

Hearing: Operation Mantus

Before the Hon P Johnson SC, Chief Commissioner

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

On Monday, 3 April 2023 at 10am
(Day 2)

WITNESS INDEX

Ronald Frankham 47

1 THE CHIEF COMMISSIONER: This is a public hearing of the
2 Law Enforcement Conduct Commission Act in Operation Mantus,
3 at which examinations of witnesses will take place during
4 the week.

5
6 Section 62 of the Law Enforcement Conduct Commission
7 Act 2016 requires the Commission to announce the general
8 scope and purpose of the examination as part of the
9 hearing. I will do that today. I will not repeat it each
10 time there is an examination of a witness.

11
12 The general scope and purpose is to investigate
13 allegations that excessive force was used by a member or
14 members of the NSW Police Force at a location in northern
15 New South Wales in September 2022 during the apprehension
16 and arrest of a young person, [YPM1], and other issues
17 arising from his detention in custody following that
18 arrest.

19
20 Are there any further applications for leave before
21 I invite counsel assisting to address?

22
23 MR FERNANDEZ: Could I just advise you, Chief
24 Commissioner, that Mr Falzon appears for the Commissioner
25 of Police today.

26
27 THE CHIEF COMMISSIONER: All right. Yes, thank you,
28 Mr Falzon.

29
30 Yes, thank you, Mr Fernandez.

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32 MR FERNANDEZ: Chief Commissioner, this is an update on
33 the Law Enforcement Conduct Commission's investigation
34 known as Operation Mantus.

35
36 The investigation relates to an incident which
37 occurred in September 2022 in northern New South Wales.
38 The incident involved a young person, known as [YPM1], who
39 was 14 years old at the time. He sustained injuries during
40 the course of being apprehended by a police officer known
41 as [MTS1]. [YPM1] was treated by ambulance close to the
42 scene and then taken to hospital, where he stayed
43 overnight.

44
45 The apprehension took place at night. [YPM1] was with
46 other young people. Police were conducting proactive
47 policing activities, and they were in plain clothes. None

1 of the police involved wore body-worn video.

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

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

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

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

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

A series of private examinations were conducted on 9 to 10 February and 13 to 17 March. Thirteen witnesses gave evidence during the private examinations.

I will summarise aspects of the evidence given by witnesses during the private examinations and advise of the evidence to be given in the coming four days of public examinations.

EVIDENCE GIVEN AT PRIVATE EXAMINATIONS

The following witnesses gave evidence at private examinations held on 9 and 10 February and 13 through to 17 March:

[YPM1];
Officer [MTS1];
Officers [MTS2], [MTS3] and [MTS4], being other police who were present on the night in question. They were in plain clothes and conducting proactive policing in response to increasing crime in the location;
Officers [MTS6] and [MTS7], who are in leadership roles in the relevant police district;
Officer [MTS8], the custody manager;.
Officers [MTS9] and [MTS10], the two police investigating alleged offences committed by [YPM1], who

1 interviewed him when he returned from hospital;.

2 Mr Ron Frankham, head of Legal Aid NSW Children's
3 Legal Service, Ms Alex Burkitt and Mr James Clifford, both
4 from the Aboriginal Legal Service. They gave evidence of
5 recurring issues relating to young people in custody being
6 interviewed by police, even when the young person's wishes
7 were not to be interviewed and those wishes had been
8 communicated.

9

10 During the private examinations, each police officer
11 was represented by a barrister or solicitor. [YPM1] was
12 represented by both a barrister and a solicitor.

13

14 It is not automatic that legal representatives are
15 given permission to ask questions of witnesses who have
16 given evidence at examinations in this Commission.
17 However, all representatives were able to make applications
18 for permission to ask witnesses about issues they
19 identified. Notably, [YPM1] was asked questions regarding
20 his evidence by a number of representatives.

21

22 BACKGROUND

23

24 Officers [MTS9] and [MTS10], both senior officers in
25 the relevant police district, described the background as
26 follows: the district covers a very large geographical
27 area and there are a large number of police officers and
28 administrative staff. There are also youth engagement
29 officers or youth officers and Aboriginal community liaison
30 officers working within the police district. There are
31 a number of discrete Aboriginal communities, as well as
32 larger Aboriginal communities within some of the bigger
33 locations in the district.

34

35 Northern New South Wales suffered an extraordinary
36 period of flooding in February and March 2022.
37 Approximately 60 per cent of houses were uninhabitable.
38 8,000 people were without a home immediately after the
39 floods. More than 15,500 people were in evacuation centres
40 across the region. They went into temporary accommodation
41 in motels, caravans and Winnebagos. Police provided
42 caravans and on-site caravan programs across the district.

43

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

1
2 In the first week after the floods, some towns were
3 completely cut off by floodwater. Police had to use
4 helicopters to fly in food and medicine.
5

6 An Aboriginal youth strategy was under way by police
7 before the floods. Police had convened the first meeting
8 a week before the floods, and were due to have a second
9 meeting on the day of the first flood.
10

11 The floods fractured communities as well because a lot
12 of petty theft or looting occurred. This had not been
13 a major problem before the floods. In particular, property
14 crime, break and enters, aggravated break and enters,
15 stolen cars, steal from persons or steal from dwellings
16 were taking place. They increased quite dramatically after
17 the floods. Police stations in smaller communities were
18 closed by the floods, so there was a significantly reduced
19 local police presence.
20

21 Police wanted to stop the offending, protect the
22 victims and make the community safe. A high visibility
23 police approach was adopted, with a number of extra police
24 patrolling at various times of the day and night. Police
25 also engaged with the community to show there was
26 a presence.
27

28 Police also undertook a proactive policing approach
29 in August and September of 2022. One part of this was
30 a plain clothes police operation put together to
31 investigate the offences and to identify and prosecute
32 offenders. This strike force included a covert, plain
33 clothes operation to identify offenders. Police were
34 expected, if they detected something, to act. This would
35 not necessarily involve arrest. The action required would
36 depend on a variety of circumstances.
37

38 Body-worn video and how it was to be used was
39 discussed by police in the lead-up to the night in
40 question. This discussion included opportunities in
41 relation to compliance checks, capturing young people
42 police were doing bail checks on, and making comparisons to
43 CCTV footage that police had previously reviewed or may
44 capture in the future, so there were opportunities for
45 investigation as well as checking on compliance.
46

47 Although body-worn video had been discussed as part of

1 the planning for the strike force and, in fact, was carried
2 by one officer on the night of the incident, it was not
3 used. [YPM1] says after being apprehended, he was thrown
4 on the ground and punched. Officers [MTS1] and [MTS2] deny
5 any punching. The dispute in the evidence will not be
6 assisted by electronic evidence, as none of the police
7 present on the night wore body-worn video.

8 9 THE NIGHT OF THE INCIDENT

10
11 Officer [MTS2] was an officer in the NSW Police Force
12 who had been stationed in the police district for many
13 years. He was in the proactive crime team, which was
14 focused on property theft, break, enter and steal offences,
15 and cases based on forensic evidence such as fingerprints
16 and DNA. He was the senior officer by rank on the night in
17 question.

18
19 His understanding was body-worn video would be used
20 whenever he used a police power, was involved in an arrest,
21 patrolled a licensed premises or executed a search warrant.
22 These were the times police would most likely use body-worn
23 video and also when anticipating using a police power, such
24 as during questioning or arrest.

25
26 Officer [MTS2] was not aware of any operational,
27 practical or other reasons why body-worn video would not be
28 routinely used in his team.

29
30 Each of the officers who attended on the night were in
31 plain clothes. Officer [MTS2] was with Officer [MTS1], and
32 the two other officers, [MTS3] and [MTS4], were together.

33
34 Officer [MTS2] took a body-worn camera and put it in
35 his police car. He left it and his torch in the console,
36 though, when he got out and started following a group of
37 young people.

38
39 Officer [MTS2] described following the group
40 and thinking they had entered a premises. He and
41 Officer [MTS1] followed them. Eventually, all four police
42 came across the group of young persons. Those in the
43 group, including [YPM1], started running. Officer [MTS1]
44 chased [YPM1]. This was at around 9.45 to 10pm.

1 The apprehension

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Officer [MTS1] gave this evidence:

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

6

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

8

9

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

11

12

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

13

14

15

Q. [The name of the] Road - it's a two-lane road; is that right?

16

17

A. Unmarked, yeah.

18

19

Q. It's unmarked?

20

A. Yes.

21

22

Q. There are stones at each side; is that correct?

23

24

A. Yes.

25

26

Q. Beyond the stones, there are houses on each side, most of them with grass; is that right?

27

28

A. Yes, yes.

29

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31

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

32

33

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

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Officer [MTS1] gave this evidence:

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Q. Just describe what happened there?

45

46

A. As I said, it appeared to me he - there was a tree out the front of the house there, one of those - the council strip.

47

1 *It appeared to me he might have been trying*
2 *to loop around that, and as he's done that,*
3 *his feet slipped out from underneath him.*

4
5 Officer [MTS1] described the tripping as follows:

6
7 Q. *When you said he tripped over, can you*
8 *describe what actually happened to him?*

9 A. *As I say, just like his feet sort of*
10 *slipped out from under him. It just - as*
11 *he turned, he slipped over. It wasn't - it*
12 *wasn't a - he didn't trip on anything,*
13 *I didn't see him trip on anything, it was*
14 *just more of a slip.*

15
16 Later, Officer [MTS1] stated:

17
18 Q. *What did he do after getting up?*

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

29
30 Officer [MTS1] said:

31
32 Q. *Was there a point in time when you had*
33 *another piece of contact with him?*

34 A. *Yes, as we - as he sort of got around*
35 *the tree, I managed to get close enough and*
36 *tackled him.*

37
38 Q. *When you say "tackled", what do you*
39 *mean?*

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

43
44 Q. *Did you actually put both of your arms*
45 *around his body in that tackle or was it*
46 *like a shoulder charge?*

47 A. *No, no, it would have - I - yeah, it*

1 *wasn't - certainly wasn't a shoulder*
2 *charge; it was both arms around him.*

3
4 *Q. Why did you do that?*

5 *A. To apprehend him, to bring him - to*
6 *stop him from running away and apprehend*
7 *him.*

8
9 *...*

10
11 *Q. What happened when you tackled him?*

12 *A. We fell to the ground. He was under*
13 *me and I was on top. Just in that position*
14 *over the top. I managed to get his left*
15 *arm out I think it was, and I had hold of*
16 *that behind his back, and I said to him,*
17 *"Mate, it's the police. Don't be silly,*
18 *it's the police." And then he was -*
19 *originally he had his other hand tucked*
20 *under his body, he wouldn't pull it out.*
21 *I managed to get it out. I don't know if*
22 *he just released it or I managed to get it*
23 *out. I got it out and then cuffed him. He*
24 *was on his stomach and I cuffed him.*

25
26 [YPM1]

27
28 [YPM1] was in the town on the night with other young
29 people. He described being chased by a group of men who
30 turned out to be the police. He said that after he and his
31 friends had dispersed following their first contact with
32 this group of men who were in plain clothes, the following
33 happened:

34
35 *Q. Where did you run to?*

36 *A. Behind a tree.*

37
38 *Q. Behind a tree?*

39 *A. Yeah.*

40
41 *Q. Was anything being said? Was anyone*
42 *saying anything as these two fellows were*
43 *chasing you?*

44 *A. Yes, he just said, "You're under*
45 *arrest."*

46
47 *Q. How long did - how long were you being*

1 *chased for before someone said, "You're*
2 *under arrest?"?*
3 A. *About 30 seconds.*
4
5 Q. *When someone said, "You're under*
6 *arrest", where were you at the time?*
7 A. *Still on [Name of] Street.*
8
9 Q. *Still on [Name of] Street. And you*
10 *mentioned that you went behind a tree.*
11 *Were you behind the tree when someone said*
12 *you were under arrest or were you somewhere*
13 *else?*
14 A. *No, when he got me - when he got me*
15 *down, he said, "You're under arrest."*
16
17 Q. *What happened before this person got*
18 *you down? So you were being chased, and*
19 *you were running away; is that right?*
20 A. *Yeah.*
21
22 Q. *Where did you see your other - the*
23 *other - your friends and the other people?*
24 *Where did you see them go?*
25 A. *We all split up.*
26
27 Q. *What happened when you got towards*
28 *this tree? You talked about being behind*
29 *a tree. Did something happen behind the*
30 *tree?*
31 A. *No. He just tackled me, started*
32 *punching me and that.*
33
34 Q. *Before you got tackled, did you ever*
35 *fall to the ground, or was the first time*
36 *you --*
37 A. *Yeah.*
38
39 Q. -- *went to the ground when you got*
40 *tackled?*
41 A. *I - what?*
42
43 Q. *So when you got tackled by this*
44 *person, did you fall to the ground?*
45 A. *Fall to the ground.*
46
47 Q. *Did you fall on the ground when he*

1 *tackled you?*
2 A. *Yeah.*
3
4 Q. *Before he tackled you, did you fall on*
5 *the ground at all?*
6 A. *Nah.*
7
8 Q. *When this person tackled you, how did*
9 *that happen? What did he do?*
10 A. *He just dived and hit me in the leg*
11 *and then tripped.*
12
13 Q. *Were you facing towards him when he*
14 *dived or were you facing --*
15 A. *No.*
16
17 Q. *-- in the other direction?*
18 A. *Facing the other direction.*
19
20 Q. *And before you tripped, what was it*
21 *that you were doing?*
22 A. *Nothing.*
23
24 Q. *Were you running away at that time?*
25 A. *Nah. I couldn't.*
26
27 Q. *Why is that?*
28 A. *Because he had me on the ground.*
29
30 Q. *Before he had you on the ground, after*
31 *diving at your leg and tripping you over,*
32 *did you ever fall on the ground before that*
33 *time or was that the first time you fell on*
34 *the ground?*
35 A. *That's the first time.*
36
37 Q. *When you say he dived at your leg, did*
38 *you see what it was that he did?*
39 A. *No.*
40
41 Q. *What happened when you fell on the*
42 *ground?*
43 A. *Hit my head.*
44
45 Q. *Where did you hit your head?*
46 A. *On - huh?*
47

1 Q. You hit your head. What did you hit
2 your head on?
3 A. Gravel.
4
5 Q. After you hit your head, what was the
6 next thing that happened?
7 A. Started punching me.
8
9 Q. When you say he started punching you,
10 how many times did he punch you?
11 A. Four.
12
13 Q. Four times?
14 A. Yes.
15
16 Q. Which parts of your body did he punch
17 you?
18 A. Just around my body.
19
20 Q. You just showed with your hand, you
21 just motioned towards your chest - is it
22 the left side of your chest?
23 A. Yeah.
24
25 Q. Did he punch you anywhere else?
26 A. Nah. He picked me up and slammed me
27 to the ground.
28
29 Q. Was that before he punched you or
30 after he punched you?
31 A. After.
32
33 Q. When he was punching you, did he say
34 anything?
35 A. No. He just said, "You're under
36 arrest."
37 .
38 Q. Was that before he was punching you,
39 after he was punching you or while he was
40 punching you?
41 A. After.
42
43 Q. So while he was punching you, did he
44 say anything to you?
45 A. No.
46
47 Q. Did you say anything to him?

1 A. No.
2
3 Q. While he was punching you, did you
4 know who he was?
5 A. No.
6
7 Q. After he punched you those four times,
8 what happened next?
9 A. He walked me up to the street and one
10 of the other officers punched me in the
11 belly once.
12
13 Q. Now, you mentioned that the other
14 person who punched you four times picked
15 you up and slammed you; is that right?
16 A. Yes.
17
18 Q. How did that happen? What did --
19 A. He picked me up from the back - picked
20 me up from the back and then chucked me on
21 the ground.
22
23 Q. When you say he picked you up from the
24 back, which part of your body did he touch,
25 or your clothes?
26 A. Just at the back here (indicating).
27
28 Q. So you've just touched the back of
29 your jumper. Did you have a hold of
30 something when he picked you up?
31 A. Nah.
32
33 Q. How did he pick you up? What was it
34 that he did?
35 A. He just grabbed me.
36
37 Q. How many hands did he grab you with?
38 A. Two.
39
40 Q. Were you facing towards him at [the]
41 time, just before he picked you up, or were
42 you facing in another direction?
43 A. Facing the other direction.
44
45 Q. How do you know that he picked you up
46 with two hands?
47 A. Because I could feel it.

1
2 Q. How far up did he pick you up off the
3 ground? Were you able to tell?
4 A. Huh?
5
6 Q. How far up off the ground were you
7 picked up? Were you able to tell?
8 A. Nah.
9
10 Q. When you say you were slammed on the
11 ground, what was it that happened?
12 A. He just slammed me on to ground.
13
14 Q. How hard did you hit the ground?
15 A. Hard.
16
17 Q. Which part of your body hit the
18 ground?
19 A. My head.
20
21 Q. Which part of your head, are you able
22 to say, hit the ground?
23 A. About over here (indicating).
24
25 Q. You're just showing on the right-hand
26 side of your head, just up at the top of
27 your head; is that right?
28 A. Yeah.
29
30 Q. Did it hurt you when you hit the
31 ground and hit that side of your head?
32 A. Yeah.
33
34 Q. And did anything happen to that side
35 of your head after you hit the ground?
36 A. It was bleeding.
37
38 Q. Did you notice that side of your head
39 was bleeding at any time before you hit the
40 ground?
41 A. No.
42
43 Q. After your head had hit the ground,
44 what was the next thing that happened?
45 A. He walked me up to the side of the
46 road and one officer punched me in the
47 belly once, and then my aunty pulled up.

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

A. Huh?

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

A. Yeah.

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

A. Can't remember.

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

A. Yeah.

Q. How was he doing that?

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

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

A. On the grass.

...

Q. What happened when you saw this other person?

A. He just punched me in the belly.

Q. Punched you in the belly?

A. Yes.

Q. How hard was that punch?

A. Hard.

Q. Did you say anything?

A. No.

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Q. Did the other person say anything, the one who punched you in the belly?
A. He said, "You're under arrest" too.

[MTS2] said he did not see the contact between [YPM1] and Officer [MTS1]. He saw [YPM1] only after he had been arrested by Officer [MTS1]. Later, he saw [YPM1] handcuffed and he could see that [YPM1] had blood "sort of on the side of his face here". He said:

[YPM1] was crying. He was yelling out saying, "Help me, I haven't done anything. I can't breathe."

Describing a point later in time when [YPM1] started to look unwell, Officer [MTS2] gave this evidence:

Q. At that point of time when [YPM1] was falling - started to look lethargic as you've described, did he still have his handcuffs on?

A. Yes, he did.

Q. Were his hands behind his back or in front of his back?

A. I think they might have been still behind.

Q. What did you do about that, the fact that --

A. Arranged to move them, to get someone to move them to the front.

Q. Why was it necessary that the handcuffs - that he remained handcuffed, given the state that he was in, [YPM1]?

A. Once he became lethargic?

Q. Yes.

A. It probably was one of - there probably was less of a need for him to remain handcuffed, but being handcuffed to the front, it still was - he was in a position where he wasn't needing to - it didn't change his position.

1 Q. What was he going to do if he was not
2 handcuffed?

3 A. I don't think he would have done
4 a great deal.
5

6 Q. Were you the person who gave the
7 direction that the handcuffs were to be
8 moved so that his hands were going to be
9 handcuffed in front of him rather than
10 behind him?

11 A. Yes, I did.
12

13 Q. Why did he have to remain handcuffed?

14 A. I think the handcuffs probably could
15 have been removed at that time.
16

17 Q. The whole time that he was lethargic,
18 he had handcuffs on?

19 A. They were taken off once the other
20 medical help arrived.
21

22 Q. That's the ambulance that arrived
23 later on; is that correct?

24 A. The fire truck, I think.
25

26 Q. How long between you seeing [YPM1]
27 being lethargic and having the handcuffs
28 moved to the front of his body until the
29 fire truck arrived?

30 A. I can't remember, sorry.
31

32 AN AMBULANCE WAS CALLED AND [YPM1] WAS TAKEN TO HOSPITAL
33

34 The Commission has the VKG - that is, the NSW Police
35 Force radio call sign - recordings for the night, which
36 relevantly start at 9.30pm and continue until almost
37 midnight. The relevant calls include the following:
38

39 21:30:

40
41 *just got one in custody ... just after*
42 *a caged truck please.*
43

44 22:17:

45
46 *caged truck ... to assist ... got one in*
47 *custody ...*

1
2 22:19:
3 for cage truck that can assist ... please.
4 One is custody requesting a caged
5 truck to their location, please.
6
7 22:28:
8
9 "... can we get an ambulance to start
10 making its way to the location got
11 a 14-year-old male conscious,
12 breathing ... got a bit of a head
13 laceration ... difficulty breathing."
14 "Yeah ... can we um get [undescribable]
15 that ambulance if we can ... in and out of
16 consciousness."
17 VKG: Copy that will do.
18
19 22:32:
20
21 "just chasing update on ambo when you can."
22 "Yeah just for the ambos mate we um, he's
23 had, he's had a tumble, got a head knock,
24 um, bleeding reasonable heavy from the
25 head. He's just in and out of
26 consciousness at the moment."
27 VKG: Copy that.
28 VKG: Our side is just on the phone to the
29 ambos now, just seeing if we can get
30 a quick response.
31
32 22:36:
33
34 Ambos are responding lights and
35 sirens ... They've also tagged the fire
36 brigades to see if they can assist with
37 medical assistance due to the response
38 time.
39
40 23:09:
41
42 VKG: Ambos should only be a couple of
43 minutes off.
44
45 23:29:
46
47 Did ambos make it to your location?

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That was a question asked by VKG. The response is:
They've been, thanks.

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

RETURN TO POLICE STATION AND INTERVIEWING

When [YPM1] arrived at the police station soon after 6am the custody manager was Officer [MTS8]. A custody manager is a police officer who has specific responsibilities for people in custody, including ensuring the person's rights are protected. Officer [MTS8] had responsibility for [YPM1]. Officer [MTS8] tried to arrange for a support person to go to the police station to stay with [YPM1] while he was in custody. Officer [MTS8] tried unsuccessfully over a number of hours to arrange this.

During [YPM1]'s time in custody, Officer [MTS8] arranged for [YPM1] to have a telephone call with the Aboriginal Legal Service to advise him of his legal rights and give him legal advice about being interviewed by police. The Aboriginal Legal Service runs a telephone legal advice service which operates 24 hours a day, seven days a week. It enables Aboriginal people in custody to speak to a solicitor.

[YPM1] spoke to the solicitor on call at the time, Mr Jonathan Whitting, who recorded the following:

- He gave [YPM1] advice about the right to silence.
- He told [YPM1] that he did not have to, and should not, go into an interview room.
- He told [YPM1] not to discuss the allegation with a support person.
- He gave [YPM1] advice not to do a recorded interview.
- He gave [YPM1] advice not to give a written or

1 notebook statement to police.

2

3 [YPM1] told Mr Whitting he wished to exercise the
4 right to silence, and his solicitor could disclose his
5 instructions to the police.

6

7 Mr Whitting confirmed [YPM1]'s instructions that:

8

9 There would be no electronically recorded interview or
10 statement;

11 [YPM1] was not to be taken into an interview room;

12 [YPM1]'s instructions were to be recorded in the
13 custody management records;

14 Mr Whitting would send an email to police.

15

16 Mr Whitting stated in his private examination that:

17

18 *Q. When you've asked custody managers to*
19 *ask to have your client's instructions*
20 *being recorded in the custody management*
21 *records, what sort of responses have you*
22 *got?*

23 *A. Mostly the police are agreeable to*
24 *doing that. Occasionally, we do get some*
25 *push-back. Some of the responses I've had*
26 *are, you know, the custody management*
27 *record is not for that purpose, it's - you*
28 *know, "Your advice to your client is*
29 *between you and him" - that is a comment.*
30 *We've had - occasionally I've had police*
31 *say, "Well, we still want to put the*
32 *allegation to the person out of fairness",*
33 *or police sometimes have expressed a sense*
34 *of obligation that they themselves want to*
35 *hear from the person themselves personally*
36 *that that's the person's instructions.*

37

38 Officer [MTS8] gave this evidence:

39

40 *Q. What did you say when [Mr Whitting]*
41 *asked you [to make a record in the custody*
42 *management records]?*

43 *A. I didn't say that I would or wouldn't.*
44 *It was just, "I would like it recorded in*
45 *the custody management record,".*

46

47 *Q. Did you ever record that in the*

1 custody management record?

2 A. No.

3

4 Q. Why is that?

5 A. That's his private legal advice.

6 I don't believe it's something for the
7 record.

8

9 Q. But his private legal advice was
10 relevant to whether he wished to be
11 interviewed by police, do you understand
12 that?

13 A. Yes.

14

15 Q. It's important, isn't it, to make
16 a note in the custody management records
17 that here, [YPM1] did not wish to be
18 interviewed by police. Do you agree with
19 that?

20 A. It's not something that I've ever
21 done, no.

22

23 Q. You've never done that at any time
24 while you have been a custody manager?
25 You've never made a note of whether the
26 person wishes to be interviewed or not
27 interviewed; is that what you are saying?

28 A. Yes, that's what I'm saying. I don't
29 ever record their legal advice in the
30 custody management record.

31

32

33 A little while later:

34

35 Q. Are you aware that the custody
36 management records that you are responsible
37 for are relevant both to the care of the
38 person there at the time with you, as well
39 as later, as a record of what took place
40 when that person was under your
41 responsibility? Are you aware of that?

42 A. Yes.

43

44 Q. Doesn't that mean, then, that you need
45 to put as much information as you possibly
46 can so that other people, other police, can
47 have access to that information, and other

1 *people if necessary; do you agree with*
2 *that?*
3 A. *Yes.*

4

5 Later, a support person, referred to as [STM4], came
6 to the police station and stayed with [YPM1] while he was
7 in custody.

8

9 During the morning, two investigating police officers,
10 [MTS9] and [MTS10], spoke to [MTS8], the custody manager,
11 [YPM1] and [STM4], the support person. They arranged for
12 [YPM1] to be interviewed in an interview room on camera
13 with [STM4] present. The evidence is unclear about what
14 [MTS8] told [MTS9] and [MTS10] about whether [YPM1] wanted
15 to be interviewed, and whether [MTS9] and [MTS10] even
16 asked about this.

17

18 In a statement made to the Commission, the support
19 person, [STM4], said he went to the police station to act
20 as a support person for [YPM1] while he was in custody.
21 [STM4] was not told by the custody manager or by
22 investigating police [YPM1] had been given legal advice.
23 [STM4] was present when investigating police spoke to
24 [YPM1] about being interviewed. [YPM1] agreed to being
25 interviewed.

26

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

29

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

32

A. *No.*

33

34 Q. *You don't want to be interviewed?*

35

A. *What?*

36

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

39

A. *Yeah.*

40

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

45

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

1 police:

2

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

6

7 Q. *And what happened after that?*

8 A. *That's all.*

9

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

12 A. *Stopped.*

13

14 Q. *Mhm.*

15 A. *And I slipped.*

16

17 Q. *You slipped?*

18 A. *Yeah.*

19

20 Q. *Yep. What happened when you slipped?*

21 A. *He started bashing me.*

22

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

24 Q. *Yeah.*

25

26 Q. *Yep. Did you hurt yourself when you*
27 *fell over?*

28 A. *Nup.*

29

30 Q. *No? And then so they started bashing*
31 *you?*

32 A. *Yeah.*

33

34 Q. *What happened there?*

35

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

39

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

42

43 MS BURKITT, MR CLIFFORD, MR FRANKHAM

44

45 Three witnesses gave evidence at the private
46 examinations about systemic issues regarding young people
47 being interviewed by police even when they refused to take

1 part in an interview and police had been advised of this
2 refusal. They were Ms Alex Burkitt and Mr James Clifford,
3 solicitors from the Aboriginal Legal Service, and Mr Ron
4 Frankham from the Children's Legal Service at Legal Aid
5 NSW.

6
7 Ms Burkitt was previously the manager of the CNS -
8 Custody Notification Service - within the Aboriginal Legal
9 Service between August 2019 and March 2020. She had taken
10 approximately 2,900 telephone calls from Aboriginal people
11 in custody.

12
13 Mr Clifford is managing solicitor for New South Wales
14 and the ACT of the Children's Criminal Law practice at the
15 Aboriginal Legal Service. Mr Frankham is the manager of
16 the Children's Legal Service within Legal Aid NSW.

17
18 The Children's Legal Service provides legal advice and
19 representation to children, as well as a legal hotline for
20 young people in custody, called the Legal Aid Youth
21 Hotline.

22
23 Mr Frankham gave evidence about a protocol between the
24 Commissioner of Police and Legal Aid NSW regarding children
25 getting legal advice in custody. The protocol includes
26 this section:

27
28 *If the young person exercises their right*
29 *to silence, the investigating officer*
30 *should record this in COPS event as*
31 *"interview declined". The custody manager*
32 *should also record in the general comments*
33 *of the custody management record that the*
34 *young person declined an interview.*

35
36 Mr Frankham's experience was this protocol was
37 inconsistently applied. There were many instances when it
38 did happen, but also many when it did not.

39
40 Mr Frankham described examples of conversations with
41 custody managers as follows:

42
43 *It can involve - I should say it can*
44 *involve a conversation either with the*
45 *custody manager or the officer in charge of*
46 *the investigation. There are often,*
47 *I guess, back and forth conversations where*

1 generally our solicitor will say, "The
2 young person wishes to exercise their right
3 to silence, they don't wish to participate
4 in an interview, they don't wish to have
5 their refusal to participate in an
6 interview recorded either on ERISP or other
7 tape."
8

9 And that's where we sometimes fall into
10 disagreement, where you'll get either
11 a custody manager or an officer
12 investigating the alleged offences saying
13 they either want to record the refusal or
14 they want to interview the young person,
15 often we gets comments like, "in fairness
16 to put the allegation to them", and
17 comments like that, and we have an example
18 as recently as last night.
19

20 Ms Burkitt gave this evidence: :

21
22 I have personally experienced some issues
23 with this, with making these requests of
24 custody managers or officers in charge of
25 a matter through my work on the CNS. You
26 are often met with resistance where some
27 officers can be uncooperative. When asking
28 for these instructions to be recorded in
29 the [custody management records], comments
30 are sometimes made like, "It's my custody
31 management record. You can't tell me what
32 to add to it", or, "No, I won't be doing
33 that", when we ask for it to be recorded.
34

35 We also have within our CNS form
36 information that if those instructions are
37 given, that we should pass on to the
38 custody manager to call the ALS back if the
39 instructions change. And so that mostly,
40 in my experience, never happens, and it is
41 only when you get to the court process that
42 you realise that the instructions have
43 subverted or the interview has taken place.
44

45 Ms Burkitt explained:

46
47 It's at that point where there are some

1 officers, be it the custody manager or an
2 officer in charge, who will essentially
3 disagree with that piece of information and
4 say, "Well, I'm going to be offering them
5 the opportunity to be interviewed out of
6 fairness", or, "It's my own practice that I
7 offer them the opportunity to be
8 interviewed. I'm just going to take them
9 into the interview room or film them for
10 the purpose of refusal, put them on camera
11 or ask them to sign a notebook statement as
12 well."

13
14 And that's when you do get into
15 a conversation with the officers or an
16 argument about the fact that you have been
17 provided advice by the young person that
18 they specifically do not wish to do that.
19 This is something - they say - the
20 opportunity for them to hear the
21 allegations is another reason that I've
22 heard, and these comments are so frequent
23 that, in my own practice, or it is general
24 practice at the ALS to teach junior
25 solicitors how to deal with those comments
26 on the CNS during their initiation, during
27 that process.

28
29 Ms Burkitt also stated:

30
31 In my experience on the CNS, I have had
32 officers suggest that young people may get
33 bail if they do an interview, and this is
34 often said directly to me in a way where
35 the young person in the station can hear
36 it, or where I've heard it being said to
37 the young person through the phone, "Oh,
38 you know, we can't consider bail unless you
39 do the interview. We don't know what
40 happened. We want to hear your side of the
41 story." And it's sort of used as a carrot
42 for these young people where they think
43 that they are not getting out of custody
44 unless they comply with these requests.

45
46 The situation was so bad in one location in New South
47 Wales that Mr Clifford wrote to its superintendent. The

1 superintendent's reply included the following:

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

Mr Frankham said:

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

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

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

A FURTHER SYSTEMIC ISSUE: THE ROLE OF THE CUSTODY MANAGER

As a result of the evidence given at the private examinations, a further systemic issue has been identified, which is the following relating to NSW Police custody managers:

- Their training;
- Their role, which is to protect people in custody and particularly vulnerable people;.
- Their understanding of their role;.
- Recording their interactions with people in custody,

1 particularly vulnerable people;.
2 Recording and conveying of the instructions of people
3 in custody to investigating police.
4

5 Another issue which has come about in this
6 investigation is the degree of force used in [YPM1]'s
7 arrest.
8

9 THE EVIDENCE IN THE COMING WEEK

10
11 The evidence in the coming week will focus primarily
12 on systemic issues which have been identified. Legal Aid
13 NSW and the Aboriginal Legal Service have made submissions
14 in writing about the issue of young people in custody being
15 interviewed even after legal advice has been given and they
16 do not agree to being interviewed.
17

18 Both organisations have highlighted that the majority
19 of police and custody managers carry out their
20 investigative role and custody management functions
21 properly. However, the issue of young people in custody
22 being interviewed even after legal advice has been given
23 and they do not agree to being interviewed is one that
24 frequently comes up.
25

26 This frequency and consequent systemic nature of the
27 problem is evident in a number of cases which have been
28 before the Children's Court, District Court and Supreme
29 Court, where admissions obtained by police from young
30 people have been excluded. These cases continue to come
31 before the courts.
32

33 Concern about this issue has also been raised with the
34 Law Enforcement Conduct Commission by the New South Wales
35 Director of Public Prosecutions, Sally Dowling SC,
36 in February 2023.
37

38 At least two assistant commissioners of police are
39 expected to give evidence this week. They are Assistant
40 Commissioner Cotter, giving evidence particularly about
41 custody management; and Assistant Commissioner Crandell,
42 relating to the use of body-worn video.
43

44 They will be asked questions on a number of topics
45 including:

46 Custody management;
47

1 Standard operating procedures relating to custody
2 management;
3 The role of the custody manager;
4 How the role is regulated;
5 What happens when a person arrives at the station in
6 police custody;
7 Communications between the custody manager and
8 investigating police;
9 What communications and recording are undertaken if
10 investigating police want to interview a person in custody;
11 Direct contact between investigating police and the
12 vulnerable person before, during and after legal advice has
13 been given;
14 Understanding of the obligations to contact a
15 solicitor if a person in custody changes their decision
16 regarding being interviewed;
17 Support persons;
18 Keeping of custody management records;
19 How records are created and kept;
20 What is to be recorded in custody management records;
21 Allegations against police regarding use of force and
22 other specific entries which should be made in custody
23 management records;
24 What is to be recorded about legal advice received and
25 sought by people in custody;
26 Recording of discussions with the person's solicitor;
27 Interviewing vulnerable persons in custody;
28 Refusals to be interviewed, why these are recorded and
29 why they are necessary; and
30 The use of body-worn video.

31
32 There will also be an examination of reasonable force
33 used in arrest.

34
35 The following will also give evidence at the public
36 examinations: Ms Keisha Hopgood, the acting principal
37 legal officer of the Aboriginal Legal Service, and Mr Ron
38 Frankham, the head of Legal Aid NSW Children's Legal
39 Service.

40
41 They will give evidence of their experience and the
42 experience of their legal services with police,
43 particularly regarding speaking to police when young people
44 are in custody and whether children should be interviewed
45 or not.

46
47 Finally, Chief Commissioner, at the outset of the

1 hearings on 14 December 2022, the Commission heard
2 submissions orally, and later received submissions in
3 writing, about whether evidence should be taken in public
4 or private. A public judgment was issued by the
5 Commission. There was a private judgment, which was also
6 issued, which was then limited to the parties. That
7 private judgment, with some redactions and some explanation
8 of events subsequent to its handing down, will be made
9 public and will shortly appear on the Law Enforcement
10 Conduct Commission's website.

11
12 Chief Commissioner, I will shortly turn to tendering
13 exhibits at the public examination and then calling
14 Mr Frankham. Could I have a short adjournment before doing
15 so?

16
17 THE CHIEF COMMISSIONER: Yes.

18
19 Just before we do adjourn, as counsel assisting has
20 recently observed, the Commission issued a public decision
21 on 3 March 2023 concerning the use of public and private
22 examinations in aid of the investigation in Operation
23 Mantus. That public decision has been on the Commission
24 website since that day.

25
26 In addition, as counsel assisting has observed, and as
27 the parties granted leave are aware, the Commission issued
28 a confidential decision. That confidential decision
29 provided a further explanation of the reasons why a
30 combination of private and public examinations were to be
31 used.

32
33 As stated in that confidential decision, the
34 Commission considered whether the confidential decision
35 could be released with certain redactions. A decision has
36 been made that that will take place. I have given
37 a direction that the confidential decision in its amended
38 form will be placed on the Commission website today and
39 will be available to the public.

40
41 There are limited continuing redactions from the
42 confidential decision. The things redacted are, in
43 essence, the precise location in northern New South Wales
44 where events occurred and one other paragraph relating to
45 other proceedings.

46
47 There are also contained in the confidential decision,

1 in its amended form, footnotes explaining certain events
2 which have occurred since the confidential decision was
3 first released on a limited basis to those who had been
4 granted leave to appear. So that confidential decision
5 will now be made public on the Commission website.

6
7 How long would you ask for at this stage?

8
9 MR FERNANDEZ: We have Mr Frankham coming at 11.30. We
10 just have to juggle some other things. So 11.35, if that
11 is possible, Commissioner.

12
13 THE CHIEF COMMISSIONER: All right. The Commission will
14 adjourn for the moment until 11.35am.

15
16 **SHORT ADJOURNMENT**

17
18 THE CHIEF COMMISSIONER: Yes, Mr Fernandez?

19
20 MR FERNANDEZ: Two matters before I call Mr Frankham,
21 Chief Commissioner.

22
23 Can I correct my opening from this morning, when
24 I turned to the background early in my address, I referred
25 to two officers who were both senior officers in the
26 relevant police district. I referred to them mistakenly as
27 [MTS9] and [MTS10]. They were in fact [MTS6] and [MTS7].

28
29 THE CHIEF COMMISSIONER: Yes.

30
31 MR FERNANDEZ: Mr Frankham I will shortly call to give
32 evidence. I understand Ms Lewer is here and will be
33 seeking leave.

34
35 MS LEWER: Yes, Chief Commissioner, Lewer, L-E-W-E-R,
36 I seek leave to appear for Legal Aid NSW.

37
38 THE CHIEF COMMISSIONER: Yes, thank you, leave is granted,
39 thank you, Ms Lewer.

40
41 MR WHITE: Chief Commissioner, could I just correct one
42 thing that was also said by my learned friend. It was
43 indicated that [MTS4], who I represent, also gave evidence
44 in the private hearing, but he did not, and he was in fact
45 summonsed but was not required by the Commission.

46
47 THE CHIEF COMMISSIONER: Is that --

1
2 MR FERNANDEZ: [MTS4] was the support person. When I
3 referred to - sorry, [STM4] was the support person. When
4 I referred to his evidence, what I was referring to was the
5 recorded interview that he has given, which is an
6 exhibit in the private examination. But he wasn't
7 called to --

8
9 THE CHIEF COMMISSIONER: Officer [MTS4] - did Officer
10 [MTS4] get called at a private examination in February
11 or March?

12
13 MR FERNANDEZ: I might just confirm the pseudonyms.
14 I will confirm that.

15
16 THE CHIEF COMMISSIONER: There is an element of
17 complication in the pseudonyms. But [MTS] is obviously
18 based on a short form of "Mantus". [STM] I think is to
19 distinguish civilians versus police officers but there is
20 a risk of slips.

21
22 MR FERNANDEZ: Yes. I do now confirm that Officer [MTS4],
23 Mr White's client, did not give evidence at the private
24 examinations.

25
26 THE CHIEF COMMISSIONER: All right. Thank you, Mr White,
27 for clearing that up.

28
29 All right, yes, Mr Fernandez?

30
31 MR FERNANDEZ: Chief Commissioner, I tender the following
32 exhibits in the public examination. I think we're up to
33 MTS62, as the first exhibit.

34
35 I tender a redacted email from Jonathan Whitting to
36 [MTS1] and [MTS8], the arresting officer and the custody
37 manager, on 12 September 2022. The barcode for that
38 document is 8620258.

39
40 **EXHIBIT #MTS62 REDACTED EMAIL FROM JONATHAN WHITTING TO**
41 **[MTS1] AND [MTS8] ON 12 SEPTEMBER 2022 BARCODED 8620258**

42
43 MR FERNANDEZ: I tender a redacted call form record from
44 the Aboriginal Legal Service. It's a custody notification
45 system document, concerning [YPM1], and it's dated
46 12 September 2022. The barcodes are 8543557 through
47 to 559.

1
2 **EXHIBIT #MTS63 REDACTED CALL FORM RECORD, CUSTODY**
3 **NOTIFICATION SYSTEM, BY THE ABORIGINAL LEGAL SERVICE**
4 **CONCERNING [YPM1] DATED 12 SEPTEMBER 2022, BARCODED**
5 **8543557-8543559**
6

7 MR FERNANDEZ: I tender a redacted document titled "Role
8 of a support person", signed by [STM4] - that's the support
9 person - on 12 September 2022. The barcode for that
10 document is 8543560.
11

12 **EXHIBIT #MTS64 REDACTED DOCUMENT TITLED "ROLE OF A SUPPORT**
13 **PERSON" SIGNED BY [STM4] ON 12 SEPTEMBER 2022, BARCODED**
14 **8543560**
15

16 MR FERNANDEZ: I tender the submission made by Legal Aid
17 NSW to the Commission dated March 2023. The barcodes are
18 8543561 through to 8543584.
19

20 **EXHIBIT #MTS65 SUBMISSION OF LEGAL AID NSW TO THE**
21 **COMMISSION ENTITLED "SYSTEMIC ISSUES AND PRACTICES IN**
22 **POLICE INTERVIEWS WITH CHILDREN AND YOUNG PEOPLE", BARCODED**
23 **8543561-8543584**
24

25 MR FERNANDEZ: I tender the submission of the Aboriginal
26 Legal Service to the Commission, also dated March of 2023.
27 The barcodes are 8543585 through to 8543605.
28

29 **EXHIBIT #MTS66 SUBMISSION OF THE ABORIGINAL LEGAL SERVICE**
30 **TO THE COMMISSION ENTITLED "SYSTEMIC ISSUES RELATING TO**
31 **POLICE PRACTICES OF INTERVIEWING CHILDREN FOLLOWING REFUSAL**
32 **OF INTERVIEW", DATED 30 MARCH 2023, BARCODED**
33 **8543585-8543605**
34

35 MR FERNANDEZ: I tender a redacted email between Legal Aid
36 NSW and the NSW Police Force regarding use of body-worn
37 video in questioning young people. The barcodes are
38 8543606 through to 8543608.
39

40 **EXHIBIT #MTS67 REDACTED EMAIL BETWEEN LEGAL AID NSW AND**
41 **THE NSW POLICE FORCE REGARDING USE OF BODY-WORN VIDEO**
42 **IN QUESTIONING YOUNG PEOPLE, BARCODED 8543606-8543608**
43

44 MR FERNANDEZ: I tender redacted emails between the
45 Aboriginal Legal Service and NSW Police dated 19 and
46 22 August 2022. These emails relate to interviewing young
47 people after they have accepted the right to silence

1 advice. The barcodes for these emails are 8543609 to
2 8543610.

3

4 **EXHIBIT #MTS68 REDACTED EMAILS BETWEEN THE ABORIGINAL LEGAL**
5 **SERVICE AND NSW POLICE DATED 19 AND 22 AUGUST 2022 RELATING**
6 **TO THE INTERVIEWING OF YOUNG PEOPLE AFTER RECEIPT OF LEGAL**
7 **ADVICE, BARCODED 8543609-8543610**

8

9 MR FERNANDEZ: I will now tender a number of cases which
10 are on point in relation to this investigation about
11 interviewing of children following legal advice. I tender
12 a judgment of Judge Nicholson in the District Court in 2006
13 of *R v APCR* and *R v CP*.

14

15 **EXHIBIT #MTS69 DECISION OF JUDGE NICHOLSON SC IN R V APCR**
16 **AND R V CP [2006] NSWDC 12, BARCODED 8543611-8543629**

17

18 MR FERNANDEZ: I tender the case of *R v FE*, judgment of
19 Justice Adamson in the Supreme Court in 2013, barcoded
20 8543630-8543658.

21

22 **EXHIBIT #MTS70 DECISION OF JUSTICE ADAMSON IN R V FE [2013]**
23 **NSWSC 1692, BARCODED 8543630-8543658**

24

25 MR FERNANDEZ: I tender a judgment of Justice Hamill in
26 the Supreme Court in the *R v Taleb [2019] NSWSC 241*. The
27 barcode for the judgment is 8543659 through to 8543716.

28

29 **EXHIBIT #MTS71 DECISION OF JUSTICE HAMILL IN R V TALEB**
30 **[2019] NSWSC 241, BARCODED 8543659-8543716**

31

32 MR FERNANDEZ: I tender a judgment of Judge Grant in the
33 District Court of *R v DN [2019] NSWDC 492*. The barcodes
34 are 8547005 to 8547015.

35

36 **EXHIBIT #MTS72 DECISION OF JUDGE GRANT IN R V DN [2019]**
37 **NSWDC 492, BARCODED 8547005-8547015**

38

39 MR FERNANDEZ: I tender a judgment of Judge Yehia, as
40 her Honour then was, in *R v DB* and *R v AP [2020] NSWDC 472*.
41 The barcodes are 8547016 to 8547048.

42

43 **EXHIBIT #MTS73 DECISION OF JUDGE YEHIA SC, AS HER HONOUR**
44 **THEN WAS, IN R V DB, R V AP [2020] NSWDC 472, BARCODED**
45 **8547016-8547048**

46

47 MR FERNANDEZ: I tender a judgment of Justice Hamill in

1 the Supreme Court in *R v Archer (No. 1) [2021] NSWSC 569*.
2 The barcode is 8547049 to 8547076.

3
4 **EXHIBIT #MTS74 DECISION OF JUSTICE HAMILL IN R V ARCHER**
5 **(NO.1) [2021] NSWSC 569, BARCODED 8547049-8547076**

6
7 MR FERNANDEZ: I tender the judgment which will be
8 referred to in this Commission as the *Police v ABC*,
9 a judgment of Magistrate Hamilton in the Children's Court
10 on 6 July 2021. The barcode for this judgment is 8547077
11 to 8547114.

12
13 THE CHIEF COMMISSIONER: I will just pause for a moment.
14 The document I think is the transcript of that day, which
15 includes the transcript of evidence and the judgment of
16 Magistrate Hamilton.

17
18 MR FERNANDEZ: That's so, Chief Commissioner.

19
20 THE CHIEF COMMISSIONER: And having regard to the fact
21 that that is a Children's Court decision and which has not
22 been published on case law, steps have been taken to edit
23 it in various respects having regard to the jurisdiction
24 involved.

25
26 MR FERNANDEZ: Yes, that's so, yes.

27
28 **EXHIBIT #MTS75 TRANSCRIPT AND JUDGMENT OF A HEARING IN THE**
29 **CHILDREN'S COURT DESCRIBED AS *POLICE V ABC*, INCLUDING THE**
30 **JUDGMENT OF MAGISTRATE HAMILTON, ON 6 JULY 2021, BARCODED**
31 **8547077-8547114**

32
33 MR FERNANDEZ: I tender the judgment of Judge Herbert in
34 the District Court in the matter of *R v Lindsay*. The date
35 of the judgment is 1 April 2022. The barcodes are 8547115
36 to 8547155.

37
38 **EXHIBIT #MTS76 JUDGMENT OF HER HONOUR JUDGE HERBERT IN R V**
39 **SHANE LINDSAY, PARRAMATTA DISTRICT COURT, ON 1 APRIL 2022,**
40 **BARCODED 8547115-8547155**

41
42 MR FERNANDEZ: I tender the transcript of proceedings in
43 the Children's Court. They will be referred to as the
44 *Police v DEF*. Having regard to the jurisdiction, a number
45 of details have been redacted and anonymised. This is
46 a transcript of proceedings before Children's Court
47 Magistrate Wilson on 18 May 2022. The barcodes are 8544463

1 to 8544470.

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1 fact that that judgment is unrevised. It is entirely
2 understandable because there was no purpose in it being
3 revised, and there is no criticism of the court, of course,
4 in circumstances where that decision was provided to the
5 Commission in that informal state.

6
7 The Commission is grateful to the court for that
8 assistance.

9
10 As I understand it, that judgment does not involve
11 young persons but, in fact, persons who were adults. For
12 the moment, it is not being tendered. If it is tendered at
13 some point, it will be subject to all the qualifications
14 which I have just expressed, but it did involve, on my
15 understanding of it, at least with respect to one or
16 perhaps more of the accused, a scenario where the
17 Aboriginal Legal Service indicated the accused did not wish
18 to be interviewed by the police, but the police proceeded
19 to interview nevertheless.

20
21 MR FERNANDEZ: Yes.

22
23 THE CHIEF COMMISSIONER: So I mention that at this point.
24 It's in a different category to the other judgments which
25 involve young persons, and it's appropriate that the
26 Commission note that it has been provided by the court and
27 to express its gratitude for receiving the judgment in the
28 circumstances I have outlined.

29
30 Yes, Mr Fernandez.

31
32 MR FERNANDEZ: I tender an extract from the NSW Police
33 Force handbook concerning questioning of suspects. The
34 barcode is 8544525.

35
36 **EXHIBIT #MTS79 EXTRACT FROM THE NSW POLICE FORCE HANDBOOK**
37 **CONCERNING QUESTIONING SUSPECTS, BARCODED 8544525**

38
39 MR FERNANDEZ: I tender the standard operating procedures
40 of NSW Police Force concerning charging and custody
41 management in force on 12 September 2022. The barcodes are
42 8544526 to 8544565.

43
44 **EXHIBIT #MTS80 NSW POLICE FORCE STANDARD OPERATING**
45 **PROCEDURES CONCERNING CHARGE ROOM AND CUSTODY MANAGEMENT**
46 **AS IN FORCE ON 12 SEPTEMBER 2022, BARCODED 8544526-8544565**

1 MR FERNANDEZ: I tender the NSW Police Force standard
2 operating procedures concerning body-worn video in force as
3 of November 2022. The barcodes are 8620182 to 8620198.

4
5 **EXHIBIT #MTS81 NSW POLICE FORCE STANDARD OPERATING**
6 **PROCEDURES CONCERNING BODY-WORN VIDEO AS IN FORCE AS**
7 **AT NOVEMBER 2022, BARCODED 8620182-8620198**

8
9 MR FERNANDEZ: I tender the NSW Police Force handbook on
10 the use of force. The extract is 8620199.

11
12 **EXHIBIT #MTS82 EXTRACT FROM THE NSW POLICE FORCE HANDBOOK**
13 **ENTITLED "USE OF FORCE", BARCODED 8620199**

14
15 MR FERNANDEZ: I tender a document called "The use of
16 force principles" by the Australian and New Zealand
17 Policing Advisory Agency (ANZPAA)". The barcode for this
18 document is 8620200.

19
20 **EXHIBIT #MTS83 THE AUSTRALIAN AND NEW ZEALAND USE OF FORCE**
21 **PRINCIPLES ISSUED BY THE AUSTRALIA AND NEW ZEALAND POLICING**
22 **ADVISORY AGENCY, BARCODED 8620200**

23
24 MR FERNANDEZ: I tender the New Zealand Police use of
25 force overview dated 5 August 2022. The barcodes for this
26 document are 8620201 to 8620249.

27
28 **EXHIBIT #MTS84 USE OF FORCE OVERVIEW DATED 5 AUGUST 2022**
29 **ISSUED BY THE NEW ZEALAND POLICE, BARCODED 8620201-8620249**

30
31 MR FERNANDEZ: I tender a one-page redacted police
32 statement of facts relating to admissions by a young
33 person. The barcode is 8620250.

34
35 **EXHIBIT #MTS85 REDACTED PAGE OF A STATEMENT OF FACTS**
36 **CONCERNING ADMISSIONS WITH RESPECT TO A YOUNG PERSON,**
37 **BARCODED 8620250**

38
39 MR FERNANDEZ: I tender a redacted page taken from
40 a police statement of facts relating to a young person,
41 which refers to recordings made of admissions on body-worn
42 video. The barcode is 8620251.

43
44 **EXHIBIT #MTS86 REDACTED PAGE FROM A STATEMENT OF**
45 **POLICE FACTS CONCERNING THE USE OF BODY-WORN VIDEO,**
46 **BARCODED 8620251**

1 MR FERNANDEZ: I tender an article from the Daily
2 Telegraph of 30 March this year titled "Police review rules
3 for body-worn cameras for specialist officers". This
4 relates to an incident which took place in Queensland. The
5 barcodes of this document are 8620252 to 8620256.

6

7 **EXHIBIT #MTS87 ELECTRONIC ARTICLE IN THE DAILY TELEGRAPH OF**
8 **30 MARCH 2023 ENTITLED "POLICE REVIEW RULES FOR BODY-WORN**
9 **CAMERAS FOR SPECIALIST OFFICERS", BARCODED 8620252-8620256**

10

11 MR FERNANDEZ: I tender the Legal Aid Youth Hotline
12 precedent letter sent to police. This is a document in the
13 form of a template. The barcode is 8620257.

14

15 **EXHIBIT #MTS88 LEGAL AID NSW PRECEDENT LETTER AS SENT TO**
16 **POLICE, BARCODED 8620257**

17

18 MR FERNANDEZ: I tender the Legal Aid Youth Hotline
19 telephone advice report - this is a form of an electronic
20 template. The barcodes are 8620259 to 8620260.

21

22 **EXHIBIT #MTS89 LEGAL AID NSW ELECTRONIC TEMPLATE WITH**
23 **RESPECT TO TELEPHONE ADVICE, BARCODED 8620259-8620260**

24

25 MR FERNANDEZ: I tender NSW Police Force circular No. 2 of
26 2005. This relates to interviewing of suspects. The
27 barcode is 8620261.

28

29 **EXHIBIT #MTS90 NSW POLICE FORCE CIRCULAR NO. 2 ISSUED IN**
30 **2005 WITH RESPECT TO INTERVIEWING SUSPECTS, BARCODED**
31 **8620261**

32

33 MR FERNANDEZ: I tender redacted pages from a statement of
34 police facts relating to a young person. The barcodes for
35 this document are 8620362 to 8620363.

36

37 **EXHIBIT #MTS91 REDACTED PAGES FROM A STATEMENT OF POLICE**
38 **FACTS CONCERNING A YOUNG PERSON, BARCODED 8620362-8620363**

39

40 MR FERNANDEZ: I tender redacted pages from a statement of
41 police facts relating to a young person. The barcodes for
42 this document are 8620364 to 8620365.

43

44 **EXHIBIT #MTS92 REDACTED PAGES FROM A STATEMENT OF POLICE**
45 **FACTS CONCERNING A YOUNG PERSON, BARCODED 8620364-8620365**

46

47 MR FERNANDEZ: Chief Commissioner, I now call Mr Ronald

1 Frankham from Legal Aid NSW.

2

3 THE CHIEF COMMISSIONER: Just before that occurs, the
4 article in the Daily Telegraph, MTS87, I think you noted in
5 passing that it is an incident in Queensland last week.

6

7 MR FERNANDEZ: Yes, that's right.

8

9 THE CHIEF COMMISSIONER: It's not a New South Wales
10 incident.

11

12 MR FERNANDEZ: It's not.

13

14 THE CHIEF COMMISSIONER: But it is one where plain clothes
15 police forming a specialised unit were not wearing
16 body-worn video at a time that a person was shot dead.

17

18 MR FERNANDEZ: That's correct, Chief Commissioner.

19

20 THE CHIEF COMMISSIONER: And there is controversy in
21 Queensland about that.

22

23 MR FERNANDEZ: That's correct, yes.

24

25 <RONALD FRANKHAM, affirmed: [12.14pm]

26

27 <EXAMINATION BY MR FERNANDEZ:

28

29 MR FERNANDEZ: Q. Can you please state your name?

30 A. Ronald Frankham.

31

32 Q. Are you the manager of Legal Aid NSW Children's Legal
33 Service?

34 A. That's correct.

35

36 Q. Mr Frankham, did you give evidence at a private
37 examination before this Commission on 17 March this year?

38 A. I did.

39

40 Q. Mr Frankham, you are aware that Legal Aid NSW has
41 prepared a submission to this Commission that is now an
42 exhibit - you might have heard me going through a number of
43 exhibits. It is exhibit MTS65 and it is titled "Systemic
44 issues and practices in police interviews with children and
45 young people." Do you have a copy of that document before
46 you?

47 A. I do.

1
2 Q. Is that a submission that you were heavily involved in
3 the preparation of?
4 A. I had input.
5
6 Q. It contains a number of case studies and experiences
7 of Legal Aid NSW as an organisation with police relating to
8 a number of different matters which are being investigated
9 by this investigation; is that correct?
10 A. That's correct.
11
12 Q. How long have you been admitted as a solicitor?
13 A. Since 2007.
14
15 Q. How long have you worked at the Children's Legal
16 Service?
17 A. I've been at Legal Aid since 2011. In that time, I've
18 had two stints in the Children's Legal Service, so roughly
19 around seven to eight years all up of my time at Legal Aid
20 has been at the Children's Legal Service.
21
22 Q. When were you appointed the manager of the Children's
23 Legal Service?
24 A. At the end of 2018.
25
26 Q. During those periods of time when you've been at the
27 Children's Legal Service, have you been involved in
28 something called the Legal Aid Youth Hotline?
29 A. Yes.
30
31 Q. Is that a free service provided by Legal Aid NSW which
32 is staffed by solicitors of Legal Aid NSW?
33 A. Yes.
34
35 Q. Those solicitors all have expertise in children's
36 criminal law; is that correct?
37 A. That's correct.
38
39 Q. The Youth Hotline provides legal advice and
40 information to young people under 18 and it operates from
41 9am to midnight on weekdays and 24 hours between Friday at
42 9am to Sunday, midnight, as well as on public holidays; is
43 that correct?
44 A. That's right.
45
46 Q. The Legal Aid Youth Hotline is frequently contacted by
47 police on behalf of children who are in custody at police

1 stations; is that correct?
2 A. Yes.
3
4 Q. The Aboriginal Legal Service also conducts a service
5 called the CNS - Custody Notification Service - is that
6 correct?
7 A. Yes.
8
9 Q. And if any inquiries are received by Legal Aid NSW
10 relating to Aboriginal young people, are they directed
11 towards the Custody Notification Service?
12 A. Yes, that's standard practice.
13
14 Q. During your time at Legal Aid NSW in the Children's
15 Legal Service, have you had shifts where you've worked on
16 the Youth Hotline?
17 A. I have.
18
19 Q. Would it be correct to say that you've advised many,
20 many young people on their legal rights in custody?
21 A. Yes, I - it'd be thousands of calls, since 2011, I've
22 averaged two to three shifts per month every year, average
23 10 or more calls - it's hard to say, but it would be in the
24 thousands.
25
26 Q. When you gave evidence at the private examinations and
27 now and in terms of the submission of the Legal Aid
28 Commission to this Commission, have you drawn on your own
29 experience as well as the experience of other solicitors
30 working within the Children's Legal Service?
31 A. Yes, and other - I should say, other solicitors
32 working within Legal Aid generally. Not all of the
33 solicitors who man the Youth Hotline are based in the
34 Children's Legal Service.
35
36 Q. I understand. Within the submission prepared by Legal
37 Aid NSW are a number of case studies; is that correct?
38 A. That's correct.
39
40 Q. Relating to actual young people who have been
41 anonymised?
42 A. Yes.
43
44 Q. Which draw out many of the issues that this Commission
45 is investigating; is that right?
46 A. That's right.
47

1 Q. With the Legal Aid Youth Hotline, in addition to
2 speaking to young people, do solicitors also speak to
3 support persons who are at police stations with young
4 people?

5 A. They do.

6

7 Q. And advice is given to those support persons about
8 issues relating to them as support people as well as legal
9 rights for the young person; is that right?

10 A. Yes.

11

12 Q. Perhaps to draw out the advice that you give and the
13 information that you take from young people, what I will
14 have put up is the advice form which is filled out, it's
15 the form of a template on a computer. It's an exhibit in
16 these proceedings, which is MTS89. The barcode is 8620259
17 to 8620260. I wonder if that might be put up on the
18 screen.

19 A. Yes.

20

21 Q. I'll just ask you to look at the top of the
22 page first. Is this what a print-out of the computer
23 template would look like?

24 A. Yes, it's the first page.

25

26 Q. So solicitors working within the Youth Hotline, when
27 they're answering calls, either at work or at home, have
28 access to a computer and when a young person - someone
29 calls on behalf of a young person at a police station, this
30 is the form that's filled out --

31 A. Yes.

32

33 Q. -- is that correct? What is contained at the top are
34 a number of details relating to the advice - relating to
35 the young person; is that correct?

36 A. Yes.

37

38 Q. And then if you go to the bottom third of the page,
39 there are a number of details relating to the young person,
40 such as what outcomes police are considering, what the
41 situation is with bail and the details of the support
42 person; is that right?

43 A. Yes.

44

45 Q. Some of the details that you get from the young person
46 include whether they live in out of home care; is that
47 right?

1 A. That's correct.
2
3 Q. And whether the young person is, in fact, under arrest
4 and, if so, what that's for; is that correct?
5 A. Yes.
6
7 Q. Just turning to the next page, about a third of the
8 way - or in the top part of the page there's a box that
9 refers to speaking to the client. Is that a place where
10 solicitors can type in notes or write in notes about the
11 young person and what their details are and any additional
12 information that they are spoken to about?
13 A. Yes, that's right.
14
15 Q. About a third of the way or in the middle of the page,
16 there are a number of boxes which contain information about
17 advice on the Young Offenders Act, advice regarding the
18 right to silence and other advice; is that right?
19 A. That's correct.
20
21 Q. Does that form a guide as to the important matters
22 that should be raised with the young person when you or
23 anyone else is speaking to that child?
24 A. Yes, that's right.
25
26 Q. Included in the right to silence advice is the
27 following: an explanation of the right to silence; not
28 doing a recorded interview; not going into an interview
29 room; and no recording of a refusal on tape - is that
30 correct?
31 A. Yes.
32
33 Q. In terms of instructions from the young person, you
34 give advice to young people, and it's up to the young
35 people whether they accept your advice or not; is that
36 correct to say?
37 A. That's right.
38
39 Q. What you are able to do, though, is to note the
40 instructions from the young person, such as wanting to
41 admit the allegations for the purpose of the Young
42 Offenders Act outcome or offering a Young Offenders Act
43 outcome but denying an allegation; is that correct?
44 A. That's right.
45
46 Q. What you note is also whether the young person wants
47 to exercise their right to silence, whether the young

1 person consents to you speaking to their support person,
2 and whether the young person consents to you relaying their
3 instructions on to police?
4 A. That's right.
5
6 Q. In the very bottom part of the page is a heading
7 referring to minor assistance, but of more importance is
8 a box that relates to discussion with police; is that
9 right?
10 A. That's right.
11
12 Q. Once again, that's a place where what you have is
13 a guide to what you might raise with police as is relevant
14 in that particular case; is that correct?
15 A. That's right.
16
17 Q. One outcome is for a recorded interview for the
18 purpose of a caution or a Youth Justice conference?
19 A. That's correct.
20
21 Q. Other outcomes, though, are exercising the right to
22 silence and refusing an interview; is that correct?
23 A. That's correct.
24
25 Q. Another outcome is to ask the custody manager to note
26 instructions in the custody management record?
27 A. Yes.
28
29 Q. And a confirmation letter sent to police; is that
30 correct?
31 A. Yes, that's correct.
32
33 Q. In order to do those things, do you get the consent
34 of the young person first to do those things - in fact,
35 it's referred to in one of the boxes that you get that
36 consent --
37 A. That's right.
38
39 Q. -- is that correct? Those documents, that template
40 that you have, assists you and any other solicitor who
41 works at the Youth Hotline with the recurrent advice and
42 procedures that pop up relating to young people in custody;
43 is that right?
44 A. Yes.
45
46 Q. What you also do is you speak to the custody manager
47 at the police station as well as the officers in charge, if

1 they're available; is that correct?

2 A. That's correct.

3

4 Q. Just in relation to the issue of children being placed
5 before a camera to be recorded as to a refusal to give
6 a recorded interview, are you aware of a police circular
7 from March of 2005 in relation to that very issue?

8 A. Yes.

9

10 MR FERNANDEZ: I would ask for that police circular to be
11 placed up on the screen. It is an exhibit and it's MTS90.
12 The barcode is 8620261.

13

14 Q. This is a police circular which has the title
15 "Recording refusals by suspects to participate in an ERISP
16 interview" - or electronic recording by police - is that
17 right?

18 A. That's right.

19

20 Q. And just looking at it, this sets out in a document
21 which was then in force called the "Code of practice for
22 CRIME", which was a document set out for police that, as
23 you can see on the right-hand side of that document -
24 perhaps we can focus in on the right-hand side column to
25 the very first paragraph, please - this circular refers to
26 the following in terms of admissibility of interview
27 evidence, and it's this:

28

29 *However, you do not have the power to*
30 *compel or intimate to the suspect that they*
31 *must participate in an electronic recorded*
32 *interview for the purpose of recording*
33 *their refusal. Record the refusal in your*
34 *notebook and if appropriate, on the facts*
35 *sheet.*

36

37 Can you see that?

38 A. I can.

39

40 Q. That protocol is something that is, in fact, referred
41 to in the precedent letter that is sent to police after
42 legal advice is given; is that correct?

43 A. It is, when - I should say when the letter or email is
44 actually sent.

45

46 Q. When it is sent?

47 A. Yes.

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Q. I'm going to ask for that email to be placed up on the screen. It is an exhibit. It is MTS88. The barcode is 8620257. I took you previously to the template advice. That allows you also, on your computer system, to generate a letter to be sent to the custody manager at a police station; is that correct?

A. That's right.

Q. This letter that's now up on the screen is one used to confirm the instructions which have been relayed between yourself and the custody manager; is that correct?

A. Yes, also sometimes the OIC or sometimes both.

Q. If it's to both, would you send it to both - would you send this email to both?

A. Yes, I mean, it's more - email is used more frequently than letters or faxes these days, so I think when it was first made we were sending more faxes but these days it's more likely to be an email than a fax or a letter.

Q. What the email refers to is it's a confirmation of a telephone discussion. It confirms that the young person does not wish to be interviewed and will not provide any form of written statement. The young person does not wish to record his or her refusal to be interviewed electronically on ERISP or hand-held voice/video recorder or otherwise; is that correct?

A. That's right.

Q. You can see that after indicating that the young person wishes to exercise his or her right to silence, you make a note from the circular that I just read to you, what is set out in terms of whether police have the power to compel or intimate to a suspect that they have to record a refusal on video; is that correct?

A. That's right.

Q. There is also a protocol that exists between Legal Aid NSW and the Commissioner of Police that was in force since September of 2004; is that right?

A. That's right.

Q. That protocol, which is referred to in the submission, makes reference to the operation of the hot line and the recording by police of interviews or the refusal to take part in an interview on electronic tape; is that correct?

1 A. There is reference, yes, to that.
2
3 Q. There is this circular, there is a protocol. What is
4 your experience, in terms of police, and specifically,
5 whether after children have been given advice to exercise
6 their right to silence, which is communicated to the
7 custody manager and/or the officer in charge, whether
8 interviews still go ahead?
9 A. It's both my experience and the experience of the
10 staff that man the Youth Hotline that interviews often
11 still happen regardless of that advice or, I should say,
12 regardless of those instructions being relayed to the
13 police.
14
15 Q. Is the way that you find out about that some time
16 afterwards when children actually come to court with their
17 police facts and they're talking to solicitors getting
18 advice about any charges they may have?
19 A. Yes, that's often the first time we find out.
20
21 Q. If I can ask you to turn to the Legal Aid submission
22 to page 9, please, what you refer to at part 4.2 there,
23 under the issue of recording the refusal on tape, is that
24 your experience is, even though these documents exist, it's
25 the case that police still go ahead and put children in
26 front of a recorded interview; is that right?
27 A. Yes, that does happen.
28
29 Q. And whilst they might say to you that the recording is
30 a recording of a refusal on tape, is your experience and
31 the experience of others who work with you that the
32 interviews go beyond recording of a refusal but the actual
33 questions and answers - that is, a full interview with
34 those children?
35 A. Yes, that happens as well.
36
37 Q. When you speak to police, are you given a number of
38 different reasons - this is with the custody manager as
39 well as the officers in charge - as to why police will put
40 young people in front of a camera?
41 A. Yes.
42
43 Q. What sort of reasons are you given by police as to why
44 that is done, notwithstanding this protocol and this
45 circular which in are in force?
46 A. I guess common terms used are words to the effect of
47 "In fairness to the young person, we'd like to put the

1 allegation to them"; "It's my standard practice to have
2 a refusal recorded." We've had instances where they say
3 "Well, I'm just going to turn on the body-worn and have
4 them say that", so they're all examples.
5

6 Q. Are you yourself also aware of police saying - and
7 this is recorded in the Legal Aid submission at page 11 -
8 that if the young person doesn't give the young person's
9 side of the story, that police will have to charge the
10 young person and they may not get bail?

11 A. Yes.
12

13 Q. Have you yourself ever had that particular experience,
14 where you've heard that said or it has been said to you?

15 A. Not in those terms personally. My experience has been
16 earlier having a conversation with police, prior to
17 speaking to the young person about bail, often comments are
18 along the lines of, when we're asking if they're
19 considering bail or likely to give bail, comments along the
20 lines of, "Well, it depends what they say."
21

22 Q. What is set out in the Legal Aid submission is
23 a number of recurring issues that take place with custody
24 managers and officers in charge. I've already asked you
25 about some of them, such as the recording of the refusal on
26 tape, as well as these other reasons police give to explain
27 why they put a young person on tape. I did take you to the
28 template, and there is a box about requesting the custody
29 manager to make a note in the custody management record; is
30 that correct?

31 A. Yes.
32

33 Q. Of the advice that you've actually given to the young
34 person and which you've relayed to the custody manager.
35 What's your experience of whether that is in fact done?

36 A. It's difficult to say, because we obviously don't have
37 access to the actual custody management records. For the
38 majority of times the custody manager will say "Yes, that's
39 fine." Occasionally, you will get custody managers who
40 might say words to the effect of "Well, they're my records.
41 I will put in there what I want to", or words to those
42 effect.
43

44 Q. One of the issues that has been identified in the
45 Legal Aid submission is that police facts are subsequently
46 prepared and given to the young person, which do not, in
47 fact, refer to the advice given to the young person, that

1 they not take part in an interview; is that correct?

2 A. That's right.

3

4 Q. How is it that you find that out when you're looking
5 at a police statement of facts? How do you actually
6 determine what the advice was that was given to the young
7 person?

8 A. The only way we can do that is to check our electronic
9 database for the actual advice. If it's a client that the
10 Legal Aid Youth Hotline has spoken to, we can get a copy of
11 the advice form and we can have a look at the notes made by
12 the solicitor who was rostered on to see what advice was
13 given.

14

15 Q. I will take you to some facts a little bit later on
16 where what's noted in the police facts makes no mention of
17 the actual advice given to children. Is that something
18 that's fairly frequent as far as you're aware?

19 A. Yes, that's relatively common.

20

21 Q. What about the situation about a change of mind by the
22 young person? What I mean by that is you give advice to
23 the young person and it's up to the young person whether
24 they follow your advice or not, but assuming the young
25 person accepts your advice not to take part in an
26 interview, is there scope later on if the young person
27 changes their mind for further advice to be provided by the
28 Legal Aid Youth Hotline?

29 A. Well, there is further scope, yes. We are always
30 available to give further advice if required.

31

32 Q. In your experience, how often has that happened, that
33 a young person has decided to take part in an interview and
34 police have actually contacted you on the young person's
35 behalf?

36 A. It's not common at all. I can't recall a specific
37 example when I was on the Youth Hotline where that has
38 happened.

39

40 Q. I took you to a protocol that you have referred to
41 which was between NSW Police and Legal Aid NSW from 2004.

42 A. Yes.

43

44 Q. Have you or Legal Aid tried to update that protocol
45 with NSW Police?

46 A. We certainly are aware it needs updating, yes.

47

1 Q. Have you ever taken any steps or are you aware of
2 others within Legal Aid trying to get that protocol
3 updated?

4 A. Yes.

5
6 Q. What steps have you taken?

7 A. We have, within Legal Aid - we have an updated draft
8 prepared that we are happy with. The next step, I guess,
9 is to sit down with police and see if they are happy with
10 it.

11
12 Q. Have you made steps to speak, to engage with police
13 about the update to this memorandum?

14 A. Since - I can't speak prior to me being in my current
15 role, but we had a meeting with police in August 2019 where
16 an update to the youth protocol was one of other - one of
17 several, I guess, youth items on the agenda of the meeting.

18
19 Q. It may very well be that there is some evidence later
20 in this week by assistant commissioners about some priority
21 that might be given to the updating of that protocol. Are
22 you yourself aware of any recent steps taken by NSW Police
23 to update that protocol?

24 A. I believe we might have received an email last week
25 about perhaps sitting down and discussing with a view to
26 updating it.

27
28 Q. And who was the person who received that email, do you
29 know?

30 A. I'm not sure. I can't recall the exact nature.
31 I just remember it coming through the email chain.

32
33 Q. Someone within Legal Aid NSW?

34 A. Yes.

35
36 Q. I'm going to take you to the use of body-worn video.
37 You have referred to it as one way of young people being
38 recorded, although not on tape. I'm going to take you to
39 an exhibit in these proceedings. It is MTS67, and it is an
40 email between Legal Aid NSW and the NSW Police Force. The
41 barcodes are 8543606-3608. I'm just going to ask for that
42 email to be brought up. I'm just going to go to the bottom
43 half of that first page first. If that could be zoomed in
44 on, please.

45
46 This is, you're aware, an email sent between a
47 solicitor at Legal Aid NSW and a police officer, and

1 reading the text at the bottom of that first page, it
2 refers to confirming telephone advice that the young person
3 doesn't wish to be interviewed nor to provide a handwritten
4 statement, and the young person didn't wish to have that
5 refusal recorded either on ERISP, an electronic recording,
6 or a hand-held video or on body-worn video; is that
7 correct?

8 A. That's right.

9

10 Q. And if we can turn to the next page, so the
11 page ending in barcode 07, you can see that the end of that
12 email refers to the circular and to the direction to police
13 about not having powers to compel; is that correct?

14 A. That's right.

15

16 Q. What you received, though, was a response to this
17 email - and if we can go back to the previous page, please,
18 ending in 06. What it says is the - the police officer
19 wrote to the solicitor referring to the following:

20

21 *I appreciate your email. However, your*
22 *understanding of the use of Bodyworn camera*
23 *is not applicable to the information you*
24 *have supplied.*

25

26 And it goes on to refer to this officer stating:

27

28 *As guided by ... legislation and NSW Police*
29 *Policy [that he or she was] allowed to*
30 *activate the Bodyworn camera to record any*
31 *refusal to be interviewed.*

32

33 Can you see that?

34

A. Yes.

35

36 Q. Without going through the text of the rest of the
37 email, which is an exhibit in these proceedings, what the
38 officer has said is that if they wish, they will use their
39 body-worn camera and activate it to record a refusal. Can
40 you see that?

41

A. I can see that.

42

43 Q. Is this something that you have experienced frequently
44 about the use of body-worn video?

45

A. Yes, it's not uncommon. Emails to this effect I can't
46 remember anymore than that, but it's more likely to be in a
47 conversation between the police officer and the lawyer on

1 the telephone.

2

3 Q. What you have done, Mr Frankham, which took you
4 a considerable amount of time, is in order to give evidence
5 before this Commission, you've gone back over a number of
6 records kept by the solicitors from the Legal Aid Youth
7 Hotline; is that correct?

8 A. The files are from the Children's Legal Service based
9 at Parramatta rather than the Youth Hotline files.

10

11 Q. And you've looked at the physical records of advices
12 as well as police facts that relate to those advices; is
13 that correct?

14 A. Yes, that's right.

15

16 Q. And in that way, you were able to compare the advice
17 given to children with the outcome which is set out in
18 police facts; is that correct?

19 A. That's right.

20

21 Q. In fact, you have got many such advices and you have
22 spent a number of hours going through to pull out examples
23 to illustrate the issues that we've just been discussing;
24 is that correct?

25 A. Yes, that's correct.

26

27 Q. Just on this issue of body-worn video, I'm going to
28 ask for a document to be put up on screen. It's MTS86.
29 The barcode is 8620251.

30

31 This is one page from a statement of facts which has
32 had information taken out, which is identifying
33 information. This was one example that you came across
34 where you looked at facts and compared it to the advice
35 given, and you made a note of how body-worn video was used
36 in a different way to an electronic recording; is that
37 correct?

38 A. That's right.

39

40 Q. What you noted, which is contained on these police
41 facts, is that the child in this case was given legal
42 advice and - I think it doesn't refer to legal advice in
43 this extract, but it refers to the child declining to take
44 part in a recorded interview, but, in fact, being
45 interviewed on body-worn video; is that correct?

46 A. That's right.

47

1 Q. If I just read directly from the facts, it says,
2 relevantly:

3
4 *However, when requested about the incident*
5 *on [body-worn video] and shown CCTV*
6 *stills ...*

7
8 The young person went on to provide some information; is
9 that correct?

10 A. That's right.

11
12 Q. That was one example of a number of examples that you
13 had where, although a child hasn't been put in front of
14 a recording machine, they have been questioned on body-worn
15 video; is that correct?

16 A. Yes.

17
18 Q. I'm going to take you to another example which you've
19 provided. This is exhibit MTS85 and it is barcoded
20 8620250. If we can just zoom in a little bit, in the top
21 paragraph on that page there's reference to police speaking
22 with the young person in an interview room, and the young
23 person giving police some information. Then what you can
24 see in the third paragraph is:

25
26 *Police offered the young person the*
27 *opportunity to participate in an*
28 *interview ...*

29
30 Which the young person accepted and then made admissions;
31 is that correct?

32 A. That's right.

33
34 Q. Having these police facts, you then cross-reference
35 these facts with the actual advice given to the young
36 person; is that correct?

37 A. That's right.

38
39 Q. What did that advice indicate?

40 A. I can't go into exact detail in terms of all of it
41 because of privilege but I can --

42
43 Q. Of course.

44 A. I can say that the young person gave permission to
45 speak to police and to relay to police that he wished to
46 exercise his right to silence and not have his refusal
47 recorded.

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Q. I should have been more specific. Just in relation to that aspect, did the advice show the young person did not wish to speak to police; is that correct?

A. That's correct.

Q. Even though that advice was given, these facts make no reference to that advice; is that correct?

A. That's correct.

Q. And the young person was, in fact, interviewed, and there is a part of the Legal Aid submission to this Commission which refers to police facts which don't completely contain all the relevant facts, including the advice given to young people; is that correct?

A. That's correct.

Q. This is one example of that being the case; is that right?

A. Yes. I should just clarify in terms of the advice, that it is specific to the advice wherein instructions have been relayed to the police, that they want to exercise those rights. That's what's missing.

Q. I'm going to go to an exhibit MTS91, which is barcoded 8620362 to 8620363. This is a redacted statement of facts, and this was a police statement of facts provided by yourself on behalf of the Commission, relating to a child who had been placed under arrest and it is noted at the very bottom of that first page, the child spoke with Youth Legal Aid - that's the Children's Legal Service; is that right?

A. That's right.

Q. And then turning to the next page, what it indicates is:

The Child participated in an electronically recorded interview ...

And was later charged. Having provided that part of the police facts, did you go back to the actual advice given to the child?

A. Yes.

Q. And relevantly to the questions that I have been asking - I'm not asking you to waive privilege or anything

1 else - what did that advice indicate?
2 A. That the young person wished to exercise their right
3 to silence and they wished those instructions to be passed
4 along to police, and it was indicated in the advice that
5 that occurred.
6
7 Q. What these facts show is, firstly, none of that is
8 recorded in these facts; is that correct?
9 A. That's correct.
10
11 Q. And, secondly, even though that was the advice which
12 was passed on to police, the interview went ahead
13 regardless?
14 A. Yes.
15
16 Q. Is this something that that has come up; it's an
17 experience that you've - it's not uncommon; it's something
18 that frequently takes place?
19 A. Yes.
20
21 Q. Your evidence is that there are police who do follow
22 the appropriate steps and when children don't wish to be
23 interviewed, they don't interview them; is that correct?
24 A. That's right.
25
26 Q. However, there are these recurring issues where that's
27 not taking place; is that correct?
28 A. That's correct.
29
30 Q. I'll take you to exhibit MTS92, barcoded 8620364 to
31 8620365. This is a statement of facts, which if we just
32 zoom in on the bottom of the page, please, this refers to
33 police speaking to a young person, cautioning the young
34 person and then taking that young person back to the police
35 station and reading the young person's rights in the
36 presence of the support person, and then speaking to the
37 Children's Legal Service; is that correct?
38 A. That's right.
39
40 Q. And then just turning to the next page, the facts
41 refer to the young person being offered the opportunity to
42 take part in an electronic interview which the young person
43 accepted and which was also accepted by the support person.
44 Having seen these facts, did you go back to look at what
45 the advice was that was given to the young person?
46 A. That's right.
47

1 Q. And relevantly to what we've been discussing and not
2 disclosing anything that doesn't need to be disclosed, what
3 was that advice?

4 A. In a similar fashion to the last matter, it was
5 a matter where the young person wished to exercise their
6 right to silence, we received permission from the young
7 person to relay those instructions to police. Those
8 instructions were then relayed to the police.

9

10 Q. Is it correct to say that you're finding out about
11 police conducting interviews even though the advice has
12 been relayed that there would be no interview really at the
13 time that children are coming to court and showing you
14 facts, which you are then checking against the advice
15 given?

16 A. Yes, although we don't check it in every occasion,
17 because sometimes it's not an issue that needs to be
18 raised.

19

20 Q. Do you yourself have experience in challenging the
21 interviews in the circumstances that we've been discussing
22 in hearings in the Children's Court?

23 A. Yes. Not recently, but several years ago, yes.

24

25 Q. What about young people - are they always wanting to
26 challenge the admissibility of these issues?

27 A. No. It's my experience that it's more common for them
28 not to want to challenge the admissibility.

29

30 Q. What are they saying to you? What are the words they
31 are using as to why they don't wish to challenge these
32 interviews?

33 A. There are all sorts of reasons. Often, the interview
34 by itself - well, there's other evidence in addition to the
35 interview. Often if it's the only evidences, a young
36 person on bail who has been advised, for example, that
37 their likely penalty might be a good behaviour bond, they
38 will often say, "Well, I would rather my matter over and
39 done with and not be on bail for an extended period, and
40 have the matter determined by a court," in circumstances
41 where they may not be successful. That's not uncommon.

42

43 Q. These issues relating to young people and interviews
44 with police, are these issues that you have encountered for
45 all of your time at the Children's Legal Service?

46 A. Yes.

47

1 Q. Do they continue right up until now?
2 A. They do. I should say the use of body-worn video,
3 though, has become more prevalent in the last three to four
4 years. Prior to that it wasn't used as often.

5
6 Q. When you say body-worn video "has become more
7 prevalent", or its use, what do you mean by that - as they
8 relate to young people?

9 A. As it relates, yes, to the use by police, it's often
10 used by police to take admissions for a Young Offenders Act
11 diversion, for instance. I think it's very easy for police
12 to just turn on the recording, take some admissions and
13 turn it off and it's becoming more common to question them
14 in terms of their investigation.

15
16 Q. The children aren't actually put in front of the
17 videotape but they're recorded in these other ways; is that
18 right?

19 A. That's right.

20
21 Q. Even though the template letter that you send to
22 police makes clear that they are not to be recorded in any
23 way, including through a hand-held or other device; is that
24 right?

25 A. Yes. When those letters or emails are sent, yes.

26
27 MR FERNANDEZ: That completes my questions, Chief
28 Commissioner.

29
30 THE CHIEF COMMISSIONER: Q. Could I just ask you
31 a couple of things. What you have described, helpfully to
32 the Commission, is a process of advice and communication by
33 telephone.

34 A. Yes.

35
36 Q. And that reflects the practical reality that there are
37 people in police stations all over the state at any time
38 who are being arrested and may be going through the
39 processes which you've been discussing.

40 A. Yes.

41
42 Q. Is it still the situation that perhaps during the
43 working daytime, if there is interaction with the police,
44 that there may be a Legal Aid solicitor at the police
45 station who may be able to talk face to face to the police
46 about these sorts of situations, or is the practical
47 reality that it's pretty well all done by telephone now?

1 A. It's all done by telephone. I can't recall an example
2 of a Legal Aid solicitor appearing in person at a police
3 station.

4
5 Q. I suppose the Legal Aid solicitor is likely to be at
6 the courthouse rather than the police station on any
7 specific day, certainly?

8 A. Yes. Well, normally, when they are rostered on for
9 the Youth Hotline, they're normally not rostered on court
10 at the same time. So they're normally during the day in
11 the office or they're, since COVID, more likely to be maybe
12 working from home.

13
14 Q. In circumstances where all the communications are
15 being done by telephone or email, rather than seeing what's
16 happening, I take it that you are not in any position to
17 say whether the police at the police station, who may be
18 saying they want to use body-worn video to record
19 something, are in uniform or in plain clothes?

20 A. No, I couldn't say.

21
22 THE CHIEF COMMISSIONER: Thank you.

23
24 MR FERNANDEZ: Nothing arising, thank you, Chief
25 Commissioner.

26
27 THE CHIEF COMMISSIONER: Does anyone want to seek leave to
28 ask some questions of Mr Frankham?

29
30 MS LEE: Yes, Chief Commissioner.

31
32 THE CHIEF COMMISSIONER: Yes, all right. Leave granted.

33
34 **<EXAMINATION BY MS LEE:**

35
36 MS LEE: Q. Just based on your long-term experience at
37 Legal Aid in the children's unit --

38
39 THE CHIEF COMMISSIONER: Could I just ask you to get
40 a microphone a little closer to you, thank you, Ms Lee?

41
42 MS LEE: Q. Just in relation to your experience at Legal
43 Aid in the children's unit, for you, in your experience,
44 what are the particular vulnerabilities pertaining to young
45 people in custody?

46 A. There are many vulnerabilities. It's hard to describe
47 it briefly. They often have very limited experience with

1 the criminal justice system and being in police custody.
2 A lot of them have difficulties understanding not just
3 legal advice but the process at the police station. And
4 whilst they often are supported by support people, it's
5 often the case that the support person themselves, if it's
6 a family member, often isn't in much of a better situation
7 than the young person. So they're particular
8 vulnerabilities. They're often scared to speak to the
9 police about what they want or whatever it may be.

10
11 Q. And would you say there is a power imbalance between
12 the young person and the police?

13 A. Yes.

14
15 Q. And in terms of young people in regional areas, do you
16 think there are some particular vulnerabilities for those
17 in regional areas?

18 A. I think so to the extent that regional areas often
19 don't have the same level of support services that are
20 available in metropolitan areas, and whilst that might not
21 factor in at the particular time at the police station,
22 there might be, for example, youth workers available in the
23 metro areas who might be able to attend to assist the young
24 person that have a long-lasting relationship with that
25 young person. Often the young people in regional areas
26 don't have the benefit of those types of support services
27 that can really assist while young people are at the police
28 station.

29
30 Q. Thank you. And then also for children who are of
31 First Nations background, are there any particular
32 vulnerabilities for those children?

33 A. I would say yes. Again, a lot of them, in my
34 experience, are from those regional areas and regional
35 towns where there is a lack of any type of support
36 services. They often have a long history, unfortunately, a
37 long history, of interacting with the police, and not just
38 the young person, but their extended families.

39
40 Q. In terms of your evidence that you have given about
41 sometimes police don't adhere or allow the young person to
42 implement their instructions from you, is there any
43 legislative change you think would assist with
44 strengthening the rights of young people in custody in
45 regards to that particular issue?

46 A. Yes. I think if it's made more clear about what the
47 obligations are on custody managers and officers in charge

1 of investigations, where it's made particularly clear what
2 they are allowed or they are not allowed to do in terms of
3 young people in interviews, I think it needs to be set out
4 in plain language so that there is no room for
5 miscommunication or misunderstanding.

6
7 Q. And do you think training would be sufficient to deal
8 with these issues that have been raised today by you?

9 A. I think it would be beneficial, but in and of itself,
10 I think it also needs to be backed by other measures.

11
12 Q. Just a couple more questions, one around body-worn
13 video. When body-worn video footage came in, did you see
14 it operating in this way as being a tool for collecting or
15 undergoing interviews with children?

16 A. No. That's not how we originally viewed it. In my
17 experience, it was to be a good thing if it was, I guess,
18 recording interactions between young people or adults or
19 any other person and the police. But it seems to have,
20 I guess, unintended consequences.

21
22 Q. Do you think it's being used to supersede the need for
23 an ERISP?

24 A. Yes, in circumstances, yes. I should say, in my
25 experience, yes.

26
27 Q. Have you heard of, in your experience, body-worn video
28 footage being used to identify children?

29 A. Not my direct experience. But I have had staff within
30 our team speak about young people being identified on
31 body-worn video. Normally used to, I guess, take a video
32 of the young person shortly after an alleged offence, they
33 might match the description or CCTV in terms of clothing or
34 other identifying marks.

35
36 Q. And would this be for children under 14 years as well?

37 A. I think children of all age groups from 10 to 17.

38
39 Q. If that's the case, do you think that the Forensic
40 Procedures Act comes into play in these circumstances.

41
42 THE CHIEF COMMISSIONER: I think we're moving into an area
43 where there might be an opportunity for the Legal Aid NSW
44 to make submissions on these things. I think entering into
45 the Forensic Procedures Act is a little beyond the scope of
46 what we're doing now. It may be a matter for submissions
47 in due course, or possibly even questions of the police

1 officers, but if we could keep a little closer to the mark
2 as to the subject matter for which Mr Frankham has been
3 called.

4

5 It is after one, Ms Lee. How much longer are you
6 going to be?

7

8 MS LEE: Yes, can I ask two more questions, Chief
9 Commissioner?

10

11 THE CHIEF COMMISSIONER: Sure.

12

13 MS LEE: Q. I just turn now to the use of force, which
14 is also part of these examinations. In your experience,
15 have you represented children where force has been used
16 against them for fine-only offences?

17

18 A. I can't recall specific examples. I couldn't say one
19 way or another.

19

20 Q. Thank you. And in your experience, when force has
21 been disclosed by the young person, is it reflected in the
22 facts sheets by police?

23

24 A. It's been my experience, in the several years ago when
25 I was practising, if an issue of excessive force came up in
26 terms of admissibility or otherwise, it often wasn't
27 included in detail in the facts sheet.

27

28 MS LEE: Thank you. That concludes my questions.
29 Thank you.

30

31 THE CHIEF COMMISSIONER: Does anyone else wish to seek
32 leave?

33

34 MR HALL: Chief Commissioner, I had two questions, but
35 your first question covered the first question, so I've
36 just got one other issue just in relation to the MTS89 and
37 that sheet and as to whether there is any distinction
38 between the ages from 10 to 18, and just lastly what
39 training, if ever, do the members receive in relation to
40 the understanding of the young person on the other line.

41

42 THE CHIEF COMMISSIONER: It's almost 10 past 1. It's
43 necessary for the Commission, for other purposes, to
44 adjourn now, but we will resume at 2pm, if that is
45 convenient.

46

47 If you'd like to step down for the moment, thank you,

1 Mr Frankham, your evidence will continue at 2 o'clock.

2

3 THE CHIEF COMMISSIONER: Yes, the Commission will adjourn
4 until 2 o'clock.

5

6 **LUNCHEON ADJOURNMENT**

7

8 THE CHIEF COMMISSIONER: Thank you, if you could come back
9 to the witness box, Mr Frankham.

10

11 Mr Hall, you had some questions?

12

13 MR HALL: Very quickly, Chief Commissioner.

14

15 THE CHIEF COMMISSIONER: Yes, that's all right.

16

17 **<EXAMINATION BY MR HALL:**

18

19 MR HALL: Q. My name is Mr Hall, I'm acting on behalf of
20 Officer [MTS1] in these proceedings.

21

22 Just picking up from where the Chief Commissioner
23 asked you some questions, is it the case that of all the
24 case studies that you reviewed or your team reviewed, there
25 was none where there was a personal interaction either by
26 a video conference or a visit to the police station or
27 visit to the area that the young person was being held by
28 the police?

29 A. That's right. It was all over the phone.

30

31 Q. In all those matters?

32

33 A. Yes.

34

35 Q. And how many did you review?

36

37 A. I can only give an estimate. There were two filing
38 cabinets. I'd estimate between three to four hundred files
39 all up.

40

41 Q. And I think in your evidence you gave a view as to how
42 many you did per shift. The interaction - just a general
43 interaction - with a young person, what would be the
44 estimated time that you might spend on the phone with the
45 young person?

46

47 A. It's really hard to say. It varies so much. It can
be anywhere - but I'd say at least five to 10 minutes, but
some young people it can go up to as long as 30 minutes on
some occasions and even longer.

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Q. And is there any note on the file to say how long the interaction was?

A. There's a place on the form that records the time of the call and the end time of the call. It also records if a message is received and we're calling the police back.

Q. And just the last point that I asked the Commissioner for leave to ask some questions: in relation to that form, is it a one-size form for ages between whatever ages there are, or is there a differentiation of any forms that you use?

A. No. It's the same form used for anywhere between 10 and 17, and obviously there are parts of the form that only apply to young people of certain ages, for instance, if we're giving advice in relation to doli incapax.

Q. I didn't want to go into that area. Just in relation to the young person's understanding, do the officers under you, or you, have any specific training in relation to gathering that understanding?

A. What do you mean by --

Q. How do you determine that the young person on the other end of the line has understood the complex issues that you're discussing with them?

A. There are - it forms part of our training of dealing with young people not just on Youth Hotline but on a day-to-day basis in court, particular things; for instance, you might be asking the young person to repeat back to you in their words what they understood you meant, and you do your best that way to make sure that you finish the call with the young person having the best understanding that they can.

Q. And that is an important issue, isn't it?

A. Yes.

MR HALL: Thank you. No further questions, Chief Commissioner.

<EXAMINATION BY MR WHITE:

MR WHITE: Q. Mr Frankham, just in relation to your relationship with the young person that you're talking to on the phone, it's an advice service; is that correct?

A. Yes.

1
2 Q. So do you agree that it's not necessarily an ongoing
3 legal relationship you have with that person; it's just
4 a temporary relationship in terms of the advice you give
5 them - is that correct?
6 A. It's a temporary relationship in terms of the advice
7 but can extend further than that if, for instance, the
8 young person is requesting us to do something on their
9 behalf, such as passing on their instructions, or it might
10 be speaking to a third party, such as a support person or
11 a youth worker or whatever it may be.
12
13 Q. That would be dependent on further instructions coming
14 from the young person; correct?
15 A. Yes. We don't take those steps unless we have those
16 instructions first.
17
18 Q. So in the absence of any further instructions after
19 your phone call with the young person, as far as you're
20 concerned, whatever relationship you had with that person
21 has ended; correct?
22 A. For that call?
23
24 Q. Yes.
25 A. Unless - yes.
26
27 Q. And in some cases - and you've given examples in your
28 evidence where you might meet that person again at court
29 and they engage Legal Aid and then a solicitor/client
30 relationship commences; is that right?
31 A. Yes, in relation to the charges?
32
33 Q. Yes.
34 A. Correct.
35
36 Q. So that solicitor/client relationship hadn't been
37 created at the time of the telephone call, had it?
38 A. Well, I say there is a solicitor/client relationship
39 in relation to the advice and the information provided to
40 the police. It's just a different type of relationship
41 than a client/solicitor relationship 6 L--
42
43 Q. But not in terms --
44 A. -- at court.
45
46 Q. Sorry to interrupt you. But not in terms of an
47 ongoing relationship or a retainer for the purpose of the

1 particular matter?

2 A. No, not unless something comes up where we're required
3 to do further work.

4

5 Q. And you would agree that in terms of your involvement
6 with the phone call, that's often done in the absence of
7 a support person?

8 A. We always speak to the young person first prior to
9 speaking to a support person. It's a direct client
10 relationship and we need their instructions to speak to the
11 support person. But it's our best practice, and we try to,
12 in the full advices that we give, speak to the support
13 person if possible.

14

15 Q. But you would agree that there would be some cases
16 where you speak to the young person and there is no support
17 person available at that stage?

18 A. Yes.

19

20 Q. So you give the advice to the young person in the
21 absence of a support person; correct?

22 A. It depends on the occasion. There are occasions where
23 if I speak to an officer or custody manager and they say
24 the support person is five to 10 minutes away, we will
25 instruct them we'll call back when they get there. If they
26 tell me, "We're unlikely to be able to get a support person
27 at all ", or they're unable to give an ETA on when the
28 support person is going to arrive, we will speak to the
29 young person and we will, as a matter of standard practice,
30 say, "Can you please call back when the support person
31 arrives?"

32

33 Q. Let's just assume for argument's sake, though, when
34 you're talking to the young person, there's no support
35 person on the horizon at that stage?

36 A. Yes.

37

38 Q. That situation would happen, wouldn't it?

39 A. Yes.

40

41 Q. And you would proceed to give the young person advice;
42 correct?

43 A. That's right.

44

45 Q. And you would agree, in your experience, Mr Frankham,
46 that after that initial advice, when a support person may
47 ultimately appear at the police station, things can change;

1 correct?
2 A. That's right.
3
4 Q. A support person might be a parent; correct?
5 A. Yes.
6
7 Q. Might be a guardian?
8 A. Yes.
9
10 Q. And they might have their own views about whether the
11 person should agree to an interview; correct?
12 A. They may.
13
14 Q. And they may have their own views about the legal
15 advice they were given over the phone; correct?
16 A. Yes.
17
18 Q. And that person might override whatever views the
19 young person had about whether they should have accepted
20 that advice; correct?
21 A. Yes.
22
23 Q. And on the assumption that that has happened, the
24 police offer that person an interview, you can see why the
25 interview would then take place; correct?
26 A. I can see why it happens in those circumstances.
27
28 MR WHITE: Yes, nothing further, thank you.
29
30 THE CHIEF COMMISSIONER: Yes?
31
32 MS LEWER: With the Commission's leave could I ask
33 a number of clarifying questions?
34
35 THE CHIEF COMMISSIONER: Yes, certainly. Thank you,
36 Ms Lewer.
37
38 **<EXAMINATION BY MS LEWER:**
39
40 MS LEWER: Q. Mr Frankham, in circumstances where
41 a Youth Hotline worker speaks to a young person where there
42 is no support person present, is there a standard practice
43 of what is conveyed to the police in those circumstances?
44 A. There is.
45
46 Q. And what is that?
47 A. Normally to - if they're expecting a support person -

1 call back when the support person arrives at the police
2 station.

3

4 Q. Do you have an expectation that there would be a call
5 back to the Youth Hotline once the support person is there?

6 A. Yes, if we've spoken to the police and made that
7 request, we do have that expectation.

8

9 Q. Are you able to say whether that occurs in every case
10 or whether there is a practice one way or another about
11 that?

12 A. It doesn't occur in every case. It occurs in many but
13 there's often many it does not occur. We also have
14 a standard practice for our solicitors if there is no call
15 back after a certain amount of time, they may follow it up
16 with a further call to the police station.

17

18 Q. You have been asked some questions and given some
19 evidence that has dealt with these concepts of advice and
20 instructions. Could you just clarify how you understand
21 the Youth Hotline process to work in terms of the advice
22 that is given and the instructions that are taken?

23 A. Yes. I mean, the advice can be wide ranging but given
24 the issue here, I'll speak to the right to silence. So we
25 go through with them, and in my view that's what the advice
26 is, explaining to them what the right to silence means,
27 explaining to them what their rights and obligations are,
28 speaking also to the support person about the same types of
29 rights and obligations, and then having a conversation with
30 the young person, do they want to exercise that right, and
31 if they do, asking the young person, "Do you want me to
32 speak on your behalf to the police to convey that to them?"
33 And that's what I consider instructions, when they say at
34 that point, "Yes, that's what I want you to do."

35

36 Q. So the advice portion, if I can put it this way, is
37 from the solicitor to the client?

38 A. Yes.

39

40 Q. And then the client provides the solicitor with
41 instructions?

42 A. That's correct.

43

44 Q. And then if there is permission to do so, those
45 instructions are then conveyed to the police officer; is
46 that right?

47 A. That's right.

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Q. That's the process as you understand it --
A. Yes.

Q. -- to take place?

MS LEWER: Thank you. They are the questions I have.

THE CHIEF COMMISSIONER: Yes, thank you, Ms Lewer. Any other applications?

Mr Fernandez?

<EXAMINATION BY MR FERNANDEZ:

MR FERNANDEZ: Q. I would like to ask you some questions just taking up questions you were asked about support persons and what happens when support persons arrive at the station. Do you still have the Legal Aid submission there with you?

A. I don't.

THE CHIEF COMMISSIONER: We can have it brought up electronically, or if it happened to be physically --

MR FERNANDEZ: Perhaps it could be brought up electronically, please. This is MTS65.

THE CHIEF COMMISSIONER: It could be that the document is in the hearing room. We will just have that handed to Mr Frankham.

MR FERNANDEZ: Q. Could you turn, please, to page 14. At part 4.8 on that page, the heading relates to "Change of mind, and failure to follow up Hotline". Can you see that?
A. Yes.

Q. What's set out in Legal Aid's submission starts with this:

A support person plays an important role in assisting a child through the arrest process. In some cases, however, the support person will have fundamentally different ideas about "what is best" for the child, that do not align with their role or consider the full range of legal

1 consequences.

2

3 A. Yes.

4

5 Q. Is that something that you have personal experience
6 of, that very situation described there?

7 A. That's correct, I have.

8

9 Q. What sort of situations does that take place in?

10 A. Normally, in my experience, it's normally - normally
11 involves advice where you're giving - where a young person
12 is going to be charged where you give them the advice about
13 their right to silence, the young person wants to exercise
14 those rights, you then speak to a parent who wants the
15 young person to be truthful and honest and speak to the
16 police about what has occurred. That's normally the
17 standard scenario in which it occurs.

18

19 Q. If you turn, please, to page 15 of the Legal Aid
20 submission, what is set out there is, relevantly, as
21 follows, and this is at the very top of the page:

22

23 *Unlike a solicitor, who acts on direct*
24 *instructions and with full understanding*
25 *about the range of legal implications,*
26 *a support person will sometimes exhort the*
27 *child to make admissions against interest*
28 *and against legal advice.*

29

30 Is that something you have personal experience of?

31 A. It is.

32

33 Q. Is it the case that you have any control over who the
34 support person will be who goes to the police station to
35 support a young person?

36 A. No, no control.

37

38 Q. Do you make some inquiries, if you have a chance to,
39 to work out if there's any fundamental conflict between the
40 position of the support person and the child?

41 A. We do, that's part of our standard practice. If we
42 get a situation where a support person is of a different
43 view to what the young person wants, we will spend some
44 time trying to speak with them. Often, it's a case where,
45 as is in the submission, the parent normally doesn't
46 understand the legal consequences, and we can often speak
47 to that and they may change their mind.

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Q. It might be a parent or a carer, support worker, youth worker or anyone else who is there to attend?

A. That's correct.

Q. If you look at the submission, you can see in the second paragraph on page 15 what Legal Aid sets out is its awareness of several cases where, despite instructions being clearly communicated to police that a child does not wish to be interviewed, that following separate conversations with a support person, the child has "changed [their] mind" and decided to take part in an interview; is that correct?

A. That's correct.

Q. I want to ask you about some questions you were asked about training, particularly the training provided through the Legal Aid Children's Legal Service for solicitors who take part in the Youth Hotline. Are you yourself involved in that training?

A. Yes, I am.

Q. What training is provided to solicitors who are going to be staffing the Youth Hotline?

A. As a starting point, we have a training package and a solicitor hotline manual that includes references to legislation, other material that may be helpful and assist them. Following that, they generally have a one-on-one session with me and I use that not only for training but to make an estimate of their level of skill and ability and how much further training they may require prior to being rostered on to the hotline.

Q. Is there scope for you to listen in on calls with solicitors for the benefit of improvement or if there is a particularly difficult call, for example?

A. Yes.

Q. How does that happen?

A. I often get calls from solicitors who are on the hotline, who ring me and say, "I've got this difficult case. What do you think?" That happens on a fairly regular basis. So I'm available pretty much whenever it is running, 24/7, to take those calls. There's other more senior solicitors in the office that are available if I'm not available, and there is, at least during office hours, an opportunity, especially for those solicitors who are

1 still inexperienced, to listen in on those calls. And
2 that's expected before they're placed on the roster and
3 working by themselves.

4
5 Q. You are aware from the evidence at the private
6 examination that Ms Burkitt gave evidence that there would
7 be specific training on difficult situations with custody
8 managers?

9 A. That's right.

10
11 Q. Is that something that Legal Aid also does?

12 A. That's correct.

13
14 Q. How does that happen?

15 A. That's generally me in the first training session that
16 we do one on one. There is a range of examples that I will
17 go through with them about tricky situations that come up
18 on a fairly regular basis.

19
20 Q. Lastly, I'm going to ask you questions about what was
21 described as the period of time that you were talking to
22 a young person. Although there might be a segmented
23 contact with the young person, is it correct to say that
24 the first contact is likely to be through the Youth Hotline
25 by a young person with the Children's Legal Service?

26 A. Yes.

27
28 Q. But that's not the end of the contact, because the
29 records that you prepare are then available for anyone else
30 who might represent that particular young person; is that
31 correct?

32 A. They are available, yes.

33
34 Q. And for those solicitors who do work with the
35 Children's Legal Service, they are talking to young people
36 on the hotline, and then they're they are talking to young
37 people almost every day of the working week; is that
38 correct?

39 A. That's right.

40
41 Q. And is there some specific training at Legal Aid or
42 elsewhere about communicating with young people?

43 A. It's training we offer for every new solicitor that's
44 part of the Children's Legal Service. Again, there's
45 a training package, we make reference to a lot of different
46 material, and that's followed up by on-the-job training
47 with very strict supervision, normally while they're over

1 at court to make sure they're doing their job correctly.

2

3 MR FERNANDEZ: That completes my questions, Chief
4 Commissioner.

5

6 THE CHIEF COMMISSIONER: Q. Can I just ask you about
7 this, and this is a general topic: if court proceedings
8 were going to be commenced, civil proceedings, for a young
9 person, say in the Supreme Court, for damages arising from
10 an accident of some sort or there is a legal requirement
11 for there to be a tutor, an adult who is the tutor on
12 behalf of the child - that is, until the person turns 18
13 and then that person can exercise their own rights - that
14 procedure, of course, is of no assistance at all by way of
15 analogy with the present subject matter because a call
16 comes through, and it's a young person held at a particular
17 police station, possibly in the middle of the night, and
18 it's that person who is the client for the purpose of the
19 conversation. That's so?

20 A. That's right.

21

22 Q. And as you see it, it's the right of the young person,
23 when one is talking about the right to silence that needs
24 to be explained?

25 A. Yes.

26

27 Q. A support person may be a parent, they may be
28 a guardian, they may be someone else. It may often be the
29 case that it's hard to find a person to act as support
30 person - that's a common enough experience, isn't it?

31 A. That's true.

32

33 Q. So when the support person comes in, comes on the
34 scene, is the nature of that person's involvement and the
35 relationship with the young person really to be found in
36 LEPR and what it says in the LEPR Act or regulations
37 about the role of support persons?

38 A. Yes, there's a document there that I guess describes
39 the role of a support person that's provided to them.

40

41 Q. Whether the support person may be in a position to
42 provide sound advice or unsound advice to the young person
43 is always a matter of - it's an open question, if I could
44 put it that way?

45 A. It is.

46

47 Q. Do you know of any cases, in your own experience or

1 from what you have heard through Legal Aid, of the support
2 person having a conversation with the police officer which
3 may lead to what is said to be a change in mind leading to
4 an interview as against the background where an interview
5 was not to take place initially?

6 A. I have personally experienced that, and our staff, but
7 that's not normally something we find out about the
8 particulars of that until we get to court and it arises in
9 the course of us taking instructions on a particular
10 charge.

11
12 Q. There happens to be an example of that amongst the
13 decisions which are now in evidence, exhibit MTS69, Judge
14 Nicholson, in *R v APCR* and *R v CP*, a 2006 decision where,
15 as his Honour outlined at paragraph 82 and thereafter, the
16 police officer spoke to the mother and the police officer
17 said it would be in the young person's best interests to do
18 an interview now and get it all cleared up, and the mother
19 then thought the detective seemed friendly and, as
20 a consequence, an interview took place. Have you heard of
21 that type of scenario occurring?

22 A. Yes.

23
24 Q. And is a problem with that that whether it is in the
25 interests of the child or not involves legal considerations
26 too, including the rights that the Legal Aid lawyer gave
27 some advice about?

28 A. Yes.

29
30 Q. And is that a type of scenario where, if there were
31 circumstances changing of that type, that it would be
32 hoped, if not expected, that there would be an opportunity
33 for further legal advice to be given to the young person?

34 A. In an ideal world, that would be my expectation.

35
36 THE CHIEF COMMISSIONER: All right. Were there any
37 questions arising out of what I have just asked?

38
39 MR HALL: Chief Commissioner, I just have one question
40 that came up as a result, a clarification.

41
42 THE CHIEF COMMISSIONER: Yes.

43
44 **<EXAMINATION BY MR HALL:**

45
46 MR HALL: Q. Mr Frankham, in relation to this case, it's
47 true, isn't it, that there was a fairly inexperienced

1 solicitor on this file, that was new to the area?
2 A. You mean the subject of the --
3
4 Q. Well, the person who was in this particular matter.
5 Was he experienced or inexperienced?
6 A. I can't comment on that. I believe the solicitor was
7 from the Aboriginal Legal Service. Is that what you are
8 talking about?
9
10 THE CHIEF COMMISSIONER: Sorry, which situation are you
11 talking about?
12
13 MR HALL: Sorry, Chief Commissioner. Sorry, in this
14 instance --
15
16 THE CHIEF COMMISSIONER: We have any number of these ones
17 and courts have been throwing these interviews out for some
18 years. Are you talking about one of those cases or
19 something else?
20
21 MR HALL: No. Mr Whitting was fairly inexperienced in the
22 area, he had only just come into the area.
23
24 THE CHIEF COMMISSIONER: I'm not sure if I --
25
26 MR HALL: I'll withdraw the question.
27
28 THE CHIEF COMMISSIONER: What's the proposition you are
29 putting? What's the assumption you want Mr Frankham to
30 make for the purpose of your question?
31
32 MR HALL: That there wasn't one of the experienced
33 solicitors from his area handling this particular matter in
34 relation to the understanding of the young person on the
35 other end of the line.
36
37 THE WITNESS: I can't comment on Mr Whitting's experience.
38
39 MR HALL: Thank you. Nothing further, Chief Commissioner.
40
41 MS LEE: Just one question, Chief Commissioner.
42
43 THE CHIEF COMMISSIONER: Yes.
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47 <EXAMINATION BY MS LEE:

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MS LEE: Q. In the Legal Aid submission on page 8 it refers to a protocol that exists between Legal Aid NSW and NSW Police. What's your understanding as to why that protocol was set up in the first place?

A. My understanding is that protocol was set up as a model of best practice both for the police and the solicitor manning the Legal Aid Youth Hotline.

Q. And what does that best practice mean to you? What does that involve?

A. I mean, the best practice is setting out, I guess, what is expected of the police on every call and also what the expectations would be on the solicitor who is taking the call.

Q. And that protocol exists to ensure that young people receive independent legal advice; is that right?

A. That is part of it, yes.

MS LEE: Yes, thank you.

THE CHIEF COMMISSIONER: Anything further, Mr Fernandez?

MR FERNANDEZ: No, thank you, Chief Commissioner.

THE CHIEF COMMISSIONER: All right. Thank you very much for your attendance today, Mr Frankham, and for your evidence and for the work that went into the submission.

I'm conscious that it's yourself and your colleagues at Legal Aid who have put this together, and this is a topic of significance to the Commission and the Commission is very grateful to Legal Aid and to the Aboriginal Legal Service for their efforts in putting together at relatively short notice very helpful documents.

THE WITNESS: Thank you.

THE CHIEF COMMISSIONER: Thank you. If you would like to step down.

<THE WITNESS WITHDREW

MR FERNANDEZ: Chief Commissioner, the next witnesses will be available at 10am tomorrow. They are Assistant Commissioner Cotter and then Assistant Commissioner

1 Crandell.

2

3 THE CHIEF COMMISSIONER: Now, looking ahead, on Wednesday,
4 there will be a 9.30 start on Wednesday, and the Commission
5 can only sit half the day.

6

7 MR FERNANDEZ: Yes.

8

9 THE CHIEF COMMISSIONER: So it will be stopping at about
10 12.30 on Wednesday.

11

12 MR FERNANDEZ: The only witness called on that day will be
13 Ms Hoggood and we will be starting at 9.30 on that day. If
14 additional evidence needs to be given from Assistant
15 Commissioners Cotter or Crandell and any other witnesses
16 who give evidence on behalf of the police, that will take
17 place on Thursday.

18

19 THE CHIEF COMMISSIONER: Yes. We will see tomorrow
20 whether the two assistant commissioners are in a position
21 to deal with the range of questions to be asked, but if
22 there is any issue in that respect, there will be Thursday
23 available, as you have just pointed out.

24

25 MR FERNANDEZ: Yes, that's right.

26

27 THE CHIEF COMMISSIONER: All right. Does anyone wish to
28 raise anything before I formally adjourn until 10 o'clock
29 tomorrow?

30

31 All right. The hearing is adjourned until 10am
32 tomorrow.

33

34 **AT 2.30PM THE COMMISSION WAS ADJOURNED TO**
35 **TUESDAY, 4 APRIL 2023 AT 10AM**

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