  
37 *confirmed this would be sent in an email to*  
38 *me to be passed on to the OICs.*  
39  
40 Q. Looking at the facts for Luke when they were prepared  
41 by police, were those details included in the facts?  
42 A. No.  
43  
44 Q. You have the facts there. If you could just read the  
45 relevant part of the facts relating to that contact with  
46 police, please?  
47 A. Certainly:

1  
2           *He then spoke to Aboriginal Legal Aid over*  
3           *the phone where he received certain advice.*  
4           *The young person was then offered the*  
5           *opportunity to be interviewed which he*  
6           *accepted. Police then conducted an*  
7           *electronically recorded interview with the*  
8           *young person in relation to ...*

9  
10       and so on.

11  
12       Q.    The details that were requested to be put on the  
13       custody management record were not included in the facts?

14       A.    No, not at all. And I should just say the last part  
15       is:

16  
17           *The young person made full admissions to*  
18           *these offences. In addition, police had an*  
19           *extensive conversation with the young*  
20           *person about right and wrong and the*  
21           *consequences of certain actions. Police*  
22           *believed the issue of doli incapax was*  
23           *sufficiently negated.*

24  
25       Q.    Another issue that this investigation has received  
26       evidence about is the potential use of bail as something  
27       which will give a child to an incentive to take part in an  
28       interview. That's something you yourself and solicitors at  
29       the Aboriginal Legal Service have had experience with; is  
30       that right?

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

38  
39           Interestingly, as part of that short-term remand work  
40       I do, what has come through from the two - actually,  
41       I won't name them, but some of the pilot locations we're  
42       working at, is police saying, one of the barriers to bail  
43       is young people not being interviewed. And I don't  
44       understand how that could operate. When I've investigated  
45       it a little bit more, I think it's when police have thought  
46       that not being interviewed means they can't say who they  
47       live with or who they would be going home to if they got

1 bail. But it does seem to be an attitude that police might  
2 actually put to young people in practice quite frequently,  
3 that bail is connected to interviewing.

4  
5 Q. What you have noted in your submission, if you can  
6 just turn to page 14, please - I won't ask for it to be  
7 brought up on the screen - about just under halfway down  
8 the page, there is a note made by a solicitor which says  
9 this:

10  
11 *I have spoken to clients on the CNS charged*  
12 *with serious offences who insist on*  
13 *participating in formal questioning anyway*  
14 *because police have told them they won't*  
15 *get bail if they refuse to interview.*

16  
17 Is that right?

18 A. That's correct.

19  
20 Q. The quote goes on:

21  
22 *A young person who is desperate to get out*  
23 *of a charge room won't always be receptive*  
24 *to legal advice about this.*

25  
26 A. That's right. Young people are concerned with the  
27 immediacy of the situation before them and they want to go  
28 home, and so if someone has suggested to them this is how  
29 they get bail, that's front and centre.

30  
31 Q. Ms Hopgood, there are two last areas that I'm going to  
32 ask you questions about. Firstly, in your time working for  
33 Legal Aid and now the Aboriginal Legal Service, what are  
34 the changes that you have noticed in terms of dealings with  
35 police, young people, children with police, and solicitors  
36 with the police?

37 A. Sadly, I haven't seen any change in the frequency of  
38 these types of incidents occurring and police going behind  
39 legal advice, legal instructions that a young person  
40 doesn't wish to be interviewed. I couldn't say I've seen  
41 any change in that frequency from the time of my admission.

42  
43 I will say again, because I think the credit is  
44 deserved, that I do certainly see a youth command that is  
45 willing to try and do things differently.

46  
47 Q. You were the solicitor involved in a case that went to

1 the Supreme Court called *FE*; is that correct?

2 A. That's correct.

3

4 Q. That case is before this investigation in evidence.  
5 Just very briefly, in that case, there was a 15-year-old  
6 child who police spoke to when they were contemplating  
7 charges - a charge of murder; is that right?

8 A. That's correct.

9

10 Q. There was one interview with that child where there  
11 was no warning and no caution given but an interview  
12 undertaken?

13 A. That's correct.

14

15 Q. And relevant to you, there was another interview where  
16 that child spoke to you and you gave that child advice not  
17 to take part in an interview; is that correct?

18 A. That's correct.

19

20 Q. Ultimately, the advice that you gave was not acted  
21 upon at all by police and wasn't communicated along the  
22 line; is that correct?

23 A. That's correct.

24

25 Q. There was a comment made in the judgment that the  
26 relevant police officer in that case acted as if that child  
27 had not exercised her right to silence; is that right?

28 A. That's correct. Can I just say, because you asked  
29 about whether the police were contemplating murder, at the  
30 time they spoke to me, which is - which influenced how  
31 I spoke to the young person, at the time they spoke to me,  
32 the officers very clearly said that they were investigating  
33 an affray, and it was only when I asked questions about any  
34 injuries to anyone, that I found out that there was  
35 a deceased in that affray, and knew that then there was  
36 a possibility of a more serious charge such as murder,  
37 which is, in fact, what happened. But I wasn't advised of  
38 that.

39

40 Q. Let's go back to 2012. That case involved the  
41 interviewing of a child after a refusal had been noted and  
42 advice had been given. Is your evidence that those issues  
43 continue really right up until now?

44 A. Absolutely.

45

46 Q. There have been some changes, but changes that don't  
47 particularly address those aspects of systemic issues which

1 I've addressed with you; is that right?  
2 A. That's right. There's a lot of focus at the moment on  
3 the protected admissions scheme, as I indicated before, and  
4 looking at barriers to diversion, and one solution to that  
5 is to mandate the use of the protected admissions scheme  
6 rather than make it a strong suggestion for police. So  
7 that's where I see a real change in attitude and a real  
8 movement from talking about the same issues we've been  
9 talking about for years and years and years to actually  
10 effecting change.

11  
12 MR FERNANDEZ: Thank you. Those are my questions, Chief  
13 Commissioner.

14  
15 THE CHIEF COMMISSIONER: Yes. Does anyone wish to seek  
16 leave to ask questions?

17  
18 MR KERKYASHARIAN: If I may, Chief Commissioner.

19  
20 THE CHIEF COMMISSIONER: Yes, Mr Kerkyasharian.

21  
22 **<EXAMINATION BY MR KERKYASHARIAN:**

23  
24 MR KERKYASHARIAN: Q. Ms Hopgood, I take it you have  
25 a pretty good understanding of the workings of part 9 of  
26 LEPR, how it operates to extend detention effectively for  
27 investigative purposes?

28 A. That's correct.  
29

30 Q. You know that there's a not really a hard six-hour cap  
31 but there's a six-hour cap subject to some wait times and  
32 the ability to apply for further times?

33 A. Yes.  
34

35 Q. But also, there's this idea of a reasonable time  
36 having regard to the circumstances that's the actual  
37 operative cap under part 9?

38 A. Yes.  
39

40 Q. In your experience or in the course of any discussions  
41 that you've had with the various agencies, sorry, with  
42 various police officers, do you know if there's a police  
43 officer who's responsible for determining what that  
44 reasonable time is?

45 A. I'm really - it's been a long time since I have been  
46 in court and engaged with this at this level. Well, the  
47 custody manager would be responsible for the welfare of the

1 young person, but I'm sorry, I can't refer to beyond that.

2

3 Q. No, that's okay. Do you know, in the course of the  
4 CNS calls, is there any discussion of what investigative  
5 procedures might occur? I mean, there's obviously  
6 discussion about an interview. Do they also ask, or is  
7 there any discussion about, say, forensic procedures that  
8 might occur?

9 A. Yes, on occasion there's discussions or we might seek  
10 confirmation that that's not something that's being  
11 discussed today, but yes, sometimes that comes up.

12

13 Q. Other than those, have you ever experienced or heard  
14 of any other kind of investigative procedures being  
15 discussed over the CNS hotline?

16 A. Identification issues, so line-up. They're the main  
17 two, line-up or a forensic procedure, DNA application for  
18 a buccal swab.

19

20 Q. Is it fair to say in the vast majority of the CNS  
21 calls, let's say firstly involving children, it's really  
22 only going to be an interview or a forensic procedure  
23 that's going to happen?

24 A. Oh, absolutely, in the vast majority, it's only really  
25 about an interview.

26

27 Q. Only about an interview?

28 A. Yes. I think I have had in all years, two urgent  
29 applications for a forensic procedure in regards to taking  
30 a hair sample, and I can think of two.

31

32 Q. So I've asked you that in relation to children. What  
33 about adults? Is it still the majority of those where it's  
34 really just an interview?

35 A. I wouldn't feel equipped to answer that. I haven't -  
36 I have only done one CNS shift. I can certainly make those  
37 inquiries, but in the interests of being absolutely correct  
38 in what I say, I take that on notice.

39

40 Q. I appreciate that. Once it is communicated to the  
41 police that there is not going to be an interview, or that  
42 the young person or the person doesn't want to be  
43 interviewed, is there still an expectation that a support  
44 person is going to come, if they're not already there?

45 A. So once it has been communicated that they don't wish  
46 to be interviewed?

47



1 Q. Yes.

2 A. So as I think in terms of my evidence before,  
3 normally, that conversation with the young person, those  
4 instructions would be waiting on the support person to be  
5 there. Depending on the urgency of the situation, it may  
6 be that you've given some advice and passed something on to  
7 police in terms of instructions to not be interviewed, but  
8 we would always need to be called when the support person  
9 was there to confirm that and to go through that.

10

11 Q. Just to kind of unpick that a little bit, is it the  
12 case that the advice about whether or not to have  
13 a conversation is given in the absence of a support person?

14 A. Can it be?

15

16 Q. Yes, can it - well, is that done as a matter of  
17 practice?

18 A. If that's what the young person wanted. So again, if  
19 the young person said, "You have got consent to speak to  
20 the support person", often, in a practical sense, the  
21 support person would be present with the young person in  
22 the same area. So it's a one-on-one conversation with the  
23 young person that is over the phone, so the support person  
24 is not part of that conversation. But they might be  
25 present in the same vicinity.

26

27 As I said before, if there was a situation where the  
28 support person wasn't there, they weren't going to be able  
29 to get one, then absolutely, you'd have that conversation  
30 with the young person to give them still that information  
31 and take those instructions, give it --

32

33 Q. And pass that on?

34 A. And then pass that on to the police. Again, there  
35 might be a rare, just for completeness, situation where  
36 although a young person can't relinquish their right to  
37 a support person, that, let's say, it's a matter where it's  
38 clear cut, a serious matter, police have said they're  
39 charging, the young person is not getting bail and you're  
40 looking at a situation where court might stop taking fresh  
41 custodies, then I have, on occasions, said to the police,  
42 and put in writing, "Please process this young person and  
43 get them before the court. They don't wish to" - you know,  
44 the normal - "don't wish to be interviewed, but we do not  
45 want to wait for a support person who is not going to  
46 change the outcome. We need to get that young person  
47 before the court and processed."

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Q. Now, the Aboriginal Legal Service has services that assist people in finding support persons, do they?

A. No.

Q. What about --

A. We have funding to start looking at - as I said, to look at a process of having appropriate support people in training.

Q. Is there still field officers?

A. There's field officers.

Q. Do they ever help in finding support people?

A. Yeah. So on an ad hoc basis yes, a field officer might assist with calling a family member, or let's say in a regional area police can't get in contact with a support person, can't get in contact with someone, we will assist in that. Sorry, I should clarify that, absolutely can assist in that way.

Q. Do they start doing that after the person has been taken to court or does that start sometimes when they're still at the police station?

A. So the role of a support person at the police station, would have to start while they were at the police station, if that's the way we were assisting. And just to clarify again, we don't, as a service, provide support people ourselves, but we can assist with finding a suitable support person.

Q. But the field officers also find support people when they come --

A. Yes.

Q. When, say, a child comes to court, the field officer might make some attempts to find a support person for court?

A. The field officer and the solicitor can find - make attempts to make sure a young person has support there. The field officer can perform that role at court as the support person, just not at the police station.

Q. Can I just ask you this: in the circumstances where you have given - the young person has said, "I'm not going to an interview", and that has been communicated to the police, do you think in those circumstances - leaving aside

1 the lawfulness of doing so - that it's a good idea to still  
2 wait for a support person to come to the police station, or  
3 should they just go before the court as quickly as  
4 possible?

5 A. I think there's no one answer to that question.  
6 I think that a support person fulfills a very important  
7 role, both in terms of offering support in the way we  
8 understand the word "support" to a young person who is  
9 going to be in that situation at the police station - if  
10 they're an appropriate support person, that is.

11  
12 I think a support person also fulfills a legislative  
13 role in terms of the Young Offenders Act. But again, in a  
14 circumstance where there's delay, that also has to be  
15 considered. There's a lot of different moving parts to  
16 consider when you're thinking of a young person's interest,  
17 and if delay is going to be adverse to their interests,  
18 then the balance changes a bit.

19  
20 So yes, in certain circumstances, as I indicated, it  
21 would not be in a young person's interests to sit waiting  
22 for a support person before things could progress.

23  
24 I have seen young people miss court cut-off, then be  
25 taken into detention overnight because police have bail  
26 refused while they have been waiting on a support person,  
27 who, I should say, in some of those examples hasn't ended  
28 up attending, a young person then has been processed, taken  
29 into detention, all that that entails, including a partial  
30 clothes search, all that that involves, and then gets  
31 before the court the next day and is granted bail. So if  
32 we can avoid that situation, then yes, I wouldn't suggest  
33 that we'd be sitting there waiting for the support person  
34 in that example.

35  
36 THE CHIEF COMMISSIONER: Q. Could I ask you this, in  
37 terms of the practicalities of that: the lawyer is on the  
38 phone, who is giving the advice, and perhaps the court  
39 hours are drawing to an end. For practical purposes in the  
40 Children's Court setting, is there a duty solicitor scheme  
41 so that there will be an actual solicitor of the court who  
42 could represent the young person before the magistrate, if  
43 you can get it in before the court closes, or does that  
44 involve some arrangement so that a solicitor actually  
45 attends the court for that purpose, or is that question so  
46 general that it can't really be answered?

47 A. No, it can be answered. Both, Chief Commissioner.

1 Certainly at the metro courts, courts will have a duty  
2 solicitor there who will still be there at that time. Even  
3 in our regional courts, there might be non-specialist  
4 children's courts, you will still have a duty solicitor  
5 that has been there, but if all the other matters have  
6 finished they may have gone back to the office, but they  
7 would be on call to come back.

8  
9 So to explain, if I was on the CNS service or on the  
10 hotline service and I got a phone call from police at  
11 2 o'clock and they were waiting on a support person, and  
12 I know that court stops taking fresh custodies at 3, I will  
13 be very cognisant of the fact that this young person needs  
14 to be processed.

15  
16 Again, it comes down to context. If police are  
17 saying, "They're here for a larceny, we want to give them  
18 a caution", then we're waiting for the support person to  
19 come because they're a necessary part of the process. If  
20 they're there for a robbery in company, their third matter,  
21 and they're being bail refused, then the interest of that  
22 young person is, "Please, officer, can you process them and  
23 get them before the court?" And then I, or one of our  
24 staff on the service, would contact the solicitor that is  
25 at court and contact the court themselves and say, "Hey,  
26 we've got a freshie" - that's a fresh custody - "coming,  
27 just to put you on notice." I would say that to the police  
28 as well, "I will let the court know to expect this young  
29 person", so they know that there's an expectation that  
30 things are going to move and that young person won't miss  
31 court cut-off.

32  
33 Q. If all of that can be done you have the advantage of  
34 having a solicitor on the ground at the location who can  
35 pick up so that the whole process is not being done by  
36 telephone?

37 A. Yes.

38  
39 Q. That's the ideal position, I suppose, to have someone  
40 who can then appear on a bail application, for example, so  
41 the person is not unrepresented before the magistrate?

42 A. They would never be unrepresented. They would always  
43 have a solicitor there. What you lose in that circumstance  
44 would only be, as I said, if it was a lost diversionary  
45 opportunity at the time of the police station. But again,  
46 in that circumstance where police were saying, "No, we want  
47 to exercise - we want to utilise the Young Offenders Act",

1 then we would wait for the support person. It's only where  
2 police have communicated, "We are charging this young  
3 person and bail refusing them", that we would say, "Okay,  
4 well, please" - and it's a time of day that the court is  
5 about to close, stop accepting people, we would say,  
6 "Please progress, process them."  
7

8 Q. Just a practical question. Once the police have  
9 charged, so that there is a matter that is going before the  
10 court, does that mean that the Young Offenders Act is off  
11 the table for all purposes, that it's a once and for all  
12 opportunity for it to be dealt with; or if the matter is  
13 adjourned for a couple of weeks, does the statutory scheme  
14 allow for the prospect that it becomes a Young Offenders  
15 Act matter after all?

16 A. Yes, a really good question. The court can give Young  
17 Offenders Act diversionary options, so the court can  
18 caution and conference and, indeed, they have actually  
19 wider powers than the police do, because they can also  
20 provide a diversionary option for damage by fire offences,  
21 for example. Police can't do that.  
22

23 So that option is still open from the court. It is  
24 still open, and I've done this myself before, where a young  
25 person has been charged, gone before the court, the police  
26 facts sheet had indicated they were considering a Young  
27 Offenders Act option but couldn't locate a support person,  
28 where I've then written to police and said, "Okay, well,  
29 let's set that process up. Could you please withdraw the  
30 charges", and had the charges withdrawn. So it doesn't go  
31 away in that sense, either. There is that option.  
32

33 The legislation also provides for, very importantly,  
34 a kind of an adjournment process, so to speak, at the time,  
35 when a young person is in police custody. So I've had many  
36 matters where police have said, "Look, we want to utilise  
37 the Young Offenders Act. We don't have a support person",  
38 or the young person has said, "I don't know, I just don't  
39 know", they're too stressed out, they can't make  
40 a decision. So we have said to police, and it's built into  
41 our training, "Don't make you decision now then. You know,  
42 you've done this investigation, you're willing to deal with  
43 them under the Young Offenders Act, which means you're not  
44 going to be putting bail on them, you're not going to be  
45 charging them, you've indicated that willingness, so why  
46 don't we have - let's make an appointment for one week's  
47 time. The young person will see us in the interim, come

1 back to you on Tuesday and can make the relevant admissions  
2 with mum present, or a support person present, or they'll  
3 have a chance to consider it and consider what they want -  
4 you know, what they want to do."  
5

6 I have had a really good police officer do that with  
7 me for a young person who was terrified of police, she had  
8 been removed as a child, and they allowed a process whereby  
9 they went through me, sent me the relevant paperwork.  
10 I met with her at a Legal Aid office, went through what the  
11 allegations were, went through the protected admissions  
12 scheme form, sent that back to police, and we did it that  
13 way, outside of the police station and the police process.  
14 So, you know, there is some flexibility there to get the  
15 right outcome.  
16

17 Q. The custody notification form we're looking at, which  
18 is annexure A to the statement, just on the first  
19 page there is the heading, "Protected Admissions Scheme",  
20 then underneath that:  
21

22 *Postponement of police determination:*  
23 *If appropriate to do so, will police*  
24 *postpone their determination for 14 days?*  
25

26 Is that an example of postponing the decision as to whether  
27 the Young Offenders Act may be involved?

28 A. Exactly.  
29

30 Q. And so you would expect that an ALS solicitor working,  
31 using this form as something of a template, would be in a  
32 position to raise that as a possibility, if it was still an  
33 open question from the police point of view?

34 A. Absolutely. Although I must say, extreme reluctance  
35 on the part of police to do that, and I've spoken to them  
36 about why that is, and it makes sense, but it's a shame  
37 that we don't utilise it, and the reason given is they've  
38 got so many other things to do, they've got more people in  
39 custody. If you finalise a matter then and there by way of  
40 diversion or charge, it's off the desk. If you're saying,  
41 "Yes, let's make an appointment for next week", it's  
42 another piece of work to follow up. So it's a resourcing  
43 efficiency issue. So there is reluctance to do it, but  
44 I have, as I indicated recently with that young girl, had  
45 experience of police being willing to do it and we have  
46 utilised that option.  
47

1 THE CHIEF COMMISSIONER: Thank you.

2

3 Yes, Mr Kerkyasharian?

4

5 MR KERKYASHARIAN: Q. Can I just ask following on, is  
6 there ever a circumstance where police indicate they are  
7 willing to go under the Young Offenders Act, or potentially  
8 willing, if there's an admission, and then they  
9 nevertheless continue to detain the young person, or do  
10 they just kind of - well, I'll just ask that question.

11 A. Well, then there would then be - we would have the  
12 phone call, and then there's a process that flows from  
13 that, so the detention, I presume, not being at the police  
14 station, but the detention then continues while that  
15 process plays out. I can't tell you of any examples where  
16 I've had a police officer say to me, "We want to deal with  
17 this under the Young Offenders Act. We've facilitated that  
18 admission", and then, subsequent to that, they've still  
19 been kept it the police station.

20

21 Q. Just going back, you gave an example before of  
22 a situation where somebody was kept - in effect, was  
23 entered into custody overnight because of the delay waiting  
24 for the support person?

25 A. Yes.

26

27 Q. Do you have any sense of how often that occurs?

28 A. No, I couldn't - I couldn't give you a numerical  
29 summation of that. I could say that kids - I can use the  
30 word "frequently". Kids would definitely, on - I don't  
31 know, I actually don't know what adjective to use other  
32 than say it wouldn't surprise me if someone said to me "Oh,  
33 they missed court cut off and they were kept there waiting  
34 for the support person and missed cut off and the  
35 consequence of that being they spent the night in a police  
36 cell". I wouldn't go, "Oh, that's unusual".

37

38 Can I put something higher on it in terms of frequency  
39 or sometimes or often? It's a bit tricky without taking it  
40 on notice and doing a bit more of an investigation, but as  
41 I said, I wouldn't be surprised if someone told me that was  
42 an outcome for a young person.

43

44 Q. It happens enough that you think it's a problem?

45 A. That's a problem which we try and address, hence by  
46 training our solicitors to say if there's going to be delay  
47 that makes someone see court cut-off, then make sure you're

1 communicating with the officers that the priority is to get  
2 the young person before the court.

3

4 Q. Just one final question, which is something I should  
5 have asked you before, but the Aboriginal community liaison  
6 officers that the police have, the ACLOs, are they  
7 involved, to your understanding, with finding support  
8 people?

9 A. Yes, I'd say they would be - that's my understanding.

10

11 Q. Do the ACLOs have any role during the interview  
12 process, in your experience?

13 A. Not that I've seen in my experience.

14

15 MR KERKYASHARIAN: Thank you, Chief Commissioner.

16

17 THE CHIEF COMMISSIONER: Yes, Ms Lewer?

18

19 MS LEWER: Thank you, Chief Commissioner.

20

21 **<EXAMINATION BY MS LEWER:**

22

23 MS LEWER: Q. Ms Hopgood, you answered some questions  
24 from counsel assisting on conversations that might take  
25 place between legal practitioners and police regarding  
26 police attitude to bail.

27 A. That's right.

28

29 Q. I just wanted to confirm, if, during a conversation,  
30 the police indicated to the legal practitioner that the  
31 young person was eligible for a Young Offenders Act outcome  
32 and they were willing to consider that, would the  
33 practitioner, on the other end of the line, then speak to  
34 the police officer about their attitude to bail?

35 A. No, there wouldn't be a need then to speak to the  
36 officer then about bail. It would only be if something  
37 changed after speaking to the young person that we would  
38 then have to - if we came back to the officer saying, for  
39 example, "They don't want to make the relevant admissions.  
40 Are you going to charge?" And then after confirmation  
41 that, "Yes, well, we are going to charge in those  
42 circumstances", then we would ask about, "What's your  
43 attitude towards bail?"

44

45 Q. The evidence that you've given today specifically  
46 concerns solicitors working on the CNS, but you yourself  
47 have intimate familiarity with the Youth Hotline as well,



1 don't you?

2 A. That's correct.

3

4 Q. In fact, you were employed by the Children's Legal  
5 Service for Legal Aid and did many shifts on the Youth  
6 Hotline; is that right?

7 A. Many shifts, yes.

8

9 Q. And you worked closely with Legal Aid on these issues  
10 that arise, speaking to police about the provision of  
11 advice to young people in custody?

12 A. That's correct.

13

14 Q. Your evidence about the process that is adopted by  
15 legal practitioners on the phone, speaking to police on the  
16 CNS, is that effectively the same for solicitors who work  
17 on the Youth Hotline?

18 A. That's correct.

19

20 Q. They go through the same essential process?

21 A. Same process. When I came across to the ALS and  
22 I went into the children's managing solicitor role,  
23 I developed the custody notification form that was  
24 specifically for juveniles. Until that point, we had one  
25 form that covered both juveniles and adults and, as you may  
26 see when you look at the exhibits, I modelled it -  
27 shamelessly, took it straight from the Legal Aid hotline.

28

29 Q. You gave some evidence earlier about the  
30 appropriateness of certain support persons and you referred  
31 to a police informer being used. Was the reference you  
32 were making to the registered police informer that was used  
33 as the support person in the matter of *JB*?

34 A. That's correct.

35

36 Q. That is a case that has been subject to a number of  
37 decisions, including 2015 NSWCCA 182. I appreciate you  
38 might not know the citation, but that's the case that you  
39 are referring to?

40 A. That's right, and I do know it was 2015.

41

42 Q. Just lastly, you gave some evidence about the form  
43 that police provide support persons and a process that has  
44 been undertaken with police to attempt to have amendments  
45 made to that form; is that fair?

46 A. That's correct.

47

1 Q. You might not know this, but I'm going to suggest to  
2 you that that is something that has been on the agenda  
3 between groups like Legal Aid and ALS and the police for  
4 many years.

5 A. I do know that, absolutely.

6  
7 Q. And in fact, after many years of work on it, in August  
8 of 2018 the Justice Advocacy working group provided police  
9 with the finalised proposed version that the working group  
10 thought was appropriate?

11 A. Yes, I think that that is correct and I think,  
12 subsequent to that, then there was also another attempt at  
13 providing a document.

14  
15 Q. Yes. So in August 2018, some years of work culminated  
16 with a draft document being provided to police; is that  
17 right?

18 A. That sounds right.

19  
20 Q. And police indicated they were going to look at it?

21 A. Yes.

22  
23 Q. And it didn't go anywhere?

24 A. That's my understanding.

25  
26 Q. And so some time later the issue has been revisited  
27 again with an attempt to have a document prepared?

28 A. That's correct.

29  
30 MS LEWER: Thank you. They are the questions I have,  
31 Chief Commissioner.

32  
33 THE CHIEF COMMISSIONER: Yes. Mr Hall?

34  
35 MR HALL: Chief Commissioner, I've just got a short couple  
36 of questions.

37  
38 THE CHIEF COMMISSIONER: Yes, carry on.

39  
40 <EXAMINATION BY MR HALL:

41  
42 MR HALL: Q. Good morning, Ms Hopgood. My name is Bruce  
43 Hall. I'm acting on behalf of [MTS1] in these proceedings.

44 A. Good morning.

45  
46 Q. I read your report, I had it this morning, and I noted  
47 in the report that you talked about when interviewing young

1 persons, from a vulnerable background, that you need  
2 a certain skill set to I guess communicate properly with  
3 them, depending on what their background is?

4 A. Yes.

5

6 Q. I guess as we know, the law applies, delineated in  
7 numbers of 10, 4, and so forth. With someone from that  
8 background, do you think those numerical numbers really  
9 serve the purpose? So the understanding of a young person,  
10 could it be less or more, in your opinion, if they are from  
11 a vulnerable background?

12 A. Sorry, just so I understand the question --

13

14 Q. I will get back - it is about understanding. If you  
15 look at the case that you highlighted - it was Luke - in a  
16 very basic question that he was asked by the police, he  
17 said "No", and I guess you highlight that as a red flag,  
18 and then the investigation kept continuing as if it didn't  
19 matter.

20 A. Mmm-hmm.

21

22 Q. So what I'm trying to say, or ask you, is when you are  
23 speaking to people, young people - and I'm not going to  
24 look at age, I'm just looking at understanding - how do you  
25 know that they are understanding what you are saying?

26 A. Look, I completely acknowledge the limitations of  
27 the phone and the limitations of the young person, but  
28 solicitors have to be confident that they are getting  
29 instructions before they pass that on.

30

31 So how you know is by, for example, in that matter  
32 Luke, when I looked at the custody management record, that  
33 solicitor spent 20 minutes, over 20 minutes, with that  
34 young person, and did have concerns, expressed to police  
35 that she had concerns, and that's recorded on her record,  
36 that she had concerns about his capacity, because of the  
37 length of time he took to explain back to her concepts.  
38 But in that, you can see that what she did was ask him to  
39 explain back, took that time for him to be able to do it.

40

41 The Representation Principles for Children's Lawyers  
42 prepared by the Law Society say that kiddies - kids, I  
43 should say - normally have the skills by around six or  
44 seven to give instructions.

45

46 Yes. With our young people there are often cognitive  
47 impairments, mental health issues, background of trauma

1 that influence that, and so we train our solicitors to not  
2 only explain things in an easy - more easily understood  
3 way, difficult legal concepts, but we also train them to  
4 check the sufficiency of that understanding before they  
5 will pass instructions on.  
6

7 So, for example, when I have done CNS training, I will  
8 actually go into detail to say, "This is how I explain the  
9 concept of doli incapax", and in the handbook, we will  
10 actually give them the words, as well, to explain to  
11 a young person these tricky legal concepts.  
12

13 My other concern with that is that - I can't sit here  
14 and suggest that it's absolutely perfect, but in that  
15 sense, the lawyers are still playing a protective role.  
16 They are making sure that the young person has sufficient  
17 understanding of their legal options, of the consequences  
18 that will flow from their decision, and then that they  
19 have - that they have satisfied themselves that they have  
20 the consent and the young person's understanding to pass  
21 that information on to police.  
22

23 Now, as I said, it is not perfect, but my concern is  
24 if you took that away, how would it flow that police then,  
25 who are then going to ask someone to make a decision that  
26 is going to have significant legal consequences for them,  
27 to do so in the absence of that legal advice? Those  
28 concerns stand, but not only stand, they stand - the impact  
29 of that is so much more significant.  
30

31 You know, I think the only - if the solution - sorry,  
32 if the conclusion was, "It's over the phone, it is an  
33 11-year-old, there are too many questions around the  
34 complexity and the understanding of that advice, we  
35 shouldn't have it", then surely the only solution that  
36 flows from that is that the police don't interview in any  
37 circumstances because of those concerns, because how could  
38 you be confident that a young person, absent that legal  
39 advice, was able to tell police what their decision was  
40 around interviewing? I don't think that's a solution. So  
41 if that answers your question.  
42

43 Q. Yes, and it flows to the last question that I've got.  
44 Looking at the research you have done - and I noticed,  
45 I read it this morning, it is about 15 per cent that you  
46 extracted that had these issues - the question I'm going to  
47 ask now is: in relation to the original advice given, how

1 do you know that that original advice was understood by the  
2 young person?

3 A. Just in the way I just outlined, you have to satisfy  
4 yourself before you pass those instructions on.

5  
6 Q. The question was in relation to the research: did  
7 people go back to the individuals and see what their  
8 understanding was?

9 A. Oh, sorry. Can you just confirm to me, then, what you  
10 are referring to in this?

11  
12 Q. You went through, I think, about 853 cases, and of  
13 those you extrapolated there were about 15 per cent that  
14 had this issue?

15 A. Mmm-hmm.

16  
17 Q. Just a purely research question I'm asking. The  
18 original advice given - how do you know that that original  
19 advice was understood? That's my question.

20 A. Yes. So how I know that - I wasn't on the - I didn't  
21 conduct the phone calls.

22  
23 Q. Of course.

24 A. But how I know that is it is in reference to my  
25 previous answer, which is because of the process I'm aware  
26 happens with our staff, because of the way I know they  
27 would have to conduct themselves and the confidence they  
28 would have to have before they passed on that information  
29 to police.

30  
31 And what we did check, as it says there, was the  
32 specific CNS form in regards to that, where the solicitor  
33 has gone through and filled that out and confirmed they  
34 have given those instructions to police. So I am confident  
35 that if they gave those instructions to police, they were  
36 of the view that that young person was making an informed  
37 decision, and that informed decision meant they understood  
38 the information the police - sorry, the solicitor had given  
39 them and were instructing the solicitor to convey that  
40 information to police.

41  
42 MR HALL: Thank you very much.

43  
44 THE CHIEF COMMISSIONER: Q. Could I just ask you, you  
45 mentioned a short time ago the Representation Principles  
46 for Children's Lawyers prepared by the Law Society. Are  
47 they publicly available?

1 A. They are.

2

3 Q. Could you possibly provide to those assisting the  
4 Commission that material? It would be of assistance,  
5 I think?

6 A. Certainly.

7

8 Q. What you have said recently in answer to Mr Hall has  
9 raised what is something of a dilemma, in a sense, that if  
10 the police are investigating someone between the ages of 10  
11 and less than 15, then the *doli incapax* principle is there  
12 until rebutted, but during the investigation period, police  
13 want to interview that person. As you say, if one was to  
14 work on the basis that there is a fundamental problem in  
15 understanding, then that would mean that police shouldn't  
16 be allowed to interview them at all, in one sense.

17

18 What you have described is a system where ALS and  
19 Legal Aid lawyers, speaking on the phone with considerable  
20 training, go through a process to obtain the best  
21 instructions by process of question and answer, dealing  
22 with a young person on the other end of the phone?

23 A. Yes.

24

25 Q. The law hasn't got to the point of saying that the age  
26 of criminal responsibility has moved, but there are always  
27 particular complexities where the investigation relates to  
28 young persons, in particular those under 14.

29

30 When Mr Frankham was in the witness box I raised with  
31 him the contrast between criminal proceedings and civil  
32 proceedings. In civil proceedings, if there is a claim for  
33 damages on behalf of a young person, there will be a tutor  
34 appointed, often a parent, although not always. The tutor  
35 has to be a truly independent person who can provide  
36 instructions on behalf of the young person, and the court  
37 has an interest in seeing who the tutor is.

38

39 But in the situations we are discussing, there is not  
40 the luxury of time to allow for some process of having  
41 a tutor. The instructions have to be obtained from the  
42 young person, making all due allowance for their youth, but  
43 in circumstances where the lawyer explaining the rights and  
44 obtaining instructions does their best to get accurate  
45 instructions. That's really what we are talking about  
46 here, isn't it?

47 A. That's right. They do their best, and they satisfy

1 themselves. So it does happen on occasion that you can't  
2 get those instructions. I had a 10-year-old boy who had  
3 a cognitive impairment and his mother was the support  
4 person and she had a cognitive impairment, and I spoke to  
5 the police and said, "I am not satisfied. I know you are  
6 saying you want to deal with him by way of a caution.  
7 I can't get those instructions. You shouldn't feel  
8 satisfied that you are going to be getting an admission  
9 that is fully informed." Again, it was one of those  
10 matters, "Can we defer it?" He came in to the office. We  
11 still struggled to get those instructions.  
12

13 So it is not as though people just kind of blunder on  
14 if you can't satisfy yourself. I am satisfied that when we  
15 are explaining to the police or telling the police that  
16 a young person does not want to be interviewed and that's  
17 their instructions, or we're telling the police that the  
18 young person wishes to make the relevant admissions for  
19 a Young Offenders Act diversion, that we are instructed to  
20 do so.  
21

22 It's the same when you think about fitness  
23 proceedings: there can be different levels of capacity.  
24 So a young person can understand enough, I think, and when  
25 you have got a trained lawyer who can explain to them  
26 concepts of the charge process, what bail means, what  
27 a caution means and what that actually means when you go to  
28 the police station and the police officer says what they  
29 say, what an admission means - that when you have got  
30 someone trained like that, you can actually get those  
31 instructions and the young person is capable of giving  
32 those instructions. I'm confident in that, that you can  
33 get to that place.  
34

35 I am less confident, significantly less confident,  
36 that a young person, in the absence of that advice or with  
37 that advice, sitting at a police station at 12 years of  
38 age, with a support person who may or may not be  
39 appropriate and a police officer in that position of power  
40 who suggests an interview, that that young person in that  
41 circumstance is able to fully understand all the  
42 consequences that flow from that, understand the immediacy  
43 of the consequences that flow from that. That's a very  
44 different, very different, question, which again is why  
45 there are options like the protected admissions scheme,  
46 because they allow that - they provide that protection for  
47 that circumstance.

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Q. And the starting point for all of this is the right to silence, which remains fundamental and which vests in the suspect, whatever age?

A. That's right. That's right. And I think it is important that - I know what you said about the civil side and a tutor, but in the criminal law, because a young person - you know, principles of rehabilitation and restitution and accountability all play out, it is important that the young person is that direct representative - sorry, that direct - they have a direct representative and they are the ones that are taking the consequences of their actions, and again they are the ones that - a rehabilitation focus includes concepts of accountability and restitution. They need to be the active driver of their situation. The law says they have capacity, then they should be the one making the decisions.

And it is hard, and I have had many conversations with parents and I have said to them, "I'm a parent too", but that is the reality. They are the ones that give the instructions and that's what the lawyer is bound by.

THE CHIEF COMMISSIONER: Yes. Thank you, Ms Hopgood. Any further questions? Do you have anything further, Mr Fernandez?

MR FERNANDEZ: I don't, Chief Commissioner.

THE CHIEF COMMISSIONER: All right. On behalf of the Commission I would like to thank you and everyone at the Aboriginal Legal Service for the work that has gone into the preparation of this report at relatively short notice. I said the same to Mr Frankham on Monday.

This investigation has been proceeding, but once it was apparent that this was an issue, an examination of the cases indicated the very direct and real interest of both the ALS and Legal Aid in seeing if there can be significant improvements, to say the least, in this area, and the Commission is very grateful for the assistance provided by the Aboriginal Legal Service and by Legal Aid NSW and by the attendance of yourself, both at the earlier private examination, albeit by audio-visual link, and today in person, so I would ask that you pass that on to all at the Aboriginal Legal Service so that there is appropriate recognition of their work in this field and, in particular,



1 in the work that has gone into the material provided to the  
2 Commission.

3  
4 THE WITNESS: Thank you, Chief Commissioner.

5  
6 THE CHIEF COMMISSIONER: All right. So if you would like  
7 to step down.

8  
9 <THE WITNESS WITHDREW

10  
11 MR FERNANDEZ: That completes the evidence for today,  
12 Chief Commissioner.

13  
14 THE CHIEF COMMISSIONER: That's the evidence for today.  
15 Tomorrow we have Assistant Commissioner Crandell  
16 returning --

17  
18 MR FERNANDEZ: Yes.

19  
20 THE CHIEF COMMISSIONER: -- on aspects relating to  
21 body-worn video. There is Sergeant Edgell --

22  
23 MR FERNANDEZ: Yes.

24  
25 THE CHIEF COMMISSIONER: -- who has extensive experience  
26 as a custody manager.

27  
28 MR FERNANDEZ: And training.

29  
30 THE CHIEF COMMISSIONER: And training, which raises  
31 a number of issues which cross over these topics, including  
32 the interviewing issue.

33  
34 An issue, what has been described as the "use of  
35 force" issue, in a sense, is an overlapping issue too, as  
36 to the circumstances in which young persons should be  
37 arrested or their arrest should be continued or  
38 discontinued, as well as any use of force that may be  
39 involved in that. Is there expected to be a police force  
40 witness on those topics who can assist?

41  
42 MR FERNANDEZ: We are very much hoping that there will be.  
43 I've been speaking to Mr Coffey. Unfortunately, there is  
44 no-one here representing NSW Police, but, Chief  
45 Commissioner, you also reiterated the importance of that  
46 yesterday. So the goal is to have that witness.

47

1 THE CHIEF COMMISSIONER: There are a series of related  
2 issues, and some of these may be matters for submissions.  
3 There is already a significant body of evidence on these  
4 matters. It doesn't necessarily have to require a witness  
5 to speak directly to them, although it will help in  
6 particular in understanding what the practices and training  
7 are, but the circumstances of arresting young persons; the  
8 role of section 8 of the Children (Criminal Proceedings)  
9 Act in that respect in determining whether to arrest and as  
10 to the means of commencement of proceedings; looking more  
11 closely at the circumstances of this case, whether there  
12 were circumstances which called for the discontinuance of  
13 the arrest at some point after the initial arrest; the use  
14 of handcuffs; and some of those topics move through the  
15 events during the night when the young person was taken  
16 from the street to the hospital and then ultimately to the  
17 police station. So there are some issues which  
18 I anticipate will certainly be picked up in submissions, at  
19 least, but I mention that now because of there being  
20 a short moment just to indicate that I think those are live  
21 issues here, quite apart from the ones we have been looking  
22 at so far.

23  
24 Now, it is at 10 o'clock start tomorrow?  
25

26 MR FERNANDEZ: 10 o'clock tomorrow, Chief Commissioner.  
27

28 THE CHIEF COMMISSIONER: And will Assistant Commissioner  
29 Crandell go first?  
30

31 MR FERNANDEZ: He will be first.  
32

33 THE CHIEF COMMISSIONER: All right. Yes, well, the public  
34 hearing is adjourned until 10 o'clock tomorrow morning.  
35 I will adjourn.  
36

37 **AT 11.20AM THE COMMISSION WAS ADJOURNED TO THURSDAY,**  
38 **6 APRIL 2023 AT 10AM**  
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